THE ARMY LAWYER

Headquarters, Department of the Army

April 2011

ARTICLES

TJAGLCS PRACTICE NOTES

Faculty & Staff, The Judge Advocate General's Legal Center & School

BOOK REVIEWS

CLE NEWS

CURRENT MATERIALS OF INTEREST

Department of the Army Pamphlet 27-50-455

Editor, Captain Madeline Yanford
Assistant Editor, Captain Ronald T. P. Alcala
Assistant Editor, Major Ted Martin
Technical Editor, Charles J. Strong

The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for $45.00 each ($63.00 foreign) per year, periodical postage paid at Charlottesville, Virginia, and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Editor and Assistant Editor thank the Adjunct Editors for their invaluable assistance. The Board of Adjunct Editors consists of highly qualified Reserve officers selected for their demonstrated academic excellence and legal research and writing skills. Prospective candidates may send Microsoft Word versions of their resumes, detailing relevant experience, to the Technical Editor at TJAGLCS-Tech-Editor@conus.army.mil.

The Editorial Board of *The Army Lawyer* includes the Chair, Administrative and Civil Law Department; and the Director, Professional Writing Program. The Editorial Board evaluates all material submitted for publication, the decisions of which are subject to final approval by the Dean, The Judge Advocate General's School, U.S. Army. *The Army Lawyer* welcomes articles from all military and civilian authors on topics of interest to military lawyers. Articles should be submitted via electronic mail to TJAGLCS-Tech-Editor@conus.army.mil. Articles should follow *The Bluebook, A Uniform System of Citation* (19th ed. 2010) and the *Military Citation Guide* (TJAGLCS, 15th ed. 2010). No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed on the World Wide Web by registered users at http://www.jagcnet.army.mil/ArmyLawyer.

Address changes for official channels distribution: Provide changes to the Editor, *The Army Lawyer*, The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781, telephone 1-800-552-3978 (press 1 and extension 3396) or electronic mail to TJAGLCS-Tech-Editor@conus.army.mil.

Articles may be cited as: ARMY LAW., [date], at [first page of article], [pincite].

New Developments

Lore of the Corps

Articles

TJAGLCS Practice Notes

Faculty & Staff, The Judge Advocate General's Legal Center & School

Government Information Practice Notes

Book Reviews

Administrative & Civil Law

The Death of Exemption "High 2" of the Freedom of Information Act

On 7 March 2011, the U.S. Supreme Court issued an opinion in *Milner v. Dep't of Navy*[1] that dramatically narrowed the application of Exemption 2 of the Freedom of Information Act (FOIA). Exemption 2 of the FOIA authorizes withholding of documents that "relate solely to the internal personnel rules and practices of an agency."[2]

Exemption 2 was interpreted for years to create two separate bases for withholding documents, which were commonly referred to as "Low 2" and "High 2." "Low 2" authorized "the withholding of internal matters that are of a relatively trivial nature" such that "the administrative burden [of processing the FOIA request] on the agency . . . would not be justified by any genuine public benefit."[3] "High 2" authorized withholding of "internal matters of a far more substantial nature the disclosure of which would risk the circumvention of a statute or agency regulation."[4]

In *Milner*, the Navy sought to withhold maps of Naval Magazine Indian Island, Washington, located in Puget Sound, showing the locations of munitions storage bunkers and the estimated blast radius of those munitions.[5] The Navy invoked "High 2," arguing that release of the documents could help a terrorist bent on attacking the facility circumvent the agency's mission of safeguarding the munitions.[6] The Navy preferred not to classify the maps, thus enabling it to withhold them under Exemption 1 of the FOIA,[7] because it wanted to be able to share the information with local authorities (i.e., the fire department and law enforcement) without the difficulties of handling and sharing classified information.[8] Relying on longstanding judicial interpretation of "High 2," the Ninth Circuit Court of Appeals upheld the Navy's withholding of the maps.[9]

The Supreme Court reversed the Ninth Circuit and ruled against the Navy.[10] In so doing, the Court did away with "High 2" and narrowed "Low 2." The opinion is based on straightforward application of rules of statutory construction coupled with the principle that FOIA exemptions are meant to be construed narrowly.

In the Court's view, "High 2" simply stretched the language of the statutory exemption too far. Writing for the majority, Justice Kagan commented that "Exemption 2, consistent with the plain meaning of the term 'personnel rules and practices,' encompasses only records pertaining to issues of employee relations and human resources."[11] She observed that "[o]ur construction of the statutory language simply makes clear that Low 2 is all of 2 (and that High 2 is not 2 at all)."[12] While the decision is most noteworthy for destroying "High 2," it should not be forgotten that it also corrals any interpretation of trivial matters under "Low 2" that may stray outside the limits of "personnel rules and practices of an agency."

Milner stands to have a significant ripple effect as the Government has relied on "High 2" to withhold numerous documents over the years. The military, for example, has used "High 2" to withhold such things as unclassified rules of engagement[13] and force feeding techniques for detainees on hunger strikes.[14] The Government's authority to withhold these and many other types of documents are now in question. We may expect to see increased use of the classification process (thus authorizing withholding under Exemption 1) and greater reliance on Exemption 7,[15] which includes several sub-exemptions related to records maintained for law enforcement purposes.[16]

—Major Scott E. Dunn, USA

---

[1] No. 09-1163 (S. Ct. Mar. 7, 2011), 562 U.S. ____ (2011).

[2] 5 U.S.C. § 552(b)(2) (2006).

[3] U.S. DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 176 (2009).

[4] *Id.* at 184.

[5] *Milner*, 562 U.S. at 4–5.

[6] *Id*. at 5.

[7] 5 U.S.C. § 552(b)(1).

[8] Transcript of Oral Argument at 28–31, Milner v. Navy, No. 09-1163 *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1163.pdf (argument of Anthony Yang, Assistant to the Solicitor Gen., representing the respondent).

[9] *Milner*, 562 U.S. at 5.

[10] *Id*. at 19.

[11] *Id*.

[12] *Id*. at 8.

[13] Hiken v. DOD, 521 F. Supp. 2d 1047, 1059–60 (D.D.C. 2007).

[14] Davis v. DOD, No. 07-492, 2010 WL 1837925 (W.D.N.C. May 6, 2010).

[15] 5 U.S.C. § 552(b)(7) (2006).

[16] *Id*. Exemption 7 contains six specific sub-exemptions related to records compiled for law enforcement purposes. Such records may be withheld if release could "reasonably be expected to interfere with enforcement proceedings," *id.* § 552(b)(7)(A)); if it would "deprive a person of . . . a fair trial," *id.* § 552(b)(7)(B)); if it would "reasonably be expected to constitute an unwarranted invasion of personal privacy," *id.* § 552(b)(7)(C)); if it "could reasonably be expected to disclose the identity of a confidential source," *id.* § 552(b)(7)(D)); if it would "disclose techniques and procedures . . . or . . . guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law," *id.* §552(b)(7)(E)); or if release "could reasonably be expected to endanger the life or physical safety of any individual," *id.* § 552(b)(7)(F)).

Post Traumatic Stress, Poly-Pharmacy, Pain Management, or Traumatic Brain Injury

All Army Activities (ALARACT) message number 363/2010 imposes coordination requirements prior to the public release of any information related to post traumatic stress, poly-pharmacy, pain management, or traumatic brain injury.[17] Requests to release information about these subjects have to be coordinated with "local subject matter experts, local public affairs officers (PAO) and local operation security officers."[18] The PAO and Operations Security Program Manager for the Office of The Surgeon General/Medical Command must also be consulted prior to the release of information.[19] This ALARACT applies to any public release of information on these matters, whether the release is proactive or in response to a request or inquiry.[20] It is advisable to ensure that local Freedom of Information Act (FOIA) offices are aware of this ALARACT and its requirements.

—Major Scott E. Dunn, USA

[17] Message, 300120Z Nov 10, U.S. Dep't of the Army, subject: ALARACT 363/2010, Guidance on Procedures for the Release of Information Related to Post Traumatic Stress, Poly-Pharmacy, Pain Management, and/or Traumatic Brain Injury.

[18] *Id.*

[19] *Id*.

[20] *Id*. ALARACT 363/2010 provides the following examples of public releases of information: "media interviews, data, statistics, policies, web postings, videos, talking points, plans, photographs, manuscripts, briefings, articles, etc." *Id*.

Lore of the Corps:

Crossed Sword and Pen: The History of the Corps' Branch Insignia

Fred L. Borch III

Regimental Historian & Archivist

While there have been judge advocates (JAs) in the Army since the Revolution, they did not have any distinguishing insignia until 1857, and the crossed sword and pen familiar to Army lawyers today did not exist until 1890. But the story of that insignia is an important one, since it is the trademark of the Corps and is today proudly worn by JAs, legal administrators, and paralegals.

Some will be surprised to learn that for many years, JAs did not wear a uniform. While William Tudor, the first Judge Advocate General (JAG), had the military rank of lieutenant colonel, he did not wear a uniform, and neither did his successors. Army regulations published in 1825 explicitly stated that JAs (along with chaplains) "have no uniform."[1]

Not until 1857 did the Army authorize a distinguishing item for JA wear: a white pompon.[2] Judge advocates were to wear this pompon—"a tuft of cloth material which looked like an undersized tennis ball and protruded from the hat"[3]—whenever they wore the standard staff officer uniform with epaulettes. But, as there was but one JA of the Army during this period in history, and JAs in the field all held commissions in other branches, it is likely that the white pompon was infrequently worn, if at all.[4] When the Army subsequently revised its uniform regulations in 1862, any mention of the white pompon was omitted, suggesting that it was not a popular uniform item.[5]

When the Civil War began in April 1861, the Regular Army consisted of 15,000 enlisted men and 1100 officers, most of whom were on duty on the western frontier. By the end of the war, however, 2.2 million men had served in Union blue uniforms, but not the JAG.[6] On the contrary, Brigadier General Joseph Holt, who served as the JAG from 1862 to 1875, never wore a uniform; he wore only civilian clothing.[7] Some officers who worked for Holt in the Bureau of Military Justice (the forerunner of today's Corps) also wore civilian clothes. Others, who had started their careers as line officers, did wear Union blue out of habit, but there was nothing to distinguish them as Army JAs.

It was not until 1872 that Army JAs were first authorized to wear special uniforms with distinctive insignia, and that the letters "JA" in Old English letters were embroidered on each shoulder knot.[8] The term "shoulder knot" describes insignia consisting of gold wire or rope that is twisted in a series of loops. These shoulder knots are still worn by officers on the Army blue mess uniform jacket.[9]

The "JA" letters worn on each shoulder disappeared in 1890, and were replaced with the insignia familiar to Soldiers today—the crossed pen and sword.[10] General Order No. 53 provided that the following insignia for officers in the Judge Advocate General's Department (JAGD) (a "Department" had been created in 1884 and remained so until becoming a Corps in 1947) was to be worn on shoulder knots:

> of gold cord, one-fourth of an inch in diameter . . . on dark blue cloth ground; insignia of rank embroidered on the cloth ground of the pad . . . with sword and pen crossed an wreathed, according to pattern, embroidered in silver on the cloth ground of the pad (except for a colonel and assistant judge advocate general, who will wear the device made of solid silver on the knot midway between the upper fastening of the pad).[11]

---

[1] WAR DEP'T, REG. OF 1825, para. 865.

[2] WAR DEP'T, REG. OF 1857, para. 1430.

[3] Edward F. Huber, *Crossed Sword and Pen*, JUD. ADV. J, Mar. 1945, at 43.

[4] JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER 34–35 (1975) [hereinafter THE ARMY LAWYER].

[5] Whatever one may think of the white pompon as a badge of office, the Cavalry (the forerunner of today's Armor Branch) could claim the most unique identification in the mid-19th century: from 1841 to 1857, Army regulations provided that "mustaches" or "moustaches" would not be worn, *except by cavalry regiments*, "on any pretense whatsoever." Huber, *supra* note 3, at 43.

[6] JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 313 (1988).

[7] THE ARMY LAWYER, *supra* note 4, at 54–55.

[8] LEON W. LAFRAMBOISE, HISTORY OF THE ADMINISTRATIVE AND TECHNICAL SERVICES BRANCH OF SERVICE INSIGNIA 349 (1986).

[9] *See* U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA paras. 24-5 & fig.24-11 (3 Feb. 2005).

[10] LAFRAMBOISE, *supra* note 8.

[11] War Dep't, General Orders No. 53 (23 May 1890).

According to the Quartermaster General's Heraldic Section, the pen denoted the recording of testimony and the sword symbolized the military character of the JA mission. The wreath was part of the insignia because it was the traditional symbol of accomplishment. In the 1890s and early 1900s, the crossed-pen-and-sword was required to be worn on all shoulder knots. By World War I, however, shoulder knots disappeared from service dress uniforms, and JAs wore a one-inch dark brown metal crossed sword and pen insignia on the standing collar of the olive drab uniform coat. When the Army transitioned to olive-colored coats with lapels in the 1920s, the crossed pen and sword insignia moved from the standing collar to the lapel, where it remains today.[12]

In February 1924, a major change occurred when Major General (MG) Walter A. Bethel, the new Judge Advocate General (TJAG), authorized a new branch insignia for Army lawyers. The crossed sword and pen was out, and in its place was a gold-colored "balance" or scale, which rested on the point of a one-inch high silver Roman sword with a gold grip. A silver ribbon completed the design.[13]

Major General Bethel and others did not like the crossed sword and pen for several reasons. First, the insignia was thought to be too similar to the collar brass worn by the Inspector General's Department (IGD), especially as both the JAGD and the IGD insignia featured a wreath. While this might not seem to be a problem, more than a few JAs resented being mistaken for an inspector. Some Army lawyers apparently suggested to the IGD that it should change its insignia so that there would be no confusion between the two branches, but this suggestion was rebuffed.[14]

There was, however, a more fundamental reason to create a new insignia: the crossed sword and pen was not believed by MG Bethel and others to be "sufficiently symbolic" of the JA function.[15] The result: MG Bethel consulted with Major G. M. Chandler, a member of the Quartermaster General's Heraldic Section, and asked him to create a new branch insignia. Chandler chose a sword to indicate the military character of the JA's practice. He used a Roman sword because the Romans were great law-givers.

As for the balance, Chandler recognized that it was a symbol of justice in antiquity, and he actually based his design on the bronze zodiac signs in the floor of the main reading room at the Library of Congress.[16]

Judge advocates hated the change: "the immediate reaction to the new insignia ranged from open hostility to ridicule, and the officers were almost unanimous in their opinion that the new device was no improvement."[17] The outcry had an impact: in November 1924, MG Bethel canvassed JAs for their views on the new insignia, and most told him that they did not like it. Shortly thereafter, MG Bethel retired unexpectedly due to poor health. The new TJAG, MG John A. Hull, quickly moved to restore the old crossed sword and pen insignia, but the Adjutant General rescinded the new insignia in December 1924.[18] As a result, the Roman balance insignia was out before many were produced for wear. Consequently, it is an extremely rare item and highly sought after by collectors of U.S. military insignia. As for the crossed sword and pen, it has remained the branch insignia of the Corps without change since that time.

Enlisted personnel—yesterday's legal clerks, today's paralegals—wore the crossed sword and pen briefly in World War I, when the Army authorized enlisted men to join the JAGD "for the period of the existing emergency."[19] The Army authorized bronze collar disks from May 1918 through March 1920 but, after Congress restricted the JAGD to officers only in June 1920, enlisted personnel could no longer wear the crossed sword and pen. Although some legal clerks wore domed (convex) bronze disks with the crossed sword and pen in the 1950s and 1960s, these were unauthorized insignia. It was not until February 1968 that enlisted personnel assigned to staff judge advocate offices were *officially* allowed to wear gold-colored disks with the crossed sword and pen on their shirt collars and uniform lapels.[20]

[12] Huber, *supra* note 3, at 44–45.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 45 n.32.

[17] WILLIAM K. EMERSON, ENCYCLOPEDIA OF U.S. ARMY INSIGNIA AND UNIFORMS 251–52 (1966).

[18] *Id.*

[19] War Dep't, General Orders No. 27, para. XII (22 Mar. 1918).

[20] EMERSON, *supra* note 17, at 252.

Warrant officers were the last uniformed community in the Corps to adopt the crossed sword and pen as their insignia. This occurred in 2004, when legal administrators gave up their distinctive eagle rising insignia and began wearing branch insignia worn by the Corps' JAs. The rationale for the change was that if warrant officers were to be fully integrated into the branch-based systems of the larger Army officer corps, they should adopt both the branch insignia and the branch colors of their respective primary military occupation specialty. For legal administrators, this meant wearing the crossed sword and pen on their lapels and adopting the Corps' blue and white colors on their dress uniforms. It also meant exchanging the eagle rising on their service caps for the eagle worn by commissioned officers on their caps.[21]

MG Bethel's short-lived JAGD insignia, ca 1924

Today, JAs, legal administrators and paralegals throughout the Army are identified by the "gold-colored sword and pen, crossed and wreathed"[22] which they wear both as insignia of branch and as Regimental distinctive insignia. There is every reason to believe that this unique badge of office will identify the members of the Corps for many years to come.

Current JAGC insignia

More historical information can be found at
The Judge Advocate General's Corps
Regimental History Website
Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.
https://www.jagcnet.army.mil/8525736A005BE1BE

[21] Message, 021111 Mar 04, U.S. DEP'T OF ARMY, subj: Changes to CW5 Rank and Warrant Officer Branch Insignia and Colors.

[22] AR 670-1, *supra* note 9, para. 28-10.*b*.(9).

Double, Double Toil and Trouble: An Invitation for Regaining Double Jeopardy Symmetry in Courts-Martial

Major Daniel J. Everett[*]

Double, double toil and trouble;
Fire burn, and caldron bubble.[1]

I. Introduction

Shakespeare opens his play *Macbeth* with the king seeking advice from the three witch oracles.[2] Later, Macbeth approaches as the witches hover over a ghoulish caldron, preparing a menacing concoction.[3] As they prepare their brew they conjure the image of impending doom by chanting the lines "Double, Double, Toil and Trouble," expressing the witches' desire to double human suffering by trying "to increase human misery, to multiply pain and distress, chaos, and tyranny."[4] In the context of double jeopardy, the witches' expectation, symbolized by their menacing hymn, epitomizes legal attempts to protect defendants against a prosecutorial desire to double human toil and trouble. At the same time, throughout the play the witches forecast the future, providing their advice and forewarning through ominous brainteasers and riddles. Similar puzzles plague the legal scholar seeking to discern the meaning of the Double Jeopardy Clause.

The misunderstandings regarding the Double Jeopardy Clause exist because "[t]he riddle of double jeopardy stands out today as one of the most commonly recognized yet most commonly misunderstood maxims in the law, the passage of time having served in the main to burden it with confusion upon confusion."[5] Hence, like the prophecy of the witches, double jeopardy jurisprudence is "full of double jeopardy double talk."[6] This is especially true when conducting a double jeopardy analysis in factual situations at the fringes of the clause's protection or in the context of a military court-martial, where constitutional and statutory protections intersect.

One such circumstance is double jeopardy's application to the factual situation found in *Diaz v. United States*.[7] Although rarely applied, the *Diaz* holding provides an "exception"[8] to constitutional double jeopardy protection where an accused is tried and convicted for a lesser offense, such as assault, and later, after completion of the trial, the original victim dies. According to the *Diaz* court, the Double Jeopardy Clause will not prevent a subsequent prosecution of the accused for the death of the victim even though the accused stands convicted of a lesser offense.[9]

While the *Diaz* "exception" seems simple to state and apply, the application of the exception in a court-martial is complicated by the additional statutory protection provided by Article 44 of the Uniform Code of Military Justice (UCMJ).[10] While at least one appellate court implied that Article 44 and the Fifth Amendment Double Jeopardy Clause provide equal protections, a closer look demonstrates that their interplay is more complicated.[11] This is partly because military appellate courts fail to articulate the double jeopardy basis of their holding—Article 44 or the Fifth Amendment—due to the fact that the court assumes the protections run parallel.[12]

Because of the riddles, confusion, and mystery of the Double Jeopardy Clause, this article dissects these complimentary double jeopardy shields by studying their application in a *Diaz* factual scenario. Accordingly, this article starts by exploring the history of the double jeopardy protection, looking for insight into whether *Diaz* is an exception to the clause or a factual situation where the clause, by definition, is inapplicable. Second, this article uses the historical development of the double jeopardy concept to examine the history and policy of both the constitutional and statutory double jeopardy protections

---

[*] Judge Advocate, U.S. Army. Presently assigned as a Litigation Attorney, Litigation Division, U.S. Army Legal Services Agency, Arlington, Virginia. This article was submitted in partial completion of the Master of Laws requirements of the 58th Judge Advocate Officer Graduate Course.

[1] WILLIAM SHAKESPEARE, MACBETH act 4, sc. 1.

[2] *Id.* act 1, sc. 1.

[3] *Id.* act 4, sc. 1.

[4] Roland Mushat Frye, *Launching the Tragedy of Macbeth: Temptation, Deliberation, and Consent in Act I*, HUNTINGTON LIBR. Q., Summer 1987, at 249, 251.

[5] Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 263 n.4 (1965) [hereinafter *Twice in Jeopardy*] (quoting Note, 24 MINN. L. REV. 522 (1940)). In fact, Justice Rehnquist stated, "While the Clause itself simply states that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb,' the decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." Albernaz v. United States, 450 U.S. 333, 343 (1981).

[6] Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1807 (1997).

[7] 223 U.S. 442 (1912).

[8] *See* discussion *infra* Parts V–VI (exploring whether this is an exception to double jeopardy's protection or a case where double jeopardy does not apply because it is by definition not the "same offense").

[9] United States v. Diaz, 223 U.S. 442, 448–49 (1912).

[10] UCMJ art. 44 (2008).

[11] United States v. McClain, 65 M.J. 894 (A. Ct. Crim. App. 2008).

[12] In fact, one scholar declared, "the mere volume of activity has not cast much light upon the meaning of the concept of double jeopardy." JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY, at v (1969).

provided to servicemembers in courts-martial. Third, the article applies the principles and policy rationale of these protections to a *Diaz* factual situation.[13] This article concludes that Article 44 provides more protection to an accused in a *Diaz* factual situation on account of Article 44's additional policy foundations. Because of this phenomenon, this article ends with the implications a *Diaz* factual situation has for military justice practitioners and recommends that Congress should amend Article 44 to clear any confusion.

II. History of Double Jeopardy Protection

Many courts declare that the protection against double jeopardy is a fundamental right of man or universal law.[14] Some jurists maintain that double jeopardy is a concept engrained in the common law carried over from England.[15] Others contend it is so significant that it was incorporated as part of the Magna Carta, even though it is not expressly or impliedly contained in the text of the document.[16] Modern jurists would likely conclude that the protection against being twice placed in jeopardy is fundamental to our contemporary understanding of the rule of law that protects individual rights against state despotism.[17]

Interestingly, while viewed as a fundamental individual right today, this was not always the case. Indeed, a double jeopardy clause was not contained in most post-Revolutionary War state constitutions.[18] While manifestations of the right exist in early English common law writings, including those of Hale and Coke in the seventeenth century and Blackstone in the eighteenth century,[19] it is unclear that double jeopardy was a fundamental protection in colonial America.[20] Therefore, the Constitution gives double jeopardy its status as a fundamental right.[21] This may also explain the divergence of views between English double jeopardy law and that developed in American jurisprudence.[22]

A. Historical Development

Even if double jeopardy was not considered fundamental at the time of incorporation into the individual protections of the Bill of Rights, a study of the historical origins of the right in England sheds light on its present day application. Beginning in the *Digest of Justinian*, double jeopardy originated as a concept to protect those *acquitted* of a crime: "the governor should not permit the same person to be again accused of a crime of which he had been acquitted."[23] The idea then carried over into Roman canon law.[24] During early English common law, the victim was authorized to appeal cases, thus the double jeopardy concept developed as a constraint to prevent the appellant from repeatedly prosecuting a defendant in a case where he was acquitted on an indictment, not as a check on state power.[25] As a result, although not originally applicable to indictments, double jeopardy applied to a final resolution on appeal.[26]

Ultimately, though, the notion flourished as a check upon state power. The concept of a protection from retrial after an acquittal arose at common law in England because the only punishment for felonies was death or mutilation.[27] While seemingly harsh, common law punishment suggests that the "life or limb" phrase from the Fifth Amendment derives from its literal meaning in English history.[28] Eventually, the concept barring dual trials grew in importance because of the need for a check on governmental power as the quantity of criminal laws increased.[29] Accordingly, modern double jeopardy concepts began as an

---

[13] *But see id.* at 62 n.106 (stating that it is unclear whether the Fifth Amendment applies to the military).

[14] *E.g.*, United States v. Parcon, 6 PHIL. 632 (1906).

[15] SIGLER, *supra* note 12, at v.

[16] *Id.* at 4.

[17] United States v. Lynch, 162 F.3d 732, 737 (2d Cir. 1998) (Sack, J., concurring) (concluding that "In 1769, Blackstone used the term 'jeopardy' to describe the principle underlying Coke's pleas of *autrefois acquit* and *autrefois convict*; these pleas, he wrote, rested on 'the universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence.'").

[18] SIGLER, *supra* note 12, at 23.

[19] *Twice in Jeopardy*, *supra* note 5, at 262 n.1. One Justice has stated that "'Coke's *Institutes* were read in the American Colonies by virtually every student of the law' and no citation is needed to establish the impact of Hale and Blackstone on colonial legal thought." Gannett Co. v. DesPasquale, 443 U.S. 368, 424 (1979) (Blackmun, J., concurring in part, dissenting in part).

[20] SIGLER, *supra* note 12, at 36.

[21] *Id.* at 4 (stating that "[D]ouble jeopardy is not mentioned in English statute law before its adoption into the American Constitution. Probably double jeopardy was not so fundamental a privilege, or perhaps it was obvious and well-established before the great writs of English history.").

[22] *Id.* at 36.

[23] *Id.* at 2 (quoting from the *Digest of Justinian*). The protection from multiple prosecutions after an acquittal of an offense is still the most powerful of all the double jeopardy protections, reinforcing the understanding of the protection of a trial by jury which embraces jury nullification.

[24] *Id.* at 3.

[25] *Id.* at 13–14. The end result was that "whatever protection against repeated prosecution may have been available before the fifteenth century seems to have been a bar against the repeated abuse of private prosecution, rather than a protection against the state." *Id.* at 15.

[26] *Id.* at 14.

[27] *Id.* at 4.

[28] *See* Amar, *supra* note 6, at 1810–12.

[29] SIGLER, *supra* note 12, at 9–10.

effort to lessen the power of the king and mitigate the harshness of criminal prosecutions at common law.[30]

Consequently, Blackstone declared that "the plea of *autrefois acquit*, for a formal acquittal, is grounded in the universal maxim . . . that no man is to be brought into jeopardy of his life more than once for the same offense."[31] While Blackstone applied the concept of double jeopardy as an individual right that limited the power of the state, his conception of English common law limited the scope of the right itself.[32] English common law, at the time of America's birth, limited double jeopardy protection to felonies and required a verdict of acquittal or conviction for jeopardy to vest as a bar to additional prosecution.[33]

The American formulation of the modern day double jeopardy jurisprudence began in Massachusetts common law.[34] Here, jeopardy broadened beyond "life and limb" to all criminal prosecutions and civil trespasses.[35] Ultimately, New Hampshire was the first American constitution to adopt a double jeopardy "clause."[36] Its constitution stated, "No subject shall be liable to be tried after an acquittal, for the same crime or offense."[37] Hence, even in early American constitutions, double jeopardy existed as a procedural bar to subsequent trials following an acquittal, a theory modeled on the early common law notions of double jeopardy. In its 1790 *Declaration of Rights*, Pennsylvania announced that "no person shall, for the same offense, be twice put in jeopardy of life or limb."[38] For the first time, an American state adopted the more modern concept that double jeopardy protected an accused from multiple prosecutions for the same offense, regardless of the initial verdict (conviction or acquittal).

Eventually, the ever-growing belief in double jeopardy as an individual entitlement forced its incorporation into the Bill of Rights as part of the Fifth Amendment, transforming this rule of criminal procedure into a constitutional right.[39] Because of the importance of limiting the power of the state,

> [i]t is therefore not surprising that, in constructing a charter of individual liberties to supplement the structural provisions of the Constitution, the Framers looked to common-law protections against the power of the Crown, and adopted the prohibition of double jeopardy reflected in the *Institutes* [the writings of Coke], the *Pleas* [the writings of Hale], and the *Commentaries* [the writings of Blackstone].[40]

Thus, James Madison, when drafting the Fifth Amendment, included the prohibition that "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense."[41] This language concerned the Senate, and was changed to prevent a person from being "twice in jeopardy of life or limb."[42] While the language remains today, the clause's application at the time of the Constitution's enactment was much simpler, given that neither "the United States nor the defendant had any right to appeal an adverse verdict. [Therefore, t]he verdict in such a case was unquestionably final, and could be raised in bar against any further prosecution for the same offense."[43]

---

[30] *Id.* at 19.

[31] 4 WILLIAM BLACKSTONE, COMMENTARIES *335; SIGLER, *supra* note 12, at 17. For a detailed discussion of the common law pleas, see *infra* notes 44–55 and accompanying text.

[32] In fact, as the common law developed it appeared the cases became even more restrictive of the state's power to continually try an accused after a verdict. "By the time of Blackstone, it appears that although the king was theoretically permitted to bring a writ of error when the error appeared on the face of the record, the prosecution could not be granted a new trial unless the defendant had obtained his acquittal by fraud or treachery." United States v. Jenkins, 490 F.2d 868, 872 (2d Cir. 1973) (citations omitted).

[33] SIGLER, *supra* note 12, at 20; 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN *248 (stating that "But *autrefois convict* or *autrefois acquit* by verdict . . . is no plea, unless judgment be given upon the conviction or acquittal in any case.").

[34] SIGLER, *supra* note 12, at 21.

[35] *Id.* "No man shall twice be sentenced by civil justice for one and the same crime, offense, or trespass." *Id.* at 22 (quoting from the *Body of Liberties*).

[36] *Id.* at 23.

[37] *Id.*

[38] *Id.*

[39] *See id.* at 35.

[40] United States v. Lynch, 162 F.3d 732, 738 (2d Cir. 1998) (Sack, J., concurring).

[41] *Id.* The change occurred because Representative Benson recognized that

> the amendment 'was intended to convey what was formerly the law, that no man's life should be more than once put in jeopardy for the same offense.' Yet it was well known, he insisted, that a defendant was entitled to more than one trial, upon reversal of his original conviction.

United States v. Jenkins, 490 F.2d 868, 873 (2d Cir. 1973) (citation omitted).

[42] *Lynch*, 162 F.3d at 738. The change in language suggests, "that the Senate intended to ensure that the Double Jeopardy Clause incorporated the protections that the common law had come to provide—neither more nor less." *Jenkins*, 490 F.2d at 873.

[43] United States v. Scott, 437 U.S. 82, 88 (1978).

B. Common Law Pleas in Bar

Due to its common law foundations, an understanding regarding the application of the archaic pleas at bar can assist in an interpretation of the current conception and application of double jeopardy.[44] The Double Jeopardy Clause of the Fifth Amendment has its historical roots in the English common law pleas in bar.[45] Those pleas include *autrefois acquit*,[46] *autrefois convict*,[47] *autrefois attaint*,[48] and former pardon.[49] Of these four, only two of these concepts survive in present day theories of double jeopardy: *autrefois acquit*[50] and *autrefois convict*.[51] The other two pleas no longer exist and survive only in the form of historical vestiges of the formal laws of English pleading in the past.[52] The full French phrase for the two pleas that survive, relevant to an understanding of today's double jeopardy jurisprudence, are *autrefois acquit de meme felonie* and *autrefois convict de meme felonie*.[53] Thus, at common law, "if a person has, on a prior occasion (autrefois) been acquitted or convicted of the exact same crime (la meme felonie) with which he is now charged, he can plead the previous judgment as a bar to the second indictment."[54] Today, the common law pleas merge into a single plea of double jeopardy.[55] Ultimately, double jeopardy's past sheds light upon the policy and application of double jeopardy protections in current factual situations.

III. Fifth Amendment Double Jeopardy Clause

Similar to the English common law development, the boundaries of modern double jeopardy, as a concept, have expanded as criminal law statutes continue to multiply. One scholar surmised that double jeopardy "[p]recede[s] questions of substantive criminal law and become[s] more significant as the number of incriminat[ing] acts increase[s], and then only if other methods of restraining the prosecutor's discretion are inadequate."[56] The history of the Double Jeopardy Clause's development illustrates the rise of individual rights in an effort to contain the power of the state. This creates a tension when resolving double jeopardy issues between the power of the state to select and impose punishment and the rights of the individual to finality. In order to resolve this tension, it is important to consider the policy rationale and underlying purposes of the protection against double jeopardy.

Ultimately, the "moral sentiment which double jeopardy exemplifies is the feeling that no man should suffer twice for a single act."[57] This principled belief confuses lay persons who erroneously believe that any unfavorable action taken against them will result in a complete bar of future adverse consequences arising out of the same incident. Unfortunately, while finality as a whole is engrained as an individual right rooted in fundamental fairness, the legal purpose of jeopardy is to protect a defendant from obsessive criminal prosecution, not all adverse actions taken by a sovereign, such as employment decisions made as a consequence of an employee's criminal acts.[58] However, within the penal system itself, the courts must enforce the policies inherent in the double jeopardy protection if the

[44] SIGLER, *supra* note 12, at 1.

[45] BLACKSTONE, *supra* note 31, at *335; HALE, *supra* note 33, at *240–55; *see also Jenkins*, 490 F.2d at 871 (stating that "By the time of Lord Coke, the nascent double jeopardy concept had begun to mature into a complex of common law pleas, the most prominent of which were *autrefois acquit* and *autrefois convict*.").

[46] The formality of the plea at common law required the defendant at his new trial to bring forth two "matters" to substantiate the plea. Those matters included matters of record and matters of fact. The matters of record required the accused to present the previous record and indictment establishing the justice who heard the case and the verdict of acquittal. The matter of fact required the accused to prove that he was the same person who received the acquittal from the record and that the facts of the previous case were the same as those of his current indictment. HALE, *supra* note 33, at *241.

[47] BLACKSTONE, *supra* note 31, at *336.

[48] *See generally* HALE, *supra* note 33, at *251–54 (discussing the historical application of the common law pleas of *autrefois convict* and *autrefois attaint*). This plea exists because, "generally, such proceeding on a second prosecution cannot be to any purpose; for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had, so that it is absurd and superfluous to endeavor to attaint him a second time." BLACKSTONE, *supra* note 31, at *337. The constitutional bar against bills of attainder prevents application of this plea in the United States. U.S. CONST. art. 1, § 9. Chief Justice Rehnquist described the clause as follows:

> These clauses of the Constitution are not of the broad, general nature of the Due Process Clause, but refer to rather precise legal terms which had a meaning under English law at the time the Constitution was adopted. A bill of attainder was a legislative act that singled out one or more persons and imposed punishment on them, without benefit of trial. Such actions were regarded as odious by the framers of the Constitution because it was the traditional role of a court, judging an individual case, to impose punishment.

WILLIAM H. REHNQUIST, THE SUPREME COURT 82 (2002).

[49] SIGLER, *supra* note 12, at 18–19. This plea was based on the concept that "a *pardon* may be pleaded in bar, as at once destroying the end and purpose of the indictment, by remitting that punishment which the prosecution is calculated to inflict." BLACKSTONE, *supra* note 31, at *337.

[50] The most prominent case establishing the rule regarding the plea in bar at common law was *Vaux's Case*, 4 Coke 44 (Q.B. 1591). United States v. Jenkins, 490 F.2d 868, 871 (2d Cir. 1973).

[51] SIGLER, *supra* note 12, at 18–19.

[52] *Id.*

[53] Amar, *supra* note 6, at 1814.

[54] *Id.*

[55] Helvering v. Mitchell, 303 U.S. 391 (1937).

[56] SIGLER, *supra* note 12, at 35.

[57] *Id.*

[58] This assumes that the sovereign or the military is the employer.

legislature fails to act to define criminal acts or punishments appropriately.[59]

A. Purpose and Policy

Double jeopardy is said to protect an accused against a second prosecution or conviction for the same offense or to protect an accused against multiple punishments for the same offense.[60] However, this statement is of no assistance to the practitioner because it only reiterates the text of the Fifth Amendment in terms less poetic than those found in the Constitution itself. Thus, one must search further for a deeper understanding of the rationale for this special protection.

One scholar pronounced, "[T]he purpose of double jeopardy policy is to restrict the prosecution by applying judicial standards of interpretation of legislative intent, even in the absence of any actual intent."[61] This statement gets to the root of the issue: double jeopardy exists as a rule of finality in criminal cases.[62] In order to achieve this finality, courts must interpret the substantive criminal law in a manner that ensures a given defendant is not receiving a windfall by escaping conviction for a crime that is not the "same" as the one for which he previously stood trial.[63] Thus, courts must establish rules of statutory construction aimed at balancing these interests. However, in the end, the rule seeks the policy succinctly summarized in *Green v. United States*:

> The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.
>
> . . . .
>
> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[64]

At its core, the policy attempts to protect the innocent from being wrongfully convicted from multiple prosecutorial attempts.[65] At the same time, the policy acknowledges that even those guilty of committing a criminal act need repose because of the stress and strain involved in mounting an adequate criminal defense.[66]

Therefore, several aims become apparent. First, recognition of the double jeopardy protection makes the "status" of an acquittal significant, minimizing convictions of innocent persons.[67] Second, double jeopardy forces the state, represented by the prosecutor (and in the military, the convening authority), to accept decisions of factfinders on verdicts and punishment.[68] Third, the protection strives to

[59] *Id.*

[60] North Carolina v. Pearce, 395 U.S. 711, 717 (1969). "The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted." *Ex parte* Lange, 85 U.S. 163, 169 (1873); *see also Twice in Jeopardy*, *supra* note 5, at 266.

[61] SIGLER, *supra* note 12, at vii.

[62] Crist v. Bretz, 437 U.S. 28, 33 (1978); *Twice in Jeopardy*, *supra* note 5, at 277.

[63] Brown v. Ohio, 432 U.S. 161, 165 (1977) .

[64] 355 U.S. 184, 187 (1957).

[65] One scholar breaks down double jeopardy policy as follows:

> First, guilt should be established by proving the elements of a crime to the satisfaction of a single jury, not by capitalizing on the increased probability of conviction resulting from repeated prosecutions before many juries. Thus reprosecution for the same offense after an acquittal is prohibited. Second, the prosecutor should not be able to search for an agreeable sentence by bringing successive prosecutions for the same offense before different judges. Thus, reprosecution after conviction is prohibited. Third, criminal trials should not become an instrument for unnecessarily badgering individuals. Thus, the Constitution forbids a second trial—a second jeopardy—and not merely a conviction at the second trial. Finally, judges should not impose multiple punishments for a single legislatively defined offense. Thus multiple punishment for the same offense at a single trial is prohibited.

Twice in Jeopardy, *supra* note 5, at 266–67.

[66] The reason for this protection was summarized by Justice Black:

> one of the best common law judges that ever sat on the bench of the Court of Appeals of Kentucky remarked, 'that every person acquainted with the history of governments must know that state trials have been employed as a formidable engine in the hands of a dominant administration . . . . To prevent this mischief the ancient common law. . . provided that one acquittal or conviction should satisfy the law.

Ex parte Lange, 85 U.S. 163, 170–71 (1873).

[67] *Twice in Jeopardy*, *supra* note 5, at 278; United States v. Scott, 437 U.S. 82, 91 (1978).

[68] *Twice in Jeopardy*, *supra* note 5, at 278. In the military this includes the acceptance of a panel's determination of appropriate punishment; whereas in the civilian context that determination is made by a judge. Thus, the term factfinder is used here as a generic term to include the person or persons that render a verdict or sentence.

prevent unnecessary suffering and harassment of criminal litigants caused by multiple prosecutions,[69] sparing defendants the burden of a second trial.[70] This rationale requires some level of overreaching conduct by the prosecution and prejudice to the defendant.[71] Ultimately, the policy attempts to discourage bad faith and arbitrary prosecutorial decision-making.[72] Fourth, an effect of this protection is a net cost savings for the public because it reduces or eliminates redundant litigation.[73] Fifth, it enhances the due process rights of a criminal defendant because it prevents the state from obtaining a sneak peak at the defense's case prior to adequate trial preparation, eliminating the prosecutorial "dry run."[74] Finally, double jeopardy acts as a shield protecting an accused's "valued right to have his trial completed by a particular tribunal."[75] Thus, once begun, a defendant has a right "to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate."[76]

Accordingly, while expressed as a rule of finality, double jeopardy is more than *res judicata*; it is an affirmative attempt to level the playing field and create parity between the Government and the defendant in the criminal justice system.[77] In this fashion, "[the] idea underlying double jeopardy [is that the] . . . Government should not structure the adjudication game so that it is 'heads we win; tails let's play again until you lose; then let's quit (unless we want to play again).'"[78]

B. Application

If the purpose of the Fifth Amendment Double Jeopardy Clause is to create parity by establishing a set of rules for the "game" of criminal litigation, two questions arise. First, what are the boundaries of those rules? Second, what factual situations arise where the rules apply? Several key cases applying modern double jeopardy law answer these two questions under the most common circumstances.

The historical development of double jeopardy at common law reveals that the breadth of the clause's applicability is set by the phrase "life or limb." While the scope of the phrase was uncertain at one time, it is clear that "life or limb" now applies to any criminal offense.[79] In effect, it is nothing more than a "poetic metaphor for all criminal punishment."[80] While broad, the phrase does have limiting characteristics. For instance, while it applies double jeopardy to criminal prosecutions, administrative and civil actions escape the bounds of jeopardy's application, relying on other finality rules such as *res judicata*. The rationale seems obvious: in terms of equalizing the relationship of the parties, finality is most important in criminal cases because liberty, rather than money, is at stake.[81]

As a result of the "life or limb" limitation of double jeopardy protections to criminal prosecutions, three principal factual situations recur in double jeopardy jurisprudence.[82] The first is cases where two governmental entities seek to try an accused for a violation of their criminal laws arising out of the same facts and circumstances.[83] Second is cases where an accused is acquitted or convicted, at trial, and the Government seeks to indict on a different charge or another offense, potentially even a greater or lesser offense, arising out of the same facts and circumstances as those proven at the original trial.[84] The final scenario arises in the case where a trial, after beginning on the merits, is stopped, for one reason or another, prior to termination by a verdict of acquittal or conviction.[85]

The first category is commonly referred to as the "dual sovereignty" exception to double jeopardy, and it originated in international law.[86] This exception holds that each sovereign has the right to punish, as appropriate, those who

[69] *Id.*; *Green*, 355 U.S. at 187.

[70] Amar, *supra* note 6, at 1816; *Twice in Jeopardy*, *supra* note 5, at 277.

[71] *Twice in Jeopardy*, *supra* note 5, at 286.

[72] *Id.* at 267.

[73] *Id.* at 277.

[74] Ashe v. Swenson, 397 U.S. 436, 447 (1970).

[75] Wade v. Hunter, 336 U.S. 684, 689 (1949).

[76] United States v. Jorn, 400 U.S. 470, 486 (1971) (plurality opinion).

[77] *Twice in Jeopardy*, *supra* note 5, at 277–78.

[78] Amar, *supra* note 6, at 1812.

[79] *Ex parte* Lange, 85 U.S. 163 (1873); Amar, *supra* note 6, at 1810; *see also* SIGLER, *supra* note 12, at 39.

[80] Amar, *supra* note 6, at 1810.

[81] *See id.* at 1811.

[82] One additional category may arise when "[o]ne act may constitute conduct directed at several persons or objects. The question arises whether each person or object injured represents a criminally punishable act." SIGLER, *supra* note 12, at 41. This factual situation is extremely important in determining the breadth and scope of a specific conspiracy but beyond the scope of this article. Typically, these cases are resolved under the definition of "same offense." *See infra* notes 88–110 and accompanying text.

[83] SIGLER, *supra* note 12, at 41.

[84] *Id.* at 40–41.

[85] *Id.* at 40.

[86] The full scope and applicability of this exception is beyond the scope of this article. *See* United States v. Lanza, 260 U.S. 377 (1922), Abbate v. United States, 359 U.S. 187 (1959), and Bartkus v. Illinois, 359 U.S. 121 (1959) (providing an interesting discussion of this exception). While the exception is mentioned because of the prolific litigation it generates, a full discussion is unnecessary for the development of the thesis of this article. However, when looking at the policy implications argued by this article, the mere fact that an accused cannot be court-martialed for his actions in a *Diaz* scenario due to Article 44's additional protections does not mean the accused will escape justice. Merely, the forum for seeking justice may need to shift from a military tribunal to a civil forum such as federal or state court.

violate their criminal laws. Accordingly, the actions of one sovereign should not act to bind the hands of another.[87]

The second category arises directly from the language of the Double Jeopardy Clause. The Fifth Amendment protection only bars a second prosecution if and when an accused is retried for the "same offense." Although this language is simple, courts have struggled with the clause's application. The difficulty arises due to the increased number of criminal statutes, in modern times, requiring a determination of legislative intent regarding individual culpability for any given set of facts.[88]

Consequently, this has resulted in attempts to resolve what constitutes the "same offense" using judicially created tests.[89] Historically, courts fashioned and applied the "law and fact" test. Under this test, a crime had to be the same in both law and fact for the Double Jeopardy Clause to protect an accused from subsequent prosecution after a prior conviction or acquittal.[90] This test developed from strict pleading standards in English common law.[91] The intent of the test was to ensure the accused is convicted of each act that itself violates a criminal statute.[92] This likely developed as a restrictive test that prevented the application of double jeopardy in many factual situations because of the severe restriction at English common law of joining offenses in a single trial.[93] While easy to state, this test is difficult to apply, prompting one commentator to describe it as, "almost formless and consequently of little value."[94]

The "law and fact" test was first applied in the case of *Commonwealth v. Roby*.[95] There the court attempted to determine whether a former trespass conviction[96] barred a prosecution for murder when the victim died after the trespass conviction.[97] After an extensive historical analysis, the court relied upon the English common law test laid out in *Rex v. Vandercomb*.[98] The Court held that "unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second."[99] If this test failed, then the offense charged was not "the same *in law* and *in fact.*"[100] The "law and fact" test took root in the United States as a means for determining whether a previous acquittal or conviction was the "same offense" for purposes of a double jeopardy analysis.[101]

Over time, the conclusion that offenses were not the same in "law and fact" led the courts to flesh out the actual meaning of this ineffectual test. The Supreme Court fashioned a more workable solution declaring,

> The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.[102]

This test took root, solving the application problem for lower courts, and was reiterated in *Blockburger v. United States* as the standard for determining if two offenses are the "same" for double jeopardy purposes.[103] The settled test for double jeopardy purposes became the "same evidence" or "distinct

---

[87] *Lanza*, 260 U.S. 377; *Abbate*, 359 U.S. 187; *Bartkus*, 359 U.S. 121; *see also* SIGLER, *supra* note 12, at 55–63.

[88] SIGLER, *supra* note 12, at 64. Additionally, the intertwining of due process concepts which embody the lesser-included offense doctrine further complicate the process of providing a universal test because the tests are similar but the policy basis for the lesser-included offense doctrine rests in due processes fair notice opposed to double jeopardy's finality and repose roots.

[89] *Id.*

[90] *See Twice in Jeopardy*, *supra* note 5, at 270–71.

> Some courts seem to consider this [law and fact] test equivalent to the distinct elements test. But the distinct elements test would not permit prosecution for necessarily included offenses, while the same in law and fact test would. However, courts using the latter test usually make exception for necessarily included offenses, and thus it is functionally equivalent to the distinct elements test.

Id. at 273 n.53.

[91] *See id.* at 270–71 (stating that "At common law the slightest variance between the allegation and proof was fatal to the prosecution. Since a plea of former acquittal barred reprosecution for the same offense, this variance rule might have set criminals free simply because of the prosecutor's ineptness—an ineptness engendered more by the pedantry of the pleading system that by the prosecutor's negligence.").

[92] *See id.* at 269.

[93] Ashe v. Swenson, 397 U.S. 436, 453 (1970) (Brennan, J., concurring).

[94] SIGLER, *supra* note 12, at 68.

[95] 29 Mass. 496 (1832).

[96] Based on a careful reading of the case it appears that trespass included the modern day concept of criminal assault consummated by a battery.

[97] *Roby*, 29 Mass. at 509–10.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 509.

[101] Other courts followed suit applying this test. *See generally* State v. Littlefield, 70 Me. 452 (1880); Burton v. United States, 202 U.S. 344 (1906). For application of the test to a military court-martial, see *Grafton v. United States*, 206 U.S. 333 (1907).

[102] Gavieres v. United States, 220 U.S. 338, 342 (1911).

[103] 284 U.S. 299 (1932). At one point the Supreme Court modified this holding by applying a same transaction/act type test. *See* Grady v. Corbin, 495 U.S. 508 (1990). The *Grady* rule was subsequently overruled and the *Blockburger* test was restored as the standard for Fifth Amendment purposes. United States v. Dixon, 509 U.S. 688 (1993).

elements" test.[104] Currently, prosecutors must look to the elements to determine whether one statute requires proof of facts which the other does not.[105]

The application of this test, coupled with other criminal procedure doctrines, establishes some general rules for practitioners. First, a lesser-included offense, in most circumstances, is the "same offense" as the greater in applying the Double Jeopardy Clause.[106] Thus, acquittal or conviction for a lesser offense will bar a subsequent prosecution for the greater offense.[107] Second, a conviction of a lesser-included offense when the greater offense is at issue is considered an implicit acquittal of the greater and bars subsequent prosecution of the greater offense, even if the case is retried after appeal on the lesser offense.[108] Finally, collateral estoppel, a component of double jeopardy, bars a trial on other, similar charges after an acquittal or an implied acquittal even if they are not the "same offense," provided that the accused is "acquitted" of certain facts.[109] This is to protect the sanctity of an acquittal and the policy behind the Double Jeopardy Clause. Without this component, under the *Blockburger* test, the Government could continue to prosecute a defendant with slightly different crimes until it secured a conviction—despite previous acquittals—in flagrant violation of the policy underpinnings of the Double Jeopardy Clause.[110]

In addition to the dual sovereignty exception and "same offense" determination, the third scenario focuses on what "twice in jeopardy" means. The concept is broken into two distinct issues. First, when does jeopardy attach? Second, after it attaches, what action bars a subsequent prosecution? One scholar explained the issue of "twice in jeopardy" as follows: "Although courts often speak of when jeopardy attaches, this attachment metaphor misleads to the extent that it implies that there is one key moment rather than two. Jeopardy is a process—like any other game—and we thus must ask when it begins and when it ends."[111]

Historically, the English rule at common law was that a "final verdict is required before jeopardy can be said to begin."[112] Thus, attachment was not an issue because an acquittal or conviction was required to constitute a prior jeopardy.[113] In other words, any termination of a criminal proceeding prior to a verdict allowed the prosecution to retry the defendant, regardless of the cause, without offending the Double Jeopardy Clause. Early American cases followed this approach. As Justice Washington stated, jeopardy is "nothing short of the acquittal or conviction of the prisoner and the judgment of the court thereupon."[114]

Due to the policy rationale for double jeopardy's protection and the nature of the protection as a fundamental right in the Constitution, the question arose as to "whether a prior uncompleted trial had reached such a degree of maturation as to amount to a 'jeopardy.'"[115] As stated, this question was easily resolved at common law, but a divergence from the common law began in America where the courts recognized a "wide difference between a verdict given and the jeopardy of a verdict."[116] Thus, the British common law rule was rejected in American courts.[117]

Once a policy determination is made that termination of a trial proceeding prior to a verdict triggers jeopardy protections, a rule must develop to properly balance the rights and risk of a defendant versus the ability of the state and community to hold criminals accountable. Therefore, the concept of attachment arose as a judicial determination that there was a sufficient amount of risk at a previous trial that a defendant should, in certain circumstances, receive the protections of double jeopardy's bar to subsequent prosecution.[118] Consequently, if jeopardy does not attach, then the prior trial never legally occurred.[119] Unfortunately, the balancing of interests and the movement away from the easily applied rule at common law led one author to conclude that "the internal inconsistencies inherent in the doctrine of attachment are so great that they immediately give rise to qualifications and exceptions."[120]

Generally, jeopardy attaches in a jury trial when the jury is empanelled and sworn.[121] However, in a judge alone trial, jeopardy attaches when the court first begins to hear

---

[104] *Twice in Jeopardy*, *supra* note 5, at 273 n.52 (comes from *Garries* adopted and applied in *Blockburger*); United States v. Teters, 37 M.J. 370 (C.M.A. 1993) (applying *Blockburger* to the military).

[105] SIGLER, *supra* note 12, at 66.

[106] Amar, *supra* note 6, at 1813; Brown v. Ohio, 432 U.S. 161 (1977).

[107] Amar, *supra* note 6, at 1813; *Brown*, 432 U.S. at 169 (holding that "[w]hatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense").

[108] Green v. United States, 355 U.S. 184 (1957); Amar, *supra* note 6, at 1826.

[109] Amar, *supra* note 6, at 1827. *See infra* Part VI.C.

[110] *Id.*; Ashe v. Swenson, 397 U.S. 436 (1970).

[111] Amar, *supra* note 6, at 1838.

[112] SIGLER, *supra* note 12, at 15.

[113] *Id.* at 16.

[114] Amar, *supra* note 6, at 1838 (citing United States v. Haskell, 26 F. Cas. 207, 212 (C.C. Pa. 1823)).

[115] SIGLER, *supra* note 12, at 41.

[116] *Id.* at 42.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.* at 74.

[121] Downum v. United States, 372 U.S. 734 (1963); Crist v. Bretz, 437 U.S. 28 (1978).

evidence.[122] Ordinarily, once jeopardy attaches, the Double Jeopardy Clause will only bar retrial after a verdict. Furthermore, in order to protect an accused's right to have "his trial completed by a particular tribunal," an unnecessary termination of a trial prior to a verdict will impose a double jeopardy bar to successive prosecutions. In other words, necessity is required to declare a mistrial and terminate proceedings prior to a verdict.[123] Accordingly, "manifest necessity" for termination prior to a verdict acts as an exception to the attachment rule, allowing retrial of the defendant.[124] In addition to necessity, consent of the defendant, as occurs when the defense requests a mistrial, operates to prevent a double jeopardy bar in a subsequent proceeding.[125] Nevertheless, even with consent, the prosecutor cannot act in a manner that provokes the defense into requesting a mistrial.[126] So, the attachment rules serve the fundamental policy rationale of the Fifth Amendment protection by preventing the prosecutor from using the case as a trial run, terminating the proceedings due to poor preparation, or intentionally causing a mistrial.[127]

The attachment issue also arises when trial is terminated early due to dismissal of charges rather than a declaration of mistrial or a retrial of an accused subsequent to a meritorious appeal. Originally, a defendant's voluntary appeal did not prevent a retrial upon reversal based on the early belief that the ability to appeal was tied to the accused's "waiver" of his double jeopardy rights.[128] The Court put the accused into a choice which "forces the defendant to choose to accept a lesser penalty or to enter an appeal and take the risk that the second charge might be much more serious."[129] Other justices rationalized the lack of a bar in the appellate setting under the concept that the retrial was merely part of a continuing jeopardy from the attachment at the original trial.[130] Currently, the Court has abandoned this logic, stating,[131] "[t]o condition an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another, however, conflicts with the constitutional bar against double jeopardy."[132] Thus, double jeopardy policy is not implicated when an accused chooses to appeal and gains the benefit of a new trial.[133]

Similarly, a dismissal prior to a verdict, even if after attachment, does not prevent a Government appeal or subsequent retrial of the accused.[134] The Court, discussing the balancing of related interests and the policy of the Double Jeopardy Clause, explained its rationale stating,

> We think that in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant. We do not thereby adopt the doctrine of "waiver" of double jeopardy. . . . Rather, we conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice[135]

Finally, any double jeopardy analysis is incomplete without an understanding of collateral estoppel.[136] Collateral

---

[122] Serfass v. United States, 420 U.S. 377 (1975).

[123] SIGLER, *supra* note 12, at 42.

[124] *Id.* at 43. The following cases illustrate factual circumstances where the courts have determined "manifest necessity" exists: United States v. Perez, 22 U.S. (9 Wheat) 579 (1824); Dreyer v. Illinois, 187 U.S. 71 (1902); Lovato v. New Mexico, 242 U.S. 199 (1916); Thompson v. United States, 155 U.S. 271 (1894); Illinois v. Somerville, 410 U.S. 458 (1973); Arizona v. Washington, 434 U.S. 497 (1978); and Wade v. Hunter, 336 U.S. 684 (1949).

[125] United States v. Dinitz, 424 U.S. 600 (1976).

[126] *Id.* at 611; Oregon v. Kennedy, 456 U.S. 667 (1982).

[127] *Twice in Jeopardy*, *supra* note 5, at 287.

[128] SIGLER, *supra* note 12, at 71.

[129] *Id.* at 72.

[130] *See generally* Kepner v. United States, 195 U.S. 100, 134–37 (1904) (Holmes, J., dissenting) (arguing that appeals are allowed based on the concept of continuing jeopardy).

[131] Green v. United States, 355 U.S. 184 (1957); SIGLER, *supra* note 12, at 72.

[132] SIGLER, *supra* note 12, at 72 (discussing the holding in Green v. United States, 355 U.S. 184 (1957)).

[133] *See* United States v. Tateo, 377 U.S. 463, 466 (1964) (finding that "[i]n reality, therefore, the practice of retrial serves defendants' rights as well as society's interest. The underlying purpose of permitting retrial is as much furthered by application of the rule to this case as it has been in cases previously decided.").

[134] United States v. Scott, 437 U.S. 82 (1978).

[135] *Id.* at 98–99 (1978) (citations omitted). The Court explained further

> We think the same reasoning applies *in pari passu* where the defendant, instead of obtaining a reversal of his conviction on appeal, obtains the termination of the proceedings against him in the trial court without any finding by a court or jury as to his guilt or innocence. He has not been "deprived" of his valued right to go to the first jury; only the public has been deprived of its valued right to "one complete opportunity to convict those who have violated its laws." No interest protected by the Double Jeopardy Clause is invaded when the Government is allowed to appeal and seek reversal of such a midtrial termination of the proceedings in a manner favorable to the defendant.

Id. at 100 (citation omitted).

[136] Collateral estoppel is incorporated in military law through Rule for Court-Martial (RCM) 905(g) which states "[a]ny matter put in issue and finally determined by a court-martial, reviewing authority, or appellate court which had jurisdiction to determine the matter may not be disputed by

estoppel is the requirement "that the determination of a question of fact essential to the judgment of a previous trial should be conclusive in a subsequent trial involving the same parties and the same facts."[137] This concept protects the province of the factfinder. Accordingly, once acquitted, collateral estoppel prevents the Government from using the concepts of double jeopardy law to charge a client with a similar but different offense in order to secure a conviction when resolutions of similar facts are required. For instance, if a defendant is charged and acquitted of murdering one of two individuals at a certain time and place based on an alibi defense, the Government cannot try the accused for the other murder since the factfinder made a conclusive finding at the first trial based on alibi.

The practical effect of applying the Fifth Amendment Double Jeopardy Clause to courts-martial is that nearly every factual situation where double jeopardy principles are implicated can be resolved under the general rules of the current constitutional framework. This is why military appellate tribunals state that Article 44 provides the same protection to defendants as the Fifth Amendment or fail to articulate the specific legal basis for their double jeopardy holdings.[138] While the premise that Article 44 and the Fifth Amendment provide parallel or twin protections is, generally speaking, a good guiding principle, the history, formation, and policy of Article 44's enactment demonstrate the potential for conflict in extreme situations.

IV. Article 44, UCMJ

Prior to the 1949 decision in *Wade v. Hunter*,[139] military justice practitioners were unsure whether the Fifth Amendment applied to courts-martial.[140] For that reason, the drafters of the UCMJ chose to afford servicemembers a statutory double jeopardy protection reminiscent that found in the Articles of War.[141] As such, the UCMJ, when signed into law in 1951, included Article 44, entitled Former Jeopardy, stating,

> (a) No person may, without his consent, be tried a second time for the same offense.
> (b) No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification is a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed.
> (c) A proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this article.[142]

The end result was the enactment of a statutory double jeopardy protection necessary for the UCMJ's automatic appellate system which attempted to codify the Court's holding in *Wade*.

A. History

Article 44 is derived from Article of War 40.[143] In fact, Article 44(a) and (b) nearly duplicate the language of the original Article of War. However, Article 44(c) was added during the passage of the UCMJ, completing the current statutory former jeopardy framework. Unlike the Fifth Amendment, Article 44's framework adopts the concept of "continuing jeopardy" originally proposed by Justice Holmes.[144] The legislative history of Article 44(b) illustrates a troubling consequence of this concept:

> Now, article of war 40 says that a man shall not be tried twice for the same offense, but that a trial is defined as the proceedings before a court, plus the approval of the reviewing authority, and that there is not a trial until the reviewing

---

the United States in any other court-martial of the same accused." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 905(g) (2008) [hereinafter MCM].

[137] SIGLER, *supra* note 12, at 52.

[138] *See, e.g.*, United States v. McClain, 65 M.J. 894 (A. Ct. Crim. App. 2008).

[139] 336 U.S. 684 (1949).

[140] *Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on the Armed Servs.*, 81st Cong. 1048 (1949) [hereinafter *House UCMJ Hearings*] (statement of Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense) (Mr. Larkin also served as the Executive Secretary to the Committee on the Uniform Code of Military Justice and Chairmen, Uniform Code of Military Justice Working Group); *see generally* H.F. Gierke, *The Use of Article III Case Law in Military Jurisprudence*, ARMY LAW., Aug. 2005, at 25.

[141] *House UCMJ Hearings*, *supra* note 140, at 669 (statement of General (Gen.) Franklin Riter on behalf of The American Legion).

[142] UCMJ art. 44 (1956).

[143] *House UCMJ Hearings*, *supra* note 140, at 669 (statement of Gen. Franklin Riter).

[144] *See generally* Kepner v. United States, 195 U.S. 100, 134–37 (1904) (Holmes, J., dissenting) (arguing that appeals are allowed based on the concept of continuing jeopardy).

> Holmes's basic idea is that a state could indeed structure its judicial system such that erroneous trial judge rulings are simply not final. When a defendant is convicted at trial because of a pro-state trial court error, an appellate court can review this error, reverse the conviction, and remand for a new trial. This new trial is not, constitutionally, a second jeopardy, but a continuation of the first, because the trial court 'conviction' was not a true conviction.

Amar, *supra* note 6, at 1842 (discussing this issue in more depth).

> authority acts, and so, by applying that literally, you reach the conclusion that until the reviewing authority acts, a man can be tried any number of times.[145]

While Article 44(a) seems to reiterate the concept of double jeopardy embodied in the Fifth Amendment, the statutory scheme of Article 44 as a whole illustrates that the historical development of double jeopardy in military law is different than that found in the Constitution. The primary reason for this difference is one of the innovative protections contained in military criminal law's framework: the automatic right of appeal. Unlike civilian criminal law systems, the court-martial system provides additional protections for all accused servicemembers through the provision of an automatic appeal.

Because the UCMJ drafters believed that the automatic appeal system was the ultimate protection afforded an accused, especially in a system controlled by military commanders, they created a complicated, multilayered, statutory system designed to execute their intent. The framework includes Articles 44, 62, 63, 66 and 69. Because these statutes operate collectively and in sync, they must be read together for insight into the policy protections provided to servicemembers.[146] These statutes ensure appellate review occurs automatically as an additional protection against unlawful command influence, protecting the rights of servicemembers from the perceived abuses and lack of due process in past court-martial cases. This rationale is found in the legislative history:

> A rehearing can be ordered. That is the language we use, but no man can be convicted of any offense at the rehearing of which he was not convicted before, and he cannot be punished any more severely. . . .
>
> . . . .
>
> The purpose of it, however, was to prevent a situation where an obviously guilty man would escape punishment on a technicality. He has every protection, and he cannot be punished any more severely and cannot be convicted of any offense which he was not convicted before unless you have a new set of charges and a new investigation and consolidate the two cases.[147]

The constant concerns over the feasibility of the automatic appeal system led to the drafter's belief that a complimentary but different jeopardy system was required in military law.[148] Since the accused was not electing to have his case reviewed, the UCMJ architects felt the language in Article 44(b) was necessary to ensure the automatic appellate system was workable.[149] Inherent in designer's concerns for Article 44 was the prevailing view at the time, based on Fifth Amendment jurisprudence, that double jeopardy only authorized rehearings after successful appeal

---

[145] *Uniform Code of Military Justice: Hearings on S.857 and H.R. 4080 Before a Subcomm. of the S. Comm. on the Armed Servs.*, 81st Cong. 168 (1949) [hereinafter *Senate UCMJ Hearings*] (statement of Franklin Riter, Officers' Reserve Corps, Judge Advocate Gen. Corps, Commander, Dep't of Utah, The American Legion).

[146] For a specific instance, see Felix Larkin's testimony during the House hearings on the inability to have a retrial in the case of an acquittal requiring the reading of Articles 44 and 62 together. *House UCMJ Hearings*, *supra* note 140, at 1051 (statement of Felix Larkin).

[147] *Id.* at 1049.

[148] *Senate UCMJ Hearings*, *supra* note 145, at 322 (discussion of major differences in the testimony of witnesses before the Subcomm. with Prof. Morgan and Mr. Larkin).

[149] This issue is clearly illuminated in the legislative history of Article 44. Colonel Weiner stated,

> It must be kept in mind that review of courts-martial cases in the military system and in this code by the convening authority in the first instance, and by the board of review in most cases, is mandatory and automatic. In civil courts this is not true. If a person is convicted in civil courts and there is a verdict against him, the appellate tribunal can consider the case and set aside the verdict of guilty and order a new trial, but they do so upon waiver by the defendant in the form of his petition for review and his request for reversal.
>
> Since most military cases are automatically reviewed, the convening authority or the board of review may determine for one reason or another that the verdict of guilty is not sustainable. They may change that verdict; make it a nullity by setting it aside or remanding the case for a rehearing, or, in some instances, providing for a new trial. If jeopardy attached at the beginning of the case and a subsequent finding of guilty was set aside for any reason, a rehearing could not be conducted without the consent of the accused because jeopardy would probably have attached. To change the military concept of jeopardy would necessitate a major change in the automatic appellate system that is provided by the military, which automatic system can only work in the interest of the accused.

H.R. REP. NO. 81-491, at 23 (1949); *see also House UCMJ Hearings*, *supra* note 140, at 803 (statement of Colonel Frederick B. Weiner). Felix Larkin reiterated these sentiments in his testimony, stating,

> If jeopardy first attached in the beginning of the case, then if the verdict was set aside and not sustained you could not have a rehearing unless you got the consent of the accused because jeopardy would probably prevent rehearing. This it seems to me would involve a major change in the automatic appellate system that is provided in military law.

House UCMJ Hearings, *supra* note 140, 1048–49, 52 (statement of Felix Larkin).

because the accused "waived" his double jeopardy rights by voluntarily appealing his case.[150]

Based on these concerns, the drafters turned to the structure of the Articles of War. Therefore, Article 44(a) and (b)'s language "envisages only the old common law pleas of former acquittal and former conviction[, *autrefois acquit* and *autrefois convict*,] and it did not consider the modern doctrine that jeopardy can attach before verdict or findings."[151] As a result, Article 44 is jeopardy in its pure common law form, requiring a verdict before jeopardy "attaches" or one is actually in jeopardy of being punished or tried twice for the same offense.[152] This idea was criticized extensively in that

> [i]t keeps only 'autre fois acquit; autre fois convict'—the old common law idea that there had to be a verdict before jeopardy could attach.
>
> That is, a man had to be acquitted or he had to be convicted before he could plead. We know that that is not the law under the fifth amendment today—that jeopardy can attach in our civil courts as soon as the jury is sworn and the first witness sworn.
>
> And yet the military courts have attempted to perpetuate that archaic rule.[153]

Felix Larkin, the executive secretary of the drafting committee, responded to the criticism that the language was contrary to current law by asserting, "I would not say that it [Article 44's language] is not at variance with the present military law. But the military law has been at variance with the general civil law."[154]

Due to these concerns, Congress recognized that the language adopted from the prior Articles of War needed updating in order to allow for some jeopardy protections prior to findings. Primarily, Congress was concerned with the potential for abuse exhibited by the case of *Wade v. Hunter*.[155] In *Wade*, two German women in Krov, Germany, were raped by two men in American uniforms on 13 March 1945.[156] Two weeks later, Wade and another American Soldier were tried by general court-martial.[157] After hearing evidence, the court closed for deliberation, but announced that the trial would be continued in order to take testimony from other witnesses unavailable before rendering findings.[158] Later, the convening authority withdrew the charges and requested transfer to another convening authority, stating,

> The case was previously referred for trial by general court-martial and trial was commenced. Two witnesses, the mother and father of the victim of the alleged rape, were unable to be present due to sickness, and the Court continued the case so that their testimony could be obtained. Due to the tactical situation the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time.[159]

After this action, a new convening authority referred the case to another court-martial and Wade filed a plea in bar with the court, arguing that double jeopardy prevented continuation of the trial.[160] The trial court ruled against Wade and he was subsequently convicted. After several years, his appeal reached the Supreme Court.[161] Ultimately, the Supreme Court held that double jeopardy did not bar the subsequent trial. Because the court-martial ended prior to a finding, according to the Court, the first trial was terminated due to "manifest necessity.[162]

Due to the publicity surrounding *Wade*, Congress was concerned that Article of War 40 did not address trial terminations by the convening authority due to lack of counsel preparation. In discussing the facts of the case, prior to the Supreme Court's decision, the legislative history states,

---

[150] *See supra* notes 128–135 and accompanying text for a discussion of the "waiver" theory. This concept has since fallen by the wayside but Article 44 remains unchanged from the language contained in its initial passage. *See infra* note 180 and accompanying text.

[151] *Senate UCMJ Hearings*, *supra* note 145, at 167 (statement of Franklin Riter).

[152] Colonel Weiner, a noted military law historian, testified that "I feel that article 44, as it now stands, is a correct statement of jeopardy; and, as a matter of fact, is closer to the original interpretation of the Fifth Amendment than a good many cases in civil courts." *House UCMJ Hearings*, *supra* note 140, at 802 (statement of Colonel Frederick Bernams Weiner, Washington, D.C.). Colonel Weiner drew this concept from a statement by Justice Washington in his 1823 interpretation of the Fifth Amendment. United States v. Haskell, 26 F. Cas. 207, 212 (C.C. Pa. 1823).

[153] *House UCMJ Hearings*, *supra* note 140, at 669–70 (statement of Gen. Franklin Riter).

[154] *Id.* at 1047 (statement of Felix Larkin).

[155] 336 U.S. 684 (1949). For congressional concerns related to this issue, see *Senate UCMJ Hearings*, *supra* note 145, at 186 (statement of Franklin Riter).

[156] Wade v. Hunter, 336 U.S. 684, 685 (1949).

[157] *Id.* at 686.

[158] *Id.*

[159] *Id.* at 686–87 (quoting the convening authority).

[160] *Id.* at 687. While the current practice is to file a motion to dismiss opposed to a plea in bar, the Court explicitly states that the defendant "filed a plea in bar" at his second court-martial. *Id.*

[161] *Id.*

[162] *Id.* at 690–92. The holding was handed down during the congressional hearings on the UCMJ prior to its passage in 1950.

> But the court . . . asked for additional testimony. In Federal court a district attorney must have his witnesses in court at his peril.
>
> He cannot go ahead and try a lawsuit and put a man in the penitentiary and then, when he sees he is going to get licked, nolle prose his case and them come back and take a second bite.[163]

Ultimately, the compromise was the addition of Article 44(c). By adding the final section to Article 44, Congress attempted to prevent a *Wade v. Hunter* scenario in the future.[164] Thus, it appears, Article of War 40's language was amended in an attempt to apply jeopardy in a fashion similar to civilian courts. The consequence of Article 44(c) is that Article 44 bars re-prosecution where the court-martial is terminated because the prosecution is unprepared.[165] This is in keeping with the double jeopardy policy goals: preventing unnecessary suffering and harassment of criminal litigants caused by multiple prosecutions,[166] preventing the state from obtaining a sneak peek at the defense's case,[167] protecting an accused's "valued right to have his trial completed by a particular tribunal."[168]

B. Policy

Viewing the history and text of Article 44, it is apparent that the statute serves the same policies as those of the Fifth Amendment Double Jeopardy Clause.[169] However, because of the inherent differences in the military justice system's appellate process, including a servicemember's right to an automatic appeal and the public policy that prevents the waiver of this right in plea bargaining,[170] Article 44 aims to provide additional safeguards—the absolute protection from any harm coming to an accused on appeal.[171] Unlike Article III appellate courts, the Court of Criminal Appeals "provides a de novo trial on the record at appellate level, with full authority to disbelieve the witnesses, determine issues of fact, approve or disapprove findings of guilty, and, within the limits set by the sentence approved below, to judge the appropriateness of the accused's punishment."[172] The differences in power and procedure at the appellate level give rise to differing interpretations of the application of double jeopardy to servicemembers and thus, the need for statutory protection under Article 44.

But for Article 44, an accused has no statutory protection from abusive and vindictive actions of the command or prosecutors in a system of automatic appeal. Succinctly put,

> In military judicial procedure automatic consideration by a board of review is provided. Since there is no provision for appeal to this intermediate tribunal by an accused, no notion of waiver, strictly speaking, is available to sustain "prosecution appeals"—that is, certifications by a service Judge Advocate General. However, action by a board of review is always taken on behalf of an accused and in his interest. Literally he can never be prejudiced by this appellate review—for on retrial, if any, he cannot be tried for an offense greater than that charged at the first trial, nor can he receive a sentence greater than that adjudged at the first trial. Since prejudice is impossible under this procedure, the evils contemplated by and even prompting the

---

[163] *House UCMJ Hearings*, *supra* note 140, at 671 (statement of Gen. Franklin Riter).

[164] 336 U.S. 684 (1949).

[165] *Senate UCMJ Hearings*, *supra* note 145, at 170 (statement of Franklin Riter).

[166] Green v. United States, 355 U.S. 184, 187 (1957); *Twice in Jeopardy*, *supra* note 5, at 278.

[167] Ashe v. Swenson, 397 U.S. 436, 447 (1970).

[168] *Wade*, 336 U.S. at 689.

[169] In one case this may not be completely accurate. Since Article 44 embodies the common law concept of double jeopardy requiring a verdict for jeopardy to "attach," it cannot protect a defendant's valued right to have his trial completed by the current tribunal.

[170] *See infra* note 240.

[171] In fact, the Court of Military Appeals summarized this additional double jeopardy policy, stating,

> 'should waive other rights so important as to be saved by an express clause in the Constitution of the United States.'
>
> This Court has also expressed the view that, assuming jurisdiction below, an accused cannot come to harm by appealing here and securing a reversal of his conviction. We conclude that, as in *Green* with regard to the jury's verdict, an accused who obtains review here does not forgo the right to beneficial action taken on his behalf by the Court of Military Review when he secures reversal of that court's action. If the Government believes that the Court of Military Review erred, it has the right to seek certification of the case by the Judge Advocate General for possible corrective action in this Court. It may not claim that the accused's successful petition for review has the same effect and removes any basis for his claim of former jeopardy.

United States v. Crider, 46 C.M.R. 108, 110 (C.M.A. 1973) (citations omitted).

[172] *Id.* at 111.

> guaranty against double jeopardy are entirely inoperative.[173]

Along these lines, Congress's intent behind forcing an automatic appeal right, granting broad fact finding powers to the Court of Criminal Appeals, and requiring an affirmative waiver of these rights in writing, was to benefit the accused. By doing so, the courts protect the constitutional right against double jeopardy by preventing an accused from being "harmed" by this system of automatic appeal.[174] One mechanism to protect against such a situation was the congressional enactment of Article 44 to protect servicemembers from such a violation of their right against double jeopardy.

C. Application

Putting the Article 44 framework together illustrates that the statutory double jeopardy protection contained in Article 44 is a modified version of common law double jeopardy prohibitions with the additional policy goal of ensuring that an accused should never be harmed by the military appellate process.[175] In effect, "Congress has provided a double jeopardy protection for military personnel tried under the Uniform Code of Military Justice, but it has stipulated that only final judgments would have the effect of prior jeopardy."[176]

Military double jeopardy case law suggests that Article 44 is broader than the strict common law concept of double jeopardy intended by the UCMJ drafters. For instance, the Court of Military Appeals has on one occasion stated that jeopardy attaches at the reception of evidence on the general issue of guilt or innocence.[177] However, most of the military case law in this area fails to articulate which specific double jeopardy protection—the Fifth Amendment or Article 44—forms the basis of their holding. In fact, a strict reading of Article 44(c) in conjunction with Article 44(a) leads to the conclusion that there is some form of a limited "attachment" right allowing a jeopardy bar prior to a verdict in some cases.[178] Nevertheless, Article 44's common law conception of jeopardy is still likely the best way to view and apply this protection in light of legislative history, while keeping in mind the added policy rationale for the statute itself.

At least one legal text has suggested that, because of the differences in the application of Article 44 and the Fifth Amendment, these two provisions may apply differently in different factual scenarios.[179] Professors Gilligan and Lederer's analysis of Article 44's legislative history suggests that the statute is different than the current constitutional interpretation of the Fifth Amendment. Because the framers of the UCMJ intended to protect rights similar to the interpretation of the Double Jeopardy Clause in the 1950's, "it may be that the Uniform Code, with its prohibition on trying the accused a second time for the same offense, is substantially more protective than the Constitution. As a result, . . . it may well be that Article 44 is more protective of the accused."[180]

In view of this, Article 44 must be applied and analyzed separately in a given factual situation. Article 44(a) prevents an accused from being "tried a second time for the same offense."[181] Article 44(b) and (c), however, define "trial" for purposes of Article 44(a). In the seminal case of *United*

---

[173] United States v. Zimmerman, 6 C.M.R. 12, 23–24 (C.M.A. 1952) (citations omitted); *see also* United States v. Dean, 23 C.M.R. 185 (C.M.A. 1957); United States v. Shulthise, 33 C.M.R. 243, 245 (C.M.A. 1963) (stating that "an accused can never be prejudiced by appellate review"); United States v. Crider, 46 C.M.R. 108, 110 (C.M.A. 1973) (stating that "an accused cannot come to harm by appealing here and securing a reversal of his conviction."); United States v. Culver, 46 C.M.R. 141 (C.M.A. 1973).

[174] Professor Morgan, the primary drafter of the UCMJ, made the following statement on the appeal issue:

> [I]f [an accused service-member] had been convicted, and it is set aside, and a new trial ordered, you see, and in the new trial he cannot be stuck for anything he was not found guilty of before. No sentence for the same offense can be increased on the new trial, and so forth.

Senate UCMJ Hearings, *supra* note 145, at 321 (discussion of major differences in the testimony of witnesses before the subcommittee with Professor Morgan and Mr. Larkin). The following colloquy in the Senate Hearings illustrates this point more clearly in the discussion of an accused's right to waive appellate review:

> Senator Saltonstall. Under what conditions would he waive a review, because he was satisfied with the sentence?
>
> Professor Morgan. He practically would never do it, as a matter of fact, because we have got him protected here. He cannot be stuck any worse than he was on the new trial. The sentence could not be increased. It is all to the good for him, so that he will never waive it, as a matter of fact.

Id. at 323.

[175] One commentator framed the policy in discussing the Fifth Amendment Double Jeopardy Clause, "the question of impact of the defendant's appeal should be resolved in such a way that the defendant would not be forced to gamble with his future." SIGLER, *supra* note 12, at 75.

[176] *Id.* at 43.

[177] United States v. Wells, 26 C.M.R. 289 (C.M.A. 1958). *But see* United States v. McClain, 65 M.J. 894 (A. Ct. Crim. App. 2008) (stating attachment occurs at different time based on whether the finder of fact is a judge or panel).

[178] United States v. Villines, 9 M.J. 807 (N.M.C.M.R. 1980). Under the predecessor to Article 44, providing that no person should, without consent, be tried a second time for the same offense, the first trial had to be a complete trial, and not justly or unavoidably interrupted one. Sanford v. Robbins, 115 F.2d 435 (5th Cir. 1940).

[179] FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT MARTIAL PROCEDURE § 7-11.00 (2d ed. 1999). In fact, instances exist where the protections do not run concurrently. *Cf.* United States v. Richardson, 44 C.M.R. 108, 111–12 (C.M.A. 1971).

[180] GILLIGAN & LEDERER, *supra* note 179, § 7-11.00.

[181] UCMJ art. 44(a) (2008).

States v. Ivory,[182] the Court of Military Appeals conducted an extensive analysis of Article 44. Applying this statute, the court held that while the mandate of Article 44(a) is clear, the rule's application is governed by how trial is defined in Article 44(b) and (c).[183] Looking at the history of Article 44, the court recognized that "[i]n enacting this Article, members of Congress considered two practices peculiar to the Armed Forces which they felt should be explicitly covered by statute."[184]

Article 44(b) address the first policy related to the military's appellate system. The court noted that Article 44 protected an accused's appellate rights based on the military's system of automatic appeal.[185] Presuming that an accused waived his double jeopardy rights by appealing in the civilian appellate system, the court recognized that Congress's intent behind Article 44(b) was to ensure a valid rehearing under the military's automatic review system.[186] Ultimately, the court surmised that Congress wanted to benefit an accused by setting up an automatic review system to eliminate trial errors and prevent unlawful command influence.[187] In discussing Article 44(b) the court stated,

> The theory behind this provision is obvious. Pretermitting the safeguards cloaking sentences, which are not presently involved, if an accused is initially found guilty, he can never be convicted of a degree of an offense greater than that returned by the original court-martial. Consequently, an accused who, after being convicted, is subjected to retrial for the same offense of which he was previously found guilty can never be prejudiced. The only change which can be made to his status would be a reduction in the degree of the offense from the findings of the original court-martial.[188]

The second policy addressed by Article 44(c) was the *Wade* scenario.[189] Here the court recognized that Article 44(c) "was designed to prevent a convening authority from affording the Government a second opportunity to convict an accused by dismissing a court before findings if he felt that the prosecution had not adequately proved its case and the trial might result in an acquittal."[190] Thus, Congress as a matter of fairness to individual defendants wanted to ensure that the Government could not end a trial due to a lack of preparation in order to seek additional evidence to ensure a conviction.[191]

Thus, Article 44 provides an independent double jeopardy bar in addition to that contained in the Fifth Amendment. While the Fifth Amendment focuses on the core notion of finality, Article 44 complements these core polices with the guiding principle that an accused should come to no harm in an automatic appellate system. Because the clause operates differently and focuses on additional policies, in certain cases, Article 44 may provide greater protections. This is especially true in cases where Article 44's additional policies are implicated as in a *Diaz* factual scenario,[192] policies not addressed or protected by the Fifth Amendment.

V. The *Diaz* "Exception"

As stated above, it is clear that, under the Fifth Amendment a conviction will bar subsequent prosecution for the "same offense." The Supreme Court in *Brown v. Ohio*, applying the concepts of the lesser-included offense doctrine and the *Blockburger* test, held that double jeopardy prevented the subsequent prosecution for a greater offense when the accused stood convicted of a lesser-included offense.[193] This rule applies regardless of whether the defendant seeks protection under the double jeopardy provisions of the Fifth Amendment or Article 44. But what if an accused is tried and convicted for an assault offense prior to the death of the victim and subsequently the victim dies? Taken literally, the *Blockburger* test, defining same offenses, bars prosecution of the defendant for the victim's death.[194] Therefore, in *United States v. Diaz*, the Supreme

---

[182] 26 C.M.R. 296 (C.M.A. 1958).

[183] United States v. Ivory, 26 C.M.R. 296, 300 (C.M.A. 1958) (citations omitted).

[184] *Id.*

[185] *Id.*

> It has been axiomatic to our jurisprudence that the jeopardy provisions of the Constitution are waived by an accused who is enjoying a new trial as a consequence of his own successful appeal from a former proceeding. This waiver would not, of course, be applicable in all appeals in military law since, under our procedure, an accused may be the beneficiary of certain automatic appeals. Rather than eliminate this salutary provision of military law the legislature chose instead to insure legally valid rehearings by providing [Article 44(b)].

Id.(citations omitted)

[186] *Id.*

[187] *See id.*

[188] *Id.* (citation omitted)

[189] *Id.* at 301.

[190] *Id.*

[191] *Id.*

[192] United States v. Diaz, 223 U.S. 442 (1912).

[193] Brown v. Ohio, 432 U.S. 161, 169 (1977) (holding that "[w]hatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense.").

[194] Amar, *supra* note 6, at 1813–14.

Court crafted an exception allowing prosecution in such a case.[195]

Gabriel Diaz was accused of assaulting "by blows and kicks" a man named Alcanzaren on 30 May 1906.[196] The day following the attack, he was charged with assault and battery.[197] He was found guilty of misdemeanor battery and fined fifty pesetas and costs.[198] Subsequent to Diaz's conviction, Alcanzaren died on 26 June 1906.[199] Diaz was then charged with homicide.[200] At his murder trial, Diaz pled former jeopardy claiming that the original misdemeanor conviction barred the second prosecution for murder.[201] In finding the Philippine double jeopardy statute did not bar the ensuing murder prosecution, the Supreme Court held:

> The provision against double jeopardy . . . is in terms restricted to instances where the second jeopardy is 'for the same offense' as was the first. That was not the case here. The homicide charged against the accused in the court of first instance and the assault and battery for which he was tried before the justice of the peace although identical in some of their elements, were distinct offenses both in law and in fact. The death of the injured person was the principal element of the homicide, but was no part of the assault and battery. At the time of the trial for the latter the death had not ensued, and not until it did ensue was the homicide committed. Then, and not before, was it possible to put the accused in jeopardy for that offense.[202]

Since 1912, the Supreme Court has consistently upheld this double jeopardy "exception" in dicta and footnotes.[203] For instance, in *Blackledge v. Perry*, the Supreme Court held that a prosecutor was presumptively vindictive for bringing a more serious charge against an accused solely for the invocation of his statutory right to appeal.[204] In a footnote to the holding the court stated, "[t]his would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset, as in *Diaz v. United States*."[205] Additionally, in *Brown v. Ohio*, holding that successive prosecutions for greater and lesser offenses are barred by double jeopardy,[206] the Court limited its holding in a footnote stating, "[a]n exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence."[207]

While *Diaz* was decided many years before *Blockburger*, the exception "still lives."[208] The Court expanded the holding in *Garrett v. United States*,[209] the first case to specifically apply *Diaz* since 1912. There, the Court

---

[195] 223 U.S. 442 (1912).

[196] *Id.* at 444. This case arose out of the Philippines giving the Supreme Court federal jurisdiction to hear the defendant's appeal. Specifically, the Court construed the double jeopardy provision contained in the Philippine Civil Government Act in its holding. Because the language of the statute is the same as that found in the Fifth Amendment Double Jeopardy Clause this fact is insignificant in determining the import of the Court's holding.

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.* at 448–49 (citations omitted). Additionally, in dicta, the court found another basis for the lack of a double jeopardy bar. The court stated "although possessed of jurisdiction to try the accused for assault and battery, was without jurisdiction to try him for homicide; and of course, the jeopardy incident to the trial before the justice did not extend to an offense beyond his jurisdiction." *Id.* This "jurisdictional exception" is not relevant in the military justice system and therefore will not be addressed in this article.

[203] It is unclear whether *Diaz* applies to the military**.** The Supreme Court's constitutional interpretations are only accorded persuasive value in military courts, opposed to precedential value, because of the special nature of the military justice system. *See* Gierke, *supra* note 140. This is especially true in this context where the civilian justice system does not have an automatic appellate right and appellate courts with fact finding powers as found in Article 66. Additionally, civilian criminal courts authorize an accused to waive his appellate rights for purposes of receiving a more beneficial plea bargain and waiver of appellate rights is presumed when an accused does not file a timely appeal (opposed to our system where the accused must affirmatively withdraw his appellate rights and the withdrawal must be in writing). Despite these issues, it seems likely that this exception will apply since the court is likely to adopt all the Fifth Amendment double jeopardy caselaw once it determines the constitutional right applies to military members. As such, this article assumes it applicability. If *Diaz* does not apply in the military then a mechanical application of *Brown* holding prevents a subsequent prosecution of a greater offense, even if the victim was alive at the time of the original trial.

[204] 417 U.S. 21, 29 (1974).

[205] *Id.* at 29.

[206] 432 U.S. 161, 169 (1977).

[207] *Id.* at 169. In *Illinois v. Vitale*, 447 U.S. 410, 420 (1980), the Supreme Court strengthened the force of the holding in *Brown*, determining that if two offenses are the same under *Blockburger* then the trial on a later charge constitutes double jeopardy. Again they reiterated the *Diaz* exception stating,

> [w]e recognized in *Brown v. Ohio*, 432 U.S., at 169, n.7 that '[a]n exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence.

Id. This exception was not applicable because the trial court found that the prosecution was aware that Vitale's accident had resulted in two deaths at the time he was prosecuted for failing to reduce speed.

[208] Amar, *supra* note 6, at 1824.

[209] 471 U.S. 773 (1985). For an excellent summary of this case's effect, see Amar, *supra* note 6, at 1824–25.

held that prosecution under the continuing criminal enterprise (CCE) statute was not barred by double jeopardy even though the statute required proof of a predicate felony for which the accused was previously convicted. The Court's rationale hinged on the fact that "[q]uite obviously the CCE offense is not, in any common-sense or literal meaning of the term, the 'same' offense as one of the predicate offenses."[210] Relying, by analogy, on *Diaz*, the Court concluded that the CCE was not complete at the time the original prosecution for the predicate offense occurred.[211] In a concurring opinion, Justice O'Connor went even further, relying on *Diaz* for the conclusion that "successive prosecution on a greater offense may be permitted where justified by the public interest in law enforcement and the absence of prosecutorial overreaching."[212]

Based on this jurisprudence, it is difficult to determine the impact of *Diaz*. One commentator has suggested that "[r]ead narrowly, Diaz only applies when the greater offense has not occurred at the time of the first trial."[213] However, *Brown* suggests that the inability of the prosecution to discover the greater offense due to "due diligence" may be enough.[214]

Thus, the question arises: Is the *Diaz* holding an exception to the rule or definitional exemption to the same offense doctrine?[215] The expansion of the holding beginning with *Brown* and *Garrett* suggests this is an exception, opposed to a definitional exemption under *Blockburger*.[216] If viewed as an exception, the *Diaz* rule would only apply under facts similar to those found in *Diaz*, acting as an exception to the general rule announced in *Brown v. Ohio*. Thus, the exception would only apply in an *autrefois convict* factual scenario where the accused was convicted on a lesser offense but the victim dies after the trial and the prosecution seeks to try the accused for the greater offense. If viewed as a definitional exemption, the *Diaz* rule means that in cases where the victim dies after the first trial, the two crimes are not the "same offense" for double jeopardy purposes. In this case, the rule would apply equally to an *autrefois convict* and *autrefois acquit* factual scenario, expanding the reach of the *Diaz* holding.

While no military case has applied *Diaz*, *United States v. Hayes* resolves a similar set of facts. Nevertheless, *Hayes*'s holding is contrary to *Diaz*.[217] In that case, the accused pled guilty to one specification of Absence Without Leave (AWOL), in violation of Article 86, from 1 May 1953 until 11 June 1953.[218] At initial action the convening authority published the following:

> In the foregoing case of Donald Eugene Hayes, aviation machinist's mate airman, U. S. Navy, the service record reveals that Hayes was an unauthorized absentee from the naval service from 1 May 1952 to 11 June 1953 rather than from 1 May 1953 to 11 June 1953 as charged in the specification. The sentence is disapproved and the charge of unauthorized absence from 1 May 1953 to 11 June 1953 is dismissed in order that appropriate disciplinary action may be taken for the complete period of absence.[219]

Clearly, the convening authority discovered that the accused was AWOL for a longer period of time after the trial but prior to action. After the action was published, the accused was court-martialed again for desertion, in violation of Article 85, for a longer period of absence. On appellate review, the Court held that Article 44 barred re-prosecution because

> [w]e are of opinion that in the circumstances disclosed by this record the convening authority in effect "terminated" the proceedings in order to start afresh with disciplinary action which he considered more appropriate to his post-trial determination from entries in the service record of the accused; that this "termination" and "dismissal" was without any fault of the accused; and that the language of Article 44, UCMJ, interpreted in light of the discussion in MCM, 1951, 68d, and the provisions relating to reconsideration and revision in Article 62, UCMJ, [sic] does not include authorization for the action taken by the convening authority in this case.[220]

The Court came to that conclusion because the convening authority's purpose was "patently to increase the severity of the punishment to be imposed on the accused."[221]

---

[210] *Garrett*, 471 U.S. at 786.

[211] *Id.* at 779–80.

[212] *Id.* at 783 (O'Connor, J., concurring).

[213] Amar, *supra* note 6, at 1824.

[214] *Id.*

[215] In the original holding, the *Diaz* Court stated the subsequent homicide was not the same in "law or fact" to the original assault charge. United States v. Diaz, 223 U.S. 442, 448–49 (1912). At the time *Diaz* was decided, this meant that the crimes were not the "same offense" for double jeopardy purposes. *See* Part II.B (providing a historical discussion on the development of the "same offense" test in Fifth Amendment double jeopardy jurisprudence).

[216] Amar, *supra* note 6, at 1825.

[217] 14 C.M.R. 445 (N.M.B.R. 1953).

[218] *Id.* at 447.

[219] *Id.*

[220] *Id.* at 449.

[221] *Id.* at 448.

In the military, it appears that once an accused has been tried for a lesser offense, they cannot be tried for the greater offense that differs from the lesser offense in degree only under Article 44.[222]

While the *Diaz* "exception" seems simple to state and apply, the application of the exception in a court-martial is complicated by the additional statutory protection provided by Article 44. Clearly, in the majority of cases, Article 44 and the Fifth Amendment Double Jeopardy Clause provide equal protections. A closer look at these two provisions in a *Diaz* factual scenario reveals a more complicated interplay. As a result, it is important to analyze discrete periods of time under both protections to determine, how each operates. In the end, it is possible that in a *Diaz*-type factual situation, depending on the procedural posture of the case, Article 44 may prevent the *Diaz* "exception" from applying.

VI. Mixing the Witches' Brew

Given the analytical framework for both protections, this section explores the interplay between the dual double jeopardy shields provided servicemembers by applying them to factual situations in various procedural postures. For purposes of evaluating these protections, assume that an accused assaults another person, the victim, and the victim later dies as a result of the injuries sustained from the original assault. This is a factual situation similar to that found in *Diaz*. The resulting analysis will depend upon the timing of the victim's death in relation to the original verdict and the procedural posture of the case. On balance, Article 44 will, at minimum, operate as a procedural double jeopardy bar if the victim dies prior to final action but after trial begins.

A. The Independent Ground: Abrogation

Regardless of the timing of the victim's death in relation to the procedural posture of the case, as alluded to, an independent ground for greater statutory protection may exist based on the timing of enactment of Article of War 40, the precursor to Article 44. If so, this basis prevents application of *Diaz* in the military, absent specific statutory authority. Thus, the first rationale for greater protection under Article 44 in a *Diaz* factual scenario is that the *Diaz* case does not apply to Article 44. This argument is based on the passage of Article 44 itself and is independent of the timing of the victim's death.

Article 44's former jeopardy bar is based on the language of Article of War 40. The original statute was part of the 1920 Articles of War applicable to the U.S. Army and was passed after the 1912 holding in *Diaz*. Because the statute was passed after *Diaz*, and the legislature is presumed to have knowledge of the holding at the time of its passing, one argument for enhanced protection under Article 44 is that the enactment of the statute without express mention of the exception abrogates this exception under Article 44. Thus, the fact that the statute was later in time suggests that Congress intended that a *Diaz* exception would not be a basis for the Government to charge a servicemember with a greater offense if faced with facts similar to those of *Diaz*.

Three facts that distinguish military law from criminal law in civilian courts support this rationale. First, military courts are courts of limited jurisdiction intended to enforce good order and discipline in the armed forces through the application of criminal sanctions and punishment. Second, abrogation of the *Diaz* exception supports the policy, found in the UCMJ's legislative history, that a servicemember should not be harmed by appealing his case in a system of automatic appeals.[223] Finally, the accused is typically discharged, severing military jurisdiction, at the time of final action. Since, under Article 44, this is the end of the trial and the time period when jeopardy "attaches," imposing the former jeopardy bar, there is less need for such an exception in military law. Therefore, it merely prevents re-prosecution in a court-martial for the greater offense.

Some might disagree, contending that the abrogation argument puts the Government in the position of delaying prosecution in a case where a person is severely assaulted to determine if he will die, in order to hold him accountable for murder, or risk pursuing charges for a greater offense of murder by quickly disposing of the case under charges for aggravated assault. This argument suggests that any speedy disposition would then later bar a conviction for murder. While seemingly logical, this argument is flawed because it considers only one forum appropriate for criminal prosecution that of a court-martial. In effect, the lack of a *Diaz* exception at a court-martial does not prevent a subsequent trial of a servicemember in a state or federal court, it merely shifts the forum for the later prosecution. Thus, the abrogation argument does not lead to a conclusion that the servicemember is immunized from prosecution all together. The abrogation argument merely reiterates the military justice policy that a court-martial is not the appropriate forum under these circumstances.

In spite of Article 44's additional protections, the Department of Justice could prosecute the accused for the greater offense in any federal court of general jurisdiction as an appropriate forum, because the Fifth Amendment poses no bar in federal court. Assuming the *Diaz* exception does apply to military law, Article 44 still may insulate an accused from additional prosecution for a greater offense in

[222] *Id.*; *see also* United States v. Lynch, 47 C.M.R. 498 (C.M.A. 1973) (stating that "One cannot be prosecuted and punished for an act which is 'part and parcel' of an offense for which he was previously convicted and punished").

[223] *See* discussion *supra* Part IV.B.

some circumstances. Here the issue turns on the timing of the facts.

B. The Easy Case: Victim Dies Prior to Trial or After Final Action

With the exception of the abrogation argument, the resolution depends upon the timing of the victim's death and the procedural posture of the case. The first case, and the easiest to resolve, is a case where an accused assaults the victim and prior to the trial, the victim dies. At this juncture, no double jeopardy concepts are implicated. Since the trial has not begun there is no attachment of jeopardy under the Fifth Amendment. Additionally, since there is no final action, there is no former jeopardy bar under Article 44. Therefore, the Government can appropriately either dismiss the assault charge and prefer a charge of murder, or merely prefer an additional charge of murder.

The next factual scenario is also easily resolved. Here, assume that the accused is charged with and found guilty of aggravated assault of the victim. At the trial, the accused receives confinement but no discharge and the case proceeds to final action. After final action, the accused is not administratively discharged from the service, but remains on active duty. After final action, the victim dies as a result of the injuries from the original assault. Under these facts, the victim's death occurred after the accused's original conviction therefore the *Diaz* exception allows prosecution of the accused for the greater offense because the Fifth Amendment's Double Jeopardy Clause does not bar successive prosecution. Article 44 does not bar re-prosecution because the facts giving rise to the greater offense, the victim's death, did not occur until after final action.

If *Diaz* is viewed under a "same offense" theory, then the victim's death resulted in a new crime, murder. Since Article 44(a) only prevents a person from being "tried a second time for the same offense," there is no statutory bar to charging the accused with murder. If *Diaz* is viewed under an exception theory, Article 44 still imposes no bar. The original assault trial is complete under Article 44(b) because final action transpired prior to the death of the victim. Since *Diaz* operates as an exception to an *autrefois convict* scenario, the original assault conviction does not bar subsequent prosecution. Additionally, the policy rationale of protecting an accused from harm as a result of the military's automatic appellate review is not implicated because appellate review is complete at the time of final action. Furthermore, the exception is consistent with *Diaz*'s policy, preventing an accused from escaping the culpability commensurate with his criminal acts, since his initial conduct placed the chain of events in motion which led to the victim's death.

However, even if Article 44 did bar a subsequent court-martial, again the accused could face trial in a federal district court. This scenario is more probable under these circumstances, because if the assault is egregious a punitive discharge is likely. Final action executes this discharge, terminating jurisdiction unless the accused's prison term outlasts the time it takes to exhaust his appeal.[224] Regardless, a forum is available to prevent the frustration of justice.

C. The Dilemma: Victim Dies After Acquittal

Other factual situations require a more complex analysis. For instance, suppose the accused is tried and acquitted of assault, but after acquittal the victim dies from injuries sustained in the assault. This could occur if the accused asserted an alibi/identification, self-defense, accident, or duress special defense at trial.

Here, re-prosecution may depend upon the theory of how *Diaz* applies. For instance, if the *Diaz* holding is viewed as a definitional exemption, then the crimes of assault and murder are not the "same offense" for double jeopardy purposes. This leads to the unusual result that the assault acquittal is not a bar to re-prosecution for murder under the Fifth Amendment. Additionally, Article 44(b) states that the trial is over at the time of the finding of not guilty. Thus, a statutory bar hinges on whether Article 44(a) prevents the subsequent prosecution.[225] If the assault and murder are not the "same offense," then an Article 44 analysis reaches the same conclusion as a Fifth Amendment analysis: separate crimes allow separate trials with no former jeopardy bar.

The principles underlying the collateral estoppel doctrine may possibly bar re-prosecution, but the rationale for that doctrine in criminal cases is based on double jeopardy principles, which are arguably not at play since the crimes are, by definition, separate offenses.[226] Additionally, if self-defense was the basis for the acquittal, collateral estoppel might not bar subsequent prosecution because the force used to defend against an attack must be reasonable and proportional to the force used by the attacker, here the victim. Thus, the force by the accused in the second prosecution is that causing death or grievously bodily harm, a greater amount than the factfinder may have considered in a simple battery prosecution at the original trial. Unfortunately, this definitional exemption view of *Diaz's* holding, in this scenario, does not seem to place adequate

[224] *See* UCMJ art. 2(7) (2008).

[225] *Id.* art. 44(a).

[226] One argument for additional collateral estoppel protection in the military is that RCM 905(g) expands the scope of the concept of collateral estoppel. By promulgating a specific rule, the President may have severed the connection between collateral estoppel and double jeopardy. If so, mechanical application of the rule is required regardless of whether double jeopardy policies are implicated.

importance on the stature of an acquittal as that required under the law.

If the *Diaz* holding is viewed under the more modern theory—an exception to the rule announced in *Brown*—the result is different. Under this rationale, *Diaz* only exists as an exception to an *autrefois convict* scenario. Here, the basis for the bar is derived from the common law *autrefois acquit* plea at common law. As a consequence, the exception would not apply regardless of whether the bar arises under the Fifth Amendment or Article 44 concepts of double jeopardy, resulting in a bar to subsequent prosecution based on the original acquittal.

Today, the better view is that *Diaz* is an exception to the rule. If viewed as a definitional exemption, the valued right of an acquittal is not protected.[227] Again, opponents of this view might argue that the accused is still protected under the collateral estoppel concept, but this is a narrowly construed exception.[228] Additionally, collateral estoppel is based on the principles of double jeopardy, so if the crimes are not legally the "same offense" this concept should technically not apply.

A broad reading of *Diaz*, as *Garrett* and *Brown* suggest, demonstrates that the holding is more appropriately viewed as an exception to double jeopardy than a definition exemption (i.e., that is not the "same offense"). This may be the result of the shift in test from the common law concept of "law and fact" to *Blockburger*'s elements test.[229] The "law and fact" test was formalistic.[230] Because of the strict requirements, a conviction or acquittal on a lesser offense would not bar a subsequent prosecution of a greater offense, or vice versa.[231] The harsh application of the rule made it unnecessary to create an exception in a *Diaz* factual scenario, because application of the "law and fact" test allows a subsequent prosecution. When *Blockburger*, as implemented in *Brown*, juxtaposed the concepts of double jeopardy and the lesser included defense doctrine, *Diaz's* holding transformed to an exception based on the development of the distinct elements test, a change necessary to maintain the end result enunciated in *Diaz*. Furthermore, the exception rationale comports with the broadening of the *Diaz* holding, including lack of knowledge or due diligence on the part of the prosecutor. Finally, looking at *Diaz* as an exception to *autrefois convict* makes more sense from a policy perspective because the original holding was not trying to create an exception to a double jeopardy *autrefois acquit* scenario.[232] The Court's original focus was trying to ensure that the criminal does not escape liability for a murder originally caused by his actions (i.e., an *autrefois convict* scenario).[233] Thus, from a policy perspective and based on the current case law, the better way to view *Diaz*'s holding is as an exception to the rule announced in *Brown v. Ohio*.

The same outcome occurs in an implied acquittal scenario. This arises where the accused is tried for aggravated assault at the original trial but is only convicted of simple assault, after the jury is instructed on the charged offense and all potential lesser-included offenses. Under the law, the accused is impliedly acquitted of the greater charge because the factfinder determined, based on their verdict, that the Government did not meet all the elements of the greater offense. Therefore, in an implied acquittal scenario, where the accused is convicted only of a lesser charge, the acquittal of a greater offense at the first trial should bar subsequent prosecutions for other greater offenses in subsequent prosecutions, such as murder. This results from the fact that the accused as a matter of law is acquitted of one of the potential crimes in the range of crimes for which he is potentially liable. Since the Government could not prove an element at the original trial, the subsequent death of the victim does not allow the Government to try and reprove an element necessary for a murder conviction which they failed to prove originally.[234]

---

[227] United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) (citing United States v. Ball, 163 U.S. 662, 671 (1896)) (stating, "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '(a) verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting (a defendant) twice in jeopardy, and thereby violating the Constitution.'"); United States v. Scott, 437 U.S. 82, 91 (1978) (stating, "the law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent, he may be found guilty.'").

[228] *See Twice in Jeopardy*, *supra* note 5, at 283–84 (illustrating that many courts limit the application of collateral estoppels because they require the defendant to show with near certainty that the prior litigated facts was the only basis for the acquittal in order to invoke this rule).

[229] *See id.* at 270–71.

> Some courts seem to consider this [law and fact] test equivalent to the distinct elements test. But the distinct elements test would not permit prosecution for necessarily included offenses, while the same in law and fact test would. However, courts using the latter test usually make exception for necessarily included offenses, and thus it is functionally equivalent to the distinct elements test.

Id. at 273 n.53.

[230] *See* discussion *supra* Part III.B. *See also Twice in Jeopardy*, *supra* note 5, at 270–71 (stating that "At common law the slightest variance between the allegation and proof was fatal to the prosecution. Since a plea of former acquittal barred reprosecution for the same offense, this variance rule might have set criminals free simply because of the prosecutor's ineptness.").

[231] *Id.*

[232] United States v. Diaz, 223 U.S. 442, 448–49 (1912).

[233] *Id.*

[234] This conclusion presumes that proving the element is necessary. However, it if is unnecessary for proof it is unlikely that the offenses are related as greater and lesser offenses. If not, then *Brown*'s general rule is not applicable and general double jeopardy principles, applied mechanically, would allow a subsequent prosecution because the crimes are not the "same offense." The only potential bar in this scenario would arise from collateral estoppel.

The result of this analysis is that in an *autrefois acquit* scenario there is no difference between the application of the two double jeopardy bars if *Diaz* is properly viewed as an exception or collateral estoppels is applied to ensure just results. In the end a Fifth Amendment and Article 44 analysis reach the same conclusion: double jeopardy bars a subsequent prosecution.

D. The Brainteaser: Victim Dies After Trial but Prior to Final Action

The final scenario is the most difficult one. The final scenario occurs where an accused is tried and convicted of assault and the victim dies as a result of the injuries suffered from the assault after the verdict, but prior to final action. For purposes of analyzing these facts under the Fifth Amendment, two relevant time periods arise: (1) when jeopardy attaches and (2) when jeopardy "vests." Here the death occurred after attachment and after jeopardy "vests" because the death occurred after findings of guilt. Thus, for Fifth Amendment purposes, a subsequent murder prosecution for the death of the victim is a "new" offense. Alternatively, the *Diaz* exception applies and no constitutional double jeopardy bar exists. Regardless of how the *Diaz* holding is read, the Fifth Amendment will not bar the accused's subsequent prosecution.

The Article 44 analysis is more difficult in this scenario. Here, because no final action has occurred, the trial is not final for purposes of Article 44(b).[235] Therefore, for purposes of an Article 44 analysis, this scenario is analogous to a Fifth Amendment analysis where the victim's death occurs in the middle of the trial prior to a guilty verdict. This poses a problem in the application of the *Diaz* holding to Article 44. Here, it is difficult to argue that these crimes are not the "same offense" or that the facts leading to application of the *Diaz* exception apply. Unlike the *Diaz* case, the death here did not occur after the completion of a prior trial, leading to the original holding that the case was different in both "law and fact."[236] Furthermore, unlike the Fifth Amendment, the applicable time period for "attachment" and "vesting" of the jeopardy bar under Article 44 is the completion of trial. This time is based on Article 44's application of the common law concept that jeopardy does not arise until acquittal or conviction. Under Article 44(b), the relevant time period for analysis is final action, not the findings at trial. Therefore, here, at minimum, the facts of the assault and murder are inextricably tied together and the crimes are the same in "fact" even if they are distinct in law. Since these crimes are not distinct, the *Diaz* exception will not apply to Article 44 and double jeopardy will bar the subsequent proceeding. This scenario is similar to the facts in *United States v. Hayes* where the court held Article 44 bars subsequent prosecution.[237]

This situation places the prosecution in a precarious position. Because a trial for purposes of Article 44 has not occurred, *Diaz* is factually distinguishable. One argument for proceeding on the greater charge may be that there is no former jeopardy protection under Article 44 at this point because Article 44(a) requires that a former trial must occur for the protection to vest. Since the trial is ongoing, the prosecution could analogize this to a case of manifest necessity, have the case returned for a rehearing, prefer the additional charge of murder, and refer both charges to trial, or, in the alternative, dismiss the assault charge and proceed anew under a newly preferred charge of murder and a new trial.

Unfortunately, both courses of action ignore the additional policy protections inherent in the UCMJ's statutory automatic appellate scheme created by Articles 44, 63, and 66. The cases dealing with this policy clearly stand for the proposition that Congress's intent behind their creation of our appellate system was to benefit the accused.[238] By doing so, the courts protect the constitutional right against double jeopardy by preventing an accused from being "harmed" by appealing.[239] But for Article 44, an accused has no statutory protection from actions of the prosecution to increase the severity of the accused's conviction or his punishment in a system of automatic appeal. Also, without this policy—as implemented in part by Article 44—an accused would be placed in the difficult position of deciding whether to withdraw his appellate rights or forgo his statutory defense of former jeopardy in order to secure a reversal of an erroneous conviction. As stated in *Hayes*, the policies behind Article 44 are implicated when the convening authority's action "patently [serves] to increase the severity of the punishment to be imposed on the accused."[240] Certainly, Congress did not intend to place a servicemember in such a dilemma when enacting automatic appellate rights, given the substantially different nature of the military appellate process and the substantial additional rights given an accused in the military justice system.[241]

Should the prosecution choose to take the second course of action—dismissing the charge and proceeding with a greater charge—the prosecution faces an additional challenge of dealing with the language contained in Article

[235] UCMJ art. 44(b) (2008).

[236] *Diaz*, 223 U.S. at 448–49.

[237] 14 C.M.R. 445, 448 (N.M.B.R. 1953).

[238] *See* discussion *supra* Part IV.B.

[239] *Id.*

[240] *Hayes*, 14 C.M.R. at 448.

[241] Congressional intent is supported by the fact that withdrawal must be in writing. UCMJ art. 61 (2008); MCM, *supra* note 136, R.C.M. 1110. This is also supported by the fact that it violates public policy for the Government to force an accused to waive these rights as part of a plea agreement. *E.g.*, *id.* R.C.M. 705(c)(1).

44(c). Article 44(a) prevents the appellant from being "tried a second time for the same offense."[242] Article 44(b) and (c), however, define trial for purposes of Article 44(a).[243] By terminating the proceeding and dismissing the charge after the original trial for assault occurred, Article 44(c), by its language, makes the assault trial final after the victim's death, resulting in a "trial" for purposes of Article 44(a).[244] Therefore, unlike the facts in *Diaz*, the first trial is final *after*, the death of the victim. Because Article 44 and the Fifth Amendment differ in their definition of a "trial," the *Diaz* "exception" does not apply under Article 44 in this situation since the trial only becomes final under Article 44(c) at the time of the dismissal. Contrast this outcome with the Fifth Amendment where the original trial is final at the time of the verdict. Thus, by dismissing the original assault charge, the Government may create an Article 44 double jeopardy bar where the *Diaz* "exception" will not apply. Although seemingly unfair to the Government, this result is consistent with the additional policy rationale for Article 44, preventing harm from coming to an accused as a result of his appeal.

In addition to this Article 44 issue, the prosecution is faced with additional jurisdictional problems, intertwined with the former jeopardy analysis and the policy protecting individuals from additional harm resulting from exercising their appellate rights. This is primarily due to the limited jurisdiction of a court-martial.[245] Once the case is forwarded to the appellate courts, the convening authority and inferior tribunals are limited in the power they have over the case or controversy in question because jurisdiction vests in the appellate court by operation of law.[246]

Once a case reaches the appellate courts, Articles 66 and 67 vest jurisdiction over the subject matter of the offense(s) with the appropriate appellate court hearing the case.[247] By necessity, this divests any inferior court or convening authority with jurisdiction over the case. Until the appellate court releases jurisdiction, or a higher court takes jurisdiction, the appellate court maintains exclusive jurisdiction over the subject matter of the case. Any decision by the Court of Criminal Appeals, other than remanding the case for a new trial, shows a clear intent to divest the inferior tribunals of their unfettered jurisdiction over the case. Consequently, "[a]fter remand of a case, a lower court, or in the military any lower echelon, is without power to modify, amend, alter, set aside, or in any manner disturb or depart from the judgment of the reviewing court."[248] In cases where the appellate authority has acted,

> [a]fter decision by the appellate court and remand, it is the duty of the lower court to comply with the directions of the appellate court ***. *After remand the lower court has no authority to enter any judgment or order not conforming to the mandate, or any judgment other than that directed or permitted by the reviewing court, or necessary to carry out the judgment into effect*.[249]

The purpose of this jurisdictional restriction is to protect the judicial process, as well as the interests of the accused. In some circumstances, the court has declared void actions favorable to the accused because the convening authority's action was outside the court's mandate.[250] As a result, the Government is faced with the dilemma of choosing the second course of action—dismissing of the assault charge and re-preferring a murder charge. This will restore plenary power to the convening authority over the subject matter of the case. As explained above, this is an action the prosecution wants to avoid because it solidifies the Article 44 bar to re-prosecution for murder.

After considering issues related to the definition of a "trial" for Article 44 purposes, the Government may face an issue of *res judicata* as well. Because the victim died while the trial was ongoing (i.e., there is no final action so the trial is not complete), the Government is forced to stop an ongoing proceeding and charge the defendant with a greater offense. While based in the concepts of Fifth Amendment's attachment of jeopardy,

---

[242] UCMJ art. 44(a) (2008).

[243] Article 44(b) defines trial for purposes of Article 44(a) as "No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification is a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed." *Id.* art. 44(b). Article 44(c) defines trial for purposes of Article 44(a) as "A proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this article." *Id.* art. 44(c).

[244] In fact, this is exactly what occurred in *United States v. Hayes* where the court stated

> that this "termination" and "dismissal" was without any fault of the accused; and that the language of Article 44, UCMJ, interpreted in light of the discussion in MCM, 1951, 68d, and the provisions relating to reconsideration and revision in Article 62, UCMJ, [sic] does not include authorization for the action taken by the convening authority in this case.

Hayes, 14 C.M.R. at 448.

[245] United States v. Goodson, 3 C.M.R. 32 (C.M.A. 1952).

[246] United States v. Montesinos, 28 M.J. 38, 42 (C.M.A. 1989) (stating that "[the] convening authority loses jurisdiction of the case once he has published his action or has officially notified the accused thereof; and from that point on, jurisdiction is in the Court of Military Review.").

[247] UCMJ arts. 66 & 67.

[248] United States v. Stevens, 27 C.M.R. 491, 492 n.1 (C.M.A. 1959); *see also Montesinos*, 28 M.J. at 44.

[249] United States v. Collier, 26 C.M.R. 529, 535 (A.B.R. 1958) (emphasis in original).

[250] *Montesinos*, 28 M.J. at 44.

> the stopping of a trial to permit the defendant to be charged with a higher offense, or with the same offense before a higher tribunal so that a more severe sentence may be imposed, is, absent a statute to the contrary, the equivalent of an acquittal and bars any subsequent prosecution for a higher offense that embraces the offense first tried.[251]

This may not be directly applicable since in the factual situation at hand, the Fifth Amendment does not bar prosecution due to the *Diaz* holding, however, this rationale fits within the purpose of Article 44's statutory scheme and the rationale for Congress's addition of Article 44(c). In fact, the rationale is similar to that expressed in *Hayes* because the prosecution stopped the proceeding in order to increase the accused's criminal culpability.[252]

In the end, the analysis is not as simple as one might believe when looking only at the Fifth Amendment jurisprudence and the *Diaz* holding. Appropriately, Article 44 prevents application of the *Diaz* exception in certain circumstances because of the policy rationale behind its implementation and the structure of the military appellate system. The lack of literature and jurisprudence in this area coupled with the lack of differentiation in military appellate law between Fifth Amendment double jeopardy analysis and that of Article 44 leads to the conclusion that in certain factual situations, Article 44 provides an accused with former jeopardy protections that are unavailable in federal or state criminal courts. In the military this conclusion is reinforced by the policy that an accused should not be harmed from his appeal. The result is that Article 44 protects an accused when the additional facts leading to a greater offense occur prior to final action but after beginning trial on the merit.

VII. Recommendations

Because of the difficulty in applying the *Diaz* holding to an Article 44 analysis and the potential for confusion, Article 44 should be amended to clarify Congress's intent. This amendment is necessary to provide clear guidance to prosecutors and defense counsel on how to proceed under circumstances where a factual situation, similar to *Diaz* might occur. Based on current events, this situation may easily arise in the future.

For instance, consider the recent events at Fort Hood. On 5 November 2009, Major (MAJ) Nadal Hasan allegedly engaged in a shooting rampage resulting in the death or injuries to numerous civilian and military personnel at Fort Hood, Texas.[253] Based on this incident, MAJ Hasan is charged with thirteen specifications of premeditated murder and thirty-two specifications of attempted premeditated murder.[254] If MAJ Hasan were found guilty and received life without parole or the death penalty, his case would be automatically reviewed. It is likely this appeal will take a number of years before completion and final action. Suppose that during this process, one of the injured victims dies of wounds suffered during this attack. Can the Army subsequently charge and prosecute MAJ Hasan for the murder of these victims? Will Article 44 prevent additional murder charges while his case is appealed at a court-martial? If his case is reviewed, error is discovered, and a retrial is ordered, can the Government then add the additional murder charges? What, if any, advice should his defense counsel or appellate counsel provide regarding this issue? How should the Government proceed? Without an amendment to Article 44, the answers to these questions are uncertain, and no clear guidance exists for counsel faced with these dilemmas, despite the ease with which one can cite the *Diaz* holding.

Two options arise when looking at the appropriate manner for amending Article 44.[255] The first option is to repeal Article 44 altogether or to modify Article 44's language to state that the former jeopardy protections provided to servicemembers are equivalent to those provided under the Double Jeopardy Clause of the Fifth Amendment. It is now clear that Fifth Amendment Double Jeopardy protections apply to courts-martial.[256] Additionally, the Supreme Court has clarified that the "waiver" or "continuing jeopardy" theory in retrial cases is not the basis for these holdings.[257] Thus, the Fifth Amendment does not preclude retrial even in an automatic appellate system. Currently, retrials are authorized after meritorious appeals because appeals seek a benefit for the accused. As such, they do not implicate core purposes of the double jeopardy protection. Since part of the rationale underlying the necessity of Article 44—the fact that the statute was required due to the

[251] 21 AM. JUR. 2D *Criminal Law* § 300 (2009).

[252] United States v. Hayes, 14 C.M.R. 445, 448 (N.M.B.R. 1953).

[253] *Officials: Fort Hood Shootings Suspect Alive; 12 Dead*, CNN, Nov. 7, 2009, http://www.cnn.com/2009/US/11/05/texas.fort.hood.shootings.

[254] *Army Adds Charges Against Rampage Suspect*, MSNBC, Dec. 2, 2009, http://www.msnbc.msn.com/id/34243082/ns/us_news-tragedy_at_fort_hood.

[255] Another possible alternative is to add additional language to the analysis of Article 44 in the *Manual for Courts Martial*. Unfortunately, while this may clarify the drafting committee's intent, it does not clarify the overall congressional intent for this statutory protection. *Diaz* was not specifically addressed in the legislative history nor has the Court of Appeals for the Armed Forces ruled on this issue. Thus, the issue remains litigable until resolved by Congress.

[256] *E.g.*, Wade v. Hunter, 336 U.S. 684 (1949); United States v. McClain , 65 M.J. 894 (A. Ct. Crim. App. 2008).

[257] *See supra* notes 128–133 and accompanying text.

automatic appeal system in military law without the accused's consent—is no longer a valid concern in former jeopardy jurisprudence, Article 44 can be safely repealed.

While viable as an alternative, this does not altogether clarify the confusion associated with the issues discussed in this article. Many of Article 44's concepts justifying greater protection in certain circumstances are based upon the policy rationale that an accused should not come to any "harm" as a result of the automatic appeal system. Those policy arguments, while not as strong without the statutory language of Article 44, are still available by citing the policy rationale inherent in other articles of the UCMJ such as Article 63 (Rehearings) and Article 66.[258] Therefore, this option may continue to create confusion without ultimately clarifying how counsel should proceed in a scenario like the one presented in Part VI.

The second option is to amend Article 44 by adding an additional section, Article 44(d), to clarify this specific issue by providing a statutory *Diaz* exception or by clarifying that this exception does not apply to courts-martial. Suggested language is contained in Appendix A for both courses of action. While good arguments exist for both positions, the key issue is that Congress must resolve the current ambiguity to ensure counsel for both sides can adequately advise and represent their respective clients.

Until Congress takes action, counsel should consider the Article 44 implications when making charging decisions. Clearly, the most compelling argument for greater statutory protections, unless military courts demonstrate that they are receptive to the abrogation argument, is in the scenario where the additional fact raising the greater offense, such as the death of an assault victim, occurs when the case is proceeding through the appellate courts after trial but prior to final action. Here, jurisdiction issues arise with the prosecution's actions in these scenarios. If placed in this situation, military prosecutors should consider requesting return of the case from the appellate court. When moving for return of the case, the Government should request that the court vacate the previous judgment or set aside the findings and order a new trial. Once returned to the convening authority, the prosecutors should prefer an additional charge for the greater offense and refer both the original and additional charge to trial. Additionally, the prosecution should advise the convening authority to provide sentence credit for any portions of the sentence the accused served from the original conviction. This lessens the impact of arguments that the Government is attempting to exact multiple punishments for the same set of facts. Prior to dismissing the previous charge, the Government should proceed with caution to ensure that no Article 44(c) argument can be advanced by the defense.[259] By terminating the proceeding and dismissing the original charge, the convening authority may place itself in a situation where Article 44(c) results in a "trial" for purposes of Article 44(a). Since the death will occur prior to completion of the "trial," it is easier for the defense to distinguish the case from *Diaz*.

By taking these actions, the Government can argue that the two crimes are not the "same offense." Additionally, the Fifth Amendment will not preclude trial on the greater offense. Also, the accused is not harmed by appealing because he gets credit for the sentence already served, he gets an additional opportunity for an acquittal, and he is not punished more under Article 63 because this is an additional offense and Article 63 only applies to the assault charge. Also, it can advance the argument that Article 44 is no longer an issue because the trial has not been completed, and therefore, no jeopardy has "attached."

The defense on the other hand needs to be aware of the *Diaz* exception and the potential additional protections offered for its client. The defense can use the ambiguity to its advantage to exact a better deal in exchange for consent to trial under Article 44(a). When looking at how to structure a deal, consider a term where the Government agrees not to proceed on the greater charge even if the victim dies some time after the accused pleads guilty. This action will provide the ultimate protection for the client in the future.

Additionally, *Diaz* has important implications in cases where a client is convicted of an assault offense and it does not appear the victim will survive. Defense counsel needs to advise its client of the risks inherent in appealing and should put in writing the client's desires regarding waiver of post-trial or withdrawal of appellate rights. This protects counsel from being seen as ineffective should new counsel attempt to make the policy arguments advanced in this article if the client's case is remanded on appeal. In some cases, such as where a client is convicted of assault and the victim is still in critical condition, consider the withdrawal of appellate rights if the client receives a short sentence and a punitive discharge, in order to terminate military jurisdiction in case the victim subsequently dies.

VIII. Conclusion

In the end, the opening chant in *Macbeth* expresses the witches' desire to double human suffering by concocting their brew. Prosecutors must balance the societal benefit of ensuring an accused receives a conviction commensurate with the crime committed with the perception that they are exacting more human toil and trouble upon defendants in a factual situation similar to *Diaz*. Similarly, as Macbeth tried to analyze his future by solving the witches' riddles, counsel for both sides must wait for congressional clarity but restrain themselves from coming to the simple conclusion that the Fifth Amendment and Article 44 provide the same protections regardless of the situation. Moreover, Congress

[258] UCMJ arts. 63 & 66 (2008).

[259] *See* discussion *supra* Part VI.D.

must get involved in solving these same puzzles that plague counsel faced with difficult factual situations by clarifying Article 44. This will ensure all judge advocates understand whether *Diaz* applies to Article 44 and what, if any, additional protections are given to an accused under military double jeopardy law. Doing so will solve the mystery of double jeopardy riddles and brainteasers for military justice practitioners.

Appendix

1. If Congress chose to provide additional protection servicemembers and prevent application of *United States v. Diaz's* holding in military law, Article 44(d) might read:

> *No person may be tried in a court-martial for a greater offense after the introduction of evidence in a proceeding on a lesser charge. This subsection applies regardless of whether the United States was unable to proceed on the greater offense at the introduction of evidence because a particular fact occurred after introduction of evidence, or the United States was unable to discover the particular fact despite the exercise of due diligence prior to the introduction of evidence. Nothing in this subsection will be read to bar the United States from proceeding on the greater offense in another federal forum, such as a United States District Court, if authorized under the Constitution of the United States.*

2. If Congress chose to provide a statutory *Diaz* exception in military law, then Article 44(d) might read:

> *(d) Notwithstanding any other provision in this code, an offense is not the same offense under subsection (a), if after the introduction of evidence, a particular fact occurs or the United States was unable to discover the particular fact despite the exercise of due diligence, which allows the government to proceed on a more serious charge. However, the accused will receive sentence credit for any punishment received at the original trial for the lesser offense.*

Military Justice, the Judge Advocate and the 21st Century

Colonel Charles N. Pede[*]

The Spotlight

A decade into the 21st century, the world is still sorting out what it means to be 21. In the middle of this frenetic, post-Cold War, global coming of age, our military justice system, like our Army, shares center stage. No news cycle is complete without coverage somewhere of a Soldier, scarred by war, engaging in "disquieting behavior."

Soldier misdeeds and the prosecutions that follow reliably consume the headlines and sustain online blogs. Whether it is the Wikileaks revelation *du jour*, the heinous shootings at Fort Hood, the macabre allegations of Afghan murders being tried at Fort Lewis, the Army physician refusing to deploy and contesting the Commander-in-Chief's birth credentials, or the abuse of detainees at Abu Ghraib, military misconduct is guaranteed to monopolize headlines and generate tumult within the Pentagon and on Capitol Hill.

News coverage is invariably followed by calls for action. The predictable refrain that follows often includes tales of the "enemy within our ranks," command failures, or over-medication, among others. When the critics are not advocating for more prosecutions or greater "accountability," they argue just as vehemently that we prosecute too much or that we prosecute the wrong things or the wrong people.[1]

This intense focus on military justice places great demands on judge advocates (JA), but with proper training, mentorship, and access to superior resources, JAs can excel in this challenging environment. To do so, JAs must take a proactive approach to professional development if they wish to improve their knowledge of the law and their skills as advocates. While leaders bear some responsibility for encouraging training, JAs must ultimately own their careers and assume responsibility for their personal development as military justice practitioners.

The strategies, tools, and resources outlined below are designed to assist JAs in building a strong foundation in the only core competency required by statute of the Judge Advocate General's (JAG) Corps: military justice.[2] Establishing a culture of training is essential to developing competent and capable JAs, and the JAG Corps offers multiple local and external opportunities to train military justice practitioners. Additionally, the Office of The Judge Advocate General (OTJAG) has introduced several tools—including Military Justice Online (MJO), the improved Military Justice Report, skill identifiers, and the Trial Advocate Tracking System (TATS)—to aid in the practice of military justice. The Trial Counsel Assistance Program (TCAP), the Defense Counsel Assistance Program (DCAP), the JA Resource Library, and Highly Qualified Experts (HQE)—are also available to JAs with specific questions on the law or trial strategy.

In sum, to meet the demands of the 21st century, JAs must achieve and maintain proficiency in military justice by trying cases, aggressively training, and leveraging the multitude of resources offered by the Corps.

The Lion's Share

Despite harsh criticism of the Army and highly publicized stories of Soldier misconduct circulated in the press, the real story is one of a superbly disciplined Army, led by equally superb leaders. Indeed, for every incident of Soldier misconduct, there are countless American men and women, "*the lion's share*," who selflessly wear our nation's uniform and do our nation's bidding with little fanfare or debate, utterly free of "disquieting behavior."

Our military justice system is not just about courts-martial or trying cases. It is about discipline: everything from a good "arse-chewing" to a capital murder case. When it is working properly—and it usually does—our system is the best in the world. Military justice is fundamentally about advising commanders on the innumerable options available to ensure good order and discipline. It is about understanding the Soldier-client and how to counsel Soldiers charged with an offense. It is about leveraging the immense experience and talents of our law firm and, when cases need to be tried, trying them well.

---

[*] Judge Advocate, U.S. Army. Presently assigned as Chief, Criminal Law and Policy Division, Office of The Judge Advocate General, U.S. Army, Rosslyn, Virginia.

[1] Representative Jane Harman, D-California, actually opined that the Army propagates a culture of rape. Such mischaracterizations are a disservice to those in uniform, both male and female alike. Jane Harman, *Rapists in the Ranks*, L.A. TIMES, Mar. 31, 2008, *available at* http://www.latimes.com/news/printedition/asection/la-oe-harman31mar31,0,3129956.story. *See also* Jane Harman, *Stopping Rape in Military Must Be a Priority*, THE HILL, Sept. 30, 2008, *available at* http://www.house.gov/list/hearing/ca36_harman/9_30Hill.shtml. Equally curious are a number of well-meaning but ultimately misinformed supporters of ten Soldiers who were convicted of, among other crimes, murdering out of combat detainees. The general theme is either that the victims (in most cases detainees) were terrorists anyway or that more senior co-accused or leaders were more responsible, among other arguments. SOLDIERS FOR JUSTICE.COM, http://soldiersforjusticeandpeace.com/leavenworth-10 (last visited Mar. 16, 2011).

[2] *See, e.g.*, 10 U.S.C. §§ 807, 827 (2006).

The programs and initiatives outlined in this practice note are designed to cultivate broad-spectrum military justice proficiency over a career as a JA. These programs, therefore, must be understood by practitioners in order to be effective.

Catching Excellence—And Staying Out of the History Books

The quality of our military justice must never be a creature of chance or "ad hockery." Proficiency in military justice must be deliberately and relentlessly nurtured within our professional ranks. As Vince Lombardi once noted, "Perfection is not attainable, but if we chase perfection *we can catch excellence*."[3]

A capable system of justice, therefore, is a deliberate choice. If we fail to make this choice and follow through with applied training and education, we will emerge like some of our allied armies—with systems of military justice that are in steep decline and which are only read about in the history books. Despite the glare of the spotlights, we want our system to be a matter of current event reporting.

Predicate for Understanding: Where We Were and Why It's Different

Other than our most senior leaders, all JAs today began the practice of military justice at a time when courts-martial rates began to drop steadily. A reduction in force following the Gulf War—the so-called peace dividend[4]—produced a corresponding drop in court-martial numbers and had a lasting impact on our practice. The rate of indiscipline and the annual number of cases entering our courtrooms has remained consistently lower—between 1100 and 1500 general and special courts combined per year, down from roughly 2200 in 1990.[5] Interestingly, the same number of active component trial and defense counsel—about 550 combined—are chasing these cases.

It is in this dynamic of fewer cases that our Corps has matured over the last fifteen years. As those who tried cases in an era of declining courts-martial have been promoted, they have steered even fewer cases as deputies and staff judge advocates (SJAs). A corresponding dissipation of experience with pretrial and post-trial best practices was inevitable, so it is no surprise that our overall processing time for 50% fewer general and special courts has grown by 60% over the last twenty years.[6]

At the same time, modularity attenuated the mentorship paradigm that existed in the past. New counsel, especially trial counsel (TC), have been deprived of the synergy and immersion that used to be provided by a centralized military justice office, where young counsel could learn from and consult with their more experienced colleagues.[7] Modularity also further dispersed talent and, at least temporarily, diffused the focus on military justice, which was supplanted by operational issues. To many, operational law carried a greater sense of immediacy. Modularity also meant that field grade officers, who spent two to three years at a brigade combat team (BCT), did not have realistic opportunities to hold chief of justice or senior defense counsel billets—the critical, historic building blocks of proficiency. These dynamics, combined with an explosion in other practice areas—*e.g.*, detainee operations and rule of law—help to account for the decline in the historic volume of courts-martial, and the concomitant military justice immersion that we took for granted in our growth model for judge advocates.

The Strategic "So What"

As practitioners, we must find ways to compensate for the military justice immersion lost as a result of modularity, war, and a reduced and reoriented fighting force. Make no mistake: nothing is broken. Our system is healthy. But we need not be sick to get better. We need not birth a crisis in competence just so that we can later identify a crisis and fix it. We must apply responsible, competence-sustaining programs and paradigms here and now to ensure future proficiency.

Our Corps's leadership is steadfastly focused on maintaining a Corps of uncompromisingly capable counsel. This commitment is evident in a number of initiatives instituted over the last few years designed to focus JAs on military justice. The intent of these efforts is to sustain and improve an already capable bar.

The Judge Advocate General (TJAG) has set in place the following lines of effort to make each of us better military justice attorneys.

---

[3] *Famous Quotes by Vince Lombardi*, VINCE LOMBARDI, http://en.wiki quote.org/wiki/Vince_Lombardi (last visited Mar. 16, 2011) (emphasis added).

[4] The Army was reduced from eighteen combat divisions to the current ten.

[5] *See* REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, OCTOBER 1, 2009 TO SEPTEMBER 30, 2010 (2010); REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, OCTOBER 1, 1989 TO SEPTEMBER 30, 1990 (1990).

[6] *Compare* REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, OCTOBER 1, 2009 TO SEPTEMBER 30, 2010 (2010), *with* REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, OCTOBER 1, 1989 TO SEPTEMBER 30, 1990 (1990).

[7] A notable but perhaps unsurprising explosion in summary courts-martial has flowed from our BCT-centric Army.

A Culture of Training

Excellence is not a creature of chance. It is the product of hard work.

A good result at trial, whether you are a defense counsel or a TC, is not the result of ad hockery. It is not the result of luck. Good results come from relentless and tireless anticipation, preparation, and aggressive, tenacious advocacy. Effective advocacy, in turn, derives from sustained training. Any "luck" that figures into the process is simply the residue of design.[8]

Training is non-negotiable. Local training programs in advocacy and substantive criminal law must be a fixture for Army JAs worldwide and at all stages of their careers. Attorneys that do not train are like infantrymen or tankers who do not go to the range or to gunnery. For JAs, the Judge Advocate General's Legal Center and School (TJAGLCS), TCAP, and DCAP are a trove. Use them. The Judge Advocate General expects you to train, and your SJA, regional defense counsel and military judge will underwrite the training.

External training opportunities include institutional (TJAGLCS), field-focused (TCAP/DCAP), specialized (sexual assault and special victims prosecutor (SVP) focused), and civilian (National Advocacy Center—Trial Advocacy I & II) training. The Office of The Judge Advocate General and our military justice training programs (TCAP/DCAP) can assist you in locating opportunities and in creating your own training. The OTJAG website now contains a consolidated training calendar that can be used to ensure fully scoped training for counsel. Additionally, designate a TC or defense counsel (DC) to be the subject matter expert in your office on some aspect of crime or evidence. You decide, but be deliberate about it.[9]

Never find yourself thinking that you're too busy to train, or worse, that since "Captain Jones is about to PCS, she's not worth sending to training." The tyranny of the urgent—meetings, BCT obligations or the like, and shortsightedness—must be deposed. Send the busy counsel, or the 'soon to PCS counsel.' You will make a wise investment not only in our trial counsel but in our Corps as well. Like the stock market, TJAG expects senior practitioners to take the long view. Captain Jones will leverage the training in her next job.

Finally, OTJAG continues to identify gaps and seams in our training and is currently focused on ensuring we have cradle to grave training vehicles for all of our military justice practitioners. Accordingly, we recently initiated a "best practices" seminar for SJAs, who are often a number of years removed from the hands-on practice of military justice. This day-long "re-immersion" seminar is focused almost exclusively on tactics, techniques, and procedures for military justice. It covers everything from what an SJA should do with a referral packet to common issues in a record of trial. This is just one example of an identified gap, and TJAG's desire to fill it.

Military Justice Online

Military Justice Online is our law firm's cradle-to-grave forum for "doing justice." Fielded in 2009 as a work in progress, the Corps' IT Division, and OTJAG Criminal Law Division intend to finish the court-martial module and a downrange, offline version of MJO in 2011.

- **Charter**—The program is not designed for Department of the Army (DA); it is intended for JAs at the brigade and general court-martial (GCM) levels. Attorneys downrange, where bandwidth is limited, must process an exception to policy with OTJAG.[10] Offices should also ensure that mobilized guard units and rear detachments continue to use MJO.

- **Usage Rates**—The Office of The Judge Advocate General tracks usage rates by GCM to determine where the challenges are. Because of low usage rates in some jurisdictions, OTJAG funded mobile training teams to promote greater use. If you need training, ask for it.

- **Defense counsel**. In the future, MJO will include material for DC, from discovery and witness requests, to motions, and offers to plead, to post-trial documents.

Military Justice Report

The Military Justice Report is the renamed and improved JAG-2 monthly report. It was created to respond to trend analysis at the local and DA level and to answer information requests from DA, the Office of the Secretary of

[8] This was a favorite expression of Colonel (Ret.) John M. Smith, who quoted Branch Rickey, the famous Major League Baseball figure. Colonel Smith served in a variety of important assignments throughout his career, inspiring judge advocates with his passion for the law and the rigor of his practice—and leaving nothing to chance. *Branch Rickey Quotes*, BASEBALL ALMANAC, http://www.baseball-almanac.com/quotes/quobr.shtml (last visited Mar. 16, 2011).

[9] Office of The Judge Advocate General Consolidated Training Calendar, https://www.jagcnet2.army.mil/8525744700446A95/0/AEE0473D39EB39BB852577C70064BD9D?opendocument&noly=1 (last visited Mar.16, 2011).

[10] A memorandum template for a "Request for an Exception to Policy for Use of MJO" is available on JAGCNet at *Criminal Law*, JAGCNET, https://www.jagcnet2.army.mil/8525744700446A95 (last visited Mar. 16, 2011).

Defense, and other branches of government. Once integrated into MJO, monthly reports of indiscipline should be easy to produce, because MJO automatically tracks all reprimands, nonjudicial punishment, and summary courts, among other actions. Staff judge advocates must verify and submit this report monthly.

Skill Identifiers

The purpose of the skill identifier (SI) program is to (1) encourage recurrent justice experience in jobs over the course of a career—a sort of periodic rebluing[11]—and (2) to incentivize training.[12] The SI program is not a training waiver program. Instead, it is designed to incentivize and motivate JAs to train and to seek jobs in MJ. Indeed, since a judge advocate is never too busy to train, SI applications should never cite crushing workloads as a reason for a failure to meet a SI training gate – absent truly extraordinary circumstances.

As an added benefit, SIs aid in the assignment process by helping identify DC or TC for a particular case or the next potential SDC, SVP, or Chief of Justice (CoJ). When experience is needed, our SI program helps our leaders make informed decisions, with commonly understood measures and metrics of experience in military justice.

Trial Advocate Tracking System (TATS)

How are potential CoJs, SDCs, SVPs, and trial advocates with special skills or training for a high profile case identified? How are participants selected for specialized, limited-seating training events? Before TATS, senior leaders making assignments simply called their buddies. Now, the Corps has a system that helps manage training and helps to identify JAs for special support to cases and assignments. The new tracking system also serves as the gateway to TJAG's trial advocate resource library, which means JAs who do not enroll do not receive the highly-sought "box of books" and reference material. Judge Advocates should update their profile on TATS regularly, especially after returning from training.

JA Resource Library

Despite the explosion of content for JAG University and the Tandberg system of "wired lawyering," books remain fundamental to the JA's practice of law. The JAG Corps has as much of an obligation to train you how to lawyer as you have a personal obligation to learn how to lawyer. Because there are many ways to learn the law, do not rely on one tool—for example, the Internet—to the exclusion of others, including books.

Books should remain central to your competence. The Judge Advocate General has dedicated the institution's time and money in a world of dwindling resources to printed resources, so you should take advantage of them. Also, take the time to read the letter that accompanies each book, as well as the introductions TJAG has written to the various resources.

Military Justice Policy

In April 2008, TJAG published a key memorandum on military justice and the BCT.[13] This new policy began a steady and deliberate set of strategic initiatives by the senior uniformed lawyer in the Army that clearly set out how JAs would function in the new modular Army. The policy recognized that one size does not fit all, but it signaled what "right" looks like in rating schemes and duty locations.

The primary purpose of the policy is to ensure the JAG Corps maintains positive control and situational awareness over the delivery of legal services and how JAs develop as military attorneys. Just as infantrymen do not learn tactics from lawyers, TCs do not learn lawyering from infantrymen—e.g., company commanders, battalion or brigade combat team executive officers, or S3s. Certainly each can learn from the other—but not the basics of the profession. Thus, living and working together as professionals is key to basic lawyer competence in our Corps. The co-location of JAs in a coordinated legal office—and a rating scheme that ties JAs together—is essential. Additionally, changing the duty title of BCT counsel from the generic "OPLAW JA" to "Trial Counsel" restores the primacy of the military justice mission and signals to BCT JAs—and the brigade leaders they serve—the paramount nature of military justice.

[11] Rebluing is a process whereby gun metal is restored to its original finish and protected from rust——much as advocates are brought up to currency by periodic training and education.

[12] *Additional Skill Identifiers in Military Justice*, TJAG SENDS, vol. 37-17, July 2008; Policy Memorandum 08-2, Office of The Judge Advocate General, subject: Military Justice Additional Skill Identifiers (July 21, 2008).

[13] TJAG SENDS, *Changes in Military Justice*, TJAG SENDS, vol. 37-16, Apr. 2008; Policy Memorandum 08-1, Office of The Judge Advocate General, U.S. Army, subject: Location, Supervision, Evaluation, and Assignment of Judge Advocates in Modular Force Brigade Combat Teams (Apr. 17, 2008).

In 2009, TJAG published the SVP/Highly Qualified Experts (HQE) policy memorandum.[14] This initiative, unprecedented in its scope, creates a centrally managed pool of litigators to invigorate trial practice, especially in special victim cases, worldwide. The first reviews of this program have been universally positive and mostly center on the SVPs' "in-court" abilities and their development of and partnership with other counsel and law enforcement, primarily the Criminal Investigation Division (CID). Leaders need to continue to leverage this program, constantly identify the next generation of SVPs, and support the incumbents as much as possible with logistical and paralegal support.

The HQEs represent a veritable gold mine for practitioners. Led by Mr. Larry Morris, the Chief of Trial Advocacy at OTJAG, HQEs seek to raise the bar on trial advocacy. Mr. Morris assists both government and defense practice to develop, implement, and assess training with a particular focus on sexual assault. His broad mission includes day-to-day interaction with TCAP and DCAP along with other HQEs. His contributions include work on specific cases to strategic initiatives at the DA level.

Mr. Keith Hodges and Mr. E.J. O'Brien serve our defense bar at DCAP, and Mr. Roger Canaff, Ms. Bridget Healy Ryan, and Ms. Sandy Tullius, with more than fifty years of prosecution experience among them, round out our TCAP expertise. These HQEs provide direct support to defense and government advocates. Additionally, Mr. Jim Clark, a career prosecutor from Connecticut, serves as the HQE for TJAGLCS, where he develops and delivers a focused curriculum on sexual assault and victims crimes to both JAs and commanders.

Over the Military Justice Horizon

A steady focus on the fundamentals of military justice and our law firm's comprehensive, integrated, and synchronized approach to proficiency are every JA's business. The Criminal Law Division continues to look for ways to improve JA practice. Some upcoming efforts include:

- Court-martial module and a downrange, offline version of MJO
- Courtroom building and renovation
- LLMs in advocacy and criminal law
- Trial document management software and trial presentation software
- Best practices in MJ seminar for SJAs
- Enlisted and court-reporter military justice training content and assignments
- Revisions to the *Manual for Courts-Martial* (*MCM*), the Uniform Code of Military Justice (UCMJ), and Army Regulation 27-10
- Formal recognition of the best MJ shop in the Army
- Capital litigation study group
- Interactive sexual assault training disk for prosecutors

Conclusion

It is an exciting time in military justice. Your Corps's leadership is steadfast in its focus and looks to you, the practitioner at the tip of the proverbial spear, to keep our justice system vibrant, healthy, and, above all, fair to everyone who is subject to it. We encourage you to tell your leadership where we can improve our system, whether it is a change to the *MCM* or the UCMJ, or the type of training you'd like to see. Make these initiatives your own, and stay focused on military justice.

[14] *Special Victim Prosecutors and Highly Qualified Experts in Military Justice*, TJAG SENDS, vol. 37-18, Jan. 2009; Policy Memorandum 09-3, Office of The Judge Advocate General, U.S. Army, subject: Special Victim Prosecutors (May 29, 2009).

Government Information Practice Notes

Reporting Requirements Incident to Breaches of Personally Identifiable Information

Major Scott E. Dunn[1]

All Army Activities (ALARACT) message number 050/2009[1] sets forth stringent reporting requirements for reporting unauthorized access to personally identifiable information (PII). The ALARACT defines PII as "any information about an individual which can be used to distinguish or trace an individual's identity such as name, social security number, date and place of birth, mother's maiden name, and biometric records."[2] A PII breach or compromise incident occurs "when it is suspected or confirmed that PII is lost, stolen, or otherwise available to individuals without a duty related official need to know."[3]

Once such an incident is suspected, the following reports and notifications are required: report to the U.S. Computer Emergency Response Team (US-CERT) within one hour;[4] concurrently, send an e-mail to PII.Reporting@us.army.mil to inform Army leadership;[5] and report to the Army FOIA/Privacy Office within twenty-four hours.[6] These reports are in addition to, not in lieu of, any command notification requirements that may also apply (such as Serious Incident Reports, etc.).[7] Notification of affected individuals may also be required, depending on the severity of the breach.[8] The ALARACT contains more information concerning the required formats of the reports.

Department of Defense Initiative to Reduce the Use of Social Security Numbers (SSNs)

Major Scott E. Dunn

Military agencies routinely use social security numbers (SSNs) for a number of purposes, often without good reason.[9] Common, and sometimes unnecessary, use of SSNs increases the risk to servicemembers of identity theft.[10] The Department of Defense (DoD) is aware of the problem and has sought to address this in an ongoing initiative to reduce its use of SSNs.[11] The primary components of the initiative are twofold: first, a review of all official forms within DoD to ensure that SSNs are only required when there is a good reason for it;[12] and second, the eventual adoption of alternative forms of identification for most routine business practices within DoD.[13] Most notably, this initiative will eventually result in the elimination of visible SSNs from DoD identification cards[14] and the use of DoD identification numbers and DoD benefits numbers instead.[15]

---

[1] Judge Advocate, U.S. Army. Presently assigned as Associate Professor, Administrative and Civil Law Department, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia.

[2] Message, 262121Z Feb 09, U.S. Dep't of Army, subject: ALARACT 050/2009, Personally Identifiable Information (PII) Incident Reporting and Notification Procedures para. 2.

[3] *Id*. para. 3.

[4] *Id*. para. 4.1.

[5] *Id*.

[6] *Id*. para. 4.2.

[7] *Id*. para. 4.3.

[8] *Id*. para. 4.5.

[9] *See, e.g.*, Gregory Conti et al., *The Military's Cultural Disregard for Personal Information*, SMALL WARS J., Dec 6, 2010, http://smallwarsjournal.com/blog/journal/docs-temp/615-conti.pdf.

[10] *Id*. at 1.

[11] Memorandum from Undersec'y of Def., Personnel & Readiness, for Sec'ys of the Military Dep'ts et al., subject: Directive-Type Memorandum (DTM) 2007-015-USD(P&R)—"DoD Social Security Number (SSN) Reduction Plan" (28 Mar. 2008) (incorporating C1, 29 Nov. 2010).

[12] *Id*. attachment 2.

[13] *Id*. attachment 2, para. 4.

[14] Memorandum from Undersec'y of Def., Personnel & Readiness, for Sec'ys of the Military Dep'ts et al., subject: Updated Plan for the Removal of Social Security Numbers (SSNs from Department of Defense (DoD) Identification (ID) Cards (5 Nov. 2010).

[15] *Id*. at 3.

The Fourth Star: Four Generals and the Epic Struggle for the Future of the United States Army[1]

Reviewed by *Major Evan R. Seamone*[*]

A writer who is Jack of all themes will be master of none.[2]

I. Introduction

In 2007, Pentagon correspondents David Cloud and Greg Jaffe were frustrated with the Army's inability to apply a successful counterinsurgency (COIN) strategy in Iraq.[3] At a time when a division commander in Baghdad ripped the Velcro stars from his uniform, threatening to resign in the face of Iraqi corruption, sectarian violence, and crippling Washington oversight,[4] these journalists believed that the Army had taken on an impossible challenge.[5] Drawing on their close relationships with flag officers,[6] time as embedded reporters,[7] and award-winning journalistic techniques,[8] the authors set out to write *The Palace War*,[9] a study of the Army's failure to absorb historical COIN lessons, despite the leadership of Generals David Petraeus, Peter Chiarelli, John Abizaid, and George Casey Jr.[10] But *The Palace War* never came to be. Although Cloud and Jaffe had already begun their research, a few short weeks into the project, they realized that the Army had undergone a "transform[ation]" that enabled Soldiers to meet the region's most daunting challenges.[11] *The Palace War* quickly morphed into *The Fourth Star*, a more optimistic account of how these four generals—in some cases—overcame a longstanding mindset that had denied the military's crucial role in post-conflict reconstruction.[12]

In twelve chapters consisting of nearly 300 pages and an epilogue, Cloud and Jaffe follow the four generals from their initial entry into the Army following Vietnam, through quite uncommon career pathways, to Operation Iraqi Freedom. In lieu of an introduction or preface—tools that normally orient the reader to a book's thesis and methodology[13]—the book uses vivid imagery and rich dialogue to set the stage. Rather than spoon-feeding the reader key points, Cloud and Jaffe signal important lessons with descriptive chapter titles.[14] While the lack of a clear thesis at the outset of the book empowers readers to draw numerous lessons from the text, it does so at the risk of leading readers astray in the voluminous material. Although the book's vague title suggests the basic theme of top leaders' ability to influence the Army's future,[15] Cloud and Jaffe provide little more interpretive guidance. The following sections will explore how, despite deep personal insights and useful lessons for judge advocates, Cloud and Jaffe's journalistic style obscures their intended message.

---

[*] Judge Advocate, U.S. Army. Student, 59th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[1] DAVID CLOUD & GREG JAFFE, THE FOURTH STAR: FOUR GENERALS AND THE EPIC STRUGGLE FOR THE FUTURE OF THE UNITED STATES ARMY (2009).

[2] FRANCIS FLAHERTY, THE ELEMENTS OF STORY: FIELD NOTES ON NONFICTION WRITING 31 (2009).

[3] Greg Jaffe, Book Lecture at the U.S. Army War College: The Fourth Star: Four Generals and the Epic Struggle for the Future of the United States Army (Dec. 16, 2009), *available at* http://www.youtube.com.

[4] CLOUD & JAFFE, *supra* note 1, at 235 (describing how Major General J.D. Thurman, Commander of the Fourth Infantry Division (Mech.), declared, "Goddammit, I am going to just quit," as he waived his rank).

[5] Jaffe, *supra* note 3.

[6] *Id.* (describing the authors' personal knowledge and appreciation of the four spotlighted generals). David Cloud, for example, now works as a policy advisor to Ambassador Karl Eikenberry. Lieutenant Colonel Steve Leonard, *The Fourth Star: Four Generals and the Epic Struggle for the Future of the United States Army*, MIL. REV., Jan. 1, 2010, at 123 (describing Cloud's current employment).

[7] *See, e.g.*, Transcript of *The NewsHour with Jim Lehrer* (Mar. 28, 2005) (No. 8193) (describing Jaffe's status as an embedded reporter in Iraq in 2005).

[8] Leonard, *supra* note 6, at 123 (reviewing Jaffe's numerous awards, which include the Pulitzer Prize); Press Release, Crown Publishers, The Fourth Star by David Cloud and Greg Jaffe (Oct. 13, 2009) (on file with author) (describing David Cloud's award "for coverage of the September 11, 2001, terror attacks").

[9] Matthew Thornton, *Deals*, PUBLISHERS WKLY., Oct. 15, 2007, at 8 (reporting on the authors' original book proposal).

[10] *Id.*

[11] Jaffe, *supra* note 3 ("The Army that we saw fighting in 2007 and 2008 was nothing like the Army that we remembered from 2003. . . ."); *id.* ("The frame we had chosen for this book was incomplete.").

[12] *Id.*

[13] *See, e.g.*, UNIV. CHICAGO PRESS, THE CHICAGO MANUAL OF STYLE: THE ESSENTIAL GUIDE FOR WRITERS, EDITORS, AND PUBLISHERS § 1.40, at 23 (16th ed. 2010) (observing how the preface "includes reasons for undertaking the work" and the author's "method of research").

[14] The title of chapter eleven, "What Would You Do, Lieutenant?," for example, denotes General Chiarelli's recollection of a training film that encourages leaders to fire mortars even when confronted with malfunctions, a vignette that resembles his dilemma of commanding at a time when military policies were failing in a similar way. CLOUD & JAFFE, *supra* note 1, at 235–36.

[15] *See, e.g.*, Lieutenant General (Ret.) James M. Dubik, *The Fourth Star: Four Generals and the Epic Struggle for the Future of the United States Army*, PARAMETERS, Apr. 1, 2010, at 120 (inferring the book's central theme from its two-part title). *But see* discussion *infra* accompanying notes 32–35.

II. Journalistic Conventions as Obstacles to a Central Thesis in *The Fourth Star*

While *The Fourth Star* has topped military reading lists,[16] and comes highly recommended by legal scholars,[17] including the Army's Judge Advocate General,[18] it has also garnered criticism for valuing storytelling over scholarly rigor,[19] trivializing important military doctrines,[20] narrowly focusing on the Army and only four leaders,[21] and rehashing existing literary studies of the surge.[22] These conflicting evaluations and interpretations are largely attributable to the book's writing genre. Rather than a scholarly or historical piece with conventions that demand "complete accuracy,"[23] this book represents creative nonfiction (CNF).[24] Much like the COIN doctrine explored by Cloud and Jaffe, their CNF style abides by unique and non-traditional reporting rules.

Creative nonfiction is like traditional reporting in the way it uses "story rather than datum" as "the basic unit" of communication.[25] In CNF, however, writers bring a personal dimension to their subjects with rich descriptions, conveying main points through a character's life experiences and fusing different dialogues with minimal summaries.[26] Authors in this genre often "underwrite" their points, hoping that the complete story will convey the key idea at some epiphanic moment.[27] While CNF permits authors the "flexibility" to depart from standard requirements for accuracy,[28] it bears dangers that befall Cloud and Jaffe, such as meandering through dialogue[29] and distorting facts through "artistic license."[30]

Cloud and Jaffe's biggest problem is a series of competing themes that distract readers from their own acknowledged central thesis. According to veteran *New York Times* editor Francis Flaherty's analogy of a book to a tree, while an author can explore secondary themes, all of these should appear to the reader as branches, distinguished from the trunk, or main theme.[31] Upon completing *The Fourth Star*, even with an epilogue, readers are left to wonder about the nature and scope of the "epic struggle" referenced in the book's title. While some reviewers conclude that the "epic" struggle involves the delicate balance between conventional war-fighting and non-conventional COIN strategies,[32] Jaffe, himself, rejects this interpretation.[33] For others, the book's "epic" struggle might

---

[16] *See, e.g.*, J. Ford Huffman, *The Best Military Books of the Decade*, ARMY TIMES, Jan. 18, 2010, at 4.

[17] *See, e.g.*, Lieutenant Colonel Jeff Bovarnick, *Read Any Good (Professional) Books Lately?: A Suggested Professional Reading Program for Judge Advocates*, 204 MIL. L. REV. 260, 308 app. B (2010) (providing the author's recommendation on *The Fourth Star*).

[18] *Id*. at 303 app. A (reprinting Lieutenant General Dana Chipman's recommendation).

[19] *See, e.g.*, Lieutenant Colonel Scott Logel, *The Fourth Star: Four Generals and the Epic Struggle for the Future of the United States Army*, 63 NAVAL WAR C. REV. 159, 160 (2010) (observing how "Cloud and Jaffe deliver a story that is engaging, although short on analysis . . .").

[20] *Compare* CLOUD & JAFFE, *supra* note 1, at 66 (summarizing the "Powell Doctrine" as a "preference for short, fire-power-intensive battles"), *with* Dubik, *supra* note 15, at 120 (suggesting that the authors' characterization of this doctrine misrepresents a "rich" theory that combines principles that "should [still] guide a nation deciding to wage war, regardless of type").

[21] *See, e.g.*, Jack D. Kern, *On the Nightstand—"The Fourth Star" by David Cloud and Greg Jaffe*, REFLECTIONS FROM DR. JACK: COMBINED ARMS CTR. BLOG (Nov. 13, 2009, 8:14 AM), http://usacac. army.mil/blog/ (follow 2009 archive) (suggesting greater coverage of Generals Jack Keane and Ray Odierno); Esoskin, *Eph Bookshelf#5: The Fourth Star*, EPHBLOG (Jun. 30, 2010, 10:27 AM), http://www. ephblog.com (criticizing Cloud and Jaffe for neglecting the experiences of the Marine Corps).

[22] One West Point critic faults *The Fourth Star* for following the standard "narrative arc and thrust" of popular "hagiographies" of the surge and providing "[n]othing really new . . . at all." Colonel Gian P. Gentile, *The Army You Have*, SMALL WARS J. BLOG (Oct. 26, 2009, 7:13 AM), http://smallwarsjournal. com/blog/2009 (follow links). For existing books in the same genre, see generally LINDA ROBINSON, TELL ME HOW THIS ENDS: GENERAL DAVID PETRAEUS AND THE SEARCH FOR A WAY OUT OF IRAQ (2008); BOB WOODWARD, THE WAR WITHIN: A SECRET WHITE HOUSE HISTORY 2006–2008 (2008); THOMAS E. RICKS, THE GAMBLE: GENERAL DAVID PETRAEUS AND THE AMERICAN MILITARY ADVENTURE IN IRAQ, 2006–2009 (2009); KIMBERLY KAGAN, THE SURGE: A MILITARY HISTORY (2009). To their credit, however, Cloud and Jaffe draw from some of these works to enhance their own accounts. CLOUD & JAFFE, *supra* note 1, at 306, 308, 310–12 (citing Woodward in their references); *id*. at 311–12 (citing Robinson).

[23] RICHARD D. BANK, THE EVERYTHING GUIDE TO WRITING NONFICTION 210 (2010).

[24] *Id*. ("Creative nonfiction is writing nonfiction (true and accurate content) employing the creative techniques of fiction writing including the use of literary devices.").

[25] Nicholas Lemann, *Weaving Story and Idea*, *in* TELLING TRUE STORIES: A NONFICTION WRITERS' GUIDE FROM THE NIEMAN FOUNDATION AT HARVARD UNIVERSITY 112, 116 (Mark Kramer & Wendy Call eds., 2007).

[26] *See, e.g.*, BANK, *supra* note 23, at 198–201 (reviewing the numerous conventions of CNF, including the central objective "Show, don't tell.").

[27] David Halberstam, *The Narrative Idea*, *in* TELLING TRUE STORIES: A NONFICTION WRITERS' GUIDE FROM THE NIEMAN FOUNDATION AT HARVARD UNIVERSITY 10, 11 (Mark Kramer & Wendy Call eds., 2007). To Halberstam, "The book *is* the idea. Once you have the idea, it just flows out." *Id*. at 10. *See also* Leonard, *supra* note 6, at 123 (distinguishing *The Fourth Star* from "contemporary military biographies [that] can seem sterile or even distant").

[28] BANK, *supra* note 23, at 210.

[29] Lemann, *supra* note 25, at 112, 115–16 (describing the danger of merely "spin[ning] a dramatic yarn.").

[30] BANK, *supra* note 23, at 210.

[31] FLAHERTY, *supra* note 2, at 53. Moreover, a cluster of too many branches will tend to "muck up the impact of each." *Id*. at 32–33.

[32] *See, e.g.*, Dubik, *supra* note 15, at 120 (reaching this conclusion but finding that the book fails to answer the call of the question). The epilogue also references this question. CLOUD & JAFFE, *supra* note 1, at 286 (addressing General Casey's dilemma of "locat[ing] the middle-point somewhere between counterinsurgency and conventional combat that would allow the military to react in whichever direction it had to in the future").

[33] Abu Muqawama, *Book Club: A Special Abu Muqawama Interview with Greg Jaffe*, ABU MUQAWAMA POST (Oct. 29, 2009, 5:59 PM), http://www.cnas.org/blogs/abumuqawama/ 2009/10 (follow club listing) (citing Jaffe: "This whole conventional vs. irregular debate is stupid. War is war. And we waste far too much energy trying to categorize it. I think most lieutenants, captains and majors are beyond this *false* conventional vs. irregular frame that we try to impose over war.") (emphasis added).

concern the delicate balance between dissenting to prevailing policies and obeying orders of military (and civilian) superiors—especially when the policies are clearly failing.[34] Another possibility is the "epic" struggle to develop educated military leaders by balancing the proper mix of troop time in the field with time to obtain an advanced education.[35] While each tree branch is significant in its own right, Cloud and Jaffe's failure to distinguish a trunk is the major drawback of *The Fourth Star*.

Despite varied interpretations, Jaffe cautions readers against the search for a "secret story of Iraq" in *The Fourth Star*,[36] instead highlighting a far simpler theme: Key events in the four generals' prior experiences must have something to do with the way they waged war and eventually contributed to the Army's doctrinal transformation.[37] The trouble with this explanation is that the "something" remains undefined. At a lecture, Cloud explained that he and Jaffe selected pivotal events to explain the generals' choices based on guesswork, once referring to their theories as nothing more than "two-bit psychological analysis."[38] Jaffe further confessed that the featured generals might not agree with his take on the formative events in each of their lives.[39] Ultimately, the cacophony of noise obscured the authors' underlying message: unique educational experiences and uncommon paths allowed senior military leaders to approach a similar conflict in different but meaningful ways, sometimes with resounding success. While the book could have readily utilized this theme as the "trunk" of the tree, the authors' prose from the start veers off in multiple but confusing directions, making this message vague at best.

Even the most accommodating reader should be concerned with Jaffe's further admission that, based on more recent events, he would have written chapters differently[40] and that the book, though published, still represents "a work-in-progress."[41] These comments suggest that he also succumbs to "presentism"—a limiting perspective in which current events shape the reporting of historical ones.[42] Within *The Fourth Star*, presentism is most evident in the way the authors downplay the Army's use of Delta Force, Ranger, and Special Forces teams to transcend the limitations of conventional war-fighting approaches.[43] Likewise, the authors, in their haste to convince readers that the Army ignored important Vietnam lessons, forget to explain the essence of those very lessons. The closest they come is a few lines of text discussing an American "advisory command" for South Vietnamese military units in the ninth chapter.[44]

Despite an impenetrable theme, *The Fourth Star* succeeds in its diverse use of source materials—a hallmark of effective CNF.[45] Cloud and Jaffe accordingly build the book on a broad foundation that includes everything from detailed interviews with the four generals (and their families and neighbors) to quotes from the generals' fitness reports,[46] professors' scribbles on their term papers,[47] and even entries in the generals' wartime journals.[48] At a time when sitting military commanders face significant consequences for sharing such raw materials and insights,[49] this book provides

[34] Readers encounter the issue in the Army's hostile reception to Major Andy Krepinevich's critical book about Vietnam, CLOUD & JAFFE, *supra* note 1, at 62–64, and, decades later, Lieutenant Colonel Paul Yingling's critique of general officers' leadership in the contemporary fight. *Id*. at 270–72, 294–95. The authors contrast these events with accounts of General Abizaid, who was criticized by his staff, *id.* at 136, and General Casey, who was criticized by Senator John McCain, for painting too optimistic a view of the Army's capabilities when the officer should have acknowledged the drawbacks of existing plans. *Id*. at 253. *The Fourth Star*'s epilogue teases readers: "[Chiarelli] knew what kind of officers would be needed. He wanted an officer corps that argued, debated, and took intellectual risks." *Id*. at 295.

[35] While the authors explore the benefits of advanced education for Generals Abizaid, Chiarelli, and Petraeus, in all three cases, the generals' academic experiences exposed them to substantial risk. After completing a Ph.D. and teaching, Petraeus was forced to counter the perception that he had only book-knowledge of combat. *See, e.g.*, *id*. at 93 (describing the disparaging name "Doc"). Chiarelli had been written-off by his branch manager for staying in an academic setting too long. *Id.* at 59. And, Abizaid's decision to undertake graduate study in Jordan initially made him a pariah to even the State Department. *Id*. at 28. The epilogue highlights this struggle by criticizing the small number of officers accepted for overseas academic scholarships. *Id*. at 288.

[36] Greg Jaffe, Book Lecture at the Center for New American Security: Book Launch—The Fourth Star (Oct. 13, 2009), *available at* http://www.youtube.com.

[37] Jaffe, *supra* note 3 ("What allows some of them to lead change and drive change within this institution better than others? I think that's the essence of our book.").

[38] David Cloud, Book Lecture at the Center for New American Security: Book Launch—The Fourth Star (Oct. 13, 2009), *available at* http://www.youtube.com.

[39] "I think Casey's experiences of . . . losing his dad . . . affected the way he fought in Iraq," Jaffe revealed, further expressing, "in ways that I'm not sure I fully understand and I'm not sure he fully understands." Jaffe, *supra* note 3.

[40] *Id*.

[41] *Id*.

[42] Jill Lepore, *Writing About History*, *in* TELLING TRUE STORIES: A NONFICTION WRITERS' GUIDE FROM THE NIEMAN FOUNDATION AT HARVARD UNIVERSITY 86, 86 (Mark Kramer & Wendy Call eds., 2007).

[43] CLOUD & JAFFE, *supra* note 1, at 22–24, 37, 90, & 186–87.

[44] *Id*. at 183. This extremely brief reference apparently describes one of "the most relevant lessons when it came to rebuilding a foreign military." *Id*. at 179.

[45] Halberstam, *supra* note 27, at 10, 12–13.

[46] *See, e.g.*, CLOUD & JAFFE, *supra* note 1, at 298 (citing to General Abizaid's evaluation).

[47] *See, e.g.*, *id*. at 61 (citing written comments from General Petraeus's graduate school professor).

[48] *See, e.g.*, *id*. at 169 (sharing General Casey's reminder to himself about the importance of "attitude").

[49] *See, e.g.*, Bill Gertz, *Inside the Ring*, WASH. TIMES, July 15, 2010, at 9 (describing effects of the resignations of General Stanley McChrystal and Admiral William J. Fallon based on media reports).

readers with a rare personal introduction.[50] As an added benefit, this uncommon perspective provides career advice for readers[51] and professional reading recommendations,[52] as if directly from the generals and their mentors.

While *The Fourth Star*'s varied sources give the book tremendous value, the authors largely mismanage source-attribution. Jaffe recalls that he and Cloud were completely overwhelmed with materials and had exceeded their allotted research time by three months.[53] Their citations reflect this problem; while the authors sometimes signal the origin of quotes with a section of endnotes that track specific references,[54] numerous quotations in the book remain unattributed, causing the reader to doubt whether dialogue—like Winn Casey's tearful ruminations over an argument between Major General George Casey Sr. and his son's college friends—was the product of a verbatim recollection or merely an example of the artistic license that pervades CNF.[55] Despite the doubts of at least one critic,[56] the authors' uncommon access to the generals' personal lives leaves little reason to doubt Cloud and Jaffe's journalistic integrity.

III. *The Fourth Star*'s Lessons for Judge Advocates and Concluding Remarks

Judge advocates will benefit from *The Fourth Star* because the many struggles facing the Army's top leaders unavoidably concern everyone in uniform. Interestingly, aside from references to two generals' early plans to pursue careers as lawyers,[57] Cloud and Jaffe wait until the book's seventh chapter (April 2003) to portray a military lawyer.[58] Foregoing numerous opportunities to discuss judge advocates' military justice function,[59] the authors first depict the military attorney in their description of then-Major General Petraeus's efforts to commence elections and promote trade and economic development in Mosul, Iraq.[60] From these accounts, not only do readers learn that commanders require frequent and effective legal guidance to wage effective COIN operations, readers also learn that judge advocates must rise above their former role "playing second fiddle to swaggering combat officers" to develop innovative solutions from "heady" concepts.[61]

Through Colonel Richard Hatch's experiences, Cloud and Jaffe also relate the dangers inherent in the judge advocate's new role. If a staff judge advocate's job is merely to help commanders escape the constraints of civilian policies, judge advocates must be willing to accept the possibility that their commanders will be relieved for following legal advice.[62] The firing of General Wesley Clark for countermanding his civilian bosses exists in *The Fourth Star* as a constant reminder of the inherent risks of side-stepping.[63]

Concluding with Flaherty's arboreal analogy, Cloud and Jaffe prove that some trees can still be visually appealing despite a trunk obscured by stray and intertwined branches. Even with an ambiguous theme, multiple "epic" struggles, and unanswered questions, the book provides uncommon and unique insights into the Army's recent transformation. Hence, it is worthwhile to obtain and thoroughly read *The Fourth Star*.

---

[50] One reviewer suggests that Cloud and Jaffe not only "read [the generals'] e-mails" but also "their minds." J. Ford Huffman, *When 4-Stars Collide*, A.F. TIMES, Nov. 16, 2009 (praising the book's "provocative inside information").

[51] Consider General Jack Galvin's career advice to General Petraeus: "Think beyond the foxhole, about history and strategy, about the relations between the military and their civilian bosses in Washington, about the next war . . . ." CLOUD & JAFFE, *supra* note 1, at 43.

[52] *See, e.g.*, *id*. at 94 (describing General Petraeus's experience with Lartéguy and Fall's books); *id*. at 168 (reviewing General Casey's experience with Nagl's book); *id*. at 178 (describing Petraeus's lessons from Lawrence's book). *See generally* JEAN LARTÉGUY, THE CENTURIONS (Xan Fielding trans., 1960); BERNARD B. FALL, HELL IN A VERY SMALL PLACE: THE SIEGE OF DIEN BIEN PU (2d ed. 2002); LIEUTENANT COLONEL JOHN A. NAGL, LEARNING TO EAT SOUP WITH A KNIFE: COUNTERINSURGENCY LESSONS FROM MALAYA AND VIETNAM (2002); T.E. LAWRENCE, SEVEN PILLARS OF WISDOM (1922).

[53] Jaffe, *supra* note 3.

[54] CLOUD & JAFFE, *supra* note 1, at 297–312 (providing a separate "notes" section).

[55] *Id*. at 6.

[56] Kern, *supra* note 21 (drawing attention to errors in people's ranks and names).

[57] CLOUD & JAFFE, *supra* note 1, at 5 (discussing General Casey's legal ambitions); *id*. at 15 (describing General Chiarelli's multiple attempts to gain admittance to law school).

[58] *Id*. at 118 (describing the 101st Airborne Division's Staff Judge Advocate, Colonel Richard Hatch).

[59] *See, e.g.*, *id*. at 93 (describing the "zero-defect" Army); *id*. at 119 (describing the problem of drug-addicted Soldiers); *id*. at 236–37 (describing Colonel Michael Steele and the Haditha incident).

[60] *Id*. at 118–19, 130–31.

[61] *Id*. at 119.

[62] Notably, the innovative policies blessed-off by Colonel Hatch ran contrary to the positions of both the Coalition Provisional Authority and the Department of State. *Id*. at 130–33.

[63] *Id*. at 108.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).

Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (August 2009–September 2010) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C20	185th JAOBC/BOLC III (Ph 2)	15 Jul – 28 Sep 11
5-27-C22	60th Judge Advocate Officer Graduate Course	15 Aug – 25 May 12
5F-F1	217th Senior Officer Legal Orientation Course	20 – 24 Jun 11
5F-F1	218th Senior Officer Legal Orientation Course	29 Aug – 2 Sep 11
JARC 181	Judge Advocate Recruiting Conference	20 – 22 Jul 11

NCO ACADEMY COURSES		
512-27D30	5th Advanced Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D30	6th Advanced Leaders Course (Ph 2)	1 Aug – 6 Sep 11
512-27D40	3d Senior Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D40	4th Senior Leaders Course (Ph 2)	1 Aug – 6 Sep 11

PARALEGAL COURSES		
512-27D/DCSP	20th Senior Paralegal Course	20 – 24 Jun 11
512-27DC5	36th Court Reporter Course	25 Jul – 23 Sep 11
512-27DC6	11th Senior Court Reporter Course	11 – 15 Jul 11

ADMINISTRATIVE AND CIVIL LAW		
5F-F22	64th Law of Federal Employment Course	22 – 26 Aug 11
5F-F24E	2011USAREUR Administrative Law CLE	12 – 16 Sep 11

CONTRACT AND FISCAL LAW		
5F-F10	164th Contract Attorneys Course	18 – 29 Jul 11
5F-F103	11th Advanced Contract Course	31 Aug – 2 Sep 11

CRIMINAL LAW		
5F-F31	17th Military Justice Managers Course	22 – 26 Aug 11
5F-F34	38th Criminal Law Advocacy Course	12 – 16 Sep 11
5F-F34	39th Criminal Law Advocacy Course	19 – 23 Sep 11

INTERNATIONAL AND OPERATIONAL LAW		
5F-F47E	2011 USAREUR Operational Law CLE	16 – 19 Aug 11
5F-F41	7th Intelligence Law Course	15 – 19 Aug 11
5F-F47	56th Operational Law of War Course	1 – 12 Aug 11
5F-F48	4th Rule of Law Course	11 -15 Jul 11

3. Naval Justice School and FY 2010–2011 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (030)	1 Aug – 7 Oct 11
0258 (Newport)	Senior Officer (080)	6 – 9 Sep 11 (Newport)
2622 (Fleet)	Senior Officer (Fleet) (100) Senior Officer (Fleet) (110) Senior Officer (Fleet) (120) Senior Officer (Fleet) (130)	27 Jun – 1 Jul 11 (Pensacola) 1 – 5 Aug 11 (Pensacola) 1 – 5 Aug 11 (Camp Lejeune) 8 – 12 Aug 11 (Quantico)
03RF	Continuing Legal Education (030)	13 Jun – 28 Aug 11
07HN	Legalman Paralegal Core (020) Legalman Paralegal Core (030)	24 May – 9 Aug 11 31 Aug – 20 Dec 11
525N	Prosecuting Complex Cases (010)	11 – 15 Jul 11
627S	Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	8 – 10 Aug 11 (Millington) 20 – 22 Sep ((Pendleton) 21 – 23 Sep 11 (Norfolk)
748A	Law of Naval Operations (020)	19 – 23 Sep 11 (Norfolk)
748B	Naval Legal Service Command Senior Officer Leadership (010)	25 Jul – 5 Aug 11
786R	Advanced SJA/Ethics (010)	25 – 29 Jul 11
846L	Senior Legalman Leadership Course (010)	25 – 29 Jul 11
850T	Staff Judge Advocate Course (020)	11 – 22 Jul 11 (San Diego)
850V	Law of Military Operations (010)	6 – 17 Jun 11
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	20 – 24 Jun 11 26 – 30 Sep 11
932V	Coast Guard Legal Technician Course (010)	8 – 19 Aug 11
961J	Defending Complex Cases (010)	18 – 22 Jul 11
3759	Legal Clerk Course (080)	19 – 23 Sep 11 (Pendleton)
4040	Paralegal Research & Writing (030)	18 – 29 Jul 11
NA	Iraq Pre-Deployment Training (020)	12 – 14 Jul 11

NA	Legal Specialist Course (030)	29 Apr – 1 Jul 11
NA	Legal Service Court Reporter (030)	22 July – 7 Oct 11

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	13 Jun – 1 Jul 11 11 – 29 Jul 11 15 Aug – 2 Sep 11
0379	Legal Clerk Course (070) Legal Clerk Course (080)	18 – 29 Jul 1 22 Aug – 2 Sep 11
3760	Senior Officer Course (060) Senior Officer Course (070)	8 – 12 Aug 11 (Millington) 12 – 16 Sep 11

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	13 Jun – 1 Jul 11 25 Jul – 12 Aug 11 22 Aug – 9 Sep 11

947J	Legal Clerk Course (070) Legal Clerk Course (080) Legal Clerk Course (090)	13 – 24 Jun 11 1 – 12 Aug 11 22 Aug – 2 Sep 11

4. Air Force Judge Advocate General School Fiscal Year 2010–2011 Course Schedule

For information about attending the following cou Legal Clerk Course (070)rses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB,AL	
Course Title	**Dates**
Staff Judge Advocate Course, Class 11-A	13 – 24 Jun 11
Law Office Management Course, Class 11-A	13 – 24 Jun 11
Paralegal Apprentice Course, Class 11-05	20 Jun – 3 Aug 11
Judge Advocate Staff Officer Course, Class 11-C	11 Jul – 9 Sep 11
Paralegal Craftsman Course, Class 11-03	11 Jul – 23 Aug 11
Paralegal Apprentice Course, Class 11-06	15 Aug – 21 Sep 11
Environmental Law Course, Class 11-A	22 – 26 Aug 11

Trial & Defense Advocacy Course, Class 11-B	12 – 23 Sep 11
Accident Investigation Course, Class 11-A	12 – 16 Sep 11

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

AAJE:
American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA:
American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL:
Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA:
American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

ASLM:
American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB:
Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA:
Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN:
CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1220 North Fillmore Street, Suite 444 Arlington, VA 22201 (571) 481-9100
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University Law School 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
MC Law:	Mississippi College School of Law 151 East Griffith Street Jackson, MS 39201 (601) 925-7107, fax (601) 925-7115

NAC	National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (803) 705-5000
NDAA:	National District Attorneys Association 44 Canal Center Plaza, Suite 110 Alexandria, VA 22314 (703) 549-9222
NDAED:	National District Attorneys Education Division 1600 Hampton Street Columbia, SC 29208 (803) 705-5095
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 (in MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762

UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

6. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at https://jag.learn.army.mil.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2012 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2011 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact Ms. Donna Pugh, commercial telephone (434) 971-3350, or e-mail donna.pugh@us.army.mil.

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. Training Year (TY) 2011 RC On-Sites, Functional Exercises and Senior Leader Courses

Date	Region	Location	Units	ATRRS Number	POCs
15 – 17 Jul 2011	Northeast On-Site FOCUS: Rule of Law	New York City, NY	4th LSO 3d LSO 7th LSO 153d LSO	004	CPT Scott Horton Scott.g.horton@us.army.mil CW2 Deborah Rivera Deborah.rivera1@us.army.mil 718.325.7077
12 – 14 Aug 2011	Midwest On-Site FOCUS: Rule of Law	Chicago, IL	91st LSO 9th LSO 8th LSO 214th LSO	005	MAJ Brad Olson Bradley.olson@us.army.mil SFC Treva Mazique treva.mazique@usar.army.mil 708.209.2600, ext. 229

2. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

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

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

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

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

4. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

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