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Lore of the Corps

Articles

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Lore of the Corps

Defending Soldiers at Early Courts-Martial

Fred L. Borch
Regimental Historian & Archivist

While Army lawyers today provide a thorough and zealous defense for a soldier facing court-martial proceedings, defense services for a soldier being prosecuted in the early years of the Army were markedly different.

George Washington's Continental Army and the Army of the newly created United States tried thousands of courts-martial, yet there are no complete records of trial from the 18th century because a fire destroyed all War Department files in November 1800.[1]

The earliest known example of a court-martial record dates to 1808 and, while it identifies the members of the panel, the judge advocate, the charges and specifications, the questions and answers of the witnesses, the decision of the court and the action of the convening authority, the record says nothing about how the accused defended himself.[2]

A record of trial from the following year, however, reveals that there were significant restrictions on the representation of an accused at a court-martial. In *United States v. William Wilson*, the accused, who was an Artillery officer, had the services of a Mr. William Thompson as his individual counsel. While Thompson may or may not have had legal qualifications as an attorney, he certainly knew how to conduct a vigorous defense, as he examined witnesses, made objections, and read a statement written by the accused.

While Wilson was convicted and sentenced by the panel, the reviewing authority, General James Wilkinson, was exceedingly unhappy with the defense counsel's participation in the proceedings. Consequently, he disapproved the court-martial and wrote the following in his action:

> [T]he General [Wilkinson] owes it to the Army . . . not only to disapprove the proceedings and sentence of this general [court] martial, but to exhibit the Causes of his disapproval.
>
> The main points of exception . . . are the admission of Counsel for the defense of the prisoner . . . Shall Counsel be admitted . . . to appear before General Court-Martial [and] to interrogate, to except, to plead, to tease, perplex & embarrass by legal subtilties [sic] & abstract sophistical Distinctions?
>
> However various the opinions of professional men on this Question, the honor of the Army & the Interests of the service forbid it . . . Were Courts-Martial thrown open to the Bar the officers of the Army would be compelled to direct their attention from the military service & the Art of War, to the study of Law.
>
> No one will deny to a prisoner, the aid of Counsel who may suggest Questions or objections to him, to prepare his defense in writing–but he is not to open his mouth in Court.[3]

General Wilkinson's sentiments in the *Wilson* trial reflected the prevailing view that courts-martial were courts of discipline, and not justice.[4] Consequently, permitting lawyers to transform these disciplinary proceedings into law courts was anathema—and would not be tolerated. After all, Article 69 of the Articles of War of 1806 provided what was then thought to be enough to guarantee that the accused received a fair hearing:

> The judge advocate . . . shall prosecute in the name of the United States, but shall so far consider himself *as counsel for the prisoner*, after the said prisoner shall have made his plea, as to object to any leading question to any of the witnesses or any question to the prisoner, the answer which might tend to criminate himself. (Emphasis supplied)[5]

As Colonel William Winthrop explains in his authoritative *Military Law and Precedents*, Article 69 was "a most imperfect and ineffective provision," if for no other reason than "objecting to leading questions" is just one function of a defense counsel.[6]

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[1] JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER 29 (1975).

[2] *Id.*

[3] *Id.*

[4] For another court-martial involving General Wilkinson and an officer who refused to cut his pigtail, see Fred L. Borch, *The True Story of a Colonel's Pigtail and a Court-Martial*, ARMY LAW., Mar. 2010, at 3.

[5] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 982 (2nd ed. 1920).

[6] *Id.*, at 197.

It would be many more decades before the Army–and lawyers wearing uniforms—were willing to accept that courts-martial should operate more like civilian courts, and that the accused should have a robust–and legally qualified—defense. In fact, not until the enactment of the Uniform Code of Military Justice in 1950 did an accused have the absolute right to legally qualified counsel, and then only at general courts-martial.[7]

The evolution of this right to counsel, and the development of the defense function at courts-martial however, is a story for another Lore of the Corps.

More historical information can be found at

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

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

[7] Article 27, Uniform Code of Military Justice.

The Intersection of Line of Duty Determinations (LODs) and Department of Veterans Affairs (VA) Benefits in the National Guard

Captain Jeremy R. Bedford[*]

I. Introduction

While serving as a legal assistance attorney in the Army National Guard during a drill weekend, a Soldier comes to you with a question about line of duty determinations (LODs) and Department of Veterans Affairs (VA) benefits. The Soldier injured himself during a typical inactive duty for training (IDT) weekend, through no fault of his own, and believes that the government should pay the medical bills for his injury. The Soldier also questions whether he can apply and/or obtain VA benefits while still a member of the National Guard. What advice should you give? Should you advise that he file an LOD, a claim for VA benefits, or both? This article will discuss the interactions between LOD benefits and VA benefits, when to file a claim, the benefits to doing so, and eligibility for National Guard members.

For the purposes of this article, we will assume that the Soldier injured his knee while performing a preventative maintenance checks and services (PMCS) on his High Mobility Multipurpose Wheeled Vehicle (HMMWV) during drill weekend. The injury is a torn medical collateral ligament (MCL) and it requires follow up doctor's appointments, physical therapy, and, potentially, surgery.

II. Types of Compensation Benefits

A. LOD Benefits

Line of duty determinations are not typically conducted for Soldiers serving on active duty unless there are questions of misconduct. Even if an LOD determination is made, "Soldiers who are on active duty (AD) for a period of more than 30 days will not lose their entitlement to medical and dental care, even if the injury or disease is found to have been incurred not in line of duty (LD) and/or because of the Soldier's intentional misconduct or willful negligence."[1] If an active duty LOD determination is found to be not in the line of duty (NLD), the Soldier still receives free medical treatment while serving on active duty.

Line of duty determinations are conducted for the following reasons: extension of enlistment; longevity and retirement multiplier; forfeiture of pay; disability retirement and severance pay; medical and dental care for soldiers on duty other than AD for a period of more than thirty days; and benefits administered by the Department of Veterans Affairs (DVA).[2] As this article focuses on the National Guard, it will only address the last two situations.[3]

Line of duty determinations allow National Guard Soldiers to receive benefits similar to that of active duty Soldiers that are injured in the line of duty. "A soldier of the National Guard" "is entitled to hospital benefits, pensions, and other compensation, similar to that for soldiers of the Active Army for injury, illness, or disease incurred in LD under the following conditions . . . ."[4] The reasoning is that if these Soldiers were on active duty for more than thirty days and injured, they would be eligible to receive these benefits. Additionally, service members cannot sue the government for benefits or compensation under the Feres Doctrine.[5] They are also ineligible to receive workers' compensation, so the only recourse for these National Guard Soldiers is to file for either LOD, VA benefits, or both.

To illustrate, an active duty Soldier tears his MCL while performing a PMCS on a HMMWV. This Soldier will receive free medical care through the military for the remainder of his enlistment. He will also still receive his Army salary for any time away from work that he spends attending medical appointments and/or recovering. Alternatively, in the National Guard, a Soldier that is injured in that exact same scenario, but on a drill weekend, is no longer in a covered military status after the completion of the drill weekend. He will not continue to receive an Army salary or be able to receive free military medical care. He also cannot sue the government for any potential torts or workers' compensation. The LOD benefits help close that benefit gap.[6] As indicated

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[1] U.S. DEP'T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS para. 2-2e. (4 Sept. 2008) [hereinafter AR 600-8-4]; 10 U.S.C. § 1074 (2016).

[2] *Id*. para 2-2.

[3] This article will offer an in depth analysis of Army Regulation (AR) 600-8-4 and its application to National Guard Soldiers. The author recommends that readers read Department of Defense Instruction (DoDI) 1241.01, which is the on point DoDI for Reserve Component Soldiers.

[4] *Id*. para. 2-2e. These conditions are while performing active duty for a period of 30 thirty days or less, performing inactive duty training, funeral honors duty, traveling to and from the place of duty, while remaining overnight before the commencement of inactive duty training or serving on funeral honors, or while remaining overnight between periods.

[5] The Feres doctrine bars claims against the federal government by active duty service members. Feres v. U.S., 340 U.S. 135 (1950).

[6] *See* DEP'T OF DEF., INSTR. 1241.01, RESERVE COMPONENT (RC) LINE OF DUTY DETERMINATION FOR MEDICAL AND DENTAL TREATMENTS AND

above, an in the line of duty determination (ILD) may entitle the National Guard Soldier to hospital benefits, pensions, and other compensation, similar to that for Soldiers of the active Army. Additionally, the National Guard Soldier is eligible for VA benefits under the facts in this scenario.

What effect does an LOD determination have on VA benefits for a National Guard Soldier? According to the AR 600-8-4, the VA makes its own determination whether a veteran is entitled to service connected disability compensation and other benefits.[7] Finally, as pertaining to VA benefits, AR 600-8-4 states that "Statutes governing these benefits generally require that disabling injury or death be service connected, which means that the disability was incurred or aggravated in LD (38 USC 101). The statutory criteria for making such determinations are in 38 USC 105."[8] This provision of AR 600-8-4 will be described in great depth, below.

B. VA Benefits

To what VA benefits would this Soldier be entitled based on the above injury? The main benefit, for the purposes of this article, is disability compensation. According to the VA, "Disability compensation is a monthly tax-free benefit paid to Veterans who are at least 10% disabled because of injuries or diseases that were incurred in or aggravated during active duty, active duty for training, or inactive duty training."[9] According to the above facts, the Soldier in this scenario should file a disability compensation claim with the VA. The guidance below may be used by legal assistance attorneys to inform National Guard Soldiers how to file a VA claim.

III. VA Claim Requirements

Veterans' claims for disability compensation benefits comprise five elements: (1) Veteran status, (2) present disability, (3) service connection, (4) degree of disability, and (5) effective date of the disability.[10]

A. Veteran Status

To obtain veteran status, a claimant must prove that he or she is a "veteran" for VA purposes, defined in relevant part as "a person who served in the active military, naval, or air service and who was discharged or released therefrom under conditions other than dishonorable."[11]

Active duty means "'full-time' duty in the Armed Forces, other than active duty for training."[12] Veteran status for active duty is simple, as one obtains veteran status by serving and completing a tour of required duty with a discharge or release under conditions other than dishonorable. An example would be a Soldier completing a four year enlistment and being discharged with an honorable or general discharge. Veteran status for active duty for training (ACDUTRA) and inactive duty for training (INACDUTRA) is trickier as, based on these statuses alone, one is not considered a veteran. A Soldier in the National Guard can serve an entire twenty-year career and never be considered a veteran by the VA.

The VA defines ACDUTRA as "full-time duty in the Armed Forces performed by Reserves for training purposes."[13] It is additionally defined as "full-time duty under section 316, 502, 503, 504, or 505 of title 32, or the prior corresponding provisions of law."[14] Generally speaking, ACDUTRA is initial entry training (IET) and annual training (AT). The term INACDUTRA is defined as "duty (other than full-time duty) prescribed for Reserves" "by the Secretary concerned under section 206 of title 37 or any other provision of law."[15] Generally speaking, INACDUTRA is drill weekend and is referred to in Army Regulations as IDT.

If a Soldier is injured on a drill weekend, how does he or she obtain the veteran status that is required to obtain VA disability compensation benefits? Fortunately, there is an exception to the general rule regarding veteran status. The term "active military, naval, or air service" is defined to include (1) active duty or a period of active duty for training during which a person was disabled or died from a disease or injury; and (2) any period of inactive duty for training during which a person was disabled or died from an injury incurred or aggravated in the line of duty or from "an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident occurring during such training."[16] The Soldier in our scenario would be considered a veteran by the VA on the basis of his injury occurring on a drill weekend.

INCAPACITATION PAY ENTITLEMENTS (19 Apr. 2016). This instruction establishes policy, assigns responsibility, establishes objectives, and provides guidance for determining an entitlement to medical and dental treatment and pay and allowances for reserve component (RC) service members with injury, illness, or disease incurred or aggravated in the line of duty (in-LOD).

[7] AR 600-8-4, *supra* note 1, para. 2-2f.

[8] *Id*.

[9] *Disability Compensation*, U.S. DEP'T OF VETERANS AFFS., http://www.benefits.va.gov/COMPENSATION/types-disability.asp (last visited May 31, 2017).

[10] *See* D'Amico v. West, 209 F.3d 1322, 1326 (Fed. Cir. 2000).

[11] 38 U.S.C. § 101(2) (2016).

[12] *Id*. § 101(21)(A).

[13] *Id*. § 101(21)(A).

[14] *Id*. § 101(22)(C).

[15] *Id*. § 101(23)(A).

[16] *Id*. § 101(24); 38 C.F.R. § 3.6 (2016).

B. Present Disability

Here, the Soldier has a torn MCL. The method on how to prove this to the VA will be discussed in the next section, Service Connection.

C. Service Connection

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) incurrence or aggravation of a disease or injury in service; and (3) a nexus between the claimed in-service injury or disease and the current disability.[17]

Evidence of a current disability is established through either medical or lay evidence. An ILD determination is helpful, because such a determination would render the Soldier eligible for medical treatment covered by the Department of Defense. The Soldier could use this medical documentation showing a current disability in his submission to the VA. Without an ILD determination, the Soldier would have to obtain medical evidence of a current disability on his own or through the VA. In order to obtain the medical evidence through the VA, the Soldier would have allege a current disability and hope that the VA would provide a medical opinion.

An ILD determination is also helpful in evidencing incurrence or aggravation of a disease or injury in-service. The VA would likely consider an ILD determination sufficient for purposes of proving in service incurrence or aggravation. Proving in service incurrence becomes much more difficult without an ILD determination, especially with the passage of time. An undocumented report of injury that occurred within the last year is generally more reliable than an undocumented report of injury that occurred 30 years ago. An ILD determination would go a long way in showing in service incurrence of an injury that occurred 30 years ago.

The final, and most difficult step, in establishing service connection is establishing a nexus between the claimed in-service injury or disease and the current disability. This nexus is almost always established through a medical opinion. As indicated above, if a Soldier has an ILD determination, he may be able to obtain a medical opinion through Department of Defense provided health care. The VA may also determine that the ILD determination is sufficient to establish a nexus. Other options include obtaining a private medical opinion or submitting the VA claim without a nexus and hoping that the VA requests a medical opinion.

Obtaining a private medical opinion could be an expensive proposition, especially in complex medical claims. If this route is taken, the medical opinion must be provided by a qualified examiner, be based upon an accurate factual premise, and have adequate rationale.[18] In layman's terms, the medical opinion must state that the claimed injury was "as likely as not"[19] caused by the in-service accident. The examiner must also explain why he or she believes so. If the VA determines that the private opinion is adequate for rating purposes, it may not require that the Soldier obtain a VA opinion before granting disability compensation benefits. This could save a great deal of time. Unfortunately, it is often difficult and costly for Soldiers to obtain such medical evidence, so they have to turn to the VA for assistance.

If this route is taken, the VA may be required to provide the Soldier with a medical examination under its duty to assist. The Secretary's duty to assist a disability compensation claimant includes "providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim."[20] A medical examination or opinion is considered necessary

> when there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability, and (2) evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the claimant qualifies, and (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the veteran's service or with another service-connected disability, but (4) insufficient competent medical evidence on file for the Secretary to make a decision on the claim.[21]

The types of evidence that indicate that a current disability may be associated with military service "include, but are not limited to, medical evidence that suggests a nexus but is too equivocal or lacking in specificity to support a decision on the merits, or credible evidence of continuity of

[17] *See* Davidson v. Shinseki, 581 F.3d 1313, 1316 (Fed. Cir. 2009); Hickson v. West, 12 Vet. App. 247, 252 (1999); Caluza v. Brown, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

[18] An adequate medical opinion must be "accurate and fully descriptive," 38 C.F.R. § 4.1 (2016), and based on an accurate factual premise and consideration of the veteran's prior medical history. Ardison v. Brown, 6 Vet.App. 405, 407 (1994); *see* Floyd v. Brown, 9 Vet. App. 88, 93 (1996). In addition, the opinion "must support its conclusions with an analysis that the Board can consider and weigh against contrary opinions." Stefl v. Nicholson, 21 Vet. App. 120, 124 (2007); *see* Nieves–Rodriguez v. Peake, 22 Vet. App. 295, 304 (2008) ("[A] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two."); *see also* Hicks v. Brown, 8 Vet. App. 417, 421 (1995) (inadequate medical evaluation frustrates judicial review).

[19] *See* 38 U.S.C. § 5107(b) ("Where there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant").

[20] 38 U.S.C. § 5103A(d)(1) (2016); Green v. Derwinski, 1 Vet. App. 121, 124 (1991).

[21] McLendon v. Nicholson, 20 Vet. App. 79, 81 (2006); *see* 38 U.S.C. § 5103A(d); 38 C.F.R. § 3.159(c)(4)(i) (2016).

symptom[s,] such as pain or other symptoms capable of lay observation."[22] This threshold is low.[23]

In this scenario, the Soldier may be able to obtain a VA examination based solely on his assertion that he hurt his knee at drill and that it still hurts. However, this is a risky strategy, because, under the *McLendon* standard, the VA has discretion to not provide a medical opinion.

Additionally, this is not the most efficient route for a Soldier to be granted disability compensation benefits from the VA. First, it may take a few months up to a few years for the VA to schedule an examination. Second, the Soldier runs the risk of receiving an inadequate examination and having the claim ultimately being remanded or denied. In 2015, the Board of Veterans Appeals remanded 46.4 percent of claims,[24] with many of the remands ordering new medical opinions because of the inadequacy of the already provided opinions. These opinions can be found inadequate for a variety of reasons including: unqualified examiner,[25] opinion based on inaccurate factual premise,[26] inadequate rationale,[27] uses an improper medical standard,[28] etc. Potential missteps by the VA or VA examiner could add years to the processing of the claim.[29]

To summarize, an ILD determination by itself may be deemed sufficient enough by the VA to grant service connection. As indicated above, the VA process can be long and arduous, so an ILD determination can make the process quick and painless.

D. Degree of Disability

It is necessary to determine the degree of disability in order to determine the rate at which the Soldier will receive disability compensation. "Disability compensation is a monthly tax-free benefit paid to Veterans who are at least 10% disabled because of injuries or diseases that were incurred in or aggravated during active duty, active duty for training, or inactive duty training."[30] "The benefit amount is graduated according to the degree of the Veteran's disability on a scale from 10 percent to 100 percent (in increments of 10 percent)."[31] The rating schedule is used to try to compensate veterans for the average impairment in earning capacity in civil occupations resulting from disability. "The degrees of disability specified are considered adequate to compensate for considerable loss of working time from exacerbations or illnesses proportionate to the severity of the several grades of disability."[32] Knee disabilities are generally rated under 38 C.F.R. § 4.71a. In this case, as in most others, the medical examiner would determine the degree of disability.

E. Effective Date

Finally, to complete the Soldier's disability compensation claim, an effective date must be determined. Generally, "the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation ... shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor."[33] The effective date will be the date of receipt of the claim or the date the entitlement arose, whichever is later.[34] In determining the date entitlement arose, when an original claim for benefits is pending, the Board must determine when a claimant's disability manifested itself under all the "facts found" and "the date on which the evidence is submitted is irrelevant."[35]

Here, it is important to note the effective date cannot be earlier than the date of the receipt of the application. Even though the Soldier in our scenario was injured in 2016 and met all the requirements for service connection, the effective date will be the date of claim. So, if he waits until the year 2046 to submit the claim, the effective date will be the year

[22] *McLendon*, 20 Vet. App. at 83.

[23] 38 U.S.C. § 5103A(d)(2)(B); *McLendon*, 20 Vet. App. at 83.

[24] *See* U.S. DEP'T OF VETERANS AFFS., BOARD OF VETERANS' APPEALS, ANNUAL REPORT (2015) [hereinafter VA ANNUAL REPORT].

[25] *See* Guerrieri v. Brown, 4 Vet. App. 467, 470–71 (1993) (probative value of the medical opinion comes from medical expert's personal examination of the patient, the physician's knowledge and skill in analyzing the data, and the medical conclusion that the physician reaches).

[26] *See Caluza*, 7 Vet .App. at 505–06; *Gilbert*, 1 Vet. App. at 52. Cf. Reonal v. Brown, 5 Vet. App. 458, 461 (1993) ("An opinion based upon an inaccurate factual premise has no probative value.").

[27] An adequate medical opinion must be "accurate and fully descriptive," 38 C.F.R. § 4.1 (2016), and based on an accurate factual premise and consideration of the veteran's prior medical history, Ardison v. Brown, 6 Vet. App. 405, 407 (1994); *see* Floyd v. Brown, 9 Vet. App. 88, 93 (1996). In addition, the opinion "must support its conclusions with an analysis that the Board can consider and weigh against contrary opinions." Stefl v. Nicholson, 21 Vet. App. 120, 124 (2007); *see* Nieves–Rodriguez v. Peake, 22 Vet. App. 295, 304 (2008) ("[A] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two."); *see also* Hicks v. Brown, 8 Vet. App. 417, 421 (1995) (inadequate medical evaluation frustrates judicial review).

[28] *See* Wise v. Shinseki, 26 Vet. App. 517, 531 (2014) (noting that rather than mandate that "a medical principle reach the level of scientific consensus in order to support a claim for VA benefits," Congress established a low standard in 38 U.S.C. 5107(b) authorizing VA to resolve scientific or medical questions in the claimant's favor when the positive and negative evidence is in "approximate balance"); *see also* Jones v. Shinseki, 23 Vet. App. 382, 388 n.1 (2010) (noting that in the veterans benefits system, the benefit of the doubt on any material issue goes to the veteran if the evidence is in equipoise and the burden of nonpersuasion is with VA).

[29] *See* VA ANNUAL REPORT *supra* note 25, at 21.

[30] *Disability Compensation*, *supra* note 9.

[31] *Id*.

[32] 38 C.F.R. § 4.1 (2016).

[33] 38 U.S.C. § 5110(a) (2016).

[34] 38 C.F.R. § 3.400 (2016).

[35] McGrath v. Gober, 14 Vet. App. 28, 35 (2000).

2046. Therefore, it is important for Soldiers that want to obtain VA benefits, to apply for them as soon as possible in order to preserve the effective date. Even if it takes ten years for the VA to grant the claim, the Soldier will receive pay dating back to the date of the claim.

IV. Preexisting Injury and Aggravation

What happens if the Soldier already had a torn MCL and reinjured it during drill? First, in LOD determinations, there is a presumption that a Soldier is in sound "physical and mental condition upon entering AD or status in paragraph 2–2e."[36] To overcome the presumption, "it must be shown by substantial evidence that the injury or disease, or condition causing it, was sustained or contracted while neither on AD nor in authorized training."[37] An injury or disease existed prior to service (EPTS) when "there is substantial evidence that the disease or injury, or underlying condition existed before military service or it happened between periods of active service."[38] This determination is particularly important to National Guard Soldiers as they have numerous opportunities for injuries to occur "between periods of active service."

A determination of EPTS is usually made by the examining doctor who will use information from the medical record to "support a determination that an EPTS condition was or was not aggravated by military service."[39] "If an EPTS condition was aggravated by military service, the determination will be 'in LD.' "If an EPTS condition is not aggravated by military service, the determination will be 'not in LD—not due to own misconduct.'"[40]

What happens if our Soldier injured his knee while playing basketball between weekends on a nonduty status and reinjured it while working on the HMMVW? According to AR 600-8-4, if the injury is classified as aggravated by the doctor, a determination of ILD should be made. If the injury is not classified as aggravated, a determination of NLD should be made. So, even if the original injury did not occur in a military status, a subsequent reinjury could be found as ILD if the doctor determines that it has been aggravated.

What happens if the Soldier injured his knee during drill a year prior and reinjures it while working on the HMMVW? Since this injury initially occurred while on a covered status, any subsequent reinjury would also be ILD as long as it was not caused by misconduct or willful negligence.[41]

How does an LOD determination help with VA claims? Similar to the Army, the VA makes a determination as to whether an injury preexisted or was aggravated while in a covered status. As indicated above, in a VA disability compensation claim, establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) incurrence or *aggravation* of a disease or injury in service; and (3) a nexus between the claimed in-service injury or disease and the current disability.[42]

The VA considers an injury to have been aggravated when there is an increase in disability during the service.[43] However, in order for the presumption to apply, the preexisting injury or disease must have been aggravated during *active* military, naval, or air service.[44] As indicated above, ACDUTRA and INACDUTRA do not qualify as *active* military service for VA disability compensation claim purposes. Therefore, the presumption of aggravation does not apply when the claim is based on a period of ACDUTRA or INACDUTRA.[45]

So, without the status as a veteran, a National Guard Soldier trying to establish entitlement to service connection cannot use the many presumptions in the law that are available only to veterans, including aggravation. For example, presumptive periods allowing for the presumed incurrence of a condition in service do not apply to ACDUTRA or INACDUTRA, nor do the presumptions of soundness and aggravation.[46]

However, even without the presumption of soundness and aggravation, the VA can still find that a preexisting injury was aggravated during ACDUTRA or INACDUTRA. With

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[36] AR 600-8-4, *supra* note 1, para. 4-8f.(1)

[37] *Id*.

[38] *Id*. para. 4-8e.(1).

[39] *Id*. para. 4-8e.(2).

[40] *Id*. at para. 4-8e.(2).

[41] *Id*. para. 4-8f.(3).

[42] *See* Davidson v. Shinseki, 581 F.3d 1313, 1316 (Fed. Cir. 2009); Hickson v. West, 12 Vet. App. 247, 252 (1999); Caluza v. Brown, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table) (emphasis added).

[43] 38 U.S.C. § 1153 (2016). "A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease." *Id.*

[44] *Id*.

[45] Smith v. Shinseki, 24 Vet. App. 40, 48 (2011); *see also* Donnellan v. Shinseki, 24 Vet. App. 167, 171 (2010) ("[W]here a claim is based on a period of [ACDUTRA], the presumption of aggravation is not applicable."). However, in *Hill v. McDonald*, No. 14-1811 (2016), the Court of Appeals for Veterans Claims held that "once a claimant has achieved veteran status for a single disability incurred or aggravated during a period of ACDUTRA, that status applies to all disabilities claimed to have been incurred or aggravated during that period of ACDUTRA." The Court extended this holding to claims based on periods on INACDUTRA.

[46] Smith v. Shinseki, 24 Vet. App. 40, 48 (2011); *see also* Donnellan v. Shinseki, 24 Vet. App. 167, 171 (2010).

respect to a claim of aggravation of a preexisting condition during ACDUTRA (or INACDUTRA), the National Guard Soldier must prove both that a worsening of the condition occurred during the period of ACDUTRA (or INACDUTRA) and that the worsening was caused by the period of ACDUTRA (or INACDUTRA).[47] This is generally a determination that must be made through medical evidence. Usually, a medical opinion stating that a condition worsened while on a covered status is enough for the VA to find that aggravation occurred. Again, an ILD determination may be all that a Soldier needs to have VA benefits granted in this situation.

V. Overall Impact of an ILD Determination on VA Benefits

How does an ILD determination aid National Guard Soldiers in obtaining VA benefits? Going back to National Guard Soldiers not serving on active duty, veteran status is awarded based on "any period of inactive duty for training during which a person was disabled or died from an injury incurred or aggravated *in the line of duty*."[48] Here, the VA would consider our Soldier a veteran on basis of the injury he incurred during drill.

As noted by AR 600-8-4, in making its benefits determination, the VA does make its own line of duty determination.[49] However, in coming to this determination, the VA presumes that an injury or disease incurred by a veteran during active service was incurred in the line of duty and not caused by the veteran's misconduct.[50] This presumption can be rebutted by the VA establishing, by the preponderance of the evidence, that the injury or disease was caused by the veteran's own willful misconduct.[51] VA has defined willful misconduct as an act involving conscious wrongdoing or known prohibited action.[52] It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.[53] Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct.[54] Willful misconduct will not be determinative unless it is the proximate cause of injury, disease, or death.[55]

Importantly, however, VA Regulations provide that a service department finding of in the line of duty is binding on the VA unless it is patently inconsistent with the requirements of laws administered by the VA.[56] Examples of patently inconsistent LOD findings include the abuse of drugs or alcohol at the time of injury.[57] However, VA regulations are similar to Army Regulations as "Injury, disease, or death that results in incapacitation because of the abuse of alcohol and other drugs is not in line of duty. It is due to misconduct."[58] Thus, a finding of ILD goes a long way toward assisting a National Guard Soldier in obtaining disability and compensation benefits from the VA.

VI. VA Disability Compensation Pay Eligibility

National Guard Soldiers are eligible to receive VA disability compensation pay while still in drilling status. However, Soldiers must choose between receiving drill pay or disability compensation pay as concurrent receipt is prohibited.[59] Veterans who perform active or inactive duty training must choose the benefit they prefer and waive the other.[60] Most National Guard Soldiers choose to receive drill pay instead of disability compensation or pension because drill pay is typically the greater benefit.[61] These Veterans must waive their VA benefits for the same number of days each year that they received drill pay.[62] During a single fiscal year, members of the National Guard normally receive drill pay for a total of sixty-three days, which consists of forty-eight drill periods and fifteen days of annual training.[63] It is 48 drill periods, because on each day of drill, the Soldier is paid for two unit training assemblies (UTA), and each UTA is essentially a day of active duty pay. "The term drill pay refers to the monetary benefits a reservist or member of the National Guard receives for performing active or inactive duty training."[64]

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[47] *Id*.

[48] McGrath v. Gober, 14 Vet. App. 28, 35 (2000) (emphasis added).

[49] AR 600-8-4, *supra* note 1, para. 2-2f.

[50] Thomas v. Nicholson, 423 F.3d 1279, 1283-84 (Fed. Cir. 2005).

[51] *Id*.

[52] 38 C.F.R. § 3.1 (n) (2016).

[53] *Id*. § 3.1 (n)(1).

[54] *Id*. § 3.1 (n)(2).

[55] *Id*. § 3.1 (n)(3).

[56] *Id*. § 3.1(m).

[57] Carlson v. Nicholson, 20 Vet. App. 447 (2006) *aff'd*, 226 F. Appx. 987 (Fed. Cir. 2007) (affirming the Board's rejection of favorable service department LOD determinations because, in light of the Veteran's extensive drug abuse, upholding the service department LOD determinations would be patently inconsistent with the requirements of VA laws); Paul v. Nicholson, 23 Vet. App. 453 (2007) (setting aside a Board decision which found that a favorable "in line of duty" determination by the service department was patently inconsistent with the requirements of laws administered by VA based on admissions by the Veteran that he was intoxicated at the time of his injuries).

[58] AR 600-8-4, *supra* note 1, para. B-4.

[59] 10 U.S.C. § 12316 (2016); 38 U.S.C. § 5304(c) (2016).

[60] *Id*.

[61] U.S. DEP'T OF VETERANS AFFAIRS, M21-1 ADJUDICATION PROCEDURES MANUAL REWRITE pt. 3, subpart. V, ch. 4, sec. C., para. 1(b) (20 Apr. 2015) ("Adjusting Department of Veterans Affairs (VA) Benefits Based on a Veteran's Receipt of Active Service Pay").

[62] *Id*.

[63] *Id*. para. 2(a).

[64] *Id*. para 1(a).

Active duty Soldiers are ineligible to receive VA disability compensation pay.[65] This includes National Guard Soldiers that are mobilized to active duty, serve on ADOS, or join the AGR program. However, after release from active duty, upon request of the Soldier, the payments will be resumed.[66] Importantly, with regard to the resumption of disability compensation pay, prior service connection determinations made by the VA will not be disturbed[67] except in rare circumstances.[68] Compensation will be authorized based on the degree of disability found to exist at the time the award is resumed.[69] If a Soldier entered active duty with a service connected disability rated at ten percent and that disability worsened to thirty percent while on active duty, upon leaving active duty, the Soldier will be compensated at a thirty percent rate.

In our scenario, let's say the VA granted service connection at a ten percent rate for his injury that he incurred during drill. If he subsequently enlisted in the active duty Army for four years, he would be ineligible to receive his VA compensation for that time period. However, upon leaving active duty, at his request, he would resume receiving payments. He would also be able to request an increased rating if his condition worsened while serving on active duty.

VII. Involuntary Separation from the National Guard

As indicated above, one must be considered a veteran in order to be eligible for VA disability compensation benefits. Veteran is defined in relevant part as "a person who served in the active military, naval, or air service and who was discharged or released therefrom under conditions other than dishonorable."[70] Above, we discussed how National Guard Soldiers can be considered veterans on the basis of an injury that occurred while serving on ACDUTRA or INACDUTRA. This section will focus on the language of the statute which states "discharged or released therefrom under conditions other than dishonorable."[71]

Let's say that, in our scenario, the Soldier is granted service connected disability compensation benefits by the VA on the basis of injuring his knee while serving on a drill weekend. What happens if that Soldier subsequently fails a urinalysis and is separated from the National Guard with a service characterization of other than honorable on the basis of that misconduct? Will the VA revoke his disability compensation benefits?

According to AR 135-178, a "separation characterized as under other than honorable conditions could deprive the Soldier of veterans' benefits administered by the [DVA]. A determination by that agency is required in each case."[72] As discussed below, this provision is inapplicable to the scenario at hand as it fails to take into account VA rules, regulations, and case law.[73] In order sever benefits, the VA would have sever the previous decision granting service connection.

Veterans Affairs regulations state that "Previous determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error."[74] "Subject to the limitations contained in sections 3.114 and 3.957, service connection will be severed only where evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being upon the Government)."[75] Generally, clear and unmistakable error exists when, "either the correct facts, as they were known at the time, were not before the Board, or the statutory and regulatory provisions extant at the time were incorrectly applied."[76] To summarize, when determining whether severance is necessary, the VA looks at the law and facts at the time that service connection was granted, and will determine whether there was a clear and unmistakable error in the application of the law to the facts.

Clear and unmistakable error does not exist when a National Guard Soldier is granted service connection for an injury and is subsequently separated with a service characterization of other than honorable. Since severance requires the VA to look at the facts at the time that service connection was granted, in our scenario, the subsequent separation with an other than honorable (OTH) is not relevant as this fact did not exist at the time that service connection was granted.

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[65] 38 C.F.R. § 3.654(a) (2016).

[66] *Id*. § 3.654(b)(2) (2016).

[67] *Id*. § 3.654(b)(2) (2016).

[68] *Id*. § 3.105(d) (2016) (Subject to the limitations contained in §§ 3.114 and 3.957, service connection will be severed only where evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being upon the Government)). Where service connection is severed because of a change in or interpretation of a law or Department of Veterans Affairs issue, the provisions of § 3.114 are for application. *Id.*

[69] *Id*. § 3.654(b)(2) (2016).

[70] 38 U.S.C. § 101(2) (2016).

[71] *Id*.

[72] U.S. DEP'T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS para. 2-8(a) (13 Sept. 2011).

[73] For a more thorough explanation of the character of separation and eligibility for VA benefits, see Captain Jeremy R. Bedford, *Eligibility for VA Disability Compensation and Health Care Benefits for Army National Guardsmen Discharged with an Other Than Honorable Discharge*, ARMY LAW., July 2014, at 36 [hereinafter *Eligibility for Benefits*].

[74] 38 C.F.R. § 3.105(a) (2016).

[75] *Id*. § 3.105(d) (2016). (38 C.F.R. §§ 3.114 and 3.957 do not apply in this scenario as they address changes in VA law and the 10 year rule regarding protected service connected ratings).

[76] 38 C.F.R. § 20.1403, r. 1403(a) (2016).

Additionally, the VA has long held that VA benefits from previous periods of service would not be disturbed by subsequent service. According to the DVA General Counsel's precedential opinion in 1991, the "DVA long ago adopted an administrative interpretation that a discharge under dishonorable conditions from one period of service does not constitute a bar to VA benefits if there was another period of qualifying service upon which a claim could be predicated."[77] The only time that a subsequent OTH will affect VA disability compensation benefits accrued from a previous period of service is when "any person [is] shown by evidence satisfactory to the Secretary [of Veteran Affairs] to be guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or of its allies."[78] Such persons "shall forfeit all accrued or future gratuitous benefits under laws administered by the Secretary."[79] Here, failing a urinalysis does not meet this standard.

Regarding National Guard Soldiers' eligibility for compensation benefits, in a 2004 opinion, the DVA General Counsel held "that a claimant's eligibility for VA disability compensation is governed by the character or release from the [active duty for training (ADT)] period during which a disabling injury or disease was incurred, [and that] [D]VA is not required to reconsider an award based on a period of ADT if the claimant is subsequently discharged from the National Guard under other than honorable conditions."[80] While this opinion does not directly address INACDUTRA, logically, this rule of law would extend to it.

To summarize, a subsequent separation from the National Guard with a service characterization of OTH would have no impact on a previous grant of service connection by the VA based upon an injury incurred during a drill weekend.[81] There is no provision of VA law that would allow it to sever any service connected benefit on the basis of a service characterization of other than honorable from a separate period of service. Additionally, the Soldier would still be eligible for disability compensation benefits even after the OTH separation based upon the in-service injury.[82]

To illustrate, our Soldier injured his knee on a drill weekend in July 2016. He applies for and receives VA disability compensation benefits for his knee injury in January 2017. In March 2017, while attending drill, he fails a urinalysis and is subsequently separated from the National Guard with a service characterization of OTH based upon misconduct. The subsequent separation will have no impact on his continued receipt of disability compensation benefits for his knee.[83] He will continue receiving compensation and can file for increased ratings or even file additional disability compensation claims.

Similarly, our Soldier injured his knee on a drill weekend in July 2016, but he does not file for VA disability compensation benefits. In March 2017, while attending drill, he fails a urinalysis and is subsequently separated from the National Guard with a service characterization of OTH based upon misconduct. In April 2017, he files a disability compensation claim with the VA on the basis of his July 2016 knee injury. Under these facts, the VA would grant service connection and the separation characterization of OTH would have no impact on the determination because it would be considered a separate period of service by the VA.[84]

VIII. Conclusion

As laid out above, a legal assistance attorney should advise a National Guard Soldier that is injured during drill to file both an LOD and VA disability compensation claim. An ILD determination could provide immediate medical care and assist the Soldier in any subsequent VA disability compensation claims. A disability compensation claim would further compensate and allow for medical treatment of the in service injury. An ILD determination could also make the VA disability compensation application process easier and faster.

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[77] The Effect of a Discharge Under Dishonorable Conditions on Eligibility for Gratuitous Veterans' Benefits Based on a Prior Period of Honorable Service, Vet. Aff. Op. Gen. Couns. Prec. 61-91 (July 17, 1991) (citing Adm'rs Decision No. 655 (June 20, 1945); Op. Sol. 218-51 (June 4, 1951). According to VA regulations, the VA General Counsel is authorized to designate precedential opinions. 38 C.F.R. § 2.6(e)(8) ("The General Counsel, or the Deputy General Counsel acting as or for the General Counsel, is authorized to designate, in accordance with established standards, those legal opinions of the General Counsel which will be considered precedent opinions involving veterans' benefits under laws administered by the Department of Veterans Affairs.").

[78] 38 U.S.C. § 6104 (2016); *Eligibility for Benefits*, *supra* note 74, at 38.

[79] *Id*.

[80] Character of Discharge of National Guard Member, Vet. Aff. Op. Gen. Couns. Prec. 06-04 (July 12, 2004).

[81] The only scenario in which the Soldier may be ineligible for VA benefits is if the misconduct (i.e. failing a urinalysis) occurred on the weekend on which the Soldier was injured. In this case, the VA would likely have to go back and sever service connection based upon the correct facts not being known at the time—the service characterization for that drill weekend being other than honorable. For the purposes of this article, the Soldier did not fail a urinalysis on the same drill weekend that he was injured. To date there is no case law that covers this scenario.

[82] Jeremy R. Bedford, *Outdated VA Regulations Lead to Confusion for Army National Guard Soldiers with OTH Service Characterizations*, FED. LAW., Oct./Nov. 2014, 58-65, 77 [hereinafter *Outdated VA Regulations*].

[83] *Eligibility for Benefits*, *supra* note 74, at 38.

[84] *Outdated VA Regulations*, *supra* note 83, at 58-65, 77.

Offense Occupied: Article 134's Preemption Doctrine

Major W. Casey Biggerstaff[*]

For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter.[1]

I. Introduction

Justice Rehnquist recognized a commander's need for a flexible tool to manage good order and discipline in his defense of Article 134,[2] perhaps the most curious statute in the Uniform Code of Military Justice (UCMJ). Also known as the general article, it applies to a broad range of behavior by focusing on adverse impacts to the military instead of a specific crime.[3] The general article further extends the UCMJ's coverage by incorporating or assimilating other sources of law.[4] Due to the article's breadth, courts have constrained its use in various ways in order to curb abuse.[5]

One of these limitations is preemption, a case-law doctrine that "prohibits application of Article 134 to conduct covered by Articles 80 through 132."[6] While often misunderstood, practitioners can apply preemption correctly by using methods of statutory interpretation distilled from case law and understanding how preemption relates to other legal concepts. These methods will assist counsel in identifying the characteristics that distinguish proper general article offenses from those that should be preempted.

In order to provide context, this paper will provide a preliminary overview of preemption by summarizing its historical background and explaining related concepts. This discussion will inform the substantive analysis of how to apply the doctrine. Techniques synthesized from case law will assist practitioners by providing different ways to evaluate preemption problems. Finally, the paper will help practitioners avoid a common pitfall when charging the general article. Overall, the analysis will assist both trial and defense counsel in recognizing preemption issues and in litigating them at trial.

II. Background

The general article allows the UCMJ to regulate the behavior of military personnel more broadly "than a typical state criminal code regulates civilians."[7] In response, courts have used preemption and other doctrines to restrict its use.[8] Despite these limitations, commanders have largely retained the flexibility to address misconduct with a uniquely corrosive impact on military discipline. It is therefore helpful to understand the original concerns that led to preemption's emergence from case law.

In 1951, the UCMJ replaced the Articles of War (AoW) as the statutory framework for the military justice system.[9] Congress reorganized various offenses but preserved a general article to address service-discrediting and prejudicial conduct.[10] However, drafters embedded a limitation in the statute. "*Though not specifically mentioned in this chapter*, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring

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[1] Parker v. Levy, 417 U.S. 733, 756 (1974).

[2] *See id.* Article 134 applies to, "[t]hough not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital . . . ." UCMJ art. 134 (2012).

[3] *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶¶ 60(b), (c) (2016) [hereinafter MCM].

[4] *See id.* pt. IV, ¶¶ 60(c)(2)-(4).

[5] *See, e.g.*, *Parker*, 417 U.S. 733; *see also* United States v. Medina, 66 M.J. 21, 26-28 (C.A.A.F. 2003); United States v. Guardado, 75 M.J. 889, 901 (A. Ct. Crim. App. 2016) ("For prudential, prophylactic, and perhaps other purposes, the doctrine—a child of both case law and Presidential rule—limits the scope of Article 134 for good reason.").

[6] MCM, *supra* note 3, pt. IV, ¶ 60(c)(5)(a).

[7] *See Parker*, 417 U.S. at 750-51; *cf.* United States v. Wright, 5 M.J. 106, 111 (C.M.A. 1978) (quoting United States v. Borys, 40 C.M.R. 259, 266 (C.M.A. 1969) (stating that federal enclaves are not "privileged sanctuaries of immunity for persons engaging in conduct that is criminal in all other parts of [a] State")).

[8] *See generally Parker*, 417 U.S. 733 (vagueness and over-breadth); United States v. Warner, 73 M.J. 1 (C.A.A.F. 2013) (fair notice); United States v. Fosler, 70 M.J. 225, 228-29 (C.A.A.F. 2011); United States v. Saunders, 59 M.J. 1, 8-9 (C.A.A.F. 2003) (fair notice); United States v. Vaughan, 58 M.J. 29 (C.A.A.F. 2003) (fair notice); United States v. Maze, 45 C.M.R. 34, 37 (C.M.A. 1972) (describing "limitations other than the imagination of the drafter"). *But see* United States v. Merritt, 72 M.J. 483 (C.A.A.F. 2013) (lack of fair notice).

[9] *See generally* 50 U.S.C. §§ 551-741 (1950).

[10] *See Fosler*, 70 M.J. at 227.

discredit upon the armed forces, and all crimes and offenses not capital . . . shall be punished . . . ."[11] The italicized phrase implies that the general article should not be applied to conduct covered by an enumerated article.[12] Congress carefully drafted the enumerated articles; thus, any gaps in coverage were deliberate.[13]

In the seminal case of *United States v. Norris*, the Court of Military Appeals (CMA) applied this argument to wrongful taking under Article 134, which lacked the specific intent required under Article 121.[14] In concluding that it was not an offense, the CMA relied heavily on discussions during congressional subcommittee hearings concerning the UCMJ.[15] The court concluded that "Article 134 should be limited to military offenses and those crimes not specifically delineated by the punitive Articles."[16]

> [T]here is scarcely an irregular or improper act conceivable which may not be regarded as in some indirect or remote sense prejudicing military discipline under Article 134. We cannot grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134. We are persuaded, as apparently the drafters of the Manual were, that Congress has . . . covered the entire field of criminal conversion for military law.[17]

> In essence, then, *Norris* . . . holds that offenses specifically set out in the Code may not, following deletion of one or more elements, also be made punishable under the general Article, the theory being that, had Congress intended larceny to be made out on less than the requirements specified, it would have so provided and would not have included in . . ., Article 134, the disclaiming phrase, "Though not specifically mentioned in this chapter."

United States v. Herndon, 36 C.M.R. 8, 10 (C.M.A. 1965) (citing UCMJ art. 134 (1958)).

Later cases interpreted the doctrine permissively, preserving the general article's flexibility, eventually formulating a two-prong test that remains the current standard for preemption.[18] Counsel must understand the methods courts use to apply the prongs when assessing charges.

III. Preliminary Matters

There are a few general rules and concepts that counsel must understand prior to introducing the preemption test. Understanding a general overview of these principles avoids confusion when assessing charging options and litigating challenges.[19]

A. The Misleading Manual

The *Manual for Courts-Martial* (*MCM*) provides the following summary:

> The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132. For example, larceny is covered in Article 121, and if an element of that offense is lacking—for example, intent— there can be no larceny or larceny-type offense, either under Article 121 or, because of preemption, under Article 134. Article 134 cannot be used to create a new kind of larceny offense, one without the required

[11] UCMJ art. 134 (2012) (emphasis added).

[12] *See* United States v. Taylor, 23 M.J. 314, 316-17 (C.M.A. 1987) ("[I]f the legislature has explicitly prohibited certain conduct, then it did not intend also to prohibit other conduct which, though similar, does not meet the statutory requirements for criminal liability."); s*ee also* United States v. Hallett, 15 C.M.R. 378 (C.M.A. 1954); United States v. Johnson, 11 C.M.R. 174 (C.M.A. 1953); United States v. Norris, 8 C.M.R. 36 (C.M.A. 1953). This interpretation is strengthened by the principle of statutory construction *expressio unius est exclusio alterius*, which states that specifically including one item necessarily excludes another not mentioned. *See Taylor*, 23 M.J. at 317 n.2. *But see* United States v. Guardado, 75 M.J. 889, 900 (A. Ct. Crim. App. 2016) (stating the doctrine is "based on prudential concerns, not as a matter of statutory interpretation"), *rev. granted*, 76 M.J. 166 (C.A.A.F. 2017).

[13] *See Taylor*, 23 M.J. at 316-17.

[14] *Norris*, 8 C.M.R. at 38.

[15] *See id.* at 39. Certain offenses were deliberately enumerated while others were retained under the general article. *Id.*

[16] *Id.*

[17] *Id.*

[18] *See* United States v. Wright, 5 M.J. 106, 110-11 (C.M.A. 1978); United States v. Maze, 45 C.M.R. 34, 36-37 (C.M.A. 1972); United States v. Taylor, 38 C.M.R. 393, 394-95 (C.M.A. 1968); United States v. Toutges, 32 C.M.R. 425, 426-27 (C.M.A. 1963); United States v. Fuller, 25 C.M.R. 405, 406-07 (C.M.A. 1958).

[19] During charging analysis, counsel should also consider issues that are collateral or interrelated to preemption. For example, all of the service courts except the Army Court of Criminal Appeals (ACCA) have held that preemption is a jurisdictional issue, regardless of the clause or theory used. *See* United States v. Guardado, 75 M.J. 889, 901 (A. Ct. Crim. App. 2016), *rev. granted*, 76 M.J. 166 (C.A.A.F. 2017). "The basis for the preemption doctrine is the principle that, if Congress has occupied the field for a given type of misconduct, then an allegation under Article 134 . . . fails to state an offense. A claim of preemption therefore presents a question of subject-matter jurisdiction of the trial court . . . ." United States v. Hill, No. 38848, 2016 CCA LEXIS 291, at *4 (A.F. Ct. Crim. App. May 9, 2016) (unpublished) (internal citations omitted); *see also* United States v. Taylor, No. 200600526, 2007 CCA LEXIS 176, at *21 n.7 (N-M Ct. Crim. App. May 23, 2007) (unpublished). Practitioners should note that ACCA's holding in *Guardado* that preemption is not jurisdictional was an issue granted by the Court of Appeals for the Armed Forces (CAAF) when granting the appellant's petition for review, the decision for which is pending. *Guardado*, 76 M.J. at 166.

> intent, where Congress has already set the minimum requirements for such an offense in Article 121.[20]

This description is overly simplified and potentially hazardous if applied literally without referencing how it is applied in case law.[21] "The . . . explanation of the preemption doctrine is somewhat unique in the *MCM*. . . . Notably, the rule is *descriptive*, not *proscriptive*. . . . [I]t does not prohibit anything, but rather states that "the preemption doctrine prohibits . . . ." It refers to an authority (presumably case law) outside of itself."[22] In short, the *MCM* is a useful reminder that the doctrine exists, but it is an incomplete statement of the law.[23] Counsel should not rely solely upon its description when analyzing preemption.

B. Internal Applications of the Preemption Doctrine

Before proceeding to the test, counsel should also understand some simple distinctions between the various clauses of Article 134. For this paper, the first and second clauses are grouped together as prohibiting conduct that has a uniquely undesirable impact on the military. This set of offenses requires alleging and proving one of two terminal elements alleging this unique impact.[24] These clauses are distinct from the third clause, which incorporates certain offenses from the United States Code into the UCMJ.[25] Various principles apply based on the clause(s) charged.

As a threshold matter, preemption only applies to conduct prohibited by Articles 80 through 132.[26] It generally does not apply internally between clause three—non-capital, federal offenses—and clauses one or two—service-discrediting or prejudicial offenses; nor does it apply between offenses listed by the President and those not listed.[27] These guidelines are better illustrated by examining the relationships between the various charging options under Article 134.

Federal offenses do not preempt the use of clauses one or two of the general article.[28] "[A] facial similarity between a military offense and a Federal crime does not mean that the offense must be brought under the third clause of Article 134."[29] If a federal statute applies, counsel have three primary options. First, counsel may charge the federal statute under clause three. Second, counsel may charge elements identical to those in the federal statute along with a terminal element under clauses one, two, or both. Third, counsel may charge the offense under alternative theories, using all three clauses in one or more specifications.[30] When a federal statute is on point, all three clauses are available, whether alternatively or conjunctively.[31]

There are also guidelines for offenses listed in the *MCM* as examples of misconduct meeting the terminal elements under clauses one or two.[32] The general rule is that listed

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[20] MCM, *supra* note 3, pt. IV, ¶ 60(c)(5)(a).

[21] *See* United States v. McGuiness, 35 M.J. 149, 151 (C.A.A.F. 1992) (stating that the Presidential rule "merely codifie[s] existing military law."); *Guardado*, 75 M.J. at 901.

[22] *Guardado*, 75 M.J. at 901 n.18. (emphasis original) (internal citations omitted); *see* MCM, *supra* note 3, pt. IV, ¶ 60(c)(5)(a).

[23] The following is a suggested amendment to the MCM: The preemption doctrine prohibits application of Article 134 when Congress has occupied the field of a given type of misconduct using Articles 80 through 132. If Congress intended for the enumerated punitive articles to cover the type of conduct in a complete way, another offense may not be created and punished under Article 134 by eliminating a vital element. For example, larceny is covered in Article 121, and if an element of that offense is lacking—for example, intent— there can be no larceny or larceny-type offense, either under Article 121 or, because of preemption, under Article 134. Article 134 cannot be used to create a new kind of larceny offense, one without the required intent, where Congress has already set the minimum requirements for such an offense in Article 121. *Accord McGuiness*, 35 M.J. at 151.

[24] *See* United States v. Leonard, 64 M.J. 381, 382-83 (C.A.A.F. 2007); MCM, *supra* note 3, pt. IV, ¶¶ 60(c)(1)-(4). While not defining specific offenses outright, the *MCM* does specify certain factual criteria that could meet the elements of either offense. *See* United States v. Jones, 68 M.J. 465, 471-72 (C.A.A.F. 2010); *Guardado*, 75 M.J. at 903. In the absence of a listed offense, counsel may draft a novel specification. *See* MCM, *supra* note 3, pt. IV, ¶ 60(c)(6)(a); *see also* United States v. Saunders, 59 M.J. 1 (C.A.A.F. 2003) (fair notice); United States v. Vaughan, 58 M.J. 29 (C.A.A.F. 2003) (fair notice).

[25] *See Leonard*, 64 M.J. at 382-83; MCM, *supra* note 3, pt. IV, ¶ 60(c)(4). Generally speaking, clause three offenses necessarily imply the statutory element of a "crime[] or offense[] not capital" by expressly alleging an applicable federal statute. *See* MCM, *supra* note 3, pt. IV, ¶ 60(b).

[26] MCM, *supra* note 3, pt. IV, ¶ 60(c)(5)(a).

[27] *See* United States v. Arriaga, 49 M.J. 9, 11-12 (C.A.A.F. 1998); United States v. Maze 45 C.MR. 34, 37-38 (C.M.A. 1972) (stating the "general rule that even if an act may be charged as a 'crime or offense not capital,' the act may also be charged under other parts of Article 134"); United States v. Guardado, 75 M.J. 889, 903 (A. Ct. Crim. App. 2016)), *rev. granted*, 76 M.J. 166 (C.A.A.F. 2017); United States v. Benitez, 65 M.J. 827, 829 (A.F. Ct. Crim. App. 2007); United States v. Wagner, 52 M.J. 634, 637 (N-M. Ct. Crim. App. 1999); MCM, *supra* note 3, pt. IV, ¶ 60(c)(6)(a) (listed and unlisted offenses).

[28] *See Arriaga*, 49 M.J. at 11-12; *Maze*, 45 C.M.R. at 37-38; *Wagner*, 52 M.J. at 637.

[29] United States v. Williams, 29 M.J. 41, 42 (C.M.A. 1989); s*ee Maze*, 45 C.M.R. at 37.

[30] *See* United States v. Medina, 66 M.J. 21, 26 (C.A.A.F. 2008); United States v. Long, 6 C.M.R. 60, 65 (C.M.A. 1952) ("[F]ederal statutes, may be properly tried as offenses under clause (3) of Article 134, but that if the facts do not prove every element of the crime set out in the criminal statutes, yet meet the requirements of clause (1) or (2), they may be alleged, prosecuted and established under one of those."); *Wagner*, 52 M.J. at 637.

[31] *See* United States v. Fosler, 70 M.J. 225, 230 (C.A.A.F. 2011); *Medina*, 66 M.J. at 26; United States v. Leonard, 64 M.J. 381, 382-83 (C.A.A.F. 2007) ("The *MCM* states no preference as to which clause of Article 134, UCMJ, must be used in a particular case.").

[32] *See Guardado*, 75 M.J. at 903. "[W]hen the President lists elements of an offense under Article 134 the President does not create a substantive criminal offense, but simply provides 'guidance . . . regarding potential violations of the article' by 'merely indicating various circumstances in which the elements of Article 134, UCMJ could be met.'" *Id.* (quoting United States v. Jones, 68 M.J. 465, 471-72 (C.A.A.F. 2010)).

offenses do not preempt other charging options.[33] "[A]s the President cannot create a new offense, the enumeration of an offense under Article 134 cannot preempt another Article 134 offense . . . ."[34] If the President lists an offense in the *MCM*, counsel may still allege a novel specification under clauses one or two, or a federal offense under clause three.

There is a narrow exception to this rule related to the mental state required for an offense. The CMA carved out the exception by setting aside a conviction for "wrongfully communicating language [requesting] another to commit a criminal offense" that omitted the broadly-recognized specific intent element for solicitation.[35] "[W]e are convinced that the creation of a lesser-included offense not requiring specific intent flies in the face of the preemption doctrine."[36] Counsel should carefully inspect charges for mental states that vary from those listed in the *MCM* or used at common law. Although preemption generally does not apply between listed and unlisted offenses, the doctrine may prevent the use of Article 134 to skirt the intent requirements of some offenses.[37]

These principles govern the relationship between all three clauses and between listed and unlisted offenses. With these explained as a general overview, readers should now be able to understand application of the actual preemption test more clearly.

IV. How to Apply the *Wright* Test

The CMA formally articulated preemption as a two-prong test in *United States v. Wright.*

> [T]he applicability of the preemption doctrine requires an affirmative answer to two questions. The primary question is whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code; the secondary question is whether the offense charged is composed of a residuum of elements of a specific offense and asserted to be a violation of either Articles 133 or 134, which because of their sweep, are commonly described as the general articles.[38]

The interpretation and application of these two prongs throughout years of case law provides insight into several techniques that counsel should use to accurately apply the test.

A. The Congressional Intent Prong

Examining congressional intent can be intimidating, but gleaning intent from statutes is a common legal task. In the absence of expressly stated intent—which is often the case—practitioners must resort to examining more implicit sources. References in the congressional record or inferences from statutory structure may provide insight. Practitioners may also look to the status quo at the time of changes in the law in order to infer legislative intent from certain decisions concerning statutory schemes. Counsel should use these methods to differentiate between viable alternatives and offenses that should be preempted.

1. Statutory Text

Examination should begin with the statutory text. Unfortunately, legislative intent is seldom, if ever, expressly stated in the UCMJ.[39] Counsel may need to argue word choice and connotations. Examining statutory headings may also be helpful, though they are not controlling.[40] Courts are hesitant to rely on these sources unless the intent to preempt a given field is express.[41] Courts are more likely to interpret legislative history or alternatively infer intent from other circumstances not directly related to the congressional

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[33] *See id.* at *42-44; United States v. Benitez, 65 M.J. 827, 829 (A.F. Ct. Crim. App. 2007).

[34] *Guardado*, 75 M.J. at 903. The *MCM* implicitly endorses this principle. "If conduct by an accused does not fall under any of the listed offenses for violations of Article 134 in this Manual . . . a specification not listed in this Manual may be used to allege the offense." MCM, *supra* note 3, pt. IV, ¶ 60(c)(6)(c).

[35] *See* United States v. Taylor, 23 M.J. 314, 316-18 (C.M.A. 1987).

[36] *Id.* at 318; *see also* United States v. Hill, No. 38848, 2016 CCA LEXIS 291, at *6 (A.F. Ct. Crim. App. May 9, 2016) (unpublished) (distinguishing cases cited by the appellant as "addressing the *mens rea* requirement under criminal law, rather than an extension of the preemption doctrine"); *cf.* United States v. Woodson, 12 C.M.R. 128, 130-31 (C.M.A. 1953) (specific intent and assaults); United States v. Deller, 12 C.M.R. 165, 169 (C.M.A. 1953) (specific intent and absence offenses).

[37] One could argue that there is no exception to the general rule that listed offenses do not preempt other charges under the general article. Noting the sound arguments underlying the general rule articulated in *Guardado*, 75 M.J. at 903, the narrow holding in *Taylor* could be limited to its facts. The listed offense of solicitation is a common-law offense with a widely recognized and well-settled specific intent element, which could distinguish the case from most others.

[38] United States v. Wright, 5 M.J. 106, 110-11 (C.M.A. 1978).

[39] *See, e.g.*, United States v. Gomez, 46 M.J. 241, 244 (C.A.A.F. 1997); United States v. Taylor, 38 C.M.R. 393, 395 (C.M.A. 1968).

[40] *See* United States v. Erickson, 61 M.J. 230, 233 (C.A.A.F. 2005) (Article 112a's heading did not preclude using Article 134 to punish wrongful use of other mind-altering substances); *Gomez*, 46 M.J. at 244 (attempts and assaults possible outside of Articles 80 and 128, respectively).

[41] *See Gomez*, 46 M.J. at 244 ("No codal provision was enacted which expressly prohibited [the offense]."); *Taylor*, 38 C.M.R. at 395 ("Nothing in the language, or the arrangement, of Article 115 indicates that Congress intended to eliminate the existing offense . . . .").

record.[42] As a result, counsel will typically need to examine alternative sources.

2. Congressional Record

Short of having a statute that expressly states a position on preemption, a reference in the congressional record can be an effective alternative. Evidence in the record may offer persuasive evidence for what legislators intended when passing a particular statutory scheme. There are two major trends in applying legislative history for preemption that merit emphasis.

First, sexual offenses have received increased congressional scrutiny over the past decade.[43] As a result, there is an atypical amount of evidence in legislative history that indicates Congress's intent with regard to sexual misconduct.[44] Courts have responded by consistently holding that Article 120b is a "comprehensive sexual conduct article" that preempts many child sexual offenses.[45] In contrast, courts have not found that Article 120's legislative history indicates a similar intent with regard to adult offenses.[46] Whenever charging adult or child sexual offenses, counsel should closely examine these cases in order to determine whether preemption applies to a particular offense.

Next, courts are reluctant to place much weight on legislative history unless it is clearly on point.[47] Counsel should carefully compare legislative history to applications in case law with this in mind. For example, advisory comments made during subcommittee hearings when the UCMJ was first adopted provided that the Code "differs from current service practice in that assaults with intent to commit specific crimes [e.g., assault with intent to commit rape] have been eliminated. Such assaults could be punished under Article 80 (attempts), or . . . [Article 128]."[48] Despite these advisory comments, the President listed assault with intent to commit rape as a general article offense in the *MCM*.[49] The Court of Appeals for the Armed Forces (CAAF) upheld the offense by construing the statutory language "though not specifically mentioned in this chapter" strictly to mean that Article 134 could be used unless the crime was "specifically delineated" in the Code.[50] Thus, even a reference to *eliminating* a practice may not be dispositive in light of other factors.

Similar scrutiny has been applied to legislative history in drug offense cases. Strong language in the congressional record indicates that Congress intended for Article 112a to eliminate the need to prosecute controlled substance offenses under Article 134.[51] Despite this language, Article 112a only preempts offenses under clauses one and two—not clause three— because the CMA found that the federal counter-drug statutory scheme was meant to simplify drug prosecutions.[52] Had the court extended preemption to clause three, it would have frustrated Congress's intent to address the drug problem using the federal scheme.[53]

These examples illustrate the high bar that counsel face when arguing that preemption applies based upon legislative history. When researching the congressional record, counsel should closely examine subcommittee hearings, committee reports, and commentary by drafters.[54] These sources provide insight into the actual considerations of the legislature when a statute was passed, whereas other sources require more deduction and speculation. Outside of the Article 120b arena, counsel should not expect to successfully preempt offenses listed under the general article or unlisted offenses that have

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[42] *See, e.g.*, *Taylor*, 38 C.M.R. 393 (subcommittee hearings and committee reports); United States v. Norris, 8 C.M.R. 36, 39 (C.M.A. 1953) (subcommittee hearings).

[43] *See* MCM, *supra* note 3, pt. IV, ¶ 45 (referencing three versions of the statute between 2007 and 2016).

[44] *See, e.g.*, United States v. Feldkamp, No. 38493, 2015 CCA LEXIS 172, at *29 (A.F. Ct. Crim. App. May 1, 2015) (unpublished); United States v. Long, No. 1756, 2014 CCA LEXIS 386, at *12-13 (A.F. Ct. Crim. App. July 2, 2014).

[45] *See* United States v. Rodriguez (*Rodriguez I*), No. 20130577, 2015 CCA LEXIS 551, at *18-24 (A. Ct. Crim. App. December 1, 2015) (unpublished), *aff'd on reh'g*, 2016 CCA LEXIS 145 (A. Ct. Crim. App. March 7, 2016) (unpublished); *Long*, 2014 CCA LEXIS 386, at *11-13. However, even in the Article 120b arena, the residuum element must still be met in order for preemption to apply. *See* United States v. Costianes, No. 38868, 2016 CCA LEXIS 391, at *18-19 (A.F. Ct. Crim. App. June 30, 2016) (unpublished).

[46] *See Feldkamp*, 2015 CCA LEXIS 172, at *27-31; United States v. Quick, 74 M.J. 517, 522-23 (N-M. Ct. Crim. App. 2014); United States v. Kowalski, 69 M.J. 705, 707 (C.G. Ct. Crim. App. 2010).

[47] *See, e.g.*, United States v. Gomez, 46 M.J. 241, 245 (C.A.A.F. 1997) (finding the legislative history "troubling," but nevertheless finding other factors more persuasive).

[48] *Id.* at 244 (citing Hearing on H.R. 2498 Before the Subcomm. of the H. Armed Serv. Comm., 81st Cong., 1st Sess. 1234 (1950)).

[49] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 64 (1984) [hereinafter 1984 MCM].

[50] *Gomez*, 46 M.J. at 245. "The Manual's drafters apparently felt that the express language of Article 134 on when to charge offenses under that codal article took precedence over advisory comments in the legislative history . . . ." *Id.* at 245 n.4.

[51] *See* United States v. Reichenbach, 29 M.J. 128, 136-37 (C.M.A. 1989). The court's reluctance to interpret legislative history broadly resulted in an anomalous case with preemption applying differently to clauses one and two compared to clause three. See *id.*

[52] *See id.* at 137 ("[Article 112a's] goal is quite consistent with the purpose of the third clause of Article 134—namely, to allow military authorities to prosecute misconduct that could be the basis for criminal prosecution in a federal district court.").

[53] *See id.*

[54] *See, e.g.*, United States v. Taylor, 38 C.M.R. 393 (C.M.A. 1968) (subcommittee hearings, committee reports, commentary by drafters of original UCMJ proposal); United States v. Norris, 8 C.M.R. 36, 39 (C.M.A. 1953) (Senate subcommittee hearings).

generally been approved through consistent practice; courts tend to give these factors more weight while analyzing congressional intent than imprecise references in legislative history.

3. Statutory Structure

The relationship between a set or series of statutes can often indicate whether Congress intends to preempt a certain field. A statutory scheme is preemptive where a set of statutes,

> taken together make criminal a single form of wrongful behavior while distinguishing (say, in terms of seriousness) among what amount to different ways of committing the same basic crime. At the same time, a substantial difference in the kind of wrongful behavior covered (on the one hand by the state statute, on the other, by federal enactments) will ordinarily indicate a gap for a state statute to fill—unless Congress, through the comprehensiveness of its regulation, or through language revealing a conflicting policy, indicates to the contrary in a particular case.[55]

Although this standard technically applies outside of the UCMJ context, its reasoning logically extends to preemption under Article 134; the inquiry in both frameworks is whether Congress intended to cover a particular field with its legislation.[56] Absence and larceny offenses are helpful illustrations of how multiple statutes can impact the intent analysis.

Articles 85, 86, and 87 cover various offenses where a person is generally not where he or she is supposed to be.[57] All three articles describe carefully delineated scenarios for when an unauthorized absence is punishable.[58] When comparing the three articles, it is evident that Congress intended the three articles to cover all absence offenses by describing a complete set of offenses distinguishable by degree of seriousness.[59] Missing movement bridges the gap between Articles 85 and 86, providing commanders with a range of options covering all degrees of the offense that Congress intended to proscribe.[60]

Similarly, larceny under Article 121 covers conversion offenses in a complete way.[61] The article deliberately consolidates the discrete common law offenses of larceny, false pretenses, and embezzlement.[62] These crimes are distinguishable by the method used to commit the offense. This diverse coverage shows that "Congress has, in Article 121, covered the entire field of criminal conversion for military law."[63]

These examples illustrate how a group of statutes can define offenses in such a deliberate way that it shows Congress's intent to preempt the field. On the other hand, having more than one statute cover criminal conduct may indicate that Congress intended certain conduct to be punishable in various ways. To clarify this point, compare the articles applicable to bad check offenses. Articles 121 and 123a contain elements that describe some type of misrepresentation.[64] Article 123a defines a more specific offense in that the misrepresentation must pertain to the accused's sufficiency of funds or credit.[65] This overlap indicates Congress did not intend to cover the field of bank transaction cases with Article 123a.[66] To the contrary, the article "created an additional and simplified method of prosecuting bad check offenses within the military but did not eliminate from prosecution under Article 121 the offense of larceny by false pretenses involving bad checks."[67] Hence,

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[55] Lewis v. United States, 523 U.S. 155, 165-66 (1998) (internal citations omitted).

[56] *See* United States v. Robbins, 52 M.J. 159, 162 (C.A.A.F. 1999). *Robbins* involved a state law assimilated under the Federal Assimilative Crimes Act (FACA), 18 U.S.C. § 13 (2012), and charged under clause three. *Id*. at 159.

[57] *See* UCMJ arts. 85-87 (2012) (desertion, absence without leave, and missing movement).

[58] *See id*.

[59] *See* United States v. Johnson, 11 C.M.R. 174, 177-78 (C.M.A. 1953); *see also* United States v. Deller, 12 C.M.R. 165, 169 (C.M.A. 1953) (affirming the holding in *Johnson*).

[60] *See Johnson*, 11 C.M.R. at 177-78. *Compare* UCMJ art. 85 (2012) *with* UCMJ art. 86 (2012). This argument is further supported by the *Manual*'s explanation for Article 86 that the "article is designed to cover every case not elsewhere provided for" relating to absence offenses. MCM, *supra* note 3, pt. IV, ¶ 10(c)(1).

[61] *See* United States v. Norris, 8 C.M.R. 36, 39 (C.M.A. 1953).

[62] *See* United States v. McFarland, 23 C.M.R. 266, 269 (C.M.A. 1957); *Norris*, 8 C.M.R. at 39; MCM, *supra* note 3, pt. IV, ¶ 46(c)(1)(a).

[63] *Norris*, 8 C.M.R. at 39. This is distinguishable from using the general article to allege an offense not covered by an enumerated article. *See, e.g.*, United States v. Bonavita, 45 C.M.R. 181, 182 (C.M.A. 1972) (distinguishing concealment of stolen property from Article 121); *McFarland*, 23 C.M.R. at 269 (distinguishing receipt of stolen property from Article 121); United States v. Jones, 66 M.J. 704, 707 (A.F. Ct. Crim. App. 2008) ("[W]e do not find fault with charging a general Article 134, UCMJ violation in a circumstance where the evidence does not fit into the language of [an enumerated or listed] offense.").

[64] *See* UCMJ arts. 121, 123a(2) (2012); MCM, *supra* note 3, pt. IV, ¶¶ 46(c)(1)(e), 49(c)(10).

[65] *See* MCM, *supra* note 3, pt. IV, ¶ 49(c)(10). Such a misrepresentation would also qualify as a false pretense under Article 121. *See Jones*, 66 M.J. at 706-07.

[66] *See Jones*, 66 M.J. at 707.

[67] United States v. Letourneau, 32 C.M.R. 909, 912 (A.F.B.R. 1962).

overlapping statutes are an important factor in determining that preemption does not apply.[68]

Whether multiple statutes indicate an intent to preempt depends on how they collectively address the conduct at issue. If the statutes describe a variety of offenses that collectively form a spectrum, this implies that Congress intended to cover the field in a deliberate, preemptive way.[69] The spectrum may be based on a variety of factors, such as the level of aggravation involved or how the particular crime is carried out.[70] On the other hand, if each statute criminalizes distinct conduct with distinguishable statutory purposes, this shows Congress did not intend to occupy the field in a complete way.[71] This is evident when one statute describes a broad range of conduct, whereas another contains more specific elements to simplify the prosecution of a specialized crime.[72]

4. Prior Practice

The status quo can be a powerful tool in arguing congressional intent. Knowing what practices were common when a statute entered into force provides insight into why a particular course of action was or was not necessary. When attempting to decipher whether Congress intended for an enumerated article to preempt the field, it is critical to understand what the prior practices were under both the AoW and UCMJ.

As a case in point, negligent homicide was upheld as a general article offense even though it was not mentioned in either Articles 118 or 119, UCMJ.[73] Prior to the adoption of the UCMJ, negligent homicide was prosecuted as a lesser included offense of murder and manslaughter under the AoW.[74] The CMA found it was "reasonable to assume that Congress was aware of the existence of such military law when" adopting the UCMJ.[75] The court cited this pre-UCMJ practice as a "special reason" for not addressing negligent homicide in either Articles 118 or 119.[76]

The court similarly upheld the offense of assault on a commissioned officer not in the execution of his office under Article 134, prior to its inclusion as an aggravated offense under Article 128.[77] Prior to the UCMJ, the offense was prosecuted separately from assaults on officers who were in execution of their offices.[78] "With that practice extant . . . prior to the Uniform Code, we surely cannot find any indication of Congressional intent to change the situation and preempt the field when . . . the pattern was perpetuated and ratified. The present Manual merely continues a practice already sanctioned under prior law . . . ."[79] As these examples show, a prior practice under the general article may survive the adoption of an enumerated article unless there is clear evidence that Congress intended that the practice end.[80] Defense counsel should look for evidence indicating an intent to change the status quo, otherwise, a prior practice will likely be upheld.

In summary, legislative intent is often elusive. Congress does not typically state why it does or does not take a particular course of action with any clarity. Accordingly, counsel must be prepared to use several techniques in order to divine what Congress intended. Drawing inferences from statutory structure or prior practice can be more helpful than looking to a statute's text or legislative history, given the relative infrequency that preemption is addressed in the latter. Look for all of the statutes that address the conduct in question, then determine if the statutory scheme addresses the behavior in a comprehensive way, or if the statutes are merely alternative options for punishing factually similar crimes with distinguishable statutory purposes.

It is important to keep in mind that congressional intent is only half of the inquiry. A trial court may find that Congress intended an enumerated statute was intended to cover the field in a complete way but still not preempt use of the general article.[81] In order for preemption to apply, the general article offense must still offend the residuum prong of the *Wright* test.

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[68] *See Jones*, 66 M.J. at 707; *cf.* United States v. Barnes, 34 C.M.R. 347, 349 (C.M.A. 1964) ("What is presented, then, is a situation in which an accused's conduct might violate either of two specific statutes, *i.e.*, according to the evidence, constitute either larceny by false pretenses or the making and uttering of a worthless check. Under such circumstances, the doctrine of preemption is not involved.").

[69] *See* Lewis v. United States, 523 U.S. 155, 164-66 (1998); United States v. Robbins, 52 M.J. 159, 160-63 (C.A.A.F. 1999).

[70] *See Lewis*, 523 U.S. at 165-66; s*ee, e.g.*, United States v. Johnson, 11 C.M.R. 174, 177-78 (C.M.A. 1953).

[71] *See, e.g.*, *Robbins*, 52 M.J. at 163; *Jones*, 66 M.J. at 707; *Letourneau*, 32 C.M.R. at 912.

[72] *See, e.g.*, *Jones*, 66 M.J. at 707; *Letourneau*, 32 C.M.R. at 912.

[73] *See* United States v. Kick, 7 M.J. 82, 85 (C.M.A. 1979).

[74] *See id.*

[75] *Id.*

[76] *Id.*

[77] *See* United States v. Toutges, 32 C.M.R. 425, 426-27 (C.M.A. 1963).

[78] *See id.*

[79] *Id.* at 427.

[80] *See* United States v. Norris, 8 C.M.R. 36, 39 (C.M.A. 1953); United States v. Rodriguez (*Rodriguez I*), No. 20130577, 2015 CCA LEXIS 551, at *18-24 (A. Ct. Crim. App. December 1, 2015) (unpublished), *aff'd on reh'g*, 2016 CCA LEXIS 145, (A. Ct. Crim. App. March 7, 2016) (unpublished); United States v. Long, No. 1756, 2014 CCA LEXIS 386, at *12-13 (A.F. Ct. Crim. App. July 2, 2014).

[81] *See* United States v. Hill, No. 38848, 2016 CCA LEXIS 291, at *4-5 (A.F. Ct. Crim. App. May 9, 2016) (unpublished); *see also* United States v. Costianes, No. 38868, 2016 CCA LEXIS 391, at *18-19 (A.F. Ct. Crim. App. June 30, 2016) (unpublished) (clarifying *Hill*).

B. The Residuum Prong

Whereas the congressional intent prong involves somewhat nebulous arguments concerning inferences from various sources, the residuum prong is typically more straightforward in its application. Practitioners should already be familiar with the traditional elemental analysis used to compare and contrast the elements between different offenses. For example, common legal tests in military practice consist of comparing elements in order to assess double jeopardy protections or determine whether an offense is a lesser included offense of another.[82]

For preemption, the inquiry is simply "whether the offense charged is composed of a residuum of elements of a specific offense."[83] An element may be deleted altogether, or it may be constructively deleted by broadening the standard set by the statute. For instance, using clauses one or two to charge a state law violation that defines a child as a person under the age of eighteen would improperly broaden the definition of a child under the UCMJ as a person under the age of sixteen.[84] While the question of whether a residuum exists appears simple, it can be difficult to answer depending on the charges involved.

There are several common difficulties in the analysis. Statutes may define elements using different language, or use multiple elements to define what is a single element in another offense.[85] In other cases, a general article offense may substitute a key fact from an element of an enumerated offense, such as exchanging theft of *property* under Article 121 with theft of *services* under Article 134.[86] These variations can make it unclear whether a vital element was eliminated. Courts have adapted to such challenges by developing an alternative technique for use when elemental comparisons are not straightforward.

To simplify matters, courts often compare and contrast the statutory purposes underlying each offense to determine whether an enumerated offense was improperly broadened.[87] If a general article offense has a distinct statutory purpose, courts generally find that the residuum prong is not met.[88] Charging a residuum is distinguishable from charging an offense that focuses on a nuance not fully captured by an enumerated offense.[89] Preemption does not preclude charging alternative offenses with unique purposes just because elements happen to overlap with an enumerated offense.[90]

Consider the case of *United States v. Robbins*, in which the accused assaulted his pregnant wife and caused the early

[82] *See* Blockburger v. United States, 284 U.S. 299, 304 (1932) ("whether each provision requires proof of a fact which the other does not"); United States v. Jones, 68 M.J. 465, 470 (C.AA.F. 2010); United States v. Teters, 37 M.J. 370 (C.M.A. 1993).

[83] United States v. Wright, 5 M.J. 106, 111 (C.M.A. 1978). Two early cases prior to *Wright* imply that preemption is not limited to offenses where vital elements are deleted, but also includes offenses where elements are added under the general article in order to create an aggravated offense. *See* United States v. Herndon, 36 C.M.R. 8, 10 (C.M.A. 1965) (stating in dicta that a residuum is not always required); United States v. McCormick, 30 C.M.R. 26, 28 (C.M.A. 1960) (plurality opinion) (stating the doctrine is not limited to deletions of vital elements). However, *McCormick* has no precedential value because the concurring judges in the plurality opinion did not agree with the principal opinion's expansion of the doctrine. *See McCormick*, 30 C.M.R. at 28 (Quinn, C.J. and Latimer, J., concurring in the result). The cases *McCormick*'s principal opinion cites are best understood as concerning alterations to specific intent elements, not creating a new variation of preemption. *See* United States v. Woodson, 12 C.M.R. 128 (C.M.A. 1953) (specific intent for certain assaults); United States v. Deller, 12 C.M.R. 165 (C.M.A. 1953) (specific intent for absence offenses). The post-*Wright* trend is to strictly apply the residuum standard. *See, e.g.*, United States v. Kick, 7 M.J. 82, 85 (C.M.A. 1979); United States v. Maze, 45 C.M.R. 34, 36-37 (C.M.A. 1972); *Costianes*, 2016 CCA LEXIS 391, at *18-19; *Hill*, 2016 CCA LEXIS 291, at *4; United States v. Feldkamp, No. 38493, 2015 CCA LEXIS 172, at *33 n.7 (A.F. Ct. Crim. App. May 1, 2015) (unpublished) (distinguishing attempts to broaden enumerated offenses from charging "additional elements"); United States v. Taylor, No. 200600526, 2007 CCA LEXIS 176, at *21 n.7 (N-M Ct. Crim. App. May 23, 2007) (unpublished). *But see* United States v. Wiegand, 23 M.J. 644, 645 n.3 (A.C.M.R. 1986).

[84] *See Long*, 2014 CCA LEXIS, at *8-9; *cf.* United States v. Robbins, 52 M.J. 159 (C.A.A.F. 1999).

[85] *See Rodriguez I*, 2015 CCA LEXIS 551, at *9 (comparing "wrongfully annoy or molest" under state law and "lewd act" under the UCMJ); *Long*, 2014 CCA LEXIS, at *8 ("We are not convinced by the Government's argument that use of 'a computer communication system' is materially different from using 'any communication technology.'"). For example, Article 80 covers attempts to commit UCMJ offenses, whereas attempts in violation of state or federal laws fall under Article 134. *See* MCM, *supra* note 3, pt. IV, ¶¶ 60(c)(2)-(4). Article 80 breaks the overt act requirement for the crime of attempt into three elements, but other jurisdictions may use fewer. *See id.* pt. IV, ¶ 4(b). Alleging an attempt under the general article that uses fewer elements for the overt act requirement can create a perception that an element was eliminated from Article 80. *See Taylor*, 2007 CCA LEXIS 176, at *21-22. Despite the different language or number of elements used, though, the underlying standard for proving the overt act—a substantial step—may be the same. *Id.* at *23-27; *see also* United States v. Byrd, 24 M.J. 286, 290 (C.M.A. 1987) (Article 80 and substantial step); MCM, *supra* note 3, pt. IV, ¶ 4(c)(2). In that case, charging an attempt under Article 134 would not omit any of the essential elements of Article 80. *Taylor*, 2007 CCA LEXIS 176, at *27.

[86] *See Herndon*, 36 C.M.R. at 10-11.

[87] *See* United States v. Anderson, 68 M.J. 378, 387 (C.A.A.F. 2010); United States v. Robbins, 52 M.J. 159, 163 (C.A.A.F. 1999); *Herndon*, 36 C.M.R. at *11; United States v. McNaughton, No. 20090089, 2009 CCA LEXIS 187, at *2-3 (A. Ct. Crim. App. April 16, 2009) (unpublished); United States v. Benitez, 65 M.J. 827, 828-29 (A.F. Ct. Crim. App. 2007); United States v. Supapo, 61 M.J. 718, 719-20 (C.G. Ct. Crim. App. 2005). This is always a consideration when using clause three, since a federal or assimilated state statute will always be alleged. *See* MCM, *supra* note 3, pt. IV, ¶ 60(c)(4). In addition, practitioners often model general article specifications under clauses one and two on state or federal laws, each with their own legislative purpose. *See id.* pt. IV, ¶¶ 60(c)(2)(a), (3) (referencing "act[s] in violation of a local civil law").

[88] *See Anderson*, 68 M.J. at 387; *Robbins*, 52 M.J. at 163; *Herndon*, 36 C.M.R. at *11; *McNaughton*, 2009 CCA LEXIS, at *2-3; *Benitez*, 65 M.J. at 828-29; *Supapo*, 61 M.J. at 719-20.

[89] *See supra* note 87.

[90] *See* United States v. Hill, No. 38848, 2016 CCA LEXIS 291, at *6-7 (A.F. Ct. Crim. App. May 9, 2016) (unpublished); *McNaughton*, 2009 CCA LEXIS, at *2-3; *Benitez*, 65 M.J. at 828-29; Supapo, 61 M.J. at 719-20.

termination of her pregnancy.[91] The CAAF distinguished the offenses of involuntary manslaughter under Article 119 and unlawful termination of a pregnancy under an assimilated state statute using clause three.[92] The issue was whether the state law protecting all unborn children enlarged the definition of "human being" used in involuntary manslaughter, which did not include unborn children.[93] The court found that the state statute did not enlarge an enumerated offense; rather, the state law was distinct from homicide because it specifically intended to protect unborn children.[94] It appropriately filled a gap in Congress's legislation of crimes specifically against unborn children.[95] Therefore, when traditional elemental comparison is difficult, distinct statutory purposes can have a significant impact on preemption.

The final point on the residuum prong is that *United States v. Jones* and *United States v. Fosler* have had little, if any, meaningful impact on the preemption doctrine.[96] These cases clarified that the terminal elements in clause one and two offenses must be alleged and proved like any other statutory element.[97] There is an argument that this necessarily prevents a clause one or two offense from ever being a residuum of an enumerated offense.[98] The offenses require proof of an additional fact—a terminal element—so logically they could never be a residuum of an enumerated offense. However, the service courts thus far have demurred to precedent and declined to find that preemption has been implicitly overruled.[99] Preemption continues to survive despite the terminal element, but counsel should continue making the argument until the matter is decided by the CAAF.

In summary, the residuum prong can appear much easier to apply in theory than it is in reality. Counsel need to carefully examine elements in order to determine if differences in the statutory language used, the number of elements used, or the facts required by each offense are significant. In addition, practitioners should always research the statutory purpose of each offense in order to decide if each offense addresses unique aspects of misconduct. Finally, it is critical to remember that the residuum prong must be met in order for preemption to apply, regardless of how strong the evidence of congressional intent to preempt may be. A court may avoid the congressional intent question altogether if the residuum element is clearly not met.[100] With the substantive elements of the *Wright* test explained, a significant distinction needs to be addressed in order for counsel to competently apply the doctrine in practice.

V. FACA Preemption

A common pitfall in analyzing preemption is conflating the doctrine with the distinct preemption principles specific to the Federal Assimilative Crimes Act (FACA), a federal law often charged under clause three.[101] This statute acts as a gap-filler by assimilating state criminal statutes into federal law in areas of exclusive federal jurisdiction.[102] If there is no federal or military offense applicable, the statute adopts the law of the state where the federal jurisdiction is located.[103] To clarify, many federal statutes can be charged under clause three, one of which looks to state law in order to define certain offenses in a limited set of circumstances. The preemption doctrine regulates the relationship between these three clauses and the enumerated articles.

Preemption has a tangled relationship with the FACA, which has its own preemption "element" written into the

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[91] *Robbins*, 52 M.J. 159. This case predates the adoption of Article 119a, which covers death or injury to an unborn child. Articles 118 and 119 defined "human being" in accordance with the common law, which required a child to be born alive. *See id.* at 163.

[92] *See id.*

[93] *See id.* at 162-63.

[94] *See id.* at 163.

[95] *See id.* ("[W]e conclude that the offense . . . is not 'a residuum of elements of a specific offense,' but instead is a separate offense proscribed by [state law].").

[96] United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011); United States v. Jones, 68 M.J. 465 (C.A.A.F. 2010); *see* United States v. Costianes, No. 38868, 2016 CCA LEXIS 391, at *7-8 (A.F. Ct. Crim. App. June 30, 2016) (unpublished). These cases explained the relationship of Article 134's terminal elements to notice pleading and the determination of lesser included offenses under the "necessarily included" standard of Article 79. *See Fosler*, 70 M.J. at 226-32.

[97] *See Fosler*, 70 M.J. at 226-32; *Jones*, 68 M.J. at 470. With regard to clause one and two offenses, specifications must allege the terminal element either expressly or by necessary implication. *Fosler*, 70 M.J. at 226-32. Lesser included offenses do not need to be charged if they are "necessarily included" in a charged offense, which are determined by comparing the elements of each offense. *See Jones*, 68 M.J. at 470; United States v. Teters, 37 M.J. 370, 375-76 (C.A.A.F. 1993).

[98] *See* United States v. Girouard, 70 M.J. 5, 9 (C.A.A.F. 2011).

[99] *See* United States v. Guardado, 75 M.J. 889, 902 (A. Ct. Crim. App. 2016), *rev. granted*, 76 M.J. 166 (C.A.A.F. 2017); *Costianes*, 2016 CCA LEXIS, at *7-8; United States v. Rodriguez (*Rodriguez II*), No. 20130577, 2016 CCA LEXIS 145, at *4-5 (A. Ct. Crim. App. March 7, 2016) (unpublished); United States v. Rodriguez (*Rodriguez I*), No. 20130577, 2015 CCA LEXIS 551, at *11 (A. Ct. Crim. App. December 1, 2015) (unpublished); United States v. Long, No. 1756, 2014 CCA LEXIS, at *9-10 (A.F. Ct. Crim. App. July 2, 2014).

[100] *See, e.g.*, United States v. Hill, No. 38848, 2016 CCA LEXIS 291, at *4 (A.F. Ct. Crim. App. May 9, 2016) (unpublished) ("In this case, we need not delve into congressional intent because the offense alleged did not consist of a residuum of another offense.").

[101] 18 U.S.C. § 13 (2012).

[102] *See* United States v. Wright, 5 M.J. 106, 111 (C.M.A. 1978). Under the FACA, the state laws *become* federal law, but only if there is a legitimate gap to be filled. FACA preemption is the analysis that determines whether a gap truly exists. If there is no gap, then state law may not be assimilated. *Id.*

[103] *See* 18 U.S.C. § 13; *Wright*, 5 M.J. at 111.

statute.[104] While the preemption doctrine applies to all three clauses under Article 134, FACA preemption only applies when the offense is charged under clause three by alleging the FACA as the federal statute violated.[105] Confusion arises due to the similarity in the standards applied under the two different doctrines.

The FACA allows for the assimilation of state crimes unless they are already "punishable by any act of Congress."[106] This phrase places a limiting construction on the statute, making it inapplicable if federal law has already occupied the offense. Under FACA preemption, the test has two prongs. First, counsel must ask if the offense is already "made punishable by *any* act of Congress."[107] Next, counsel must determine if an applicable federal statute preempts assimilation of the state law,

> because its application would interfere with the achievement of a federal policy, because the state law would effectively rewrite an offense definition that Congress carefully considered, or because federal statutes reveal an intent to occupy so much of a field as would exclude use of the particular state statute at issue . . . .[108]

While this paper does not discuss FACA preemption in depth, counsel at a minimum must understand the different standards applied under each doctrine.[109] Noticeably, the *Lewis* test does not contain a residuum prong, making the test much more restrictive than preemption under *Wright*. Counsel must guard against applying FACA preemption when it does not apply, and must ensure that military judges do the same when ruling on preemption motions. When conducting research and arguing motions, it is vital to distinguish those cases that are applying both doctrines so that they are not conflated by the court or counsel.

VI. Conclusion

Counsel practicing in military justice will inevitably confront Article 134, either as a charging option or as charge that they must defend against. For trial counsel, incorrectly applying the doctrine could lead to limiting your charging options unnecessarily, which could lead to unfortunate second and third order effects. For the defense bar, competent representation requires that counsel be able to identify improper specifications in order to limit clients' criminal exposure. There are several learning points that can assist in avoiding issues for trial and defense counsel alike. For both prongs of the *Wright* test, it is imperative to compare, contrast, and distinguish the statutory elements and purposes of the various enumerated offenses involved. Thorough analysis allows counsel to correctly categorize a statutory scheme as either a comprehensive set of offenses, or merely alternative methods of prosecuting distinct crimes. Success during litigation often hinges upon identifying nuances between offenses, so these techniques are essential for counsel to master.

The preemption doctrine is not as intuitive as the *Manual*'s vague description suggests. Looking to case law, courts are somewhat reluctant to dismiss Article 134 offenses in the absence of inescapable proof that Congress intended to cover the field. Practitioners must understand that the doctrine imposes a higher bar than the *Manual* implies, and must look to various factors highlighted in case law interpreting the two prong *Wright* test to correctly apply the doctrine.

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[104] *Guardado*, 75 M.J. at 900.

[105] *See Costianes*, 2016 CCA LEXIS 391, at *16 (applying the preemption element of the FACA distinctly from general preemption). In other words, FACA preemption does not apply to charges under clauses one or two, and does not apply to other federal statutes charged under clause three. *See id.*

[106] 18 U.S.C. § 13(a).

[107] Lewis v. United States, 523 U.S. 155, 164 (1998) (quoting 18 U.S.C. § 13(a)).

[108] *Id.* at 164-65 (internal citations omitted).

[109] The FACA's preemption element is more restrictive by preventing the assimilation of a state statute that "generally seeks to punish the same wrongful behavior' as a federal statute, whereas the residuum prong makes general preemption more permissive. *Costianes*, 2016 CCA LEXIS, at *16; *see* United States v. Rodriguez (*Rodriguez II*), No. 20130577, 2016 CCA LEXIS 145, at *6 (A. Ct. Crim. App. March 7, 2016) (unpublished) (citing *Lewis*, 523 U.S. at 165).

A Formal Guide to Commander's Informal Funds: Background, Set-Up, and Best Practices

Major Josiah T. Griffin[*]

There is no better way to inculcate ethics in organizations than through the education of their leaders. Even their minor decisions are closely observed and treated as precedent, reverberating down the chain of command. In military organizations in particular, the more senior the commander, the wider the influence exerted and its resulting perversion, should the influence be flawed.[1]

I. Introduction

Imagine the following hypothetical situation: As a new administrative law attorney, you are reviewing an Army Regulation (AR) 15-6 investigation involving the mismanagement of a battalion informal fund (IF). The First Infantry Battalion (1st IN BN) recently held their annual unofficial dining-out function at an off-post location. This event was primarily funded via direct ticket sales to members of the unit. Although ticket sales were sufficient to pay for each attendee's catered meal, there was not enough money left to pay for the venue rental. To make up the difference, the battalion commander decided to expend all money in the 1st IN BN IF, with any outstanding balance coming from the commander's own personal funds. After completely exhausting the IF, the commander paid the remaining amount using personal funds totaling $1,000. Several weeks later, the battalion sent Soldiers to work at a Morale, Welfare, and Recreation (MWR) event during official duty time to raise money for the exhausted IF and to reimburse the commander for his $1,000 out-of-pocket expenditure. The battalion commander allegedly encouraged his Soldiers to volunteer to work at the MWR event in order to "build-up the unit activity fund for future events." Furthermore, he promised a four-day pass for the squad that worked the most hours. Through their volunteer efforts, battalion members managed to raise more than enough money to reimburse the commander and to reestablish the depleted IF.

Does anything in the above hypothetical give you cause for concern? It should. Not only did the fundraiser possibly violate the Joint Ethics Regulation (JER) prohibition on receiving "a salary supplement for the performance of DoD duties,"[2] it also had the appearance of personally enriching the battalion commander. Moreover, the four-day pass promise was a prohibited inducement to volunteer.[3] Among other things, this investigation discovered that the battalion had no IF standard operating procedure (SOP) and poor accounting overall. The investigation determined that the battalion commander violated the JER and improperly benefitted personally from this incident. You found the investigation legally sufficient, and subsequently discovered that the appointing authority directed a permanently-filed letter of reprimand for this commander. When the dust settled, you resolved to reflect on what the unit could have done differently—could the commander have avoided this negative outcome and could a judge advocate have helped in some way?

Informal funds are activities of a limited scope, funded by military members and civilian employees, designed to support unofficial activities for those personnel.[4] These funds are ideal to support unofficial activities or events that do not qualify for appropriated funds.[5] They also present a consistent management challenge across the Army.[6] This article will examine how a few critical control measures enable the efficient and ethical operation of commander's informal funds. With some controls in place, the entire hypothetical 1st Infantry saga could have been avoided. This article attempts to serve as a formal guide to informal funds, including explanations of the policy framework for IFs, tips for set-up, and best practices for smooth operation. Part II

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[1] A. Edward Major, *Ethics Education of Military Leaders*, MILITARY REV., Mar.-Apr. 2014, at 55, 56.

[2] U.S. Dep't of Def., 5500.7-R, Joint Ethics Regulation (JER) para. 3-205 (30 Aug. 1993) [hereinafter JER]. *See also* U.S. Dep't of Def. Standards of Conduct Off. (SOCO), Encyclopedia of Ethical Failure 127 (Sept. 2016).

[3] U.S. Dep't of Army, Reg. 600-29, Fund-Raising Within the Department of the Army para. 1-10e. (7 Jun. 2010) [hereinafter AR 600-29].

[4] U.S. Dep't of Def., Instr. 1000.15, Procedures and Support for Non-Federal Entities Authorized to Operate on DoD Installations para. 14 (24 Oct. 2008) [hereinafter DoDI 1000.15].

[5] Commander's informal funds (IFs) are not unit funds, and should not be used to augment official events funded through appropriated funds. 31 U.S.C. § 1341(a)(1)(A) (2016). Additionally, family readiness group (FRG) IFs are separate and distinct from commander's IFs, and augmenting commander's IFs with FRG IFs is not authorized. U.S. DEP'T OF ARMY, REG. 608-1, ARMY COMMUNITY SERVICE para. J-7a (22 Dec. 2016) [hereinafter AR 608-1]. The language used in paragraph J-7a is "the unit's informal funds (the unit's cup and flower funds)." *Id.* However, this article recommends using the term *commander's informal fund.* The term *commander's informal fund* better distinguishes between the unit's appropriated funds and unofficial IFs, than does the term *unit informal funds*.

[6] This assertion is based on the author's professional experiences as an administrative law attorney for the First Armored Division and the Military and Civil Law Division, USAREUR.

covers the background and history of IFs. Part III discusses IF policy in depth, including Department of Defense (DoD) guidance, a comparison of sister service policies, and a more comprehensive exposition of Army IF guidance. Part IV consists of best practices for commanders and judge advocates to deliver efficient and ethical management. Finally, Appendix A is a sample battalion-level IF SOP.

II. Background

This section describes the history of IFs and, more specifically, of fundraising in the federal workplace, since the two histories are so intertwined. In order to properly contextualize IFs, it is important to understand how they came to exist.

A. Fundraising

1. Fundraising in the Federal Workplace

The history of fundraising in the federal workplace is a history of incrementally increasing oversight over the course of the last 70 years. Prior to the administration of President Dwight Eisenhower, there was no substantial executive guidance covering fundraising in the federal workplace.[7] The current Combined Federal Campaign (CFC) describes this period prior to the 1950s as "an uncontrolled free-for all" [8] for "on-the-job fundraising in the federal workplace." [9] This overly permissive environment led President Eisenhower to commission his administration to develop "a uniform policy and program for fundraising within the federal service."[10] In a precursor to what would eventually become the CFC, Eisenhower issued Executive Order (EO) 10728, which established a formal committee and procedures for fundraising within the federal service.[11] Importantly, EO 10728 included an exception to the new standard fundraising policy for "solicitations conducted by organizations composed of civilian employees[12] or members of the armed forces among their own members for organizational support or for the benefit or welfare funds for their members."[13] This exception, and its perpetuation through subsequent EOs, still forms the basis of executive authority for certain DoD fundraising today, including commander's IFs.[14] In addition, federal departments, including the DoD, have the regulatory authority to "establish policies and procedures applicable to [these types of internal] solicitations" [15] without running afoul of the CFC. Finally, the *Standards of Ethical Conduct for Employees of the Executive Branch* contains additional ethical guidance regarding fundraising in the Federal workplace. [16]

2. Informal Fund Fundraising

Informal fund policy covers both funds donated directly by members served by the fund and funds raised through sanctioned fundraising events.[17] While it is possible for an IF to include only funds donated directly from participating members (as in the case of some office coffee funds), most

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[7] *Early Years*, CFC TODAY, https://cfctoday.org/content/early-years (last visited May 25, 2017).

[8] *Id.* ("Prior to the 1950's, on-the-job fundraising in the federal workplace was an uncontrolled free-for-all. Agencies, charities, and employees were all ill-used and dissatisfied. Some of the problems cited were: Quotas for agencies and individuals were freely established and supervisors applied pressure to employees.").

[9] *Id.*

[10] *President's Committee on Fundraising*, CFC TODAY, https://cfctoday.org/content/presidents-committee-fundraising (last visited May 25, 2017).

[11] Exec. Order No. 10,728, 22 Fed. Reg. 7219 (Sept. 6, 1957) [hereinafter EO 10728] (establishing the president's committee on fund-raising within the federal service).

> SEC. 7. This order shall not apply to solicitations conducted by organizations composed of civilian employees or members of the armed forces among their own members for organizational support or for benefit or welfare funds for their members. Such solicitations shall be conducted under policies and procedures approved by the head of the department or agency concerned.

Id.

[12] *See* U.S. DEP'T. OF DEF., STANDARDS OF CONDUCT OFF., ETHICS COUNSELOR'S DESKBOOK sec. V, para. E2b (Oct. 2015), http://ogc.osd.mil/defense_ethics/resource_library/deskbook/fundraising.pdf [hereinafter ECD]. ("NOTE: Organizations composed of civilian employees and armed forces members have been recognized by Presidential Executive Orders dating back to 1957. See e.g., Section 7 of Executive Order No. 10728 (1957); Section 3 of Executive Order No. 10927 (1961); Section 7 of Executive Order No. 12353 (1983) Cannot include contractors.").

[13] EO 10728, *supra* note 11, sec. 7.

[14] EO 10728, *supra* note 11; Exec. Order No. 10,927, 26 Fed. Reg. 2383 (Mar. 18, 1961) (abolishing the president's committee on fund-raising within the federal service and providing for the conduct of fund-raising activities); Exec. Order No. 12,353, 47 Fed. Reg. 12,785 (Mar. 23, 1982) (charitable fund-raising); Exec. Order No. 12,404, 48 Fed. Reg. 6685 (Feb. 10, 1983) (charitable fund-raising).

[15] Scope of the Combined Federal Campaign, 5 C.F.R. § 950.102 (2012) [hereinafter CFC Scope].

[16] Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.808 (2017) [hereinafter Standards of Ethical Conduct]. Interestingly, the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Ethical Conduct) only defines fundraising as "raising of funds for a nonprofit organization," which generally does not apply to IF activities. *Id.*

[17] This distinction is not obvious in the text of Army Regulation (AR) 600-20, paragraph 4-20. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-20 (6 Nov. 2014) [hereinafter AR 600-20]. However, at least some of the IF examples (office coffee, cup and flower, and annual picnic funds) will include donated funds by their nature (i.e. units do not typically hold events as a means to raise "office coffee funds"). Regarding fundraising events, AR 600-20 paragraph 4-20d permits "[f]und-raising solicitations conducted by organizations composed of civilian employees or members of the Uniformed Services among their own members for organizational support." *Id.*

IFs will also involve a degree of fundraising. This article assumes that all IFs involve fundraising to some degree, though in practice, not all IFs hold fundraisers.[18] This distinction is important because if an IF involves fundraising, there are more complicated regulatory requirements.[19] "Fundraising is complicated because no comprehensive fundraising regulation exists. Instead, it is governed by independent, overlapping, and unrelated regulations."[20] Because fundraising is expansive, this article attempts to consolidate this guidance only as applied to IFs.

B. Limited Informal Fund Guidance

There is limited guidance in Army regulations regarding IFs.[21] The current entirety of Army-specific guidance is found in AR 600-20, which contains only one applicable paragraph.[22] Based on this limited framework, commanders have broad discretion to authorize IFs in accordance with Army command policy.[23] While this discretion may enable some flexibility in the exercise of good judgment, it also leaves much to be desired in the area of pragmatic guidance. There is not even a requirement for IFs to be established in writing. Because of the lack of guidance in this area and the potential consequences of mismanagement, local policy is both valuable and advisable.[24]

III. Informal Fund Policies

In keeping with historical precedent, the DoD maintains limited guidance regarding IFs, leaving each of the DoD uniformed services broad discretion to establish service-specific IF policies.[25] Comparing the respective guidance of each of the uniformed services shows differences in the approach of each service regarding IF policy. Such comparisons inform where Army IF policy stands in relation to the other services, and promotes best practices for IF management from all available sources.

A. Specific DoD Guidance

Current DoD policy for IFs is summed up succinctly in Department of Defense Instruction (DoDI) 1000.15, paragraph 14:

> Certain unofficial activities conducted on DoD installations do not need formal authorization because of the limited scope of their activities. Examples are office coffee funds, flower funds, and similar small, informal activities and funds. The DoD Components shall establish the basis upon which such informal activities and funds shall operate . . . .[26]

The JER further explains that endorsement by DoD employees of fundraising (or membership drives) for such informal activities does not violate the general prohibition on endorsement.[27] However, "any support other than endorsement must be authorized in accordance with paragraph 3-211.b. of the JER,"[28] which requires the same analysis as any other limited DoD support to non-federal entity (NFE) events. Nevertheless, as long as a fundraiser does not use government resources, such events are explicitly permitted to occur outside of the federal workplace.[29] While the federal workplace is normally the physical location where

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[18] One example is a small donations-only office coffee/refreshment fund. It is also true that not every IF may benefit from a formal standard operating procedure (SOP) and substantial oversight (IFs are intended to be *informal* after all.) Although participants still must follow the JER and AR 600-20 guidance, such a fund is unlikely to benefit from a formal SOP. Additionally, informal funds are within a commander's purview to manage at the unit level, therefore these funds should not operate without command approval.

[19] Part III.C.5. *infra* discusses fundraising regulatory guidance in greater detail. Part IV further describes why the originator of an IF should decide upfront whether the fund will involve both member donations and fundraising.

[20] ECD, *supra* note 12, sec. III, para. A. at 5. The February 2000 issue of *The Army Lawyer* includes an article with short descriptions of the multiple resources containing applicable Federal, Department of Defense (DoD), and Army rules; however, some of these resources are outdated since the article is over sixteen years old. Teresa A. Smith, *Everything You Always Wanted to Know About Official Support to Non-Federal Entity Fundraisers*, Army Law., Feb. 2000.

[21] AR 600-20, *supra* note 17, para. 4-20.

[22] *Id*. The basic elements from this guidance are: fund expenses must be related to the fund purpose; there must be one accountable individual per fund; the fund operation must be consistent with the Army Values and the JER; and there is a limited ability to fundraise during the Combined Federal Campaign. *Id.*

[23] *Id.*

[24] Importantly, no policy restricts a commander's ability to establish additional procedures for IFs at the local level. Local policy is neither required nor prohibited by DoD or Army regulations, so there is an array of local installation guidance in this area. *See infra* Part III.C.6 for a discussion of this guidance.

[25] DoDI 1000.15, *supra* note 4.

[26] *Id*. Note: The original concludes with the words "at Enclosure 3." This does not make contextual sense, since Enclosure 3 is unrelated to informal funds.

[27] JER, *supra* note 2, para 3-210a(6), at 34 ("DoD employees shall not officially endorse or appear to endorse membership drives or fundraising for any non-Federal entity except the following organizations which are not subject to the provisions of subsection 3-211 of this Regulation . . . . (6) Other organizations composed primarily of DoD employees or their dependents when fundraising among their own members for the benefit of welfare funds for their own members or their dependents when approved by the head of the DoD Component command or organization after consultation with the DAEO or designee.").

[28] ECD, *supra* note 12, sec. V, para. E.3, at 19.

[29] JER, *supra* note 2, para. 3-211b, at 36 ("OPM has no objection to support of events that do not fundraise on the Federal Government workplace (which is determined by the head of the DoD Component command or organization.).").

employees conduct their duties, heads of DoD components have the discretion to designate areas on a DoD installation as outside of the workplace.[30] Essentially, this means that a commander may authorize an IF fundraiser within an area on the installation, whether or not the event would otherwise qualify for logistical support, as long as the area is not the workplace.

B. Service Policy Comparison

Each of the uniformed DoD services draws from the same basic federal and departmental guidance pertaining to fundraising within and among members of subordinate organizations. However, minor differences exist in the implementation of this guidance by the respective services. These differences are instructive in order to clarify DoD intent and to model pragmatic management across the respective services. Thus, a brief examination of guidance from each service warrants attention as a learning tool.

The U.S. Navy (USN) relies almost entirely on the fundraising provisions within the JER and other DoD-wide policy without separate service-level implementing guidance.[31] However, the Navy Installations Command issued fundraising guidance that applies on board all USN installations, which consequently applies throughout the service worldwide.[32] Additionally, each subordinate Navy command or installation is not precluded from establishing local policy, and in some cases, have done so.[33]

United States Marine Corps (USMC) policy is comparable to U.S. Army policy, though there are some significant differences.[34] The most instructive portion of the USMC guidance relates to defining terms and boundaries:

> Examples [of certain unofficial activities] are office coffee funds and plaque funds. These funds are often improperly referred to as 'unit funds,' however, these funds are not Government money and do not belong to a unit or the Marine Corps. The money in informal funds belongs to the members of the fund in their personal private capacity. No one may be required to donate to an informal fund.[35]

Interestingly, USMC policy also specifically authorizes "office coffee/soda messes . . . to generate money for an informal fund,"[36] but such messes are not authorized to sell food or other items.[37] Finally, USMC policy is currently the only service policy which includes both an IF monetary cap and an approval process for exceeding the cap.[38] The Army previously had a similar monetary cap, which no longer remains in effect and which was never formally codified into the IF guidance of AR 600-20.[39]

United States Coast Guard (USCG) policy also captures the basic DoD guidance, with some unique distinguishing features.[40] United States Coast Guard policy explicitly permits solicitation for these funds within the federal workplace.[41] Because USCG policy does not differentiate

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[30] ECD, *supra* note 12, sec. V, para. D, at 17-18.

[31] E-mail from Commander Jason Ayeroff, Student, 65th Judge Advocate Officer Graduate Course, The Judge Advocate Gen.'s Legal Ctr. & Sch., to author (Nov. 3, 2016, 2:43 EST) (on file with author). The Navy informally refers to this type of fundraising within the Navy as "By Our Own - For Our Own" (or BOO-FOO for short). *See* U.S. DEP'T OF NAVY, COMMANDER, NAVY INSTALLATIONS COMMAND (CNIC) INSTR. 11000.1, NON-FEDERAL ENTITIES ON BOARD NAVY INSTALLATIONS enclosure 1, at 13 (5 July 2012), https://cnic.navy.mil/content/dam/cnic/hq/pdfs/Instructions/11000Series/CNICINST%2011000.1.pdf, [hereinafter CNIC INSTRUCTION].

[32] CNIC INSTRUCTION, *supra* note 31, at 1. Interestingly, this installation command policy also requires consultation with an ethics official prior to DoD personnel endorsing BOO-FOO fundraising efforts. *Id*. Enclosure 1, at 13 ("DoD personnel may endorse fundraising efforts of organizations composed primarily of DoD members or their dependents when: (1) those organizations are fundraising among their own members; (2) the fundraising benefits the welfare funds of the group's own members or their dependents; and (3) the fundraising has been approved by the CO after consultation with the appropriate ethics official.").

[33] *See, e.g.*, U.S. DEP'T OF NAVY, NAVAL SUPPORT ACTIVITY (NSA) MONTEREY INSTR. 11000.2A, NON-FEDERAL ENTITIES ON BOARD NSA MONTEREY (30 Jan. 2015), https://my.nps.edu/documents/103424743/106376526/NSAMINST+11000.2A+Non+Federal+Entities+on+Board+NSA+Monterey.pdf/.

[34] U.S. Marine Corps, Order 5760.4C, Procedures and Support for Non-Federal Entities to Operate on Marine Corps Installations and Informal Funds subsec. 4.a.(2)(b) (18 Mar. 2010) [hereinafter MCO 5760.4C].

[35] *Id.* subsec. 4.a.(2)(b)(1).

[36] *Id*. subsec. 4.a.(2)(b)(2).

[37] *Id*. Note that this article does not address potential prohibitions on fundraisers that compete with authorized commercial activities, such as the Army and Air Force Exchange Service (AAFES) or Navy Exchange (NEX), nor does it address regulations that may restrict fundraisers involving food service.

[38] *Id*. subsec. 4.a.(2)(b)(3) ("An informal fund that generates more than $350 per month or has more than $1000 in the fund must have written authorization from the installation commander to operate aboard the installation.").

[39] *Smith*, *supra* note 20, at 6 n.39. Also, this should not be confused with the current annual income cap of $10,000 for informal funds belonging to FRGs. AR 608-1, *supra* note 5, para. J-7e.

[40] U.S. COAST GUARD, COMMANDANT INSTR. M5370.8B, STANDARDS OF ETHICAL CONDUCT art. 2.I.4.h (1 Mar 2002), https://media.defense.gov/2017/Mar/16/2001717683/-1/-1/0/CIM_5370_8B.PDF, [hereinafter COMDTINST M5370.8B] ("The restrictions on fundraising in the Federal Workplace do not apply to organizations composed primarily of Coast Guard employees or their dependents when fundraising among their own members for the benefit of welfare funds for their own members or their dependents. These organizations include but are not limited to the Chief Petty Officers Association, the Coast Guard Officers Association, The Coast Guard Academy Alumni Association, and the Coast Guard Spouses Club.").

[41] *Id.* ("Solicitations by these organizations in the Federal workplace shall be conducted in accordance with the following procedures: . . . Fundraising shall be conducted in a personal capacity. However, the restrictions above limiting personal solicitation to off-duty and out of uniform do not apply to these solicitations.").

between funds *solicited* from members of the unit (member-donated funds) and funds *raised by a specific event* (bake sale, car wash, etc.), it is unclear whether this guidance unambiguously follows the JER; the JER only sanctions informal fundraising events held outside of the federal workplace.[42] Furthermore, USCG policy explicitly permits limited solicitation of these funds while on duty and in uniform.[43] This permission for merely collecting donated money from fund members while on duty and in uniform may be implied in the other services,[44] but it is not explicitly stated in other service policies.

The U.S. Air Force (USAF) presents perhaps the most confusing guidance in this area, primarily in the form of one paragraph in the Air Force Instruction (AFI) pertaining to Private Organizations (POs),[45] and two footnotes in the general AFI on fundraising.[46] Air Force Instruction 134-223, *Private Organizations Program*, paragraph 2.2 states:

> Small unofficial activities (like coffee funds, flower funds, sunshine funds, and other small operations) are generally not considered POs. However, if their current assets (which include cash, inventories, receivables, and investments) exceed a monthly average of $1,000 over a 3-month period, the activity/organization must become a PO, discontinue on-base operations, or reduce its current assets below the $1,000 threshold.[47]

Unites States Air Force policy further specifies within the general fundraising AFI that an installation commander may authorize solicitations "for a local internal program at the workplace"[48] aimed exclusively at Air Force members. Paradoxically, an installation commander may also authorize solicitations for "local internal programs *away* from the workplace,"[49] including "special events or benefits conducted by private, social, or professional organizations associated with the installation and composed primarily of DoD employees. To be eligible for official support and endorsement, the fundraising must be conducted by DoD employees, among DoD employees, for the benefit of DoD employees."[50] This guidance is confusing because it appears to draw an arbitrary distinction between the internal fundraising activities of Air Force members at the workplace, and special events or benefits conducted by "organizations associated with the installation and composed primarily of DoD employees"[51] held away from the workplace. One possible explanation is that the intent of this distinction is to address the difference between collecting money for an office coffee fund during the duty day (likely authorized), and holding a full-blown fundraiser at the workplace during the duty day (likely unauthorized). Whether that was the intent, however, is unclear.

Regardless of their differences, certain aspects of the respective service policies may still be useful to effective operation of IFs in the Army.[52] While the balance of this article will focus primarily on Army policy and best practices, the issues presented are similar enough that the other services may also find some benefit.

C. Army Policy

Army IF policy is contained succinctly in one paragraph in AR 600-20,[53] which is laid out in two short sections below.

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[42] JER, *supra* note 2, para. 3-211b, at 36. In accordance with this paragraph, an IF fundraising event is only eligible for limited logistical support if the event qualifies under the same analysis for any other DoD-supported NFE event in paragraph 3-211a, subsections (1) through (6). The Army explicitly states that IFs should not be involved in on-the-job fundraising. AR 600-29, *supra* note 3, para. 1-7c.

[43] COMDTINST M5370.8B, *supra* note 40 ("Any fundraising during business hours should be limited to incidental amounts of time (such as responding to email inquiries, accepting donations delivered in person by a member of the organization, or holding a brief meeting during a meal or coffee break).").

[44] Since the time required to collect monetary contributions from other fund members is incidental, it is reasonable that members are permitted to do so in uniform while on duty, as opposed to *fundraising* under the same circumstances, which requires more than incidental time and is therefore more problematic.

[45] U.S. DEP'T OF AIR FORCE, INSTR. 34-223, PRIVATE ORGANIZATIONS PROGRAM para. 2.2. (C1, 30 Nov. 2010), http://static.e-publishing.af.mil/production/1/af_a1/publication/afi34-223/afi34-223.pdf [hereinafter AFI 34-223].

[46] U.S. DEP'T OF AIR FORCE, INSTR. 36-3101, FUNDRAISING WITHIN THE AIR FORCE 14 tbl.1, nn.2 & 4, (12 July 2002), http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-3101/afi36-3101.pdf [hereinafter AFI 36-3101].

[47] AFI 34-223, *supra* note 45, para. 2.2. It is unclear from where this $1,000 figure is derived or whether this amount is arbitrary. The Army regulation on private organizations (POs) specifically does not apply to informal funds and does not include any similar provision for an IF (with funds exceeding a certain amount) to become a PO. U.S. DEP'T OF ARMY, REG. 210-22, PRIVATE ORGANIZATIONS ON DEPARTMENT OF THE ARMY INSTALLATIONS para. 1-1(b)(2)(r) (22 Oct. 2001) [hereinafter AR 210-22].

[48] AFI 36-3101, *supra* note 46.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] For example, the precedent in other services for a monetary cap on informal funds, raises the question of whether the Army should return to a monetary cap. MCO 5760.4C, *supra* note 34, subsec. 4.a.(2)(b)(3).

[53] AR 600-20, *supra* note 17, para 4-20. Few additional Army regulations make reference to IFs. The regulations referencing IFs generally do so only to state that they do not apply to IFs. For example, AR 210-22, AR 215-1, and AR 608-1 (appendix J-7) all fall into this category. AR 210-22, *supra* note 47, para 1-1b(2)(r); U.S. DEP'T OF ARMY, REG. 215-1, MILITARY MORALE, WELFARE, AND RECREATION PROGRAMS AND NONAPPROPRIATED FUND INSTRUMENTALITIES para. 1-6b(18) (24 Sept. 2010); AR 608-1, *supra* note 5, para. J-7a(1). However, AR 600-29, *Fund-Raising Within the Department of the Army*, creates fundraising restrictions which do apply to IFs. AR 600-29, *supra* note 3. Part III.C.5. *infra* discusses these restrictions.

The first portion, including the first three sub-paragraphs, contains the following guidance:

> Commanders may authorize informal funds. Examples of informal funds are office coffee, cup and flower, and annual picnic funds. These funds are subject to the following guidelines:
>
> a. Use is limited to expenses consistent with the purpose and function of the fund.
>
> b. Only one individual is to be responsible for fund custody, accounting, and documentation. Annually, this individual's supervisor is advised of the fund's financial status.
>
> c. Operation of the fund will be consistent with Army values and DoD 5500.7–R.[54]

Although concise, each subparagraph contains substantive guidance, which should be analyzed separately in order to fully comprehend the intent and implications of each part.

1. Fund Purpose (Paragraph 4-20a)

The regulation allows commanders to authorize IFs but does not actually define this term; it merely provides examples.[55] In addition to the examples listed, funds raised to pay for a specific event such as a military ball, hail and farewell, or other gathering of military members, are regulated by IF rules and Army fundraising guidelines.[56] This raises questions of how broad the purpose of a fund should be. One approach is to narrowly limit the fund to a very specific purpose, such as a cup and flower fund, or a very specific event, such as an annual unit organizational day. A benefit to this approach is that limiting expenses to the fund's purpose is somewhat easier, which also simplifies accounting. A major shortcoming of this approach is that many organizations would then have numerous IFs for various events or purposes, resulting in confusion and inefficiencies. Creating separate funds for each regular event put on by an organization is not categorically ill-advised, but also not a solution in many cases. However, there are good reasons to create separate funds. A major annual unofficial event, such as a military ball, is an example where a separate fund may be beneficial, particularly in larger organizations where such events often incur significant expenses. Such an event might benefit from having a separate responsible individual, with separate accounting and internal review outside of any other IF expenses. The example SOP in Appendix A is for a general activity fund; this format should be sufficient as a means to support all of the recurring unofficial events in most organizations.

2. One Responsible Individual (Paragraph 4-20b)

The requirement to designate one individual "to be responsible for fund custody, accounting, and documentation" [57] is simple, but there are still concepts to explore. First, although not stated explicitly, it is implied that this individual should not be the unit commander.[58] Second, when multiple IFs are used for different purposes in the same unit, there is nothing in the regulation to disqualify the same individual from being designated to control more than one fund, though this may be ill-advised in some cases. For example, it may be reasonable for the 1st IN BN adjutant to be responsible for both the activity fund (used for an annual event) and the cup and flower fund (ongoing; supported by regular member donations). On the other hand, if the battalion also maintains a separate IF for another major event (annual military ball for example), the organization might be better served if the commander designates a different responsible individual for this fund only.[59]

Only the responsible individual's supervisor is required to be apprised annually of the fund's status.[60] In practice, if the reviewing supervisor is not also the commander, there needs to be some arrangement for reporting back to the commander since IFs are command-run activities. In the 1st IN BN hypothetical, there are no facts to indicate whether the commander designated a responsible individual, and whether the commander established any internal controls over IF expenses. A formal SOP is helpful for specifying how all of this is to be accomplished.

3. Ethical Informal Fund Operation (Paragraph 4-20c)

An individual violates ethical boundaries by operating an IF inconsistently with the Army Values or the JER, but the same is not necessarily true if an individual only violates the

[54] AR 600-20, *supra* note 17, para. 4-20.

[55] *Id.* ("office coffee, cup and flower, and annual picnic funds.").

[56] *Id. See also* AR 600-29, *supra* note 3, para. 1-10. *Cf.* ECD, *supra* note 12, sec. IV, para. C., at 6. This paragraph highlights that the term *fundraising* is often applied to informal funds, even though other federal regulations define *fundraising* more narrowly as raising funds for charitable or non-profit organizations (which does not include informal funds by definition). ECD, *supra* note 12, sec. IV, paras. A, B.

[57] AR 600-20, *supra* note 17, para. 4-20a.

[58] The regulation includes a requirement for the responsible individual's supervisor to be annually apprised of the fund's financial status. AR 600-20, *supra* note 17, para. 4-20b. Therefore, it makes contextual sense that the commander should not be responsible for the fund so that the supervisory chain remains within the unit served by the fund.

[59] This point will be further expounded upon in Part IV, *infra*, Best Practices.

[60] AR 600-20, *supra* note 17, para. 4-20b.

purpose of the IF.[61] This is interesting since the requirement for the fund to be operated consistent with its purpose is more restrictive than the requirement for the fund to be operated consistent with the Army Values and the JER.[62] However, using an IF contrary to its established purpose might still violate ethical obligations. The established fund purpose, the Army Values, and JER requirements are not mutually exclusive, and the range of possible outcomes for violations of any of these requirements is similar. In the opening hypothetical, there were no facts indicating that the 1st IN BN IF even had a designated purpose, and there was no SOP to show what that purpose might have been. This left the door open for misuse. The scenario facts resulted in an official reprimand, but different facts might require different consequences. Specific acts determine the range of administrative or punitive actions available for ethical failures related to IFs, and the usual command discretion applies in these situations.[63]

4. Fundraising Among Members (Paragraph 4-20d)

The final sub-section of AR 600-20, para 4-20 states:

> d. Fund-raising solicitations conducted by organizations composed of civilian employees or members of the Uniformed Services among their own members for organizational support or for the benefit of specific member welfare funds are permitted, but they should be limited in number and scope during the official Combined Federal Campaign/ Army Emergency Relief periods in order to minimize competition with Combined Federal Campaign/Army Emergency Relief.[64]

This final section echoes the language found in EO 10728 issued by President Eisenhower in 1957, and raises the important question of what "fundraising among their own members"[65] means. Some commanders and ethics counselors take a restrictive approach to this language, with the interpretation that alpha company is permitted to fundraise among alpha company and bravo company is permitted to fundraise among bravo company, but bravo company Soldiers may not take part in alpha company fundraising events and vice versa.[66] This approach is more restrictive than intended by the JER and DoD guidance, which both draw language from EO 10728.[67] The rationale for EO 10728 was that federal workplace fundraising for *external* organizations was in need of more control, while fundraising among federal employees and specifically *within the military community* did not necessitate the same degree of control.[68] Unless local policy dictates otherwise, a pragmatic rule permits fundraising within the physical footprint of the respective garrison. This is especially pertinent in garrisons with multiple geographic locations, as often occurs outside of the continental United States (OCONUS). If the hypothetical 1st IN BN headquarters was geographically isolated, apart from the barracks or family housing, it would not make sense to restrict fundraising activities only to the unit footprint, where other members of the military community might not go, thereby unnecessarily limiting the base of potential authorized contributors.

One example of designated fundraising locations within an organization comes from United States Army Europe (USAREUR) Regulation 210-22. This regulation empowers garrison commanders to designate fundraising locations outside of the federal workplace, including "areas near public entrances, in community-support facilities, or in personal quarters."[69] Regardless of local guidance vis-à-vis location, fundraising participants must take precautions to avoid soliciting contractors or civilians from outside of the military community. One possible precaution is to request to see a military identification card from anyone not in uniform prior to accepting any money at a fundraising event. While doing so might be cumbersome, it may be the best way to ensure that the fund receives only authorized contributions.

Finally, organizations have a limited ability to fundraise during the CFC and Army Emergency Relief (AER) fund drives.[70] In this context, it is important to note that

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[61] *Id.* paras. 4-20a, 4-20c. In other words, it could be possible for an individual to operate a fund inconsistently with its purpose, without necessarily violating ethics regulations.

[62] *Id.* para. 4-20a, states "[u]se is limited to expenses consistent with the purpose and function of the fund." However, this provision is not punitive and does not necessarily require a response if violated inadvertently, absent any fraud or other blatant ethical violations.

[63] *Id.* para. 4-7 ("Commanding officers exercise broad disciplinary powers in furtherance of their command responsibilities. Discretion, fairness, and sound judgment are essential ingredients of military justice.").

[64] *Id.* para. 4-20d.

[65] *Id.* This part focuses on interpretation of the phrase "among their own members," however the phrase "for the benefit of specific member welfare funds" is also significant. *Id.* Commanders should not use IFs for the benefit of organizations not comprised of military members, even charities or other worthwhile causes. *Id.*

[66] This assertion is based on the author's professional experiences as an administrative law attorney for the First Armored Division and the Military and Civil Law Division, USAREUR.

[67] EO 10728, *supra* note 11, Sec. 7.

[68] *Id*.

[69] U.S. ARMY IN EUROPE, REG. 210-22, PRIVATE ORGANIZATIONS AND FUNDRAISING POLICY para 11a (13 Aug. 2010), *available at* http://www.eur.army.mil/aepubs/publications/AER210-22_1004303!.pdf. This regulation applies to IFs as well as POs, even though the identically numbered Army Regulation (AR 210-22) specifically *does not* apply to informal funds. AR 210-22, *supra* note 47, para 1-1b(2)(r).

[70] AR 600-20, *supra* note 17, para. 4-20d. This prohibition is also further codified in the general Army fundraising regulation. AR 600-29, *supra* note 3, para. 1-10.

commander's IFs are subject to different fundraising rules than fundraising for 501(c)(3) charitable or non-profit organizations.[71] The CFC runs annually from September 1 to December 15,[72] and "is the only authorized solicitation of Government personnel in the Federal workplace on behalf of charitable organizations."[73]

5. Fundraising Policy

At the Army level, requirements for fundraising organizations, including IFs, are found in AR 600-29. Paragraphs 1-10a through 1-10h contain fundraising prohibitions that apply to IFs including, but not limited to, a summarized list of prohibitions.[74] Commanders, supervisors, or IF fundraising organizers shall not: 1) Make fundraising solicitations during the CFC; 2) Make inquiries about whether individual Soldiers or civilian employees choose to make IF contributions, or make performance evaluations based on participation or nonparticipation is fundraising events; 3) Use figures that purport to represent an individual's *fair share* contribution to the organization (although suggested contributions are authorized); 4) Develop or use "lists of either noncontributors or contributors for purposes other than the routine collection and forwarding of contributions;"[75] 5) Grant military members "special favors, privileges, or entitlements, such as special passes, leave privileges, or the wearing of civilian clothing, that are inducements to contribute;"[76] 6) Harass "an individual through continued discussions, meetings, orientations, 'counseling,' or other methods to cause an individual to change his or her decision to give or not give;"[77] 7) Make "an individual to believe, either directly or indirectly, that he/she is the only one, or one of a small number of people, preventing the achievement of an organizational goal, whether it is a participatory goal or a monetary goal;"[78] 8) Solicit government contractors. General ethical guidance and local regulations may add to this list of fundraising prohibitions. Judge advocates can add value in this area by observing local practices and spotting issues as they arise.

6. Local Policy

Finally, local policy or regulation may establish further procedures or limitations for IFs. No specific provision in DoD or Army policy restricts a higher-level commander from dictating IF procedures to subordinate or tenant units. Local regulations can often bring clarity to unclear aspects of IF policy. For example, local regulations may establish a fund cap, specify authorized fund purposes, geographic fundraising restrictions, SOP formats, etc. One such example is Fort Campbell Regulation 210-4 (CAM 210-4), which applies to Informal Fund Organizations (IFOs) operating on Fort Campbell.[79] Among other particulars, this regulation establishes: caps on annual income and annual cash balance for IFs, a list of approved fundraising activities, an approval process for fundraising on the installation, and general guidance regarding IF tax liability.[80] United States Army Europe Regulation 210-22 is another example of local policy, though this regulation only touches the fundraising aspect of IFs, without the same degree of specificity regarding IF operation as found in CAM 210-4. Other installations may have similar local policies regarding IFs, fundraising, or both. When Army regulations, local policies, and competent legal advice all come together, best practices for informal fund operations emerge.

IV. Best Practices

There are ten recommended best practices to effectively establish IFs at the unit level.[81] The best practices are primarily focused on the judge advocate's role in advising commanders of ethical concerns related to IFs, and the commander's role in establishing clear IF guidance. These best practices may also assist fund custodians and fundraising organizers.

First, informal funds need a clearly defined purpose. Judge advocates should advise organizations to establish separate funds for separate purposes, tailored to the organization's needs. For example, a brigade judge advocate (BJA) may advise the commander of a brigade-sized unit to establish a separate card & flower fund, general activity fund, and unit ball fund, while a battalion-sized unit may be better served with a general activity fund covering all events including its annual battalion ball. A company may only require a cup and flower fund, an informal coffee fund, or no fund at all. The upfront advice and recommendations of the

[71] ECD, *supra* note 12, sec. IV, at 5-6.

[72] CFC Scope, *supra* note 15, § 950.102(a).

[73] ECD, *supra* note 12, sec. V, para. A.3, at 11.

[74] This list of prohibitions applies to all Army fundraising, but some of the specific language does not apply to informal funds, such as the language regarding allotments in paragraph 1-10d. AR 600-29, *supra* note 3. This summarized list highlights the language most applicable to informal fund fundraisers.

[75] AR 600-29, *supra* note 3, para. 1-10d.

[76] AR 600-29, *supra* note 3, para. 1-10e. Furthermore, there should be no "express or implied requirement to contribute as a condition precedent to normal career progression." *Id.*

[77] AR 600-29, *supra* note 3, para 1-10f.

[78] AR 600-29, *supra* note 3, para 1-10g.

[79] U.S. Dep't of Army, Fort Campbell Installation, Reg. 210-4, Recreational and Educational Private Organizations and Informal Funds on Fort Campbell (1 Jun. 2015) (on file with the author). Fort Campbell Regulation 210-4 defines informal funds more broadly as Informal Fund Organizations (IFOs), which include both traditional informal funds established by commanders and select POs allowed to operate on the installation. *Id.* para. 1-2.

[80] *Id*. para. 2-2, ch. 4.

[81] These best practices assimilate the DoD and Army guidance into practical, real-world guidance.

BJA or other servicing legal advisor are invaluable in this area.

Second, commanders should decide upfront whether an IF will consist of member donations only, or whether the fund members will engage in authorized fundraising activities. If fundraising is involved, commanders should establish parameters to manage these activities in accordance with Army and local policies. A formal SOP provides one way to accomplish this objective. The advice of the servicing legal advisor or installation ethics counselor is beneficial at this early stage, when a fund is first created.

Third, commanders should carefully select a responsible IF custodian. The IF custodian should be a Soldier or Government Services (GS) civilian employee who is not directly in the command group and not a contractor or dependent.[82] Further, the fund custodian should be appointed in writing, and should be capable of using basic accounting procedures. Ideally, the commander should designate separate custodians for separate funds. In cases where the same individual manages more than one fund, the commander should be able to reasonably articulate why this arrangement is necessary.

Fourth, judge advocates that serve as ethics counselors should become subject matter experts on IFs and fundraising policy. Ethics counselors should assist in reviewing local policies for consistency with DoD and Army guidance, and may also help draft local policy.

Fifth, commanders must ensure that family readiness group (FRG) events and fundraisers are separate from commander's IF events and fundraisers. Family readiness group IFs are completely distinct from other IFs in the unit, and FRG events cannot be augmented with unit IFs.[83] To maintain this separation, FRG funds should not be used to support unofficial events that are otherwise funded through the commander's IF.

Sixth, IFs that incur significant expenses or that maintain a large cash balance should have an SOP. This primarily applies to unit activity funds, military ball funds, or any other IF used to support command-wide unofficial events. As a practical matter, IFs at the battalion-level and above derive the most benefit from having a formal SOP due to the number of personnel served by the fund. Though not required by Army regulations, an SOP is also extremely beneficial for any IF that engages in fundraising events. Standard operating procedures should include all required elements from Army policy and any applicable local or installation policies. The SOP included in Appendix A is modeled for an informal activity fund at the battalion level.[84]

Seventh, commanders should regularly review IF expenses and accounting. For a fund such as unit ball fund, annual accounting may be adequate since these events usually occur on an annual basis. One best practice is to require a review within the week following an annual event, once all expenses are reconciled. For other types of funds, more regular reviews (quarterly or semi-annual) may be advised, especially if expenditures are more dynamic. This is more applicable for funds like a cup and flower fund that collects and expends funds more frequently.

Eighth, commanders should seriously consider imposing an IF monetary cap for several reasons. Even though such a cap is not expressly required by AR 600-20 or other regulations, there are benefits in setting a fund cap. For starters, since many IFs will outlast the command team that initially established the fund, a fund cap prevents a build-up of funds over time, due to potential fluctuations in the degree of emphasis or oversight between different commanders. Second, a fund cap alleviates the possibility of largescale fraud and abuse. Finally, a fund cap avoids potential tax liability issues involved in amassing large sums of money.[85] Though not applicable to commander's IFs, FRG IF guidelines provide a good example of a reasonable fund cap.[86]

Ninth, informal funds generating substantial sums (greater than $200 for instance) should use a non-interest bearing bank account at an easily accessible financial institution located on or near the installation. This enables easy access and facilitates transfer of funds in the account due to changes of the fund custodian. Some banks require an Employer Identification Number (EIN) for an account opened in the

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[82] This requirement is implied, since contractors cannot donate or be solicited for donations. AR 600-20, *supra* note 17, para. 4-20b. *See also* AR 600-29, *supra* note 3, para. 1-10. Furthermore, while the executive officer (XO) and senior non-commissioned officer in an organization are not prohibited by regulation from serving as a fund custodian, commanders should consider negative perception issues before appointing these individuals as custodians.

[83] AR 608-1, *supra* note 5, para. J-7a(3). *See also supra* note 5 (regarding use of the term *unit informal funds*).

[84] This SOP borrows elements from numerous sources. *See, e.g.*, AR 608-1, *supra* note 5, para. J-7c (FRG IF SOP language); FAMILY READINESS PROGRAM MGMT., MANEUVER SUPPORT CTR. OF EXCELLENCE, FORT LEONARD WOOD FRG FUNDRAISING GUIDE para. 6-4 (Mar. 2011), http://www.wood.army.mil/family/Documents/FRG%20Fundraising%20Guide%20v2.1.doc; GORDON MWR, FORT GORDON FUNDRAISING GUIDE (7 Jun 2012), http://www.fortgordon.com/wp-content/uploads/2014/10/Fundraising-Guide-2012.pdf (Fort Gordon FRG informal fund SOP).

[85] The Internal Revenue Service (IRS) does not require some organizations, including properly constituted informal fund organizations, whose gross annual receipts are not more than $5,000, to apply for formal tax exempt status in order to be considered tax exempt. I.R.S. PUB. 1635, *Understanding your EIN* 10, https://www.irs.gov/pub/irs-pdf/p1635.pdf (last visited May 25, 2017). *See also* I.R.C. § 501(c)(7). Generally, this excludes occasions where unit members pay directly for an event, such as ticket sales for a military ball. Ethics advisors should consider recommending further tax consultations in unique situations.

[86] AR 608-1, *supra* note 5, para. J-7e ("FRG informal funds will therefore not exceed an annual gross receipt (income) cap of $10,000 per calendar year from all sources, including fundraising, gifts, and donations. Unit commanders may establish a lower annual income cap.").

name of a group rather than an individual.[87] This does not preclude the IF custodian from opening a personal account for the fund using their own social security number, but it would make the fund custodian personally liable for any income generated by the account. For this reason, the account should be non-interest bearing. In this case, the fund custodian must also take measures to transfer control of the account prior to permanently changing stations. Informal funds generating small sums, such as a modest coffee fund, should make use of a cash box accessible only to the fund custodian or other means to ensure security of the funds and easy access for regular inspection by the command.

Finally, commanders should consult an ethics counselor from the servicing Office of the Staff Judge Advocate (OSJA) regarding any gifts offered to IF organizations[88] and prior to purchasing any gifts using IFs. The organization should take reasonable steps to ensure no gifts of money or tangible objects are received from prohibited sources.[89] Generally, units should not buy gifts for unit members using IFs, unless the fund is established for that purpose. Purchasing specific gifts would also have to be consistent with the purpose of the fund, and be for the benefit of those served by the fund. Additionally, for gifts to military members there must be a way to determine who contributed and how much, due to price limits on gifts between federal employees imposed by the JER.[90]

Some funds are operated in a pay-in, pay-out manner (i.e. members who contribute $100 to the unit plaque fund get battalion colors and their spouse gets flowers at the end of their tour). This system is essentially more of a payment for goods received, and is not subject to gift restrictions, since the recipient paid market value for the goods. Additionally, there is no restriction on maintaining a list of contributors in such a scenario, because such funds are not subject to the prohibition found in AR 600-29, paragraph 1-10d.

These recommended best practices are just a few areas in which judge advocates and commanders will interact regarding the establishment and operation of IFs. Because IFs are command-run, command involvement is required to operate them successfully. Judge advocates can play an important role to ensure that these funds are established properly and operated in an ethical manner.

V. Conclusion

The opening scenario involved major ethical failures that led to a negative outcome for the 1st Infantry Battalion commander. The ideal control in that scenario would have been the use of an IF SOP, such as the example in Appendix A. Additionally, proactive suggestions from an ethics counselor may have helped minimize ethical problems in the activity planning stage, avoiding the issue altogether. Judge advocates play a critical role in offering advice and recommendations to commanders regarding IFs. Without this advice and other controls in place, even small mistakes may compound and lead to greater ethical lapses.

Informal funds provide an excellent mechanism for commanders to fund unofficial unit activities that build healthy morale. When operated properly, IFs can be a highly effective tool and a significant resource. Command oversight is essential for IFs to operate properly. The best practices articulated in this formal guide to informal funds should help commanders, fund custodians, and judge advocates avoid common mistakes and maintain high ethical standards related to unofficial unit activities.

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[87] *See, e.g.*, *Tax-exempt organizations need an Employee Identification Number*, https://www.irs.gov/pub/irs-tege/EIN%20article%20final%20100214%20508.pdf (last visited May 25, 2017) ("EIN Benefits. . . It is usually required to open a business bank account.").

[88] U.S. DEP'T OF ARMY, REG. 100-1, THE ARMY GIFT PROGRAM para. 2-7 (27 July 2015). Organizations are only required to consult with an ethics counselor regarding "any gift proffer valued at more than $250 that a delegated gift acceptance authority can accept." *Id.* However, the ethics counselor will likely also be the individual responsible to determine whether a delegated gift acceptance authority may accept any gift, regardless of value.

[89] Standards of Ethical Conduct, *supra* note 16, § 2635.202.

[90] JER, *supra* note 2, para 2-203(a). *See also* Standards of Ethical Conduct, *supra* note 16, § 2635.304.

Appendix A. Informal Fund SOP Template

Letterhead

Office Symbol Date

MEMORANDUM FOR 1st Infantry Battalion Members

SUBJECT: Battalion Activity Fund

1. **References**

a. AR 600-20, Army Command Policy

b. AR 600-29, Fundraising Within the Department of the Army

c. DoD 5500.7-R, Joint Ethics Regulations

d. AR 1-100, The Army Gift Program

e. [Insert any applicable installation-level policies]

2. **Purpose**. Identify procedures for the creation and management of the 1st Infantry Battalion's Activity Fund (BAF), which is an informal fund (IF) authorized IAW AR 600-20, para 4-20. The purpose of the BAF is to fund or defer expenses for unofficial team-building and social events for members of the battalion and their dependents. Examples of such events include organization days, the annual Battalion Ball, and approved social observances. The BAF is not a business, and is not being run to generate profits. The BAF operates solely using funds solicited from and/or raised by its members through sanctioned fund-raising events. This fund is not considered an instrumentality of the U.S. Government. It shall be self-sustaining and shall not receive any financial assistance from the U.S. Army or non-appropriated funds.

3. **Applicability**. This SOP applies to the 1st Infantry Battalion and subordinate units, including all assigned Soldiers and civilians, and Family members who participate in BAF events. This SOP does not apply to the 1st Infantry Battalion Family Readiness Group (FRG), which operates a separate IF solely for FRG functions. This SOP does not preclude the creation of other IFs within the 1st Infantry Battalion with command approval (for example company activity funds, office coffee funds, or cup & flower funds.)

4. **Responsibilities**

a. The Battalion Commander will—

(1) Serve as Chairman of the BAF Committee.

(2) Approve in writing all expenditures from the Fund in excess of [$1000].

(3) Appoint the Fund Custodian in writing.

b. The Battalion Executive Officer (XO) will serve as written approval authority for all fund expenditures in amounts greater than [$500], up to [$1000].

c. The Fund Custodian (FC) will—

(1) Establish and maintain a non-interested bearing bank account at a local financial institution for BAF funds.

(2) Approve all expenditures in amounts up to [$500], and retain receipts or invoices documenting such expenditures for no less than 24 months.

(3) Deposit proceeds from fundraisers within 48 hours of the fundraiser event.

(4) Reconcile bank statements with fund receipts on a monthly basis.

(5) Review financial records semi-annually with the BAF Committee.

5. **Management**

a. The Fund Custodian is appointed by the Battalion Commander. The Fund Custodian will normally be the Battalion S-1. The tenure of this appointment is for a period not to exceed [24 months].

b. The BAF Committee manages and oversees BAF operation. The Committee consists of four members: the Battalion Commander (Chairman), the Command Sergeant Major, the XO, and the Fund Custodian. The Committee will meet at least semiannually to review the current status of the Fund.

6. **Fundraising**

a. Fundraising is governed by the requirements of the Joint Ethics Regulation, DoD 5500.7-R, and AR 600-29, Chapter 1. Fundraising events should involve prior consultation with a DA ethics official or servicing judge advocate.

b. The prohibitions in AR 600-29 are applicable to all fundraising events. Participation in fundraising events must be entirely voluntary. No special inducements such as granting special passes, leave privileges, or the wearing of civilian clothing may be used as fundraising incentives.

c. The BAF may conduct fundraising activities within the unit population served by the fund, and at other locations within the garrison footprint unless otherwise restricted. Government contractors may not be solicited for donations or participation, regardless of the fundraising location.

d. Fundraising events will state the purpose of the fundraiser on all advertisements.

e. Earnings from the fundraiser will be turned-in to the Fund Custodian for deposit within 48 hours of the event. Prior to funds transfer to the Fund Custodian, monies will be secured in a combination safe where access is limited to authorized personnel. The organizer of the fundraiser will provide a statement of accounting to the Fund Custodian listing the income and itemized expenses for the fundraiser.

f. The BAF shall not solicit gifts nor accept unsolicited gifts from prohibited sources. Donations from military members to the BAF are not considered gifts. The Fund Custodian shall consult with the Office of the Staff Judge Advocate for any necessary clarification pertaining to gifts.

7. **Banking and expenditure of funds**

a. Funds will be expended for expenses consistent with the purpose and function for which they were established. In the case of the BAF, expenses may include food, beverages, supplies, entertainment, and other similar purposes.

b. Informal funds will not exceed an annual gross receipt (income) cap of [$5,000] per calendar year from all sources, including fundraising and gifts, and donations.

c. The Battalion Commander will be the approval authority for all expenditures from the BAF in excess of [$1000]. Approval will be obtained in writing and retained on file.

d. The Battalion XO will be the approval authority for all expenditures from the BAF in amounts in excess of [$500]. Approval will be obtained in writing and retained on file.

e. Funds will be used for the benefit of the participants of the fund, i.e., 1st Infantry Battalion military and civilian employees, and their dependents.

f. The Fund Custodian will record a log receipt for all fund deposits and withdrawals. These receipts will be routinely reconciled with bank deposit and withdrawal transaction vouchers. All documentation will be maintained and ready for review at any time.

g. All monies deposited into and withdrawn from the BAF will be itemized; that is to say, all individual amounts comprising the deposit or withdrawal will be clearly annotated. Individual donations must be logged at the time of receipt.

h. The Fund Custodian will deposit proceeds from fundraisers in a non-interested bearing bank account within 48 hours of receipt of funds when possible. Prior to funds deposit, monies will be secured in a combination safe where access is limited to authorized personnel only. Bank statements will be reconciled on a monthly basis.

i. Expenses and earnings from fundraising events will be itemized and clearly recorded. Clearly itemized receipts of goods purchased with withdrawn funds and clearly itemized records of monies earned in the fundraiser event must be maintained. Within 72 hours of a fundraising event, the Fund Custodian will reconcile receipts of funds spent to receipts of funds collected during the fundraiser. The Fund Custodian will keep this documentation and make it available to the command upon request.

8. **Disestablishment of the BAF.** The Fund will be disestablished when the purpose for the Fund ceases to exist. The Battalion Commander must approve disestablishment of the fund.

9. Point of Contact for this SOP is the undersigned.

IAM A. COMMANDER
LTC, IN
Commanding

Left of Boom: How a Young CIA Case Officer Penetrated the Taliban and Al-Qaeda[1]

Reviewed by *Major Wayne Shew*[*]

I. Introduction

Douglas Laux served as a case officer (CO) in the Central Intelligence Agency (CIA) from 2005 until February 2013.[2] In *Left of Boom*, Laux tells the story of how he came to join the CIA and discuses his roles as a CO in Afghanistan and in Syria. His background is one that will be familiar to military audiences. He initially attended the University of Indiana intending to become an eye doctor.[3] The events of September 11, 2001 changed his trajectory and led him to the CIA.[4]

Left of Boom follows a formula similar to other autobiographical accounts written by young men who have served in the Global War on Terror: (1) initial training; (2) deployment; (3) disillusionment; and (4) departure from the service.[5] It is an entertaining read and offers the audience a look into how the CIA recruits personnel, how its COs conduct operations, and how the stress of a clandestine career affects personal relationships. What *Left of Boom* lacks is an in-depth analysis of the events in the book, though this may be by design. Laux intend *Left of Boom* to be his account of his career at the CIA and not about the CIA as a whole.[6] Consequently, *Left of Boom* provides a unique view into the world of a young CIA CO but does not provide more for those who seek a deeper understanding of the CIA's inner workings.

II. Recruitment

Laux's description of his recruitment into the CIA provides a brief peek behind the curtain on how the organization selects personnel. After filling out an application online, Laux receives a number of phone calls, phone interviews, and instructions on places to go for follow on interviews.[7] Many of the details of what he is specifically asked during these interviews or tests have been either redacted or omitted.[8] These redactions are presumably to prevent the disclosure of classified information though it is not clear exactly what could be compromised in certain cases. Many of the redactions surrounding his recruitment process have to do with the time it took for Laux to complete the process itself.[9] The recruitment process can take from two months to over a year depending on the applicant's experience.[10]

Laux provides insight into the people who are accepted into the CIA. Unsurprisingly, the CIA sought former military special forces personnel such as Navy SEALs or Delta Force operators as COs.[11] Laux however takes issue with this recruiting method.[12] He believes it is "a lot harder to teach charm and empathy than it is to instruct someone on how to fire an M4 at a target."[13]

He also saw a failing in the CIA's recruitment policies for those hired without military experience. They generally made poor COs.[14] Laux found that many of his peers in the CIA were "straightlaced [sic] and boring."[15] Many of them were Mormons who spoke another language and had traveled overseas. Their problem was not that they were not friendly, but that they lacked "experience dealing with a wide range of people, especially . . . [those who] are willing to trade their deepest, darkest secrets for cash."[16] He does note later, though, that at least one of the COs with a "straightlaced" background made a "fantastic case officer."[17]

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[*] Judge Advocate, U.S. Marine Corps.

[1] DOUGLAS LAUX & RALPH PEZZULLO, LEFT OF BOOM: HOW A YOUNG CIA CASE OFFICER PENETRATED THE TALIBAN AND AL-QAEDA (2016)

[2] *Id.* at 13-22, 298. Mark Mazzetti, *A C.I.A. Grunt's Tale of the Fog of Secret War*, N.Y. TIMES (Apr. 1, 2016), http://www.nytimes.com/2016/04/02/world/middleeast/a-cia-grunts-tale-of-the-fog-of-secret-war-douglas-laux.html?mwrsm=Email&_r=0.

[3] LAUX, *supra* note 1, at 13.

[4] *Id.* at 14.

[5] *See* CRAIG M. MULLANEY, THE UNFORGIVING MINUTE: A SOLDIER'S EDUCATION (2009); *see also* DONOVAN CAMPBELL, JOKER ONE: A MARINE PLATOON'S STORY OF COURAGE, LEADERSHIP, AND BROTHERHOOD (2009). Both books are memoirs that recount the authors' entry into military service, initial training, deployments to Afghanistan and Iraq respectively, and decision to leave the military afterwards.

[6] Mazzetti, *supra* note 2.

[7] LAUX, *supra* note 1, at 14-20.

[8] Sections of this book have been redacted to prevent the disclosure of classified information. At times these redactions appear to be of a single word while other times whole paragraphs are redacted.

[9] LAUX, *supra* note 1, at 14-15, 18-22.

[10] *Careers and Internships FAQs*, CENT. INTELLIGENCE AGENCY [US] https://www.cia.gov/careers/faq.

[11] LAUX, *supra* note 1, at 24.

[12] *Id.* at 24-25.

[13] *Id.*

[14] *Id.* at 25.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 297.

III. Case Officers in the Field

The bulk of *Left of Boom* is devoted to Laux's experience in the field and some of his frustrations with the impediments that kept the United States from conducting intelligence operations more effectively in Afghanistan.

The most interesting parts of *Left of Boom* discuss how a CO in Afghanistan acquires information. Laux quickly dispels the movie myth that spies obtain information at cocktail parties dressed in elegant eveningwear. Much of Laux's time in Afghanistan is spent in forward operating bases, wearing body armor, and dressed in local clothing.[18] Through his interactions with village elders at *shura* meetings, Laux is able to gain an understanding with the populace regarding what information he is willing to pay for.[19] It is through this process that he is able to develop his network of "assets." "Asset" is a term used by the CIA to describe people COs have recruited to bring them information.[20]

A brief study of how Laux acquired assets, his understanding of Pashtu culture,[21] and his understanding of the daily life of the average Afghan[22] would be beneficial to servicemembers deploying to Afghanistan. He observes that among Afghans no one ever does a favor without expecting something.[23] The Afghans believed whenever foreigners conducted a humanitarian aid project that the foreigners would ask for a favor in return and it terrified the Afghans.[24] His observations help clarify why it can be difficult to build good will through civil construction projects alone.

Laux's narrative provides further insight into information validation or what he refers to as "sourcing."[25] "Sourcing" is the process by which intelligence officers confirm the information their "assets" give them.[26] Laux describes the process as essentially seeking an independent source to verify the information you are being given.[27] While the technique may sound simple, it is difficult to apply when deployed to an austere environment like Afghanistan.

"Sourcing," or the lack of it, was a problem. Laux discovered that much of the information the CIA paid for was not confirmed by independent sources.[28] It is worth noting that some of the "assets" Laux developed did not appear to provide information he could fully "source."[29] However, he did ask for additional information or evidence to corroborate the information his "assets" provided to him.[30] The lack of proper "sourcing" of information was just one issue that plagued the U.S. intelligence mission.

Laux describes a frustrating set of circumstances in Afghanistan that limited the United States' ability to effectively gather timely intelligence. The different goals of military intelligence officers compared to the CIA COs caused some of the problems.[31] Military intelligence officers "were concerned with protecting the base and determining the location of specific IEDs. They weren't interested in monitoring the people and weapons crossing the border, even though it was a major Taliban supply route."[32] Laux's interest as a CIA CO was in monitoring the people and weapons crossing the border.[33]

He also views the over-compartmentalization of information and the unwillingness of agencies to work with one another as another stumbling block. In one instance, a U.S. Army special forces officer refused to share information regarding a Taliban commander because they both want to use the Taliban commander as a source of intelligence.[34] The compartmentalization is not only interagency, but intra-agency as well. In one instance, Laux was excluded from a meeting with a possible senior member of the Taliban because senior officers in Kabul wanted another CO to conduct the interview.[35] The rationale for this is not entirely clear as that portion of the book is redacted.[36] However, Laux spoke Pashtu and was familiar with the interviewee's cultural

[18] *Id.* at 49.

[19] *Id.* at 49-50.

[20] The author never explicitly defines the term "asset." However, the phrase is used throughout the book to describe people who bring him information in exchange for money. In a later passage, the author discusses the psychological effect the death of an asset can have on a case officer (CO). *Id.* at 296-97.

[21] *Id.* at 65.

[22] *Id.* ("Given the harshness of their existence, any possible monetary gain that might give them a little relief was tremendously appealing. That provided me with the opening I needed.").

[23] *Id.* at 49-50.

[24] *Id.* ("What are the Americans going to want in return? Our firstborn sons?").

[25] *Id.* at 139.

[26] *Id.*

[27] *Id.* ("Sourcing of information is critical. If a friend comes to you and says that Michael Jordan is going to be in Los Angeles tomorrow, you're naturally going to wonder about the source of that information in order to access its veracity. So you might ask: How do you know Michael Jordan is going to be in LA tomorrow? . . . If your friend answers that they were roommates in college and you find out independently that MJ and your friend's brother are the same age and did attend the same college at the same time, then the information is more credible.").

[28] *Id.* at 139-40, 145.

[29] *Id.* at 151-61.

[30] *Id.*

[31] *Id.* at 48.

[32] *Id.*

[33] *Id.* at 47-48.

[34] *Id.* at 193.

[35] *Id.* at 165.

[36] *Id.*

background.[37] The CO who conducted the interview neither spoke Pashtu nor was he apparently familiar with the in interviewee's cultural background.[38] The meeting did not go well.[39] The Navy SEAL raid that killed bin Laden also frustrated Laux because the CIA had not given any of its COs a warning.[40] This "jeopardized everything [his] colleagues and [he] had been working on for months."[41] Many of his assets felt the raid put their lives and their families' lives at risk and did not believe Laux did not know ahead of time.[42] Laux does acknowledge the necessity of compartmentalization in order to maintain operational security,[43] but does not offer much analysis as to how this issue could have been mitigated or whether or not the compartmentalization was necessary.

The limited analysis Laux provides regarding why certain protocols are taken is a short-coming of the book. The reader is often left wondering why certain decisions are made. Laux does not always present the information weighing against an action he advocates in the book. This could be due in part to Laux serving eight years in the CIA.[44] Although that is not a short period of time, eight years is likely not enough time for someone to understand all of the complexities of serving in a government bureaucracy like the CIA. Laux is aware of this criticism.[45] In response to a former CIA officer comparing another CO's book to "a 1st year med student writing about brain surgery," Laux said, "[n]o, it's not. It's like a 1st year med student writing about her first year in med school."[46] *Left of Boom* is a CO's perspective of the CIA's operations in Afghanistan.

IV. Personal Costs

Laux gives the reader a brief look into how his work with the CIA adversely affected his personal relationships. The requirement to maintain a cover identity and his unwillingness to inform his girlfriends about the true nature of his job contributed to the end of at least two relationships.[47] Much of the book provides his view of the relationship, but there is a portion where he is able to provide one of his ex-girlfriend's perspectives through paraphrased excerpts from her diary.[48] Her points are likely familiar to servicemembers: (1) long distance separations, (2) lack of consistent communication when Laux was deployed, and (3) an inability to discuss with his girlfriend what he was doing.[49] As with his recounting of his actions as a CO, Laux does not provide much analysis or reflection on how these relationships affected him in the long term or if he drew any lessons from them.

V. Conclusion

Left of Boom is an entertaining book and offers readers a look at how COs run operations in Afghanistan. It is written as a memoir of Laux's time with the CIA from his perspective at that time. Readers should not expect an in-depth analysis of policies or CIA actions in Afghanistan itself. However, the book does offer the reader an understanding of the challenges facing a young CO in a warzone.

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[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* at 210.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] Mazzetti, *supra* note 2.

[45] Tom O'Brier & Douglas Laux, *Rebel Without a COS*, HUFFINGTON POST: THOUGHT MATTERS (May 4, 2016), http://www.huffingtonpost.com/thought-matters/rebel-without-a-cos_b_9828822.html ("I tried to relate exactly how I felt at the specific time of the story and often would think, "Jesus, I was such a fucking whiny brat back then.").

[46] *Id.*

[47] LAUX, *supra* note 1, at 28-30, 238-41.

[48] *Id.* at 238-41.

[49] *Id.*

Valiant Ambition: George Washington, Benedict Arnold and the Fate of the American Revolution[1]

Reviewed by *Mr. Micah I. Shirts*[*]

I. Introduction

History is always more complex than the labels we prescribe to its biggest players. Benedict Arnold is, and always will be, the traitor and George Washington is America's conquering hero. In *Valiant Ambition: George Washington, Benedict Arnold, and the Fate of the American Revolution*, Nathaniel Philbrick challenges any simplistic view of "His Excellency,"[2] George Washington, and the treasonous Benedict Arnold. Through compelling story telling and expertly interwoven firsthand accounts, Philbrick unfolds the complex world in which these two historically polarized men make their legacies. *Valiant Ambition* explores Washington and Arnold's engagements both on and off the battlefield in a fascinating compare and contrast of character.

The same care is taken to capture the frailty of the Continental Congress and the American people. During the Revolution, Americans remained in many cases divided or uncertain in their loyalties. As the War trudged on, patriotic zeal among Revolutionaries "lapsed into cynicism and self-interest."[3] Philbrick asserts that "[j]ust as the American people appeared to be sliding into apathy and despair, Arnold's treason awakened them to the realization that the War of Independence was theirs to lose."[4] "A traitor . . . saved them from themselves."[5]

While the book delivers in its comparison of Washington and Arnold, it fails to connect Arnold's treason to America's salvation. Despite a valiant effort, Philbrick is unable to meet his ambitious objective to elevate Arnold's shame into the turning point of the Revolutionary War. Nevertheless, in missing the mark, Philbrick creates a valuable study of the principles of leadership that shaped the paths of Washington, Arnold, and Revolutionary War America.

II. The Battle Without[6]

For all that George Washington is, *Valiant Ambition* exposes that he is not, at least initially, a good combat general. Washington is by nature overly aggressive and repeatedly rushes to attack the British when the situation calls for a more defensive stance.[7] When facing one of the largest British fleets ever assembled, Washington refuses to retreat from New York and traps his army on Long Island.[8] After suffering a humiliating loss, Washington is only able to save what remains of his army when a miraculously dense fog appears and allows an escape by boat over the Hudson River.[9]

Washington's thirst for attack leads to similar defeats at the Battles of Brandywine[10] and Germantown.[11] In each case Washington's initial aggression turns to indecision as the battles deteriorate into defeats.[12] Philbrick boldly concludes that Washington is "not a good battlefield thinker."[13] The assertion has some merit. In these early battles, Washington is repeatedly "outgeneraled"[14] by his British counterparts.

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[1] NATHANIEL PHILBRICK, VALIANT AMBITION: GEORGE WASHINGTON, BENEDICT ARNOLD AND THE FATE OF THE AMERICAN REVOLUTION (2016).

[2] PHILBRICK, *supra* note 1, at 3.

[3] *Id.* at xv.

[4] *Id.* at 321.

[5] *Id.* at xv.

[6] Philbrick is clearly a historian with an eye for the interesting detail. His battlefield narratives capture well the movements, motivations and anxiety of each side of the conflict. However, this approach makes the reader work and may turn off those who are not as interested in the complexities. The book includes multiple maps to assist in visualizing the events. Taking the effort to digest the battles is worth it and readers should not shy away from the book because it demands engaged reading. *But see*, Janet Maslin, *Review: Nathanial Philbrick's "Valiant Ambition" Revisits Benedict Arnold*, N.Y. TIMES (May 12, 2016), http://www.nytimes.com/2016/05/13/books/review-nathaniel-philbricks-valiant-ambition-revisits-benedict-arnold.html?_r=0. "'Valiant Ambition' is atypically dry, with a lot of it devoted to troop movements and all those maps." *Id.*

[7] PHILBRICK, *supra* note 1, at 16, 78, 86, 138-39, 158-60, 184-85.

[8] *Id.* at 9-18.

[9] *Id.* at 17.

[10] *Id.* at 138-40. Washington sends his troops across the Brandywine River to attach the British. This aggressive move allows the British to flank Washington on the right and leads to a rout of Washington's army. If Washington had remained in a defensive position, "his army would have been positioned to deliver the British a potentially crushing blow." *Id.* at 139.

[11] *Id.* at 158-61. After losing Philadelphia without a fight, Washington seeks redemption by attacking Germantown. During the battle, Washington's army is distracted by a skirmish over a stone mansion known as Clivenden. The British occupied the mansion and used it to disrupt the American lines with artillery fire. Unnecessarily, Washington stops and engages his soldiers in order to overtake the mansion. The effort is unsuccessful and creates sufficient confusion to allow the British to repulse the Germantown attack. *Id.*

[12] *Id.* at 61, 160. *But see*, U.S. DEP'T ARMY, REG. 600-100, ARMY LEADERSHIP 3 (8 Mar. 2007) [hereinafter AR 600-100]. "Leaders at each level must be able to address unanticipated situations, as many may have to make decisions in stressful situations that can easily have strategic or political implications." *Id.*

[13] PHILBRICK, *supra* note 1, at 68. Even in victory, Philbrick finds Washington's tactical skills lacking. At the second battle of Trenton, Washington places his army in precarious physical position. Trapped again on an island, the Army is saved by an extra cold night that freezes an escape route to safety. *Id.* at 79-84.

[14] *Id.* at 68, 139, 158.

Philbrick paints a much different picture of Benedict Arnold. Arnold is not outgeneraled by anyone on the battlefield. In some of the book's best writing,[15] Philbrick describes Arnold's masterful use of wind and topography to tuck his "Mosquito Fleet"[16] in Valcour Bay and gain the advantage over the mighty British vessels on Lake Champlain. From the deck of his well-positioned ship, Arnold waits as the British fleet struggles to sail against the wind in order to engage in a volley with the American cannons.[17] After a fierce day of fighting, Arnold finds his fleet, like Washington's army, trapped by the British. The escape Arnold leads is thrilling, as the Americans muffle their oars and silently slip through the British line under the cover of a foggy night.[18]

More death-defying heroism pours off the pages as the book touts Arnold's battlefield acumen. "[T]here were few officers in either the American or British army," Philbrick writes, "who possessed [Arnold's] talent for almost instantly assessing the strengths and weaknesses of the enemy."[19] On land, Arnold used his knowledge of the native customs to end the siege of Fort Stanwix without firing a shot.[20] Twice his horse is shot out from under him as he rides along the front lines at the Battle of Ridgefield.[21] Stripped of his command and ordered out of the fight at Saratoga, Arnold defiantly mounts his horse and furiously leads the capture of a critical British redoubt.[22] As Philbrick notes, the hero of Saratoga proved himself, "one of the bravest officers in the Continental army."[23]

While *Valiant Ambition*'s battlefield contrast of Washington and Arnold is intriguing, it is unfortunately overstated. In order to advance the book's objectives, Philbrick fails to make much of the similarities in the two generals' experiences. The aggressive tactics of both men lead to devastating defeats. Arnold's actions at Valcour Bay destroys more than two-thirds of the American fleet.[24] Washington's defeat in New York leads to droves of desertions that reduce his army to three-quarters of its original strength.[25] Without a second thought, Philbrick describes Arnold as a genius and Washington as a failure despite both generals being trapped by the British and forced to rely on fortuitous fog for their freedom.[26] While there are notable differences in Arnold and Washington's forays on the battlefield, the divide is not as great as the chasm Philbrick attempts to create. Instead, the clearer contrast is found in the book's exploration of the men's inner character.

III. The Battle Within

If Arnold is indeed a master of the battlefield, then he is as equally inept and incapable of mastering himself. Arnold suffers from unending self-centeredness and is overly sensitive to a slight.[27] He is lavish in his spending and wallows in financial debt.[28] He is brash with those with whom he disagrees and completely unable to hold his tongue.[29] Lost in his unchanging character, "Arnold did whatever Arnold wanted."[30]

His abrasive approach earned Arnold multiple detractors and accusations of impropriety hounded the General throughout his career.[31] At any given time, Arnold faced a varied list of charges, including commandeering goods for personal gain and misusing his position to broker secret deals.[32] He constantly battled with the Continental Congress over his rank, seniority, and financial reimbursement.[33] For all of the clamor he produced, Arnold only received a mere written reprimand from Washington.[34] The punishment proved to be a wholly insufficient deterrent. Arnold was well

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[15] Nathaniel Philbrick is a sailor who specializes in stories about the sea. In 1978, Philbrick was an Intercollegiate All-American sailor and won the Sunfish North American Championship. He was the editor for *Sailing World* magazine and has authored multiple best sellers and award winning books centered on nautical historical events. *About*, NATHANIEL PHILBRICK, http://www.nathanielphilbrick.com/about/ (last visited Sept. 23, 2016).

[16] PHILBRICK, *supra* note 1, at 32.

[17] *Id.* at 41-51.

[18] *Id.* at 51-53. After slipping through the British line, Arnold's fleet dashes down the lake in an effort to reach Fort Ticonderoga at its southern end. The British fleet is able to catch up to Arnold and destroy the majority of his ships. Arnold and his men escape on land back to the fort. Although Arnold lost the Battle of Valcour Bay, he inflicted sufficient damages to extinguish any thought of a British advance on Fort Ticonderoga and down the Hudson River during that fighting season. The British praised Arnold for his courageous actions on Lake Champlain. *Id.* at 53-57.

[19] *Id.* at 165.

[20] *Id.* at 134-35. Arnold convinces Iroquois natives loyal to the British to quit the fight, by sending inflated reports to them of his Army's strength through Oneida Iroquois who supported the Americans. *Id.*

[21] *Id.* at 96-98.

[22] *Id.* at 166-67. During the battle, Arnold is shot in the left leg, shattering his femur. The injury will take years to heal and keep him from further action on the battlefield. *Id.*

[23] *Id.* at 98.

[24] *Id.* at 56.

[25] *Id.* at 61.

[26] *Id.* at 17, 51.

[27] *Id.* at 35, 91, 165, 239, 246, 249

[28] *Id.* at 89, 101, 234.

[29] *Id.* at 36, 124, 280. Arnold "cannot avoid remarking" on the losses suffered by his colleagues. *Id.* at 280.

[30] *Id.* at 246.

[31] *Id.* at 36.

[32] *Id.* at 40, 231.

[33] *Id.* at 90, 128, 173, 260, 313.

[34] *Id.* at 261.

on his way to treason, an offense Philbrick deems among "the most self-centered of acts."[35]

In contrast, self-centeredness had no place in General Washington. Admirers gushingly wrote of his impeccable character and Philbrick cunningly weaves these accolades into his book.[36] Washington is loyal and exhibits a remarkable ability to "look beyond the frustrations of the moment and . . . do what [is] right for the future of [the] country, despite the shortsightedness of the overlords of Congress."[37] He is measured in his response to his critics. After accidentally intercepting a slanderous letter, Washington writes directly to the author to inform him of the unintentional intercept.[38] The tempered response has greater effect on the author than any lash dealt from Arnold's abrasive tongue.[39]

What *Valiant Ambition* so adeptly points out is that Washington was not always so self-controlled. Early in the campaign, during the attack at Kips Bay, Washington rode into a group of unorganized and confused militia in an attempt to gain order, but the Soldiers did not respond. In a crazed furor, Washington "swatted at the passing soldiers with his sword and snapp[ed] his unloaded pistols in a futile attempt to make it all stop."[40] He completely lost control at Kips Bay, but would not make the same mistake again. A year and a half later, Washington again rode forward among confused and retreating men at the Battle of Monmouth.[41] This time Washington masterfully controlled the situation and gained the Soldiers' compliance and the admiration of the attending officers.[42] According to Philbrick, Washington's genius was his ability to self-correct.

IV. The Leadership Lesson

The study of Arnold and Washington's character is where *Valiant Ambition* makes its greatest contribution. Philbrick drives home the value of adaptation in leadership. The book makes clear that the brilliance of Arnold in battle cannot compensate for his lack of moral fortitude. His outward heroism and courage fails to deliver him from the inner demons that doom his legacy. Mired in his stagnant self, Arnold will forever be the embodiment of a traitor.

In contrast, Washington is aptly able to rise above his inner and outer flaws. Following the Battle of Germantown, Washington abandons his aggressive battle instincts and adopts a more successful defensive strategy for the "best of his army and his country."[43] As Philbrick so artfully concludes, "Washington, as complex and highly controlled a human being as has ever lived, was capable of modulating his conduct to what the situation required. Not Arnold."[44] For all that George Washington is, *Valiant Ambition* exposes one of his most valuable leadership traits: adaptability.[45]

V. The Turning Point

Unfortunately, Philbrick goes one step too far in the book by ambitiously attempting to apply the adaptation principle to the whole of America. He promises readers a connection between Arnold's treason and the turnaround of the war.[46] He claims that, "without the discovery of Arnold's treason . . . the American people might never have been forced to realize that the real threat to their liberties came not from without but from within."[47]

The book sets the stage well for this attempt as it suitably explores the slow decline in patriotic fervor. Much like Arnold, the nation begins to wallow in individual and state self-interest as the years of war grind on.[48] Congress becomes stuck in partisanship and indecision and is unable to address the pressings issues of the day.[49] Americans lose interest in financially backing the Army and allow Soldiers to starve and freeze during brutal winters.[50] In Philadelphia, Soldiers open fire on local militia in order to protect political minorities from attack.[51] America had turned its attention from defeating the British, "to destroying one another."[52]

Upon this precarious backdrop, Philbrick intimately paints the events of Arnold's treason. The book closes with momentum as the sensational details of Arnold's pernicious plot unfold and then completely come undone. With the

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[35] *Id.* at 310.

[36] *Id.* at 36, 101, 191, 213, 214, 240.

[37] *Id.* at 100.

[38] *Id.* at 62.

[39] *Id.* at 101. The author of the letter, Joseph Reed, later sought Washington's forgiveness and acknowledged his own inability to match Washington's character. *Id.* at 101.

[40] *Id.* at 30.

[41] *Id.* at 211-13.

[42] *Id.* at 213.

[43] *Id.* at 185.

[44] *Id.* at 261.

[45] AR 600-100, *supra* note 13, at 1. "[L]eaders are innovative, adaptive, and situationally aware professionals who demonstrate character in everything that they do, are experts in the profession of arms, boldly confront uncertainty, and solve complex problems. . . . [Leaders] are aware of their limitations and strengths and seek to develop and improve their knowledge." *Id.* at 1, 3.

[46] PHILBRICK, *supra* note 1, at xv, 321.

[47] *Id.* at xvii.

[48] *Id.* at 189, 229-30, 236-37, 253, 264, 266-67.

[49] *Id.* at 229.

[50] *Id.* at 191, 264-65.

[51] *Id.* at 253.

[52] *Id.* at 237.

reader well within his grip, Philbrick fails to strike the final masterful blow. The book ends without proof that Arnold's disgrace led to America's turnabout. Only two paragraphs in the unsatisfyingly short epilogue address a change in Congress's support of the war and America's renewed appetite for untied revolution.[53] In the end, Philbrick doesn't supply enough details to support the cause and effect relationship between Arnold's treasons and the salvation of America. Perhaps Philbrick has saved the Washington-like self-correction and adaptation of the American Nation for his next Revolutionary War book.

VI. Conclusion.

All in all, *Valiant Ambition* is a satisfying read. Philbrick is an excellent writer, researcher, and storyteller. His contrast of Washington and Arnold is intriguing and thought provoking. Readers are left to contemplate their own character, explore their own inner battles, and address "the fault line that is in all of us."[54]

[53] *Id.* at 322-23.

[54] *Id.* at xix.

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