



# THE ARMY LAWYER

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## Lore of the Corps

### The Trial by Military Commission of “Mother Jones”

Fred L. Borch  
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In March 1913, Mary Harris Jones, better known as “Mother Jones,” and forty-seven other civilians were tried by a military commission in West Virginia. Governor William E. Glasscock had declared martial law in the aftermath of violent and bloody strikes by coal miners in the Paint and Cabin Creek areas of Kanawha County, and the Judge Advocate of the West Virginia National Guard was now prosecuting Jones and other civilians for murder and conspiracy to commit murder. Why and how “Mother Jones” came to be prosecuted by this military tribunal almost 100 years ago is an unusual story that is worth telling.

Labor unrest during the Progressive Era of the early 20th century was common and soldiers were repeatedly called upon to suppress violence between striking workers and their employers. While Federal troops were sometimes called out to intervene in labor disputes, state National Guard forces usually were sufficient to quell violence between management and labor.<sup>1</sup> This explains why, when armed clashes between guards employed by coal mine operators and striking miners occurred in the Paint Creek district of West Virginia in April 1912, the state National Guard was sent in to restore order.

The Paint Creek strike resulted when the United Mine Workers of America (UMWA) demanded higher wages for the coal miners it was representing in contract negotiations with the Kanawha Coal Operators Association (KCOA). Union labor had been used in KCOA mines since 1904, and so it was neither unusual nor unexpected for the UMWA to press for increased pay. But the negotiations between the two sides broke down in April 1912. Some KCOA members hired armed guards, evicted strikers from company-owned houses, and hired non-union workers to mine coal. The displaced strikers responded by attacking both guards and replacement workers.

The violence only increased when Mother Jones, who joined the striking mineworkers in the Paint Creek area in July, persuaded the workers at nearby Cabin Creek to join the strike. Although she was over eighty years old, Jones was a powerful and dynamic speaker who organized both rallies and marches. By August, she had not only convinced the Cabin Creek miners to join their brothers on Paint Creek,

but also got many of the non-union Cabin Creek workers to join the UMWA.

As historian Edward M. Steel explains, mine operators in the Paint and Cabin Creek districts and Charleston businessmen with a financial interest in the coal mines initially looked to the civilian courts to control the violence, but local Kanawha County officials “insisted that they could not rely on either grand or petit jurors to be fair in cases arising out of the strike.”<sup>2</sup> This distrust of civilian law enforcement was well-founded. In the early weeks of the strike, a group of guards and miners opened fire on each other; one striker was killed and another wounded. But, when the guards asked the local grand jury to return an indictment for assault against the strikers, the grand jury instead indicted the guards. While the county prosecutor declined to pursue the case, the message was clear: the civilian courts were unlikely to punish the strikers and this meant labor violence would continue.

As for Mother Jones, she was either a dangerous radical whose fiery revolutionary rhetoric threatened to turn the world upside down or a grandmotherly “miners’ angel” who simply sought a decent wage for working men. Born in Ireland in August 1837, Mary Harris Jones immigrated with her family to Canada before settling in the United States. She married and was living in Tennessee with her husband and four children (all under the age of five) when tragedy struck in 1867: a yellow fever epidemic killed her entire family, leaving her alone. She never remarried.

Jones now moved to Chicago and opened a dressmaking business. Four years later, she lost her shop and all her possessions in the Great Chicago Fire of 1871. The hardship she suffered in this second loss was apparently a catalyst for her to join the Knights of Labor, an early union organization. In the 1890s, Jones also joined the Populist and Socialist Labor Parties and participated in a variety of political activities. When the Knights of Labor disbanded, Jones joined the UMWA. In 1900, that union hired her as an organizer, the only woman to be so employed. Over the next few years, “Mother Jones” (she adopted the moniker in the late 1890s) organized thousands of coal and copper miners in Colorado, Montana, and Pennsylvania. She also assisted

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<sup>1</sup> For an excellent discussion of military intervention in labor disputes in the early years of the 20th century, see CLAYTON D. LURIE & RONALD H. COLE, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1877–1945* (1996); see also *Use of Military Force in Domestic Disturbances*, 45 *YALE L.J.* 879 (1936).

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<sup>2</sup> EDWARD M. STEEL, JR., *THE COURT-MARTIAL OF MOTHER JONES* 6 (1995). Note that while the title of Steel’s book refers to Jones’s trial as a court-martial, this is a misnomer as she was in fact tried by a military commission. Steel’s book includes the complete trial transcript, *id.* at 99–306, omitting only the verdict and sentence. As he explains, the record of trial does not contain this information. *Id.* at 55, 306.

striking workers in the textile, telegraph, garment, and railroad sectors.<sup>3</sup> Jones was famous for her speaking skills and for turning a phrase; she once exhorted her followers to “pray for the dead and fight like hell for the living.”<sup>4</sup>

Mother Jones’s arrival in Kanawha County in July 1912 and the resulting increase in violence, coupled with the inability of civilian law enforcement to preserve the peace, ultimately caused Governor Glasscock to declare that a “state of war” existed in the Paint Creek and Cabin Creek districts and that he was imposing martial law.<sup>5</sup> No governor had previously made such a declaration, and Glasscock apparently did so reluctantly. West Virginia National Guard troops quickly moved into the military zone and confiscated all weapons (from both guards and strikers). Glasscock then “set up a military commission to try offenders in the martial law zone,” with Lieutenant Colonel (LTC) George S. Wallace, the Judge Advocate of the National Guard, as the prosecutor.<sup>6</sup>

Born in Albemarle County, Virginia, in September 1871, George Selden Wallace graduated from the University of Virginia’s law school in 1897 and then moved to Huntington, West Virginia, where he established a thriving private practice. He served as a second lieutenant in the 2d West Virginia Volunteers in the Spanish American War and then joined the West Virginia National Guard. His service as a prosecuting attorney in Cabell County from 1904 to 1908 and his military status in the Guard made Wallace the ideal choice to serve as prosecutor.<sup>7</sup> While Wallace tried most of the more than 200 civilians prosecuted by military commission over the next seven months, his most celebrated case involved Mother Jones.<sup>8</sup>

Jones and her fellow defendants were charged with conspiracy “to inflict bodily injury . . . with intent to maim, disfigure, disable and kill,” and with the murder of Fred Bobbitt and W. R. Vance. Both victims were non-union “scabs” hired by coal operators to replace the striking coal miners. All forty-eight defendants also were charged with being accessories after the fact in that they had helped those who had murdered Bobbitt and Vance to escape.<sup>9</sup>

The charges arose out of a 9–10 February 1913 incident in which about fifty armed strikers clashed with a detachment of guards and non-union workers manning a machine gun near the town of Mucklow. The strikers attempted to steal the weapon and, in the course of this attempt, killed Bobbitt and Vance. As many as 150 strikers and guards had participated in what was being called the “battle of Mucklow” and, although Mary Jones was not present at the fight, she was charged as a conspirator because her inflammatory speeches had incited the miners to violence. She had, for example, urged the strikers “to get their guns and shoot them [the guards] to hell.”<sup>10</sup>

The military commission proceedings began in the Odd Fellows Hall in Pratt, West Virginia, on Friday, 7 March 1913. From the beginning, the trial was acrimonious. Some accused refused to enter pleas, arguing that the military commission had no jurisdiction over them and that any trial must be in a civilian court. As for Mary Jones, she immediately proclaimed that she had “no defense to make” and that her activities in and around Paint and Cabin Creek were simply one battle in a long campaign. Said Jones: “Whatever I have done in West Virginia, I have done it all over the United States, and when I get out, I will do it again.”<sup>11</sup>

The military commission followed the procedure and rules of evidence then in use in West Virginia’s state courts, although the members themselves ruled on all objections made by any party to the trial.<sup>12</sup> Some of the defendants hired civilian counsel to represent them, and the commission appointed two military officers, Captains Edward B. Carskadon and Charles R. Morgan, to represent those accused who did not hire attorneys. Both captains were lawyers.<sup>13</sup>

The trial of Mother Jones lasted a week, and LTC Wallace presented mostly testimony from coal mine guards and National Guard troopers about the Mucklow battle. Most of the witnesses proved nearly useless to the prosecution, admitting that they heard shooting but not

<sup>3</sup> *Id.* at 3–5. See also MARY HARRIS JONES, THE AUTOBIOGRAPHY OF MOTHER JONES (1925), available at <http://www.marxists.org/subject/women/authors/jones/index.html> (last visited Feb. 25, 2012); DALE FETHERLING, MOTHER JONES, THE MINERS’ ANGEL: A PORTRAIT (1974).

<sup>4</sup> U.S. Department of Labor, Workers Memorial Day Poster (28 Apr. 2010).

<sup>5</sup> *Ex parte* Jones, 77 S. E. 1029, 1030 (W. Va. 1913).

<sup>6</sup> STEEL, *supra* note 2, at 7.

<sup>7</sup> *Id.* Wallace remained in the West Virginia National Guard after completing his duties as prosecutor. Shortly before the United States entry in World War I, he was commissioned as a major in the Judge Advocate General’s Reserve Corps and, when hostilities ended in November 1918, Wallace had spent six months in France and achieved the rank of lieutenant colonel in the National Army.

<sup>8</sup> *Id.* at xi.

<sup>9</sup> *Id.* at 100–02.

<sup>10</sup> *Id.* at 40. Steel cites a newspaper report for this statement. It is unclear whether evidence of this statement came up at trial; none of the witnesses mentioned it. At one point five of Mother Jones’s speeches were introduced as exhibits, but these are not included in Steel’s book. *Id.* at 142–43.

<sup>11</sup> *Id.* at 100.

<sup>12</sup> Colonel Charles F. Jollette, the president of the five-member commission, was a lawyer and his opinion almost certainly carried great weight with his fellow commission members. *Id.* at 38, 76.

<sup>13</sup> *Id.* at 25, 51. This compares favorably with the due process available in true courts-martial of the same era, where the accused were typically represented by non-lawyers, and a court of non-lawyers got all its legal advice from the prosecuting Judge Advocate. See Fred L. Borch, III, “The Largest Murder Trial in the History of the United States”: The Houston Riots Courts-Martial of 1917, ARMY LAW., Feb. 2011, at 1, 2; see also Fred L. Borch, III, *Anatomy of a Court-Martial: The Trial and Execution of Private William Buckner in World War I*, ARMY LAW., Oct. 2011, at 1, 2 & n.10.

which side shot first, and being unable to identify specific individuals with any particularity. Lieutenant Colonel Wallace often found himself cross-questioning his own witnesses about the answers they had given in pretrial interviews.<sup>14</sup> However, he was able to get substantive testimony from Frank Smith, a detective from the J. W. Burns agency. Mr. Smith had come to the area posing as a UMWA member on the day of the incident, and was able to identify several accused as planning to attack arriving National Guard troops. He also testified about a speech given by Mother Jones, but the worst he reported her saying was

that every time the guards beat them up they came to her crying and she said if she was a guard she would beat them up because they stand for it; that they didn't have to fight and she told them they have a yellow streak; that it was their own fault what they did. . . . they ought to get their members in Colorado and get some nerve injected into them. . . .<sup>15</sup>

The trial was briefly interrupted when Mary Jones and two other defendants, assisted by UMWA attorneys, petitioned West Virginia's highest court for a writ of habeas corpus. Jones argued that the military commission was depriving her of the right to a trial by jury and that, as the civilian courts were open and functioning, the military tribunal had no jurisdiction over them as civilians. On 21 March 1913, however, the Supreme Court of West Virginia ruled that, as Governor Glasscock had lawfully proclaimed a state of war because of the insurrection occurring in the Paint and Cabin Creek districts, Jones and her fellow accused were "technically enemies of the state," and consequently could be prosecuted at a military tribunal.<sup>16</sup> With this favorable ruling in hand, the military commission reconvened and Wallace completed his case in chief. The defense then presented a very brief case and both sides argued to the military commission. Wallace called upon the panel members to "do [their] duty" and convict the accused.<sup>17</sup> As for Mother Jones, however, LTC Wallace conceded that while she had "largely contributed to this trouble" in that her speeches had incited the strikers,

"whether or not this evidence will connect her up with this conspiracy, it is more difficult to say." Wallace concluded by saying that he left it up to the commission members to reach the appropriate verdict, but added: "I do not think the evidence is very strong against her."<sup>18</sup>

Exactly what verdicts were reached by the commission is not known; the members determined their findings and sentences in secret and then submitted a sealed report to Governor Henry D. Hatfield, who had recently replaced Glasscock as governor and consequently was the new convening authority. But results were not long in coming. On 20 March 1913, Hatfield released ten of the accused from the military guard house where they had been jailed; another fifteen were released the following day. On 22 March, still more defendants were freed, but Jones and eleven other defendants remained incarcerated. All were transferred to the state penitentiary except for Jones, who remained confined in the guard house in Pratt. They were not released until Governor Hatfield had worked out a settlement of the strike that restored coal production.<sup>19</sup>

Mother Jones was released on 7 May 1913. The bad publicity from the strike, which reached a national audience as a U.S. Senate subcommittee held hearings on the labor unrest in West Virginia, caused Governor Hatfield to realize that the continued imprisonment of an elderly woman was ill-advised and was not helping West Virginia's image. Mother Jones was now eighty-one years old, and it also would not be good if she were to die while confined in the military guard house in Pratt.<sup>20</sup>

After her release, Jones immediately resumed her UMWA activities. Unrepentant and undeterred by her ordeal, she travelled to Colorado a few months later, where she called upon coal miners to strike. Jones was arrested and imprisoned by the Colorado National Guard after a melee between strikers and company guards in Ludlow, Colorado. While she spent some weeks in jail, Colorado authorities did not prosecute her.<sup>21</sup>

Of all the participants in this unusual trial, only Mary Harris Jones is widely remembered. She has been the subject

<sup>14</sup> See, e.g., STEEL, *supra* note 2, at 104–05, 112, 116.

<sup>15</sup> *Id.* at 185. Some witnesses testified that Mother Jones had advised them not to give up their guns, and that if she had had money she would have bought them more guns. *Id.* at 114–15, 248–50, 252, 256. Others testified that she had denounced the governor, the mine guards, and the mine clerks. *Id.* at 156, 252. One said that she had expressed disdain at low-class militia "coming in to butcher up their people" and that "they ought to fight; they had a just cause." *Id.* at 252. On the other hand, a militia captain reported that he had heard her make only a "very reasonable speech," advising the miners to continue with the strike but not to "waste money on guns," as the National Guard was now present "and would protect them." *Id.* at 201.

<sup>16</sup> *Ex parte Jones*, 77 S. E. 1029, 1045 (W. Va. 1913).

<sup>17</sup> STEEL, *supra* note 2, at 306.

<sup>18</sup> *Id.* at 302.

<sup>19</sup> *Id.* at 74–75. While some diehard socialists felt this settlement was a sell-out, Mother Jones herself described it as the best the miners could get. *Id.* at 82. Interestingly, she described Governor Glasscock, who had imposed martial law and ordered the tribunal, as a "good, weak man," but described Governor Hatfield, who made the settlement and ordered the release of all the prisoners, as "dictatorial with the instincts of a brute." *Id.* at 81.

<sup>20</sup> See *id.* at 59–60. For more on the Senate hearings, see U.S. SENATE, CONDITIONS IN PAINT CREEK DISTRICT, WEST VIRGINIA (1913). This was the first congressional subcommittee to examine a labor dispute. For more on coal mine unrest in West Virginia, see DAVID CORBIN, LIFE, WORK, AND REBELLION IN THE COAL FIELDS: THE SOUTHERN WEST VIRGINIA COAL MINERS 1880–1922 (1981).

<sup>21</sup> For more on the Ludlow massacre of 1914 and Jones's involvement, see Caleb Cain, *There Was Blood*, NEW YORKER, Jan. 19, 2009, at 76.

of a number of folk songs: Gene Autry, famous as “The Singing Cowboy” on radio and television from the 1930s to 1960s, recorded a song called “The Death of Mother Jones,” and “The Spirit of Mother Jones” was recorded by the Irish singer Andy Irvine in 2010.<sup>22</sup> The magazine *Mother Jones* also is named after her. With a paid circulation of over 200,000, it publishes stories on topics that would have resonated with Jones, such as corporate corruption, workers’ rights, community service, and feminism.<sup>23</sup>

The trial of Mother Jones was a highly unusual event in military legal history. It may even be unique as the only National Guard military commission to try an American woman for murder and conspiracy to commit murder.<sup>24</sup>

*More historical information can be found at*

The Judge Advocate General’s Corps  
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<https://www.jagcnet.army.mil/8525736A005BE1BE>

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<sup>22</sup> *Death of Mother Jones*, MOTHER JONES MUSEUM, [http://motherjonesmuseum.org/Death\\_of\\_Mother\\_Jones.htm](http://motherjonesmuseum.org/Death_of_Mother_Jones.htm) (last visited Feb. 25, 2012); *Abocurragh*, ANDY IRVINE, [www.andyirvine.com/albums/abocurragh.html](http://www.andyirvine.com/albums/abocurragh.html) (last visited Apr. 9, 2012).

<sup>23</sup> *About Us*, MOTHER JONES, <http://motherjones.com/about> (last visited Apr. 9, 2012).

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<sup>24</sup> Governor Hatfield ultimately declined to approve the findings of the military commission convened in Pratt, West Virginia, and either released or pardoned all those who had been convicted. Hatfield’s actions meant that West Virginia avoided litigation in the federal courts. It also meant that the constitutionality of the military tribunal that convicted Mother Jones and others has never been examined by the federal courts. However, in other cases, the Supreme Court repudiated the central holding of *Ex parte Jones*—that the governor had plenary power to determine that a given area was in insurrection, and to declare martial law, without having his decision challenged in federal court. *Duncan v. Kahanamoku*, 327 U.S. 304, 321 n.18 (1946) (citing *Sterling v. Constantin*, 287 U.S. 378, 401 (1932)), *cited in* Anthony F. Rezzo, *Making a Burlesque of the Constitution: Military Trials of Civilians in the War against Terrorism*, 31 VT. L. REV. 447, 489 n.202 (2007)).

## Rethinking *Voir Dire*

Lieutenant Colonel Eric R. Carpenter\*

### Basics

Before we decide what we should do during this first phase of the trial, we should define it and give it a proper label. *Voir dire* is a terrible label for this phase (no one can even agree on how to pronounce it). It is a French phrase that literally means “to speak the truth.” Well, that should apply to everyone who takes an oath to tell the truth at trial. Generally speaking, though, *voir dire* means a preliminary examination to test the suitability of a potential juror or the competence of a potential witness. So, if we were to use English rather than French to describe the first phase, maybe we could call it “Preliminary Panel Member Examination.”

However, that title would fit only one part of this phase of trial. There are really three parts to *voir dire*: individual written examination, individual oral examination, and group oral examination. For the individual written examination, the title “Preliminary Panel Member Examination” is probably appropriate. In these questionnaires, we ask the panel members questions in a sterile, test-like, examination fashion. But for the other part of this phase—the in-court, oral exchange between you and the individual, or between you and the group—that is not a good label. That part should be called “Conversations with Panel Members” because that is what you want to achieve: a conversation with your panel members.

For simplicity’s sake we will use the term *voir dire* to describe the entire phase, but distinguish between individual written examination, individual oral examination, and group oral examination. We need to be precise about these distinctions because once we understand the overall goals of *voir dire*, we will see that some of these goals should be accomplished in individual written and oral examination, and some in group oral examination. By the end of this note, you will have a simple system that you can use to approach *voir dire* that is built around achieving the goals for each of the three subcomponents of the larger *voir dire* process.<sup>1</sup>

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<sup>1</sup> This framework is derived from Lin S. Lilley’s excellent article, *Techniques for Targeting Juror Bias*, TRIAL, Nov. 1994, at 74. For further reading on *voir dire*, see James McElhaney, *Making Limited Time for Voir Dire Count*, A.B.A. J., Dec. 1998, at 66; James McElhaney, *Listen, Don’t Talk*, ABA J., Nov. 2009, at 20; Amy Singer, *Selecting Jurors: What to Do About Bias*, TRIAL, Apr. 1996, at 29; James McElhaney, *Rejiggering Jury Selection*, ABA J., Apr. 2008, at 30. Warning! If you are going to defend a capital case, then you need to learn a particular form of *voir dire* called the Colorado method. See Lieutenant Colonel Eric R. Carpenter, *An Overview of the Capital Jury Project for Military Justice Practitioners: Jury Dynamics, Juror Confusion, and Juror Responsibility*, ARMY LAW., May 2011, at 6, 22.

### Goals and How to Reach Them

Everything you do in trial advocacy needs to be goal-oriented. You must have a clearly defined reason for doing what you are about to do, and then you only do what you need to do to achieve that goal—nothing more. The corollary of that is if don’t have a reason for doing something, don’t do it. In fact, you should start with the presumption that you are *not* going to do something (call this witness, ask this question, do a cross examination, object to this question, etc.) because that forces you to think through why you need to take that action. *Voir dire* is no exception. So, let’s start with the presumption that we are not going to *voir dire* again, ever. That will force us to think through the goals of *voir dire* in general. Start with that presumption before your next trial, and that will force you to think through the goals of *voir dire* in your individual case.

The generally recognized goals of *voir dire* are information gathering, education, rapport, and persuasion.<sup>2</sup>

#### *Information Gathering*

The first goal (and the only one explicitly mentioned by the Rules for Courts-Martial (RCM))<sup>3</sup> is information gathering. Panel members may not sit unless they can be fair and impartial; therefore, you need to be able to gather information on fairness and impartiality to make meaningful use of challenges.

In civilian trials, the prospective juror pool is very large and ostensibly represents a cross-section of society. Civilian trial attorneys have a bigger information gathering challenge than you do. They really know nothing about these people and one of their primary goals is simply to get rid of the jerks and weirdos. We don’t have that problem. The Army does a pretty good job of screening our population for those with bizarre beliefs or socialization problems. Therefore, you can refine your information gathering goals.

You need to focus on the panel members’ experiences, biases, and beliefs that could affect how your panel members will solve the problem in your case. If your case involves homosexual conduct, or pornography, or cross-racial sexual relationships or violence, or a sexual assault victim who has behaved in ways that are contrary to traditional sex role expectations, or [add a controversial fact pattern here], then

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<sup>2</sup> JEFFREY T. FREDERICK, *MASTERING VOIR DIRE AND JURY SELECTION* (3d ed. 2011).

<sup>3</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(d), (f) (2008) [hereinafter MCM].

you need to explore the members' belief patterns that will shape how they approach the difficult task that you are about to give them.

The problem is that panel members, like most human beings, will not say socially unacceptable or embarrassing things in public. Sociological studies have shown that when people are put in group settings, they say what they think the group expects them to say.<sup>4</sup> If you ask panel members who are on the record and sitting there in their formal uniforms and who might themselves be a field-grade officers and who may be sitting next to their bosses, "Do you look at pornography?" – don't expect a lot of hands to go up. If you ask, "Would you be concerned if your daughter dated outside of your race?": don't expect a lot of hands to go up.

To get responses that will accurately reveal a bias or belief that will affect your case, you need to ask those questions in a safe place—individual written examination.

Your panel members will already have completed a written questionnaire that gets at some of the other RCM 912 concerns,<sup>5</sup> but that questionnaire contains plain vanilla questions. You want the panel members to complete a supplemental questionnaire<sup>6</sup> where you give them ways to expose their beliefs and experiences without any associated public embarrassment. Put yourself in the position of a panel member who knows that his or her truthful answer will be socially unacceptable, and then ask the question in a way that gives him or her some "outs"—for example, that gives them a way to shift the belief or behavior to someone else. Here, you are much more likely to get reflective and accurate answers.

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<sup>4</sup> S.E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments*, in *GROUPS, LEADERSHIP, AND MEN: RESEARCH IN HUMAN RELATIONS* 177 (Harold Guetzkow ed. 1951); SOLOMON E. ASCH, *SOCIAL PSYCHOLOGY* (1952); Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 *PSYCHOL. MONOGRAPHS: GEN. & APPLIED* 1 (1956).

<sup>5</sup> MCM, *supra* note 3, R.C.M. 912(a)(1), (f). For Army practitioners, that questionnaire is found in U.S. ARMY TRIAL JUDICIARY, *RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL*, 26 Mar. 2012, at app. E. Generally, the military justice department of the Office of the Staff Judge Advocate will circulate this questionnaire to the members shortly after the panel is selected by the convening authority, will serve a copy on the local Trial Defense Service office, and these questionnaires will remain on file with those offices for review.

<sup>6</sup> The use of supplemental questionnaires "may be requested with the approval of the military judge." MCM, *supra* note 3, R.C.M. 912(a)(1). Further, "Using questionnaires before trial may expedite voir dire and may permit more informed exercise of challenges." *Id.* discussion. *See also id.* R.C.M. 912 analysis, at A21-61. In practice, you will file a motion for appropriate relief in accordance with the military judge's docketing order in which you list the proposed questions for a supplemental questionnaire. The proposed supplemental questionnaire might have only a few questions. After the parties have litigated this motion and the military judge has ruled, the trial counsel will be responsible for submitting the approved supplemental questionnaire to the members and then for gathering them back up.

In a case involving pornography or non-traditional sexual behavior, you might ask:

- "Have you or someone you are close to (a college roommate, brother or sister, close friend) ever regularly looked at pornography?" If they disclose that someone close to them does look at pornography, then have the following question ready for them: "If someone else did, did your opinion of him or her change after you found out? Explain how it changed."

In a case involving cross-racial sexual relationships, you might ask:

- "If your son or daughter became romantically involved with someone from another race, how much would that concern you?" And then have a scale from "0" (not concern me at all) to "10" (concern me greatly).

You can ask similar questions about homosexuality ("If your son or daughter told you he or she was gay, how much would that concern you?" and then a scale). Or, the validity of the mental health field as a real science ("In your opinion, are psychology and psychiatry valid sciences or psychobabble?" with a scale). Or, whether they associate a stigma with seeking help for mental health problems ("Have your or has someone close to you been to a mental health professional? If someone else, did your opinion of him or her change? How?").

Take a look back at those sample questions. If they were asked in a group setting, what would the answers have been? The socially acceptable answers. Reduce these questions to something that is close to an anonymous survey (the written supplemental) and see if you can get accurate replies. You might even consider having a psychologist or psychiatrist help you to draft the questions. An added benefit of asking the questions via a supplemental questionnaire is that the members won't know which party is seeking the information.

You should also ask about life experiences that might impact how the panel member will approach the complex problem that you are about to give her. The military judge will ask some of these questions in front of everybody. For example, the military judge will ask, "Have you, or any member of your family, or anyone close to you personally ever been the victim of an offense similar to the offense charged?" Now suppose your case involves a sexual assault on a child. If a panel member was molested as a child but has not told anyone to this point in her life, do you really think she will raise her hand and say so in front of all of these strangers? Would you want to answer that question that way? The better place to ask that question is in individual written examination.

And you might look for the ways that they learn:

[O]ne of the most important things to look for is how the different jurors learn. Are they more creative or more logical? Would they rather look at a graph or read a book? What magazines do they read? What kind of entertainment do they enjoy? What kinds of games do they like to play?<sup>7</sup>

After all, your primary job in trial is to teach them how to solve the complex problems you are giving them. Wouldn't it be nice to know how learn?

As with anything else in trial work, the decision to submit an additional questionnaire needs to be goal oriented. If you don't need to gather information via a supplemental questionnaire in your particular case, don't.

If you do need a written individual examination, you need to start working on it early. You need to identify belief-patterns, structure arguments around them, and then draft written individual questions—during the trial preparation process, not on the day before trial. Generally, to do a written supplemental questionnaire, you will need to distribute the questionnaires a week or two before trial so that they can be sent to the members, the members can complete them, and the questionnaires can be collected and reviewed by the attorneys. Using this process forces you to get your thoughts together well before trial.

This discussion of individual written examination points us to the goal for individual oral examination. Use individual oral examination to follow up on your written individual examination. If the panel member has responded to a written question in a way that causes you concern, consider challenging him based solely on that written response. However, if the military judge wants more, bring the issue up in individual oral examination. Don't bring it up in group oral examination. Give the prospective panel member as much anonymity as you can.

Note how using written questionnaires and individual oral examination greatly simplifies the process of *voir dire*. If you gather information this way, you don't have to come up with complex charts and try to keep up with whose hands went up in response to your last question. Instead, you get the answers you need ahead of time, on paper, or later when just one person is in the panel box. *Voir dire* can be pretty easy.

The bottom line is that if you want to learn particular information about a panel member, use individual written examination to discover that information and then use individual oral examination to follow up. Don't waste your

group oral *voir dire* time doing information gathering. You won't get accurate answers in any event. Again, only do individual written examination or individual oral examination if you need to. If you don't have a good reason for doing it, don't do it.

### Education

The next goal is education: education on certain beliefs that the panel members will have to deal with, *not* education on your theory or theme of your case.

When you theory-shop or theme-shop with your panel, you might think you are doing what lawyers should be doing, and other lawyers might be impressed—but your panel members won't. First, you risk coming across as a used-car salesman or as a lawyer pulling a lawyer trick. According to James McElhaney, "Arguing your case before the jury panel members even know what it's about triggers genuine sales resistance. So does trying to push the jurors into making commitments about how they are going to decide the case."<sup>8</sup>

And when you ask questions that you think are related to your case, like, "Would you agree that cops sometimes lie?", you are insulting their intelligence. Of course they know that cops sometimes lie. What they want to know is, did a cop lie in *this* case. And they want to wait until they hear the case to deal with that issue. They don't want to feel you are pressuring them to agree with you before they know the facts. Look at these questions:

- Do you believe that, under certain circumstances, eyewitnesses' memory might not be accurate?
- How do you feel about witnesses who testify after receiving special treatment from the government?
- Do you think criminals might lie in order to get a better deal from the government?
- Do you agree that many words of the English language have various meanings?
- Do you agree that the mere presence at the scene of the crime does not establish guilt?

Each of these questions only has one answer. The panel members know that so they wonder why you are asking them a question that obviously has only one answer, and then why you want them to say that obvious answer out loud. The whole thing is unnatural. You might think you are doing something clever, but they are wondering why you are wasting their time and insulting their intelligence with questions like these.

<sup>7</sup> James McElhaney, *Making Limited Time for Voir Dire Count*, A.B.A. J., Dec. 1998, at 66.

<sup>8</sup> *Id.* at 66–67.

As a good rule of thumb, if what you intend to ask is really a request for them to make an inference or to use a generalization, then don't ask the question. For all of the questions above, you can just argue the inference or generalization. And guess what? The panel members will generally agree with those inferences and generalizations (although they may disagree about whether they apply in your particular case). Instead of asking those questions, do what the panel members want you to do: put on the evidence, and then argue the inferences and generalizations. They will appreciate that.

So, if we aren't going to theory-test and theme-test, what are we going to educate the panel members about?

Educate them on the counter-intuitive aspects of the law or of your case and on generally held beliefs that run counter to your case. The judge is going to ask some perfunctory questions that address some of these issues, particularly system bias that runs against the accused. However, all of these questions only elicit the socially acceptable responses. There is only one way to answer, "The accused has pled not guilty to all charges and specifications and is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt. Does anyone disagree with this rule of law?" No panel member is going to raise her hand while wearing her formal uniform and while on the record and say, "You know what, your honor? I cannot abide by that fundamental principle of American law. In fact, I'm really a fascist." The panel members will only respond with the socially acceptable answer, but you need to be aware that they will still likely solve the complex problem you have given them by relying on deeply-embedded generalizations about human behavior.

We need to find a way to make them aware of their underlying beliefs so that they will not act on them. To do this, you want them to describe the 800-pound gorilla in the room (the belief they would otherwise use to solve the problem). You want them to gain insight on how their "intuitive" solution contains error.<sup>9</sup>

For the defense counsel, there are several places where the law runs counter to our intuitive problem-solving processes. For example, if the accused does not testify, we all draw negative inferences from that (he must have something to hide; if I were falsely accused, I would testify to set the record straight, and so should he—he didn't; therefore, he is guilty). Because normal people draw an inference that runs counter to constitutional protections (here, the right not to testify), the law says, "Don't do that." The same goes for the prohibition against drawing a negative

inference if the defense does not put on a case (if evidence that said he didn't do it were available, of course he would put it on—so it must not exist), or the prohibition against drawing a negative inference that because the accused is in court at all, he must have done something wrong (he has been through transmittals from commanders, an Article 32 hearing, and the commanding general's referral—all those people think he did something wrong, or else he would not be sitting at that table).

These inferences draw from a person's lifelong experiences and the way she solves problems outside of a courtroom. The judge gives a simple instruction not to use those lifelong-held generalizations to solve the problem. This does not mean that she will not. It just means she will not talk out loud about them.

So, in group oral examination, ask this simple question: "What is the first thing that comes to your mind when you hear that the accused will not testify?" Wait a few moments. There may be some silence. Eventually, someone will say, "He is guilty." Now, resist the urge to challenge that person. Instead, say, "Thank you, Colonel Jones." And then ask, "Did anyone else think that?" Then say, "Thank you, [Names]." Then, have them describe the gorilla. Ask, "Okay, Major Smith, why do you think that?" Do not be judgmental with the answers. Instead, validate them. Say, "Thank you, Major Smith, I see your point," or some variation on that. Continue asking questions until the 800-pound gorilla is fully described.

And then kill the gorilla.

Ask, "Okay, why would someone who is innocent not take the stand?" Again, wait a few moments. There may be some silence. But then somebody will find an answer—a "sword," if you will—that will help you to kill the gorilla: "He might not be a good public speaker." "His attorney might have told him not to." "He may have some embarrassing skeletons in his closet." "He might be afraid that a trained prosecutor will twist his words." "He might be really nervous, particularly when this much is at stake." (If no one comes up with a reason after several moments have gone by, then toss them a sword to get them talking.) The key is to have them list all of the reasons that *no one* ever wants to testify. Then ask, "Does everyone now see why the military judge told you not to hold it against Sergeant Adams if he doesn't testify? Please raise your hand if you can see that. The members all raised their hands. Thank you."

For the presumption of innocence, you might ask, "What is the first thing you think when you see that the government has gone through all this trouble to bring the accused to trial?" The answer will probably be, "He did something wrong." Then you respond with, "Why could it be that innocent people are brought in to court?" Let them grab some swords. ("He was framed." "He was the best of several suspects." "He was in the wrong place at the wrong

<sup>9</sup> For a good discussion of the neurological reasons why you should explore these beliefs with the panel members, read JONAH LEHRER, HOW WE DECIDE (2009) (reviewed by Major Keith A. Petty, ARMY LAW., Nov. 2011, at 33).

time.” “Someone misidentified him.”). If they can’t find any, ask them, “Well, have any of you ever been accused of doing something you didn’t do? Either recently, or even as a kid?” Have them describe the situations. Then ask, “Now, does everyone see the reason why we have this presumption of innocence? Please raise your hand if you see that. Everyone’s hands went up. Thank you.”

You killed the gorilla. Now, the members are much less likely to rely on long-held generalizations that work against your client. Note that the goal is to kill the gorilla, to make them aware of their beliefs so they might not act on them. The goal is not to challenge the panel member. (You are not going to win most challenges for cause in this area anyway because the other party or the military judge will be able to ask questions that will rehabilitate the panel member).

Some members will show that they have beliefs that run counter to your case. That is okay. You are not going to be able to get them to fully reject these iceberg beliefs. (If you could, you should have become a clinical psychologist, not a lawyer.) You are simply going to make them aware of their beliefs so that they will be more receptive to counterarguments and other belief structures. As James McElhaney states, “A sermonette and long strings of questions will not change how anybody feels about basic issues. Even if they seem to go along with you, they will not reject their personal opinions. They will keep their personal opinions and reject you.”<sup>10</sup>

For the trial counsel prosecuting a non-stranger sex assault case where the victim has behaved in ways prior to the assault that are outside of traditional sex-role expectations, you will run into two beliefs that will hurt your case: first, she asked for it (or shares blame), and second, she assumed the risk that this would happen. If slightly more than one-third of your panel members has one of these beliefs (and research shows that these are commonly-held beliefs),<sup>11</sup> and you don’t deal with these beliefs, then you may have an acquittal coming.

If your victim did something like drink with the accused ahead of time and then consensually engage in kissing or oral sex, but claims that the accused forced sexual intercourse on her, then some panel members might think that she asked for it. Essentially, they will think that she shares culpability for what happened next (“if she had not done all of those things, then this guy would not have lost control of his libido”).

You can counter that by asking, “Are there circumstances where a woman can get a man so worked up that, even if she says no later, it is too late to say no?” Wait. Someone may raise their hand. Ask why they think that way. Have them describe the 800-pound gorilla and see if other people agree using the same technique as above. Then, give them a sword. Ask them, “Okay, well, if someone comes up to you and asks to borrow \$50, and you say, ‘I won’t loan you \$50, but I will loan you \$25,’ can that person then go ahead and forcibly take the other \$25? Who thinks that person cannot? Everybody raised their hands.”

If your victim placed herself in a risky situation, particularly by her own voluntary drinking, then you need to address this assumption of risk. You might first ask, “If a woman does X, Y, and Z, do you think she assumes some risk in what might happen to her?” Wait. You will probably get several people who agree. Ask why they think that way. Describe the 800-pound gorilla. The next step is to see if they think that because she assumed some risk, the offender might be less culpable. Ask, “Well, if someone gets really drunk and stumbles out of a bar, they have placed themselves at risk of getting mugged. If someone does mug them, do we let the mugger go because the victim was drunk?” Or you might ask, “If a well-dressed businessman goes to an ATM late at night in a crime-ridden part of town and gets mugged, do we let the mugger go because the victim put himself in a dangerous situation?”

Again, you need to have a good reason for doing group oral examination. If you do not have a good reason for doing it, don’t do it. You only need to do this when a damaging bias or generalization might exist in your case. If your client is going to testify or put on evidence, then you don’t need to explore those system biases. If your victim did not behave in a way that invokes those beliefs, then you don’t need to explore those generalizations about human behavior. Only describe the 800-pound gorillas that need killing.

The bottom line is: describe those belief systems (describe the 800-pound gorilla), and then have the panel members find reasons why those belief systems are sometimes unreliable (have them find some swords) so they can kill the gorilla. Again, you need to have a good reason for doing group oral examination. If you do not have a good reason for doing it, don’t do it.

### *Rapport and Persuasion*

The third and fourth goals of *voir dire*, rapport and persuasion, are really byproducts of what you have accomplished in individual written examination and both individual and group oral examination. You have established rapport with the panel by not wasting their time, by asking questions that matter, and by showing them that you are prepared. In individual and group oral examination, don’t ask test-like questions. Show an interest in what they are

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<sup>10</sup> McElhaney, *supra* note 7, , at 67.

<sup>11</sup> HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* (1966); GARY LAFREE, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* (1989).

saying. Don't ask judgmental questions, and don't judge their answers. Validate all of their responses.

Finally, by addressing the biases and beliefs that run counter to your case, you have made them more open to the case you are about to present. You will be more persuasive later.

### Questioning Techniques

Remember, in individual oral examination and group oral examination, your goal is to have a conversation. In fact, this is the only two-way conversation you get to have with the panel members during the whole trial. Don't waste it by talking the whole time. You should ask simple, open-ended questions, and then allow the panel members to talk about their beliefs or experiences. Have your co-counsel give you a cue if you are doing what lawyers love to do—monopolizing the conversation. Once you get people talking, you will be amazed by what they will say. Here are some tips:

- Be comfortable with silence. Three, four, or five seconds may go by—or even more—before someone answers. That is okay. Wait for them to talk.
- Make eye contact.
- Listen to and observe the verbal and non-verbal responses of panel members. Watch for changes in facial expressions, body movements, avoidance of eye contact, hesitancy to respond, and other indications that a member is uncomfortable or insincere in his or her response.
- Direct your questions to every panel member, not just the president.
- Relax and ask questions in a conversational tone.
- Use simple language; avoid legalese.
- Don't say things like, "Affirmative response from all members." Instead, say, "Everyone raised their hands."
- Each time you speak to someone, use his or her name: "Sergeant First Class Jones, your hand is up. What do you think?" That will keep the record straight as to who is saying what.

### Know Your Judge

The nature and scope of *voir dire* is within the discretion of the military judge,<sup>12</sup> but most military judges will allow you to ask questions. Some military judges will require you to submit questions beforehand. This is a response to having seen many bad *voir dire* sessions—particularly ones with unabashed theme and theory testing. Be prepared to tell your judge why your client (either the government or the accused) may not be able to get a fair trial without your having the ability to ask that particular question. You need to be able to explain why your questions (written or oral) directly relate to the panel member's ability to sit fairly and impartially.

The judge will ask preliminary questions similar to those in the *Military Judges' Benchbook*.<sup>13</sup> Listen to the members' responses. Don't repeat those questions. But remember that most of these questions will only receive the socially acceptable responses and so will not uncover the members' true beliefs. If you need to explore these areas, be prepared to tell the judge why you need additional questions.

### Pulling It All Together

Now that we have discussed the four goals of *voir dire* (information gathering, education, rapport, and persuasion) and how they relate to the three parts of *voir dire* (individual written examination, individual oral examination, and group oral examination), we can build an easy framework for deciding how to conduct *voir dire*, when we decide to do it at all. The appendix provides the three parts of *voir dire* and how to use them.

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<sup>12</sup> MCM, *supra* note 3, R.C.M. 912(d).

<sup>13</sup> U.S. DEP'T OF ARMY, REG. 27-9 MILITARY JUDGES' BENCHBOOK paras. 2-5-1, 2-6-2, and 8-3-1 (1 Jan. 2010).

## Appendix

### The Three Parts of *Voir Dire* and How to Use Them

	<b>Individual Written Examination</b>	<b>Individual Oral Examination</b>	<b>Group Oral Examination</b>
<b>Purpose</b>	Gather information for challenges	Follow-up on individual written examination; gather information for challenges	Educate on counter-intuitive aspects of the case and generalizations that hurt your case—this is not the place to gather information for challenges
<b>Method</b>	Written questions; reinforce semi-anonymous nature of questions; provide the panel member with “outs”	Open-ended questions; listen more than you talk	Open-ended questions; listen more than you talk; develop the counter-intuitive belief; then “kill the gorilla”
For All of These, Ask: Do I Have a Good Reason for Doing This?			

# Follow the Money: Obtaining and Using Financial Information in Military Criminal Investigations and Prosecutions

Major Scott A. McDonald\*

*Make no mistake about it. The goal of the U.S. Government is to interdict and obstruct the ability of criminals to utilize their ill-gotten gains, whether for the purpose of continuing their criminal enterprises or to enhance their lifestyles.<sup>1</sup>*

## I. Introduction

Trial counsel must be able to properly secure, and use, financial records, without exposing the government to costly civil litigation.

Military offenders are just as likely as white-collar corporate thieves to abscond with large sums of money. For example, in 2008, the Army reported \$24.2 million in losses from potentially fraudulent temporary duty claims submitted by servicemembers.<sup>2</sup> More recently, former Army Major (MAJ) Eddie Pressley was convicted of soliciting and receiving nearly \$3 million in bribes for favorable disposition of overseas contracts.<sup>3</sup>

For the criminals who obtain money for their crimes, the disposition of the illicit funds is limited only by their imaginations. While some might spend the ill-gotten gains immediately, others hide the money in the bank accounts of relatives and friends, businesses, or in capital investments like real property.<sup>4</sup> For example, MAJ Pressley, both a spender and a saver, bought expensive cars and property, but also stashed bribe money in bank accounts located in Dubai and the Cayman Islands.<sup>5</sup>

This kind of financial activity usually produces evidence in the form of financial documents. Traditional records include bank account statements, negotiable instruments such as checks, and real or personal property loan documents.<sup>6</sup> More complicated and non-traditional

records include securities and trust instruments, safe deposit records, tax information, and credit reports.<sup>7</sup> These documents can provide trial counsel with important evidence of the motives of the accused, or the means of their criminal activity.<sup>8</sup>

However, when counsel fail to comply with the laws regarding financial documents the consequences can be significant. While improperly obtained records are not often suppressed at trial,<sup>9</sup> aggrieved parties may receive substantial damages in civil court.<sup>10</sup> With significant damage awards and disciplinary action as potential penalties, counsel would do well to proceed cautiously when seeking to secure these important financial records.

The goal of this article is to enhance trial counsel's ability to properly secure, and use, financial records, without exposing the Government to costly civil litigation. Part II provides a brief history of the legislation that enables the government to obtain financial records. Part III outlines the means of obtaining financial records and the hazards of improperly obtaining such records, which include exposure to civil litigation and fines for violations. Section III also discusses three areas where courts have traditionally held the introduction of financial records to be relevant and proper proof, either direct or circumstantial, of a criminal offense.<sup>11</sup>

## II. Background

Described as “an iron fist in a velvet glove,”<sup>12</sup> the rules regarding disclosure of financial information represent the legislative and judicial desire to balance the legitimate

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<sup>1</sup> ROBERT S. MUELLER, II, *Foreword to MONEY LAUNDERING*, FEDERAL PROSECUTION MANUAL (1993) (Assistant Attorney General, Criminal Division) [hereinafter FEDERAL PROSECUTION MANUAL].

<sup>2</sup> ASSISTANT SEC'Y OF THE ARMY (FIN. MGMT. & COMPTROLLER), REP. NO. 09-001, REVIEW OF TEMPORARY CHANGE OF STATION PROGRAM (Oct. 1, 2008).

<sup>3</sup> Press Release, U.S. Dep't of Justice, Army Major, Wife Convicted in Bribery Scheme Related to Defense Contracts to Support Iraq War (Mar. 2, 2011) [hereinafter DoJ Press Release].

<sup>4</sup> See Michael Levi & Peter Reuter, *Money Laundering*, 34 CRIME & JUST. 289, 290 (2006).

<sup>5</sup> DoJ Press Release, *supra* note 3.

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<sup>6</sup> See DEP'T OF THE TREASURY FIN. CRIMES ENFORCEMENT NETWORK, FREQUENTLY ASKED QUESTIONS (FAQS) CONCERNING THE 314(A) PROCESS (Feb. 5, 2007) [hereinafter FINCEN FAQ].

<sup>7</sup> *Id.*; 26 U.S.C. § 6103(i) (2006) (tax records); 15 U.S.C. § 1681b(a)(1) (2006) (credit reports).

<sup>8</sup> See *infra* Part III.C.

<sup>9</sup> See *infra* Part III.B.

<sup>10</sup> *Id.*

<sup>11</sup> This article does not discuss the wide array of federal and military financial crimes themselves. For practice pointers on prosecuting money laundering, fraud, conspiracy, aiding and abetting drug offenses, RICO, and other related offenses, see FEDERAL PROSECUTION MANUAL, *supra* note 1.

<sup>12</sup> LAURA K. DONOHUE, THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY 152 (2008).

interests of law enforcement against the privacy rights of individuals. With this goal in mind, the legislation and case law, discussed below, create effective money laundering controls, and mandate strict customer notification and challenge procedures. These laws also impose criminal and civil penalties for violations of their provisions.<sup>13</sup>

To accomplish these objectives, a large body of federal law regulates the tracking, reporting, and movement of currency inside and outside the United States. However, the Bank Secrecy Act (BSA) of 1970<sup>14</sup> and the Right to Financial Privacy Act (RFPA) of 1978<sup>15</sup> are the primary authorities. A basic understanding of how these acts operate will provide a foundation for the effective use of financial records in criminal litigation.

#### A. Bank Secrecy Act (BSA) of 1970

Prior to 1970, secret foreign bank accounts posed a problem for law enforcement professionals trying to connect illicit funds to criminal activity.<sup>16</sup> When efforts to solve the problem through diplomatic channels proved largely unsuccessful, Congress enacted the BSA.<sup>17</sup> The primary purpose of the BSA was to combat secret financial transactions and make financial records, which have a “high degree of usefulness in criminal, tax, and regulatory investigations,” available to law enforcement.<sup>18</sup>

To minimize secret financial transactions, and to better track the movement of currency both inside and outside the United States, the BSA amended the Federal Deposit Insurance Act. It requires financial institutions to verify “the identity of each person having an account . . . with the bank,” maintain copies of “each check, draft or similar instrument drawn on [the financial institution],” and file currency transaction reports with the Department of the

<sup>13</sup> *Id.*

<sup>14</sup> Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (1970) [hereinafter BSA].

<sup>15</sup> Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641, §§ 1100–22 (1978) [hereinafter RFPA].

<sup>16</sup> See DEPARTMENT OF JUSTICE, INVESTIGATION AND PROSECUTION OF ILLEGAL MONEY LAUNDERING: A GUIDE TO THE BANK SECRECY ACT 3 (1983) [hereinafter DOJ GUIDE]. Switzerland, the Bahamas, the Cayman Islands, Liechtenstein, Indonesia, Canada, New Zealand, Panama, France, and Belgium all had laws requiring some form of bank secrecy. *Id.* at 3–4 (citing *Foreign Bank Secrecy and Bank Records: Hearings on H.R. 15073 Before the H. Comm. on Banking and Currency*, 91st Cong. 367 (1970)). For example, “[a]lthough a tax treaty with Switzerland had been in existence since 1951, difficulties existed over the exchange of information in tax fraud investigations and proceedings.” Richard Albrecht, *An Analysis of the Bank Secrecy Act*, in PRACTISING LAW INSTITUTE, BANK SECRECY ACT 10 (1976).

<sup>17</sup> DOJ GUIDE, *supra* note 16, at 5.

<sup>18</sup> BSA, *supra* note 14, at § 101.

Treasury for certain transactions.<sup>19</sup> The implementing rules impose similar reporting requirements on non-banking businesses involved in the transfer of funds, exchange of currency, or the operation of credit card systems.<sup>20</sup> The Secretary of the Treasury may make the reports available to “any other department or agency of the United States,” or to a state or foreign government.<sup>21</sup> Finally, the Act imposes criminal and civil penalties for failure to comply with the reporting provisions.<sup>22</sup> It was not long, however, before the Supreme Court would have to measure the BSA against the Fourth Amendment.

#### B. *United States v. Miller*<sup>23</sup>

By 1973, the Bank Secrecy Act (BSA) had been in effect for three years. In that year, pursuant to the authority of the BSA, federal agents obtained grand jury subpoenas for the bank records of Mr. Mitch Miller. The agents believed that Miller was operating an unregistered still and manufacturing whiskey without paying tax on the product. Among Miller’s bank records were checks Miller wrote to rent a van, secure radio equipment, and purchase still-making materials.<sup>24</sup>

Miller sought to suppress the bank records under the Fourth Amendment, but the district court denied the motion. The Fifth Circuit disagreed, stating the bank records fell “within a protected zone of privacy.”<sup>25</sup> In overturning the Fifth Circuit’s decision, the Supreme Court first noted the records were not Miller’s “private papers” within the meaning of the Fourth Amendment but rather “business

<sup>19</sup> *Id.* Currently, financial institutions must file a Suspicious Activity Report (SAR) for transactions of “at least \$5,000” that are known, or suspected, to involve “funds derived from illegal activities or . . . intended . . . to hide” such funds or “avoid any transaction reporting requirement.” 31 C.F.R. § 1020.320 (2011). Furthermore, any transaction (deposit, withdrawal, or exchange) involving \$10,000 or more must also be reported. 31 U.S.C. § 5316(a) (2006); 31 C.F.R. § 1010.311 (2011).

<sup>20</sup> See 31 C.F.R. §§ 1022.300 (money services businesses), 1023.300 (securities brokers), 1024.300 (mutual funds), 1025.300 (insurance companies), 1026.300 (futures merchants and commodities brokers), 1028.300 (credit card system operators). The Anti-Drug Abuse Act of 1988 expanded the definition of “financial institution” under the BSA to include “business[es] engaged in vehicle sales . . . [and] persons involved in real estate closings and settlements.” Pub. L. No. 100-690 § 6185, 102 Stat. 4181 (1988) (amending 31 U.S.C. § 5312(a)(2) (2006)).

<sup>21</sup> 31 C.F.R. § 1010.950(b). This information is provided in confidence, and is made available only upon written request. *Id.* § 1010.950(b)-(e) (2011).

<sup>22</sup> See, e.g., 31 U.S.C. §§ 5317(c) (forfeiture of assets), 5324(d) (fine or imprisonment). See also 31 C.F.R. §§ 1010.820 (civil penalties), 1010.830 (forfeitures), 1010.840 (criminal penalties).

<sup>23</sup> 425 U.S. 435 (1976).

<sup>24</sup> *Id.* at 436–38.

<sup>25</sup> *Id.* at 438–39.

records of the banks.”<sup>26</sup> To be certain, “[t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government.”<sup>27</sup> Because Miller exposed the checks to the bank’s employees, Miller had no Fourth Amendment privacy interest in the subsequently created records.<sup>28</sup>

Additionally, according to the Court, Congress assumed “[t]he lack of any legitimate expectation of privacy concerning the information kept in bank records” when it enacted the BSA.<sup>29</sup> Thus, a bank customer had no statutory privacy right in his financial records.<sup>30</sup> This decision motivated Congress to undertake remedial measures and enact the Right to Financial Privacy Act.

### C. Right to Financial Privacy Act (RFPA) of 1978

Congress’s concern with the decision in *Miller* was that the Court read the BSA to give government agencies potentially “unfettered access” to financial records.<sup>31</sup> To strike a better balance between the bank customer’s privacy interest and the interest of law enforcement professionals in thwarting crime, Congress created five categories of financial records access requests under the RFPA. In doing so, Congress effectively “restrict[ed] the free flow of such information.”<sup>32</sup>

The five categories are customer authorization, disclosure pursuant to administrative subpoena, search warrant, judicial subpoena, and formal written request.<sup>33</sup> This primer outlines each of these avenues in detail in Part III.A and discusses the penalties for violations of the RFPA in Part III.B.

## III. Analysis

Operating within this legislative framework, trial

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<sup>26</sup> *Id.* at 440. The Court further dismissed Miller’s assertion that the records were copies of “private documents,” noting “[t]he checks are not confidential communications but negotiable instruments to be used in commercial transactions.” *Id.* at 442.

<sup>27</sup> *Id.* at 443 (citing *United States v. White*, 401 U.S. 745, 751–52 (1971)).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 443–44 (citing 12 U.S.C. § 1829b(a)(1)).

<sup>30</sup> *Id.* at 445.

<sup>31</sup> Richard Cordero, Annotation, *Construction and Application of Right to Financial Privacy Act of 1978*, 112 A.L.R. FED. 295, § 2[a] (1993). *See also Lopez v. First Union Nat’l Bank of Fla.*, 129 F.3d 1186, 1190 (11th Cir. 1997) (stating the Court’s decision in *Miller* “prompted Congress to enact the Right to Financial Privacy Act”).

<sup>32</sup> Cordero, *supra* note 31, at § 2[a].

<sup>33</sup> RFPA, *supra* note 15, § 1102(1)–(5).

counsel can obtain a wide variety of financial information about an accused and, potentially, close friends and relatives. So long as counsel comply with the RFPA when obtaining the records, they may avoid exposure to subsequent, and potentially costly, civil litigation. Once the records are obtained, counsel may use them to prove motive, intent, or the offense itself.

### A. Avenues for Obtaining Financial Records in the Military

Before the government can offer financial records to develop its case, trial counsel must first secure the records. The Criminal Investigative Division (CID) Liaison at the Financial Crimes Enforcement Network (FinCEN) can point trial counsel in the right direction. Armed with information from FinCEN, trial counsel can then use one of the five methods set out in the RFPA to request and secure copies of relevant records.

#### 1. The Financial Crimes Enforcement Network

FinCEN is the Treasury Department’s lead agency for implementing the requirements of the BSA. FinCEN gathers reports required under the BSA and “provides intelligence and analysis for case support.”<sup>34</sup> With FinCEN’s access to these required reports, and a large number of related databases, FinCEN is “one of the largest repositories of information available to law enforcement in the country.”<sup>35</sup> As a result, FinCEN agents provide invaluable strategic analysis and support to complex investigations where financial information is relevant.

For the Army, a CID special agent serves as liaison at FinCEN pursuant to an agreement between FinCEN and CID’s Chief of Major Procurement Fraud.<sup>36</sup> The FinCEN liaison can gather a wide variety of personal information for trial counsel and investigators. A subject’s current address, real and personal property owned, liens, bankruptcies, businesses owned, and U.S. Customs information can all be collected by the liaison. More importantly, the liaison, accessing the Treasury Department’s database, can provide Currency Transaction Reports (CTRs), Suspicious Activity Reports (SARs), and Currency and Monetary Instrument Reports (CMIR).<sup>37</sup>

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<sup>34</sup> U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL, CRIMINAL RESOURCE MANUAL § 2040 (1997).

<sup>35</sup> FINANCIAL CRIMES ENFORCEMENT NETWORK, U.S. DEP’T OF THE TREASURY, [http://www.fincen.gov/law\\_enforcement/](http://www.fincen.gov/law_enforcement/) (last visited May 21, 2011).

<sup>36</sup> Telephone Interview with Special Agent Rebecca Christensen, FinCEN Liaison (Oct. 13, 2010). None of the sister services has a liaison at FinCEN. *Id.*

<sup>37</sup> *Id.*

When the evidence suggests money laundering, the FinCEN liaison may also provide limited financial information pursuant to a request under Section 314(a) of the USA PATRIOT Act.<sup>38</sup> Upon receiving such a request, FinCEN sends the information to all financial institutions.<sup>39</sup> Each institution must then search its deposit, funds transfer, trust, securities, and safe deposit box records for matching information.<sup>40</sup> If the financial institution discovers a match, it notifies FinCEN, but, at that point, does not provide any records.<sup>41</sup> Subsequent disclosure of the matching records requires one of the processes discussed below.

Finally, as part of FinCEN's partnership with the Egmont Group, the liaison may access financial information from participating international organizations.<sup>42</sup> The Egmont Group is a conglomerate of over one hundred national security organizations that collects and analyzes suspicious and unusual financial activity.<sup>43</sup> An Egmont request may prove useful when an accused hides funds in offshore and international accounts.<sup>44</sup>

## 2. Consent, Subpoenas, Search Warrants, and Written Requests

Once counsel know where to look for financial records, several avenues are available to obtain them. Counsel may request consent, make a formal request to the financial institution, issue a judicial subpoena, or request a warrant.<sup>45</sup> Administrative subpoenas, though permitted under the RFP, are prohibited by regulation in the Army.<sup>46</sup>

### a. Consent

For the Army, the preferred method is customer consent.<sup>47</sup> At any point in the court-martial and investigation process, counsel may request the consent of the accused to obtain financial records.<sup>48</sup> A request for consent must be "in writing . . . [i]dentify the particular financial records . . . [s]tate the customer may revoke the consent at any time before disclosure . . . [and] [s]pecify the purpose of disclosure."<sup>49</sup> The request must also outline the customer's RFP rights.<sup>50</sup>

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<sup>38</sup> Pub. L. No. 107-56, § 314(a), 115 Stat. 272 (2001) (requiring the Secretary of the Treasury to adopt regulations for such information sharing). A 314(a) request must be "based on credible evidence of terrorist activity or money laundering" and should detail the "size or impact of the case, the seriousness of the underlying criminal activity, the importance of the case to a major agency program, and any other facts demonstrating its significance." DEP'T OF THE TREASURY FIN. CRIMES ENFORCEMENT NETWORK, FINCEN'S 314(a) FACT SHEET (Oct. 5, 2010) [hereinafter 314(a) FACT SHEET]. See also 31 C.F.R. § 1010.520(b) (2011).

<sup>39</sup> FINCEN FAQ, *supra* note 6. Generally, requests are sent out every fourteen days. *Id.* "This power . . . quickly became known in some circles as a 'Google search.'" DONOHUE, *supra* note 12, at 162 (citation omitted). This is because FinCEN can "reach out to more than 44,000 points of contact at more than 22,000 financial institutions to locate accounts and transactions of persons that may be involved in terrorism or money laundering." 314(a) FACT SHEET, *supra* note 38.

<sup>40</sup> FINCEN FAQ, *supra* note 6. The institution is required to search records up to six to twelve months old.

<sup>41</sup> *Id.* See also, 314(a) FACT SHEET, *supra* note 38 ("Section 314(a) provides lead information only and is not a substitute for a subpoena or other legal process.").

<sup>42</sup> FINCEN FAQ, *supra* note 6.

<sup>43</sup> *Id.* "[B]y November 2005, the Egmont Group contained 101 National Financial Intelligence Units (FIUs) that meet internally developed criteria for receiving, analyzing, and processing reports (including Suspicious Activity Reports [SARs])." Levi & Reuter, *supra* note 4, at 291. At the writing of this primer, Egmont's website listed 121 members. *List of Members*, THE EGMONT GRP. OF FIN. INTELLIGENCE UNITS, <http://www.egmontgroup.org/about/list-of-members> (last visited Dec. 29, 2010).

<sup>44</sup> For example, Major Pressley set up accounts in Dubai and the Cayman Islands to hide bribe money he and his wife received. DoJ Press Release, *supra* note 3.

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<sup>45</sup> 12 U.S.C. § 3402 (2006). See also Captain Nick Tancredi, *Using Tax Information in the Investigation of Nontax Crimes*, ARMY LAW., Mar. 1986, at 30-35 (reviewing the means of obtaining, and methods of using, tax information).

<sup>46</sup> U.S. DEP'T OF ARMY, REG. 190-6, OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS para. 2-3 (9 Feb. 2006) [hereinafter AR 190-6] ("The Army has no authority to issue an administrative summons or subpoena for access to financial records").

<sup>47</sup> *Id.* para. 1-5a(1). "It is DA policy to seek customer consent to obtain a customer's financial records from a financial institution unless doing so would compromise or harmfully delay a legitimate law enforcement inquiry." *Id.*

<sup>48</sup> *Id.* As a practical matter, counsel should remain cognizant of the prohibition on direct communication with a represented party when requesting consent. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYER, r. 4.2 (1 May 1992).

<sup>49</sup> AR 190-6, *supra* note 46, para. 2-2a. See also 12 U.S.C. § 3404 (2006).

<sup>50</sup> AR 190-6, *supra* note 46, para. 2-2a. See also 12 U.S.C. § 3404 (2006).

### b. Formal Written Request

If trial counsel cannot get customer consent, or if requesting “consent from the customer would compromise or harmfully delay a legitimate law enforcement inquiry,” counsel may instead submit a formal written request to the financial institution.<sup>51</sup> The government must first serve a copy of the request on the customer.<sup>52</sup> The customer then has ten to fourteen days to challenge the request or attempt to obtain an injunction against the government.<sup>53</sup> However, counsel may only use the formal written request process if they cannot secure a judicial subpoena.<sup>54</sup> Thus, the formal written request is only available to counsel at the pre-referral stage of the court-martial process.

### c. Judicial Subpoena

Once charges have been referred, trial counsel may issue a judicial subpoena pursuant to Article 46 of the Uniform Code of Military Justice.<sup>55</sup> A post-referral subpoena *duces tecum*, issued by trial counsel under Rule for Courts-Martial 703, is a judicial subpoena under the RFPA.<sup>56</sup> Trial counsel must ensure they serve notice of the subpoena on the customer before or at the same time as the financial institution.<sup>57</sup> The customer then has ten or fourteen days to file a motion with the military judge to quash the subpoena.<sup>58</sup> However, an assertion of rights under the RFPA tolls the statute of limitations.<sup>59</sup>

<sup>51</sup> AR 190-6, *supra* note 46, para. 2-6a. Such a request must be signed by the “head of a law enforcement office of field grade rank or higher.” *Id.* para. 2-6b(5) (referencing para. 1-5b). *See also* 12 U.S.C. § 3408 (2006).

<sup>52</sup> 12 U.S.C. § 3408(2), (4)(A).

<sup>53</sup> *Id.* § 3408(4)(B). Any delay resulting from an assertion of rights under the RFPA tolls the statute of limitations. *See infra* note 59 and accompanying text.

<sup>54</sup> 12 U.S.C. § 3408(1). The statute provides that counsel may only use the written request if an administrative summons or judicial subpoena is not available. *Id.* However, as discussed above, the use of an administrative subpoena is prohibited by Army Regulation 190-6.

<sup>55</sup> *See* AR 190-6, *supra* note 46, para. 2-5. *See also* 12 U.S.C. § 3407 (2006).

<sup>56</sup> *United States v. Curtin*, 44 M.J. 439, 440 (C.A.A.F. 1996) (“[S]ubpoenas issued by a trial counsel are ‘judicial’ within the meaning of the Right to Financial Privacy Act.”). *See also*, AR 190-6, *supra* note 46, para. 2-5b (“[Judicial subpoena] [i]nclude subpoenas issued under Rule for Courts-Martial 703(e)(2) of the Manual for Courts-Martial and Article 46 of the Uniform Code of Military Justice.”).

<sup>57</sup> 12 U.S.C. § 3407(2).

<sup>58</sup> *Id.* § 3407(3) (The time limits are ten days from service or fourteen days from mailing of the subpoena.).

<sup>59</sup> *Id.* § 3419 (2006). *See also United States v. Dowty*, 46 M.J. 845, 848–49 (N-M. Ct. Crim. App. 1997) (“Under the Right to Financial Privacy Act, the applicable statute of limitations, in this case Article 43 of the UCMJ, 10 U.S.C. § 843, is tolled during the pendency of challenges to government subpoena . . .”).

### d. Search Warrants

The RFPA also permits the use of search warrants to obtain financial information.<sup>60</sup> Search warrants are the least preferred method of obtaining financial records during the pre-referral stage of the court-martial process.<sup>61</sup> Like judicial subpoenas, search warrants require customer notification.<sup>62</sup> However, only a civilian authority, such as a federal magistrate or state court judge, may issue a search warrant.<sup>63</sup> Thus, search warrants must be coordinated with the U.S. Attorney’s Office and must comply with the Federal Rules of Criminal Procedure and the Fourth Amendment, and therefore must be supported by probable cause.<sup>64</sup> Because of these hurdles, it is unlikely that trial counsel will often seek a warrant to obtain financial records.

### e. Emergency Access Requests

Finally, both the RFPA and Army Regulation 190-6 include provisions for emergency access to financial records. The emergency access provisions permit investigators to deviate from normal procedures to prevent imminent “physical injury to a person, serious property damage, or flight to avoid prosecution.”<sup>65</sup> Within five days of gaining such access, counsel must file an affidavit “setting forth the

<sup>60</sup> 12 U.S.C. § 3406 (2006). Trial counsel should not confuse a search warrant with a search authorization. A search authorization may be issued by a military judge or by a commander “who has control over the place where the property or person to be searched is situated.” *MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315(d)* (2008) [hereinafter MCM]. Unlike a search warrant, a search authorization cannot be used to secure financial records “in any State or territory of the United States.” AR 190-6, *supra* note 46, para. 2-4c. If the financial institution is located on a DoD installation “outside the United States” a search authorization may then be used. *Id.* para. 2-4d(1).

<sup>61</sup> 28 C.F.R. § 59.4(a)(1). “A search warrant should not be used to obtain documentary materials believed to be in the private possession of a disinterested third party unless it appears that the use of a subpoena, summons, request, or other less intrusive alternative means of obtaining the materials would substantially jeopardize the availability or usefulness of the materials sought . . .” *Id.*

<sup>62</sup> 12 U.S.C. § 3406(a), (b). *See also* AR 190-6, *supra* note 46, para. 2-4a. However, a court may order an initial delay in notification of up to 180 days, with additional ninety day extensions. 12 U.S.C. § 3406(c). *See also infra* Part III.A.3.

<sup>63</sup> MCM, *supra* note 60, MIL. R. EVID. 315(b)(2); FED. R. CRIM. P. 41(b).

<sup>64</sup> 12 U.S.C. § 3406(a), (b); 28 C.F.R. § 60.1 (2010) (“[I]n all instances, military agents of the Department of Defense must obtain the concurrence of the appropriate U.S. Attorney’s Office before seeking a search warrant.”); FED. R. CRIM. P. 41(d)(1). *See also* AR 190-6, *supra* note 46, para. 2-4a (permitting law enforcement officers to seek subpoenas under Rule 41 of the Federal Rules of Criminal Procedure). For general guidelines on requirements for the issuance of federal search warrants see *HOMELAND SEC., FED. LAW ENFORCEMENT TRAINING CTR., LEGAL DIVISION HANDBOOK 354–63* (2010), available at <http://www.fletc.gov/training/programs/legal-division/legal-division-handbook.pdf>.

<sup>65</sup> AR 190-6, *supra* note 46, para. 2-7.

grounds for the emergency access” with the appropriate court.<sup>66</sup>

### 3. Delay of Customer Notification

As discussed above, generally, the government must notify a customer when financial records have been requested.<sup>67</sup> This notification details the customer’s rights under the RFPA and in some cases includes a draft motion to quash, which the customer may file in court.<sup>68</sup> However, investigators may delay notification when doing so risks the “life or physical safety of any person, [f]light from prosecution, [d]estruction of or tampering with evidence, [i]ntimidation of potential witnesses, [or] [o]therwise seriously jeopardizing an investigation.”<sup>69</sup> The periods of available delay vary depending on the method used to acquire the records.<sup>70</sup>

## B. Hazards of Improperly Obtaining Records

A failure to comply with the RFPA may not result in suppression of the evidence, but violations are not without consequence. Courts are reluctant to exclude evidence at trial based solely on an RFPA violation. However, courts may instead assess fines, which can prove costly to the government.

### 1. Admissibility of Improperly Obtained Records at Trial

Though the RFPA applies at courts-martial, the remedy for evidence obtained in violation of the Act is not suppression. In *United States v. Wooten*, a fraudulent check case, the government subpoenaed the accused’s bank records. The court-martial was convened in Germany, but the financial records were maintained in the United States.<sup>71</sup> Because trial counsel lacked the authority to subpoena stateside records from Germany, defense counsel alleged that the subpoenas were improperly issued, in violation of Article 46, UCMJ.<sup>72</sup> The court, however, held that even if

<sup>66</sup> 12 U.S.C. § 3414(b)(3).

<sup>67</sup> See, e.g., *id.* §§ 3405(2), 3406(b), 3407(2), 3408(4)(a).

<sup>68</sup> See *id.* § 3408(4)(A) (draft motion to quash included with customer rights).

<sup>69</sup> AR 190-6, *supra* note 46, para. 2-9b.

<sup>70</sup> *Id.* para. 2-9a. Initial delays vary from 90 days for formal written requests to 180 days for search warrant requests. Each requested delay may then be extended for 90-day periods. *Id.* These delays require coordination with the “supporting staff judge advocate.” *Id.* para. 2-9c. See also 12 U.S.C. § 3409 (2006) (delayed notice).

<sup>71</sup> *United States v. Wooten*, 34 M.J. 141, 144 (C.M.A. 1992).

the records were obtained in violation of the RFPA with an improper subpoena, the remedy was not suppression of the evidence, but rather, a civil suit.<sup>73</sup>

The Air Force Court of Military Review reached the same conclusion in *United States v. Moreno*.<sup>74</sup> In *Moreno*, the installation commander improperly authorized a search of the base credit union, which resulted in the production of Moreno’s bank records. Because the installation commander was not “authorized to issue search warrants under the Federal Rules of Criminal Procedure,” and search authorizations may not be used for stateside financial institutions, the search violated the RFPA.<sup>75</sup>

As in *Wooten*, though the government violated the RFPA, suppression was not the answer. The court noted that Congress, in drafting the RFPA, authorized injunctive relief and penalties but did not provide for the exclusion of evidence. Because Congress omitted any provision for exclusion, the court would only exclude improperly obtained financial records if some other basis for exclusion arose.<sup>76</sup>

### 2. Proper Forum for Challenges

The proper forum to file a motion to quash a judicial subpoena is the court from which the subpoena issued. An administrative subpoena or formal written request may only be challenged in a U.S. district court.<sup>77</sup> The Court of Appeals for the Armed Forces has held that subpoenas *duces tecum*

<sup>72</sup> *Id.* at 143. See also generally *United States v. Bennett*, 12 M.J. 463, 471 (C.M.A. 1982) (discussing in depth the jurisdictional limits of the government’s subpoena power outside the United States and holding that a court-martial’s ability to enforce its subpoenas did not include forcing persons to travel to foreign countries, with or without documents).

<sup>73</sup> *Wooten*, 34 M.J. at 146–47 (“As the military judge properly recognized, Congress intended these civil remedies to be the only remedies for a breach of this Federal statute.”), 148–49 (“In these circumstances, a court-ordered remedy of a more drastic nature would be inappropriate . . . and the remedy of exclusion of the challenged evidence as supervisory punishment would not be warranted”).

<sup>74</sup> 23 M.J. 622 (A.F.C.M.R. 1986).

<sup>75</sup> *Id.* at 623–24. See also *supra* note 60 (discussing search authorizations).

<sup>76</sup> *Id.* at 624 (“Since [Congress] chose not to [provide for exclusion], exclusion is only required if the information requires exclusion for some reason other than violation of [the RFPA]”). Improperly obtained tax records have generally received the same treatment. See Tancredi, *supra* note 45, at 35–36.

<sup>77</sup> 12 U.S.C. § 3410(a) (2006).

A motion to quash a judicial [subpoena] shall be filed in the court which issued the [subpoena]. A motion to quash an administrative summons or an application to enjoin a Government authority from obtaining records pursuant to a formal written request shall be filed in the appropriate United States district court.

*Id.*

issued by trial counsel “are ‘judicial’ within the meaning of the Right to Financial Privacy Act,” and therefore may be challenged before a Military Judge.<sup>78</sup>

### 3. Civil Penalties

Unlike a motion to quash a judicial subpoena, a civil suit alleging a violation of the RFPA may only be brought in federal district court.<sup>79</sup> The RFPA provides for civil penalties against the government when the government improperly obtains financial records.

A 1998 *Army Lawyer* article discussed the issue of agency liability for violations of the RFPA.<sup>80</sup> At that time, the most common violations of the RFPA for the Army were failure to provide notice under 12 U.S.C. § 3406(b) and failure to coordinate with the U.S. Attorney’s Office.<sup>81</sup> USALSA’s concern was that a lack of awareness “or disregard for the RFPA’s requirements unnecessarily expose[d] the government to litigation and costly civil penalties.”<sup>82</sup>

In a lawsuit for violation of the RFPA, private citizens<sup>83</sup> may obtain actual damages, punitive damages, and actual costs, including attorney’s fees.<sup>84</sup> One award for the government’s violation of the RFPA was just under \$100,000 per plaintiff.<sup>85</sup> Furthermore, in addition to damages, federal employees may face “[d]isciplinary action

for willful or intentional violation[s].”<sup>86</sup>

While an RFPA violation will not alone cause evidence in financial records to be excluded, that evidence must still be introduced for a proper purpose to be relevant and admissible.

### C. Proper Purpose and Relevance of Financial Records at Trial

Once the government has properly secured the financial records of the accused, counsel may use them to develop the case.<sup>87</sup> The government may offer financial records to prove an accused’s lifestyle does not match the income earned. Similarly, the records may be used to show that the accused enjoyed an unexplained or sudden accretion of wealth connected to the underlying offense. Alternatively, counsel may use the records to demonstrate an extraordinary financial burden provided motive commit an offense.

#### 1. Living Beyond One’s Means

When monetary gain results from an offense, financial records may show that an accused was living a lifestyle unsupported by legitimate income.<sup>88</sup> Such evidence is useful in proving motive to commit the underlying offense<sup>89</sup> and mens rea.<sup>90</sup> It may also serve to prove elements of the charged offense.<sup>91</sup>

For example, when law enforcement personnel suspected that Rudolph Keszthelyi was distributing cocaine, investigators examined his financial records. The investigation revealed that over a period of five years Keszthelyi deposited just over \$240,000 into multiple bank accounts. Keszthelyi also “made a number of very expensive purchases despite having no appreciable legitimate

<sup>78</sup> United States v. Curtin, 44 M.J. 439, 439–40 (C.A.A.F. 1996).

<sup>79</sup> Russell v. Dep’t of the Air Force, 915 F. Supp. 1108, 1114 (D. Colo. 1996) (citing United States v. Wooten, 34 M.J. 141 (C.M.A. 1992); 12 U.S.C. § 3416) (“Alleged violations of the RFPA are ‘peculiarly’ within the jurisdiction of Article III courts and not the military justice system.”).

<sup>80</sup> Major Key, Litigation Division Note, *Right to Financial Privacy Act*, ARMY LAW., Sept. 1998, at 53–54 (citing 12 U.S.C. § 3417(a)); see also Litigation Division Note, *Trial Counsel’s Pre-Referral Subpoena Puts Bank at Risk*, ARMY LAW., Mar. 2003, at 35, 38 (“The RFPA provides account holders a private right of action against the government when it violates their rights under the statute . . .”).

<sup>81</sup> Key, *supra* note 80, at 54.

<sup>82</sup> *Id.* at 55.

<sup>83</sup> The *Feres* doctrine, however, bars claims for violations of the RFPA by military members. *Feres v. United States*, 340 U.S. 135 (1950); *Flowers v. United States Army*, 179 F. App’x 986, 987–88 (9th Cir. 2006) (unpublished), *cert. denied*, 550 U.S. 933 (2007). The *Flowers* case involved an improperly issued pre-referral subpoena without the required certification of compliance with the RFPA. *Flowers v. First Hawaiian Bank*, 295 F.3d 966, 968–69 (9th Cir. 2002), *discussed in* Litigation Division Note, *Trial Counsel’s Pre-Referral Subpoena Puts Bank at Risk*, ARMY LAW., Mar. 2003, at 35–37.

<sup>84</sup> 12 U.S.C. § 3417(a) (2006). See also Tancredi, *supra* note 45, at 37 (arguing the availability of punitive damages “create[s] a strong financial incentive to vigorously prosecute a civil claim”).

<sup>85</sup> Key, *supra* note 80, at 53 (citing Neece v. I.R.S., 41 F.3d 1396 (10th Cir. 1994)).

<sup>86</sup> 12 U.S.C. § 3417(b).

<sup>87</sup> For foundations for financial records see EDWARD J. MWINKELRIED ET AL., *MILITARY EVIDENTIARY FOUNDATIONS* § 4.3 (4th ed. 2010).

<sup>88</sup> *United States v. Fakhoury*, 819 F.2d 1415, 1421 (7th Cir. 1987) (quoting *United States v. Feldman*, 788 F.2d 544, 557 (9th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987)) (“Evidence that tends to show that a defendant is living beyond his means is of probative value in a case involving a crime resulting in financial gain.”).

<sup>89</sup> See *id.* at 1418 (evidence of financial circumstance used to prove motive to commit arson).

<sup>90</sup> DOJ GUIDE, *supra* note 16, at 133 (“Jurors can be better persuaded of a defendant’s criminality when the government can show that he has otherwise unexplained ties to large amounts of money or that he has obtained the money from the sale of drugs.”).

<sup>91</sup> *United States v. Keszthelyi*, 308 F.3d 557, 577 (6th Cir. 2002) (“[T]he government’s evidence was sufficient to support a finding that the total amount of unexplained cash deposits made into defendant’s accounts over the relevant time period was attributable to drug sales.”).

income.”<sup>92</sup>

At trial, the financial records, in conjunction with the testimony of Keszthelyi’s customers, served two purposes. First, by showing that Keszthelyi’s lifestyle exceeded his income, the government was able to prove that Keszthelyi had “a constant source of revenue from drug sales that explained [the] deposits.”<sup>93</sup> Once the prosecution established the illegitimacy of the source of the funds, the government was able to establish the quantity of drugs Keszthelyi distributed.<sup>94</sup> Thus, evidence that the accused was living beyond his means properly served to establish the underlying offense itself.

In a similar case, Disbursing Clerk Third Class Joseph Tebsherany was tried for larceny of more than \$50,000.<sup>95</sup> As evidence of Tebsherany’s “unexplained affluence,” the government introduced a vehicle contract made by Tebsherany at the time of the theft. The contract showed that Tebsherany made a substantial cash down payment. The Navy-Marine Court of Military Review found that though it was not unusual for junior enlisted “to purchase moderately priced automobiles . . . [t]he cash down payment is unusual” and “strong probative circumstantial evidence that he stole this money.”<sup>96</sup>

Likewise, the government’s introduction of records of Tebsherany’s gambling activity was also proper. At the time of the larceny, Tebsherany was living the “extravagant lifestyle” of a gambler at an Atlantic City casino. As the records showed, Tebsherany gambled large sums of money and received complimentary services casinos normally only afforded to “high rollers.”<sup>97</sup> On review, the Court of Military Appeals held that the amounts wagered were “well beyond the pay and emoluments of a junior petty officer” and “the documents were relevant to show that it was more likely than not that appellant was a thief.”<sup>98</sup> Thus, as in *Keszthelyi*, evidence of Tebsherany’s extravagant lifestyle served to establish the offense.

## 2. Unexplained or Sudden Accretion of Wealth

Financial records may also be relevant when an unexplained or sudden accretion of wealth serves to corroborate facts underlying the criminal offense.<sup>99</sup> For example, in *United States v. Cecil*,<sup>100</sup> an officer formerly employed by the Metropolitan Nashville Police Department was charged with distributing cocaine.<sup>101</sup> At trial, his accomplice testified that following the robbery of a drug dealer, the accomplice paid Cecil \$10,000.<sup>102</sup>

To corroborate the statement, the prosecution introduced the bank records of Cecil and his wife. The records showed that, over three years, Cecil and his wife had never deposited more than \$3,800 per year into their accounts. However, within a week of the alleged offense, Cecil and his wife had deposited \$6,000 into their accounts.<sup>103</sup>

The records were relevant and properly admitted at trial because the deposit amounts “were linked to the particular offense” and chronologically proximate to the robbery.<sup>104</sup> In reaching this conclusion, the court reiterated, “‘after the commission of an offense . . . it is permissible for the prosecution to show unusual wealth in the hands of a previously impecunious defendant.’”<sup>105</sup> Thus, it was proper for the government to show sudden unexplained wealth to corroborate the offense charged.

## 3. Imminent or Extraordinary Financial Burden

In some cases, rather than prove a sudden increase in wealth, the government may need to demonstrate an absence of wealth. This is the case when the financial records of an accused show that dire financial circumstances provided a motive to commit the offense.<sup>106</sup> However, courts often consider mere “poverty evidence,” without more,

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<sup>92</sup> *Id.* at 562–63.

<sup>93</sup> *Id.* at 577.

<sup>94</sup> *Id.* (“In order to prove drug quantity by [conversion], the government must prove by a preponderance of the evidence both the amount of money attributable to drug activity and the conversion ratio—*i.e.*, the price per unit of drugs.”) (citation omitted).

<sup>95</sup> *United States v. Tebsherany*, 30 M.J. 608, 609 (N.M.C.M.R. 1990).

<sup>96</sup> *Id.* at 613.

<sup>97</sup> *Id.* at 613–14.

<sup>98</sup> *United States v. Tebsherany*, 32 M.J. 351, 355 (C.M.A. 1991).

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<sup>99</sup> *United States v. Weller*, 238 F.3d 1215, 1221 (10th Cir. 2001) (“[T]he Government introduced evidence that [the defendant] possessed a large amount of cash after the robbery, where before the robbery she had an empty bank account, ‘maxed out’ credit cards, and no other obvious source from which to obtain cash. It appears this evidence of her sudden change in circumstances was offered as circumstantial evidence of guilt and went well beyond the improper use of ‘poverty as motive.’”).

<sup>100</sup> 615 F.3d 678 (6th Cir. 2010).

<sup>101</sup> *Id.* at 683–84.

<sup>102</sup> *Id.* at 688.

<sup>103</sup> *Id.* at 688–89.

<sup>104</sup> *Id.* at 689.

<sup>105</sup> *Id.* (quoting *United States v. Ingrao*, 844 F.2d 314, 316 (6th Cir. 1988); *United States v. O’Neal*, 496 F.2d 368, 370–71 (6th Cir. 1974)).

<sup>106</sup> *United States v. Fakhoury*, 819 F.2d 1415, 1418 (7th Cir. 1987).

improper.<sup>107</sup>

*United States v. Fakhoury* illustrates the use of evidence of dire financial circumstances to prove motive.<sup>108</sup> When Salim Fakhoury's store burned down, Fakhoury provided multiple affidavits denying any responsibility in the incident. However, Fakhoury's financial records told a different story.<sup>109</sup> As a result, the government introduced records of Fakhoury's debts, bounced checks, and sharp decline in account balances to prove his need for the money before the fire.<sup>110</sup> On review, the Seventh Circuit held that, under these circumstances, the evidence of Fakhoury's "deteriorating financial condition" was a proper demonstration of his "motive to commit arson."<sup>111</sup>

By contrast, in *United States v. Johnson*, the Government had no such proper purpose. Staff Sergeant Donald Johnson was tried for drug distribution. In Johnson's case, the evidence demonstrated that Johnson had trouble paying his bills and managing his finances, but little more.<sup>112</sup> According to the Court of Appeals for the Armed Forces, "[t]hese conditions might describe a broad swath of military members, without converting such circumstances into motive to transport and distribute drugs."<sup>113</sup> The court held that this kind of "poverty evidence," without more, "has little tendency to prove that a person committed a crime" and is therefore improper.<sup>114</sup>

These examples demonstrate that trial counsel must exercise caution when introducing evidence of an accused's imminent or extraordinary financial burden to prove motive.

Evidence of generally poor financial circumstances, without more, is improper. However, if trial counsel connect that evidence to the underlying offense, it may be used effectively to demonstrate motive.

#### IV. Conclusion

Financial records can provide a critical link between an offense and an accused. Such records may prove motive, intent, or facts underlying the charged offense. As long as counsel comply with the Right to Financial Privacy Act when they obtain financial records, and offer the records for a proper purpose at trial, the fact finder may be "better persuaded of a defendant's criminality."<sup>115</sup> However, counsel must work closely with the FinCEN liaison to locate the records, and then follow the correct procedures, to ensure that these valuable evidentiary resources are properly obtained without unnecessarily exposing the government to subsequent civil litigation. Though the process is not overly complicated, and financial records can prove quite valuable, unnecessary missteps may prove costly.

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<sup>107</sup> See, e.g., *United States v. Johnson*, 62 M.J. 31, 34 (C.A.A.F. 2005); *United States v. Mitchell*, 172 F.3d 1104, 1110 (9th Cir. 1999) ("That a person is feckless and poor, or greedy and rich, without more, has little tendency to establish that the person committed a crime to get more money, and its probative value is substantially outweighed by the danger of unfair prejudice.").

<sup>108</sup> 819 F.2d 1415 (7th Cir. 1987).

<sup>109</sup> See *id.* at 1419–20.

<sup>110</sup> *Id.* at 1418 ("[T]he appellant's individual bank account declined from an initial balance of \$18,972.29 in January 1984 to a negative balance of \$410.66 in September 1984."). "The government also submitted evidence showing that on September 4, 1984, a \$40,000 loss of earnings clause was added to the store's \$150,000 insurance policy." *Id.*

<sup>111</sup> *Id.* at 1421 ("The admission of this evidence did not constitute an abuse of discretion and certainly did not constitute plain error.").

<sup>112</sup> *United States v. Johnson*, 62 M.J. 31, 34–35 (C.A.A.F. 2005). Trial counsel argued that Johnson's "divorce, outstanding child support, loans, and overdue bills" put him in a "difficult financial position" and that drug trafficking "simply provided him the opportunity to make a great deal of money." *Id.* at 34 (quoting *United States v. Johnson*, 59 M.J. 666, 673 (A. Ct. Crim. App. 2003)).

<sup>113</sup> *Id.* at 35.

<sup>114</sup> *Id.* at 34 (citing *United States v. Mitchell*, 172 F.3d 1104, 1108–09 (9th Cir. 1999)).

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<sup>115</sup> DOJ GUIDE, *supra* note 16, at 133.

## Appendix A

### Securing Financial Records Checklist

#### Pre-Referral

1. Contact FinCEN CID liaison (703-905-3541) and secure investigative leads. Coordinate contact through the local CID office if possible.
  - a. FinCEN Form 50 (Request for Search). Counsel will need to obtain a FinCEN Form 50 to make the request. This form is not available online and can only be provided by the FinCEN liaison.
  - b. Egmont Group Request. A separate Egmont Group request form must also be completed if appropriate for the investigation.
  - c. Section 314(a) Request. If information is requested under Section 314(a) of the USA PATRIOT Act because money laundering is suspected, a law enforcement agency certification, provided by the FinCEN liaison, must also be completed.
2. Request customer consent. This is the preferred method for requesting financial records. AR 190-6, para. 2-2.
  - a. Sample. AR 190-6, Figure 2-1, provides a sample consent request.
  - b. Requirements (12 U.S.C. § 3404(a); AR 190-6, para. 2-2). The request must:
    - i. Be in writing, signed, and dated.
    - ii. Identify the records sought.
    - iii. Notify the customer of the ability to revoke consent at any time before disclosure.
    - iv. Specify the purpose of the disclosure and the agency to which the records may be disclosed.
    - v. Not exceed three months.
    - vi. Include a statement of rights under the RFPA (provided in AR 190-6, Figure 2-2).
  - c. Certification. Counsel must complete a certificate of compliance with 12 U.S.C. § 3401 *et seq.* AR 190-6, Figure 2-3, provides a sample certification.
  - d. Mail. Send the certificate of compliance and customer consent to the financial institution.
3. Formal written request to the financial institution. A formal written request is appropriate if the customer has refused consent, or seeking consent would compromise or harmfully delay an investigation. AR 190-6, para. 2-6a.
  - a. Sample. AR 190-6, Figure 2-4, provides a sample formal written request for access.
  - b. Requirements (12 U.S.C. § 3408; AR 190-6, para. 2-6). The request must:
    - i. Invoke the RFPA as a basis for the request.
    - ii. Describe records sought.
    - iii. State that records are sought in connection with a legitimate law enforcement inquiry.
    - iv. Describe the nature of the inquiry.
    - v. Be signed by a field grade officer (or civilian equivalent) who heads the law enforcement office.
  - c. Notice. The customer must receive notice of the request before the date of access to the records.
    - i. 10 days before if personal service, or 14 days before if mailed.
    - ii. AR 190-6, Figure 2-5, provides a sample notice.
  - d. Motion to Quash. Counsel must provide a draft motion to quash, suitable for filing at the local district court, with the notice to the customer. This requires coordination with the local U.S. Attorney's office. 12 U.S.C. § 3408(4)(A); AR 190-6, para. 2-6g.

- e. Certification. If a customer fails to challenge the request (within 10 days if personal service, 14 days if service by mail), or the customer loses the challenge, the head of the law enforcement office must provide written certification of compliance with 12 U.S.C. 3401 *et seq.* to the financial institution in order to receive the requested documents.
4. Request Search Warrant.
    - a. Authority (12 U.S.C. § 3406; RCM 315). Warrants may only be issued by a competent civilian authority, i.e., magistrate or state court judge, and must comply with Federal Rule of Criminal Procedure 41.
    - b. Coordination. Warrants must be coordinated through the local U.S. Attorney's Office. 28 C.F.R. § 60.1.
    - c. Notice. Within 90 days of service of the warrant, the customer must receive notification unless a delay is approved. AR 190-6, para. 2-4b includes a sample notice.
  5. Search Authorization. A search authorization is not normally a proper method of obtaining financial records. A search authorization may only be used in the limited circumstance where customer consent cannot be obtained, or seeking consent would be inappropriate, and the financial records are located on a DoD installation outside the United States, Puerto Rico, The District of Columbia, Guam, American Samoa, or the Virgin Islands. AR 190-6, para. 2-4d.

### **Post-Referral Judicial Subpoena**

1. Application. After referral, trial counsel may issue a subpoena *duces tecum* in accordance with UCMJ art. 46, and RCM 703.
2. Notice. Personally serve or mail a copy of the subpoena to the customer on or before the date the subpoena is served on the financial institution. 12 U.S.C. § 3407(2).
3. Motion to Quash. Counsel must provide a draft motion to quash suitable for filing at the local district court with the notice to the customer. This requires coordination with the local U.S. Attorney's office. 12 U.S.C. § 3407(2).
4. Certification. If a customer fails to challenge the request (within 10 days if personal service, 14 days if service by mail), or the customer loses the challenge, the head of the law enforcement office should provide written certification of compliance with 12 U.S.C. 3401 *et seq.* to the financial institution to receive the requested documents. (*See* 12 U.S.C. § 3407(3)).

### **Emergency Access Request**

1. Application. When the processes outlined above would create "an imminent danger of physical injury to a person, serious property damage, or flight to avoid prosecution" counsel may obtain financial records under the emergency access provisions. 12 U.S.C. § 3414(b); AR 190-6, para. 2-7a.
2. Requirements. AR 190-6, para. 2-7b.
  - a. Certification. Provide written certification of compliance with 12 U.S.C. § 3401 *et seq.* to the financial institution.
  - b. Affidavit. Within five days, file a signed sworn affidavit setting forth the circumstances requiring the emergency access with the court.
3. Notice. Unless a delay in notice has been granted, personally serve or mail notice to the customer "as soon as practicable." AR 190-6, para. 2-7c(1) provides a sample notice.

### **Delay of Notification**

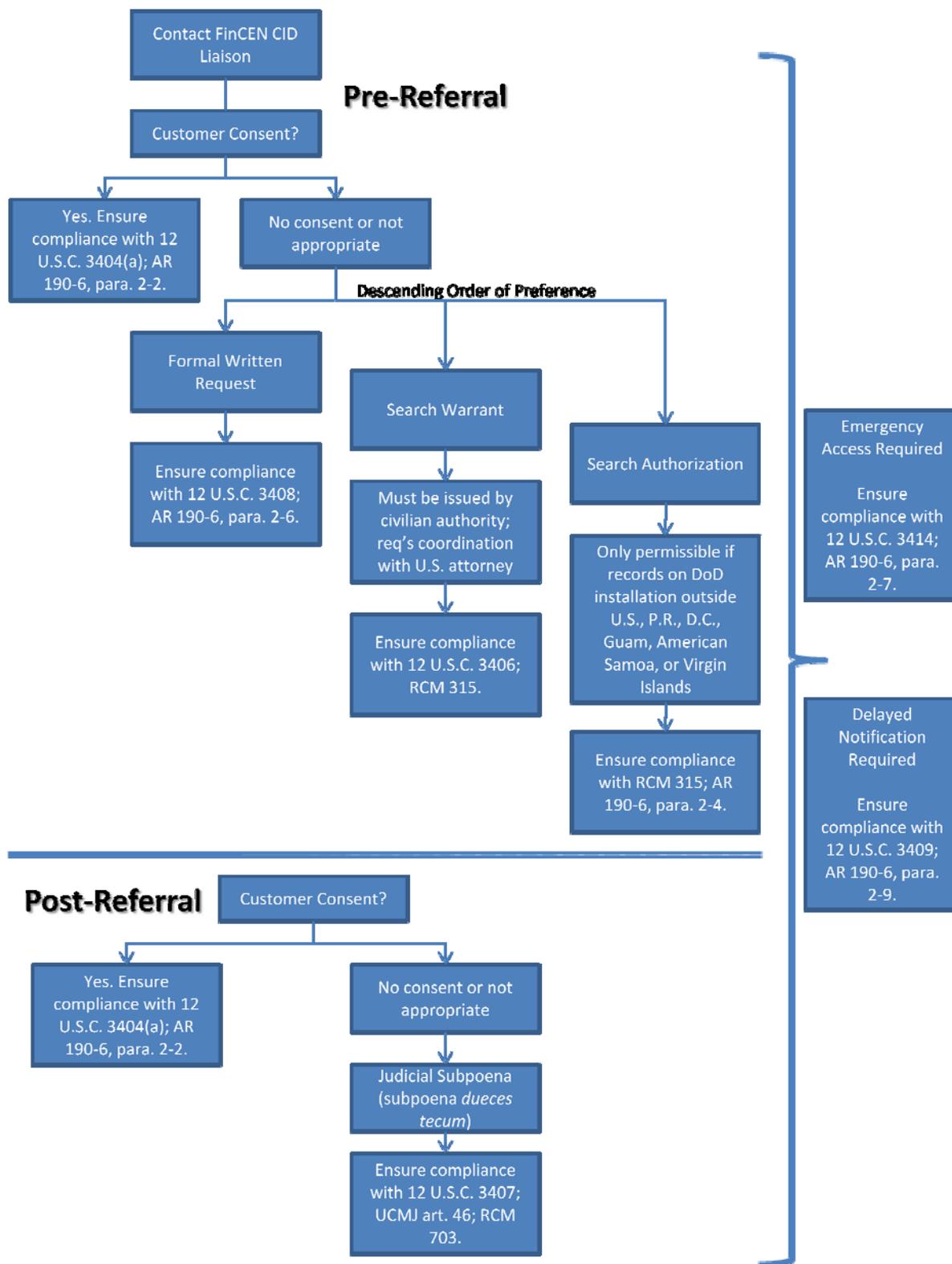
1. Application. Delay of notice is appropriate if needed to prevent flight from prosecution, destruction or tampering with evidence, intimidation of a witness, endangering life or safety of another, or seriously jeopardizing an

investigation. 12 U.S.C. § 3409; AR 190-6, para. 2-9a.

2. Requirement. Request an order from the appropriate court (for a formal written request, the appropriate court is the U.S. District Court; for a judicial subpoena, the appropriate court is the military court). *See* 12 U.S.C. § 3410(a).
3. Length of Delay. 12 U.S.C. §§ 3406(c), 3409(b); AR 190-6, para. 2-9(a).
  - a. Formal Written Request, Emergency Access: 90 days initially, then successive 90-day extensions.
  - b. Search Warrant: 180 days initially, then successive 90 day extensions.
4. Notice. Upon expiration of delay, notice must be provided as required above based on the method used to obtain the records. AR 190-6, para. 2-9d.

Appendix B

Securing Financial Records Flowchart



# Influencing the Center of Gravity in Counterinsurgency Operations: Contingency Leasing in Afghanistan

Major Michael C. Evans\*

*Counterinsurgency is not just thinking man's warfare—it is the graduate level of war.*<sup>1</sup>

## I. Introduction

In armed conflict and contingency operations, U.S. forces commonly displace private citizens from their property to quickly establish secure forward operating bases (FOBs). The security considerations that require U.S. military forces to quickly and quietly establish FOBs often leave displaced citizens homeless and feeling helpless. Some families have evacuated in advance of military operations, returning months or years later to find their homes, businesses, or land occupied. Displaced civilians often return after military operations improve the security situation but they become prime targets for insurgent recruitment when they find themselves homeless. Unfortunately, however, this does not change the fact that commanders engaged in offensive or peacekeeping operations require land and buildings to house soldiers, weapons, and equipment. A unit judge advocate opens channels of communication and limits insurgent inroads into local populations when he helps the unit quickly identify and pay property owners for the use of their land and related facilities. However, leasing land from private landowners in contingency operations, then legally paying for it out of appropriated funds, is a detailed and complex area of practice.

The purpose of this article is to prepare deploying judge advocates to efficiently navigate the lease process in Afghanistan from start to finish.

In order to effectively prepare deploying judge advocates, this article begins with background information that compares domestic property law rights with property law rights preserved by the law of war. Second, the article identifies and describes the agency that adjudicates leases in contingency operations. Third, the article identifies the process of creating a valid lease and common lease issues in Afghanistan. Finally, the article describes how quick payment of leases complements the current counterinsurgency approach in Afghanistan while promoting positive relationships with families who are paid for their property and with the greater community.

## II. Background

The property rights enjoyed by Americans in peacetime are vastly greater than those protected by the law of war. Understanding the differences will enable judge advocates to keep applicable laws in context.

Americans are extremely secure in the rights and privileges endowed by domestic property law. The Fifth and Fourteenth Amendments to the U.S. Constitution guarantee

individual property rights, forbidding the state and federal governments to take property without due process of law or just compensation. Americans take these protections for granted. However, in many countries, individual property rights are less secure.

The Hague and Geneva Conventions protect individuals' rights to property during periods of international armed conflict. When a military force of one nation enters another nation, international law prohibits the destruction or seizure of enemy property unless it is, "imperatively demanded by the necessities of war."<sup>2</sup> The law of war does not allow the destruction of property, even in combat, without a "reasonably close connection between the destruction and overcoming the enemy's army."<sup>3</sup> Army Field Manual (FM) 27-10 authorizes U.S. Army Forces to use, with or without the permission from land owners, property for:

marches, camp sites, construction of field fortifications, etc. Buildings may be destroyed for sanitary purposes or used for shelter for troops, the wounded and sick and vehicles for reconnaissance, cover, and defense. Fences, woods, crops, buildings, etc., may be demolished, cut down, and removed to clear field of fire, to clear ground for landing fields, or to furnish building materials or fuel if imperatively needed for the army.<sup>4</sup>

Once U.S. Forces firmly control an area and substitute their authority for that of the displaced government, they

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<sup>1</sup> U.S. DEP'T OF ARMY, FIELD MAN. 3-24, COUNTERINSURGENCY 1-1 (15 Dec. 2006) [hereinafter FM 3-24] (quoting a Special Forces officer in Iraq (2005)).

<sup>2</sup> Hague Convention No. IV Respecting the Laws and Customs of War on Land, art. 23(g), Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague IV].

<sup>3</sup> U.S. DEP'T OF ARMY, FIELD MAN. 27-10, THE LAW OF LAND WARFARE para. 56 (18 July 1956) [hereinafter FM 27-10].

<sup>4</sup> *Id.* (citing Geneva Convention for the Protection of Civilian Persons in Time of War, art. 53, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]).

become occupying forces.<sup>5</sup> Under the Hague and Geneva Conventions they may not destroy real or personal property belonging to private persons, “except where such destruction is rendered absolutely necessary by military operations.”<sup>6</sup> However, they may control property within occupied territory as necessary to prevent hostile forces from benefiting from or using the property.<sup>7</sup> A commanding officer may also authorize forcible requisition of real property.<sup>8</sup> When requisitioning property, U.S. Forces must provide property owners with receipts immediately. Property owners may make claims using these receipts as evidence.<sup>9</sup> Prices for requisitioned property should be mutually agreed upon, but if negotiations fail, the military authority may determine the price.<sup>10</sup>

International property rights are also protected during contingency operations through the law of war and U.S. law and policy.

### III. Contingency Leasing in Afghanistan

Units occupying foreign property in contingency operations must coordinate with the U.S. Army Corps of Engineers Contingency Real Estate Support Team (CREST). The Army Corps of Engineers has legal authority to lease private property and enter into agreements to use host nation

property for military contingency operations.<sup>11</sup> The Army Corps of Engineers (ACE) created contingency real estate teams after the Persian Gulf War to deploy overseas on short notice and support contingency operations.<sup>12</sup> The CREST mission is to, “[p]rovide real estate support to American forces during overseas contingency operations leading to war, during war-time operations, and operations other than war.” Leases can be made available for billeting, warehouses, office space or other mission requirements.<sup>13</sup> 10 U.S.C. § 2675 applies to leases in foreign countries and states:

The Secretary of a military department may acquire by lease in foreign countries structures and real property relating to structures that are needed for military purposes other than for military family housing. A lease under this section may be for a period of up to 10 years, or 15 years in the case of a lease in Korea, and the rental for each yearly period may be paid from funds appropriated to that military department for that year.<sup>14</sup>

A CREST may provide real estate services throughout the spectrum of operations anywhere in the battle space and through all phases of operations. However, the process the ACE utilizes in Afghanistan has changed in the past few years.

The U.S. Government does not have a Status of Forces Agreement (SOFA) with Afghanistan. Ordinarily, the U.S. Government and the host nation will negotiate a SOFA to ensure military forces in contingency operations have access to real property required for operations. In the absence of a SOFA, U.S. forces acquire real property through the following means: “(1) entering into an agreement with the Afghan government for use of land; (2) entering in to a permit with the International Security Assistance Force to use land made available to it under agreements with the Afghan government; and (3) entering into leases with private land owners.”<sup>15</sup>

<sup>5</sup> FM 27-10, *supra* note 3, para. 351 (citing Hague IV, *supra* note 2, art. 42).

<sup>6</sup> GC IV, *supra* note 4, art. 53.

<sup>7</sup> FM 27-10, *supra* note 3, para. 399.

<sup>8</sup> Requisition is a demand for property placed on the owner of the property or his representative. U.S. DEP’T OF ARMY, TECHNICAL MAN. 5-300, REAL ESTATE OPERATIONS IN OVERSEA COMMANDS para. 34 (10 Dec. 1958) [hereinafter TM 5-300]. See also FM 27-10, *supra* note 8, para. 412.

#### *a. Treaty Provision.*

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in operations of the war against their country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall, as far as possible, be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

*b. What May Be Requisitioned.* Practically everything may be requisitioned under this article that is necessary for the maintenance of the army, such as fuel, food, clothing, building materials, machinery, tools, vehicles, furnishings for quarters, etc. Billeting of troops in occupied areas is also authorized.

*Id.* (citing Hague IV, *supra* note 3, art. 52).

<sup>9</sup> FM 27-10, *supra* note 3, paras. 409, 412a.

<sup>10</sup> *Id.* para. 416.

<sup>11</sup> See U.S. DEP’T OF ARMY, REG. 405-10, REAL ESTATE ACQUISITION OF REAL PROPERTY AND INTERESTS THEREIN paras. 3-2a, 3-3a (14 May 1970).

<sup>12</sup> JANET A. McDONNELL, SUPPORTING THE TROOPS: THE U.S. ARMY CORPS OF ENGINEERS IN THE PERSIAN GULF WAR 172 (1996).

<sup>13</sup> Field Force Engineering: Contingency Real Estate Support Team Fact Sheet, U.S. ARMY CORPS OF ENG’RS, <http://usace.army.mil/CEMP/ffe/Documents/CREST%20Fact%20Sheet.pdf> (last visited Dec. 2, 2010).

<sup>14</sup> 10 U.S.C. § 2675(a) (2006).

<sup>15</sup> E-mail from Dominic H. Frinzi, Jr., Attorney, Headquarters U.S. Army Corps of Eng’rs Office of Chief Counsel, to Lieutenant Colonel Michael E. Mueller, Chair, Contract & Fiscal Law Dep’t, The Judge Advocate Gen.’s Legal Ctr. & Sch., Charlottesville, Va. (Feb. 28, 2011, 16:05 EST) (on file with author).

The ACE has developed North and South District Real Estate offices in Afghanistan to assist units in negotiating and executing agreements, permits and leases of real property. The District Real Estate offices replaced the CRESTs and provide comprehensive support in Afghanistan.<sup>16</sup> Units in Afghanistan must coordinate their lease efforts with the appropriate District Real Estate offices. No authority to execute leases has been delegated below the district level.<sup>17</sup> Judge advocates must be familiar with the real estate process to adequately advise their commanders in Afghanistan.

#### IV. Lease Formation and Administration Issues in Afghanistan

Deployed judge advocates encounter many claims involving real property in Afghanistan.<sup>18</sup> Not all claims lend themselves to the lease process.<sup>19</sup> Generally, the Foreign Claims Act (FCA)<sup>20</sup> or the Military Claims Act (MCA)<sup>21</sup> covers claims for damage and use of real estate for thirty days or less. The *Operational Law Handbook* and Army

Regulation (AR) 27-20 cover FCA and MCA in detail.<sup>22</sup> Claims for periods of thirty-one days or more become real estate claims and must be handled through the ACE.<sup>23</sup>

Although paying the owner of seized property is imperative, the process of obtaining a lease and verifying ownership can be arduous in contingency operations. Correctly identifying legal owners when no ownership documentation exists, while at the same time attempting to identify fraudulent claims, makes a complex process even more difficult. Judge advocates must be well integrated into an organization in order to educate unit leaders on the need to identify, locate, and quickly pay owners of occupied property. The lease process requires both the claimant and the unit claims officer, usually the judge advocate, to follow strict procedures to ensure the efficient use of U.S. taxpayer money.<sup>24</sup>

##### A. Lease Process in Afghanistan

Military units must strictly follow the ACE process in order to execute a lease in Afghanistan. First, units must identify their land requirements and validate the availability of necessary funding. Second, units must complete a Land Acquisition Request Form and an Environmental Baseline Survey, which are included as Annexes A and B of U.S. Forces–Afghanistan Fragmentary Order (USFOR–A FRAGO) 09-265. The unit claims officer must submit these forms along with proof of ownership, grid coordinates, and approval from local officials to the Corps of Engineers Real Estate Departments Transatlantic Engineer District–North (TAN) or Transatlantic Engineer District–South (TAS). In Afghanistan, land ownership is often disputed. A unit must communicate information on known land disputes to the appropriate real estate office. After submitting the required documentation, the unit should maintain contact with the real estate office. No unit should occupy property without an executed lease or real estate instrument. Once the real estate office receives the request, it will determine the appropriate method for acquiring the land.<sup>25</sup> Many issues arise in lease formation and administration in Afghanistan.

<sup>16</sup> *Id.* The Army Corps of Engineers will use Contingency Real Estate Support Teams to support contingency operations in the future.

<sup>17</sup> The Service Secretaries' authority to enter into leases is provided by 10 U.S.C. § 2675(a). The Secretary of the Army delegated this authority to the Assistant Secretary of the Army (Installations & Environment) (ASA(I&E)) through General Order Number 3, Headquarters, Department of the Army, dated 9 July 2002. The ASA (I&E) then delegated his authority to the Deputy Assistant Secretary of the Army (Installations & Environment), who further delegated it down to the Engineer districts which are now in place in Afghanistan. See Memorandum from Assistant Sec'y of the Army, Installations & Env't, to Acting Dir. of Real Estate CEMP-CR, subject: Delegation of Authority to Execute Leases in Support of Contingency Operations (12 Dec. 2008) (on file with author). See also Memorandum from Dir. of Real Estate, U.S. Army Corps of Eng's, to Mr. Vincent Leduc, Chief of Real Estate, subject: This Delegation of Authority to Execute Leases in Support of CETAS Real Estate Operations (9 Dec. 2009) (on file with author).

<sup>18</sup> Real property is any interest in land, together with improvements, structures, and fixtures on the land. 41 C.F.R. § 102.71.20 (2005).

<sup>19</sup> At the beginning of 2007 in Fallujah, Iraq the locals knew U.S. forces paid claims based on damage to real and personal property, but at that time leases were not commonly paid in that area. U.S. Forces in the area usually occupied the largest and best located property and many powerful local nationals had received nothing for property taken from them by U.S. forces. As a result, the commanding officer was consistently presented with claims for payment from powerful and influential people in areas it was his job to secure. Claims for payment were consistently presented at tribal meetings, meetings with local judges and police, and at weekly claims processing days. The deployed JA must become an expert at recognizing the processes available to adjudicate claims and manage that process effectively to ensure claims are paid in a timely fashion and fraudulent claims are not paid. He must also recognize when claims processes are not appropriate and when the more lengthy lease process should be used. The author became familiar with these issues while serving as the Deputy Regimental Judge Advocate, Regimental Combat Team–6, Fallujah, Iraq, from 10 January 2007 to 12 January 2008. During that time over 1200 lease claims were reviewed in Anbar Province resulting in over \$2.2 million in payments to verified owners.

<sup>20</sup> See 10 U.S.C. § 2734 (2006).

<sup>21</sup> See *id.* § 2733.

<sup>22</sup> INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 315–16 (2010) [hereinafter OPERATIONAL LAW HANDBOOK].

<sup>23</sup> U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS para. 2-15m (8 Feb. 2008) [hereinafter AR 27-20]. See also OPERATIONAL LAW HANDBOOK, *supra* note 22, at 318 and 337.

<sup>24</sup> Judge advocates may come into contact with claims that lend themselves to the lease process when they are out paying other unrelated claims. No requirement for judge advocate involvement exists; however, since judge advocates usually have the most experience and training in real property transactions, lease claims are normally presented to unit judge advocates. This article assumes the unit claims officer will be a judge advocate; however, anyone who follows the references in this article could successfully execute leases for their unit.

<sup>25</sup> U.S. FORCES AFGHANISTAN, FRAGMENTARY ORDER 09-265, PROCESS FOR ACQUIRING PUBLIC & PRIVATE LAND, TO OPORD 08-01 (9 Nov. 2009) [hereinafter USFOR–A FRAGO 09-265]. See *infra* Appendix A.

## 1. Real Estate Agreements on Public Land

The process of entering into a real estate agreement on public land is straightforward. First, the real estate office will verify the location of the property on a map using the grid coordinates provided by the unit and compare that location with the map sent by the unit. Second, the real estate office will review ownership documents and prepare a No-Cost Land Use Agreement (LUA). Finally, they will forward the LUA for translation and signature to the Government of the Islamic Republic of Afghanistan (GIROA) and will then return a copy of the fully executed LUA to the unit.<sup>26</sup> The process for entering into leases is somewhat different.

## 2. Leases on Private Land

On private land, the real estate office will verify the location of the property on a map using the grid coordinates provided by the unit and comparing that location with the map and aerial photographs provided by the unit. Next, they will review the ownership documents and determine the rental amount based on the proposed lease area, the type of land, and a review of any available market data. The real estate office will negotiate with the owner or representative and prepare the land lease agreement.<sup>27</sup> The real estate office will then request funds via certified purchase request and commitment (PR&C) from the unit.<sup>28</sup> The unit must provide funds prior to presenting the lease to the lessor. The unit then provides the lease to the owner(s) for his signature and returns the signed lease to the real estate office. When the lease is executed, the unit will receive a copy and can then pay the owner(s).<sup>29</sup> Unfortunately, the unit will normally encounter problems finding ownership documents in Afghanistan.

## B. Proving Ownership in Afghanistan

The feudal Afghan society, a near-complete lack of land records, and the Afghan appetite for negotiation make proving land ownership difficult in Afghanistan.<sup>30</sup> In order to pay the legitimate owners for leased property, the ACE has published forms that help the real estate office determine ownership. When disputes arise, USFOR–A FRAGO 09-265 requires the disputing parties to use local tribal practice to resolve the conflict. Disputing parties must request a shura,

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> U.S. Dep't of Defense, DD Form 3953, Purchase, Request and Commitment (PR&C) (Mar. 1991).

<sup>29</sup> USFOR–A FRAGO 09-265, *supra* note 25.

<sup>30</sup> Telephone Interview with Dominic H. Frinzi, Jr., Attorney, Headquarters U.S. Army Corps of Eng'rs Office of Chief Counsel (Mar. 8, 2011) [hereinafter Frinzi Telephone Interview].

also called a jirga, or request a formal court rule on their case.<sup>31</sup> Pashtun tribes in Afghanistan customarily use shuras to settle disputes.<sup>32</sup> A shura is a meeting of tribal elders which convenes to hear disputed claims. The shura is capable of hearing testimony and examining witnesses to find an impartial and acceptable solution to the problem. The tribe recognizes the shura's right to enforce decisions using punitive action. Shuras may resolve various ownership scenarios: (1) private owner claim with no official documentation; (2) tribal owner claim with no official documentation; (3) known ownership dispute between private parties; and (4) known ownership dispute between tribes.<sup>33</sup>

## 1. Private Ownership Claimed with No Official Documentation

A private owner must provide an ownership affidavit with appropriate signatures and fingerprints to the unit if land is located in a remote area and no dispute as to ownership exists. The ownership affidavit must state: (1) the individual named swears he is the sole owner of the property; (2) the neighbors agree that he is the sole owner of the property; and (3) the village leader concurs with the ownership of the property as set forth in the affidavit. Village rules may still require a shura. In that case, the unit must ensure the claimant provides the minutes of the shura along with the ownership affidavit. The minutes of the shura must indicate agreement through the signature and fingerprint of each member of the shura. The owner must then take the affidavit or the minutes to the highest government level possible. The unit claims officer may be able to help owners get into contact with the sub-governor, governor, or ministry for official concurrence and signature with an official stamp.<sup>34</sup> Unit claims officers, with the help of the command, can also help ensure land owners are not subject to extortion.<sup>35</sup> In Afghanistan the unit claims officer may be approached by individuals or tribes claiming land ownership.

<sup>31</sup> USFOR–A FRAGO 09-265, *supra* note 25.

<sup>32</sup> SHERZAMAN TAIZI, JIRGA SYSTEM IN TRIBAL LIFE 4-5 (2007), available at <http://www.tribalanalysiscenter.com/PDF-TAC/Jirga%20System%20in%20Tribal%20Life.pdf>.

<sup>33</sup> USFOR–A FRAGO 09-265, *supra* note 25.

<sup>34</sup> *Id.*

<sup>35</sup> Obtaining stamps and signatures from local government officials may require legitimate administrative fees. However, judge advocates who discover locals must resort to bribes for services may find creative ways to influence local leaders through their uniformed counterparts in operations and logistics.

## 2. Tribal Ownership Claimed with No Official Documentation

Tribes must provide an ownership affidavit with appropriate signatures and fingerprints to the unit in order to claim ownership in remote areas where no dispute exists. That ownership affidavit must state: (1) the tribe named is the owner of the property; (2) the neighbors agree that the tribe is the sole owner of the property; and (3) the village leader concurs with the ownership of the property as set forth in the affidavit. Village rules may still require a shura. In that case, the unit must ensure the claimant provides the minutes of the shura along with the ownership affidavit. The minutes of the shura must indicate agreement through the signature and fingerprint of each member of the shura. The tribe must then take the affidavit or the minutes to the highest government level possible. The sub-governor, governor, or ministry should officially concur and sign the ownership affidavit and affix the appropriate stamp.<sup>36</sup> Unfortunately, land disputes regarding ownership arise continuously in Afghanistan.

## 3. Known Dispute Between Private Owners

Individuals or groups involved in land ownership disputes must request that a shura be convened to settle the dispute or else present their claim to a formal court for an official ruling. If land ownership has been resolved by a shura, the shura's minutes must be provided to the real estate office via the unit. The minutes must include all the information in the ownership affidavit. The minutes must also be signed and fingerprinted by the members of the shura. The individual or group whose claim was not upheld by the shura must also sign and fingerprint the minutes, concurring with the decision. The owner must then take the affidavit or minutes to the highest level possible, namely the sub governor, governor, or ministry, for official concurrence and signature with the appropriate stamp. If a formal court rules on the case, a copy of the official ruling with the appropriate stamps must be provided.<sup>37</sup>

## 4. Known Dispute Between Tribes

If there is a known land ownership dispute between tribes, the tribal leaders must first attempt to resolve the dispute. If the tribes resolve ownership, the owning tribe must complete and sign the affidavit of ownership. The designated leader of the other tribe must concur and sign that document. The owning tribe must then take the affidavit to the highest level possible, namely the sub governor, governor, or ministry, for official concurrence and signature with the appropriate stamp. If the tribes fail to resolve the

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

conflict they must present their claims to a formal court. To prove ownership in this case, tribes must provide the decision of the formal court with the appropriate official stamps.<sup>38</sup> Once complicated ownership issues are resolved, the unit must coordinate lease payments with the district Army Corps of Engineers real estate office and the comptroller.

## C. Lease Payments in Afghanistan

Units that require leases must provide funding for them. 10 U.S.C. § 2675(b) authorizes the Department of Defense to use operation and maintenance or construction funds for the "acquisition of interests in land" in accordance with an approved lease agreement.<sup>39</sup> Operation and maintenance (O&M) funds are available to all units; however they are one-year funds, appropriated for use within a single fiscal year.<sup>40</sup> Most unit requirements for leases do not fall neatly into fiscal years. Happily, statutory authority exists to use O&M funds for leases that extend into the next fiscal year.

### 1. Leases for Periods Crossing Fiscal Years

The language of 10 U.S.C. § 2410a establishes a statutory exception to the bona fide needs rule. Units may use this authority to pay for real property leases that cross fiscal years, as long as each contract does not exceed one year. Funds may be obligated from the fiscal year in which the need for the lease arises for the entire period of the lease even though that period crosses fiscal years.<sup>41</sup> Thus, if a

<sup>38</sup> *Id.*

<sup>39</sup> 10 U.S.C. § 2675 (2006).

<sup>40</sup> 31 U.S.C. § 1502(a) (2006).

The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability. . . . However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law.

*Id.*

<sup>41</sup> 10 U.S.C. § 2410a (2012).

(a) Authority. (1) The Secretary of Defense, the Secretary of a military department, or the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, may enter into a contract for a purpose described in paragraph (2) for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract period does not exceed one year.

(2) The purpose of a contract described in this paragraph is as follows:

(A) The procurement of severable services.

lease is executed to run from August 2011 to July 2012, the whole lease can be paid for using O&M funds from fiscal year 2011. U.S. Forces–Afghanistan FRAGO 09-265 requires that a lease be in place before a unit occupies real property in Afghanistan. However, some situations require the payment of retroactive leases.

## 2. Retroactive Real Estate Claims

For myriad reasons units sometimes use real property without having leases in place. Retroactive real estate claims may be paid in two ways. When the unit already occupies the property and has a continuing need for that property, AR 405-15 expressly authorizes real estate officials to negotiate a lease to cover the requirement. The lease will become effective from the beginning of the unit's use in order to settle a claim for prior use, as long as the lease continues into the future.<sup>42</sup> If the unit has already vacated the premises the procedure is different.

A landowner may be paid for real property used and occupied under a lease (express, implied, or otherwise) under AR 27-20.<sup>43</sup> This regulation expresses a preference for handling claims for rent, damage, or other payments involving the acquisition, use, possession, or disposition of real property under AR 405-15.<sup>44</sup> However, the ACE has determined that AR 405-15 does not clearly authorize payment when the claim involves only past use of real property when there was no lease in place. In this case the claim is more appropriately paid under AR 27-20.<sup>45</sup> Before paying, the unit must coordinate with the district real estate office to ensure the claimant is not paid more than once for the same land. Unit responsibility for leased property is not limited to payment. In order to limit claims, units must attempt to protect that property.

## D. Protecting Leased Property

Once a lease is in place, the unit commander must "protect the property." "This responsibility cannot be

transferred or delegated."<sup>46</sup> Protecting the property includes protecting plumbing and heating systems from freezing, protecting interiors against the elements, and ensuring that the property is not left unsecured.<sup>47</sup> Protecting leased property enables units to avoid paying future claims for damages.

## E. Claims After a Unit Departs

Owners receiving their real property back after military forces have left normally claim the property has been damaged significantly. Although they have received lease payments for the use of their property, owners are normally given lump sum payments for damages upon termination of their leases. Payment is made in exchange for a liability release from the owner for any future claims for damage. The damages and restoration paragraph of the model lease identifies the mutually agreed-upon payment.<sup>48</sup>

Units are required to verify ownership, follow stringent procedures, and safeguard property in order to ensure our actions promote the rule of law and limit the insurgent's ability to recruit from the local population. Acting in compliance with the procedures set forth above improves our ability to conduct effective counterinsurgency operations.

## V. Leases and Counterinsurgency Operations

Executing counterinsurgency operations requires coordination across a broad spectrum of systems including military, political, economic, psychological, and civil actions. Counterinsurgency is difficult and requires the military to coordinate with other federal agencies, countries, and international organizations in order to work together toward a common goal.<sup>49</sup> "[B]y focusing on efforts to secure the safety and support of the local populace, and through a concerted effort to truly function as learning organizations, the Army and Marine Corps can defeat their insurgent enemies."<sup>50</sup> Leases are a small but valuable part of counterinsurgency operations.<sup>51</sup> Using the lease process

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(B) The lease of real or personal property, including the maintenance of such property when contracted for as part of the lease agreement.

(b) Obligation of funds.—Funds made available for a fiscal year may be obligated for the total amount of a contract entered into under the authority of subsection (a).

<sup>42</sup> U.S. DEP'T OF ARMY, REG. 405-15, REAL ESTATE CLAIMS FOUNDED UPON CONTRACT para. 5 (1 February 1980). See *infra* Appendix B for a sample retroactive lease.

<sup>43</sup> AR 27-20, *supra* note 23, para. 3-3b(1).

<sup>44</sup> *Id.* para. 2-15m.

<sup>45</sup> Frinzi Telephone Interview, *supra* note 30, at 13.

<sup>46</sup> TM 5-300, *supra* note 8, para. 48.

<sup>47</sup> *Id.* paras. 28 and 48c.

<sup>48</sup> Frinzi Telephone Interview, *supra* note 30. See also *infra* Appendix B.

<sup>49</sup> FM 3-24, *supra* note 1, para. 5-1.

<sup>50</sup> *Id.* intro.

<sup>51</sup> *Id.* para. 5-3. "COIN operations combine offensive, defensive, and stability operations to achieve the stable and secure environment needed for effective governance, essential services, and economic development." See also *id.* para. 5-12.

Commanders determine which LLOs [Local Lines of Operations] apply to their AO and how the LLOs connect with and support one another. For example, commanders may conduct offensive and defensive operations to form a shield behind which simultaneous stability operations can maintain a

described in this article and paying leases in a timely fashion allows the commander to demonstrate mutual respect and consideration for the local population in his area of operations.

#### A. Leases and Force Protection

“Both insurgents and counterinsurgents are fighting for the support of the populace.”<sup>52</sup> According to General David H. Petraeus, the people of Afghanistan are the center of gravity and the key to the success of the Afghan government and International Security Assistance Force (ISAF). Military units must engage and live with the population. “We can’t commute to the fight. Position joint bases and combat outposts as close to those we’re seeking to secure as feasible. Decide on locations with input from our partners and after consultation with local citizens and informed intelligence and security assessments.”<sup>53</sup> When units plan to move into an area, the lease procedures require them to engage the local population in order to determine where they will move in. Commanders must carefully perform that process in order to reduce the security threat associated with informing the public of future unit positions. By informing the local population and engaging the leadership in the area, units avoid creating unnecessary enemies and potentially begin winning hearts and minds. When a unit coordinates its move with local elders and citizens they can ensure they have access to sites that will help secure the area while attempting to avoid displacing families with no other property or options for shelter. Creating fewer enemies enhances force protection. Cooperating with local leadership will likely create allies in previously hostile areas.

#### B. Leases Promoting Rule of Law

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secure environment for the populace. Accomplishing the objectives of combat operations/civil security operations sets the conditions needed to achieve essential services and economic development objectives. When the populace perceives that the environment is safe enough to leave families at home, workers will seek employment or conduct public economic activity. Popular participation in civil and economic life facilitates further provision of essential services and development of greater economic activity. Over time such activities establish an environment that attracts outside capital for further development. Neglecting objectives along one LLO risks creating vulnerable conditions along another that insurgents can exploit. Achieving the desired end state requires linked successes along all LLOs.

*Id.*

<sup>52</sup> *Id.* para. 1-160.

<sup>53</sup> Memorandum from Commander, Int’l Sec. Assistance Force/U.S. Forces–Afghanistan, to the Soldiers, Sailors, Airmen, Marines and Civilians of NATO ISAF and U.S. Forces Afg., subject: COMISAF’s Counterinsurgency Guidance (1 Aug. 2010) (on file with author).

“Help Afghans build accountable governance. Afghanistan has a long history of representative self-government at all levels, from the village shura to the government in Kabul. Help the government and the people revive those traditions and help them develop checks and balances to prevent abuses.”<sup>54</sup> Using the lease process described in this article requires units to refer individuals and tribes with competing ownership claims back to local governing bodies for resolution or support. Requiring locals to use recognized processes promotes the rule of law and benefits the unit. It promotes the rule of law by reinforcing the legitimacy of the local court, government representative, or shura.<sup>55</sup> In addition, it reduces the likelihood that the unit will pay fraudulent claims, because the tribal leadership and neighbors are required to identify the legitimate owner. Lastly, if fraud occurs, it helps the unit identify who in the community knew about or committed the fraud.

Creating, maintaining and turning over complete and detailed lease files enables follow-on units to immediately resolve contrary ownership claims, which inevitably follow a previous unit’s departure. Future claimants should be referred back to local practices to resolve ownership disputes. Formal courts and shuras are both capable of adjudicating ownership claims.<sup>56</sup> Shuras also appear capable of forcing individuals who were paid by the United States to compensate other owners who were excluded from the original leases.<sup>57</sup> Thus, the United States can avoid having to adjudicate follow-on claims itself, instead leaving these to local institutions.

#### VI. Conclusion

U.S. policy and the international law of war recognize the need for military forces to take and use real property during armed conflict and contingency operations. Worldwide recognition of that fact makes it no less difficult for a family to leave their home or a farmer to walk away from his fields. Unit judge advocates have a unique opportunity to help their commanding officers reach out to locals who find themselves in this situation by ensuring correct lease procedures are followed. Although property ownership is not well documented in Afghanistan and their dispute resolution techniques seem antiquated, Afghans can resolve ownership disputes themselves and must be allowed to do so. The judge advocate should educate unit leaders and local owners on the process so that when ownership disputes are settled, the remaining requirements are complete and

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<sup>54</sup> *Id.*

<sup>55</sup> USFOR–A FRAGO 09-265, *supra* note 35. “This is a strategic initiative to reinforce good governance, rule of law, build technical opportunity and reinforce the bridge of goodwill and credibility between GIRA and the people of Afghanistan.” *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> TAIZI, *supra* note 45.

leases can be processed efficiently. Leasing land from private landowners in Afghanistan is a complex operation that requires significant coordination with the ACE but

doing it quickly and efficiently enhances counterinsurgency efforts.

Appendix A

Model Lease

LEASE AGREEMENT  
FOR  
PRIVATELY OWNED PROPERTY  
BETWEEN  
[INSERT PARTY(S) NAME(S)] AND THE UNITED STATES OF AMERICA

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This **LEASE**, is made and entered into this \_\_\_\_ day of \_\_\_\_ in the year of 20\_\_, between the owner, \_\_\_\_\_, hereinafter called the Lessor, and the **UNITED STATES OF AMERICA**, hereinafter called the Lessee. The Lessor and the Lessee may be referred to jointly as the “Parties,” and each separately as a “Party.”

In consideration for the **RENT** specified in Article 3, below, the Parties promise and agree as follows:

1. **PROPERTY:** The Lessor leases to the Lessee the following described property with all its appurtenances, herein after known as the “Premises”: [INSERT LEGAL DESCRIPTION HERE (include GPS if possible).] A map depicting the borders of the property is attached as **Exhibit “A”** hereto and made a part hereof.

2. **LEASE TERM:** The Lessee shall have the right to have and to hold the Premises, or any portion thereof, for the period beginning \_\_\_\_\_ 20\_\_ through \_\_\_\_\_ 20\_\_. The Lessee shall have the right but not the obligation to renew this Lease for up to four (4) additional terms of up to one year or less, under the same terms, conditions, and negotiated consideration provided herein. The Lessee shall provide written notice to the Lessor of the Lessee’s intent to renew this Lease prior to the expiration date of the current term or renewal period, provided further that the renewal of this Lease is subject to adequate appropriations being made available from year to year for the payment of rentals. If Lessee does not provide written notice to the Lessor of the Lessee’s intent to renew this Lease prior to the expiration date of the current lease term, or renewal period, this Lease will expire, with no further notice being required from Lessee, at the end of the current lease term or renewal period.

3. **RENT:**

a. Subject to the availability of funds, the Lessee shall pay the Lessor Annual Rent in the amount of \_\_\_\_\_ USD, or local currency equivalent. The determination as to whether to accept USD or local currency will be at the Lessee’s option. In the event the Lessee elects to pay the Lessor in local currency, the Lessee shall not be responsible for fluctuations in the exchange rate from USD to such local currency on the date payment is made as compared to any previous (or subsequent) exchange rate(s).

b. In addition to the rent described in 3.a above, the Parties mutually agree, subject to the availability of funds, that the Lessee may pay, and that the Lessor agrees to accept, a one-time payment of \$\_\_\_\_\_ or Afghani equivalent at Lessee’s option, as full and final compensation for past rent (for the period \_\_\_\_\_ through \_\_\_\_\_).

FUNDING CITATION: \_\_\_\_\_

4. **OWNERSHIP:** The Lessor warrants that the Lessor is the rightful and legal owner of the herein described premises and has the legal right to enter into this Lease and perform its obligations. If the title of the Lessor shall fail, or it be discovered that the Lessor did not have authority to lease to the Lessee, the Lessee shall have the option to terminate this Lease. The Lessor, the Lessor’s heirs, executors, administrators, successors, or assigns agree to indemnify the Lessee by reason of such failure and to **refund all rental paid by the Lessee**. Further, the Lessee shall have the option to withhold rents pending the resolution of any and all ownership issues and discrepancies.

5. **EXCLUSIVE USE:** The premises are to be used exclusively by the Lessee, its employees, agents, or contractors. The Lessor shall not interfere with or restrict the Lessee, or its representatives, in the use and enjoyment of the Premises, nor shall the Lessor erect any fence, wall, partition or any construction upon the Premises, except as otherwise agreed to in writing by the Lessee.

6. **TERMINATION:**

a. The Lessee may terminate this Lease for breach or default. No rent shall accrue after the effective date of termination. Notice of termination under this Article 6 will be computed commencing with the day after the date of mailing or other written notification.

b. The Lessee may terminate this lease in whole or in part, at any time by giving thirty (30) days notice in writing to the Lessor. Said notice shall be computed commencing with the day after the date of mailing, e-mailing, or hand delivery. No rents shall accrue for the portion or entirety of the lease premises so terminated after the effective date of said termination. In the event Lessor is furnished said notice that Lessee desires to terminate the entire lease or a portion of the leased premises after rental payment has been made, the balance of such advanced payment of rental to the Lessor, covering the time period after the effective date of said termination, shall be refunded to the Lessee within thirty (30) days after said effective date of termination. Refund payments shall be prorated on a daily basis for the occupancy period consistent with the rental rates stipulated in Article 3. RENT.

c. In the event the Lessee is directed by the government of **Afghanistan** to vacate the Premises or **Afghanistan** territory prior to the expiration date of this Lease or any extension thereof, Lessee shall have the right to terminate this Lease at any point following Lessee's receipt of the notice to vacate from the government of **Afghanistan**. No rents shall accrue for the portion or entirety of the Premises so terminated after the effective date of said termination. In the event Lessor is furnished said notice that Lessee desires to terminate after rental payment has been made, the balance of such advanced payment of rent to the Lessor, covering the time period after the effective date of said termination, shall be refunded to the Lessee within thirty (30) days after said effective date of termination. The refund payment will be prorated on a daily basis for the occupancy period consistent with the rental rates stipulated in Article 3, RENT.

d. The Lessor has no termination rights under this Lease.

7. **UTILITIES, SERVICES, EQUIPMENT AND PERSONAL PROPERTY:** [Note: This paragraph is optional depending on whether the premises have such equipment.]

a. The Lessor warrants the mechanical equipment and utilities to be in good serviceable and operating condition. In particular, the Lessor warrants that the heating system of the leased property is adequate and sufficient to maintain a 20 degree Celsius temperature. If the heating, domestic hot water, electric, water, or gas systems prove to be inadequate, the Lessor agrees to correct the deficiencies at Lessor's expense. Furthermore, the Lessor warrants the mechanical equipment, utilities, and their respective systems comply with present standards, established by the U.S. Government. Should these standards be changed or modified, the Lessor will, at Lessor's expense, do whatever is necessary to comply with the new standards.

b. The Lessee will make arrangements and payment for the utilities and services used by separate contract.

c. There is no personal property in or on these premises.

8. **ALTERATIONS:** The Lessee shall have the right, during the existence of this Lease, to make alterations, attach fixtures, excavate, and erect additions, structures, or signs, in or upon the Premises, which fixtures, additions, or structures, so placed in, upon or attached to the Premises shall be and remain the property of the Lessee and may be removed or left in place at the option of the Lessee.

9. **DAMAGES AND RESTORATION:** [Note: Use the following text if the lessor has not already received payment for damages to the premises. In cases where the United States has already paid the lessor damages for previous claims with respect to the premises (such as cases where the land was occupied by the United States before entering into a lease) use the highlighted text in lieu of the non-highlighted text.]

On or before the termination of this Lease, or its relinquishment by the Lessee, the Lessee shall, within such reasonable time as determined by the Lessee, vacate the Premises, remove all its personal property therefrom, and restore the Premises to its previous condition, damages beyond the control of the Lessee and due to fair wear and tear and construction authorized under this Lease excepted. Notwithstanding the foregoing, the Parties mutually agree, subject to the availability of funds, that the Lessee may pay, and that the Lessor agrees to accept, a one-time payment of \$\_\_\_\_\_ or COUNTRY equivalent, at Lessee's option, as full and final compensation for damage settlement in lieu of restoration arising from or related to the occupancy, use, and alteration of the Premises. In consideration of such compensation, the Lessor does hereby release, acquit, and forever discharge the Lessee from any and all manner of actions, liability, and claims for any reason whatsoever;

past, present, or future, arising from the occupancy, use, and alteration of the Premises, and for any other matters related thereto, and the Lessor agrees to indemnify, hold harmless, and defend, at Lessor's expense, the Lessee from and against any judicial process, including, but not limited to, demands and liabilities; past, present, and future, arising from the use, occupancy, and alteration of the Premises.

Lessor acknowledges that Lessor has already received a one time payment of \$\_\_\_\_\_ or COUNTRY equivalent as final compensation for damage in lieu of restoration arising from or related to the occupancy, use, and alteration of the Premises. As a result of this one time payment, Lessor agrees that Lessee will not be responsible for damages to the leased property, and the Parties mutually agree, that the Lessor does hereby release, acquit, and forever discharge the Lessee from any and all manner of actions, liability, and claims for any reason whatsoever; past, present, or future, arising from the occupancy, use, and alteration of the Premises, and for any other matters related thereto, and the Lessor agrees to indemnify, hold harmless, and defend, at Lessor's expense, the Lessee from and against any judicial process, including, but not limited to, demands and liabilities; past, present, and future, arising from the use, occupancy, and alteration of the Premises.

**10. MAINTENANCE AND REPAIRS: [Note: This paragraph is optional depending on whether the premises have such equipment.]**

a. The Lessor shall, at all times, maintain the leased property in good repair and tenantable condition. In the event the Lessor shall be absent or otherwise unavailable, Lessor shall provide the Lessee the name, address, e-mail address, and telephone number of a designated representative who will assume full responsibility for maintenance and repairs.

b. The Lessor shall be responsible to perform all maintenance and repairs of \$500 or more, as determined by Lessee (anything less will be the responsibility of the Lessee and shall be paid by separate contract), which shall be performed in a timely manner. Scheduling of all maintenance and repairs shall be coordinated with the designated occupant representative of the Lessee.

c. The Lessee occupant representative will notify the Lessor of any emergency and request the Lessor to perform the necessary work. All emergency maintenance and repairs performed by the Lessor will be completed within 48 hours from the time of notification. Emergency maintenance and repairs include but are not limited to: (1) leaking water pipes; (2) blocked or leaking drains; (3) electrical failure; and (4) sewerage system malfunction.

d. In the event the Lessor shall fail to perform emergency maintenance and repairs within 48 hours or to perform non-emergency maintenance and repairs within 5 days from the date notice is given by the Lessee, the Lessee may immediately perform or have performed such maintenance and repairs and deduct all costs thereof from the rental and other charges due or to become due under the terms of this lease.

**11. INSPECTION:** As of the beginning date of this Lease, or as soon as possible thereafter, the UNITED STATES shall prepare the following reports and will attach them as exhibits:

a. A joint physical condition survey and inspection (JS&I) report signed by representatives of the Lessor and the Lessee setting forth the agreed physical appearance and condition of the Premises on the beginning date of this Lease as determined from a joint inspection by the Parties (Exhibit B).

b. An environmental baseline survey (EBS) signed by representatives of the Lessor and the Lessee reflecting the condition of the Premises on the term beginning date of this Lease as determined by an environmental site assessment (Exhibit C).

c. At the expiration or earlier termination or revocation of this Lease, the following reports will be prepared by the UNITED STATES and attached as exhibits and made a part of this Lease:

(1) An update of the JS&I, signed by representatives of the Lessor and the Lessee, which shall be attached as Exhibit B 1 to this Lease. The update of the JS&I will set forth the agreed physical appearance and condition of the Premises on the ending date of this Lease as determined from a joint inspection by the Parties.

(2) An update of the EBS, signed by representatives of the Lessor and the Lessee, which shall be attached as Exhibit C 1 to this Lease. The update of the EBS will set forth those environmental conditions and matters on and affecting the Premises on the ending date of this Lease.

d. The final JS&I and EBS will include an unconditional release for any and all liability or claims of damage, against the Lessee, its officers, agents or employees for use and occupancy of the Premises.

12. **TAXES:** The Lessor accepts full and sole responsibility for the payment of all fees, taxes and other charges of a public nature which may arise in connection with this Lease, or which may be assessed against the Premises. This includes registration of this Lease and payment of related charges.

13. **NOTICE:**

a. Any notice under this Lease shall be in writing signed by a duly authorized representative of the party giving such notice, and if given by the Lessee shall be addressed to the Lessor at: \_\_\_\_\_, by e-mail of a scanned document to \_\_\_\_\_, or by leaving a copy of the written notice at the Entry Control Point (ECP) and informing Lessor by telephone that Lessor may retrieve the document at the ECP. Notice is effective at the point the Lessee mails, e-mails, or telephones the Lessor in conjunction with the written notice.

b. If notice is given by the Lessor, such notice shall be addressed to the Lessee at:

Camp \_\_\_\_\_, Afghanistan, ATTN: Real Estate

Alternate:

U.S. Army Corps of Engineers, District Office  
ATTN: Office Symbol  
Street  
Other (P.O. Box, etc.)  
City, State Zip

14. **LESSOR'S SUCCESSORS:** The terms and conditions of this Lease shall be binding on the Lessor, and the Lessor's heirs, executors, administrators, successors, and assigns. If the Lessor shall sell or otherwise transfer the land containing all or any portion of the Premises, Lessor shall ensure that such land is sold or transferred subject to this Lease. If Lessor fails to sell or transfer such land subject to this Lease, the Lessee shall have the same rights as under Article 4 of this Lease, OWNERSHIP.

15. **COVENANT AGAINST CONTINGENT FEES:** The Lessor warrants that no person or selling agency has been employed or retained to solicit or secure this Lease upon an agreement or understanding for a commission, percentage, brokerage, or a contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Lessor for the purpose of securing business. For breach or violation of this warranty the Lessee shall have the right to annul this lease without liability therefore, or in the Lessee's discretion, to deduct from the RENT in Article 3, the full amount of such commission, percentage, brokerage, or contingent fee.

16. **OFFICIALS NOT TO BENEFIT:** No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this Lease or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this Lease if made with a corporation for its general benefit.

17. **GRATUITIES:**

a. The Lessee may, by written notice to the Lessor, may terminate the right of the Lessor to proceed under this lease if it is found, after notice and hearing, by the Secretary of the Army or the Secretary of the Army's duly authorized representative, that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by the Lessor, or any agent or representative of the Lessor, to any officer, or employee of the Lessee with a view toward securing a lease or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performing, of such lease; provided that the existence of facts upon which the Secretary of the Army or the Secretary of the Army's duly authorized representative makes such findings, shall be in issue and may be reviewed in any competent court.

b. In the event this Lease is terminated as provided in Article 17.a hereof, the Lessee shall be entitled: (i) to pursue the same remedies against the Lessor as it could pursue in the event of a breach of this Lease by the Lessor, and (ii) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the Secretary of the Army or Secretary of the Army's duly authorized representative) which shall be not less than three nor more than ten times the costs incurred by the Lessor in providing any such gratuities to an such officer or employee.

c. The rights and remedies of the Lessee provided in this Article 17 shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Lease.

18. **EXAMINATION OF RECORDS:** The Lessor agrees that any duly authorized representatives of the Lessee shall have the right until the expiration of three (3) years after final payment of the agreed rental in Article 3, to have access to and the right to examine any directly pertinent books, documents, papers and records of the Lessor involving transactions related to this Lease.

19. **MODIFICATION:** No Change or modification of this Lease shall be effective unless it is in writing and signed by both parties to this Lease.

20. **LANGUAGE PRECEDENCE:** This Lease is executed in English. A courtesy translation may be furnished to the Lessor. In the event of inconsistency between any terms and conditions of this Lease and its translation, the English language version will have precedence and control.

21. **ASSIGNMENT:** The Lessee shall have the right to assign this Lease to a successor organization or entity, hereinafter referred to as a "Successor." Such assignment shall take effect by the signing of an amendment to this Lease by Lessor, Lessee, and the Successor. Assignment rights contained herein include the right of the Lessee to enter into agreements with any Successor for any and all fixtures, additions, alterations, improvements, or structures of the Lessee.

22. **DISPUTES CLAUSE:**

a. All disputes arising under or relating to this Lease shall be resolved under this Article 22.

b. The term "Claim" as used in this Article 22, means a written demand or written assertion by one of the Parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of the Lease terms, or relief arising under or relating to this Lease. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a Claim, unless the submission of such voucher, invoice, or other routine request for payment is converted to a Claim by following the procedures in this Article 22, because the such voucher, invoice, or other routine request for payment is either disputed either as to liability or amount, or it is not acted upon in a reasonable time.

c. All Claims shall be made in writing and submitted to the Real Estate Contracting Officer for a written decision. All Claims shall be subject to a written decision by the Contracting Officer.

d. For all Claims by the Lessor, the Lessor shall submit with the claim a certification that -

(1) The claim is made in good faith;

(2) Supporting data are accurate and complete to the best of the Lessor's knowledge and belief; and

(3) The amount requested accurately reflects the Lease adjustment for which the Lessor believes the Government is liable.

e. If the Lessor is an individual, the certification shall be executed by that individual. If the Lessor is not an individual, the certification shall be executed by-

(1) A senior company official in charge at the Lessor's office location involved; or

(2) An officer or general partner of the Lessor having overall responsibility for the conduct of the Lessor's affairs.

f. The Real Estate Contracting Officer, will, within 60 days of receipt of a Claim, decide the Claim or notify the Lessor of the date by which the decision will be made.

g. The Real Estate Contracting Officer's decision will be final unless the Lessor appeals the decision to the Chief of Real Estate. The decision of the Chief of Real Estate or his or her duly authorized representative for the determination of such appeals shall be final and conclusive.

h. The Lessee will pay interest on the amount found due and unpaid from (1) the date the Real Estate Contracting Officer receives a properly certified claim, or (2) the date payment otherwise would be due, if that date is later, until the date

of payment. Simple interest on Claims shall be paid at the current rate established by the U.S. Secretary of the Treasury, which is applicable to the period during which the Real Estate Contracting Officer receives the claim. This rate will be equal to the yield rate of ten (10) year U.S. Treasury maturities as of the date this interest first becomes due and payable, as reported by the Federal Reserve Board in Federal Reserve Statistical Release H.15, plus one and one half percent (1 1/2%) rounded up to the nearest one eighth percent (1/8%).

i. The Parties shall proceed diligently with their performance of this Lease, pending final resolution of any request for relief, claim, appeal, or action arising under the Lease, and comply with any decision of the Real Estate Contracting Officer.

**23. ENTIRE AGREEMENT:**

a. This Lease contains all terms and conditions agreed to by the parties and no other verbal statement or conditions will be honored without an amendment to this Lease in writing as provided in Article 19, above. The failure of either party to insist on strict performance of any covenant or condition hereof or to exercise any option herein contained shall not be construed as a waiver of such covenant, condition, or option in any other instance. This Lease cannot be changed or terminated orally. The provisions of this Lease shall apply to, bind and inure to the benefit of Lessor and Lessee, and their respective heirs, successors, legal representatives and assigns of the parties hereto.

b. Nothing in this lease agreement shall constitute, or be deemed to constitute an obligation of future appropriations by the Lessee, for the costs herein set forth.

**IN WITNESS WHEREOF**, the parties have subscribed their names as of the date first above written.

**LESSOR:**

\_\_\_\_\_  
WITNESS

\_\_\_\_\_  
(owner)

THE UNITED STATES OF AMERICA:

\_\_\_\_\_  
WITNESS

\_\_\_\_\_  
**BY: NAME**  
**AED Real Estate**  
**Afghanistan**

**AGENT Language**

In exchange for Lessee allowing Lessor's Agent or Attorney in Fact, hereinafter "Agent," to act on behalf of Lessor and other good and valuable consideration, Lessor and Agent agree to hold Lessee harmless in any claim or dispute between Lessor and Agent, involving the relationship between Lessor and Agent, or regarding any action taken by Agent pursuant to the agreement that allows Agent to represent Lessor in matters concerning the property described in Article 1. Furthermore, Lessor and Agent agree that the sole recourse for any such claim or dispute shall be with and between the Lessor and Agent.

## Appendix B

### Retroactive Lease

**LEASE AGREEMENT  
FOR  
PRIVATELY OWNED PROPERTY  
BETWEEN  
[INSERT LESSOR(S) NAME(S) HERE]**

**AND THE UNITED STATES OF AMERICA**

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This **LEASE**, is made and entered into this \_\_\_\_ day of \_\_\_\_ in the year of 20\_\_, between the owner, \_\_\_\_\_ (**LOCAL passport/ID #XXXXXXX(if applicable)**), hereinafter called the Lessor, and the **UNITED STATES OF AMERICA**, hereinafter called the Lessee. The Lessor and the Lessee may be referred to jointly as the “Parties,” and each separately as a “Party.”

Prior to the execution of this Lease, the Lessee occupied the Lessor’s property (land), and now the parties desire to enter into this Lease to establish the terms of occupancy and the rental consideration for the term of this Lease, and to obtain a release from the Lessor for any past, present or future claim of any kind arising from the occupancy of the premises or damage to the premises by the Lessee.

In consideration for the **RENT** specified in Article 3, below, the Parties promise and agree as follows:

1. **PROPERTY:** The Lessor leases to the Lessee the following described property with all its appurtenances, herein after known as the “Premises”: **LOCATION’S LEGAL DESCRIPTION HERE (include GPS if possible)**  
A map depicting the borders of the property is attached as Exhibit “A” hereto and made a part hereof.

2. **LEASE TERM:** The Lessee occupied and held said premises for the period beginning on or before \_\_\_\_\_ and ending \_\_\_\_\_. The lease will terminate upon execution of the lease and fulfillment of the terms hereunder.

3. **RENTAL:** The Lessee shall pay the Lessor rent for the term of this lease in the amount of \$ \_\_\_\_\_ USD, or local currency equivalent. The determination as to whether to accept USD or local currency will be at the Lessee’s option. In the event the Lessee elects to pay the Lessor in local currency, the Lessee shall not be responsible for fluctuations in the exchange rate from USD to such local currency on the date payment is made as compared to any previous (or subsequent) exchange rate(s).. Said rental payment represents the total consideration due the Lessor for occupancy of the premises by the Lessee and for any and all damages or alterations to the premises by the Lessee.

The Lessor shall have no other claim whatsoever, now or in the future, for any compensation arising from Lessee’s use or occupancy of the premises.

4. **DAMAGES:** The parties agree that the Lessee is not responsible for combat or war related damages. The parties also agree the Lessee shall not be liable for any loss, destruction or damages to the premises, including but not restricted to acts of nature, fire, lightning, floods or severe weather. The parties agree that the above rent includes any and total settlement of damages, and claims by the Lessor.

5. **OWNERSHIP:** The Lessor warrants that he is the rightful and legal owner of the property and has the legal right to enter into this lease. If the title of the Lessor shall fail, or it be discovered that the Lessor did not have authority to lease the property, the Lessee shall have the option to terminate this lease and the Lessor agrees to reimburse the Lessee for any rentals paid to the Lessor.

6. **TAXES:** The Lessor accepts full and sole responsibility for the payment of all taxes and other charges of a public nature which may arise in connection with this lease or which may be assessed against the property. This includes registration of the lease and payment of related charges.

7. **LESSOR’S SUCCESSORS:** The terms and provisions of this lease and the conditions shall bind the Lessor, and the Lessor’s heirs, executors, administrators, successors, and assigns.

**8. COVENANT AGAINST CONTINGENT FEES:** The Lessor warrants that no person or selling agency has been employed or retained to solicit or secure this lease upon an agreement or understanding for a commission, percentage, brokerage, or a contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Lessor for the purpose of securing business. For breach or violation of this warranty the Lessee shall have the right to annul this lease without liability or in its discretion to deduct from the lease price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

**9. OFFICIALS NOT TO BENEFIT:** No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this lease or to any benefit that may arise there from, but this provision shall not be construed to extend to this lease if made with a corporation for its general benefit.

**10. GRATUITIES:**

a. The Lessee may, by written notice to the Lessor, terminate the right of the Lessor to proceed under this lease if it is found, after notice and hearing, by the Secretary of the Army or his duly authorized representative, that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by the Lessor, or any agent or representative of the Lessor, to any officer, or employee of the Lessee with a view toward securing a lease or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performing, of such lease; provided, that the existence of facts upon which the Secretary of the Army or his duly authorized representative makes such findings shall be in issue and may be reviewed in any competent court.

b. In the event this lease is terminated as provided in paragraph (a) hereof, the Lessee shall be entitled (i) to pursue the same remedies against the Lessor as it could pursue in the event of a breach of the lease by the Lessor, and (ii) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the Secretary of the Army or his duly authorized representative) which shall be not less than three nor more than ten times the costs incurred by the Lessor in providing any such gratuities to an such officer or employee.

c. The rights and remedies of the Lessee provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this lease.

**11. EXAMINATION OF RECORDS:** The Lessor agrees that any duly authorized representatives shall have the right until the expiration of three (3) years after final payment of the agreed rental, have access to and the right to examine any directly pertinent books, documents, papers and records of the Lessor involving transactions related to this lease.

**12. MODIFICATION:** No Change or modification of this lease shall be effective unless it is in writing and signed by both parties to this lease.

**13. ENGLISH LANGUAGE:** This Lease is executed in English. A courtesy translation may be furnished to the Lessor. In the event of inconsistency between any terms and conditions of this Lease and its translation, the English language version will have precedence and control.

**IN WITNESS WHEREOF**, the parties have subscribed their names as of the date first above written.

\_\_\_\_\_  
WITNESS

\_\_\_\_\_  
LESSOR

THE UNITED STATES OF AMERICA:

\_\_\_\_\_  
WITNESS

\_\_\_\_\_  
Real Estate Officer  
U.S. Army Corps of  
Trans Atlantic-????

## **AGENT Language**

In exchange for Lessee allowing Lessor's Agent or Attorney in Fact, hereinafter "Agent," to act on behalf of Lessor and other good and valuable consideration, Lessor and Agent agree to hold Lessee harmless in any claim or dispute between Lessor and Agent, involving the relationship between Lessor and Agent, or regarding any action taken by Agent pursuant to the agreement that allows Agent to represent Lessor in matters concerning the property described in Article 1. Furthermore, Lessor and Agent agree that the sole recourse for any such claim or dispute shall be with and between the Lessor and Agent.

# Lincoln and the Court<sup>1</sup>

Reviewed by Captain Brett A. Farmer\*

*[T]he lives, backgrounds, experiences, temperaments, and characters of the judges who sat on the Supreme Court during the time that Lincoln was president . . . are not only informative but also essential to understanding the decisions that the Court made and how the president and the Court interacted.*<sup>2</sup>

## I. Introduction

In *Lincoln and the Court*, author Brian McGinty makes the case that while the fate of the Union was decided on the battlefield by the military personnel and other personalities with whom most Civil War buffs and historians are most familiar, the members of the Supreme Court also had a significant part to play. The Supreme Court's decisions on the legality of those men's actions ultimately preserved both the Union and the Constitution.<sup>3</sup> As McGinty makes clear in his introduction, *Lincoln and the Court* is a book designed to "appeal to scholars and general readers, to lawyers, judges, and laymen, to those who are steeped in constitutional history, and those who know little about it."<sup>4</sup> However, it is not a "law book."<sup>5</sup> McGinty does not "analyze the great legal issues of the Civil War to the point of exhaustion,"<sup>6</sup> but rather offers a survey of "the legal controversies that arose during the fighting."<sup>7</sup> *Lincoln and the Court* presents these legal controversies in an easily digestible manner such that someone with a minimal background in constitutional law could follow along.

More importantly, however, *Lincoln and the Court* serves as an examination of the lives and personalities of the jurists and policymakers who resolved the legal issues of this period. McGinty largely succeeds in his goal of humanizing the members of the Court.<sup>8</sup> Whereas libraries of books have been written about Lincoln's life, personality, opinions, and historical context, relatively little has been written about the men who sat on the Supreme Court at that time.<sup>9</sup> As Daniel Hamilton notes, "the most innovative part of the book is to

put the Court in active juxtaposition to Lincoln, existing not as a foil for the President's ambitions but in its own right."<sup>10</sup> For many readers, these justices are only names at the beginnings of judicial opinions, if even that. By understanding their lives, backgrounds, and personalities, "McGinty [brings] the Court to life and put[s] it back into the frame as a crucial actor during the war."<sup>11</sup> In the end, McGinty is successful in his "[attempt] to portray the Supreme Court justices of Lincoln's time as living and breathing human beings."<sup>12</sup>

## II. Background

Brian McGinty is an author and attorney. He has written several books about American history and law during the Civil War era, including *John Brown's Trial* and *The Body of John Merryman: Abraham Lincoln and the Suspension of Habeus Corpus*.<sup>13</sup>

## III. The Human Factor

One of the central themes of McGinty's book is that judges are not merely "cogs in an impersonal machine,"<sup>14</sup> but flesh-and-blood human beings who are not always able to "overcome their emotions, [or] to apply the law dispassionately."<sup>15</sup> McGinty believes that if the reader comes to know these justices as people then the reader can "better understand the arguments they advanced and the decisions they made."<sup>16</sup>

McGinty is largely successful in this endeavor. The book describes in detail the background of each justice who sat on the Supreme Court during Lincoln's presidency, and also provides illuminating and humanizing facts about them. Most will forever remember Chief Justice Taney for his

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\* Judge Advocate, U.S. Army. Presently assigned as Brigade Judge Advocate, 3d Brigade Combat Team, 4th Infantry Division, Fort Carson, Colorado.

<sup>1</sup> BRIAN MCGINTY, *LINCOLN AND THE COURT* (2008).

<sup>2</sup> *Id.* at 10.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 11.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 10.

<sup>9</sup> Daniel W. Hamilton, *History: Getting Right Without Lincoln*, 45 TULSA L. REV. 715, 717 (2010) (reviewing *Lincoln and the Court* as well as other works in the context of their discussion of the important legal issues faced during the Civil War).

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 715.

<sup>12</sup> MCGINTY, *supra* note 1, at 10.

<sup>13</sup> BRIAN MCGINTY, *JOHN BROWN'S TRIAL* (2009); BRIAN MCGINTY, *THE BODY OF JOHN MERRYMAN: ABRAHAM LINCOLN AND THE SUSPENSION OF HABEUS CORPUS* (2011).

<sup>14</sup> MCGINTY, *supra* note 1, at 10.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

racist pronouncements in the *Dred Scott* decision.<sup>17</sup> McGinty shows that at the time he rendered his opinion, Taney was an old man whose adult daughters were entirely dependent upon him for support,<sup>18</sup> who was well-respected by his peers,<sup>19</sup> and who had previously argued against slavery as an attorney earlier in his career.<sup>20</sup> By the end of the book, which concludes with a chapter about the heated debate that took place in the Senate about whether or not to erect a bust of Chief Justice Taney,<sup>21</sup> McGinty has presented Taney as a deeply flawed, but “great and able and learned man,”<sup>22</sup> who made an “erroneous” and “discreditable” decision.<sup>23</sup>

#### IV. Shaping the Court

Another one of McGinty’s key themes is how Lincoln used his Supreme Court nominations to shape a court that seemed hostile to his wartime policies at the beginning of his presidency, but that upheld most—though not all—of his policies afterward. As Robert Grier Stephenson observes, “by the time of Lincoln’s assassination in April 1865, the Court that had been predominantly Democratic in its membership and perceptibly pro-Southern in slavery cases became mainly a Republican, or Lincoln, Court.”<sup>24</sup> While Lincoln did have some success appointing justices whose jurisprudence was in line with his and who would support his policies, they were not mere “hacks” who rubber-stamped all of Lincoln’s initiatives.<sup>25</sup>

Some scholars contend that the Supreme Court is a “majoritarian” institution. In the opinion of Lucius A. Powe, Jr., the Court is nothing more than “part of a ruling regime doing its bit to implement the regime’s policies.”<sup>26</sup> As Donald Grier Stephenson explains,

[I]nstead of persisting in a counter-majoritarian role at odds with the popular

mood, the Court eventually reverts to a legitimizing role in which the Justices place the stamp of approval on policies that once may have been deemed constitutionally unacceptable. The proposition assumes that time is on the side of the dominant political party, either precipitating a change of mind by a previously contrarian Bench or allowing the appointment of Justices who reflect the values of the ruling coalition.<sup>27</sup>

Some of the Court’s decisions during the Civil War and Reconstruction eras do seem to support Stephenson’s cynical assessment, but others emphatically do not. McGinty attributes the Court’s rulings favorable to the Lincoln administration during the Civil War to the Court’s efforts to “support the government of which it was a part, oppose the secession, and help the president bring the war to an end.”<sup>28</sup> According to McGinty, the Court was willing to “‘stretch’ constitutional doctrine” to preserve a Union that was facing an existential crisis.<sup>29</sup> However, after the war, the Court seemed more willing to declare Lincoln’s wartime measures to be unconstitutional.<sup>30</sup>

One of the Court’s controversial decisions during the war came in the *Prize Cases*, the outcome of which McGinty feels was as important as any battlefield victory for the Union.<sup>31</sup> In 1863, during the height of the Civil War, prior to Lincoln’s reelection, and at a time when public opinion about the war was decidedly mixed, the Supreme Court held that Lincoln’s order for the Navy to blockade Southern ports was within his Constitutional powers.<sup>32</sup> Of the five justices who ruled in favor of Lincoln’s actions, Lincoln had appointed three.<sup>33</sup> This does support Stephenson’s claim that newly appointed justices will reflect the values of the ruling coalition.

However, the Court did not rubber-stamp all of Lincoln’s policies, particularly after the war, even though Lincoln had managed to appoint five justices to the Court by that time.<sup>34</sup> In the 1866 case *Ex parte Milligan*, the court unanimously held that the President’s establishment of

<sup>17</sup> See *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857) (Chief Justice Taney stated in his opinion, among other things, that people of African descent were “considered as a subordinate and inferior class of beings,” and were “so far inferior that they had no rights which the white man was bound to respect.”).

<sup>18</sup> MCGINTY, *supra* note 1, at 201.

<sup>19</sup> *Id.* at 20.

<sup>20</sup> *Id.* at 15.

<sup>21</sup> *Id.* at 292 (The Senate in earlier years had voted to erect busts of all the previous Chief Justices without incident but many in the Senators in 1865 were still outraged by Taney’s opinion in *Dred Scott*.)

<sup>22</sup> *Id.* at 293.

<sup>23</sup> *Id.* at 295.

<sup>24</sup> Donald Grier Stephenson, *The Judicial Bookshelf*, 35 J. SUP. CT. HIST. 267, 270 (2010).

<sup>25</sup> MCGINTY, *supra* note 1, at 28.

<sup>26</sup> LUCIUS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008*, at ix (2009).

<sup>27</sup> Stephenson, *supra* note 24, at 270.

<sup>28</sup> MCGINTY, *supra* note 1, at 190.

<sup>29</sup> *Id.* at 142.

<sup>30</sup> See *Ex parte Milligan*, 72 U.S. 2 (1866) (holding that civilians could not be tried by military tribunal in jurisdictions where the civilian courts were still functioning); see also *Hepburn v. Griswold*, 75 U.S. 603 (1870) (holding that the Legal Tender Act was unconstitutional with respect to preexisting debts).

<sup>31</sup> MCGINTY, *supra* note 1, at 1.

<sup>32</sup> *Id.* at 137.

<sup>33</sup> *Id.* at 140.

<sup>34</sup> *Id.* at 168.

military tribunals was unconstitutional in jurisdictions where there was no active insurrection and where there were functioning courts.<sup>35</sup> Justice Davis, a Lincoln appointee and the author of the opinion striking down the military tribunals' authority, had been so close to Lincoln that he was Lincoln's campaign manager during the 1860 election. He was Lincoln's executor after his assassination.<sup>36</sup> With the war over, the Republicans firmly in control of the government, and anti-Southern sentiment still running high in the country,<sup>37</sup> the Court clearly ruled against the tide of public opinion and ruled "according to the light which God [had] given [them]."<sup>38</sup> In McGinty's view, *Ex parte Milligan* "stands for the proposition that partisan loyalties will not trump important constitutional principles."<sup>39</sup>

Another example of the Court's willingness to rule "at odds with the popular mood"<sup>40</sup> occurred in 1871 when the Court decided by four votes to three that Lincoln's Legal Tender Act, a fundraising measure used during the Civil War in which the government issued paper money that was not backed by gold, was unconstitutional.<sup>41</sup> The author of the opinion, Chief Justice Salmon P. Chase, a Lincoln appointee, had been a staunch advocate of the Legal Tender Act when he served as Lincoln's Secretary of the Treasury during the war.<sup>42</sup> Justice Field, another Lincoln appointee, concurred in Chase's opinion.<sup>43</sup> While the holding was narrow in scope and applied only to debts that arose before the passage of the act that were paid with the government-issued "greenbacks,"<sup>44</sup> it reaffirms McGinty's position that justices make up their own minds and are not "cogs in [a] . . . machine."<sup>45</sup>

## VI. Conclusion

*Lincoln and the Court* effectively summarizes the constitutional issues that President Lincoln addressed and the manner in which he addressed them during his time in office. It also provides sufficient historical context to understand those issues both before and after Lincoln's presidency. McGinty's extensive bibliography, which

includes first-person accounts, personal letters, manuscripts, contemporary newspaper articles and biographies, as well as modern scholarly works, provides a holistic view of the constitutional challenges of the period. Readers looking for not only a scholarly discussion of the constitutional issues, but also something more than a mere dry recitation of historical cases and their holdings, will be pleased by McGinty's clear, lively writing and his examination of some of the characters and personalities who wrestled with those issues.

For judge advocates, there is a wealth of discussion about the legal issues faced by Lincoln and the Supreme Court. The struggles they faced over matters of presidential wartime powers and civil liberties still resonate today.<sup>46</sup> The insight that McGinty provides into their reasoning can help modern judge advocates inform and refine their own opinions in this ever-contested field of law. The afterword to *Lincoln and the Court*, entitled "The Legacy," should be of particular interest to modern-day judge advocates. In this section, McGinty compares and contrasts the Court's rulings on the Civil War era cases previously discussed with the modern Court's holdings in some key areas of constitutional interpretation. As presidential wartime powers and civil liberties during times of war are likely to be hot-button issues for some time, it is important for judge advocates, acting as the legal advisors to those who execute national policy, to understand the evolution of those issues.

Finally, judge advocates, just like Supreme Court justices, have a duty to uphold the law. Just as the members of the Court seek to apply the law dispassionately and not succumb to outside influences like a hostile public or a powerful executive branch, so too must judge advocates have the courage to settle issues and provide advice according to their own judgment and knowledge in the face of sometimes demanding or obstinate commanders.

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<sup>35</sup> *Id.* at 258.

<sup>36</sup> *Id.* at 247.

<sup>37</sup> *Id.* at 265.

<sup>38</sup> *Id.* at 264 (quoting 6 CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864–88, pt. 1, at 234 (1971)).

<sup>39</sup> *Id.* at 314.

<sup>40</sup> Stephenson, *supra* note 24, at 270.

<sup>41</sup> MCGINTY, *supra* note 1, at 281.

<sup>42</sup> *Id.* at 282.

<sup>43</sup> *Id.* at 284.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 10.

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<sup>46</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (holding that a U.S. citizen who is detained as an enemy combatant must be able to challenge the factual basis for his detention); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that the military commission established to try and punish an enemy combatant violated the Uniform Code of Military Justice and did not satisfy the Geneva Convention); *Rasul v. Bush* 542 U.S. 466 (2004) (holding that the federal *habeas* statute entitles enemy combatants held at Guantanamo Bay, Cuba to contest the legality of their detention in federal court); Wayne McCormack, *Emergency Powers and Terrorism*, 185 MIL L. REV. 69 (2005) (discussing the extent of executive powers during times of national emergency not amounting to war); Donald Gutierrez, *Universal Jurisdiction and the Bush Administration*, HUMANIST, Mar. 1, 2007 (discussing the perceived radicalism of the Patriot Act).

# Tried by War: Abraham Lincoln as Commander in Chief<sup>1</sup>

Reviewed by Major Luke Tillman\*

*I found the “original gorilla,” about intelligent as ever. What a specimen to be at the head of our affairs!*<sup>2</sup>

## I. Introduction

Tackling a new leadership position is a challenge that can cause even the most talented humans to feel (and sometimes behave) like primates. Each of us has likely witnessed a boss who, due to a lack of education, training, or experience, finds himself temporarily reduced by some leadership dilemma to scratching stupidly at his head, beating wildly on his chest, or shrieking angrily at his fate. Perhaps no new leader in history, though, has faced a more daunting array of difficulties than did President Abraham “The Original Gorilla” Lincoln upon taking office in 1861. His prior military experience limited to leading a small band of militia into battle against “wild onions” and “mosquitoes [sic]” during the Black Hawk War of 1832,<sup>3</sup> Lincoln shortly found himself facing the “chief challenge of his life and the life of the nation”:<sup>4</sup> winning the Civil War. In *Tried by War*, acclaimed historian James McPherson expertly weaves quotes from Lincoln and his contemporaries with his own insightful analysis to persuasively argue that it was ultimately Lincoln’s performance as commander-in-chief that ensured both “his success . . . as president and the very survival of the United States.”<sup>5</sup> The result is a very readable account of that performance filled with leadership lessons on competence and courage. This review explores a few of those lessons and their relevance to judge advocates; analyzes the book’s strengths and weaknesses; and concludes by commending *Tried by War* to those readers who are looking to evolve as leaders.

## II. Leadership Lessons

*Tried by War* provides an excellent account of Lincoln’s struggles to become competent as a military leader and to act courageously in ambiguous and uncertain circumstances.

While readers from all walks of life will draw meaning and inspiration from McPherson’s work, the book is particularly

pertinent to judge advocates given our duties as both military officers and attorneys.

### A. There is no Short—Cut to Competency

In his introduction, McPherson seeks to debunk the myth that Lincoln was a “natural strategist.”<sup>6</sup> As the author states, Lincoln “worked hard to master this subject, just as he had done to become a lawyer.”<sup>7</sup> While hard work was definitely an important factor in Lincoln’s ultimate success as commander in chief, the lawyerly approach he took to acquiring the knowledge and skill he needed to perform his duties was equally important. He exhaustively researched the topic, “digest[ing] books on military strategy,” and “por[ing] over reports from the various departments and districts.”<sup>8</sup> Additionally, he sought out “eminent generals and admirals” to discuss his ideas and test his understanding of military strategy, operations, and tactics.<sup>9</sup> In essence, Lincoln used the same method to gain competence as commander in chief that Army Regulation 27-26 commends to judge advocates seeking competence in a new area of law: study thoroughly, consult with experts, and keep in mind what is at stake in determining the proper amount of attention and preparation to be dedicated to the matter.<sup>10</sup> Thus, one important lesson we can glean from *Tried by War* is that applying the same methodology we use to find answers to novel legal issues can help us in evaluating possible solutions to new leadership challenges.

Yet, while Lincoln’s lawyerly studies of the military art certainly helped prepare him to lead the military as commander in chief, McPherson takes the position that it was only by rolling up his sleeves and getting his hands dirty that Lincoln developed the skills that made him arguably the greatest “war president” in U.S. history.<sup>11</sup> Presented with a string of generals-in-chief and subordinate military leaders who, for a variety of reasons—from old age<sup>12</sup> to

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<sup>1</sup> JAMES M. MCPHERSON, *TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER IN CHIEF* (2008).

<sup>2</sup> *Id.* at 53.

<sup>3</sup> *Id.* at 1.

<sup>4</sup> *Id.* at xvii.

<sup>5</sup> *Id.* at xv.

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<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.*

<sup>10</sup> See U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS app. B, r. 1.1 (1 May 1992). The comments to Rule 1.1 discuss how a lawyer can become competent to provide “adequate representation in a wholly novel field.” *Id.*

<sup>11</sup> MCPHERSON, *supra* note 1, at 4.

<sup>12</sup> *Id.* at 8 (General Winfield Scott).

hemorrhoids<sup>13</sup>—lacked either the competence or the will to carry out the military strategy and operations necessary to win the war, Lincoln had no choice but to frequently take the military reins himself.<sup>14</sup> In order to keep the military on track, he worked tirelessly throughout the war to improve his understanding of military strategy, operations, and tactics. Following battles, Lincoln would often work around the clock reviewing reports from the field and revising his overall military strategy as necessary.<sup>15</sup> He visited his commanders in the field to discuss their operations, sometimes while shots were being exchanged.<sup>16</sup> Lincoln even personally solicited, tested, and ordered the fielding of new weapons and technologies that gave Union forces tactical advantages over the Confederates.<sup>17</sup> While, in theory, Lincoln should have been able to rely on his subordinates to perform these duties, in reality he was often left with the option of either doing them himself or not having them done at all. Hence, *Tried by War*'s corollary lesson for judge advocates is that leadership, like the law, may be more difficult and less glamorous in practice than it is in theory.

## B. It Takes Courage to Act

Although Lincoln viewed himself as “not a specially brave man,”<sup>18</sup> McPherson makes a compelling argument that the President was, in fact, a leader who acted courageously in the face of uncertainty and ambiguity, and who encouraged his subordinates to do the same. The effectiveness of the author's argument lies in his ability to clearly convey to the reader the complexity of the problems Lincoln faced by describing the competing political, military, legal, and moral interests that coalesced at various critical junctures of the Civil War. For example, during the War's infancy in 1861, Lincoln faced the urgent need to slow the rise of the South, to prevent agitators from disrupting military operations in the North, and to rapidly increase the size of the Union Army and Navy so as to be ready to respond to the growing threat from the Confederacy. With Congress out of session and therefore unable to act, and with no legal precedent to follow, Lincoln invoked his “war powers” as President to justify his bold responses to the aforementioned problems.<sup>19</sup> First, he ordered a blockade of Confederate ports.<sup>20</sup> Next, he “authorized General [Winfield] Scott to suspend the writ of

habeas corpus on any ‘military line’ between Philadelphia and Washington.”<sup>21</sup> Finally, Lincoln issued executive orders that called for volunteers to increase the size of the regular army and navy and instructed “the treasury to advance \$2 million to three private citizens in New York to purchase arms and vessels.”<sup>22</sup> Lincoln eventually explained his decision to take these and other legally questionable actions in the following manner:

Was it possible to lose the nation, and yet preserve the Constitution? By general law life *and* limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution through preservation of the nation.<sup>23</sup>

Lincoln would again invoke his “war power” to courageously address the ambiguous issue of how to end slavery. While Lincoln opposed slavery on moral grounds, he believed as late as September of 1861 that he lacked the authority as president to permanently free slaves by executive proclamation.<sup>24</sup> Moreover, he recognized that making freedom for slaves an official objective of the war eliminated any hope of the Confederate states returning peacefully to the Union, and increased the risk of secession by neutral border states.<sup>25</sup> However, by September of 1862 it had become evident to the President “that slave labor sustained the Confederate economy and the logistics of Confederate armies.”<sup>26</sup> Additionally, public opinion in the North began to shift in favor of emancipation as abolitionists made a compelling argument that that Lincoln's “war powers” gave him the authority to seize slaves as “enemy property . . . being used to wage war against the United States.”<sup>27</sup> Ultimately, the combination of this shift in public opinion, the need to strike a heavy blow at the Confederate war machine, and the desire to do what was morally right gave Lincoln the courage to issue a preliminary proclamation on 22 September 1862,<sup>28</sup> and to follow through with the final Emancipation Proclamation on 1 January 1863.<sup>29</sup>

<sup>13</sup> *Id.* at 119 (General George McClellan).

<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Id.* at 41.

<sup>16</sup> *See, e.g., id.*

<sup>17</sup> *Id.* at 191.

<sup>18</sup> *Id.* at 100.

<sup>19</sup> *Id.* at 24.

<sup>20</sup> *Id.* at 23.

<sup>21</sup> *Id.* at 27.

<sup>22</sup> *Id.* at 23–24.

<sup>23</sup> *Id.* at 30.

<sup>24</sup> *Id.* at 60.

<sup>25</sup> *See id.* at 131–32.

<sup>26</sup> *Id.* at 7.

<sup>27</sup> *Id.* at 107–08.

<sup>28</sup> *See id.* at 130–31.

<sup>29</sup> *See id.* at 156–58.

Finally, in the summer and fall of 1864, Lincoln again showed courage in refusing to abandon the causes of emancipation and reunification in spite of intense pressure from a discouraged constituency who saw no promise of a Union victory and who desperately desired an end to the bloody war.<sup>30</sup> Although Lincoln himself was weary of war and in danger of not being reelected to a second term, he never wavered from his position that any peace agreement with the Confederacy must begin with “the restoration of the Union and abandonment of slavery.”<sup>31</sup> In response to the clamor for him to drop emancipation as a prerequisite to peace, Lincoln had the courage to reply: “I should be damned in time and eternity for so doing. The world shall know that I will keep my faith to friends and enemies, come what will.”<sup>32</sup>

Lincoln also went to great lengths to encourage his subordinates to act boldly and courageously in the face of ambiguity and uncertainty. McPherson’s account of Lincoln’s dealings with General George B. McClellan provides numerous examples. The author sums up the leadership challenge McClellan presented for Lincoln in this manner:

Having known nothing but success in his meteoric career, McClellan came to Washington as the Young Napoleon destined by God to save the country. These high expectations paralyzed him. Failure was unthinkable. Never having experienced failure, he feared the unknown. To move against the enemy was to risk failure. So McClellan manufactured phantom enemies to explain his inaction against the actual enemy, and to blame others for that inaction.<sup>33</sup>

Lincoln tried numerous approaches in his efforts to instill in McClellan the courage to ignore the phantoms and destroy the real Confederates in front of him. He sent McClellan a “fatherly letter” to help him overcome his nervousness on the eve of battle and to persuade him that he “must act.”<sup>34</sup> He congratulated McClellan following his victories and urged him onward.<sup>35</sup> He consoled him after his losses and encouraged him to regroup.<sup>36</sup> However, in the end, none of these techniques worked. In the words of General Henry

Halleck, it would have required “the lever of Archimedes” to move McClellan.<sup>37</sup>

As judge advocates, we may find ourselves advising commanders in ambiguous and uncertain conditions. Some, like Lincoln, will want to act boldly, even in the absence of any legal precedent for their proposed courses of action. To those commanders, we owe the courage to be thorough and, if necessary, creative in our search for legal authority to facilitate their actions. In contrast, other commanders, like McClellan, will look to their judge advocates for legal justifications to do nothing, even when something can and ought to be done. In those circumstances, we must remember that the Army is our client, and have the courage to use our advocacy skills to persuade our commanders, as Lincoln tried to persuade McClellan, that: “If we never try, we shall never succeed.”<sup>38</sup>

### III. Strengths and Weaknesses

*Tried by War* is generally the excellent book one would expect from an author of Mr. McPherson’s background. He is an acclaimed historian who has authored, edited and contributed to at least fifty-six works on the Civil War since 1964.<sup>39</sup> McPherson’s books include the *Battle Cry of Freedom*, for which he received the Pulitzer Prize for History in 1989,<sup>40</sup> and *For Cause and Comrades*, which won the Lincoln Prize in 1998.<sup>41</sup> He currently serves as a Professor Emeritus at Princeton University as the George Henry Davis 1886 Professor of American History.<sup>42</sup>

With *Tried by War*, McPherson delivers another Lincoln Prize winner.<sup>43</sup> As he states up front, his purpose for writing this particular Lincoln book was to help fill the relative void of literature “devoted to his role of commander in chief.”<sup>44</sup> McPherson achieves this purpose by limiting the scope of the book to the fifty months beginning with Lincoln’s

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<sup>30</sup> *Id.* at 231.

<sup>31</sup> *Id.* at 234.

<sup>32</sup> *Id.* at 240.

<sup>33</sup> *Id.* at 47–48.

<sup>34</sup> *Id.* at 82–83.

<sup>35</sup> *Id.* at 125.

<sup>36</sup> *Id.* at 99–100.

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<sup>37</sup> *Id.* at 139.

<sup>38</sup> *Id.* at 186.

<sup>39</sup> *McPherson, James M.*, LIBRARY OF CONGRESS ONLINE CATALOG, [http://catalog.loc.gov/cgi-bin/Pwebrecon.cgi?hd=1,11&Search\\_Arg=McPherson%20James&Search\\_Code=NAME%40&CNT=100&PID=XSVtg37fTTMeSn9fVSox5tk54&HIST=0&SEQ=20120611103729&SID=1](http://catalog.loc.gov/cgi-bin/Pwebrecon.cgi?hd=1,11&Search_Arg=McPherson%20James&Search_Code=NAME%40&CNT=100&PID=XSVtg37fTTMeSn9fVSox5tk54&HIST=0&SEQ=20120611103729&SID=1) (last visited June 11, 2012).

<sup>40</sup> *History*, THE PULITZER PRIZES, <http://www.pulitzer.org/bycat/History> (last visited Feb. 7, 2012).

<sup>41</sup> *The Lincoln Prize*, GETTYSBURG COLLEGE, [http://www.gettysburg.edu/civilwar/prizes\\_and\\_scholarships/lincoln\\_prize/previous\\_winners.dot](http://www.gettysburg.edu/civilwar/prizes_and_scholarships/lincoln_prize/previous_winners.dot) (last visited Feb. 7, 2012).

<sup>42</sup> *James McPherson*, PRINCETON UNIVERSITY, [http://www.princeton.edu/history/people/display\\_person.xml?netid=jmcphe](http://www.princeton.edu/history/people/display_person.xml?netid=jmcphe) (last visited Feb. 7, 2012).

<sup>43</sup> MCPHERSON, *supra* note 1.

<sup>44</sup> *Id.* at xvi.

journey to his first inauguration in February 1861<sup>45</sup> and ending with his assassination in April 1865.<sup>46</sup> Throughout *Tried by War*, the author keeps his narrative focused on Lincoln's performance as commander-in-chief. On those occasions McPherson refers to Lincoln's past, he does so briefly and only to the extent necessary to give context to a particular decision Lincoln made or an action he took as commander-in-chief. McPherson logically organizes the book into chapters that coincide with various stages of the war, and the photos and index he includes both add value to the work. Although the book is impeccably researched and relies extensively on primary sources, the quality of McPherson's writing is the book's greatest strength. The masterful way McPherson weaves an endless array of quotes from primary sources into his analysis makes the book read more like a novel than the well-researched treatise it is.

While McPherson's intimate knowledge of his subject matter certainly contributes to the overall quality of *Tried by War*, his familiarity with the Civil War and its leaders also serves to weaken his argument in two ways. First, there are occasions in the book where the author discusses events out of chronological order for no apparent reason.<sup>47</sup> Given that the book is generally organized chronologically, these segments are especially distracting. Second, McPherson's discussions of the Civil War's leaders often read more like biased descriptions of personal acquaintances than objective analyses of historical figures. Those individuals the author likes, such as General Ulysses S. Grant and General William

T. Sherman, he tends to treat with respect. Those he dislikes, however, he tends to caricaturize. Although McPherson's thorough research supports the humorous Jabba-the-Hut-like portrait he paints of the aged and obese General Winfield Scott<sup>48</sup> and the entertaining character assassination he performs on General George McClellan, his disparate treatment of these and other leaders undercuts his stated purpose for writing the book by causing the reader to question the fairness and accuracy of his analysis of Lincoln.

## V. Conclusion

Overall, *Tried by War* delivers a thoughtful examination of Lincoln's performance as commander in chief. While McPherson sometimes presents events out of order and allows his personal biases to seep into his work, he more than makes up for these minor flaws with his thorough research, focused narrative, and elegant prose. In fact, the book's readability makes it ideal for anyone looking for an unimpeccable introduction to Lincoln and the Civil War. However, it is the reader looking to become a better leadership specimen who will most benefit from McPherson's account of Lincoln's struggles. For anyone in that band, the lessons on competence and courage to be gleaned from "The Original Gorilla's" performance as commander in chief make *Tried by War* a must-read.

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<sup>45</sup> *Id.* at 1.

<sup>46</sup> *Id.* at 265.

<sup>47</sup> See, e.g., *id.* at 23–27 (discussing Lincoln's 3 May call for volunteers prior to his 15 April call for militia).

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<sup>48</sup> See, e.g., *id.* at 45.

## 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 (June 2011–September 2012) (<http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
<b>GENERAL</b>		
	61st Judge Advocate Officer Graduate Course	13 Aug – 23 May 13
5F-F1	222th Senior Officer Legal Orientation Course	11 – 15 Jun 12
5F-F1	223d Senior Officer Legal Orientation Course	27 – 31 Aug 12
5F-F70	43d Methods of Instruction	5 – 6 Jul 12

<b>NCO ACADEMY COURSES</b>		
512-27D30	6th Advanced Leaders Course (Ph 2)	9 Jul – 14 Aug 12
512-27D30	1st Advanced Leaders Course (Ph 2)	15 Oct – 20 Nov 12
512-27D30	2d Advanced Leaders Course (Ph 2)	7 Jan – 12 Feb 13
512-27D30	3d Advanced Leaders Course (Ph 2)	7 Jan – 12 Feb 13
512-27D30	4th Advanced Leaders Course (Ph 2)	11 Mar – 16 Apr 13
512-27D30	6th Advanced Leaders Course (Ph 2)	8 Jul – 13 Aug 13

512-27D40	4th Senior Leaders Course (Ph 2)	9 Jul – 14 Aug 12
512-27D40	1st Senior Leaders Course (Ph 2)	15 Oct – 20 Nov 12
512-27D40	2d Senior Leaders Course (Ph 2)	11 Mar – 16 Apr 13
512-27D40	3d Senior Leaders Course (Ph 2)	6 May – 11 Jun 13
512-27D40	4th Senior Leaders Course (Ph 2)	8 Jul – 13 Aug 13

**WARRANT OFFICER COURSES**

7A-270A0	19th JA Warrant Officer Basic Course	20 May – 15 Jun 12
7A-270A1	23d Legal Administrator Course	11 – 15 Jun 12

**ENLISTED COURSES**

512-27D/DCSP	21st Senior Paralegal Course	18 – 22 Jun 12
512-27DC5	38th Court Reporter Course	30 Apr – 15 Jun 12
512-27DC5	39th Court Reporter Course	6 Aug – 21 Sep 12
512-27DC6	12th Senior Court Reporter Course	9 – 13 Jul 12

**ADMINISTRATIVE AND CIVIL LAW**

5F-F22	65th Law of Federal Employment Course	20 – 24 Aug 12
5F-F29	30th Federal Litigation Course	27 – 30 Aug 12

**CONTRACT AND FISCAL LAW**

5F-F10	165th Contract Attorneys Course	16 – 27 Jul 12
5F-F101	12th Procurement Fraud Course	15 – 17 Aug 12

**CRIMINAL LAW**

5F-F31	18th Military Justice Managers Course	20 – 24 Aug 12
5F-F34	42d Criminal Law Advocacy Course	10 – 14 Sep 12
5F-F34	43d Criminal Law Advocacy Course	17 – 21 Sep 12

**INTERNATIONAL AND OPERATIONAL LAW**

5F-F41	8th Intelligence Law Course	13 – 17 Aug 12
5F-F47	58th Operational Law of War Course	30 Jul – 10 Aug 12
5F-F48	5th Rule of Law Course	9 – 13 Jul 12

### 3. Naval Justice School and FY 2011–2012 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.

<b>Naval Justice School Newport, RI</b>		
<b>CDP</b>	<b>Course Title</b>	<b>Dates</b>
0257	Lawyer Course (030)	30 Jul 12 – 5 Oct 12
900B	Reserve Legal Assistance (020)	24 – 28 Sep 12
850T	Staff Judge Advocate Course (020)	9 – 20 Jul 12 (San Diego)
786R	Advanced SJA/Ethics (010)	23 – 27 Jul 12
850V	Law of Military Operations (010)	4 – 15 Jun 12
961J	Defending Sexual Assault Cases (010)	13 – 17 Aug 12
525N	Prosecuting Sexual Assault Cases (01)	13 – 17 Aug 12
03TP	Basic Trial Advocacy (020)	17 – 21 Sep 12
748A	Law of Naval Operations (020)	17 – 21 Sep (Norfolk)
748B	Naval Legal Service Command Senior Officer Leadership (010)	23 Jul – 3 Aug 12
0258 (Newport)	Senior Officer (060) Senior Officer (070)	13 – 17 Aug 12 24 – 28 Sep 12
2622 (Fleet)	Senior Officer (070) Senior Officer (080) Senior Officer (090) Senior Officer (100) Senior Officer (110)	9 – 12 Jul 12 (Pensacola) 30 Jul – 2 Aug 12 (Pensacola) 30 Jul – 2 Aug 12 (Camp Lejeune) 6 – 10 Aug 12 (Quantico) 10 – 13 Sep 12 (Pensacola)
03RF	Legalman Accession Course (030)	11 Jun – 24 Aug 12
07HN	Legalman Paralegal Core (020) Legalman Paralegal Core (030)	22 May – 6 Aug 12 31 Aug – 20 Dec 12
932V	Coast Guard Legal Technician Course (010)	6 – 17 Aug 12
846L	Senior Legalman Leadership Course (010)	23 – 27 Jul 12
08XO	Paralegal Ethics Course (030)	11 – 15 Jun 12
4040	Paralegal Research & Writing (030)	23 Jul – 3 Aug 12
627S	Senior Enlisted Leadership Course (Fleet) (090)	17 – 19 Sep 12 (Pendleton)

	Senior Enlisted Leadership Course (Fleet) (100)	19 – 21 Sep 12 (Norfolk)
NA	Iraq Pre-Deployment Training (020)	26 – 28 Jun 12
	Legal Specialist Course (030)	3 May – 20 Jul 12
NA	Legal Service Court Reporter (020)	10 Jul – 5 Oct 12
NA	TC/DC Orientation (010) TC/DC Orientation (020)	30 Apr – 4 May 12 10 – 14 Sep 12

<b>Naval Justice School Detachment Norfolk, VA</b>		
0376	Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	11 – 29 Jun 12 9 – 27 Jul 12 12 – 31 Aug 12
0379	Legal Clerk Course (070) Legal Clerk Course (080)	16 – 27 Jul 12 20 – 31 Aug 12
3760	Senior Officer Course (050)	10 – 14 Sep 12

<b>Naval Justice School Detachment San Diego, CA</b>		
947H	Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	11 – 29 Jun 12 23 Jul – 10 Aug 12 20 Aug – 7 Sep 12
947J	Legal Clerk Course (070) Legal Clerk Course (080)	18 – 29 Jun 12 27 Aug – 7 Sep 12
3759	Senior Officer Course (060)	17 – 21 Sep (Pendleton)

#### 4. Air Force Judge Advocate General School Fiscal Year 2012 Course Schedule

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

<b>Air Force Judge Advocate General School, Maxwell AFB, AL</b>	
<b>Course Title</b>	<b>Dates</b>
Paralegal Apprentice Course, Class 12-04	30 Apr – 20 Jun 2012
Staff Judge Advocate Course, Class 12-A	11 – 22 Jun 2012
Law Office Management Course, Class 12-A	11 – 22 Jun 2012
Paralegal Apprentice Course, Class 12-05	25 Jun – 15 Aug 2012
Will Preparation Paralegal Course, Class 12-B	25 – 27 Jun 2012

Judge Advocate Staff Officer Course, Class 12-C	9 Jul – 7 Sep 2012
Paralegal Craftsman Course, Class 12-04	9 Jul – 22 Aug 2012
Environmental Law Course, Class 12-A	20 – 24 Aug 2012
Trial & Defense Advocacy Course, Class 12-B	10 – 21 Sep 2012
Accident Investigation Course, Class 12-A	11 – 14 Sep 2012

## 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  
1815 H Street, NW, Suite 408  
Washington, DC 20006-3697  
(202) 638-0252

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 2013 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2012 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Baucum Fulk, commercial telephone (434) 971-3357, or e-mail [baucum.fulk@us.army.mil](mailto:baucum.fulk@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](http://www.clereg.org) (formerly [www.cleusa.org](http://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) 2012 RC On-Site Legal Training Conferences

Date	Region, LSO & Focus	Location	Supported Units	POCs
20 – 22 Jul	Mid-Atlantic Region 139th LSO  Focus: Rule of Law	Nashville, TN	134th LSO 151st LSO 10th LSO	CPT James Brooks james.t.brooks@us.army.mil (615) 231-4226
17 – 19 Aug	Northeast Region 153d LSO  Focus: Client Services	Philadelphia, PA (Tentative)	3d LSO 4th LSO 7th LSO	MAJ Jack F. Barrett john.f.barrett@us.army.mil (215) 665-3391

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

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

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

### **4. The Army Law Library Service**

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

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







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