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Articles

Left Out in the Cold: The Case for a Learned Counsel Requirement in the Military
Lieutenant Commander Stephen C. Reyes

The Liberal Grant Mandate: An Historical and Procedural Perspective
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Pretrial Agreements: Going Beyond the Guilty Plea
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Note from the Field

Bundling and Consolidation: Making Sense of It All
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New Developments

Administrative & Civil Law

The Army Safety Program Update

The following Army regulation has been recently updated. The highlighted change does not necessarily address all the revisions made to this particular regulation. Attorneys should regularly consult the U.S. Army Publishing Directorate's website (<http://www.apd.army.mil>) for updates to Army publications, including regulations and pamphlets. All updated regulations feature a "Summary of Change" section that outlines pertinent revisions.

- AR 385-10, The Army Safety Program
RAR: 14 June 2010
Changes: Updates cost thresholds for accident severity classification and eliminates missiles from Class A accident criteria. A Class A accident is now defined as follows: "An Army accident in which the resulting total cost of property damage is \$2 million or more; an Army aircraft is destroyed, missing, or abandoned; or an injury and/or occupational illness results in a fatality or permanent total disability."¹

—Major Derek D. Brown, USA

Secretary of Defense Guidance on Don't Ask, Don't Tell Policy

In accordance with a recent directive issued by the Secretary of Defense to the Secretaries of the military departments,² the separation authority for homosexual conduct discharges in the Army is now the Secretary of the Army in coordination with the Under Secretary of Defense for Personnel and Readiness and the General Counsel of the Department of Defense. This change, which was announced in a memorandum from the Secretary of Defense dated 21 October 2010, affects the following regulations:

- AR 135-175, Officer Separations (28 Feb. 1987) (RAR, 27 Apr. 2010)
- AR 135-178, Enlisted Administrative Separations (12 Mar. 2007) (RAR, 27 Apr. 2010)
- AR 600-8-24, Officer Transfers and Discharges (12 Apr. 2006) (RAR, 27 Apr. 2010)

¹ U.S. DEP'T OF ARMY, REG. 385-10, THE ARMY SAFETY PROGRAM para. 3-4a (23 Aug. 2007) (RAR, 14 June 2010).

² Memorandum from Robert M. Gates, Sec'y of Def., to Sec'ys of the Military Dep'ts et al., subject: Title 10, U.S.C., § 654 (21 Oct. 2010) [hereinafter Gates Memo]; see also Memorandum from Clifford L. Stanley, Under Sec'y of Def. for Pers. & Readiness, to Sec'ys of the Military Dep'ts, subject: Don't Ask, Don't Tell Legal Developments (21 Oct. 2010).

- AR 635-200, Active Duty Enlisted Administrative Separations (6 June 2010) (RAR, 27 Apr. 2010)

According to the memorandum, the directive was issued "[i]n light of the legal uncertainty that currently exists surrounding the Don't Ask, Don't Tell law and policy" and was influenced in part by the U.S. District Court for the Central District of California's injunction in *Log Cabin Republicans v. United States*, No. 10-56634, 2010 U.S. App. LEXIS 21651 (C.D. Cal. Oct. 20, 2010).³

—Major Todd A. Messinger, USA

Center for Law & Military Operations

CLAMO Publishes New *Tip of the Spear*⁴ and *Domestic Operational Law Handbook*⁵

The Center for Law and Military Operations (CLAMO) has recently published the latest version of *Tip of the Spear*, which is now available online at CLAMO's website.⁶ This publication is the latest supplement to *Forged in the Fire: Legal Lessons Learned During Military Operations*, which CLAMO published in 2008 as a compilation of enduring lessons learned in military operations from 1994 to 2008. *Forged in the Fire* gathered all available lessons in key operational disciplines across the legal spectrum and placed them under easily referenced headings that judge advocates could quickly search, read, and digest.

With the ever-changing operational environments of the conflicts in Iraq and Afghanistan, as well as Operation Unified Response in Haiti, CLAMO recognized the need to disseminate the most recent guidance from judge advocates who advised leaders at the forefront of these operations. *Tip of the Spear* collects all CLAMO After Action Reports (AAR) completed since August 2009. It is CLAMO's intent to produce timely *Tip of the Spear* updates to *Forged in the Fire* to supplement enduring lessons learned with the most current AAR data.

The format of *Tip of the Spear* presents individual unit AAR comments in "IDR" format: issue, discussion, and recommendation. The majority of IDRs pertain to

³ Gates Memo, *supra* note 2.

⁴ CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., TIP OF THE SPEAR: AFTER ACTION REPORTS FROM AUGUST 2009—AUGUST 2010 (2010) [hereinafter TIP OF THE SPEAR].

⁵ CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., DOMESTIC OPERATIONAL LAW HANDBOOK FOR JUDGE ADVOCATES (2010) [hereinafter DOPLAW HANDBOOK].

⁶ Publications, CTR. FOR LAW & MILITARY OPERATIONS, <https://www.jagcnet2.army.mil/8525751D00557EFF/0/A86D78669E17E6F9852574DA005E3ADF?opendocument> (follow "Tip of the Spear" hyperlink).

operations in Afghanistan and Iraq, but other operations are also represented, such as Kosovo and Haiti. The observations reported are those of the legal personnel who deployed with the designated units. Their comments are presented unfiltered and are organized by area of operations and by the command in which the individual served. The IDRs do not necessarily represent the views of CLAMO or The Judge Advocate General's Corps, or have the full endorsement of the leadership of each individual commentator's organization. They simply record observations gathered through the AAR process in a transparent and unedited format for possible use by deployed judge advocates as appropriate.

The Center for Law and Military Operations has also published the latest *Domestic Operational Law Handbook for Judge Advocates (DOPLAW Handbook)*, which is also available online at CLAMO's website.⁷ The new *DOPLAW Handbook* is in its tenth edition and has been updated to include the latest information from practitioners in the field and descriptions of recent developments in law and policy relating to domestic military operations and emergency response operations.

The *DOPLAW Handbook* is designed to serve as an educational tool to assist judge advocates and paralegals involved in domestic military operations, including support to civil authorities and law enforcement, civil disturbance operations, military support to special events, disaster and emergency assistance, and related topics.⁸ Written primarily for judge advocates, the handbook is a "compilation of comprehensive legal authorities, effectively presented in a format that very knowledgeably describes the reality of DOD's war fighting and civil support missions. In short, it is the starting point for any competent lawyer's professional understanding of the . . . [current] threat environment . . ."⁹

The revised handbook's content should be familiar to readers of earlier editions. Each chapter has been updated to

reflect new developments in law and policy since the handbook was last published in November 2009. The handbook begins with a thorough overview of core authorities for Department of Defense (DoD) support to domestic operations and a comprehensive outline of the National Response Framework and other federal authorities and policies governing domestic operations. The handbook features chapters on DoD's role in chemical, biological, radiological, and nuclear (CBRNE) response; DoD support to civil authorities (DSCA); counterdrug operations; support to domestic emergency and disaster operations (with extensive discussions of the Stafford Act and related authorities); use of force in domestic operations; and intelligence and information operations, among other subjects. The *DOPLAW Handbook* also provides detailed guidance regarding interagency relationships in domestic operations with other federal and state agencies and describes the unique roles of Reserve and National Guard forces in domestic operations. The final chapter of the handbook thoroughly explores issues of fiscal and contract law in domestic operations.

As the Editor's Note explains, "[t]he Handbook is not a substitute for complete references" and "judge advocates advising in this area of law should monitor developments in this area closely as the landscape continues to evolve."¹⁰ Nevertheless, the *DOPLAW Handbook* represents a critical starting point and guide for practitioners engaged in any domestic operations mission.

To obtain hard copies of these publications for your office, please e-mail CLAMO at clamo@conus.army.mil.

—Major Albert Troisfontaines, Canadian Forces
—Lieutenant Commander Brian Robinson, USCG

⁷ Publications, CTR. FOR LAW & MILITARY OPERATIONS, <https://www.jagcnet2.army.mil/8525751D00557EFF/0/A86D78669E17E6F9852574DA005E3ADF?opendocument> (follow "2010 DOPLAW Handbook" hyperlink).

⁸ DOPLAW HANDBOOK, *supra* note 5.

⁹ *Id.* preface, at iv. Paul McHale, former Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs, wrote the preface.

¹⁰ *Id.* Editor's Note. Readers should be mindful that Field Manual 3-28, *Civil Support Operations*, and other core policy documents, including Department of Defense Directive (DoDD) 5525.5, DoD 3025.1, and DoDD 3025.15, are in the process of final approval and will be addressed in the next edition of the DOPLAW Handbook.

Lore of the Corps

Promotions to Major, Lieutenant Colonel, and Colonel in the Corps: The History of Separate Boards for Judge Advocate Field Grade Officers

Fred L. Borch III
Regimental Historian & Archivist

In March 1976, *The Army Lawyer* announced that the Secretary of the Army had “approved a separate promotion list for the Judge Advocate General’s Corps.”¹ This was a significant event because, prior to this announcement, every judge advocate field grade officer on active duty, or in the Reserve or Guard, was selected for promotion by the yearly Army Promotion Board—and consequently directly competed for promotion to higher rank with infantry, artillery, armor, engineer, and transportation officers, as well as officers of other Army branches. The story of how that changed—how the Corps obtained the authority to hold its own, separate promotion board—is worth telling.

By the mid-1970s, the grade structure of the Corps began to change as more and more young judge advocates elected to stay on active duty and make the JAG Corps a career. This was a marked change from the 1960s and early 1970s when, with the Army fighting an unpopular war in Southeast Asia, the vast majority of lawyers came into the Corps, stayed for one or two assignments, and then departed for civilian life. But the end of the war and the return of peacetime soldiering meant that more judge advocate captains were staying in the service.

Judge advocates assigned to the Personnel Plans and Training Office (PP&TO) in the Office of The Judge Advocate General (OTJAG) understood that increased retention was going to make it increasingly difficult to manage the Corps’s grade structure. “There was no way,” wrote Brigadier General (Retired) Ronald Holdaway, who served as the Chief, PP&TO, in the mid-1970s, “that we could reliably match judge advocate promotions with judge advocate vacancies under the Army Promotion List system where promotions Army-wide were matched with Army-wide vacancies and one branch might get 80 percent promotions while another got 60 percent.”²

As Holdaway further explained, the quality of judge advocates meant that the Corps had fared well in the Army Promotion List system on percentages in the past. However, these field grade promotion results had not made much difference to the Corps since the lack of retention meant that the Corps was already “way out of balance when it came to field grades.” Holdaway states, “We had acute shortages of field grade officers,” and “many of us were serving in billets

one or even two grades above our rank.”³ In fact, the low retention rate in the JAG Corps meant that it had a deficit of almost forty-five percent in field grade officers in the late 1960s and early 1970s.⁴ The shortage of majors, lieutenant colonels, and colonels to fill field grade billets in the Corps, though, also meant that field grade officer selection rates under the Army Promotion List system had been of little worry.

However, with retention increasing in peacetime, it was clear by 1975 that the Corps’s grade structure would be out of balance unless something was done. The solution: a separate JAG Corps promotion list for majors, lieutenant colonels, and colonels that would allow the Corps to manage its structure by matching JAG Corps promotions with projected JAG Corps vacancies.

At the direction of The Judge Advocate General (TJAG), Major General (MG) Wilton B. Persons, then-LTC Holdaway prepared a decision paper for The Judge Advocate General’s signature that requested the Deputy Chief of Staff for Personnel (DCSPER) give the Corps separate field grade promotion boards. Holdaway personally wrote the decision paper on two consecutive weekends so that he had the office to himself and was “not disturbed by the chaos that was PP&TO during the work week.”⁵

When the Secretary of the Army approved the concept, on the recommendation of the DCSPER, the next step was implementation.⁶ Holdaway remembers that his lieutenant colonel and colonel counterparts at DCSPER thought that a five-person board consisting of three line officers and two judge advocates would be best for a small branch like the JAG Corps. While Holdaway was willing to go along with this proposal, MG Lawrence H. Williams, The Assistant Judge Advocate General (TAJAG), was adamant that more judge advocates—if not a majority—should sit on the promotion boards. Major General Persons agreed with MG Williams, and the final decision from DCSPER acceded to the views of TJAG and TAJAG.⁷

³ *Id.*

⁴ *Separate JAGC Promotion List*, *supra* note 1.

⁵ E-mail from Brigadier General (Ret.) Ronald Holdaway to author 16 May 2010 (on file with author).

⁶ *Separate JAGC Promotion List*, *supra* note 1, at 29.

⁷ Holdaway E-mail, *supra* note 2.

¹ *Separate JAGC Promotion List*, *ARMY LAW.*, Mar. 1976, at 29.

² E-mail from Brigadier General (Ret.) Ronald Holdaway to author (17 May 2010) (on file with author) [hereinafter Holdaway E-mail]

Today, all JAGC promotion boards for field grade officers consist of six officers. A judge advocate brigadier general serves as the president of the board, and two other field grade judge advocates sit on the board as members. The other three board officers are non-special branch officers whose grades varies depending on the promotion level being considered.

Judge advocates today assume that the Corps has separate promotion boards for field grades because, given the relatively small number of judge advocates, the Corps is better able to make promotion selections than the Army Promotion Board. While that may be true, that was not the reason that the Corps asked for—and obtained—separate promotion board authority in 1976.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

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

<https://www.jagcnet.army.mil/8525736A005BE1BE>

Left Out in the Cold: The Case for a Learned Counsel Requirement in the Military

Lieutenant Commander Stephen C. Reyes*

I. Introduction

Under the Military Commissions Act of 2009 (MCA), Congress granted defendants facing the death penalty the right to a counsel learned in capital law. Congress's intent in creating a "learned counsel" position was to ensure the fairness and effectiveness of the commissions.¹ This learned counsel requirement was neither created *ex nihilo* nor is it unique to military commissions. As outlined below, the federal system and an overwhelming majority of states that authorize the death sentence have a similar requirement.² Surprisingly, a servicemember facing the death penalty has no such right.

In 2001, the Cox Commission recognized the need to provide adequate representation to defendants in capital courts-martial.³ The commission noted that "[i]nadequate counsel is a serious threat to the fairness and legitimacy of capital courts-martial, made worse at court-martial by the fact that so few military lawyers have experience in defending capital cases."⁴ The commission recommended that "Congress should study and consider the feasibility of providing a dedicated source of external funding for experienced defense counsel if military capital litigation continues to be a feature of courts-martial in the 21st century."⁵ Almost nine years have passed since the commission issued its recommendation and the military still remains one of the rare jurisdictions that have not adopted specific minimum requirements for capital counsel.

Recently, the horrific events that occurred in Fort Hood have placed considerable attention on the military's death penalty jurisprudence.⁶ This glaring spotlight and Congress's recent adoption of a learned counsel requirement for alien unprivileged enemy belligerents are ample reasons to reopen the discussion raised by the Cox Commission report and to push for the creation of a learned counsel requirement in the military.

Capital courts-martial⁷ represent a very small percentage of the thousands of courts-martial tried and appealed each year.⁸ Even so, they are the most complex and time-consuming cases in the military justice system. In other words, "death is different."⁹ What makes defending a death penalty case so different is that this ultimate penalty hovers like a specter over every aspect of the trial.

In the military, the capital sentencing scheme is set out in Rule for Court-Martial (RCM) 1004.¹⁰ Under RCM 1004, in order to impose a death sentence, the members must unanimously (1) convict the accused of a capital offense;¹¹ (2) find that one of the aggravating factors listed in RCM

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¹ In the MCA, Congress specifically noted that "the fairness and effectiveness of the military commissions system . . . will depend to a significant degree on the adequacy of defense counsel and associated resources for individuals accused, particularly in the case of capital cases . . ." National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1807 123 Stat. 2190 (2009).

² Many states do not use the term "learned counsel." For purposes of this article this term shall be used to denote counsel that meet the respective jurisdiction's qualifications to try capital cases.

³ WALTER T. COX III ET AL., NAT'L INST. OF MILITARY JUSTICE, REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (2001).

⁴ *Id.* at 10.

⁵ *Id.* at 11.

⁶ Dionne Searcey, Gary Fields & Nathan Koppel, *Death-Penalty Case Would Likely Take Years*, WALL ST. J., Nov. 10, 2009, at A7.

⁷ For purposes of this article a capital court-martial is defined as a case which remained death eligible upon the conclusion of the evidence on sentencing.

⁸ Colonel Dwight Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 2 (2006). Colonel Sullivan provides an extensive study of capital litigation in the military. In his study, Colonel Sullivan highlights that the exact number of capital courts-martial cannot be easily ascertained due to the lack of uniformity in record keeping by the services and the occasions when convening authorities inadvertently refer cases as capital. Nonetheless, he estimates that there were forty-seven capital courts-martial between 1984 and Fall 2006. Since 2006, there have been two new capital courts-martial—*United States v. Martinez* and *United States v. Hennis*—and one retrial—*United States v. Walker*. Thus, counting the retrial in *United States v. Walker*, there have been fifty capital courts-martial between 1984 and the publication of this article. (Also, the cases of *United States v. Murphy* and *United States v. Quintanilla* were initially set for a capital resentencing hearing, but both accused entered into pre-sentencing agreements which resulted in non-capital resentencing hearings. Furthermore, in the full capital rehearing in *United States v. Kreutzer*, the accused agreed to plead guilty in exchange for a non-capital referral. Since these three rehearings do not fit the definition of a capital court-martial, they were not included in the above total).

⁹ *Loving v. United States*, 62 M.J. 235, 236 (C.A.A.F. 2005) (recognizing that the unique severity of a death sentence infuses the legal process with special protections that ensure a fair and reliable trial); Symposium, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 118–19 (2004) (examining the Supreme Court's application of a heightened standard with respect to capital trials and how this standard is infused into the jury process).

¹⁰ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004 (2008) [hereinafter MCM].

¹¹ *Id.* R.C.M. 1004(a)(2).

1004(c) existed;¹² (3) find that any extenuating or mitigating circumstances are substantially outweighed by the evidence in aggravation;¹³ and (4) vote for a death sentence.¹⁴ Thus, counsel has four distinct and crucial opportunities to convince at least one member not to vote for death. The effectiveness of this argument is largely dependent on the skill and knowledge of counsel.

Competent counsel must remain abreast of evolving capital case law and contest every legal claim that may ultimately be meritorious. Pretrial motions filed in these cases can be two to four times the number filed in non-capital cases.¹⁵ Additionally, many of the issues counsel face are unique to capital defense, and even seasoned litigators may not be adequately prepared to try capital cases.¹⁶ More significantly, a capital defense not only requires a rigorous examination and investigation of the underlying crime, but in the case of sentencing, it requires an even greater undertaking to develop a mitigation case. This includes the daunting task of conducting an extensive and probing life history investigation of the accused. Under RCM 1004(b)(3), counsel has very wide latitude in preparing a sentencing case. This “imposes a greater burden to discover, investigate, analyze, evaluate, and present extenuating and mitigating evidence on behalf of a client facing a capital sentence.”¹⁷ Simply put, with such extraordinary stakes at issue, the defense counsel’s effort must also be extraordinary.

This article advocates for the adoption of a learned counsel requirement.¹⁸ Part II of this article provides an overview of the learned counsel requirement in both federal and state jurisdictions, and under the recently-enacted MCA. Part III argues in favor of adopting a similar requirement in the military and offers a proposed amendment to the Uniform Code of Military Justice (UCMJ).

II. Overview of Standards for Appointment of Capital Counsel

A. American Bar Association Guidelines

In 1989, the American Bar Association published *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines), which was revised in 2003.¹⁹ The ABA Guidelines sprouted from a growing recognition that many capital defendants were receiving inadequate representation.²⁰ Their overall objective was to “set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation”²¹

With respect to learned counsel, the ABA’s 2003 revised guidelines require that an accused in a capital case be represented by no fewer than two counsel who meet specific qualifications.²² The 2003 guidelines take a functional approach and look to the quality of counsel’s representation,²³ while the 1989 version focused on the amount of experience. Further, the commentary to Rule 5.1 of the revised 2003 edition points out that a counsel with

¹⁹ AMERICAN BAR ASS’N GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003) [hereinafter ABA GUIDELINES]. Since their publication, the ABA Guidelines have been widely accepted as the standard of performance for counsel in a death penalty case. As an example, in *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005), the Supreme Court used the ABA Guidelines to determine the reasonableness of counsel’s performance and the prevailing professional norms in defending a death penalty case. Recently, the Court noted in the case *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009), that the ABA Guidelines are not “inexorable commands” but are a helpful guide in determining what is the professional norms in defending a capital case.

²⁰ *Id.* Commentary to Guideline 1.1 (outlining a number of instances of counsel’s inadequate performance).

²¹ *Id.* Guideline 1.1(A).

²² *Id.* Guidelines 4.1, 5.1.

²³ Those qualifications listed in Guideline 5.1 include:

- substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
- skill in the management and conduct of complex negotiations and litigation;
- skill in legal research, analysis, and the drafting of litigation documents;
- skill in oral advocacy;
- skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
- skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
- skill in the investigation, preparation, and presentation of mitigating evidence; and
- skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

Id. Guideline 5.1(B)(2).

¹² *Id.* R.C.M. 1004(b)(4)(A).

¹³ *Id.* R.C.M. 1004(b)(7).

¹⁴ *Id.* R.C.M. 1004(b)(7) (referring to unanimity requirement for a death sentence found in R.C.M. 1006(d)(4)).

¹⁵ 1 MOLLY TREADWAY JOHNSON & LAURAL L. HOOPER, FED. JUD. CTR., RESOURCE GUIDE FOR MANAGING CAPITAL CASES: FEDERAL DEATH PENALTY TRIALS 3 (2004).

¹⁶ SUBCOMM. ON FED. DEATH PENALTY CASES, JUDICIAL CONFERENCE OF THE UNITED STATES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION § 1C (May 1998) [hereinafter SPENCER COMMITTEE REPORT].

¹⁷ *United States v. Kreutzer*, 59 M.J. 773, 783 (A. Ct. Crim. App. 2004) (quoting *Wiggins v. Smith*, 539 U.S. 510 (2003) and citing *United States v. Murphy*, 50 M.J. 4, 14–15 (1998)).

¹⁸ A 2002 law review article outlined a similar argument for a specialized cadre of attorneys to handle capital cases. See Major Mary M. Foreman, *Military Capital Litigation: Meeting the Heightened Standards of United States v. Curtis*, 174 MIL. L. REV. 1 (2002).

considerable experience in death penalty cases, but whose past performance in those cases was inadequate, should not be assigned to represent capital defendants.²⁴ A notable example of this type is the famous “sleeping lawyer” of Texas who slept through major parts of a capital trial. Prior to his in-court slumber, he had tried a number of capital cases.²⁵

In the military, the ABA *Guidelines* have not been formally adopted. The Court of Appeals for the Armed Forces declined to mandate their adoption. In *United States v. Loving*, the court stated that it will not involve itself in the “internal personnel management of the military services.”²⁶ Of note, the major appellate decisions that have dealt with this issue occurred prior to the publication of the revised 2003 edition.²⁷ Further, the 1989 edition of the ABA *Guidelines* allowed for such exceptions as may be appropriate for the military; however, the revised 2003 edition specifically states that its guidance should apply to the military.²⁸

B. Learned Counsel Provision in Federal Court: 18 U.S.C. § 3005

Since the First Judiciary Act of 1789, federal law has required the assignment of a “learned” counsel in capital cases.²⁹ Presently, under 18 U.S.C. § 3005, which was promulgated in 1994, a defendant in federal court accused of treason or other capital crime shall be represented by two counsel “of whom at least [one] shall be learned in the law applicable to capital cases.”³⁰ According to the *Guide to Judiciary Policy*, the term learned counsel under § 3005 means counsel with

distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in *state* death penalty trials, appeals or post-conviction review that, in combination

with co-counsel, will assure high quality representation.³¹

A federal defendant is assigned learned counsel promptly upon indictment and, in most cases, prior to the United States filing a formal Notice of Intent to Seek the Death Penalty under 18 U.S.C. § 3593(a) and (b), which is a prerequisite for imposing the death penalty. Consequently, this often means that a federal defendant has the luxury of learned counsel at the very beginning of a capital case.³² The advantage to this arrangement is that learned counsel can play an important role in convincing the Government not to pursue the death penalty.³³ Furthermore, even after the Government has decided not to seek the death penalty, it is not uncommon for learned counsel to remain on the case.³⁴

Interestingly, § 3005 requires the appointment of at least two counsel. This requirement is consistent with the ABA *Guidelines*, yet the statute differs from the ABA *Guidelines* because it only requires that one of the counsel be learned in capital law.³⁵ Also, under the *Guide to Judiciary Policy*, assigned counsel can request the appointment of additional counsel to assist in the capital defense. These “associate” counsel are appointed under the proviso that they reduce the total cost of representation.

In addition to the two appointed attorneys, defendants are commonly assigned both a mitigation specialist and an investigator. For example, in the federal case against Ahmed Ghaliani, a former Guantanamo Bay Detainee facing a non-capital military commission, the court assigned two counsel—one learned—and authorized three hundred hours for a mitigation specialist and one hundred hours for an investigator.³⁶ Notably, the funding for these positions was granted immediately after arraignment upon request from the defense counsel and prior to the Government’s decision on whether to seek the death penalty.³⁷

The establishment of this learned counsel position has produced marked improvement in the quality of legal representation and to the overall production of a capital trial. In 1998, a review of the federal death penalty system by a subcommittee of the Judicial Conference of the United States Committee on Defender Services (the “Spencer Committee”) highlighted the importance of the learned

²⁴ *Id.*

²⁵ *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001).

²⁶ 41 M.J. 213, 300 (1994).

²⁷ However, appellate counsel raised this issue in a summary assignment of error in *United States v. Walker*, 66 M.J. 721, 769 (N-M. Ct. Crim. App. 2008), and the court summarily disposed of this issue. Moreover, Walker’s previous court-martial occurred in 1993; as a result, the 1989 guidelines would have been relevant to his case. *Walker*, 66 M.J. at 721. See generally *Bobby v. Van Hook*, 130 S. Ct. 13 (2009).

²⁸ ABA GUIDELINES, *supra* note 19, at 1.

²⁹ 1 Stat 118 (1790); SPENCER COMMITTEE REPORT, *supra* note 16, § C1.

³⁰ Prior to 1994, the statute merely required counsel “learned in the law.” 18 U.S.C. § 3005 (1948).

³¹ GUIDE TO JUDICIARY POLICY, app. 6A, 1(b) (2010).

³² JOHNSON & HOOPER, *supra* note 15, at 9.

³³ See Affidavit of Kevin McNally, Federal Death Penalty Resource Counsel 2 (2002), available at http://www.capdefnet.org/pdf_library/CJA_3005_2.pdf.

³⁴ See, e.g., *In re Sterling-Suarez*, 306 F.3d 1170 (1st Cir. 2002).

³⁵ See 18 U.S.C. § 3005 (2006).

³⁶ *Ex parte* Order, Case No. 1:98-cr-01023, Document No. 748 (June 25, 2009).

³⁷ *Id.*

counsel position.³⁸ The committee interviewed a number of judges and lawyers who worked in capital litigation and noted the following:

In interviews, judges and lawyers attested to the importance of the statutory learned counsel requirement. A number of judges, particularly those with experience reviewing state death penalty trials in federal habeas corpus proceedings underscored the importance of “doing it right the first time,” i.e., minimizing time-consuming post-conviction proceedings by assuring high quality representation in federal death penalty cases at the trial level. Similarly, a former Florida Attorney General testified before an American Bar Association Task Force studying representation in state death penalty cases that, “[b]eyond peradventure, better representation at trial and on appeal will benefit all concerned.”³⁹

The Spencer Committee also noted that judges have routinely commented that the quality of representation by these learned counsel is higher than the ordinary standard of practice in other federal cases.⁴⁰

Recently, an update to the Spencer Committee report was completed and published this year.⁴¹ Despite the passage of time between the update and the initial Spencer Committee report, the update stated that much of the Spencer Committee report remains as relevant now as it was in 1998, including the need for high standards for appointed counsel.⁴² The update highlights that “the first responsibility . . . in a federal death penalty case is to appoint experienced, well trained, and dedicated defense counsel who will provide high quality legal representation.”⁴³ More specifically, the update affirms that the learned counsel requirement under federal law demands a higher degree of training and experience than that normally required.⁴⁴ Moreover, the purpose of this heightened standard is to “ensure that

representation in federal death penalty cases is both cost-effective and commensurate with the complexity and high stakes of the litigation.”⁴⁵ Lastly, the update goes on to define what is meant by the term counsel with “distinguished prior experience.”

[It] contemplates excellence, not simply prior experience, at the relevant stage of proceedings It is expected that a lawyer appointed as “learned counsel” for trial previously will have tried a capital case through the penalty phase, whether in state or federal court, and will have done so with distinction. Excellence in general criminal defense will not suffice because the preparation of a death penalty case requires knowledge, skills, abilities which even the most seasoned lawyers will not possess if they lack capital experience.⁴⁶

C. State Standards for Appointment of Learned Counsel

Thirty-five states authorize the death penalty.⁴⁷ Of those thirty-five states, at least twenty-seven have set out in a statute, court rules, or procedures outlined by the indigent defense service (IDS) provider, specific qualifications for counsel handling capital cases at the trial, appellate, or post conviction stages.⁴⁸

Similar to the 1989 ABA *Guidelines*, most of the states focus on the amount of counsel’s experience. The most common minimum experience requirement is five years; however, some states require as little as three years. California requires the most experience, with at least ten years.⁴⁹ In addition to the required years of experience, counsel must have tried a minimum number of cases. For example, Florida requires counsel to have tried a minimum of nine complex cases.⁵⁰

Also, many of the states require counsel to have specific trial experience. Idaho requires that counsel have experience in “the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic

³⁸ SPENCER COMMITTEE REPORT, *supra* note 16. The Spencer Committee was a subcommittee formed in 1997 to report on issues related to the appointment of counsel in federal death cases. The recommendations in the committee’s report were eventually adopted by the Judicial Conference.

³⁹ *Id.* § 1C.

⁴⁰ *Id.*

⁴¹ JOHN B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES JUDICIAL CONFERENCE OF THE UNITED STATES: UPDATE ON THE COST, QUALITY, AND AVAILABILITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES (2010) [hereinafter UPDATE TO THE SPENCER COMMITTEE REPORT].

⁴² *Id.* at xii.

⁴³ *Id.* at 91.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 92.

⁴⁷ The states that still authorize the death penalty are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Illinois, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

⁴⁸ *See infra* App.

⁴⁹ CAL. R. CRIM. P. 4.117(d).

⁵⁰ FLA. R. CRIM. P. 3.112(f).

evidence”⁵¹ Texas requires qualified counsel to have trial experience in the specialized areas of death penalty cases, such as the use of and challenges to mental health or forensic expert witnesses, and investigation and presentation of mitigation evidence at a capital sentencing hearing.⁵² Lastly, many states require counsel to have a minimum amount of current education or training in capital litigation.⁵³

Furthermore, in keeping with the ABA *Guidelines*, a number of states require that a capital defendant be represented by at least two counsel. For example, Arkansas, Georgia, Indiana, Idaho,⁵⁴ Louisiana, Missouri, Ohio, South Carolina, Tennessee, Utah, Virginia, and Washington all have provisions that call for the appointment of two counsel.⁵⁵ These states separate counsel into the categories of lead and associate counsel. Logically, the qualifications for lead counsel are more exacting than for associate counsel. However, the qualifications for associate counsel can also be quite extensive. In California, for example, associate counsel must have at least three years of experience, must have tried a minimum of ten felony cases or five felony cases and one murder case, must have experience in the use of expert witnesses and evidence, and must have obtained a minimum amount of continuing legal education in capital defense.⁵⁶

The learned counsel requirement is not just a product of states with a robust death penalty practice. Of the twenty seven states with this requirement, seven have a death row population of eleven or fewer inmates: Colorado (3), Connecticut (10), Kansas (10), Montana (2), Nebraska (11), Utah (10), and Washington (9).⁵⁷ These “small” states have a death row population similar to that of the military.⁵⁸ Although the number of death row inmates does not show how many capital prosecutions were sought, it does infer that these states prosecute relatively few capital cases. For instance,

- Colorado had 6 active cases in 2008 in which the district attorney sought the death penalty;⁵⁹ however, from 2002 to 2006, it had no death penalty prosecutions.⁶⁰
- Connecticut prosecuted 166 cases between 1971 and 2003 that involved a capital felony; 60 led to a conviction, and 25 had a capital sentencing hearing.⁶¹
- Kansas prosecuted 77 cases that included capital charges from 1994 to 2008; 25 of those cases went to trial and 12 resulted in a death sentence.⁶²
- Washington State had 79 death penalty cases from 1981 to 2006, and 30 death sentences were adjudged.⁶³

In comparison, the military prosecuted fifty capital court-martial from 1984 to the present.⁶⁴

A further look into the capital system of Washington State illustrates why a jurisdiction with few capital trials still requires the appointment of learned counsel.⁶⁵ Since 1981,⁶⁶ there have been seventy-nine capital trials in Washington and only thirty death sentences. The appellate history of these thirty death sentence cases has been dismal, however. According to a 2006 report by the Washington State Bar Association, twenty-three of the thirty cases have completed their appellate review at the time of the report.⁶⁷ Out of

⁵¹ ID. CRIM. R. 44.3.

⁵² TEX. CODE OF CRIM. P. art. 26.052.

⁵³ See, e.g., CAL. R. CRIM. P. 4.117(d)(6) (requiring the completion of at least fifteen hours of continuing legal education (CLE) in capital defense); FLA. R. CRIM. P. 3.112(f)(7) (requiring the completion of twelve hours of CLE in capital defense); TEX. CODE OF CRIM. P. art. 26.052(2)(G) (requiring participation in CLE in capital defense or other capital defense training).

⁵⁴ Idaho Criminal Rule 44.3 contains a unique provision that allows the court to appoint only one counsel if appropriate.

⁵⁵ See *infra* App.

⁵⁶ CAL. R. CRIM. P. 4.117(e).

⁵⁷ DEBORAH FINS, DEATH ROW U.S.A.: A QUARTERLY REPORT BY THE CRIMINAL JUSTICE PROJECT OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. 35–36 (WINTER 2010).

⁵⁸ There are currently six servicemembers with an adjudged death sentence: Kenneth Parker, Ronald Gray, Dwight Loving, Hasan Akbar, Andrew Witt and Timothy Hennis.

⁵⁹ Alan Prendergast, *Arapahoe County DA Charges Death-Penalty Fees to the State*, DENVER WESTWARD NEWS, Feb. 26, 2008, available at <http://www.westword.com/2008-02-28/news/jeffco-da-charges-death-penalty-fee-to-the-state/full>.

⁶⁰ Prior to 2002, Colorado had a three-judge panel sentence defendants in capital cases. See *id.* This type of sentencing scheme was held to be unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002).

⁶¹ CONNECTICUT COMMISSION ON THE DEATH PENALTY, COMMISSION ON THE DEATH PENALTY: STUDY PURSUANT TO PUBLIC ACT NO. 01-151, 17–18 (2003).

⁶² Kansas Facts, KAN. COAL. AGAINST THE DEATH PENALTY, http://www.kscadp.org/kansas_facts.htm (last visited Dec. 13, 2010).

⁶³ WASHINGTON STATE BAR ASS’N, FINAL REPORT OF THE DEATH PENALTY SUBCOMMITTEE OF THE COMMITTEE ON PUBLIC DEFENSE 6–7 (Dec. 2006).

⁶⁴ See sources cited *supra* note 8 and accompanying text.

⁶⁵ The author chose Washington State because it has comparable numbers to the military. For instance, in a twenty-five-year time period, Washington prosecuted seventy-nine death penalty cases. In a corresponding time period, the military tried fifty death penalty cases. There is close to a two-to-one difference, but there is also a severe population disparity between Washington (6.2 million) and the present day Active Duty military (1.4 million). With respect to actual death sentences imposed, both Washington and the military have similarly low rates: Washington 38% (30/79) and the military 32% (16/50). Moreover, both Washington and the military have similar reversal rates for capital cases, 83% (19/23) and 80% (8/10), respectively.

⁶⁶ The death penalty was re-instated in Washington in 1981. WASH. REV. CODE ch. 10.95 (1981).

⁶⁷ WASHINGTON STATE BAR ASS’N, *supra* note 63.

those twenty-three cases, nineteen (83%)⁶⁸ were reversed on appeal.⁶⁹

The errors leading to reversal involved constitutional error (2), judicial error (9), prosecutorial misconduct (2), ineffective assistance of counsel (IAC) (5), and jury misconduct (1).⁷⁰ By the numbers, IAC accounts for a little over 26% of the reversals. Further, these instances of IAC occurred prior to the imposition of a learned counsel requirement in Washington. More importantly, the deficient performance by counsel demonstrates a serious lack of understanding of the area of capital defense. These deficiencies included failing to present mitigation evidence;⁷¹ failing to conduct an adequate investigation into the facts of the crime or the defendant's life history;⁷² failing to investigate the defendant's known mental and physical conditions;⁷³ and failing to pursue well-known legal defenses.⁷⁴ As noted above, these are all tasks that are mandated by the ABA *Guidelines* as basic to a capital defense.

Today, an indigent capital defendant in Washington must be represented by a qualified learned counsel. Rule 2 of the Washington Superior Court Special Proceeding Rules—Criminal (SPRC) sets out these qualifications.⁷⁵ The SPRC was adopted in 1997, and the “learned counsel” provision has been promoted as a way to improve quality representation and fairness in capital litigation.⁷⁶ Under SPRC 2, a capital defendant shall be represented at trial and on direct appeal by a minimum of two counsel. In addition, one counsel must be qualified to handle capital cases, but both counsel must have significant trial experience and be committed to quality representation appropriate to capital cases. Furthermore, SPRC 2 limits counsel's representation to only one trial-level death penalty case at a time. The rule reads, in part,

All counsel for trial and appeal must have demonstrated the proficiency and commitment to quality representation which is appropriate to a capital case. Both counsel at trial must have five years' experience in the practice of criminal law

be familiar with and experienced in the utilization of expert witnesses and evidence, and not be presently serving as appointed counsel in another active trial level death penalty case.⁷⁷

Under SPRC 2, learned counsel is assigned once a person is charged with the capital offense and continues unless and until the prosecutor decides not to seek the death penalty.⁷⁸

D. Military Commissions Act: Counsel Learned in Applicable Law

Under the Military Commissions Act, an “alien unprivileged enemy belligerent” facing capital punishment has the right to obtain the assistance of an experienced defense counsel learned in capital law. The exact language of the provision is as follows:

When any of the charges preferred against the accused are capital, to be represented before a military commission . . . to the greatest extent practicable, by at least one additional counsel who is learned in applicable law relating to capital cases and who, if necessary, may be a civilian and compensated in accordance with regulations prescribed by the Secretary of Defense.⁷⁹

Congress intended the learned counsel provision in the MCA to have the “meaning that is commonly attributed to the same words in section 3005 of title 18, United States Code.”⁸⁰ As stated in ILB, under § 3005, the term learned counsel has been defined as an attorney with distinguished prior experience in capital litigation.

Also, there are two aspects of this provision that are particularly noteworthy: (1) the right to learned counsel applies at “preference,” and (2) the appointment of a civilian, paid for by the Government, as learned counsel is authorized. The former provision is in keeping with the federal practice of appointing counsel prior to the decision on whether to seek the death penalty, but the latter provision is unprecedented, especially in light of the fact that at a court-martial a servicemember must provide civilian counsel at his own expense. This remarkable provision, which allows civilian counsel to be retained at government expense when a qualified military counsel cannot be detailed,

⁶⁸ *Id.* at 5.

⁶⁹ *Id.* The military has a similar reversal rate of 80% (8 out of 10). See *infra* Part III.A and n.87.

⁷⁰ *Id.*

⁷¹ *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992).

⁷² *Harris v. Wood*, 64 F.3d 1432 (9th Cir. 1995); *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999).

⁷³ *In re Brett*, 16 P.3d 601 (Wash. 2001).

⁷⁴ *Pirtle v. Morgan*, 313 F.3d 1160 (9th Cir. 2002).

⁷⁵ WASH. ST. CT. R. SPRC 2.

⁷⁶ WASHINGTON STATE BAR ASS'N, *supra* note 63, at 33.

⁷⁷ WASH. ST. CT. R. SPRC 2.

⁷⁸ *Id.*

⁷⁹ 10 U.S.C. § 949a(b)(2)(c)(ii) (2006).

⁸⁰ H.R. REP. NO. 111-288, AT 863 (2009) (Conf. Rep.).

underscores the point that Congress considers learned counsel indispensable to the defense of a capital case.

Recently, the Secretary of Defense has promulgated rules concerning the application of the learned counsel requirement.⁸¹ For instance, under the Rules for Military Commission (R.M.C.), learned counsel is detailed upon the swearing of charges and when the government recommends that the charges be referred as capital.⁸² Furthermore, the convening authority (CA) is prohibited from referring the charges as capital until learned counsel is detailed.⁸³ Taken together, these rules solidifies the Secretary's intent that learned counsel be assigned at the beginning of the capital case and that such counsel should have a role in making a case against a capital referral.

III. The Case for a Learned Counsel in the Military Justice System

A. Doing a Capital Court-Martial Right the First Time⁸⁴

Capital courts-martial are rare in the military.⁸⁵ Ten cases in which the death sentence was approved by the convening authority have gone through direct review.⁸⁶ Astonishingly, of those ten cases, eight have been reversed on appeal.⁸⁷ An eighty percent reversal rate for death penalty cases is a signal that something is amiss, and a closer analysis of the cases that were reversed reveals that had learned counsel been detailed from the outset, many of the problems identified on appeal could have been avoided, to the benefit of all parties.

⁸¹ MANUAL FOR MILITARY COMMISSIONS, UNITED STATES, RULE FOR MILITARY COMMISSIONS (2010).

⁸² *Id.* R.M.C. 307(d).

⁸³ *Id.* R.M.C. 601(d)(2).

⁸⁴ See, e.g., American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 63, 65, 69, 70 (1990) (highlighting an American Bar Association Task Force study on the death penalty system. The study promoted the assignment of qualified capital counsel as a way to ensure the streamline processing, reliability and fairness of a capital trial.).

⁸⁵ See Sullivan, *supra* note 8.

⁸⁶ See *id.* at 36 (noting that nine cases have gone through some form of direct review). Since 2006, one other case—*United States v. Walker*, 66 M.J. 721, 769 (N-M. Ct. Crim. App. 2008)—has gone through the first stage of direct review.

⁸⁷ The eight reversed cases were *United States v. Dock*, 35 M.J. 627 (A.C.M.R. 1992); *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998); *United States v. Thomas*, 46 M.J. 311 (C.A.A.F. 1997); *United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1998); *United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997); *United States v. Kreutzer*, 59 M.J. 773 (A. Ct. Crim. App. 2004); *United States v. Quintanilla*, 60 M.J. 852 (N-M. Ct. Crim. App. 2005); *United States v. Walker*, 66 M.J. 721 (N-M. Ct. Crim. App. 2008).

Three of the ten cases—*United States v. Kreutzer*,⁸⁸ *United States v. Curtis*,⁸⁹ and *United States v. Murphy*⁹⁰—were reversed due to ineffective assistance of counsel. In each of these cases, defense counsel had no prior experience in capital litigation; however, defense counsel in both *Kreutzer*⁹¹ and *Curtis*⁹² were experienced litigators. Moreover, counsel's deficiency in these cases were in the investigation and handling of mitigation evidence. In *Kreutzer*, counsel failed to adequately investigate psychiatric and other mitigation evidence.⁹³ In *Curtis*, counsel was criticized for not fully developing the defendant's sentencing case.⁹⁴ In *Murphy*, counsel failed to conduct a proper mitigation investigation, to include a thorough examination of the defendant's mental health.⁹⁵

The mitigation investigation and sentencing case is viewed as the most important and arduous portion in a death penalty case.⁹⁶ Counsel's duty to thoroughly investigate mitigation evidence is, therefore, an indispensable part of a capital defense.⁹⁷ This "requires extensive and generally unparalleled investigation into personal and family history."⁹⁸ Notably, the revised 2003 ABA *Guidelines* sets out a non-exhaustive list of items that counsel should explore for mitigation, to include medical history, cognitive impairments, substance abuse, alcohol and drug use, and neurological damage.⁹⁹ More specifically, the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*¹⁰⁰ provides recommendations for a mitigation investigation. According

⁸⁸ 59 M.J. 773 (A. Ct. Crim. App. 2004).

⁸⁹ 44 M.J. 106 (C.A.A.F. 1996) (affirming the findings and sentence of death); *United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997) (granting appellant's petition for reconsideration and setting aside the death sentence based on ineffective assistance of counsel claims); *United States v. Curtis*, 48 M.J. 331 (C.A.A.F. 1997) (denying the Government's petition to reconsider the court's prior ruling to set aside the sentence); *United States v. Curtis*, 52 M.J. 166 (C.A.A.F. 1999) (affirming the lower court's decision to reassess appellant's sentence to life).

⁹⁰ 50 M.J. 4 (C.A.A.F. 1998).

⁹¹ *Kreutzer*, 59 M.J. 773, at 808–16.

⁹² *Curtis*, 44 M.J. 106, at 124 (noting that one defense counsel had tried over one hundred contested general courts-martial).

⁹³ *Kreutzer*, 59 M.J. at 773, 783.

⁹⁴ *Curtis*, 48 M.J. 331.

⁹⁵ *Murphy*, 50 M.J. 4, at 15.

⁹⁶ Russell Stetler, *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 at R. 5.1, 10.1 (2008).

⁹⁷ See *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (noting that the ABA *Guidelines* emphasizes counsel's important role in providing mitigation evidence in death cases).

⁹⁸ Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, THE CHAMPION, Jan./Feb. 1999, at 35.

⁹⁹ Stetler, *supra* note 96, R. 5.1, 10.1.

¹⁰⁰ *Id.*

to these guidelines, part of this investigation should include an examination of

medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.¹⁰¹

With this in mind, learned counsel would have identified the areas in mitigation that should have been explored, thus averting the reversible errors made in the cases discussed earlier.

Second, two pervading factors may account for the high reversal rate in the military: (1) “the military judge’s and/or counsel’s apparent unfamiliarity with death penalty practice”¹⁰² and (2) the military’s “death is different” jurisprudence, which in practice translates into a more exacting appellate standard in death penalty cases.¹⁰³ For instance, errors made in non-capital cases that would not be grounds for reversal can nevertheless be deemed reversible error in a death penalty case.¹⁰⁴ A learned counsel requirement would greatly ameliorate these two factors, which strongly contribute to the high reversal rate, and result in substantially greater judicial efficiency. The appellate history demonstrates that it takes experienced counsel—who sometimes become experienced military judges—to successfully maneuver through a capital case without committing reversible error.

I. Cost

Capital trials are time consuming and costly. From a purely practical standpoint, this is a compelling reason for doing it right the first time. In the context of the court-

¹⁰¹ *Id.*

¹⁰² Sullivan, *supra* note 8, at 47.

¹⁰³ *Id.* at 48–49.

¹⁰⁴ *Id.* at 49–50 (noting that in *Thomas* and *Simoy*, the military judge’s failure to instruct the members to vote for the lightest sentence first was reversible error, but in the non-death penalty case of *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986), the same error was not found to warrant appellate relief).

martial, the true cost of a trial is hidden by the fact that counsel and many of the expert consultants—e.g., psychiatrists, criminal investigators—are already government employees. Also, the cost of a trial depends on the tightness of the convening authority’s purse strings or the rulings of the military judge. A death case can be done on the cheap, but the relevant inquiry is the cost of doing a capital court-martial right the first time. A look at the relative cost in time and money of both state and federal prosecutions reveals that capital cases require considerably more money and time than non-capital prosecutions.

In the federal system, a capital trial can cost up to seven times more than a non-capital trial.¹⁰⁵ According to the update to the Spencer Committee report, the median amount for a capital trial, to include both pleas and contested cases, was \$353,185.¹⁰⁶ In contested cases, the median amount increased to \$465,602.¹⁰⁷ Interestingly, the update noted that the overall cost of conducting a capital trial increased in states that had little experience in these cases and decreased in states with a robust death penalty practice; however, the update added that additional study was needed in order to determine the cause of this correlation.¹⁰⁸

In state courts, there is also a considerable increase in cost for capital trials. In Maryland, a study by the Urban Institute reported that the cost to adjudicate a capital-eligible case in which the death penalty is ultimately awarded is \$1.7 million.¹⁰⁹ The report further noted that the cost to imprison an inmate during the adjudication process—the trial and the state and federal appellate stages—is \$1.3 million.¹¹⁰ According to the Urban Institute study, the cost to try a capital case is roughly \$1.9 million more than the cost of a non-capital case.¹¹¹ In Washington State, seeking the death penalty can increase the total cost of trial by as much as \$400,000.¹¹² Similarly, a 2003 study by the Kansas State Legislature revealed that the median cost for a case in which the death penalty is sought is \$1.2 million, compared to an estimated cost of \$740,000 for cases in which the death penalty was not sought.¹¹³

¹⁰⁵ SPENCER COMMITTEE REPORT, *supra* note 16, at 23–24

¹⁰⁶ UPDATE TO THE SPENCER COMMITTEE REPORT, *supra* note 41, at 24–25.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 50–56.

¹⁰⁹ URBAN INSTITUTE JUSTICE POL’Y CTR., THE COST OF THE DEATH PENALTY IN MARYLAND 2–3 (2008).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² WASHINGTON STATE BAR ASS’N, *supra* note 63, at 14–19.

¹¹³ DEATH PENALTY INFO. CTR., PERFORMANCE AUDIT REPORT: COSTS INCURRED FOR DEATH PENALTY CASES: A K-GOAL AUDIT OF THE DEPARTMENT OF CORRECTIONS 12 (2003).

In addition to dollar amounts, capital cases require more time to adjudicate. In the federal system, trial attorneys spent a median of 2,014 hours preparing for a death penalty case, or roughly 4.6 times more hours than for a non-authorized capital offense trial.¹¹⁴ The median attorney hours increase to 2,746 hours for contested capital trials.¹¹⁵ Also, on average, it takes 26.8 months for a capital defendant to go from indictment to trial.¹¹⁶

Capital courts-martial require a similarly increased expenditure of time. Examination of the five most recent capital courts-martial tried—the cases of Sergeant Hasan Akbar, Airman Andrew Witt, Airman Calvin Hill, Staff Sergeant Alberto Martinez, and Master Sergeant Timothy Hennis—reveals that the time between charging and the conclusion of trial took an average of 27.8 months—*Akbar* (25); *Witt* (15); *Hill* (15), *Martinez* (41) and *Hennis* (43).¹¹⁷ Both the *Hill* and *Martinez* capital courts-martial ended in acquittals. The *Akbar* and *Witt* cases are still at the first stage of appeal with their service courts, and their current lengths of adjudication are four years. Thus, it remains to be seen whether these cases will be in keeping with the eight and a half year average time it takes for military capital cases to go from sentencing to resolution on direct review.¹¹⁸

Some may argue that the learned counsel requirement would not be practical or cost-effective given the infrequency of capital courts-martial. However, this reasoning ignores several factors. First, the learned counsel requirement is grounded in the principle that an accused facing the death penalty should be guaranteed high-quality representation, a consideration that is subordinate to cost. From an efficiency standpoint, the appellate record vividly demonstrates that time and resources can be saved in great quantity when cases are tried competently the first time.¹¹⁹ To put it another way, the cost of trying even infrequent capital cases without learned counsel is much higher than enforcing the proposed standard. Indeed, as noted in Part II,

¹¹⁴ UPDATE TO THE SPENCER COMMITTEE REPORT, *supra* note 41, at 29.

¹¹⁵ *Id.*

¹¹⁶ Kevin McNally, Director, Federal Death Penalty Resource Counsel Project, Declaration of Kevin McNally Regarding Pre-trial Preparation Time (Mar. 11, 2009), available at http://www.capdefnet.org/fdprc/pubmenu.aspx?menu_id=98&folder_id=2496. The Federal Death Penalty Resource Counsel Project “maintains a comprehensive list of federal death penalty prosecutions and detailed information regarding district court practices in these cases.” *Id.* The information it compiles “has been relied upon by the Administrative Office of the United States Courts, by the Federal Judicial Center and by various federal district courts.” *Id.*

¹¹⁷ Recently, the accused in *United States v. Walker* had his death sentence set aside and was partially retried at a capital court-martial in 2010, roughly eighteen years after the crime was committed. Given that this case was a partial retrial of the original court-martial, it was excluded from the calculation.

¹¹⁸ Sullivan, *supra* note 8, at 41.

¹¹⁹ See CAL. R. OF CRIM. P. 4.117 (“These minimum qualifications [for learned counsel] are designed to promote adequate representation in death penalty cases and to avoid unnecessary delay and expense . . .”).

even states with few capital cases have decided that implementing a learned counsel requirement is important. Lastly, even though capital military commissions are rarer than capital courts-martial,¹²⁰ Congress has deemed it appropriate to allocate resources to fund learned counsel.

2. Acquittals: Current Trend or Outlier?

As noted above, two out of the five recent capital courts-martial ended in a finding of not guilty. More importantly, both accused were represented by military counsel.¹²¹ This forty percent acquittal rate for recent capital cases may at first blush seem to undermine the argument for a learned counsel requirement. However, notwithstanding defense counsel’s outstanding performance in these cases, three factors should be considered. First, in the *Martinez* case, at least one of the counsel had some prior capital litigation experience at the appellate stage.¹²² Second, the majority of specialized skill required in capital cases deals with the sentencing portion of the trial, and a number of the errors made in prior cases dealt with the mitigation evidence used in sentencing. Third, given the overall appellate history of capital cases, it is hard to conclude whether these two cases are simply outliers or evidence of a current trend. Notably, in 1988 the capital court-martial case of *United States v. Chrisco* ended in acquittal;¹²³ however, after *Chrisco*, death sentences were overturned on appeal in a number of other capital courts-martial.¹²⁴

¹²⁰ During and after WWII, however, a number of military commissions sentenced defendants to death. See, e.g., *Hirota v. MacArthur*, 338 U.S. 197 (1948); *Ex parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1 (1946)

¹²¹ The case of *United States v. Walker* is another notable exception in which the accused was represented solely by military counsel and received outstanding representation. Although, the accused was convicted of multiple murders, he was sentenced to life. In determining a proper conclusion to make from this result, we must consider a crucial factor: military counsel were very experienced and highly esteemed counsel, but in addition, they had extensive prior experience in death penalty litigation and received training specifically in the area of capital defense

¹²² See *United States v. Kreutzer*, 59 M.J. 773 (A. Ct. Crim App. 2004) (defense counsel for Sergeant Martinez was appellate counsel in this capital appeal).

¹²³ *United States v. Chrisco*, No. 880382 (V Corps, U.S. Army-Europe, W. Ger. 4 Feb. 1988) (resulting in total acquittal) (record of trial on file at Washington Nat’l Records Ctr., Suitland, Md.).

¹²⁴ See *United States v. Dock*, 35 M.J. 627 (A.C.M.R. 1992); *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998); *United States v. Thomas*, 46 M.J. 311 (C.A.A.F. 1997); *United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1998); *United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997); *United States v. Kreutzer*, 59 M.J. 773 (A. Ct. Crim. App. 2004); *United States v. Quintanilla*, 60 M.J. 852 (N-M. Ct. Crim. App. 2005); *United States v. Walker*, 66 M.J. 721 (N-M. Ct. Crim. App. 2008).

Arguably, the military could and has provided experienced counsel to a capital defendant, but absent a learned counsel requirement the quality of a servicemember's representation is left to chance. The ultimate goal in a learned counsel requirement is to ensure that future servicemembers facing a similar predicament as Staff Sergeant Martinez or Airman Hill will be guaranteed high-quality legal representation required for capital cases, regardless of circumstances.

B. Proposal for a Learned Counsel Requirement

In considering what type of learned counsel requirement to apply in the military, we must take into consideration the unique nature of the military and the fact that our legal system is not directly analogous to either state or federal practice. With this in mind, a learned counsel requirement that would best fit in the military would (1) be statutorily based, (2) apply the functional approach to qualifications, (3) apply at preferral of charges, and (4) include exceptions that take into consideration situations where the convening authority does not intend to seek the death penalty.

1. Statutorily Based

As outlined above, the federal or state jurisdictions with standards for capital counsel implement them through either (1) statute, (2) court rules, or (3) guidelines established by the state IDS provider. In the military, trial and appellate courts do not establish general procedural rules; therefore, court-mandated learned counsel is not feasible. As for the IDS option, since there is no centralized IDS provider in the military, each individual service Secretary or Judge Advocate General would have to adopt a provision and then set guidelines, but absent a uniform agreement by the services, such a system may lead to disparate and unequal representation. One solution would be to amend the UCMJ to include the learned counsel requirement. In addition to uniformity, an amendment would serve two purposes. First, it would establish the minimum standard for counsel in a capital case. Second, it would guarantee that any future servicemembers facing the death penalty would receive such representation.

2. Functional Approach

The federal system and the revised ABA guidelines focus on whether counsel can provide "high quality" representation. This functional approach is better situated for the military rather than the quantitative approach that many states have adopted. The quantity of counsel's experience does not necessarily entail quality. More specifically, it may be difficult for a judge advocate (JA) to amass a certain number of tried cases, given the constant change in duty stations and the fact that the number of courts-martial tried largely depends on the activity at the

trial office. As such, the functional approach widens the field for potential qualified counsel.

Also, like the requirement under § 3005 and the MCA, counsel should have actual experience in defending capital cases in order to qualify as learned counsel. In practice, it may be difficult to detail such counsel given the limited amount of capital courts-martial; however, in cases in which qualified military counsel cannot be detailed, qualified civilian counsel should be funded. This practice is authorized under the MCA for alien unprivileged enemy belligerents facing capital military commissions and should also be approved for servicemembers.

Thus, the proposed language for the minimum qualifications of capital defense counsel is as follows:

the accused shall be represented by counsel with distinguished experience in the specialized practice of capital representation and who, if necessary, may be a civilian and compensated in accordance with regulations prescribed by the Secretary of Defense .

3. Application at Preferral

One important aspect of the requirement is that it would apply upon preferral of capital offenses. This would assure the detailing of learned counsel prior to the Article 32, UCMJ, investigation.¹²⁵

The Article 32, UCMJ, investigation is an important stage at a prospective capital court-martial. At this hearing, the defendant has an opportunity to cross examine the Government's witnesses and submit mitigation evidence.¹²⁶ The appointment of learned counsel at preferral and prior to the Article 32, UCMJ, investigation would allow counsel to take full advantage of the opportunity to make a case against a capital referral, or at least begin the critical task of assembling a sentencing case. This requirement would be in keeping with current and recommended practice.¹²⁷ In the federal system, learned counsel play a key role in presenting mitigation evidence to the Government prior to the decision to seek the death penalty,¹²⁸ and under the revised ABA guidelines, learned counsel's designated function is to establish the defense team from its conception and to present

¹²⁵ See generally UCMJ art. 32 (2008).

¹²⁶ See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405 (2008) [hereinafter MCM].

¹²⁷ See DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-10.120 (2009) (providing that counsel has an opportunity to meet with the Government and present mitigation evidence prior to any decision to pursue the death penalty).

¹²⁸ *Id.*

mitigating evidence to the decision making authority as to whether to proceed with capital punishment.¹²⁹ Moreover, under the revised guidelines, counsel are required to begin assembling their mitigation case as soon as practicable.¹³⁰

4. Exception

In order to take into account the specific procedures of military practice and to address some arguments against the learned counsel requirement, there should be an exception for cases in which the CA has no intention of seeking the death penalty. For example, a major argument against imposing the learned counsel requirement is that it will lead to unintended consequences and an over-application. More specifically, the death penalty is authorized for fourteen offenses, albeit some only during a time of war.¹³¹ Furthermore, in many situations where capital offenses are preferred, the convening authority has no intention of referring the cases as capital. Lastly, Article 120, UCMJ¹³²—the offense of rape and rape against a child—is a capital offense; however, the legitimacy of this authorized punishment has been questioned as unconstitutional¹³³ and, in practice, these cases are generally never referred as capital. These concerns are legitimate, and the proposed amendment would include an exception for situations in which the CA declines to refer the charges as capital under any circumstance. This exception would take effect when the CA notifies the accused of this intent. More importantly, this notice is not evidence of the CA's intent to refer charges. Second, in light of the constitutional questions surrounding Article 120, UCMJ, offenses and the volume of such cases in the military, the CA can easily resolve the learned counsel issue by providing the accused notice of his intent not to seek the death penalty upon referral of the Article 120, UCMJ, charge.

¹²⁹ ABA GUIDELINES, *supra* note 19, Guidelines 4.1 and 10.4.

¹³⁰ *Id.* Commentary to Guideline 10.7.

¹³¹ See MCM, *supra* note 126, at A12-1 (maximum punishment chart). The fourteen capital offenses are Article 85 (Desertion in time of war); Article 90 (Assaulting, willfully, disobeying superior commissioned officer in time of war); Article 94 (Mutiny and Sedition); Article 99 (Misbehavior before enemy); Article 100 (Subordinate compelling surrender); Article 101 (Improper use of countersign); Article 102 (Forcing safeguard); Article 104 (Aiding the enemy); Article 106 (Spying); Article 106a (Espionage); Article 110 (Hazarding a vessel-willfully and wrongfully); Article 113 (Misbehavior of sentinel or lookout in a time of war); Article 118 (Murder-premeditated and during the commission of certain offenses); and Article 120 (Rape and Rape of a child);

¹³² UCMJ art. 120 (2008).

¹³³ *Coker v. Georgia*, 433 U.S. 584 (1977) (unconstitutional to impose the death sentence for rape); *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (unconstitutional to impose the death sentence for the crime of raping a child); *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008) (clarifying that its holding applies to the context of civilian criminal laws and explaining that the questions of whether application of the Eighth Amendment would be different under military law was not before the Court).

5. Proposed Language

§ 827. Art. 27 Detail of trial counsel and defense counsel

...

(d) When any of the charges preferred against the accused are capital offenses

(1) the accused shall be represented by counsel with distinguished prior experience in the specialized practice of capital representation and who, if necessary, may be a civilian and compensated in accordance with regulations prescribed by the Secretary of Defense .

(2) the requirement under (d)(1) does not apply in cases in which the convening authority has provided notice to the accused of his intent not to seek the death penalty. Such notice does not constitute the convening authority's approval that the preferred charges be referred to a court-martial.

(3) the Secretary concerned shall prescribe regulations providing for the manner in which such counsel are detailed.

IV. Conclusion

Outside the military court-martial system, virtually all capital defendants—to include those in both state and federal jurisdictions, as well as, alien unprivileged enemy belligerents at military commissions—receive the benefit of learned counsel. These jurisdictions recognize that death penalty cases are fundamentally different in scope and complexity, and thus require defense counsel with specialized knowledge and experience. The appellate record of military courts-martial, with its eighty percent reversal rate for death penalty cases, likewise illustrates that such knowledge and experience is indispensable to the conduct of minimally-sufficient capital trials. Given that, the need for a learned counsel requirement in the military is as manifest as it is in our larger society. A learned counsel requirement would bring the standards of military capital courts-martial into line with what virtually all other authorities have deemed essential, and our bring servicemembers in from the cold.

Appendix

State-by-State listing of Standards for Appointment of Qualified Counsel

Alabama—Alabama Code §13A-5-54 requires that counsel have no less than five years' experience. **Arizona**—Arizona Revised Statutes §13-4041B allows for the appointment of one counsel at the post-conviction or appellate stage. **Arkansas**—Arkansas Public Defender Commission requires two qualified counsel. **California**—California Rules of Criminal Procedure 4.117 requires the appointment of a learned counsel, but allows for the appointment of a co-counsel. **Colorado**—Colorado Revised Statutes 16-12-205 allows for one or more counsel at post-conviction review. **Connecticut**—The Connecticut Public Defender Services Commission sets out standards for qualified counsel. **Florida**—Florida Rule for Criminal Procedure 3.112 requires one learned counsel. **Georgia**—The Supreme Court of Georgia Rules requires the appointment of at least two qualified counsel. **Idaho**—Idaho Criminal Rule 44.3 requires at least two qualified counsel, unless the judge deems otherwise. **Illinois**—Illinois Supreme Court Rule 714 requires the appointment of a learned counsel. **Indiana**—Indiana Criminal Procedure Rule 24 requires the appointment of two qualified counsel. **Kansas**—Kansas Statutes Annotated, Chapter 22-4505, requires the appointment of one or more counsel to represent the defendant on appeal. **Louisiana**—Louisiana Supreme Court Rule XXXI requires the appointment of two qualified counsel. **Missouri**—Missouri Supreme Court Rules 24.036(a) and 29.16(a) requires the appointment of two counsel when the defendant files a motion to set aside his death sentence. **Montana**—Under the Montana Code, Title 46, the Office of the Chief Public Defender is responsible for establishing procedures for assigning learned counsel to capital cases. **Nebraska**—The Nebraska Committee on Public Advocacy was created by statute to assist Nebraska counties with providing indigent defense services. The NCPA has set standards for appointment of learned counsel and requires that two qualified counsel be assigned at the trial and appellate level. **Nevada**—Nevada Supreme Court Rule 250(V)2 requires that lead counsel in a capital case have been an attorney for three years, tried five felony cases and have been counsel in one death case. **North Carolina**—Capital counsel standards are set by the Office of Indigent Defense Services. **Ohio**—Rule 20 of the Rules of Superintendence for the Courts require two qualified counsel. **Oklahoma**—Oklahoma Indigent Defense System provides qualified capital counsel to seventy-five counties in Oklahoma. This office has adopted the ABA Guidelines. **Oregon**—The Oregon Public Defense Service Commission Qualification Standards for Court-Appointed Counsel establishes standards for both lead and assistant defense counsel. **South Carolina**—South Carolina Code, Title 16-3-26, requires the appointment of two counsel to represent a defendant facing the death penalty for the offense of murder. **Tennessee**—Tennessee Supreme Court Rule 13-3 requires at least two attorneys. **Texas**—Texas Code of Criminal Procedure, Article 26.052, sets out the standards for learned counsel in both capital trials and appeals. **Utah**—Utah Criminal Procedure Rule 8 requires at least two attorneys. **Virginia**—Virginia Code §19.2-163.7 requires the appointment of two qualified counsel. **Washington**—Superior Court Special Proceeding Rules SPRC 2 allows for the appointment of two qualified counsel at the trial and on direct appeal.

The Liberal Grant Mandate: An Historical and Procedural Perspective

Major Wilbur Lee*

*The origins of any legal doctrine are always complex; their explanations lie in both accessible and inaccessible history, in philosophical movements both comprehensible and mysterious . . . Lurking at all times is the risk of erroneously assigning a cause-and-effect relationship to temporal juxtapositions of developments in different fields.*¹

I. Introduction

The policy that trial courts should liberally grant challenges for cause is a “long-standing tradition in our military law.”² Over time, this concept came to be known as the “liberal grant mandate.”³ In its original form, however, this “mandate” was anything but. Rather, it was a non-partisan, exhortative policy that simply recommended that courts “be *liberal* in passing upon challenges [for cause].”⁴ The premise of this policy was that the “interests of justice are best served by addressing potential member issues at the outset of judicial proceedings, before a full trial and possibly years of appellate litigation.”⁵ Thus, military courts have regularly cited this policy in the context of reviewing rulings on challenges for cause since its inception.⁶

In 2002, in *United States v. Downing*,⁷ Judge Sullivan questioned the continued relevance of the liberal grant mandate, arguing that “reasons for this policy, although deeply historical in origin, [had] largely dissipated over time.”⁸ Several years later, Judge Erdmann, writing for the majority in *United States v. James*,⁹ took the contrasting position that the liberal grant mandate was indeed still relevant: “It is a response to the unique nature of the military justice system ‘because in courts-martial peremptory challenges are much more limited than in most

civilian courts and because the manner of appointment of court-martial members presents perils that are not encountered elsewhere.”¹⁰ In furtherance of this view, the Court of Appeals for the Armed Forces (CAAF) would transform this once advisory policy into a rule that bore very little semblance to its original form.

This article explores the “deeply historical” reasons for the liberal grant mandate that Judge Sullivan alluded to in *Downing* and examines Judge Sullivan’s argument that these reasons have “dissipated over time.” It also analyzes the relevance of these reasons in the context of the CAAF’s latest efforts to adorn the liberal grant mandate with the trappings of a legal imperative. Ultimately, it concludes that the CAAF’s interpretation and application of the mandate as the enforceable rule that it is today is inconsistent with its intended exhortative purpose, and has not proven to be any more effective in preventing potential member issues on appeal.

II. Origins of the Mandate: An Historical and Procedural Perspective

The origins of the “liberal grant mandate” can be traced back as far as the 1890 predecessor to the modern day *Manual for Courts-Martial (MCM)*.¹¹ The *Instructions for Courts-Martial and Judge Advocates (1890 Instructions)* provided military law practitioners of the day with “instructions and forms for procedure and record of courts-martial.”¹² With regard to challenges of court-martial panel members, the *1890 Instructions* specifically provided for court-martial members to “be challenged by a prisoner, but *only for cause* stated to the court.”¹³

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¹ David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1180 (1998).

² *United States v. Porter*, 17 M.J. 377, 380 (C.M.A. 1984) (Fletcher, J., concurring).

³ *United States v. Moyar*, 24 M.J. 635, 639 (A.C.M.R. 1987) (coining the phrase “liberal grant mandate”).

⁴ INSTRUCTIONS FOR COURTS-MARTIAL AND JUDGE ADVOCATES, UNITED STATES ARMY 19 (1890) [hereinafter 1890 INSTRUCTIONS] (emphasis added), available at http://www.loc.gov/rr/frd/Military_Law/CM-manuals.html (last visited Mar. 1 2010).

⁵ *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007).

⁶ WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 205 (2d. ed. 1920 reprint).

⁷ 56 M.J. 419 (C.A.A.F. 2002).

⁸ *Id.* at 425 (Sullivan, J., concurring).

⁹ 61 M.J. 132 (C.A.A.F. 2005).

¹⁰ *Id.* at 139 (quoting *United States v. Smart*, 21 M.J. 15, 19 (C.M.A. 1985)).

¹¹ Military Legal Resources: Manuals for Courts-Martial, FED. RES. DIVISION, http://www.loc.gov/rr/frd/Military_Law/CM-manuals.html (last visited Mar. 1, 2010) [hereinafter Military Legal Resources] (“The 1951 MCM was the first manual to be drafted by a committee representing all three services, and was the first manual to be issued under the 1950 UCMJ.”).

¹² 1890 INSTRUCTIONS *supra* note 4, at *5.

¹³ *Id.* at 19 (citing 88th Article of War, reprinted in WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 205 (2d ed. 1920 reprint)) (emphasis added).

During this period, as it is today, a general court-martial panel required a quorum of at least five commissioned officers,¹⁴ appointed by the convening authority,¹⁵ and on whom was impressed the “grave and important” nature of their duties.¹⁶ Service on a court-martial panel required a sense of “justice and propriety” and required the members to possess a “competent knowledge of Military Law” as well as a “perfect[] acquaint[ance] with all orders and regulations, and with the practice of Military Courts.”¹⁷ This requisite knowledge was appropriate given that they collectively voted and ruled on all matters pertaining to the court-martial from findings to sentence and everything in between, and consequently played the role of both judge *and* jury in a court-martial.¹⁸ This authority also extended to deciding challenges for cause: “The *court* shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time.”¹⁹

The 1890 *Instructions* promulgated procedures governing the challenge process in accordance with the Articles of War and remained largely consistent through 1969 when the military judge replaced the law officer as the presiding official at courts-martial.²⁰ The following is a summary of the challenge procedure as provided in the 1890 *Instructions* and as supplemented through subsequent editions of the *MCM*.

Upon establishing the jurisdictional data for the court-martial on the record, the trial judge advocate exercised his “duty” to challenge any member to whom he objected.²¹ The accused was then provided the opportunity to present challenges for cause against the members.²² The court could not “receive a challenge to more than one member at a time.”²³ Thus, even if the accused “deem[ed] all the members to be prejudiced or otherwise personally subject to exception, and though his grounds of objection may be the same to each member, he [could not] include them all in a

general challenge, but [was] permitted to challenge them singly only.”²⁴ Further, the accused bore the burden of convincing a panel of officers that one of their own was biased against him or otherwise should not sit on the panel at his court-martial.²⁵

The 1890 *Instructions* did not provide any specific guidance on what were considered acceptable grounds for challenge other than that a “challenge against a member that he [was] the author of the charges and a material witness, [was] ordinarily sufficient ground to justify” a challenge against a member.²⁶ The general rule was that the court could not excuse a member in the absence of a challenge²⁷ and the court was not to “entertain . . . [a challenge] upon the mere assertion of the accused, if it is not admitted by the challenged member.”²⁸ In other words, the accused was required to allege a specific basis for his challenge. Furthermore, a “positive declaration by the challenged member that he [was] not prejudiced against the accused, nor interested in the case, [would] ordinarily satisfy the accused, and in the [absence] of material evidence in support of the objection, justify the court in overruling [the challenge].”²⁹ Thus, it was not “unusual for a member objected to for prejudice against the accused, to disclaim having any such feeling or bias as imputed and to state that he is aware of no reason why he cannot judge impartially in the case.”³⁰

In the absence of an admission by the member of the basis for a challenge, or if the accused was not satisfied with a member’s assertion of impartiality, the merits of the challenge were litigated in the presence of the other panel members.³¹ During this “trial of the challenge,”³² the accused could “offer testimony [or other evidence] in support of his objection,” or voir dire the member “in the same manner that a juror may be examined by criminal courts.”³³ The accused and the challenged member would then withdraw, and the remaining officers would deliberate on the challenge.³⁴

¹⁴ *Id.* at 5; WINTHROP, *supra* note 6, at 70, 77, 159.

¹⁵ 1890 INSTRUCTIONS, *supra* note 4, at 3; WINTHROP, *supra* note 6, at 159.

¹⁶ 1890 INSTRUCTIONS, *supra* note 4, at 3 (quoting Headquarters, U.S. Dep’t of Army, Adjutant Gen. Order No. 28 (8 May 1880)).

¹⁷ *Id.*

¹⁸ See *United States v. Norfleet*, 53 M.J. 262, 266–67 (C.A.A.F. 2000).

¹⁹ 1890 INSTRUCTIONS, *supra* note 4, at 19 (citing 88th Article of War, reprinted in WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 205 (2d ed. 1920 reprint)) (emphasis added); see also *Norfleet*, 53 M.J. at 266 (“From the Revolutionary War through World War I, courts-martial consisted of panels of officers in which all questions—including interlocutory issues—were decided by the panel as a whole.”).

²⁰ UCMJ art. 26(a) (1968) (emphasis added).

²¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. VIII, § I, ¶ 120 (1921) [hereinafter 1921 MCM].

²² 1890 INSTRUCTIONS, *supra* note 4, at 5.

²³ *Id.* at 19 (citing 88th Article of War, reprinted in WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 205 (2d ed. 1920 reprint)).

²⁴ WINTHROP, *supra* note 6, at 207.

²⁵ *Id.* at 212.

²⁶ 1890 INSTRUCTIONS, *supra* note 4, at 20.

²⁷ *Id.*

²⁸ *Id.* at 19 (citation omitted).

²⁹ *Id.* (citation omitted).

³⁰ WINTHROP, *supra* note 6, at 210.

³¹ 1890 INSTRUCTIONS, *supra* note 4, at 19.

³² WINTHROP, *supra* note 6, at 210–11.

³³ 1890 INSTRUCTIONS, *supra* note 4, at 19 (citation omitted); see also WINTHROP, *supra* note 6, at 211 (stating other types of evidence could be submitted, e.g. documentary evidence, in support of a challenge).

³⁴ 1890 INSTRUCTIONS, *supra* note 4, at 6.

A vote on the challenge was then taken, and a majority vote was required to sustain a challenge.³⁵ The 1891 *Instructions for Courts-Martial Including Summary Courts* (1891 *Instructions*) ensured the “equality of members” in all deliberations, regardless of rank.³⁶ Beginning in 1920, the vote on the challenge was taken by secret written ballot,³⁷ reflecting a concern for anonymity and fairness in the process. Tie votes were considered to be a vote “in the negative . . . [and] the objection or motion [was] not sustained.”³⁸ If the challenge was sustained, the member was excused. However, if the challenge was denied, the challenged officer would resume his seat with the rest of the panel and the next challenge would be addressed.³⁹ This had the great potential to place the accused in a very awkward position where, as a result of directly questioning a member’s impartiality, an otherwise impartial juror might take exception and consequently become biased against the accused.

Given the labor-intensive and confrontational nature of this challenge process, the court-martial panel members represented a significant obstacle between an accused and a fair trial. Under these circumstances, it is not difficult to imagine the dilemma an accused faced in deciding whether and how to challenge any member of his court-martial panel. Moreover, because the “relevance and validity” of an accused’s challenge were determined by the very same individuals against whom he was bringing the challenge, the accused faced an uphill battle in ensuring an impartial panel throughout the challenge process.

It was in this procedural context that the liberal grant mandate appeared in its earliest form. Without elaboration, the 1890 *Instructions* simply advised, “Courts should be liberal in passing upon challenges”⁴⁰ Perhaps this exhortation recognized the inherent conflict of interest involved when members, whom the convening authority had appointed to sit on a court-martial, collectively ruled on challenges to their own impartiality. In any event, while this

simple language did not have the mandatory force or effect of a rule of law, it served as a subtle reminder to the court-martial panel that “where any reasonable doubt exist[ed] of the indifference of the member in the case to be tried, it [would] be safer and in the interest of justice to sustain the objection and excuse him.”⁴¹ Nonetheless, as of 1920, it had not gone unnoticed by observers of the military justice system that “the proceedings of courts-martial [had] been not unfrequently [sic] disapproved in General Orders for the reason that valid objections to members have failed to be allowed.”⁴²

Perhaps to reinforce the exhortation to liberally grant challenges, the 1927 *Manual* supplemented the liberal grant language with a not-so-subtle reminder that “failure to sustain a challenge where good ground is shown may require a disapproval on jurisdictional grounds or cause a rehearing because of error injuriously affecting the substantial rights of an accused.”⁴³ Additionally, the drafters of the *MCM* began to provide more definitive guidance to the panel members in resolving challenges by enumerating specific bases for successful challenges. For example, the 1908 *Manual* directed the court to sustain challenges where it was admitted or proven that a member had “investigated the charges and expressed the opinion that they can be established.”⁴⁴ In 1917, in accordance with common law principles,⁴⁵ challenges were categorized as either “principal challenges” or “challenges for favor.”⁴⁶

“Principal challenges” alleged a “specific fact of such a nature that . . . , it raises *per se*, and necessarily, a presumption of bias or prejudice which cannot be rebutted and the effect of which is *absolutely to exclude the juror*.”⁴⁷ Examples of a “principal challenge” included circumstances where a member had formed an opinion on the guilt or innocence of the accused, was “related by blood or marriage to the accused,” or had “declared enmity against the accused.”⁴⁸ Proof or admission of the facts underlying such a challenge was sufficient to sustain the challenge.

³⁵ A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND OF OTHER PROCEDURE UNDER MILITARY LAW, UNITED STATES ch. VII, § I, ¶ 90 (1917) [hereinafter 1917 MCM].

³⁶ INSTRUCTIONS FOR COURTS-MARTIAL, INCLUDING SUMMARY COURTS, UNITED STATES 9 (2d ed. 1891) [hereinafter 1891 INSTRUCTIONS] (citation omitted).

³⁷ 1921 MANUAL, *supra* note 21, ch. VIII, § I, ¶ 125.

³⁸ A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND RETIRING BOARDS, AND OF OTHER PROCEDURE UNDER MILITARY LAW, UNITED STATES ARMY 22 n.3 (1908) [hereinafter 1908 MCM] (citation omitted).

³⁹ A MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY ch. XII, ¶ 58f (1927) [hereinafter 1927 MCM].

⁴⁰ 1890 INSTRUCTIONS, *supra* note 4, at 19 (emphasis added) (citation omitted).

⁴¹ WINTHROP, *supra* note 6, at 212.

⁴² *Id.* at 213.

⁴³ 1927 MCM, *supra* note 39, ch. XII, ¶ 58f.

⁴⁴ 1908 MCM, *supra* note 38, at 29.

⁴⁵ Common law recognized four classes of challenges for cause: (1) *propter honoris respectum* (on account of a respect for nobility); (2) *propter delictum* (on account of crime); (3) *propter defectum* (on account of defect—personal or legal incapacity); and (4) *propter affectum* (on account of favor or bias). WINTHROP, *supra* note 6, at 214–17. The fourth class involved facts or circumstances from which partiality on the part of a member “must be, or may be, inferred.” *Id.* at 216. As such, they were “by far the most numerous class of challenges taken to jurors, and so to members of military courts.” *Id.* This class of challenges was divided into two subcategories: “principal challenges” and “challenges for favor.” *Id.*

⁴⁶ 1917 MCM, *supra* note 35, ch. VIII, § I, ¶ 121.

⁴⁷ WINTHROP, *supra* note 6, at 216 (emphasis added).

⁴⁸ 1917 MCM, *supra* note 35, ch. VIII, § I, ¶ 121(a).

Challenges “for favor” involved allegations of “prejudice, hostility, bias, or intimate personal friendship.”⁴⁹ These grounds for challenge were “for being in favor of one side or the other [which do not], of themselves, imply bias.”⁵⁰ Challenges for favor were determined “after hearing the grounds for [the challenge] and the reply, if any, of the challenged member, as well as any other evidence”⁵¹

In 1927, the *MCM* eliminated the distinction between challenges for favor and principal challenges in favor of a non-exhaustive list of nine enumerated “challenges for cause.”⁵² These enumerated grounds for challenge combined those previously considered to be principal challenges with those based on personal and legal defects of a member.⁵³ The list concluded with a general “catch-all” challenge based on “[a]ny other facts indicating that he should not sit as a member in the interest of having the trial and subsequent proceedings free from *substantial doubt as to legality, fairness, and impartiality*.”⁵⁴ This “catch-all” challenge would be the precursor to Rule for Courts-Martial (RCM) 912(f)(1)(N),⁵⁵ from which the doctrines of actual and implied bias were later developed.⁵⁶

Thus, in conjunction with the warning of the consequences of failure to grant challenges when “good ground was shown,” and a comprehensive list that provided specific guidance on what constituted good cause for a challenge, the liberal grant language properly equipped the court-martial panel to fairly resolve challenges to legality, fairness, and impartiality of their service on the panel. Unfortunately, in light of and despite all these “protections,” it appeared that the forest was lost for the trees in that the one obstacle around which these precautions had been built still remained: the authority of the court-martial panel to collectively rule on challenges.

III. The Beginning of the End

Surprisingly, despite the concern for the fairness and impartiality reflected in the precautions that had been implemented to ensure a fair challenge process, the practice by which the court-martial panel collectively determined

challenges remained in place through the promulgation of the 1969 *Manual for Courts-Martial*. In 1920, the Articles of War 8 and 31 were amended to require the convening authority to appoint one of the members of the panel to serve as a “law member.”⁵⁷ The “law member” was either a judge advocate or a “specially qualified” officer, if a judge advocate was not available, who was authorized to rule on interlocutory matters,⁵⁸ in addition to serving as a voting member of the panel on findings, sentence, and challenges.⁵⁹ Notably, the 1920 amendments to the Articles of War also included an amendment that provided for the exercise of one preemptory challenge per side.⁶⁰ However, despite the provision of the “law member,” the authority to decide challenges remained with the collective panel.

The post-World War II years would see even more significant changes to the composition of the court-martial panel and the manner in which it operated. In 1950, Congress enacted the Uniform Code of Military (UCMJ) in response to the “substantial criticism of the military justice system as it operated in World War II.”⁶¹ The 1951 *Manual for Courts-Martial* (1951 *MCM*) became the first such manual “drafted by a committee representing all three services, and was the first manual to be issued under the 1950 UCMJ.”⁶²

In 1950, Article 26(a), UCMJ provided for the appointment of a “law officer” in general courts-martial.⁶³ The “law officer” was an attorney who, in contrast to the “law member,” was not a voting member of the court-martial panel.⁶⁴ Rather, the authority and duties of the “law officer” now more resembled that of a judge than a juror.⁶⁵ Interestingly, a tie vote on a challenge now disqualified the member challenged.⁶⁶ In any event, while the introduction of the “law officer” to the military justice system reflected a strong “Congressional resolve to break away completely from the old procedure and insure [sic], as far as legislatively possible, that the law officer perform in the

⁴⁹ *Id.* ch. VIII, § I, ¶ 121(b).

⁵⁰ WINTHROP, *supra* note 6, at 216.

⁵¹ 1917 *MCM*, *supra* note 35, ch. VIII, ¶ I, ¶ 121(b).

⁵² 1927 *MCM*, *supra* note 39, ch. XII, ¶ 57e.

⁵³ *Id.*

⁵⁴ *Id.* (emphasis added).

⁵⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(f)(1)(N) (2008) [hereinafter 2008 *MCM*].

⁵⁶ See *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004) (stating that while RCM 912(f)(1)(N) “applies to both actual and implied bias, the thrust of the rule is implied bias” because it focuses on the “perception . . . of fairness in the military justice system”).

⁵⁷ *United States v. Norfleet*, 53 M.J. 262, 266 (C.A.A.F. 2000).

⁵⁸ See 2008 *MCM*, *supra* note 55, R.C.M. 801(e) (5) discussion (“A question is interlocutory unless the ruling on it would finally decide whether the accused is guilty. Questions which may determine the ultimate issue of guilt are not interlocutory.”); see also *Norfleet*, 53 M.J. at 266.

⁵⁹ 1921 *MCM*, *supra* note 21, at IX; see also *Norfleet*, 53 M.J. at 266.

⁶⁰ *Id.* at X.

⁶¹ *Norfleet*, 53 M.J. at 266.

⁶² Military Legal Resources, *supra* note 11.

⁶³ *Norfleet*, 53 M.J. at 267.

⁶⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 39(b) (1951) [hereinafter 1951 *MCM*].

⁶⁵ *Norfleet*, 53 M.J. at 267.

⁶⁶ 1951 *MCM*, *supra* note 64, ¶ 62h(3) (“A majority of the ballots cast by the members present at the time the vote is taken shall decide the question of sustaining or not sustaining the challenge.”).

image of a civilian judge,”⁶⁷ the authority to decide challenges for cause still remained with the panel members.

All of these changes to the composition and organization of the court-martial panel reflect a progressive transition toward a military justice system that more closely resembled the civilian system. Having come to the proverbial edge of the water with the introduction of the “law officer,” the only logical next step left in this transition was to actually provide for a judge to preside over courts-martial. Then, as if on cue, Congress replaced the “law officer” with the “military judge” when it enacted the Military Justice Act of 1968 (Act of 1968).⁶⁸

Articles 19 and 26(a), as amended by the Act of 1968, required the convening authority to detail a military judge to all general courts-martial and to any special courts-martial for which a bad conduct discharge was authorized.⁶⁹ Pursuant to Article 26(b), the military judge was required to be a

[c]ommissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.⁷⁰

The Act of 1968 endowed the military judge with “functions and powers more closely aligned to those of Federal district judges.”⁷¹ In consonance with the reasons for creating the positions of the “law member” and the “law officer,” the provision of the military judge helped further “increase the independence of military judges and members and other officials of courts-martial from unlawful influence by convening authorities and other commanding officers.”⁷²

Under the new Article 26(c), the military judge answered directly to the “Judge Advocate General, or his designee,” and served as a military judge as his primary duty.⁷³ This requirement served “to separate the military judiciary from the traditional lines of command,”⁷⁴ and further “enhance[d] the independence of judicial

decisionmaking by military judges.”⁷⁵ Article 26(c) also provided that neither the convening authority nor any member of his staff may “prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge . . . which relates to his performance of duty as a military judge.”⁷⁶ The addition of the military judge to courts-martial was a paradigm shifting change for many obvious reasons, some of which have been discussed above. In the context of challenges, this change was monumental in that it marked the first time in military justice jurisprudence that the authority to decide challenges for cause against members was removed from the collective court-martial panel; now, the military judge would “determine the relevancy and validity of challenges for cause”⁷⁷

The introduction of the military judge into the military justice system also possibly set the stage for a more subtle amendment to the way challenges for cause were viewed—at least by the drafters of the *MCM*. The 1969 *Manual for Courts-Martial* (1969 *MCM*) would be the last time the *MCM* would include the language of the liberal grant mandate in its text. Since the *1890 Instructions*, the admonition that courts-martial panels “be liberal in granting challenges” appeared in every edition of the *MCM*, dutifully reminding courts-martial panels of their obligation to ensure that the accused’s court-martial is free from substantial doubt as to “legality, fairness, and impartiality.”⁷⁸

For the first time in almost a century, this language did not appear in the text of the *MCM* when it was revised in 1984.⁷⁹ This notable deletion was explained in the Drafters’ Analysis.

Paragraph 62h(2) of MCM, 1969 (Rev.) advised that the military judge “should be liberal in passing on challenges, but need not sustain a challenge upon the mere assertion of the challenger.” This *precatory language* has been deleted from the rule as an *unnecessary* statement. This deletion is not intended to change the *policy* expressed in that statement.⁸⁰

The reference in the Drafters’ Analysis to the deleted language as “precatory” and “unnecessary” raises several interesting observations and questions. First, the liberal grant language had never been held out to be mandatory in nature. In fact, the non-mandatory tenor of the language

⁶⁷ United States v. Griffith, 27 M.J. 42, 45 (C.M.A. 1988).

⁶⁸ Pub. L. No. 90-632, 82 Stat. 1335 (1968).

⁶⁹ UCMJ arts. 19, 26 (1968).

⁷⁰ *Id.* art. 26(b).

⁷¹ United States v. Norfleet, 53 M.J. 262, 267 (C.A.A.F. 2000).

⁷² *Id.*

⁷³ *Id.* at 267–68.

⁷⁴ *Id.*

⁷⁵ *Id.* at 268.

⁷⁶ *Id.*

⁷⁷ UCMJ art. 41 (1968).

⁷⁸ 2008 MCM, *supra* note 55, R.C.M. 912(f)(1)(N).

⁷⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984) [hereinafter 1984 MCM].

⁸⁰ *Id.* R.C.M. 912(f)(3) analysis, at A21-54 (emphasis added).

made clear that it was simply advisory in nature. Nonetheless, the explicit qualification of the deleted language as “precatory” confirmed the advisory nature of the “mandate.”⁸¹

Second, the explanation that the language had been deleted because it was “unnecessary” naturally raised the question of why it was considered “unnecessary.” One explanation is that a military judge, having been trained and educated in the law, was presumed to know the law and be able to apply it correctly.⁸² Therefore, the judge would, by virtue of this knowledge and training, be less likely to be influenced by extraneous factors than a member untrained in the law might be.

Another reason why the language may have been removed, and why it had been included in the text of the *MCM* for so long in the first place, is that, along with the appearance of the military judge, the “reasons for this policy, although deeply historical in origin, [had] largely dissipated”⁸³ Once the military judge displaced the panel members as the final arbiters of challenges for cause, the role of the court-martial panel became more limited to that of a fact-finding body and, thus, more closely aligned with a civilian jury than ever before.⁸⁴ The court-martial panel was no longer subject to the conflict of interest inherent in having to rule on challenges against themselves. As a result, a significant avenue of potential influence between the convening authority and the panel members he had selected had been closed off. Moreover, because the military judge’s billet did not fall within the traditional lines of command, separation and independence from the convening authority’s sphere of potential influence enhanced the degree of fairness and impartiality associated with the military judge’s ruling on challenges for cause.

IV. The Liberal Grant Mandate Lives On

Despite the conspicuous deletion of the “unnecessary” liberal grant language from the *Manual*, appellate courts continued to routinely reference this practice in opinions addressing the propriety of military judges’ rulings on challenges for cause.⁸⁵ In fact, some even expressly referenced the Drafters’ Analysis indicating that the deletion was “not intended to change the policy expressed in that

⁸¹ See *supra* notes 7–8 and accompanying text.

⁸² United States v. Downing, 56 M.J. 419, 424 (C.A.A.F. 2002) (Crawford, J., concurring) (citing United States v. Prevatte, 40 MJ 396, 398 (C.M.A. 1994)).

⁸³ *Id.* at 425 (Sullivan, J., concurring).

⁸⁴ See United States v. Norfleet, 53 M.J. 262, 267 9 (C.A.A.F. 2000).

⁸⁵ United States v. Smart, 21 M.J. 15, 19 (C.M.A. 1985); United States v. Rome, 47 M.J. 467, 469 (C.A.A.F. 1998); United States v. Schlamer, 52 M.J. 80, 93 (C.A.A.F. 1999); *Downing*, 56 M.J. at 422; United States v. Moyar, 24 M.J. 635, 638 (A.C.M.R. 1987).

statement.”⁸⁶ And thus, the liberal grant mandate lived on in spirit.

Indeed, it was not uncommon for appellate courts referencing the liberal grant language to do so in a tone that revealed a growing sense of frustration at having to address challenges for cause on appeal that military judges clearly (from the appellate courts perspective) should have granted:

We urge all trial judges and prosecutors to read and reread the guidance as to liberally granting challenges We cannot over-emphasize the time wasted untangling these matters on appeal. We thus press home to military judges, in the strongest possible terms, what was said by the Commander-in-Chief in another context: “Read my lips.”⁸⁷

Despite the courts’ repeated invocation of the mandate, often in the context of reversing a military judge’s ruling on a challenge, no appellate court has reversed a military judge’s denial of a challenge for cause on the ground that the judge did not apply the liberal grant mandate.⁸⁸ The liberal grant mandate remained more a policy that appellate courts wished trial judges followed more often than a rule to be enforced on appeal.⁸⁹

V. Policy Becomes Mandate

By 2002, the appellate courts began to take an increasingly mandatory tone regarding the application of the liberal grant mandate at trial, in stark contrast to the more suggestive tone of the original language that once appeared in the *MCM*.⁹⁰ Invariably, the appellate courts justified the application of the liberal grant mandate to challenges for cause “because in courts-martial peremptory challenges are

⁸⁶ United States v. White, 36 M.J. 284, 287 (C.M.A. 1993) (citing 1984 *MCM*, *supra* note 79, R.C.M. 912(f)(3) analysis, at A21-54).

⁸⁷ United States v. Jobson, 28 M.J. 844, 849 n.1 (A.F.C.M.R. 1989) (internal citations omitted). See also United States v. Miller, 19 M.J. 159, 164 (C.M.A. 1985) (“[Denial of challenge] was particularly unreasonable ‘in view of the limited availability of peremptory challenges at courts-martial.’”); United States v. Townsend, 65 M.J. 460, 467 (C.A.A.F. 2008) (Baker, J., concurring) (“Why would a military judge take a chance, where, in fact, the accused has objected to the member sitting on his court and preserved the issue? Why take the chance that an appellate court will disagree and reset the clock after years of appellate litigation?”).

⁸⁸ Colonel Louis J. Puleo, *Implied Bias: A Suggested Disciplined Methodology*, ARMY LAW., Mar. 2008, at 35.

⁸⁹ *White*, 36 M.J. at 287 (“A trial court’s standard is to grant challenges for cause liberally. An appellate court’s standard is to overturn a military judge’s ruling on a challenge for cause only for a clear abuse of discretion.”).

⁹⁰ United States v. Daulton, 45 MJ 212, 217 (C.A.A.F. 1996) (“Military judges *must* follow the liberal-grant mandate in ruling on challenges for cause.”) (emphasis added).

much more limited than in most civilian courts and because the manner of appointment of court-martial members presents perils that are not encountered elsewhere.”⁹¹

In *United States v. Downing*,⁹² the CAAF reviewed a military judge’s denial of a defense challenge for cause against an officer member based on the member’s friendship with the trial counsel.⁹³ In the course of affirming the case, the CAAF determined that “[i]n light of the manner in which members are selected to serve on courts-martial, including the single peremptory challenge afforded counsel under the UCMJ, . . . military judges *must* liberally grant challenges for cause.”⁹⁴

In a concurring opinion, Judge Sullivan, in response to the mandatory tone in which the courts were beginning to cite the liberal grant mandate, attempted to stem what he perceived to be a unsettling tide.⁹⁵ Judge Sullivan reminded the courts that, “[r]egardless of the Manual drafters’ assertion that this policy is still in effect, the President removed the only express statement of this policy in 1984.”⁹⁶ Judge Sullivan further argued,

[P]olicy, unlike law, is unenforceable and largely hortatory in nature. In addition, the reasons for this policy, although deeply historical in origin, have largely dissipated over time. Finally, in view of the broad discretion afforded by this Court to a trial judge in deciding challenges for cause, a qualitative standard of liberality is nearly impossible to ensure.⁹⁷

Indeed, a close look at the history of the liberal grant mandate and its role in the challenge process bears out Judge Sullivan’s argument in that the perils once associated with the manner in which challenges for cause were resolved had been mitigated, if not eclipsed, by the development of enumerated grounds for challenge and the advent of the military judge. As concurring opinions often go, however, Judge Sullivan’s historic observations would fall on deaf ears—perhaps partly because the liberal grant mandate was

neither law nor necessary to the analysis and holding in *Downing*. Ironically, dicta would soon become law as the CAAF began the process of giving the liberal grant mandate the force and effect of law in the years following the *Downing* decision. In hindsight, Judge Sullivan’s cautionary remarks regarding the impossibility of enforcing a liberal grant mandate from the appellate bench would prove prophetic.

After *Downing*, the increased frequency⁹⁸ with which the CAAF addressed issues arising from a military judge’s denial of challenges for cause reflected the court’s “growing sense of frustration . . . [with] military judges who do not . . . articulate their reasons for denying the challenge in light of the court’s liberal grant mandate.”⁹⁹ In an effort to encourage military judges to more strictly adhere to the liberal grant mandate, the CAAF began to add teeth to this once merely exhortative policy.

In *United States v. James*,¹⁰⁰ the CAAF examined whether the liberal grant mandate was applicable to government challenges for cause. Once again citing the convening authority’s “opportunity to provide his input into the makeup of the panel through his [detailing] power,” and the limited peremptory challenges available to the accused, the court declared that there was “no basis for application of the ‘liberal grant’ policy when a military judge is ruling on the Government’s challenges for cause.”¹⁰¹ In limiting the liberal grant mandate’s application to defense challenges, the CAAF again signaled that this principle was more than just an advisory policy to be begrudgingly applied or frustrated with “*pro forma* questions to rehabilitate challenged members.”¹⁰²

Another message imparted through the CAAF’s one-sided application of the liberal grant mandate was that the concept of “impartiality” could be applied in a biased manner. This new partisan application of the liberal grant mandate stood in stark contrast to the view previously expressed by the Court of Military Appeals in *United States v. Reynolds*¹⁰³ that “[b]oth the Government and the accused [were] entitled to members who will keep an open mind and decide the case based on evidence presented in court and the law as announced by the military judge.”¹⁰⁴ This remained the Court’s position through 1999 as reflected in *United*

⁹¹ *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005) (quoting *United States v. Smart*, 21 M.J. 15, 19 (C.M.A. 1985)); see also *Miller*, 19 M.J. at 164; *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998); *United States v. Schlamer*, 52 M.J. 80, 93 (C.A.A.F. 1999); *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002); *United States v. Moyar*, 24 M.J. 635, 638 (A.C.M.R. 1987).

⁹² 56 M.J. 419 (C.A.A.F. 2002).

⁹³ *Id.* at 420.

⁹⁴ *Id.* at 422 (citing *United States v. Daulton*, 45 M.J. 212 (C.A.A.F. 1996)) (emphasis added).

⁹⁵ *Id.* at 424 (Sullivan, J., concurring) (“Turning to the question whether military judges must ‘liberally’ grant challenges for cause, I think our position on this matter should be reconsidered.”).

⁹⁶ *Id.*

⁹⁷ *Id.* (citations omitted).

⁹⁸ The CAAF has reviewed at least fifteen cases concerning the propriety of military judges’ ruling on challenges for cause since *Downing*. See generally Puleo, *supra* note 88 (tracking recent challenge cases at the CAAF).

⁹⁹ Puleo, *supra* note 88, at 35.

¹⁰⁰ 61 M.J. 132 (C.A.A.F. 2005).

¹⁰¹ *Id.* at 139.

¹⁰² *United States v. Moyar*, 24 M.J. 635, 638 (A.C.M.R. 1987).

¹⁰³ 23 M.J. 292 (C.M.A. 1987).

¹⁰⁴ *Id.* at 294 (emphasis added).

States v. Schlamer,¹⁰⁵ where the CAAF upheld a military judge's grant of a government challenge by expressly applying the liberal grant mandate to the government's challenge.¹⁰⁶

The CAAF's campaign to transform the liberal grant mandate from a policy to an enforceable rule continued with its decision in *United States v. Clay*.¹⁰⁷ *Clay* was a rape case in which a member revealed during voir dire that in light of the fact that he had two teenage daughters, "if [he] believed . . . that an individual were guilty of raping a young female, [he] would be merciless within the limit of the law."¹⁰⁸ The defense challenged the member for actual bias under RCM 912(f)(1)(N), and the military judge denied the challenge without explanation.¹⁰⁹

In setting aside the case, the CAAF noted that a challenge under RCM 912(f)(1)(N) encompassed both actual and implied bias,¹¹⁰ and the issue presented was "one of implied bias, and in particular, the application of the liberal grant mandate."¹¹¹ The court once again cited the role of the convening authority in selecting courts-martial members and the limit of one peremptory challenge per side as the reasons military judges were required to be liberal in granting defense challenges for cause. Because the record did not reflect that the military judge had considered either implied bias or the liberal grant mandate, the CAAF held that the military judge had abused his discretion in denying the challenge.¹¹²

With this decision, the court announced a new standard of review to be used when the liberal grant was improperly applied: "A military judge who addresses implied bias by applying the liberal grant mandate on the record will receive more deference on review than one that does not."¹¹³ The court subsequently refined this deference-shifting principle in *United States v. Townsend*¹¹⁴ as follows: "Where a

military judge does not indicate on the record that he has considered the liberal grant mandate in ruling on a challenge for implied bias, we will accord that decision less deference during our review of the ruling."¹¹⁵

While the outcome in *Clay* was probably the correct one, the manner in which the CAAF arrived at the result would have far more impact than the result itself. With *Clay*, the CAAF effectively turned the principle that military judges know the law and apply it correctly on its head.¹¹⁶ This was especially disconcerting because the court previously applied this very presumption in determining whether a military judge had considered the mandate in deciding a challenge for cause.¹¹⁷ Most importantly, however, the fact that the improper application of the liberal grant mandate to a challenge for cause would trigger a separate, even less deferential, standard of review than the one used for implied bias challenges completed the liberal grant mandate's transformation into a rule of law.

When the CAAF decided *James* and *Clay*, the notion that the liberal grant mandate's existence and application were justified by the role of the convening authority in selecting courts-martial members and the limit of one peremptory challenge per side was neither new nor in dispute.¹¹⁸ In fact, these justifications had been recited in case law for so long that it had become "part of the fabric of military law."¹¹⁹ It is almost no surprise, then, that no one blinked a disapproving eye (except, perhaps, Judge Sullivan) when the CAAF looked to these "historical concerns" to justify dressing an advisory policy in the clothing of an enforceable rule of law and treating it as such. This is especially noteworthy considering that in doing so, the CAAF significantly departed from many principles it had previously espoused in cases like *Reynolds* and *Schlamer*.¹²⁰

A critical analysis of these purported historical justifications for the liberal grant mandate reveals no logical connection between these reasons and the mandate's role in helping to ensure a fair and impartial court-martial panel. First, the application of the liberal grant mandate, even if limited to defense challenges, does not change or counter-balance the fact that the convening authority ultimately chooses the members that sit on the panel. Even when the liberal granting of defense challenges results in a reduction

¹⁰⁵ 52 M.J. 80 (C.A.A.F. 1999).

¹⁰⁶ *Id.* at 95 (finding that the judge had acted "consistently with the liberal-grant mandate").

¹⁰⁷ 64 M.J. 274 (C.A.A.F. 2007).

¹⁰⁸ *Id.* at 275 (emphasis in original).

¹⁰⁹ *Id.* at 276.

¹¹⁰ *Id.* ("Actual and implied bias are separate legal tests, not separate grounds for challenge.") (internal quotation marks omitted).

¹¹¹ *Id.*

¹¹² *Id.* at 278.

¹¹³ *Id.* at 277. A military judge's ruling on a challenge for cause is reviewed for an abuse of discretion. *United States v. James*, 61 M.J. 132, 138 (C.A.A.F. 2005). However, with regard to implied bias, because the courts apply an objective test, the "standard . . . is less deferential than abuse of discretion, but more deferential than de novo review." *United States v. Moreno*, 63 M.J. 129, 134 (2006). This new standard of review associated with the liberal grant mandate purported to provide even less deference than the already amorphous implied bias standard.

¹¹⁴ 65 M.J. 460 (C.A.A.F. 2008).

¹¹⁵ *Id.* at 464.

¹¹⁶ *United States v. Downing*, 56 M.J. 419, 424 (C.A.A.F. 2002) (Crawford, J., concurring) (citing *United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994)).

¹¹⁷ *Id.* ("While a statement by the military judge that he considered the liberal-grant mandate . . . would be helpful on appellate review, no such statement is required. Military judges are presumed to know the law and apply it correctly.")

¹¹⁸ *Clay*, 64 M.J. at 276-77.

¹¹⁹ *Id.* at 277.

¹²⁰ See *supra* notes 104, 106 and accompanying text.

of panel members below the required quorum in a court-martial, the convening authority must still select the additional members.¹²¹ There is no legal basis for a military judge to grant a challenge merely because the convening authority selected a member. More to the point, no legal basis exists for the judge to even consider such a fact in determining a challenge on other grounds. The argument that the liberal grant mandate would act as a moral deterrent to a convening authority who, in selecting members for a court-martial panel, might be tempted to stray from the requirements of Article 25, UCMJ, is far too speculative to justify the one-sided application of a concept whose main purpose is to ensure impartiality.

Likewise, the application of the liberal grant mandate does nothing to ameliorate the fact that military law allows only one peremptory challenge per side in courts-martial. The disparity between the number of peremptory challenges available to the military accused and his civilian counterpart reflect logistical limitations inherent in the military justice system rather than any nefarious design. More specifically, the number of peremptory challenges provided under military law reflect the fact that “[i]n civilian life the pool of potential jurors is considerably greater than the number of qualified court members available in the military community”¹²² and, perhaps to a lesser degree, the quorum requirements for trial in the military.¹²³ Viewed in this light, it may even be argued that the one peremptory challenge that the military accused wields has the potential to have more impact on the composition of a panel than the many a civilian defendant has, especially since a two-thirds majority consensus of the members is required for a conviction.¹²⁴

The view that the military judge should grant challenges liberally because the accused has only one peremptory challenge essentially requires the military judge to exercise peremptory challenges on behalf of the accused. However, as with the purported notion that the convening authority’s selection of the court-martial panel drives the application of the liberal grant mandate at the trial level, there is no *legal* basis for a military judge to consider the limited number of peremptory challenges in ruling on a defense challenge for cause.

VI. What’s In a Name?

As Judge Sullivan stated, “the reasons for this policy, although deeply historical in origin, have largely dissipated

¹²¹ 2008 MCM, *supra* note 55, R.C.M. 912(g)(2) discussion.

¹²² *United States v. Mason*, 16 M.J. 455, 457 (Everett, J., dissenting) (C.M.A. 1983); *see also* FED. R. CRIM. P. 24(b) (allocating peremptory challenges in federal criminal cases).

¹²³ 2008 MCM, *supra* note 55, R.C.M. 501 (requiring a minimum of five and three members for general and special court-martial, respectively).

¹²⁴ *Id.* R.C.M. 921(c)(2)(b).

over time.”¹²⁵ An examination of the evolution of the liberal grant mandate suggests that the “deeply historical” reasons for the liberal grant mandate were the procedures used to decide challenges for cause by a majority vote of the panel members. When this practice ended with the introduction of the military judge, the reasons for the mandate indeed “dissipated.” The explanation that the mandate exists because the convening authority appoints the panel members or because only one peremptory challenge is permitted per side is misguided.

Accordingly, courts should recognize that the liberal grant mandate was originally intended to be an exhortative policy and is, by its very nature, “unenforceable and largely hortatory.”¹²⁶ Calling a policy a “mandate” and creating a new and unique standard of review to enforce it does not necessarily make it so. The application of the liberal grant mandate, in its most recent form, has become an exercise in awkwardness on both the trial and appellate levels. It has failed to produce much in the way of consistent results, and consequently, clarity of guidance, as to its proper use. Perhaps this is so because the enforcement of this elusive standard essentially relies on proving the speculative effects of a negative—what a military judge procedurally failed to do—rather than on what facts actually exist on the record that support the military judge’s ruling on a challenge for cause.

“An appellate court’s standard” has always been “to overturn a military judge’s ruling on a challenge for cause only for a clear abuse of discretion.”¹²⁷ The added layer of analysis currently required by the relatively new and less deferential standard associated with the liberal grant mandate only makes for a more complex analysis—and likely one that would not produce a different outcome. An analysis of the recent cases, such as *Clay*, that have purported to apply the new “less than more than” standard under the liberal grant mandate, would arguably have had the same outcome based on an application of the traditional abuse of discretion standard. The message to the trial courts sent by a reversal based on the more familiar abuse of discretion standard, however, would be a much clearer indication of what military judges should not do.

As discussed, a historical perspective does not support the current application of the liberal grant mandate. Nonetheless, regardless of what the future holds for the application of the liberal grant mandate as an enforceable rule, and whatever the applicable standard of review, the liberal grant mandate should always remain an appropriate guiding principle for military judges to apply when ruling on challenges for cause, regardless of which party raises them.

¹²⁵ *United States v. Downing*, 56 M.J. 419, 425 (C.A.A.F. 2002) (Sullivan, J., concurring).

¹²⁶ *Id.*

¹²⁷ *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993).

Trial courts *should*, therefore, as a matter of policy, liberally grant challenges for cause when there is reasonable doubt regarding the impartiality of a member. Addressing such potential member issues at the outset of judicial proceedings

would undoubtedly obviate the need for years of appellate litigation and serve both the interests of justice and efficiency of the courts.¹²⁸

¹²⁸ United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007).

Pretrial Agreements: Going Beyond the Guilty Plea

Major Stefan R. Wolfe*

A defendant can “maximize” what he has to “sell” only if he is permitted to offer what the prosecutor is most interested in buying.¹

I. Introduction

Since the founding of the modern Uniform Code of Military Justice (UCMJ), the use of pretrial agreements in military justice has constantly evolved.² Once the red-headed stepchild of military justice, pretrial agreements are now viewed as a significant piece of the military justice system.³ Drafting and reviewing pretrial agreements are critical skills for every military justice practitioner.

Counsel who lack the requisite experience often make one of two errors. The first, but rare, mistake is to insert an improper term, creating unnecessary appellate issues and possibly jeopardizing the findings and sentence on appeal. While uncommon, when an appellate court sets aside the finding or sentence because of a poorly drafted pretrial agreement term, it can be a spectacular mistake. The second (but arguably greater) harm is caused by counsel who are too timid when considering the terms of a pretrial agreement. These counsel may fail to come to an agreement or negotiate a less satisfactory agreement than is otherwise possible because they insist on sticking to boiler-plate guilty plea language (e.g., an agreement to plead guilty in exchange for a simple sentence limitation) due to inexperience.

While the dangers of having an appellate court scrutinize an agreement's erroneous term are clear, the dangers of being too cautious when drafting agreements are less clear and warrant discussion. When attorneys fail to consider all the permissible terms when considering a pretrial agreement, they unnecessarily handicap themselves. First, there is clear judicial economy anytime parties can avoid litigating an issue. The parties can narrow the contested issues by agreeing to waive motions, to elect trial by military judge alone, to stipulate to facts, or to otherwise

resolve witness production and evidence issues. Second, the defense rarely ever actually, rather than tactically, disputes every element of the Government's case.⁴ For example, background facts in many cases remain undisputed, and only one or two elements are actively contested. By stipulating to the uncontested facts in exchange for a limitation on sentence—albeit a limitation not nearly as favorable as if the accused had plead guilty—both sides get a bargained for benefit: The Government is relieved of having to prove elements that, although not directly challenged, could be administratively burdensome, and the defense, in stipulating to facts they did not plan to contest, has reduced the accused's punitive exposure. Both sides, in making this agreement, have narrowed the contested issues, allowing the parties and the system to focus the trial on issues actually in contention.

Accordingly, this paper seeks to provide military justice practitioners with the tools necessary to draft comprehensive pretrial agreements. First, the paper will examine the regulatory limits governing pretrial agreements. These limits, though clear, must be understood by attorneys practicing in military courts. Second, this paper will distill a few basic rules from case law which, if followed, should ensure that almost any term in a pretrial agreement will survive appellate scrutiny. By knowing both the strictures of the Rules for Courts-Martial (RCM) and those established by the appellate courts, counsel should have the skills to negotiate and implement any pretrial agreement with confidence.

II. The Bright Line—Terms Permitted by the Rules for Courts-Martial

Before even talking to opposing counsel about a pretrial agreement, new practitioners should review both old agreements and the RCM. Pretrial agreements are governed by RCM 705, which specifies both permissible and impermissible terms.⁵ Specified permissible terms include

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¹ *United States v. Mezzanatto*, 513 U.S. 196, 208 (1995).

² For an excellent summary of the history of pretrial agreements, see Major Mary M. Foreman, *Let's Make a Deal! The Development of Pretrial Agreements in Military Criminal Justice Practice*, 170 MIL. L. REV. 53 (2001).

³ To see how far the use of pretrial agreements has changed in military justice, compare *United States v. Schmeltz*, 1 M.J. 8, 11 (C.M.A. 1975) (rejecting the use of a term requiring trial by judge alone in the pretrial agreement), with *MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705(c)(2)(e)* (2008) [hereinafter MCM] (specifically allowing trial by military judge alone).

⁴ For example, in many rape cases, the parties may agree about everything except whether there was consensual intercourse. In such cases, the parties can stipulate to all the uncontroverted facts leading up to and following the alleged rape. This could include stipulating to the DNA test results, crime scene photos, how much alcohol was consumed, and any prior relationship between the victim and accused. The sentence limitation would be proportional to the extent of the stipulation, and in some cases, it would never be in the accused's interest to enter into such a deal, regardless of the punitive exposure. Of course, since the case remains contested, such stipulations should be drafted using neutral language.

⁵ MCM, *supra* note 3, R.C.M. 705.

promises to stipulate to certain facts, testify as a witness, provide restitution to victims, refrain from committing additional misconduct, waive the right to an Article 32 investigation, waive the right to forum selection, and waive the Government's requirement to produce sentencing witnesses.⁶ Impermissible terms include any term that is not voluntarily entered into by the accused.⁷ Additionally, a pretrial agreement may not deprive the accused of "the right to counsel; the right of due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; [or] the complete and effective exercise of post-trial and appellate rights."⁸ Finally, RCM 705 allows the relevant service Secretary to prescribe limitations on the use of pretrial agreements.⁹

Though small, the proscription on the use of impermissible terms still imposes a cost. For example, prohibiting an accused from bargaining away his appellate rights, even in cases with no appealable issues, creates two costs. First, the accused is denied the opportunity to receive a lighter sentence in exchange for knowingly waiving a right.¹⁰ Second, since few accused waive appellate review

(given the strict prohibition on receiving anything in return), the appellate system is forced to divert resources from reviewing contested cases to reviewing guilty pleas.¹¹

Finally, in addition to the enumerated list of impermissible terms, RCM 705 also prohibits any term which is contrary to "public policy."¹² Since RCM 705 clearly delineates many permissible and impermissible terms, most appellate litigation on pretrial agreements focuses on whether a term or condition violates public policy.¹³

III. Beyond the Bright Line—When Does a Term Violate Public Policy?

The terms expressly permitted by RCM 705 are clear enough and should not pose a problem to most attorneys. They are, however, hardly comprehensive. Attorneys who confine themselves to drafting only agreements that strictly conform with the RCM severely limit their practice. Critically, RCM 705 is permissive in nature, and "terms or conditions . . . which are not prohibited" are allowable under the rule.¹⁴ While the rule prevents the accused from bargaining away "certain fundamental rights," it allows "the accused substantial latitude to enter into terms or conditions as long as the accused does so freely and voluntarily."¹⁵

Not surprisingly, appellate courts have approved terms other than those expressly contained in the *Manual for Courts-Martial*. In this section, I will analyze those cases and define the rules that govern what makes a pretrial agreement term permissible or impermissible. The rules are remarkably few, and if followed, they allow practitioners almost free reign in writing pretrial agreements.

⁶ *Id.* R.C.M. 705(c)(2); *see also* United States v. Thomas, 6 M.J. 573 (A.C.M.R. 1978) (finding term in pretrial agreement requiring the accused enter into a stipulation of fact was not an illegal collateral condition); United States v. Reynolds, 2 M.J. 887, 888 (A.C.M.R. 1976) (finding a provision requiring the accused to testify truthfully in other proceedings to be permissible); United States v. Callahan, 8 M.J. 804, 806 (N.M.C.M.R. 1980) (allowing a term requiring that the accused pay cash restitution to victims acceptable and cautioning against restitution "in-kind," such as labor); United States v. Dawson, 10 M.J. 142, 150 (C.M.A. 1982) (approving "no misconduct" provision in plea deal, but convening authority must give accused due process before setting aside sentence limitation); United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982) (finding that it is permissible to waive the Article 32 Investigation as part of a pre-trial agreement); United States v. Schmeltz, 1 M.J. 8 (C.M.A. 1975) (approving a plea deal in which the accused was required to request trial by judge alone); United States v. Mills, 12 M.J. 1 (C.M.A. 1981) (allowing accused to waive Government production of sentencing witnesses as part of pretrial agreement and allowing, but finding burdensome, a term that deferred confinement and clemency until after all appeals were complete).

⁷ MCM, *supra* note 3, R.C.M. 705(c)(1)(A); *see, e.g.*, United States v. Care, 40 C.M.R. 247 (1969) (finding the accused's plea was not knowing when the accused claimed that he would not have pled guilty to desertion if the trial court had explained that the charge required he had the "intent to remain away permanently").

⁸ MCM, *supra* note 3, R.C.M. 705(c)(1)(B); *see also* United States v. Holland, 1 M.J. 58 (C.M.A. 1975) (reversing findings because the pretrial agreement infringed on military judge's role by requiring accused to enter pleas before making any motions).

⁹ MCM, *supra* note 3, R.C.M. 705(a). Army regulations impose no restrictions on the types of pretrial agreements. *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (16 Nov. 2005) (failing to discuss any limitation on pretrial agreement types). In fact, rather than limiting an agreement's terms, regulations affirmatively require convening authorities to consider requiring the accused to pay restitution. *Id.* para. 18-16c ("Court-martial convening authorities will consider the appropriateness of requiring restitution as a term and condition in pretrial agreements.").

¹⁰ *See* John F. O'Connor, *Foolish Consistencies and the Appellate Review Of Courts-Martial*, 41 AKRON L. REV. 175, 188 (2008) (discussing the costs of appellate review). However, "the court-martial rules . . . prohibit the accused from trading away his appellate rights as part of plea negotiations

and prohibit the government from offering the accused any inducement at all, such as sentencing relief, in return for a waiver of appellate review." *Id.* at 191-92.

¹¹ *Id.* at 188.

¹² MCM, *supra* note 3, R.C.M. 705(d)(1) ("Either the defense or the government may propose any term or condition not prohibited by law or public policy.").

¹³ *See, e.g.*, United States v. Sunzeri, 59 M.J. 758, 759 (N-M. Ct. Crim. App. 2004) (finding provision that prohibited accused from presenting sentencing evidence violated public policy); United States v. Thomas 60 M.J. 521, 527 (N-M. Ct. Crim. App. 2004) (discussing whether an accused may waive clemency in a pretrial agreement); United States v. Mitchell, 62 M.J. 673, 675 (N-M. Ct. Crim. App. 2006) (discussing whether pretrial agreement waiving accused's right to file unreasonable multiplication of charges motion violates public policy).

¹⁴ MCM, *supra* note 3, R.C.M. 705(b)(1).

¹⁵ *Id.* R.C.M. 705(c) analysis, at A21-40.

A. A Brief History—The Retreat from Paternalism

In the initial years of the UCMJ, courts were extraordinarily paternalistic in reviewing pretrial agreements.¹⁶ Terms that RCM 705 now expressly permit, such as the promise not to engage in post-trial misconduct, were initially viewed as potentially violative of public policy.¹⁷ Appellate courts once scrutinized and expressly frowned upon any pretrial agreement that contained any term other than a limitation on sentence.¹⁸

The appellate courts have since (at least in this regard) abandoned their past paternalism and now have an expansive and permissible attitude towards pretrial agreements.¹⁹ Courts suggest that “an otherwise valid guilty plea will rarely, *if ever*, be invalidated on the basis of plea-agreement provisions proposed by the defense.”²⁰ Even when the Government proposes a term, “[o]nly actions which may reasonably be construed as attempts to orchestrate the trial proceeding”²¹ or terms that attempt to turn “the trial proceedings into an empty ritual”²² will be rejected. This relative flexibility should benefit both sides of the bargaining table. When the courts prohibit a term, the prosecutor’s hands are tied and the accused is prevented from benefiting from the otherwise agreed upon term.²³

B. Rule #1—The Rules Governing Courts-Martial Are Presumptively Waivable by the Accused in a Pretrial Agreement

After the Supreme Court’s decision in *United States v. Mezzanatto*,²⁴ the Court of Appeals for the Armed Forces (CAAF) retreated further from its past paternalism. In *Mezzanatto*, the defendant was arrested in a sting operation for trying to sell a pound of methamphetamine to an

undercover narcotics agent.²⁵ Three months later, the defendant and his attorney requested to meet prosecutors.²⁶ At the meeting, “the prosecutor informed respondent that . . . if he wanted to cooperate he would have to be completely truthful. . . . [and] would have to agree that any statements he made during the meeting could be used to impeach any contradictory testimony he might give at trial.”²⁷ During the subsequent discussions with the prosecutor, the defendant admitted that he knowingly attempted to sell methamphetamine to the undercover agent but attempted to minimize his role.²⁸ Convinced that the defendant was not being completely truthful about his culpability in the narcotics trade, the prosecutor broke off negotiations.²⁹ During the subsequent contested trial the defendant took the stand and claimed that “he was not involved in methamphetamine trafficking.”³⁰ The prosecutor then confronted the accused with his earlier statements, made during plea negotiations, where he had admitted to knowingly attempting to sell methamphetamine.³¹

Federal Rule of Evidence 410, which is substantively identical to Military Rule of Evidence 410, prohibits using admissions made during plea negotiations at trial.³² In *Mezzanatto*, the Supreme Court had to decide whether a prosecutor could require a defendant to waive Rule 410’s protections as a precondition to entering plea negotiations.³³ In determining that the agreement was enforceable, the Court held that the rules governing evidence and criminal procedure were “presumptively waivable.”³⁴ In *United States v. Rivera*, the CAAF found this presumption applies also to courts-martial.³⁵

In *Rivera*, the court determined that Article 36, UCMJ, “sets out the congressionally mandated policy” that court-martial procedures, to the extent practicable, mirror the

¹⁶ See, e.g., *United States v. Schmeltz*, 1 M.J. 8, 11 (C.M.A. 1975) (agreeing that pretrial agreement provisions for a trial by judge alone had “the appearance of evil”).

¹⁷ See *United States v. Dawson*, 10 M.J. 142, 148-49 (C.M.A. 1981) (“We do not believe, however, that this pretrial agreement clause is a proper tool to [prohibit post-trial misconduct].”).

¹⁸ Compare *United States v. Cummings*, 38 C.M.R. 174, 177 (C.M.A. 1968) (concluding that agreements should be limited to “bargaining on the charges and sentence”), with *United States v. Rivera*, 46 M.J. 52, 54 (C.A.A.F. 1997) (enforcing any agreement not prohibited by the rules).

¹⁹ The hesitancy among Army practitioners to consider aggressive pretrial agreements may in part be the result of institutional inertia stemming from the courts’ past paternalism. While the courts have evolved, some practitioners may be reluctant to abandon their tried and true ways.

²⁰ *United States v. Gibson*, 29 M.J. 379, 382 (C.M.A. 1990) (citing *United States v. DeYoung*, 29 M.J. 78, 81 (C.M.A. 1989) (emphasis added)).

²¹ *United States v. Jones*, 23 M.J. 305, 307 (C.M.A. 1987).

²² *Id.* at 307 n.4.

²³ *Rivera*, 46 M.J. at 54.

²⁴ 513 U.S. 196 (1995).

²⁵ *Id.* at 198.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 198–99.

²⁹ *Id.* The respondent attempted to minimize his role in the manufacture of methamphetamine by claiming that he had not visited the drug lab for at least a week before his arrest. Police surveillance proved otherwise. As the prosecutor believed that the respondent was not fulfilling his commitment to be truthful, he ended negotiations immediately. *Id.* at 199.

³⁰ *Id.*

³¹ *Id.*

³² FED. R. EVID 410 (“[E]vidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who . . . was a participant in the plea discussions: . . . any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.”).

³³ *Mezzanatto*, 513 U.S. at 198–99.

³⁴ *Id.* at 201.

³⁵ *United States v. Rivera*, 46 M.J. 52, 53 (C.A.A.F. 1997)

procedures used in the U.S. district courts.³⁶ Since the Supreme Court found that the rules of criminal procedure were presumptively waivable in district court, under Article 36, the rules of criminal procedure should be similarly waivable in a court-martial.³⁷

Rivera reveals the extent to which the accused may trade away his rights for leniency.³⁸ In *Rivera*, the accused agreed to make no motions and agreed to testify in any trial related to his case *without* a grant of immunity.³⁹ While the court found these terms expansive, the CAAF refused to nullify a pretrial agreement because of the “mere potential for abuse of prosecutorial bargaining power.”⁴⁰ Rather, the court stated that only when a “case-by-case” inquiry finds evidence that the accused’s waiver of rights was “the product of fraud or coercion” will the accused be entitled to a remedy.⁴¹

United States v. Francisco provides another example.⁴² The court refused to even consider the accused’s claim that the charge failed to state an offense because it found “that the appellant ha[d] waived his right to complain about the specification, on appeal, when he agreed to a pretrial agreement in which he agreed to waive all waivable claims.”⁴³ Amazingly, the court found that, absent plain error, the accused had even waived the right to contest the validity of a charged specification.⁴⁴

The extent to which the CAAF is willing to let an accused waive his rights recently became clear when the court decided *United States v. Gladue*.⁴⁵ In *Gladue*, the accused, as part of a pretrial agreement for the attempted murder of court-martial witnesses, agreed to “waive any

waivable motions.”⁴⁶ During a colloquy with defense counsel, the military judge asked which motions the defense was waiving.⁴⁷ The defense counsel mentioned several motions that the accused intended to waive, but never expressly discussed the possibility of waiving motions concerning the unreasonable multiplication of charges.⁴⁸ On appeal, for the first time, the accused claimed that the charges were unreasonably multiplied.⁴⁹ In response, the Government argued that the accused had waived this issue when he agreed to waive any waivable motions.⁵⁰

The central issue the CAAF decided was whether a waiver of an issue is “knowing” when the issue is never explicitly discussed in court. Put differently, can an accused knowingly waive issues he is unaware of? The CAAF ruled in the affirmative, holding that the accused had knowingly waived his rights when he agreed to waive any waivable motions.⁵¹ Even though “motions relating to multiplicity and unreasonable multiplication of charges were not among those subsequently discussed by the military judge and the civilian defense counsel,” the waiver was still valid.⁵² Consequently, all Government counsel should bargain for a similar provision in future pretrial agreements. Such a provision can only strengthen the Government’s case on appeal.

It should now be clear that when drafting pretrial agreements, practitioners should start with the assumption that the accused is free to waive almost any rule or right, and an accused is free to bargain away these rights in exchange for leniency. Of course, this presumption has its limits.

C. Rule #2—Do Not Try to Hide Anything from the Judge or Fact-Finder

Naturally, certain terms are so “fundamental to the reliability of the factfinding process that they may never be waived without irreparably ‘discredit[ing] the . . . courts.’”⁵³ For example, in *United States v. Josefik*, the Court speculated that an agreement that provided for the defendant to be tried by twelve orangutans would be invalid, notwithstanding the defendant’s consent.⁵⁴

³⁶ *Id.*

³⁷ *Mezzanatto*, 513 U.S. at 201; UCMJ art. 36 (2008). While the President may prescribe the rules and procedures for courts-martial, the rules “shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.” UCMJ art. 36 (2008).

³⁸ *See Rivera*, 46 M.J. at 53.

³⁹ *Id.* Admittedly, the court found the provision to waive all motions to be overly broad. *Id.* at 54. As discussed, RCM 705 prohibits the accused from waiving his right to make, for example, speedy trial or jurisdictional motions. *See infra* Part II. However, since the facts of the case did not raise any speedy trial or jurisdictional issues, the pretrial agreement was enforceable. *Rivera*, 46 M.J. at 54.

⁴⁰ *Id.* at 54.

⁴¹ *Id.* Ironically, although the accused traded away many of his rights, because of the limited sentence he received from the military judge, the sentencing limitation bargained for in the pretrial agreement was never triggered.

⁴² 2009 WL 3060207 (A.F. Ct. Crim. App. Aug. 4, 2008) (unpublished).

⁴³ *Id.* at *3.

⁴⁴ *Id.*

⁴⁵ 67 M.J. 311 (C.A.A.F. 2009).

⁴⁶ *Id.* at 314 (quoting the pretrial agreement).

⁴⁷ *Id.*

⁴⁸ *Id.* at 313 (noting that the defense counsel had considered motions for a continuance, a suppression motion, and the potential for raising an entrapment defense).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 314.

⁵² *Id.*

⁵³ *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995).

⁵⁴ 753 F.2d 585, 588 (7th Cir. 1985). The *Mezzanatto* Court cited to *Josefik*, including a quotation about the orangutans. *Mezzanatto*, 513 U.S. at 204.

In addition to restricting apes from sitting on juries, the *Mezzanatto* Court gave some meaningful guidance on what terms are impermissible as a matter of public policy. Generally, appellate courts treat terms that permit the use of otherwise impermissible evidence differently from terms that restrict the use of otherwise admissible evidence.⁵⁵ Allowing *more* evidence “enhances the truth-seeking function of trials,” whereas hiding otherwise admissible evidence from the fact-finder may subvert justice.⁵⁶ For example, in *Mezzanatto*, the court reasoned that allowing the prosecution to introduce statements made during plea negotiations

enhances the truth-seeking function of trials and will result in more accurate verdicts. . . . [O]nce a defendant decides to testify, he may be required to face impeachment on cross-examination, which furthers the function of the courts of justice to ascertain the truth. . . . A contract to deprive the court of relevant testimony . . . stands on a different ground than one admitting evidence that would otherwise have been barred by an exclusionary rule. One contract is an impediment to ascertaining the facts, the other aids in the final determination of the true situation.⁵⁷

Likewise, in *United States v. Gallaspie*, the accused agreed to waive any hearsay objections to Government sentencing evidence.⁵⁸ At trial, the accused objected to the admissibility of written statements by the accused’s commanding officer.⁵⁹ However, since the agreement expanded the amount of admissible evidence, the court found that the accused’s waiver of his rights was valid.⁶⁰

On the other hand, in *United States v. Sunzeri*,⁶¹ a pretrial agreement limited the accused from presenting evidence (of any kind) from any witness who lived outside the island of Oahu.⁶² Specifically, the agreement stated that

the accused agreed “not to call any off island witnesses for presentencing, either live or telephonically. Furthermore, substitutes for off island witness testimony, including, but not limited to, Article 32 testimony, affidavits, or letters will not be permitted or considered when formulating an appropriate sentence in this case.”⁶³ Thus, according to the pretrial agreement, the accused was prohibited from presenting relevant evidence in his sentencing case. In accordance with the Supreme Court’s guidance in *Mezzanatto*, the court found that by limiting the evidence in front of the fact finder, this provision denied the accused the right to complete sentencing proceedings.⁶⁴

This is not to say that pretrial agreements can never restrict the presentation of evidence; it only means that caution should be duly exercised. For example, in *United States v. Edwards*,⁶⁵ the accused had specifically intended to present evidence in mitigation claiming that he had been illegally interrogated by Air Force investigators.⁶⁶ However, as part of his pretrial agreement, the accused agreed that he would not mention the illegal interrogation in either the *Care*⁶⁷ inquiry or during his unsworn statement.⁶⁸ The CAAF analyzed these two terms (limiting the *Care* inquiry and limiting the unsworn statement) separately.⁶⁹

Predictably, the court found that the pretrial agreement’s limitation on the *Care* inquiry was “not . . . appropriate.”⁷⁰ Parties cannot limit a judicial inquiry into the providency of pleas, nor can parties limit the judicial inquiry into a plea agreement itself. To allow parties to limit the *Care* inquiry is equivalent to allowing them to negotiate away the fundamental processes and protections of the court-martial. Just as parties cannot agree to a jury of orangutans, parties cannot handcuff the judge’s inquiry into the facts of a guilty plea.⁷¹ However, since the trial judge had ignored the pretrial agreement’s restriction on the *Care* inquiry, the illegal term had no effect, and the accused did not receive any relief.⁷²

⁵⁵ *Mezzanatto*, 513 U.S. at 204–05.

⁵⁶ *Id.* at 204.

⁵⁷ *Id.* at 204–05 (internal quotations and citations omitted).

⁵⁸ 63 M.J. 647, 648 (N-M. Ct. Crim. App 2006).

⁵⁹ *Id.* While the accused objected to the evidence under the confrontation clause, the courts found that his objection was subsumed by his hearsay waiver. *Id.*

⁶⁰ *Id.*; see also *United States v. Gibson*, 29 M.J. 379 (C.M.A. 1990) (permitting a pretrial agreement in which the accused waived his rights to object to hearsay and confrontation clause issues).

⁶¹ 59 M.J. 758 (N-M. Ct. Crim. App. 2004)

⁶² As discussed in Part II, RCM 705(c)(2)(E) does allow an accused to waive the Government’s production of sentencing witnesses. In such cases, the defense remains free to present alternative means of testimony or to have the witness testify at no expense to the Government. See *infra* Part II. There is a significant difference between preventing the accused from

presenting sentencing evidence and merely relieving the Government of the burden of production.

⁶³ *Sunzeri*, 59 M.J. at 760.

⁶⁴ *Id.*

⁶⁵ 58 M.J. 49 (C.A.A.F. 2003). At the time, prior to 2006, investigators could not talk to a Soldier without first coordinating with a defense counsel. See *United States v. Finch*, 64 M.J. 118 (C.A.A.F. 2006).

⁶⁶ *Edwards*, 58 M.J. at 50.

⁶⁷ See *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

⁶⁸ *Edwards*, 58 M.J. at 50.

⁶⁹ *Id.*

⁷⁰ *Id.* at 51.

⁷¹ *Id.*

⁷² *Id.*

Interestingly, the court did not object to the pretrial agreement's limitation on the accused's unsworn statement.⁷³ Noting that the accused entered the agreement voluntarily and knowingly, the court did not find that the agreement's limitations on the accused's unsworn statement deprived him of a "complete sentencing proceeding" under RCM 705.⁷⁴

However, even though the CAAF may have accepted a pretrial agreement term restricting the evidence an accused could present in an unsworn statement, adopting a similar term is probably not advisable. First, the *Edwards* decision relied heavily on the specific facts of the case.⁷⁵ The accused's contemplated unsworn statement concerned matters that were unrelated to the charges and were outside the scope of evidence specifically permitted by RCM 1001,⁷⁶ which is rarely the case. Second, attempting to limit the admission of evidence in a pretrial agreement is often a fruitless exercise. In reviewing the pretrial agreement with the accused, the military judge must discuss the terms of the agreement thoroughly.⁷⁷ In doing so, the military judge will usually become aware of most issues, even those not technically admitted into evidence.

D. Rule #3—Ensure the Terms of the Agreement Are Clear

Admittedly, ensuring that the pretrial agreements are clear is easier said than done. It is a tripartite effort, requiring the attention of government and defense counsel, as well as the military judge.⁷⁸ Generally, the less specific the term, the more scrutinized the case will be on appeal. Additionally, if the parties have a material misunderstanding over what the terms of the pretrial agreement were, a guilty plea entered based on the plea agreement may be found improvident.⁷⁹

The CAAF all but encouraged parties to draft clear terms in *United States v. Spaustat*.⁸⁰ In this case, the

accused received three separate confinement credits, and the parties disagreed as to whether the *Suzuki*⁸¹ credit—for pretrial confinement under harsh conditions—should be applied to the adjudged sentence or to the cap provided for in the pretrial agreement.⁸² While the CAAF resolved the dispute in that particular case, the court noted, in dicta, that the parties could have resolved the issue by including it as a term in the pretrial agreement.⁸³

The importance of clarity when drafting a pretrial agreement was also clear in the CAAF's decision in *United States v. Acevedo*.⁸⁴ In this case, the CAAF had to parse the language of a tricky term concerning the suspension of a discharge.⁸⁵ In exchange for pleas of guilty, the convening authority agreed that a "punitive discharge may be approved as adjudged. If adjudged and approved, a dishonorable discharge will be suspended for a period of 12 months from the date of court-martial at which time, unless sooner vacated, the dishonorable discharge will be remitted without further action."⁸⁶ At trial, the accused received a bad conduct discharge.⁸⁷ The issue on appeal was whether the terms of the agreement that required the suspension of a dishonorable discharge also required the convening authority to suspend the bad conduct discharge.⁸⁸

The CAAF interpreted the agreement literally and found that the convening authority promised only to suspend the dishonorable discharge.⁸⁹ It was obvious to the CAAF (as it is to any practitioner) that the terms of the agreement created unusual incentives.⁹⁰ If the accused received a dishonorable discharge and committed no additional misconduct, the discharge would be vacated. If, on the other hand, the accused received a bad conduct discharge, it could be imposed without suspension.⁹¹ The CAAF acknowledged this irony and called the result a "crapshoot" for the accused.⁹² However, the CAAF refused "to second-guess the parties in this regard, provided the punishments proposed

⁷³ *Id.* at 53.

⁷⁴ *Id.* (finding that it was not relevant for mitigation purposes, as the interrogation did not concern the charged offenses).

⁷⁵ *See id.*

⁷⁶ *Id.*

⁷⁷ *See* MCM, *supra* note 3, R.C.M. 705(d)(4) (stating military judge reviews pretrial agreement terms to ensure there are no material disagreements as to the meaning of terms).

⁷⁸ *See id.*; *see also* *United States v. Resch*, 65 M.J. 233 (C.A.A.F. 2007) (holding that before a plea of guilty may be accepted, the military judge must ensure that the accused understands the pretrial agreement provisions and ensures that the parties agree to the terms set forth in the agreement).

⁷⁹ *See* *United States v. Hardcastle*, 53 M.J. 299 (C.A.A.F. 2000) (finding mutual mistake in agreement made pleas improvident); *United States v. Williams*, 53 M.J. 293 (C.A.A.F. 2000) (finding pleas improvident where defense counsel and military judge misunderstood accused's administrative status).

⁸⁰ 57 M.J. 256 (C.A.A.F. 2002).

⁸¹ *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983) (providing for additional credit for pretrial confinement under harsh conditions).

⁸² *Spaustat*, 57 M.J. at 261–62.

⁸³ *Id.* at 264 n.6 ("[W]e note that . . . the convening authority may require that the agreement provide that any [*Suzuki*] credit ordered by the military judge will be applied against the adjudged sentence, not the sentence cap in the pretrial agreement.").

⁸⁴ 50 M.J. 169 (C.A.A.F. 1999)

⁸⁵ *Id.* at 172.

⁸⁶ *Id.* at 171.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 173.

⁹⁰ *See id.* at 173–74.

⁹¹ *Id.*

⁹² *Id.* at 174.

are lawful.”⁹³ Practitioners should take some comfort in knowing that even when agreements are bizarre, as long as they are not illegal, they remain enforceable.

E. Rule #4—Keep the Promises You Make

It goes without saying that both the accused and the convening authority must abide by the terms of a signed pretrial agreement. Additionally, “when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.”⁹⁴ If a convening authority fails to keep his side of the bargain, the accused will almost certainly get some form of relief.⁹⁵ Not surprisingly, it is almost unheard of for a convening authority to intentionally break a pretrial agreement without just cause, but sometimes, a convening authority may unintentionally break an agreement because of negligence in post-trial processing.⁹⁶ More often, however, errors are caused when a convening authority makes a promise that he lacks the power to enforce.

The CAAF addressed a series of cases from the Navy in which all parties believed their pretrial agreements would enable the accused to continue collecting pay while in confinement.⁹⁷ Unfortunately, as all accused were past their expiration of service, Navy regulations prohibited them from collecting additional pay.⁹⁸ In all of these cases, the CAAF set aside the findings and sentence because the accused did not receive the benefit of their bargains.⁹⁹

Likewise, in *United States v. Smead*, the convening authority promised, as part of a pretrial agreement, that the accused would be confined at the Marine Corps Air Station Miramar Base Brig and enrolled in a sex offender treatment program.¹⁰⁰ Unfortunately, however, the convening

⁹³ *Id.*

⁹⁴ *Santobello v. New York*, 404 U.S. 257 (1971).

⁹⁵ *See, e.g., United States v. Smith*, 56 M.J. 271, 280 (C.A.A.F. 2002). *But see United States v. Grizzard*, 2003 WL 22803438 (N-M. Ct. Crim. App. Nov. 25, 2003) (unpublished) (finding harmless error when convening authority failed to suspend confinement as required by the pretrial agreement because accused was never confined).

⁹⁶ *See generally Grizzard*, 2003 WL 22803438.

⁹⁷ *See States v. Williams*, 53 M.J. 293 (C.A.A.F. 2000); *United States v. Hardcastle*, 53 M.J. 299 (C.A.A.F. 2000); *United States v. Albert*, 30 M.J. 331 (C.M.A. 1990); *United States v. Smith*, 56 M.J. 271, 280 (C.A.A.F. 2002). The Army, unlike the Navy, agreed on appeal to specifically perform the terms of the pretrial agreement. *See United States v. Lundy*, 63 M.J. 299 (C.A.A.F. 2006). This required obtaining the Secretary of the Army’s personal approval to pay the accused’s family the money they were due under the pretrial agreement. *Id.*

⁹⁸ *See United States v. Williams*, 53 M.J. 293 (C.A.A.F. 2000); *United States v. Hardcastle*, 53 M.J. 299 (C.A.A.F. 2000); *United States v. Albert*, 30 M.J. 331 (C.M.A. 1990); *Smith*, 56 M.J. at 280.

⁹⁹ *See United States v. Williams*, 53 M.J. 293 (C.A.A.F. 2000); *United States v. Hardcastle*, 53 M.J. 299 (C.A.A.F. 2000); *United States v. Albert*, 30 M.J. 331 (C.M.A. 1990); *Smith*, 56 M.J. at 280.

¹⁰⁰ 60 M.J. 755, 756 (N-M. Ct. Crim. App. 2004).

authority lacked the authority to determine the location of confinement, and the accused was confined elsewhere.¹⁰¹ As the convening authority made a promise he could not keep, the court overturned the convictions and remanded the case.¹⁰²

Similarly, in *United States v. Tate*, the court found that the convening authority exceeded his authority when the pretrial agreement required the accused to reject clemency from the Secretary of the Navy.¹⁰³ The court found that the convening authority cannot sign an agreement which infringes on his superior’s rights to exercise clemency power.¹⁰⁴

Of course, an accused who fails to fulfill his half of the bargain likewise does so at his peril. An accused who fails to plead guilty as required will simply not get the benefit of his bargain. Meanwhile, an accused who pleads guilty and then subsequently violates the pretrial agreement by, for example, committing post-trial misconduct can suffer drastic consequences.¹⁰⁵ In such cases, the accused may be bound by his guilty plea, but the convening authority will no longer be constrained by the sentencing limitation of the plea agreement.¹⁰⁶ Wise defense counsel will consider whether their clients will be able to keep their end of the bargain.

IV. Conclusion

Imagine a trial counsel reporting to a new installation and being handed a case file. The accused was caught, on camera, using a fellow Soldier’s ATM card to steal \$300. Based on recent contested cases with similar facts, the trial counsel estimates that the accused can expect a sentence of four to five months confinement and a punitive discharge. The case is ripe for a guilty plea, and the defense counsel has been calling, trying to probe what kind of deal he can strike. After consulting with his boss, the trial counsel thinks he will try to strike a deal for three to five months.

Now imagine that in addition to pleading guilty, requesting trial by judge alone, and signing a stipulation of fact, the accused agrees to several additional terms: The accused will provide restitution to the victim before trial and will refrain from committing any misconduct prior to the convening authority taking initial action. The accused also agrees to waive all waivable motions, waive Article 13

¹⁰¹ *Id.*

¹⁰² *Id.* at 758.

¹⁰³ 64 M.J. 269, 271–72 (C.A.A.F. 2007).

¹⁰⁴ *Id.* at 272.

¹⁰⁵ *See, e.g., United States v. Hunter*, 64 M.J. 571 (C.G. Ct. Crim. App. 2007) (finding accused can lose benefit of agreement when he fails to abide by a no-misconduct provision).

¹⁰⁶ *See, e.g., id.*

confinement credit, and relieve the Government from the requirement to produce defense witnesses at sentencing. Finally, the accused agrees to stipulate to the expected testimony of a Government sentencing witness who is currently deployed in Iraq, the authenticity and admissibility of the videotape, and two previous Article 15s. Now what is the case worth? Undoubtedly, by agreeing to additional terms the accused has made the Government's job easier. Accordingly, the accused should get a more favorable sentencing cap. Perhaps most importantly for the Government, by limiting the issues at trial and agreeing to waive all waivable motions, the case is also *more* likely to survive the appellate process.

While there can be pitfalls when drafting pretrial agreements, the benefits of pretrial agreements almost always outweigh any potential harm. Long gone are the times when pretrial agreements could only address limitations on sentence. The CAAF's paternalism, at least in this area of the law, has been in full retreat for well over a decade. Of course, some who adhere to the old rules may

refuse to consider any pretrial agreement that addresses anything other than a limitation on sentence. This continued conservativeness may have several explanations. For instance, appellate court decisions rarely discuss successful pretrial agreements, and practitioners who read only cases finding fault with pretrial agreements may be left with the false impression that pretrial agreements are routinely the source of appellate error. However, given the sheer number of pretrial agreements signed every year, appellate courts apparently find fault with relatively few.

Whatever their reasons, counsel who only consider simplistic pretrial agreements—a guilty plea in exchange for a sentence limitation—handicap their own practice. They essentially squander their bargaining chips. Whether they represent the Government or the accused, counsel who refuse to consider all options during plea negotiations do not maximize their position and ill-serve their clients.

Bundling and Consolidation: Making Sense of It All

Kenneth Jerome Rich, Sr.*

I. Introduction

Bundling and consolidating requirements¹ impact competition; however, there is no absolute prohibition against either approach. When considering bundling or consolidation, agencies should, first and foremost, analyze three provisions: (1) the Small Business Reauthorization Act of 1997² (SBRA Bundling) as implemented in the Federal Acquisition Regulation (FAR) § 7.107;³ (2) the

National Defense Authorization Act of 2004⁴ (Section 801 Consolidation) as implemented in the Defense Federal Acquisition Regulation Supplement (DFARS) § 207.170-3;⁵ and (3) the Competition in Contracting Act of 1984 (CICA)⁶ (CICA Bundling). The CICA Bundling doctrine is the most overlooked and raises the most questions because, unlike the SBRA Bundling and Section 801 Consolidation provisions, the CICA Bundling doctrine is not circulated in any statute or regulation. Over the years, the Government Accountability Office (GAO) has defined and developed the CICA Bundling doctrine through a series of decisions that may impact an acquisition strategy or plan.⁷

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¹ The practice of pooling potentially smaller purchases to leverage the Government's purchasing power and obtain the benefits of economies of scale or reduce the Government's administrative cost. Also known as aggregation or packaging, the term refers to the practice of consolidating into a single larger contract solicitation of multiple procurement requirements. NASH, SCHOONER, & O'BRIEN, *THE GOVERNMENT CONTRACTS: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT* (2d ed. 1998).

² Small Business Reauthorization Act, Pub. L. No. 105-135, § 411–414, 111 Stat. 2592 (1997); 15 U.S.C. §§ 631(j), 644(e) (2006).

³ GEN. SERVS. ADMIN. ET AL., *FEDERAL ACQUISITION REG.* § 2.101 (July 2010) [hereinafter FAR].

“Bundling” means—

(1) Consolidating two or more requirements for supplies or services, previously provided or performed under separate smaller contracts, into a solicitation for a single contract that is likely to be unsuitable for award to a small business concern due to—

- (i) The diversity, size, or specialized nature of the elements of the performance specified;
- (ii) The aggregate dollar value of the anticipated award;
- (iii) The geographical dispersion of the contract performance sites; or
- (iv) Any combination of the factors described in paragraphs (1)(i), (ii), and (iii) of this definition.

(2) “Separate smaller contract” as used in this definition, means a contract that has been performed by one or more small business concerns or that was suitable for award to one or more small business concerns.

(3) “Single contract” as used in this definition, includes—

(i) Multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources (see FAR 16.504(c)); and

(ii) An order placed against an indefinite quantity contract under a—

(A) Federal Supply Schedule contract; or

(B) Task-order contract or delivery-order contract awarded by another agency (i.e., Government wide acquisition contract or multi-agency contract). (4) This definition does not apply to

a contract that will be awarded and performed entirely outside of the United States.

Id.

⁴ National Defense Authorization Act, Pub. L. No. 108-136, § 801, 117 Stat. 1392 (2003); 10 U.S.C. § 2382 (2006).

⁵ U.S. DEP'T OF DEF., *DEFENSE FEDERAL ACQUISITION REG. SUPP.* § 207.170 (Jan. 1, 2010) [hereinafter DFARS]. “Consolidation of contract requirements” means the use of a solicitation to obtain offers for a single contract or a multiple award contract to satisfy two or more requirements of a department, agency, or activity for supplies or services that previously have been provided to, or performed for, that department, agency, or activity under two or more separate contracts.” *Id.* § 207.170-2. “Multiple award contract” means—(1) Orders placed using a multiple award schedule issued by the General Services Administration as described in FAR Subpart 8.4; (2) A multiple award task order or delivery order contract issued in accordance with FAR Subpart 16.5; or (3) Any other indefinite-delivery, indefinite-quantity contract that an agency enters into with two or more sources for the same line item under the same solicitation.” *Id.*

⁶ Competition in Contracting Act, Pub. L. No. 98-369 § 2701, 98 Stat. 494 (1984); 41 U.S.C. § 253 (2006).

⁷ See *Vantex Serv. Corp.*, B-290415, Aug. 8, 2002. The Department of the Army issued an Invitation for Bid (IFB) for a total small business set-aside at Fort Bragg for rental and servicing portable latrines. Vantex, a small business concern, challenged the IFB arguing that bundling of portable latrine rental and servicing with the other waste removal services unduly restricted competition. Vantex could perform the portable latrine portion of the requirement but not the waste removal portion. The agency responded by stating that combining such requirements reduced the administrative burden; the requirement had a long history of being successfully fulfilled in this fashion; and that the requirement still generated adequate small business competition. The GAO sustained the protest and held the fact that the agency may find that combining the requirements is more convenient administratively is not a legal basis to justify combining the requirements, if the combining of requirements restricts competition. The CICA and its implementing regulations require that the scales be tipped in favor of ensuring full and open competition. The record did not support the agency determination that combining portable latrine and services with the other waste removal services was necessary to satisfy the needs of the agency. An agency may take from Vantex that (1) even though an acquisition strategy may not violate the tenets of the FAR 2.101 “bundling” or DFARS 207.170-2 definitions of “consolidation,” the GAO may find that (1) the procurement violates the tenets of the “CICA bundling” doctrine and (2) administrative convenience alone will not provide a reasonable basis for combining requirements. See also Roger Neds, *Bundling Contract Requirements: Where the Whole Must be Less than the Sum of its Parts*, ARMY LOGISTICS & TRAINING, Sept.–Oct. 2005, at 70–71.

Acquisition planning is critical when determining whether a requirement is being bundled or consolidated. With solid planning, contracting professionals can develop a realistic strategy and be prepared to successfully defend any potential litigation that may result from combining requirements into one solicitation. The purpose of this article is to help practitioners make sense of it all by examining the differences between the SBRA Bundling provision, Section 801 Consolidation provision, and the CICA Bundling doctrine.⁸

II. Small Business Reauthorization Act (SBRA Bundling)

The SBRA Bundling provision, as defined and implemented in the FAR, is not an absolute prohibition.⁹ The provision focuses on consolidating two or more requirements for supplies or services, previously performed under separate smaller contracts, into a solicitation for a single contract.¹⁰ An agency must conduct market research to determine whether bundling is necessary and justified.¹¹ The key here is to examine market research along with other supporting data to substantiate that bundling will produce some measurable benefits to the Government, thereby justifying such an approach.¹²

Agencies may overcome the SBRA Bundling provision by demonstrating cost savings, quality improvements, reduction in acquisition cycle times, better terms and conditions, and any other data to produce measurably substantial benefits.¹³ Any cost savings identified by the agency must be *quantifiable*.¹⁴ For example, in *B.H.*

Aircraft Co., Inc., an agency consolidated a consumable parts requirement for the F404 engine into a single performance-based logistics (PBL) contract covering more than two thousand national stock numbers under one request for proposal (RFP).¹⁵ B.H. Aircraft Co. (BHA), a small business, held a contract to supply parts that would be part of the consolidation effort under the single RFP.¹⁶ BHA contended that the bundling involved in the PBL violated the CICA and the Small Business Act.¹⁷ The GAO did not dispute that the agency's actions constituted bundling of requirements that would affect many small businesses, including BHA.¹⁸ As required by statute, an agency must demonstrate that such bundling of requirements will provide substantial benefits to the Government.¹⁹ In this case, the anticipated contract value was \$300 million, which required the agency to show a savings of at least \$15 million.²⁰ As part of the acquisition planning specified in FAR § 7.107, the agency prepared a business case analysis (BCA) comparing the status quo to a PBL contract.²¹ The agency's BCA demonstrated a measurably substantial benefit of \$28.3 million over five years, an amount well above the amount required to justify bundling the parts under a single contract.²² In this case, the GAO denied BHA's protest on the basis that the agency satisfied the requirements of the SBRA statute and FAR to permit bundling.²³

If, however, an agency fails to demonstrate measurably substantial benefits, the GAO will not hesitate to sustain a protest. For instance, in *Sigmattech, Inc.*, the GAO sustained a protest by Sigmattech, a small business, challenging the agency's bundling of system engineering and support services with other requirements under a single-award blanket purchase agreement issued under the awardee's Federal Supply Schedule (FSS).²⁴ Sigmattech argued that the agency failed to perform bundling analysis or satisfy the requirements of FAR §§ 7.107(a)(b), 10.001(c)(2), and 19.202-1.²⁵ The agency argued that FAR §§ 7.107(a) and (b), 10.001(c)(2), and 19.202-1 did not apply to the task orders or the BPA issued under the awardee's FSS contract.²⁶ The GAO disagreed.²⁷ The GAO concluded that

⁸ D. DiPaola, Consolidation and Bundling Summary Chart (2010) (App.).

⁹ FAR, *supra* note 3, § 7.107.

¹⁰ *Id.* § 2.101(1).

¹¹ *Id.* § 7.107(a) ("Bundling may provide substantial benefits to the Government.") The head of the agency, however, must conduct market research to determine whether bundling is necessary and justified because of the potential impact on small business participation. *Id.*; see 15 U.S.C. § 644(e)(2) (2006). Market research may indicate that bundling is necessary and justified if an agency or the Government would derive measurably substantial benefits. See FAR, *supra* note 3, § 10.001(a)(2)(iv) and (a)(3)(vi). Measurably substantial benefits may include individually or in any combination or aggregate cost savings or price reduction, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and any other benefits. *Id.* § 7.107(b). The agency must quantify the identified benefits and explain how their impact would be measurably substantial. Except as provided in FAR § 7.107(d), the agency may determine bundling to be necessary and justified if, as compared to the benefits that it would derive from contracting to meet those requirements if not bundled, it would derive measurably substantial benefits equivalent to— (1) Ten percent of the estimated contract or order value (including options) if the value is \$86 million or less; or (2) Five percent of the estimated contract or order value (including options) or \$8.6 million, whichever is greater, if the value exceeds \$86 million

¹² FAR, *supra* note 3, § 7.107(b).

¹³ *Id.*

¹⁴ *Id.* § 7.107(d).

¹⁵ *In re B.H. Aircraft Co., Inc.*, B-295399.2, July 25, 2005.

¹⁶ *Id.* at 1.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* See also FAR, *supra* note 3, § 7.107(b)(2).

²¹ *Id.* at 3.

²² *Id.*

²³ *Id.* at 7.

²⁴ *In re Sigmattech, Inc.*, B-296401, Aug. 10, 2005.

²⁵ *Id.*

²⁶ *Id.* at 6.

under the circumstances, the consolidation of the services met the definition of bundling under the Small Business Act.²⁸ The record, however, showed that the Army failed to perform a bundling analysis as required by FAR § 7.107(a) and (b), or to comply with the requirements of FAR § 19.202-1 in providing notice of bundling to the SBA.²⁹ The GAO recommended to the Army that it conduct an analysis in accordance with the regulation to determine whether it was necessary and justified for the services to be bundled or whether these services should remain reserved for small businesses.³⁰

Even though the SBRA Bundling and Section 801 Consolidation provisions are similar in nature (i.e., statutorily based, focused on previously procured requirements), Section 801 Consolidation requires agencies to apply a different analysis to justify consolidation.³¹ The Section 801 Consolidation provision is different in its definition, application, and analysis.³²

III. The National Defense Authorization Act (Section 801 Consolidation)

The Section 801 Consolidation provision, as implemented in the DFARS, is not an absolute prohibition.³³ The primary distinction between SBRA Bundling and Section 801 Consolidation is that, as defined, Section 801 Consolidation is not limited to impacts on small businesses that have previously performed requirements under separate smaller contracts.³⁴ The Section 801 Consolidation provision applies to all combinations of requirements that were previously performed separately by businesses of any size.³⁵ For acquisitions with an estimated value of \$5.5 million, the Section 801 Consolidation analysis will include the results of market research; identification of any alternative contracting approaches that would involve a lesser degree of consolidation; and a determination by the

senior procurement executive that the consolidation is necessary and justified.³⁶ If an agency contemplates consolidating previously separate requirements into a single solicitation with the possibility of being awarded as a single or multiple-award, the agency must demonstrate that benefits received by the consolidation substantially exceed those of the other contracting alternatives.³⁷

In some cases, agencies may find it less problematic to simply state that the requirements being considered for consolidation are new and, therefore, fall outside the scope of either the SBRA Bundling or Section 801 Consolidation provisions. For instance, recently, the U.S. Court of Appeals for the Federal Circuit contemplated this issue and upheld a lower court's ruling that the U.S. Army Corps of Engineers (Corps) neither violated 15 U.S.C. § 631(j)(3) nor 10 U.S.C. § 2382 when the Corps, in part, included several construction projects to be performed under one solicitation.³⁸ In this case, the Corps's scope of work included construction for training barracks (Fort Benning, Georgia), an estimated five basic training barracks (consisting of barracks, dining facilities, support facilities, and outdoor facilities), and an unspecified number of warrior-in-transition complexes throughout an eight-state area.³⁹ The plaintiff challenged the Corps's solicitation by arguing the agency violated statutory and regulatory provisions designed to aid and protect small businesses and to insure that they receive a fair and adequate share of government contracts and business.⁴⁰ The Corps countered by arguing that a contract to design and construct a building is a *new* requirement rather than an existing one (i.e., previously performed) and therefore, falls outside 15 U.S.C. § 631(j)(3) and 10 U.S.C. § 2382.⁴¹ The Corps took the position that bundling and consolidation provisions do not apply to new construction projects.⁴² The court did not take exception to the Corps' position partly because pending legislation seems to support the notion that construction requirements (i.e., the building of specific structures) by

²⁷ *Id.* at 7. The requirements that agencies perform a bundling analysis and notify the SBA when requirements are bundled were specifically made applicable to BPAs and orders placed against FSS contracts by a *Federal Register* notice published October 20, 2003, with an "effective date" of 20 Oct. 2003. 68 Fed. Reg. 60,000 (Oct. 20, 2003); FAR, *supra* note 3, § 8.404.

²⁸ FAR, *supra* note 3, § 7.107(a).

²⁹ *In re Sigmatech, Inc.*, B-296401, at 8.

³⁰ *Id.* The GAO further recommended that the Army, once the analysis was complete, provide its acquisition package to the SBA procurement representatives as required by FAR § 19.202-1. Finally, the GAO recommended that the protester be reimbursed its reasonable costs for filing and pursuing its successful protest.

³¹ *See supra* note 5.

³² *See DFARS, supra* note 5 § 207.170-3.

³³ *Id.*

³⁴ *Id.* § 207.170-2.

³⁵ *Id.*

³⁶ *Id.* § 207.170-3(a).

³⁷ *Id.* § 207.170-3(a)(3)(i).

³⁸ *Tyler Constr. Group v. United States*, 83 Fed. Cl. 94 (2008). The court noted that the plaintiff's argument drew on the requirements of two essentially similar statutes—the Small Business Act, 15 U.S.C. §§ 631(j) and 644, and 10 U.S.C. § 2382(a) (2006)—each of which addresses the importance of safeguarding the opportunity for small businesses to participate in government procurements and the need to confine the use of contracts that involve so-called bundling or consolidation of requirements to instances in which the benefits of such an acquisition strategy "substantially exceed" alternative contracting approaches.

³⁹ *Id.* at 4. The plaintiff also challenged the use of an ID/IQ type contract for construction requirements.

⁴⁰ *Id.*

⁴¹ *Id.* (emphasis added).

⁴² *Id.*

their very nature, are deemed new requirements.⁴³ The court, however, did not go as far to decide that the bundling provisions of 15 U.S.C. § 631(j) and 10 U.S.C. § 2382 were inapplicable to acquisitions of new construction and left the question for Congress to decide.⁴⁴

The court, nonetheless, decided the bundling and consolidation issues by “assuming (without deciding) if the provisions do in fact apply, the Corps has demonstrated that the consolidation of the contract requirements was necessary and justified within the meaning of the relevant statutes.”⁴⁵ To justify consolidation, the Corps identified several benefits expected to result from a continuous build program, which included: (1) a reduction in project award time; (2) an elimination of subsequent facility design costs; (3) an increased stability of the labor pool; (4) a gain in labor efficiency resulting in a reduction in construction time and corresponding improvement in product quality; (5) a reduction in material costs; and (6) an improvement in the working relationships between the Government and the contractor.⁴⁶ Furthermore, the benefits enabled the Corps to demonstrate a “minimum of 20% reduction in cost and minimum of 30% reduction in time to occupancy.”⁴⁷ Even though the court did not answer the question as to whether new construction was within the scope of the bundling or consolidation statutes, it was clear to the court that if new construction was within the scope of either statute, the Corps met the standard to justify bundling and consolidation.⁴⁸

IV. Competition in Contracting Act (CICA Bundling)

Unlike the SBRA Bundling and Section 801 Consolidation provisions, the CICA Bundling doctrine arose strictly from a myriad of GAO bid protest decisions and is considered much broader than both provisions.⁴⁹ Specifically, the CICA Bundling doctrine does not simply apply to requirements that were previously provided or performed under separate smaller contracts but comes into play anytime an agency contemplates combining requirements into a single solicitation that creates the

potential for restricting competition.⁵⁰ As a result, the GAO will require that an agency demonstrate a reasonable basis for why the bundling is necessary to satisfy the needs of the agency.⁵¹ The CICA Bundling doctrine presents an interesting dilemma and is often misunderstood because it may apply to new requirements when both the SBRA Bundling and Section 801 Consolidation provisions would not.⁵² As noted above, the SBRA Bundling and Section 801 Consolidation provisions focus on consolidating two or more requirements for supplies or services, previously performed under separate smaller contracts.⁵³ During acquisition planning, if the SBRA Bundling and Section 801 Consolidation provisions do not apply, an agency must consider the requirement’s impact on the CICA.

The CICA Bundling doctrine is examined in the *Nautical Engineering, Inc.*, case.⁵⁴ In this case, Nautical Engineering, Inc. (NEI), a small business, challenged the Department of Homeland Security’s solicitation combining dry dock and dockside services as violating both SBRA Bundling and CICA Bundling.⁵⁵ The Department of Homeland Security (DHS) originally took the position that the solicitation did not constitute bundling because the procurement was for a new requirement, but it nonetheless prepared a justification for bundling on the basis that the consolidation of the drydock and dockside services would provide measurably substantial benefits to the Government.⁵⁶ NEI sought to challenge DHS’s solicitation on both fronts knowing that if the agency succeeded in classifying the requirements as new, the new requirement would fall outside the scope of the SBRA Bundling provision making its challenge moot.⁵⁷ Even if it fell outside the scope of the SBRA Bundling provision, however, the CICA Bundling doctrine would still require the agency to perform a reasonable basis analysis to justify why bundling was necessary to satisfy the needs of the agency.⁵⁸

⁴³ *Id.*

⁴⁴ *Id.* at 10.

⁴⁵ *Id.*

⁴⁶ *Id.* at 3. In developing the acquisition strategy, the Corps conducted market research that included industry participation, sponsorship of a nationwide forum, four regional forums, and a specialized forum with representatives of the pre-fabricated/pre-engineered/modular construction industry, as well as the implementation of an Internet-based research questionnaire.

⁴⁷ *Id.* (internal quotation marks omitted).

⁴⁸ *Id.* at 10.

⁴⁹ *See supra* note 7.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See supra* notes 3 and 5.

⁵³ *Id.*

⁵⁴ *In re Nautical Eng’g, Inc.*, B-309955, Nov. 7, 2007.

⁵⁵ *Id.* at 1.

⁵⁶ *Id.* *See also supra* note 38 (Where in Tyler the Corps took a similar approach in that the Corps argues “new” construction did not fall under the SBRA Bundling and Section 801 Consolidation statutes, but nonetheless prepared a BCA that demonstrated measurably substantial benefit savings.)

⁷ *In re Nautical Eng’g, Inc.*, B-309955, at 13. NEI argued that even if the Coast Guard’s approach of consolidating the maintenance and repair services did not violate the Small Business Act’s prohibitions on bundling, the solicitation violated the CICA’s prohibition on improperly consolidating requirements.

⁵⁸ *Id.* *See also* 41 U.S.C. § 253a(2)(b) (2006).

In addressing NEI's argument concerning the CICA Bundling violation, the GAO held that the CICA generally requires that solicitations permit full and open competition and contain restrictive provisions and conditions only to the extent "necessary to satisfy the needs of the executive agency."⁵⁹ Clearly, the GAO was speaking to competition as a whole and not simply previously performed contracts or competition among or for small business concerns.⁶⁰ In developing the CICA Bundling doctrine, the GAO has looked to see whether an agency has a reasonable basis to argue that bundling is required and has sustained protests only where no reasonable basis has been demonstrated.⁶¹ A final point made by the GAO in this case was that the agency's analysis to justify bundling under the Small Business Act was met.⁶² More importantly, in the GAO's view, the benefits offered by the agency also provided a reasonable basis to justify the consolidation of the two requirements for purposes of the CICA.⁶³

In its development⁶⁴ of the CICA Bundling doctrine, the GAO has also discussed whether an agency's reasonable basis approach offers some logical connection between the services being sought under one solicitation.⁶⁵ For instance, in *American College of Physicians Services Inc.*, the protesters argued that the agency's bundled purchase of accreditation services and proficiency testing services in the same RFP unduly restricted competition in violation of the CICA.⁶⁶ In answering the protesters' challenge, the agency argued that using separate contracts would create logistical problems in its management of laboratories since using separate contracts would require the agency to act as a "go between" to coordinate the actions of the accreditation organizations and the proficiency testing organizations.⁶⁷ The agency also pointed out that by having a single contractor responsible for both functions, obtaining the immediate review and monitoring of testing results needed to continue a laboratory's accredited status would be more likely.⁶⁸

⁵⁹ *In re Nautical Eng'g Inc.*, B-309955, at 3. See also *Phoenix Scientific Corp.*, B-286817, Feb. 22, 2001).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* See also *Teximara, Inc.*, B-293221.2, July 9, 2004).

⁶⁴ See *In re Nautical Eng'g Inc.*, B-309955.

⁶⁵ *Id.*

⁶⁶ *Am. Coll. of Physicians Servs. (ACPS), Inc.; COLA*, B-294881; B-294881.2, Jan. 3, 2005. Neither ACPS nor COLA argued that the RFP violated the SBA Bundling restrictions, as amended. See 15 U.S.C. § 631(j)(3) (2006). As a result, the GAO did not consider whether SBA Bundling restrictions provided a remedy to this procurement.

⁶⁷ *Am. Coll. of Physicians Servs. (ACPS), Inc.; COLA*, B-294881; B-294881.2, at 3 (emphasis added)

⁶⁸ *Id.*

⁶⁹ *Id.* at 4.

The protesters did not offer any specific response to establish that the agency's position to combine the requirements was, in fact, unreasonable.⁶⁹ In this case, the GAO was clear in that while the protesters' contention that the joint purchase of accreditation services and proficiency testing services with one contract would restrict competition, the question at issue was whether the agency provided a reasonable basis to conclude that bundling was necessary to satisfy the needs of the agency.⁷⁰ The GAO concluded that the agency did offer a reasonable basis for procuring these services jointly.⁷¹ The GAO also noted that "unlike its decision in an earlier case (where it sustained a protest after finding that the agency had offered no reasonable basis for bundling food services with other logistical services), there [was] no dispute here that there [was] a logical connection between the two services sought by this solicitation."⁷² Even though the *American* case does not appear to expand the reasonable basis analysis to include a logical connection to demonstrate why bundling is necessary to satisfy agency needs, the mere fact that the GAO used the term is significant because it may lead to an expansion of the CICA Bundling doctrine.⁷³

V. Practice Tips

Bundling and consolidation issues are at the forefront of acquisition planning because contracting professionals are looking for ways to simplify the entire acquisition continuum. For contracting professionals, if it is possible to bundle or consolidate individual requirements into one

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See *EDP Enters*, B-284553.6, May 19, 2003. The logical connection concept is briefly addressed in this case by the GAO when it sustained a challenge from a protester alleging the agency unduly restricted competition when it combined food services with other logistics support functions including facility operations, warehouse functions, oil analysis laboratory operations, storage, motor pool services, aircraft maintenance, and other logistical functions. In its defense, the agency argued that it was not in violation of the CICA because Army doctrine is predicated on these services being integrated within its overall logistical functions. The GAO did not question the agency's decision to classify food services as logistics support functions to be administered by the Directorate of Logistics, rather the GAO's concern was whether the agency provided a reasonable justification of its needs in terms of including food services in the same RFP with base, vehicle, and aircraft maintenance services. The fact that the agency is organized in a manner that results in the administration of the performance of all of these functions by one particular office (which may itself be reasonable), did not provide a basis for insisting that all of these varied services be procured from one source. The GAO held that beyond the question of whether all of the services are part of logistics and relate to supporting the troops, the agency's reason for bundling them all in a solicitation seems to merely reflect the belief that it is administratively more convenient to manage one entity performing all of the requirements. The GAO was very clear that there must be (1) a reasonable justification provided and, more importantly, (2) bundling requirements because mere administrative convenience alone will be legally insufficient.

⁷³ *Id.*

solicitation that will produce substantial savings and enable commanders and customers to meet their needs in an expeditious manner, why not take this acquisition approach? To take this approach is not legally objectionable because the SBRA Bundling provision, Section 801 Consolidation provision, and the CICA Bundling doctrine do not prohibit bundling or consolidation of requirements. The provisions, however, will require an agency to recognize and understand what is needed to justify any bundled or consolidated procurement. Agencies must keep the Small Business Administration (i.e., SBA Representatives) fully engaged in the acquisition planning process; however, when the acquisition involves SBRA Bundling, Section 801 Consolidation, or CICA Bundling issues, SBA involvement up front is critical.

To simply have the local SBA Representative sign the DD Form 2579⁷⁴ without fully understanding the acquisition history is not a good business practice. A good approach here is to educate SBA Representatives up and down the chain about the benefits of bundling or consolidation. If the acquisition strategy requires Department of Defense (DoD)-level approvals, having thoroughly engaged all parties prior to any DoD Peer Review Boards or briefings will pay maximum dividends. The last thing any agency needs late in the acquisition continuum is to have its market research and acquisition strategy invalidated for a lack of prior planning.

If an agency elects to use one solicitation to satisfy multiple requirements that were previously achieved by two or more smaller contracts, performed by or suitable for small businesses, which when combined are now unsuitable for small businesses, it must perform an SBRA Bundling analysis to justify the action.⁷⁵ This analysis will require an agency to quantify any savings and demonstrate that the benefits received from the bundling, as compared to not bundling, would be “measurably substantial” as defined by FAR § 7.107(b).⁷⁶ For example, a measurably substantial benefit for a procurement estimated at \$300 million will reflect a savings of \$15 million or more.⁷⁷

The estimated value of each bundled requirement will determine the percentage of savings required to meet the SBRA standard.⁷⁸ For some agencies, trying to demonstrate the measurably substantial savings is problematic because

they may lack the time and expertise needed to conduct an analysis. The sheer complexity of the acquisition itself may require months of effort to analyze. To assist an agency with acquisition planning for which cost analysis is routinely required, it may be extremely beneficial to establish a master (e.g., multiple award or signal award) indefinite delivery–indefinite quantity or requirements contract to meet this need. In such a case, a contracting officer may issue a task order against the master contract, and a qualified contractor will perform the proper cost analysis for the agency. Having a qualified contractor conduct the cost analysis may reduce the level of risk for a successful SBRA protest challenge.

If an agency elects to use one solicitation to satisfy multiple requirements that were previously achieved by two or more smaller contracts, the agency must demonstrate that consolidation of contract requirements is necessary and justified.⁷⁹ The justification *may* include a cost analysis, although it is not required as it is under the SBRA Bundling analysis.⁸⁰ The focus of the analysis is often on quality, acquisition cycle, terms and conditions, and any other benefits derived.⁸¹ The agency must show that consolidating contract requirements will offer benefits that substantially exceed any alternative approaches.⁸² For example, will consolidating requirements in a single solicitation offer more benefits than having multiple solicitations (i.e., separating each requirement)? Even though a cost analysis is not required, some economic benefit may be demonstrated to support the justification.⁸³ Unlike the SBRA Bundling requirement to quantify cost and show a mandatory percentage savings, Section 801 Consolidation does not impose such a restriction.⁸⁴ The provision, however, does say that savings in administrative or personnel costs alone do not constitute sufficient justification unless the total amount of the cost savings is expected to be substantial in relation to the total cost of the procurement.⁸⁵ Unlike the SBRA Bundling provision where a percentage is required, a good rule of thumb for your Section 801 Consolidation analysis may be to mirror the SBRA Bundling percentages or at least come as close as possible.⁸⁶ In the end, however, the Section 801 Consolidation analysis should cover more than savings in administrative or personnel costs alone.

If the SBRA Bundling and Section 801 Consolidation provisions are non-factors, the CICA Bundling doctrine may still factor, and must be addressed, in the acquisition

⁷⁴ U.S. Dep’t of Def., DD Form 2579, Small Business Coordination Record (Dec. 2000).

⁷⁵ See *supra* note 11. Measurably substantial benefits may include individually or in any combination or aggregate cost savings or price reduction, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and other benefits.

⁷⁶ See FAR, *supra* note 3, § 7.107(b). In my example, \$15 million is 5% of the \$300 million estimated contract value (including options).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Supra* note 5.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Supra* note 5.

⁸⁶ *Supra* note 11.

strategy, acquisition plan, or formal determination and findings memorandum (as noted with Section 801 Consolidation requirements).⁸⁷ Remember, with CICA Bundling, the GAO's focus is not on determining whether a requirement was previously procured or performed by a particular business, but whether the agency has combined functions in a single solicitation that would limit competition by precluding one or more firms from participation.⁸⁸ In essence, if an agency is combining ten "new" requirements into one solicitation, the SBRA Bundling and Section 801 Consolidation provisions may not apply given the strict reading of the statutes.⁸⁹ Under the CICA Bundling doctrine, however, the agency will be required to justify such a combining of requirements because of the impact on competition.⁹⁰ With CICA Bundling, the GAO will examine whether the agency has a "reasonable basis" for restricting competition.⁹¹ In developing the acquisition strategy and/or plans when CICA Bundling is a factor, agencies should provide analysis similar to what is being required for Section 801 Consolidation.⁹² Remember that even though no quantifiable cost analysis is required with either the CICA Bundling or Section 801 Consolidation analysis (except for demonstrating savings in administrative or personnel costs),⁹³ it is highly recommended to show such cost savings (no matter what the percentage), if available. Finally, although, the GAO has not expanded the law to include showing a logical nexus between the requirements to establish a reasonable basis for consolidation, an agency should consider making this argument. For example, if an agency is procuring a supply contract for ice that includes other functions such as transportation, storage,

administration, refrigeration, and other requirements, the agency should make an argument that there is a logical connection to procure ice, transportation, storage, refrigeration, and administration under one solicitation. Even though market research may show that these requirements may be procured separately under individual contracts or orders (e.g., task and delivery order contracts), it is imperative that the agency establish that bundling is necessary (e.g., benefits will be realized in overall quality of services, terms and conditions, and other measures) to satisfy the needs of the agency.

VI. Conclusion

There is no absolute prohibition against bundling and/or consolidating requirements to the benefit of an agency. The statutes and regulations, however, will require an agency to demonstrate in its acquisition strategy, acquisition plan, and determination and finding's memorandum why such a restriction on competition is in fact necessary to satisfy the agency's needs. Trying to *make sense of it all* can be a daunting task, but agencies may mitigate this task by understanding the requirement's history and building in sufficient lead time in the acquisition continuum to adequately address all issues raised by the SBRA Bundling provision, Section 801 Consolidation provision, and the CICA Bundling doctrine.

⁸⁷ *Supra* note 6.

⁸⁸ *Supra* note 57.

⁸⁹ *Supra* notes 3 and 5.

⁹⁰ *Supra* note 5.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

Appendix

	SECTION 801 CONSOLIDATION (DFARS 207.170)	SBRA BUNDLING (FAR 7.107) (FAR 2.101)	CICA BUNDLING (GAO Case Law)
Definition	Use of one solicitation to satisfy multiple requirements <i>that were previously achieved by two or more smaller contracts</i>	Use of one solicitation to satisfy multiple requirements <i>that were previously achieved by two or more smaller contracts</i> , performed by or suitable for small businesses, which when combined are now unsuitable for small business	Use of one solicitation to satisfy multiple requirements, <i>which creates the potential for restricting competition</i>
Dollar Threshold	> \$5.5M	None, but . . . > \$7.5M triggers additional “substantial bundling” analysis (see FAR 7.107(e))	None
Justification May Address	<ul style="list-style-type: none"> • Cost Savings; • Quality; • Acquisition Cycle; • Terms & Conditions; • Any Other Benefit (Mission Critical) 	<ul style="list-style-type: none"> • Cost Savings; • Quality; • Acquisition Cycle; • Terms & Conditions; • Any Other Benefit (Mission Critical) 	Must show a reasonable basis for why the bundling is necessary to meet the agency need (see <i>Vantex Serv., Inc.</i> , B-290415, Aug. 8, 2002)
Standard	Consolidation benefits must substantially exceed those of the other alternatives	<ul style="list-style-type: none"> • ≤ \$86M = 10% of total • > \$86M = 5% of total, or • \$8.6M, whichever is greater • Mission Critical Exception (see “Approval Level” below) 	<ul style="list-style-type: none"> • Reasonable Basis • Deference for national security & safety (see <i>Outdoor Venture, Corp.</i>, B 299675; B-299676, Jul. 19, 2007)
Requirement to Quantify in Dollar Amount	No, except for cost savings	Yes	No
Administrative / Personnel Savings or Convenience	Must be substantial in relation to the total cost of the procurement	Must exceed 10% of total	Insufficient justification
Approval Level	<ul style="list-style-type: none"> • < \$100M = PARC • < \$500M = HCA • ≥ \$500M = DASA(P) • (see AFARS 5107.170-3) 	<ul style="list-style-type: none"> • HCA approval for any consolidated program that cannot be placed under a preference program (see AFARS 5119.202-1) • USD (AT&L) approval for Mission Critical Exception (non delegable) (see FAR 7.107(c)) 	N/A
Location	Acquisition Strategy	Acquisition Strategy	Acquisition Strategy

Book Reviews

Palestine Betrayed¹

Reviewed by Major Roger E. Mattioli*

*Had the Mufti chosen to lead his people to peace and reconciliation with their Jewish neighbors . . . the Palestinians would have had their independent state over a substantial part of mandatory Palestine by 1948, if not a decade earlier, and would have been spared the traumatic experience of dispersion and exile.*²

I. Introduction

Palestine Betrayed is a scathing attack on the Arab leadership during the 1948 Arab-Israeli conflict. Using declassified British intelligence reports and interviews with many of the major players in the conflict, the author argues that the Arab leaders of Palestine, Syria, Transjordan, Egypt, and Lebanon betrayed the Palestinian people by deceiving them with anti-Semitic propaganda, rushing them into a war they did not want, and trying to seize portions of Palestine to incorporate into their countries during the invasion. He also claims that after their defeat, these same leaders prevented the Palestinians from engaging in an open dialogue in order to facilitate their return to Israeli-controlled Palestine. In placing the blame for the Arab exodus from Palestine squarely on their leadership, the author rejects what he views as an attempt by modern Palestinian and Israeli scholars to rewrite history in order to unjustly vilify the Israelis. The end result of the author's efforts is a work of political propaganda disguised as history.

II. The New Historians

The author is a professor of Middle East and Mediterranean Studies at King's College London.³ He has written a number of books on Middle Eastern history, but he is most well-known for his vigorous defense of the traditional Israeli view of history, as well as his attacks on the Israeli "new historians." To fully appreciate the book, the reader must understand the major debate that has been raging among Israeli historians for the past twenty years.

Prior to the mid-1980s, Israeli scholars and historians accepted as historical fact several important ideas: that the Jews created Israel out of necessity after their attempts at peaceful negotiation with the Arabs failed; that the Arabs

instigated and initiated the Arab-Israeli conflict of 1948; and that the Arab leadership encouraged the Palestinians to flee to neighboring countries during the conflict, resulting in the Palestinian refugee crisis.⁴ But in the mid-1980s, a group of Israeli scholars and historians began to argue that Israel shoulders much of the blame for the crisis.⁵ These self-anointed "new historians"⁶ challenged the view

that Zionism was a beneficent and well-meaning progressive national movement; that Israel was born pure into an uncharitable, predatory world; that Zionist efforts at compromise and conciliation were rejected by the Arabs; and that Palestine's Arabs, and in their wake the surrounding Arab states, for reasons of innate selfishness, xenophobia, and downright cussedness, refused to accede to the burgeoning Zionist presence and in 1947 to 1949 launched a war to extirpate the foreign plant.⁷

This new line of thinking resulted in a backlash from historians who continued to believe in the traditional view of Israeli history.

The author fired his first salvo at the "new historians" in *Fabricating Israeli History: "The New Historians."*⁸ *Palestine Betrayed* is his newest attack on what he views as a dangerous misrepresentation of history. In the introduction, he describes the "new historians" as "politically engaged academics and journalists who . . . have turned the saga of

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¹ EFRAIM KARSH, *PALESTINE BETRAYED* (2010).

² KARSH, *supra* note 1, at 252.

³ *Id.* at back cover.

⁴ See, e.g., MITCHELL G. BARD, *MYTHS AND FACTS: A GUIDE TO THE ARAB-ISRAELI CONFLICT 126-36* (2002); LIEUTENANT COLONEL NETANEL LORCH, *THE EDGE OF THE SWORD* (1968).

⁵ See, e.g., SIMHA FLAPAN, *THE BIRTH OF ISRAEL* (1987); BENNY MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947-1949* (1988); ILAN PAPPE, *BRITAIN AND THE ARAB-ISRAELI CONFLICT, 1948-1951* (1988); AVI SHLAIM, *COLLUSION ACROSS THE JORDAN* (1988).

⁶ Benny Morris, *The New Historiography: Israel Confronts Its Past*, *TIKKUN*, Nov.-Dec. 1988, at 21.

⁷ *Id.* at 20.

⁸ EFRAIM KARSH, *FABRICATING ISRAELI HISTORY: "THE NEW HISTORIANS"* (1997).

Israel's birth upside down, with aggressors transformed into hapless victims and vice versa."⁹ He accuses them of being ignorant of Arab "language, culture, history, and politics,"¹⁰ and argues that their "new history" is in fact simply a "recycled . . . standard Palestinian Arab narrative of the conflict."¹¹ He claims to have written *Palestine Betrayed* "to reclaim the historical truth."¹²

III. Analysis

The author sets out immediately to demonstrate that the traditional Israeli historical view is accurate. To prove this, he quotes the individuals involved in the conflict. He portrays the Israelis as a people who, throughout history, "extended [their hands] in peace to [their] neighbors."¹³ But their attempts to secure peace were rebuffed time and again by the Arab leadership, whose irrational hatred of the Jews, greed, and lust for power led them commit a "betrayal of their constituents, who would rather have coexisted with their Jewish neighbors yet instead had to pay the ultimate price of this folly: homelessness and statelessness."¹⁴

The author spends the next several chapters detailing the positive contributions Jews made to Arab society throughout history and introducing the reader to Muhammad Amin Husseini. Beginning in 1921, Amin held Palestine's top religious position, that of "Mufti." He was also the president of the Supreme Muslim Council and Palestine's "foremost Palestinian Arab political figure."¹⁵ The author devotes a great amount of effort to discrediting Amin, referring to his "enthusiasm for Nazism,"¹⁶ and relating Amin's desire to conduct "ethnic cleansing"¹⁷ by removing the Jews from Palestine. Throughout the book the author provides the reader with one inflammatory Amin quote after another.

The author takes the opposite approach with the book's hero, David Ben-Gurion, Israel's first prime minister and minister of defense. He repeatedly refers to Ben-Gurion's attempts to peacefully resolve the Arab-Israeli conflict and provides quotes to illustrate Ben-Gurion's desire that Arabs and Jews live together in peace in Israel. Ben-Gurion "look[ed] to peace, peace in the world and peace in that

corner of the world called the Near- or the Middle East,"¹⁸ while Amin claimed "it is impossible to squeeze two peoples into one small country . . . Let [the Jews] go to other parts of the world, where there are wide vacant places."¹⁹ By providing the stark contrast between Amin's rhetoric and Ben-Gurion's, the author attempts to bolster his argument that the Israelis were not to blame for the ensuing conflict.

Only once does the author discuss Ben-Gurion's earlier view that "[the Jews], as a nation, want this country to be ours; the Arabs, as a nation, want this country to be theirs."²⁰ In fact, Ben-Gurion often expressed reservations about incorporating Arabs into a new Jewish state.²¹ However, since these statements do not support the author's argument, he ignores them. This is a mistake. The author might have gained greater credibility with the reader if he had explained how and why Ben-Gurion changed his position. By ignoring the issue, he opens himself up to criticism for practicing exactly the type of selective history for which he condemns the "new historians."

Next, the author examines the Arab exodus from Palestine after war broke out. He attempts to prove what the "new historians" refer to as the third "myth" of Israel: that the Palestinians fled the country because the Arab leadership encouraged them to do so, despite Israeli efforts to discourage them from leaving.²² The author cites British intelligence documents to show that "leading Arab personalities . . . evacuat[ed] their families to neighboring Arab countries,"²³ and that their evacuation, combined with escalating violence, caused a "stream of refugees" to "turn[] into a flood."²⁴ He conveniently omits the fact that the Israelis instigated a great deal of the violence. As Ben-Gurion himself stated shortly after the war,

The strategic objective was to destroy the urban communities This was not done by house-to-house fighting inside the cities and towns, but by the conquest and destruction of the rural areas surrounding most of the towns Deprived of transportation, food, and raw materials, the urban communities underwent a process of

⁹ KARSH, *supra* note 1, at 4.

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² *Id.* at 7.

¹³ *Id.* at 1 (quoting YONA COHEN, *JERUSALEM UNDER SIEGE: PAGES FROM A 1948 DIARY* 39 (1982)).

¹⁴ *Id.* at 6-7.

¹⁵ *Id.* at 17.

¹⁶ *Id.* at 30.

¹⁷ *Id.*

¹⁸ *Id.* at 18 (quoting YEHUDA TAGGAR, *THE MUFTI OF JERUSALEM AND PALESTINE ARAB POLITICS, 1930-1937*, at 187 (1986)).

¹⁹ *Id.* (quoting Notes from an Interview Accorded to Members of the Arab Higher Committee by His Excellency the High Commissioner 15-16 (Nov. 7, 1936) (Central Zionist Archives, S25/22704)).

²⁰ *Id.* at 27 (quoting David Ben-Gurion, Address to the Vaad Leumi (June 10, 1919) (citation omitted)).

²¹ Morris, *supra* note 6, at 98.

²² FLAPAN, *supra* note 5, at 81.

²³ KARSH, *supra* note 1, at 124-25 (quoting Sixth Airborne Division, Weekly Intelligence Summary No. 61, Based on Information Received up to 23 Oct. 1947, British War Office 275/120, at 3).

²⁴ *Id.* at 125.

disintegration, chaos, and hunger, which forced them into surrender.²⁵

One of the book's more interesting chapters is "Shattered Dreams." It involves the author's attempt to defend the Israeli leadership's decision to drive the Arab population out of the towns of Lydda and Ramle. He claims that this action was "the only . . . instance in the war where a substantial urban population was driven out by Jewish or Israeli forces."²⁶ The "new historians" have pointed to the incident as an example of Israeli culpability in expelling the Palestinians.²⁷ Yitzhak Rabin, future prime minister of Israel and a brigade commander at the time of the attack, admitted that "[t]he population of Lydda did not leave willingly. There was no way of avoiding the use of force and warning shots in order to make the inhabitants march the ten or fifteen miles to the point where they met up with the Arab Legion."²⁸ Rabin also admitted that Ben-Gurion and his staff made the decision to force the population out of the towns.²⁹

But according to the author, the Israeli decision was the result of an Arab "uprising" that broke a temporary ceasefire and "sealed the city's fate."³⁰ After recounting a firefight in which around 250 Arabs were killed,³¹ he boldly claims "[had] the surrender been implemented in an orderly fashion, no exodus would have ensued."³² Next, he minimizes the importance of Ben-Gurion's order to drive the Arab population out of Lydda, stressing that "the Lydda populace needed little encouragement to leave."³³ He also claims, without any supporting authority, that the thousands of Arab detainees the Israelis forced to leave were relieved to escape the war zone.³⁴ Finally, to show how difficult this episode was on the Israelis, the author emphasizes the emotional damage Israeli Soldiers suffered as a result.³⁵

The author's defense of the Lydda-Ramle affair is passionate but unconvincing. Despite his initial claim that newly declassified British documents demonstrate the falsity of the "new historians'" assertions, the author relies almost exclusively on the Israeli Defense Forces Archive to support

his argument.³⁶ Also, the claim that a rebellion by the local populace forced the Israeli troops to counterattack and convinced Israeli leadership to make their fateful decision is not novel. "New historians" like Benny Morris responded to that same argument in the mid-1980s.³⁷ The author contributes little to the historical debate by recycling old material.

The final chapter of the book is nothing more than a restatement of the author's thesis and summary of the preceding eleven chapters. He once again places the blame for the Arab defeat and exodus squarely on the shoulders of Amin and the Arab leaders of Syria, Transjordan, Egypt, and Lebanon. After an entire book filled with these repeated attacks, the author's need to revisit them seems excessive. The entire chapter is superfluous. Similarly, the epilogue is nothing more than an attack on ex-PLO³⁸ chairman Yasir Arafat. The author compares Arafat to Amin, arguing that Arafat's actions as chairman were as destructive to the Palestinian cause as Amin's.³⁹ Since the entire book focused on the 1948 conflict, the epilogue seems forced and out of place.

IV. Conclusion

Palestine Betrayed may be a useful propaganda tool for fierce defenders of Zionism, but as an historical work, it is plodding and tedious. The author's desire to respond to each argument set forth by the "new historians" results in a repetitive, emotional work that feels more like a political rant than an historical study. Readers who are unfamiliar with the history of the 1948 Arab-Israeli conflict may gain a basic understanding of the events surrounding partition and Israeli statehood, but they would be better served by reading a less biased version of events.⁴⁰

Also, by so vigorously attacking those who see history differently than he does, the author may lose credibility with readers who are not predisposed to support either side of the debate. While readers may not agree with, or indeed be aware of, the views of the Israeli "new historians," it is immediately apparent that the author has an agenda. Although the author is careful to back up most of his assertions with footnotes to source documents, he goes to such extremes to find examples that support his conclusions that he appears to pick and choose only those sources that bolster his position. It is ironic that the author accuses the

²⁵ FLAPAN, *supra* note 5, at 92–93 (quoting DAVID BEN-GURION, WAR DIARIES 156 (1948)).

²⁶ KARSH, *supra* note 1, at 216.

²⁷ Morris, *supra* note 6, at 19.

²⁸ FLAPAN, *supra* note 5, at 81 (citation omitted).

²⁹ *Id.*

³⁰ KARSH, *supra* note 1, at 216–17.

³¹ *Id.* at 217.

³² *Id.*

³³ *Id.* at 218.

³⁴ *Id.* at 219.

³⁵ *Id.*

³⁶ *See id.* at 216–19 nn.20–30.

³⁷ *See, e.g.,* Morris, *supra* note 6.

³⁸ Palestine Liberation Organization (PLO).

³⁹ KARSH, *supra* note 1, at 252.

⁴⁰ *See, e.g.,* CHRISTOPHER SYKES, CROSSROADS TO ISRAEL, 1917–1948, at 73 (1965).

“new historians” of ignoring crucial facts in arriving at their conclusions, then does exactly that throughout the book.

Military leaders and judge advocates will find little use for this book. Some military lessons may be gleaned from the work, but the author gives short shrift to military matters. For example, he devotes only one paragraph to the fundamental transformation of the Israeli armed forces from a small force composed primarily of “semi-mobilized units” into a large conscripted force.⁴¹ This transformation was followed by a total reorganization of the force, which was one of the keys to the stunning Israeli military successes of the conflict.⁴²

The Arabs’ total failure to incorporate joint warfare concepts into their strategy was also a major reason for their defeat,⁴³ yet, once again, the author barely touches on this point. While he mentions that the initial Arab invasion of Israel “was to be directed by a unified command . . . under the headship of the Iraqi general Nureddin Mahmud,”⁴⁴ he

never examines how and why this unified command disintegrated once the Arabs invaded, except to say that the Arab countries involved were more interested in seizing a piece of Palestine for themselves than in “attempt[ing] to secure Palestinian national rights.”⁴⁵

The text provides a few lessons on leadership, but most are dull and uninspired. For example, the author repeatedly references the flight of Arab officers prior to and during the conflict,⁴⁶ but modern military officers hardly need to be told of the importance of physical presence on the battlefield. At best, *Palestine Betrayed* offers military leaders a study in what not to do. According to the author, Arab infighting, cowardice, self-interest, and zealotry resulted in their defeat. On the other hand, “the Jews had no alternative but to triumph or die.”⁴⁷ The difficulty in fighting an enemy in their homeland when they have nowhere to flee and nothing to lose is the most important lesson today’s military officer can take away from *Palestine Betrayed*.

⁴¹ KARSH, *supra* note 1, at 108

⁴² Morris, *supra* note 6, at 22–23.

⁴³ See SYKES, *supra* note 40, at 338–39, 349–50.

⁴⁴ KARSH, *supra* note 1, at 201.

⁴⁵ *Id.* at 232.

⁴⁶ See, e.g., *id.* at 134 (“[W]hen the moment of truth arrived, the commander of Arab Haifa . . . sailed out of Haifa He was quickly followed by one of his deputies . . . while a second deputy . . . left hurriedly the next day.”); 156 (“Najim al-Din . . . left [Jaffa] on May 1 at the head of a few hundred Iraqi and Bosnian fighters, carrying off some £8,000 . . . sent for military operations, as well as a substantial quantity of weapons. His successor . . . had an even briefer term in office [H]e reported . . . on May 2 that his troops had been ‘infected by panic flight.’ Shortly thereafter he fled the city himself with a few members of the NC, followed by 350-400 Yemeni and Egyptian fighters.”).

⁴⁷ *Id.* at 238 (quoting ABDEL KARIM UMAR, MUDHAKKIRAT AL-HAJJ MUHAMMAD AMIN AL-HUSSEINI 394 (1993)).

CLE News

1. Resident Course Quotas

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

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

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

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

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

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

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

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

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

ATRRS. No.	Course Title	Dates
GENERAL		
5-27-C20	183d JAOBC/BOLC III (Ph 2)	5 Nov – 2 Feb 11
5-27-C20	184th JAOBC/BOLC III (Ph 2)	18 Feb. – 4 May 11
5-27-C20	185th JAOBC/BOLC III (Ph 2)	15 Jul – 28 Sep 11
5-27-C22	59th Judge Advocate Officer Graduate Course	16 Aug 10 – 26 May 11
5-27-C22	60th Judge Advocate Officer Graduate Course	15 Aug – 25 May 12
5F-F1	215th Senior Officer Legal Orientation Course	24 – 28 Jan 11
5F-F1	216th Senior Officer Legal Orientation Course	21 – 25 Mar 11
5F-F1	217th Senior Officer Legal Orientation Course	20 – 24 Jun 11
5F-F1	218th Senior Officer Legal Orientation Course	29 Aug – 2 Sep 11
5F-F3	17th RC General Officer Legal Orientation Course	1 – 3 Jun 11
5F-F5	Congressional Staff Legal Orientation (COLO)	17 – 18 Feb 11
5F-F52	41st Staff Judge Advocate Course	6 – 10 Jun 11

5F-F52-S	14th SJA Team Leadership Course	6 – 8 Jun 11
5F-F55	2011 JAOAC	3 – 14 Jan 11
JARC 181	Judge Advocate Recruiting Conference	20 – 22 Jul 11

NCO ACADEMY COURSES

512-27D30	2d Advanced Leaders Course (Ph 2)	10 Jan – 15 Feb 11
512-27D30	3d Advanced Leaders Course (Ph 2)	10 Jan – 15 Feb 11
512-27D30	4th Advanced Leaders Course (Ph 2)	14 Mar – 19 Apr 11
512-27D30	5th Advanced Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D30	6th Advanced Leaders Course (Ph 2)	1 Aug – 6 Sep 11
512-27D40	2d Senior Leaders Course (Ph 2)	14 Mar – 19 Apr 11
512-27D40	3d Senior Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D40	4th Senior Leaders Course (Ph 2)	1 Aug – 6 Sep 11

WARRANT OFFICER COURSES

7A-270A0	JA Warrant Officer Basic Course	23 May – 17 Jun 11
7A-270A1	22d Legal Administrators Course	13 – 17 Jun 11
7A-270A2	12th JA Warrant Officer Advanced Course	28 Mar – 22 Apr 11

ENLISTED COURSES

512-27D-BCT	13th BCT NCOIC Course	9 – 13 May 11
512-27D/20/30	22d Law for Paralegal NCO Course	21 – 25 Mar 11
512-27D/DCSP	20th Senior Paralegal Course	20 – 24 Jun 11
512-27DC5	34th Court Reporter Course	24 Jan – 25 Mar 1
512-27DC5	35th Court Reporter Course	18 Apr – 17 Jun 11
512-27DC5	36th Court Reporter Course	25 Jul – 23 Sep 11
512-27DC6	11th Senior Court Reporter Course	11 – 15 Jul 11
512-27DC7	14th Redictation Course	Cancelled
512-27DC7	15th Redictation Course	28 Mar – 1 Apr 11

ADMINISTRATIVE AND CIVIL LAW		
5F-F24	35th Administrative Law for Military Installations and Operations	14 – 18 Mar 11
5F-F22	64th Law of Federal Employment Course	22 – 26 Aug 11
5F-F24E	2011USAREUR Administrative Law CLE	12 – 16 Sep 11
5F-F28H	2011 Hawaii Income Tax CLE Course	10 – 14 Jan 11
5F-F28P	2011 PACOM Income Tax CLE Course	3 – 7 Jan 11
5F-F29	29th Federal Litigation Course	1 – 5 Aug 11
5F-F202	9th Ethics Counselors Course	11 – 15 Apr 11

CONTRACT AND FISCAL LAW		
5F-F10	164th Contract Attorneys Course	18 – 29 Jul 11
5F-F12	82d Fiscal Law Course	7 – 11 Mar 11
5F-F14	29th Comptrollers Accreditation Fiscal Law Course	28 Feb – 4 Mar 11
5F-F103	11th Advanced Contract Course	31 Aug – 2 Sep 11

CRIMINAL LAW		
5F-F31	17th Military Justice Managers Course	22 – 26 Aug 11
5F-F33	54th Military Judge Course	18 Apr – 6 May 11
5F-F34	36th Criminal Law Advocacy Course	31 Jan – 4 Feb 11
5F-F34	37th Criminal Law Advocacy Course	7 – 11 Feb 11
5F-F34	38th Criminal Law Advocacy Course	12 – 16 Sep 11
5F-F34	39th Criminal Law Advocacy Course	19 – 23 Sep 11

INTERNATIONAL AND OPERATIONAL LAW		
5F-F40	2011 Brigade Judge Advocate Symposium	9 – 13 May 11
5F-F41	7th Intelligence Law Course	15 – 19 Aug 11
5F-F47	55th Operational Law of War Course	22 Feb – 4 Mar 11
5F-F47	56th Operational Law of War Course	1 – 12 Aug 11
5F-F48	4th Rule of Law Course	11 -15 Jul 11

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

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

Naval Justice School Newport, RI		
CDP	Course Title	Dates
0257	Lawyer Course (020) Lawyer Course (030)	24 Jan – 1 Apr 11 1 Aug – 7 Oct 11
0258 (Newport)	Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070) Senior Officer (080)	24 – 28 Jan 11 (Newport) 14 – 18 Mar 11 (Newport) 25 – 29 Apr 11 (Newport) 23 – 27 May 11 (Newport) 13 – 17 Jun 11 (Newport) 6 – 9 Sep 11 (Newport)
2622 (Fleet)	Senior Officer (Fleet) (040) Senior Officer (Fleet) (050) Senior Officer (Fleet) (060) Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110) Senior Officer (Fleet) (120) Senior Officer (Fleet) (130)	10 – 14 Jan 11 (Pensacola) 24 – 28 Jan 11 (Yokosuka) 14 – 18 Feb 11 (Pensacola) 4 – 8 Apr 11 (Pensacola) 9 – 13 May 11 (Pensacola) 16 – 20 May 11 (Naples, Italy) 27 Jun – 1 Jun 11 (Pensacola) 1 – 5 Aug 11 (Pensacola) 1 – 5 Aug 11 (Camp Lejeune) 8 – 12 Aug 11 (Quantico)
03RF	Continuing Legal Education (010) Continuing Legal Education (020) Continuing Legal Education (030)	25 Oct 10 – 21 Jan 11 7 Mar – 20 May 11 13 Jun – 28 Aug 11
03TP	Basic Trial Advocacy (010)	7 – 11 Feb 11
07HN	Legalman Paralegal Core (010) Legalman Paralegal Core (020) Legalman Paralegal Core (030)	26 Jan – 18 May 11 24 May – 9 Aug 11 31 Aug – 20 Dec 11
NA	Intermediate Trial Advocacy (010)	16 – 20 May 11
525N	Prosecuting Complex Cases (010)	11 – 15 Jul 11
627S	Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	10 – 12 Jan 11 (Mayport) 31 Jan – 12 Feb 11 (Okinawa) 16 – 18 Feb (Norfolk) 22 – 24 Mar 11 (San Diego) 25 – 27 Apr 11 (Bremerton) 16 – 20 May 11 (Naples) 1 – 3 Jun 11 (San Diego) 1 – 3 Jun 11 (Norfolk) 6 – 8 Jul 11 (San Diego) 8 – 10 Aug 11 (Millington) 20 – 22 Sep ((Pendleton) 21 – 23 Sep 11 (Norfolk)

748A	Law of Naval Operations (010) Law of Naval Operations (020)	28 Feb – 4 Mar 11 (San Diego) 19 – 23 Sep 11 (Norfolk)
748B	Naval Legal Service Command Senior Officer Leadership (010)	25 Jul – 5 Aug 11
748K	Trial Advocacy CLE (030) Trial Advocacy CLE (040)	20 – 21 Jan 11 (Yokosuka) 14 – 15 Apr 11 (San Diego)
786R	Advanced SJA/Ethics (010)	25 – 29 Jul 11
7485	Classified Information Litigation Course (010)	2 – 6 May 11 (Andrews AFB)
7487	Family Law/Consumer Law (010)	Cancelled
7878	Legal Assistance Paralegal Course (010)	18 – 22 Apr 11
846L	Senior Legalman Leadership Course (010)	25 – 29 Jul 11
850T	Staff Judge Advocate Course (010) Staff Judge Advocate Course (020)	25 Apr – 6 May 11 (Norfolk) 11 – 22 Jul 11 (San Diego)
850V	Law of Military Operations (010)	6 – 17 Jun 11
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	20 – 24 Jun 11 26 – 30 Sep 11
932V	Coast Guard Legal Technician Course (010)	8 – 19 Aug 11
961A (PACOM)	Continuing Legal Education (020) Continuing Legal Education (030)	17 – 21 Jan 11 (Yokosuka) 16 – 20 May 11 (Naples)
961D	Military Law Update Workshop (010) Military Law Update Workshop (020)	TBD TBD
961G	Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted) (020)	TBD TBD
961J	Defending Complex Cases (010)	18 – 22 Jul 11
3938	Computer Crimes (010)	6 – 10 Jun 11 (Newport)
3759	Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	10 – 14 Jan 11 (San Diego) 28 Mar – 1 Apr 11 (San Diego) 4 – 8 Apr 11 (San Diego) 25 – 29 Apr 11 (Bremerton) 2 – 6 May 11 (San Diego) 6 – 10 Jun 11 (San Diego) 19 – 23 Sep 11 (Pendleton)
4040	Paralegal Research & Writing (020) Paralegal Research & Writing (030)	7 – 20 Apr 11 18 – 29 Jul 11
4044	Joint Operational Law Training (010)	TBD
4048	Legal Assistance Course (010)	18 – 22 Apr 11

NA	Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (020)	16 – 18 Feb 11 12 – 14 Jul 11
NA	Legal Specialist Course (020) Legal Specialist Course (030)	28 Jan – 1 Apr 11 29 Apr – 1 Jul 11
NA	Paralegal Ethics Course (020) Paralegal Ethics Course (030)	7 – 11 Mar 11 13 – 17 Jun 11
NA	Legal Service Court Reporter (020) Legal Service Court Reporter (030)	14 Jan – 1 Apr 11 22 July – 7 Oct 11
NA	Information Operations Law Training (010)	4 – 18 Mar 11 (Norfolk)
NA	Senior Trial Counsel/Senior Defense Counsel Leadership (010)	4 – 8 Apr 11

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	24 Jan – 11 Feb 11 28 Feb – 18 Mar 11 4 – 22 Apr 11 9 – 27 May 11 13 Jun – 1 Jul 11 11 – 29 Jul 11 15 Aug – 2 Sep 11
0379	Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	31 Jan – 11 Feb 1 7 – 18 Mar 11 11 – 22 Apr 11 16 – 27 May 11 18 – 29 Jul 1 22 Aug – 2 Sep 11
3760	Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	10 – 14 Jan 11 (Mayport) 28 Mar – 1 Apr 11 6 – 10 Jun 11 8 – 12 Aug 11 (Millington) 12 – 16 Sep 11

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	24 Jan – 11 Feb 11 28 Feb – 18 Mar 11 9 – 27 May 11 13 Jun – 1 Jul 11 25 Jul – 12 Aug 11 22 Aug – 9 Sep 11
947J	Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050)	3 – 14 Jan 11 31 Jan – 11 Feb 11 28 Mar – 8 Apr 11

	Legal Clerk Course (060)	9 – 20 May 11
	Legal Clerk Course (070)	13 – 24 Jun 11
	Legal Clerk Course (080)	1 – 12 Aug 11
	Legal Clerk Course (090)	22 Aug – 2 Sep 11

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

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

Air Force Judge Advocate General's School Maxwell AFB, AL	
Course Title	Dates
Trial & Defense Advocacy Course, Class 11-A	3 – 14 Jan 11
Paralegal Apprentice Course, Class 11-02	3 Jan – 16 Feb 11
Gateway III, Class 11-A	19 Jan – 4 Feb 11
Air Force Reserve & Air National Guard Annual Survey of the Law, Class 11-A (Off-Site)	21 – 22 Jan 11
Homeland Defense/Homeland Security Course, Class 11-A	24 – 28 Jan 11
CONUS Trial Advocacy Course, Class 11-A (Off-Site, Charleston, SC)	31 Jan – 4 Feb 11
Interservice Military Judges' Seminar, Class 11-A	1 – 4 Feb 11
Legal & Administrative Investigations Course, Class 11-A	7 – 11 Feb 11
European Trial Advocacy Course, Class 11-A (Off-Site, Kapaun AS, Germany)	14 – 18 Feb 11
Judge Advocate Staff Officer Course, Class 11-B	14 Feb – 15 Apr 11
Paralegal Craftsman Course, Class 11-02	14 Feb – 30 Mar 11
Paralegal Apprentice Course, Class 11-03	28 Feb – 12 Apr 11
Environmental Law Update Course (SAT-DL), Class 11-A	22 – 24 Mar 11
Defense Orientation Course, Class 11-B	4 – 8 Apr 11
Advanced Labor & Employment Law Course, Class 11-A (Off-Site, Rosslyn, VA location)	12 – 14 Apr 11
Military Justice Administration Course, Class 11-A	18 – 22 Apr 11
Paralegal Apprentice Course, Class 11-04	25 Apr – 8 Jun 11
Cyber Law Course, Class 11-A	26 – 28 Apr 11
Total Air Force Operations Law Course, Class 11-A	29 Apr – 1 May 11

Advanced Trial Advocacy Course, Class 11-A	9 – 13 May 11
Operations Law Course, Class 11-A	16 – 27 May 11
Negotiation and Appropriate Dispute Resolution Course, 11-A	23 – 27 May 11
Reserve Forces Paralegal Course, Class 11-A	6 – 10 Jun 11
Staff Judge Advocate Course, Class 11-A	13 – 24 Jun 11
Law Office Management Course, Class 11-A	13 – 24 Jun 11
Paralegal Apprentice Course, Class 11-05	20 Jun – 3 Aug 11
Judge Advocate Staff Officer Course, Class 11-C	11 Jul – 9 Sep 11
Paralegal Craftsman Course, Class 11-03	11 Jul – 23 Aug 11
Paralegal Apprentice Course, Class 11-06	15 Aug – 21 Sep 11
Environmental Law Course, Class 11-A	22 – 26 Aug 11
Trial & Defense Advocacy Course, Class 11-B	12 – 23 Sep 11
Accident Investigation Course, Class 11-A	12 – 16 Sep 11

5. Civilian-Sponsored CLE Courses

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

- AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225
- ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

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

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

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

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

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1220 North Fillmore Street, Suite 444
Arlington, VA 22201
(571) 481-9100

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University Law School
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

MC Law: Mississippi College School of Law
151 East Griffith Street
Jackson, MS 39201
(601) 925-7107, fax (601) 925-7115

NAC National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(803) 705-5000

NDAA: National District Attorneys Association
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
(703) 549-9222

NDAED: National District Attorneys Education Division
1600 Hampton Street
Columbia, SC 29208
(803) 705-5095

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

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

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

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

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

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

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

7. Mandatory Continuing Legal Education

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

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

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

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

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

Current Materials of Interest

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

Date	Region	Location	Units	ATRRS Number	POCs
21 – 23 Jan 2011	Southeast On-Site FOCUS: Rule of Law	Tampa, FL	174th LSO 1st LSO 2d LSO 12th LSO 213th LSO	001	MAJ Rob Livingston robert.livingston @us.army.mil 863.385.5156 SFC Jarrod Murison Jarrod.t.murison@us.army.mil 305.953.0425
25 – 27 Feb 2011	National Capital Region On-Site FOCUS: Expeditionary Contracting & Rule of Law	Alexandria, VA	151st LSO 139th LSO 10th LSO 153d LSO USARLC	002	CPT David Rittgers dave_rittgers@yahoo.com david.rittgers@us.army.mil SSG Marlon Zuniga Marlon.Zuniga@usar.army.mil 703-960-7393, ext. 7443
25 – 27 Mar 2011	Western On-Site FOCUS: Military Justice & Advocacy / Legal Administrators	Salt Lake City, UT	87th LSO 6th LSO 75th LSO 78th LSO	003	MAJ Timothy Taylor Timothy.l.taylor@us.army.mil SFC Brenda Hallows Brenda.hallows@usar.army.mil 801.656.3600
30 Apr – 6 May 2011	Trial Defense Service Functional Exercise	San Antonio, TX	22d LSO 154th LSO	NA	CPT DuShane Eubanks d.eubanks@us.army.mil 972.343.3143 Mr. Anthony McCullough Anthony.mccullough@us.army.mil 972.343.4263
14 – 21 May 2011	Nationwide	Fort McCoy, WI	8 Soldiers from each LSO	NA	SSG Keisha Parks keisha.williams@usar.army.mil 301.944.3708
2 – 5 Jun 2011	Yearly Training Brief and Senior Leadership Course	Gaithersburg, MD	Each LSO Cdr, Sr Paralegal NCO, plus one designated by LSO Cdr	NA	LTC Dave Barrett David.barrett1@us.army.mil SSG Keisha Parks keisha.williams@usar.army.mil 301.944.3708
15 – 17 Jul 2011	Northeast On-Site FOCUS: Rule of Law	New York City, NY	4th LSO 3d LSO 7th LSO 153d LSO	004	CPT Scott Horton Scott.g.horton@us.army.mil CW2 Deborah Rivera Deborah.rivera1@us.army.mil 718.325.7077
12 – 14 Aug 2011	Midwest On-Site FOCUS: Rule of Law	Chicago, IL	91st LSO 9th LSO 8th LSO 214th LSO	005	MAJ Brad Olson Bradley.olson@us.army.mil SFC Treva Mazique treva.mazique@usar.army.mil 708.209.2600, ext. 229

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

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

download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

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

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

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

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

(d) FLEP students;

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

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

c. How to log on to JAGCNet:

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

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

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

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

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

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

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

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

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

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

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

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

4. The Army Law Library Service

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

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