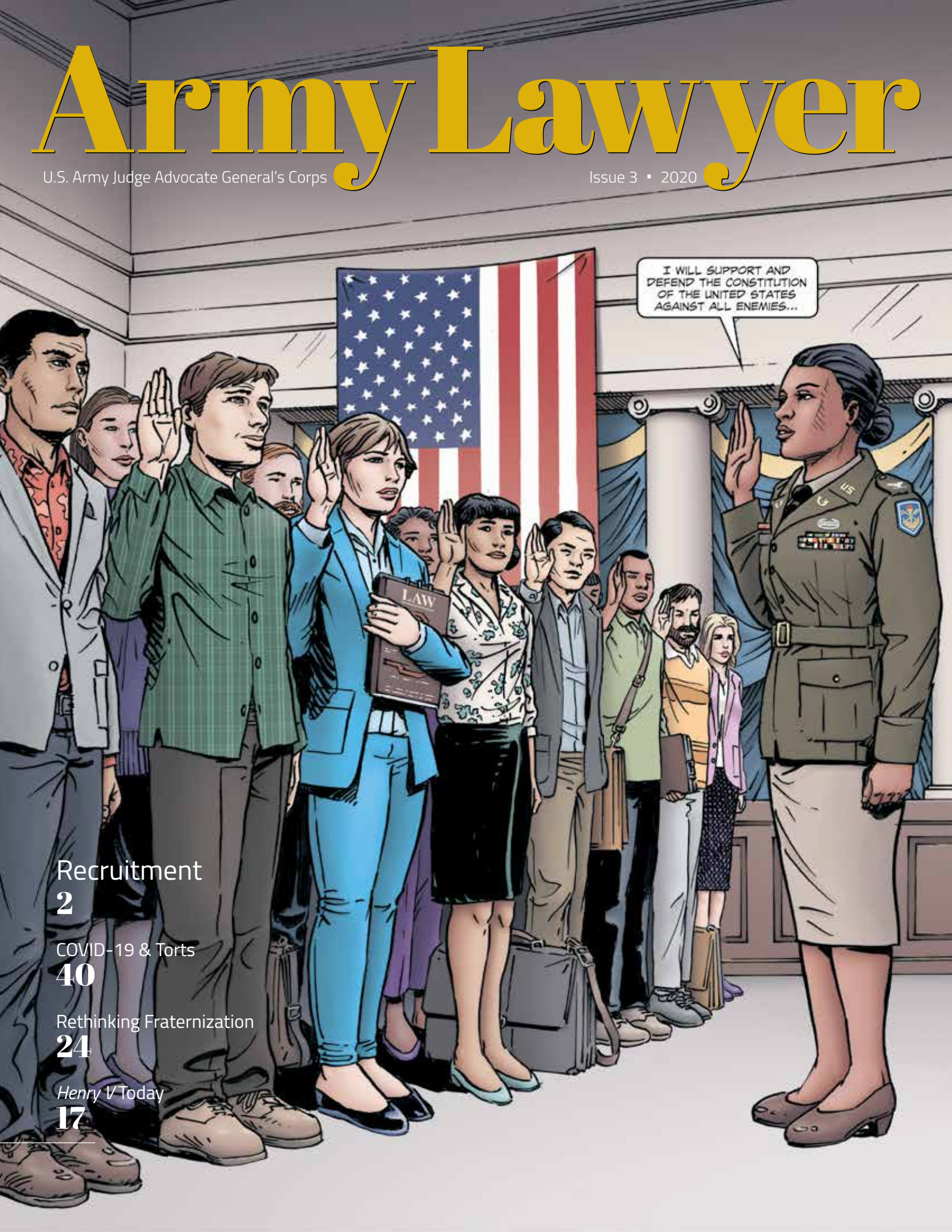
# Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 3 ▪ 2020

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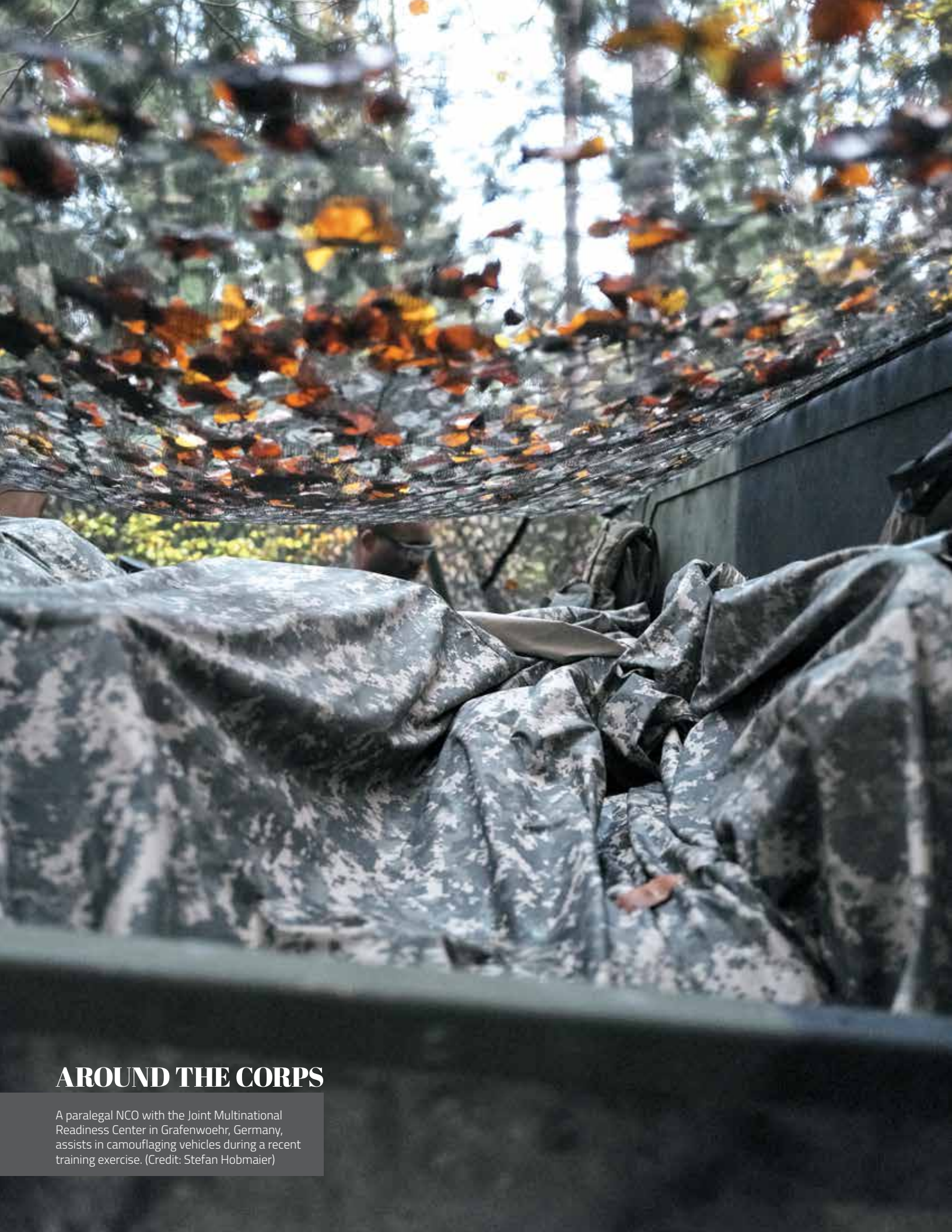

## AROUND THE CORPS

A paralegal NCO with the Joint Multinational Readiness Center in Grafenwoehr, Germany, assists in camouflaging vehicles during a recent training exercise. (Credit: Stefan Hobmaier)

# Army Lawyer

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Issue 3 • 2020



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*The Army Lawyer* (ISSN 0364-1287, USPS 490-330) is published six times a year by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia for the purpose of education and performance in legal responsibilities.



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*The Army Lawyer* articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed at https://tjaglcspublic.army.mil/tal.

Articles may be cited as: [author's name], [article title in italics], Army Law., [date], at [first page of article], [pincite].


On the cover: A graphic image of a swearing-in ceremony of new judge advocates. (Credit: Rob Van Hook, Bob Hardin, Joe Panico and Pete Carlsson)

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(Credit: istockphoto.com/z_wei)

# Court Is Assembled

## The War for Talent

*By Major General Stuart W. Risch and Lieutenant Colonel Aaron L. Lykling*

**Right now, there is a law student out there—one who is driven to succeed and to serve a higher calling,** but wondering where to begin. Throughout his or her life, this student has been a leader—perhaps in sports, in school, or among peers. He or she is a trusted confidant, a loyal teammate, a problem solver, and creative thinker who listens intently, communicates clearly, and radiates calm in stressful situations. This person is a lifelong learner and an eclectic reader, eager to grow as a leader and a lawyer. Maybe that person is you, sitting here, right now, reading this edition of *The Army Lawyer*.

If so, thank you for picking up this issue. We hope you enjoy reading it and learning more about who we are and what we do. If you are anything like the 10,000-plus judge advocates, civilian attorneys, paralegals, paraprofessionals, and legal administrators serving worldwide in our Corps, we know you will find the Judge Advocate General's Corps (JAG) Corps a dynamic and diverse team—a place where you will have significant responsibilities from day one, and be supported at every turn by senior Soldiers and Civilians. That's life in the Army JAG Corps—the oldest, biggest, and best law firm in the nation.

For those reading this issue who have served or are currently serving in our Corps, you know the importance we place on stewardship—the responsibility to care for our Regiment, our teammates, and ourselves.[1] Stewardship also requires attracting and preparing the next generation of JAG Corps leaders to sustain our legacy of providing principled counsel and premier legal support to the best clients in the world. Recruiting is not just the responsibility of the Judge Advocate Recruiting Office or the field screening officers interacting with law students and attorneys across the Nation. Every member of our Regiment is a recruiter—scouting talent, sharing the JAG Corps's story, and building our bench to shape our future. Every engagement is an opportunity to recruit, whether at a law school, a Reserve Officer Training Corps (ROTC) unit, or during a field exercise.

Think back to why you joined the JAG Corps. Perhaps you wanted to practice at the forefront of national security law, advising commanders on how to employ emerging technologies in ways that are ethical and comply with the law of armed conflict.[2] Maybe you wanted to gain courtroom experience early in your career, prosecuting courts-martial or zealously defending Soldiers accused of crimes. Service to country may have been your main motivation; or perhaps you liked the idea of practicing in all our diverse legal functions, getting the opportunity to travel the globe, or deploying in support of operations. Whatever your reasons for joining the JAG Corps, we encourage you to share your story with those who have the potential to thrive as dual professionals—as Army Soldiers and leaders, as well as attorneys. It's an awesome opportunity and responsibility.

This issue of *The Army Lawyer* is dedicated to recruitment. Attracting and retaining the right talent—professionals with the right mix of integrity, grit, confidence, humility, communication skills, and leadership potential—is essential to the enduring success of our Corps. We have recently undertaken a revision of our recruiting strategy and developed a campaign plan in recognition that we, like the rest of the Army, are in a war for talent. We look forward to validating that strategy at our first-ever recruiting summit. We are excited to share some of what we learn from this summit in the pages of this magazine, and in a variety of other forums, in the upcoming months. **TAL**

*MG Risch is the Deputy Judge Advocate General. LTC Lykling is currently assigned as the Chief, Judge Advocate Recruiting Office, Fort Belvoir, Virginia.*

### Notes

1. Stewardship is one of our Corps's Constants, along with substantive mastery, servant leadership, and the spirit behind each of them—principled counsel. We define principled counsel as providing professional advice on law and policy, grounded in the Army Ethic and an enduring respect for the rule of law. That advice must be effectively communicated with appropriate candor and moral courage, so that leaders can make fully informed decisions. TJAG and DJAG Sends vol. 40-16, Principled Counsel—Our Mandate as Dual Professionals (Jan. 9, 2020).

2. As retired General Stanley McChrystal has explained, judge advocates play an indispensable role in shaping contemporary military operations. General Stanley A. McChrystal, foreword to U.S. Military Operations: Law, Policy, and Practice, at xi-xii (Geoffrey S. Corn et al eds., 2016) ("Judge advocates contribute to strategic, operational, and tactical success by ensuring commanders understand and integrate applicable law and policy into each stage and aspect of an operation. In today's fast-paced, often fluid operating environments, this is vital.").

# News & Notes

**Photo 1**
On 28 February 2020, MSG Dan Hopkins and members of the 82d Airborne Division OSJA gathered to congratulate the most recent All-American graduates of the Fort Bragg Noncommissioned Officers Academy Basic Leader's Course. The graduates (pictured center left to right) are SPC(P) Jacob Strickland of HHBn, 82d ABN DIV and SPC(P) Tiffany Medina of 82d ABN DIV Combat Aviation Brigade. (Not pictured: CPL(P) Jordan Reyes of 3d BCT, 82d ABN DIV

**Photo 2**
SPC David Willey congratulates SPC Mark Halstead on a job well done upon the completion of SPC Halstead's Basic Leader Course graduation ceremony. SPC Halstead exceeded the standard and successfully graduated on the Commandant's list.

**Photo 3**
On 21 February 2020, the USARAF/SETAF OSJA completed their first Villa La Rotunda run. The Rotunda (in the background) was completed in 1592 and was designed by Andria Palladio, the architect whose designs were part of the inspiration for Thomas Jefferson when he was building Monticello just outside our beloved Charlottesville.

**Photo 4**
Members of the III Corps Military Justice Team attend an ACCA Outreach Oral Argument at the University of Texas School of Law in Austin, Texas (from left to right: LTC Shaun Lister, CPTs Callin Kerr, Cadman Kiker, Jason Otano, Emily Ervin, and Erik Thomas, and 1LT Connor Kohlscheen).

**Photo 5**
CDR Jonathan Shumate and MAJ Vo-Laria Brooks, both from CLAMO, served as panel members for a discussion entitled, "Use of the Military in Disaster Relief Operations" at the University of North Carolina School of Law's Festival of Legal Learning. Joining CDR Shumate and MAJ Brooks are LTC (Ret.) John Brooker and Dean Martin Brinkley, UNC School of Law.

**Photo 6**
Members of the XVIII Airborne OSJA prepare for a jump. From left to right: CW3 Chris Penfield, LTC Nagy Chelluri, LTC Chris Ford, SGM Anthony Couch, SPC Nicolas Rodriguez, CPT Trevor Harris, CPT Rob Jones, CPT Jacqueline Coplen.

**Photo 7**
On 12 February 2020, SGT(P) Luis Arias was recognized as the 15th Signal Brigade, Cyber Center of Excellence's NCO of the Quarter. He competed amongst NCOs in the rank of sergeant through sergeant first class. SGT Arias will compete for the NCO of the Year title later this year. Great job representing yourself, the Fort Gordon OSJA, and the JAG Corps.

**Photo 8**
The JAG Corps was once again well-represented at the annual Army-Navy Hockey game played at Capital One Arena in Washington, DC. From left to right: CPT Marc Emond (Government Appellate Division, USALSA), CPT Alex Boettcher (Fort Belvoir OSJA), MAJ Jack Einhorn (Defense Appellate Division, USALSA), SSG Michael Crocker (151st LOD), and COL (Ret.) Mike Mulligan. In a fairly physical matchup, all attorneys and paralegals escaped the game with no black eyes or lost teeth, and there were only two penalties attributed to the group. Surprising to no one who knows him, both penalties (roughing, goaltender interference) were simultaneously given to CPT Boettcher.

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(Credit: istockphoto.com/RichVintage)

# Azimuth Check

## Everyone Is a Recruiter

*By Colonel Steven M. Ranieri*

*"What about being a lawyer in the Army?"* He asked me. *"I didn't know you can do that,"* I replied. *"It wasn't on the preference list that my ROTC instructor showed us."* Then he said to me, *"I know someone you should talk to."*

**I was notified in 2012 of my assignment as Chief of the Judge Advocate Recruiting Office (JARO).** I wondered how my prior military service prepared me for the assignment. Although I served as a field screening officer (FSO) many years earlier, I guessed I knew little about how the Judge Advocate General's (JAG) Corps actually recruited and appointed new judge advocates. I guessed right. I quickly had to learn the basics of force management, the rules regarding officer appointment and accession, and the complexity of medical qualification. Above all, I had to learn how the JAG Corps "recruited" potential candidates. I eventually came to understand that the fundamental aspect of recruiting is person-to-person conversation—judge advocates recruit other judge advocates. Moreover, what I truly came to appreciate is that this personal discourse is not limited to the formal recruiting settings. Rather, it occurs informally and, often, unexpectedly.[1] We are all recruiters—so long as we are willing to look for and take advantage of these opportunities.

The JAG Corps recruits because it needs to continuously add new lawyers to our firm to maintain a healthy force structure. In this way, we are not unlike the rest of the legal community. Yet, we differ from our civilian counterparts significantly because we are constrained by the military's officer personnel management system.[2] "Lateral hires" are a useful tool for civilian law firms to transplant expertise and experience directly where it is needed. But unlike a civilian law firm, it is difficult to add mid-career attorneys to our Corps.[3] Consider the Funded Legal Education Program (FLEP). Officers accessed through FLEP provide valuable mid-career leadership and experience. The JAG Corps carefully manages their early career progression to ensure the individual FLEP officer's legal competence catches up to their peers, who have been practicing attorneys and judge advocates for several years. Conversely, using direct appointments to access attorneys with ten to fifteen years of experience as majors or lieutenant colonels is impracticable. This is because these lateral hires would be significantly unprepared as officers and military leaders. Appointing them as junior-grade officers is the only option that allows the JAG Corps to develop them as officers and leaders. However, experienced attorneys are not likely to be interested in joining the JAG Corps in an entry-level position and seldom apply. Thus, we rely almost exclusively on recent law school graduates to offset losses from resignations and retirements and feed entry-level officers into our ranks to later be promoted. These candidates comprise the vast majority of our new judge advocates.[4]

Finding future judge advocates continues to be harder than in past decades. Law school enrollment drastically reduced in the 2010s. Rising steadily since the 1960s, law school enrollment peaked in 2010, with 52,404 first-year students entering school.[5] By 2015, first-year enrollment dropped to 37,056.[6] After several years of declining interest in legal education following the 2008 recession, the number of applicants and enrolled students at American Bar Association-accredited law schools is finally increasing.[7] However, the current numbers are far below the peak year of 2004. Enrollment was driven down by tuition increases, declining salaries, and an overall

contraction of the legal industry.[8] Law schools struggled, and some failed. The result was fewer law students becoming lawyers and, as an understandable consequence, fewer law students becoming eligible to join the JAG Corps.

The JAG Corps felt the repercussions. In fiscal year 2014, 827 applicants applied to the Corps, and we selected approximately nine percent.[9] In fiscal year 2019, 512 applicants applied, and we selected nearly thirty-four percent.[10] While one cannot wholly attribute a decline in applications to changes in the economy and law school admissions, they are certainly the substantial factor.[11]

The JAG Corps employs all the formal methods of recruiting. We publish brochures, post on social media, and send judge advocates to conferences. Primarily, FSOs travel to every accredited law school in the country to conduct outreach and interview students. Yet, these formal recruiting methods are far from adequate to meet our recruiting requirements. Just as significant is each JAG Corps member's efforts to connect to potential candidates. As agents of our law firm, we are the best ambassadors of our brand. We understand our practice and culture because we have experienced them. For that reason, we are more genuine than any brochure or social media post. Through person-to-person discourse, we can spark or fuel someone's interest in our firm far better than any brochure. Personal interactions allow us to connect to their interest through relating our personal story of military service.

Consider this experience. It was the summer of 1994. I was spending three weeks at Fort Carson shadowing a platoon leader. I chose a quartermaster platoon because it was the only position open at Fort Carson. I was twenty-three—I just wanted to spend my summer in Colorado Springs. I was not interested in being a quartermaster officer.

One day, I was speaking to a first lieutenant in the motor pool. He was my sponsor during my Reserve Officer Training Corps (ROTC) cadet troop leader training. "So why did you choose to be a quartermaster officer? Is it something you really wanted to do?" I asked. "Well, it was third on my list of branches," he replied. "My undergraduate degree is in business, so I thought it made sense. I'm not sure how long I'll stay in the Army, and maybe this will help me when I leave . . . . What are you going to list as your preferences?"

"I'm not sure," I replied. "I was a signal corps Soldier when I was enlisted. I think I'm like you. I'll do four years and then leave. I'm actually interested in being a lawyer. I'll probably get out and go to law school."

"What about being a lawyer in the Army?" He asked.

"I didn't know you can do that. It wasn't on the preference list that my ROTC instructor showed us."

"I know someone you should talk to," he said. "My wife is a judge advocate. I'm sure she'll make time to talk with you. I'll give her a call, and I'll take you by her office."

I visited the Fort Carson legal assistance office later that afternoon. The specifics of the conversation escape me; however, I recall learning that I needed to talk with my ROTC instructor about something called an educational delay. A brochure would have been nice. An ROTC instructor informed about how to help his cadets be judge advocates would have been great, too. But I received what I needed—a judge advocate willing to take the time to meet and talk about her experiences. I figured out the rest.

Fifteen years later, I was having dinner at the house of a fellow division staff officer shortly after arriving at Fort Stewart. He introduced me to his children, and, as expected, the conversation turned to what the children might do after they graduated high school. One of his sons stated that he is attending college on an ROTC scholarship. He asked me several questions about being a judge advocate and eventually disclosed his interest in the law. I told him, "I know someone you should talk to." He came by the office, met some of the captains, and observed a court-martial. He spent the next summer as an extern at our office. He plans to apply for an educational delay when choosing his branch next year.

Our current career model tasks all of us to develop expert and versatile judge advocates. Leaders do this by smartly and deliberately managing talent. Yet, when our senior leaders remark that this talent management process allows the Corps to grow our future leaders, they are certainly implying that the seeds to grow talented officers are sown through recruiting. We must find and recruit the very best, if we care about the long-term success of our Corps. It is vital that everyone is a recruiter. **TAL**

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*COL Ranieri is currently the Staff Judge Advocate, 3d Infantry Division, Fort Stewart, Georgia.*

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## Notes

1. I attended a minor league baseball game in Allentown, Pennsylvania, a few years ago. The man sitting next to me asked me where I was from and what I did for a living. We spoke during the game about our families, our shared interest in baseball, and our careers. He mentioned that he was a judge in Philadelphia and thought that his law clerks might be interested in learning about the Judge Advocate General's Corps. One of his law clerks contacted me a few weeks later. The structure of our recruiting process provides numerous formal opportunities to discuss our profession. Staff Judge Advocates are charged with interviewing officers applying for the Funded Legal Education Program, counseling summer interns, and liaising with local Reserve Officer Training Corps battalions. The informal opportunities are just as prevalent.

2. Enacted in 1980, the Defense Officer Personnel Management Act (DOPMA) created a rigged framework for officer qualification, appointment, and promotion. *See* 10 U.S. Code §§ 531, 532 (2010).

3. Congress recently reformed DOPMA in several ways, to include providing enhanced authority for the Army to grant original appointments to officers in grades up to O6. John S. McCain National Defense Authorization Act of 2019, Pub. L. No. 115-232, § 502, 132 Stat. 1739 (2018).

4. Recent law school graduates comprise nearly seventy to seventy-five percent of newly appointed judge advocates. *See* The JAG Corps 2020 Recruiting Campaign Plan (Mar. 2020) (unpublished) (on file with author) [hereinafter Recruiting Campaign Plan].

5. *ABA Required Disclosures: Standard 509 Information Report for 2019*, ABA Section of Legal Education and Admission to the Bar, http://www.abarequireddisclosures.org/Disclosure509.aspx (last visited Apr. 11, 2020).

6. *Id.*

7. Am. Bar. Ass'n, ABA Profile of the Legal Profession (2019), https://www.americanbar.org/content/dam/aba/images/news/2019/08/ProfileOfProfession-total-hi.pdf.

8. Benjamin H. Barton, Fixing Law Schools: From Collapse to the Trump Bump and Beyond (2019).

9. Recruiting Campaign Plan, *supra* note 4.

10. *Id.*

11. Steve Nelson, *Why the War for Talent Is Escalating for Law Firms,* Attorney at Work (Feb. 26, 2019), https://www.attorneyatwork.com/why-the-war-for-talent-is-escalating-for-law-firms/.

From left to right: MAJ Pearl Sandys, LTC Hana Rollins, COL Susan McConnell, MAJ Sara Tracy, and SSG Dana Song. (Credit: Jason Wilkerson/TJAGLCS)

# Lore of the Corps

## Five Korean-American Female Soldiers at TJAGLCS

### Profiles in Paths to Service

*By Fred L. Borch III*

While virtually all men, women, and children living in the United States have ancestors who immigrated here, an unusual coincidence has brought five American women with Korean ancestry to The Judge Advocate General's Legal Center and School (TJAGLCS). Twenty-five percent of active component judge advocate strength is composed of women, while female paralegal specialists constitute about thirty-five percent of active component military occupational specialty (MOS) 27D. Given that Soldiers come from a multitude of racial and ethnic backgrounds, numbers alone make it highly unlikely that TJAGLCS would have five women assigned here with connections to the Land of the Morning Calm.[1] In alphabetical order, the five individuals are: Colonel (COL) Susan K. McConnell; Lieutenant Colonel (LTC) Hana A. Rollins; Major (MAJ) Pearl K. Sandys; Staff Sergeant (SSG) Dana M. Song; and MAJ Sara M. Tracy.

**COL Susan K. McConnell**

Born to South Korean immigrants in New York, COL McConnell grew up hearing her father tell entertaining stories about being a Korean Augmentation to the United States Army (KATUSA) in the South Korean Army.[2] As the daughter of naturalized American citizens who gave their children every opportunity to succeed, it's no surprise that this immensely patriotic woman wanted a career in public service. It was not until her last year in law school, after she signed up for an interview with the field screening officer, that she had any inkling to join the military. Colonel McConnell was directly commissioned as a judge advocate in 2000 and has served in a variety of assignments. Today, COL McConnell is the Chair of the National Security Law Department at TJAGLCS.

### LTC Hana A. Rollins[3]

The path taken to the JAG Corps by LTC Hana A. Rollins was different from that of COL McConnell. Born and raised in the small village of Tteukori, Korea, she attended Korean schools until her mother married her American step-father and the family moved to the United States. Lieutenant Colonel Rollins was twelve years old and struggled to learn and adapt to a new culture, cuisine, language, and friends.

"My road to the U.S. Army," writes LTC Rollins, "began long before I became a citizen." As a small child, she witnessed American Soldiers on military exercises and appreciated what these men "were doing for a small country like Korea." Rollins remembered "these Soldiers with their faces painted, covered in sweat and dirt" and, as her adoptive father was an infantry officer, this "planted a seed" in her to serve. Lieutenant Colonel Rollins joined the Corps after the 11 September 2001 attacks. She "wanted, in a small way, to do [her] part [to] repay a country that [had] given [her] many opportunities." Rollins is now the Vice Chair of the Criminal Law Department at TJAGLCS.

### MAJ Pearl Sandys[4]

Major Pearl Sandys, like COL McConnell, was born on American soil (Wisconsin) to Korean parents. Major Sandys's parents met at the University of Wisconsin while her mother was earning her graduate degree and her father was a doctoral research fellow. Major Sandys's family name is "Kim," and her parents gave her "Jinjoo" as a middle name, which translated into English means "Pearl."

Because her parents moved the family back and forth between two countries, MAJ Sandys spent some of her pre-high school years in Korea. She met American veterans of the Korean War and "always wondered why they sacrificed their youth to fight for democracy in a country [Korea] they had no connection to." After being an exchange student in China during law school, MAJ Sandys developed a greater appreciation for the First Amendment and realized what a privilege it is to be a U.S. citizen. She joined the Corps because "wearing the uniform is a way of showing gratitude to Korean War veterans, and [she] certainly would not be where [she is] if it was not for them." Today, MAJ Sandys is the Editor-in-Chief of the *Military Law Review* and is an assistant professor in the Administrative and Civil Law Department at TJAGLCS.

### SSG Dana K. Song

Born and raised in Bronx, New York, SSG Dana K. Song lived in the United States until she was ten years old, when her father moved the family back to South Korea for a new job. Staff Sergeant Song's parents placed her in a Korean school so that she would learn the culture and the language, and she completed third through eighth grades in Korea. Her family moved back to the United States after SSG Song completed middle school to prepare her for college and a future in America.

After graduating from the University of California-Davis in 2010, SSG Song enlisted as a paralegal specialist MOS 27D. Originally, she joined the Army because her two brothers were going to join and she wanted to be a "part of them." Her grandfather encouraged her to enlist because he believed that this would be the best way for her to learn how to be a leader. Today, SSG Song is a small group leader in the Noncommissioned Officer Academy at TJAGLCS.

### MAJ Sara M. Tracy[5]

Born in Okinawa, where her Air Force father was stationed at the time, MAJ Sara M. Tracy joined the military for two reasons. First, her father was a pilot who flew search and rescue missions, so she grew up valuing military service. Second, MAJ Tracy recognized the good that the U.S. military has done for the South Korean people and that "her Korean roots played a large role in her desire to serve." Her grandmother and her family were forced to flee their homes when the North Koreans invaded in June 1950, and her grandmother told stories of surviving on discarded food rations left behind by American Soldiers in Korean rice paddies. These, and other stories of suffering, made MAJ Tracy appreciate the importance of the American military in the lives of Koreans and those of Korean ancestry.

After graduating from the U.S. Military Academy in 2005, MAJ Tracy attended law school on the Funded Legal Education Program before leaving the Signal Corps for the JAG Corps. She serves "for the people, the camaraderie, and for the greater sense of purpose that the Army gives [her]." Today, MAJ Tracy is the Vice Chair in the Contract and Fiscal Law Department at TJAGLCS.

### The Five Korean-American Soldiers of TJAGLCS

Why is the presence of these five Korean-American women in Charlottesville significant? First, it shows that the Corps is an increasingly diverse entity. Second, the brief biographical sketches of each individual illustrate that—despite having Korean ancestry in common—their lives as Americans were different. Finally, with ranks ranging from staff sergeant to major to lieutenant colonel to colonel, all five have made their own paths to where they are in the Corps. **TAL**

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*Mr. Borch is the Regimental Historian, Archivist, and Professor of Legal History at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia.*

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### Notes

1. While there are several explanations, the most likely is that Korea is known as the "Land of the Morning Calm" because of the Choson dynasty that ruled the Korean peninsula in the fifteenth century. *See* Percival Lowell, Choson; A Land of the Morning Calm, A Sketch of Korea 6-7 (Ticknor & Co. 1886), http://raskb.com/udenlibrary/disk1/53.pdf. The word "Chosun" translates to the "land of morning calm." *Id.*

2. Eighth Army Pacific Visitors, *KATUSA Soldier Program*, 8th Army, https://8tharmy.korea.army.mil/site/about/katusa-soldier-program.asp (last visited Apr. 17, 2020). The Korean Augmentation of the United States Army (KATUSA) was an emergency program created by the U.S. Far Eastern Command to overcome manpower shortages early in the Korean War. *Id.* Initially, between 30,000 and 40,000 Republic of Korea (ROK) recruits were incorporated into the 24th and 25th Infantry Divisions and the 1st Cavalry Division in Korea and the 7th Infantry Division in Japan. *Id.* The ROK government paid and administered the KATUSA recruits, but they received U.S. rations and equipment. *Id.* By the end of the Korean War, almost 24,000 KATUSA soldiers were serving with U.S. units. *Id.* When Colonel McConnell's father was a resident in Korea, he was a KATUSA soldier. Today, the KATUSA is a branch of the ROK Army and consists of drafted Korean citizens who are augmented to the Eighth U.S. Army. *Id.*

3. E-mail from Lieutenant Colonel Hana Rollins to author (Feb. 4, 2020) (on file with author).

4. E-mail from Major Pearl Sandys to author (Jan. 30, 2020) (on file with author).

5. E-mail from Major Sara Tracy to author (Apr. 17, 2020) (on file with author).

1SG Charlene Crisp, left, and 1SG Cierra Caldwell, right, are the first female First Sergeant duo at TJAGLCS. 1SG Caldwell is the senior NCO in the LCS' student detachment, and 1SG Crisp is the deputy commandant of the NCOA.

# First Female First Sergeant Duo at TJAGLCS

*By Fred L. Borch III*

For the first time in Regimental history, there are two female First Sergeants (1SGs) at The Judge Advocate General's Legal Center and School (TJAGLCS): 1SG Cierra J. Caldwell at the Student Detachment and 1SG Charlene M. Crisp at the Noncommissioned Officer Academy (NCOA). While there have been female 1SGs previously at TJAGLCS—like Angela Moore, who was the first female 1SG at the NCOA—this is the first occasion where two female 1SGs have been present in Charlottesville at the same time. Their careers as Soldiers are worth examining because they are models to emulate; but, the assignment of 1SGs Caldwell and Crisp is also important because it reflects the drastic improvement in opportunities for women in uniform in the Corps and the Army.

### 1SG Cierra J. Caldwell[1]

Born and raised in St. Charles, Missouri, 1SG Caldwell joined the Army while she was a junior in high school, just three months after she turned seventeen years old. When she was a freshman, her history teacher invited two Army recruiters to talk to the class and—after hearing what the

Soldiers had to say and seeing the videos they showed—Cierra "knew the military was for [her]." She liked the idea of travelling, wanted structure, and "wanted to be a part of a team much larger than what [her] hometown had to offer."

While 1SG Caldwell was convinced that the Army was her future, it took her three months to convince her mother to allow her to enlist. When her mother finally gave her permission, Cierra enlisted in the Army Reserve; she chose to enlist in military occupational specialty (MOS) 27D as a paralegal specialist rather than choose an engineer MOS that would have taught her how to build bridges.

After going full-time active duty in March 2005, Caldwell decided to make soldiering her career because of the people. "I have built friendships," she commented, "with people I never would have met had it not been for the JAG Corps and the Army." She values the relationships she has with peers, subordinates, and her leaders. As she puts it, "I am here for the long haul and will stay until I cannot." Given these sentiments, it makes sense that 1SG Caldwell was chosen to be the senior NCO in the Student Detachment, where she is tasked with ensuring that the Corps's newest uniformed attorneys start off their time as judge advocates in the right direction.

### 1SG Charlene Crisp[2]

Just as 1SG Caldwell had to convince her mother to let her enlist before she was eighteen years old, 1SG Charlene Crisp also had to have the consent of her mother to enlist in the Army at age seventeen—as an aircraft electrician. Crisp "sought the challenge and structure that the Army provided." But she also was sold on joining the Army because of the skills she would learn, experiences she would gain, and places she would travel.

While stationed at Fort Campbell, Kentucky, then-Sergeant (SGT) Crisp began doing "on the job training," or OJT, with now-Master Sergeant (retired) Dawn Byrnes—also an MOS 27D Soldier. Crisp decided that she loved MOS 27D because "it was complex and always changing," and she "fell in love with the JAG Corps because of how it takes care of its people." Consequently, when it was time to re-enlist, SGT Crisp declined a bonus to stay in aviation and reclassified as a paralegal NCO in 2007. She has no regrets because she is now "where [she is] supposed to be."

First Sergeant Crisp was recently selected to attend the Sergeants Major Academy, so her future as an NCO is a bright one. As she puts it, "I plan to keep bringing my best to make the Corps proud . . . I'll know when I am done, but I feel like I am just getting started." Given this attitude, the selection of Charlene Crisp to serve as the Deputy Commandant, NCOA, makes perfect sense.

### A Tale of Two Genders

Why is the presence of two female 1SGs at TJAGLCS significant? In 1972, the Army was gender segregated, and only about one percent of all Soldiers were female. While gender segregation officially ended with the dissolution of the Women's Army Corps in 1978, it was not until after the Gulf War of 1991 that opportunities for women Soldiers increased beyond those traditionally thought to be appropriate for females in uniform. Combat aviation positions were opened up to women in 1993, but this was only a start. It took another twenty years before then-Secretary of Defense Leon Panetta removed the ban on women being assigned to units below the brigade level whose primary mission was to engage in direct combat. Not until 2015—five years ago—was Ranger school opened to female Soldiers. Only recently are women able to qualify in MOS 11B, Infantry.

When one remembers that the active Army is—still—only about fifteen percent female today, simply on the basis of numbers alone, getting to the top of the enlisted ranks in any MOS remains a challenge for women. Even in MOS 27D, which is roughly thirty-five percent female, getting to the top of the pyramid as a female paralegal specialist is no easy task.

Additionally, the Army is a traditional institution, in which change is incremental rather than revolutionary. Consequently, there are Soldiers in it—mostly male but some female—who find it difficult to accept that gender should no longer be considered when deciding who should serve, where they should serve, and how they should serve. Those traditional ideas about gender, however, are disappearing rapidly—albeit certainly not fast enough for some Soldiers.

As 1SG Crisp puts it:

> I'm not out to conquer the world because I am a female. I also am not naive enough to believe that men and women are good at the same things—because, well—God made us different, so that's just not true. I want to be successful because of my character, competence, and intellect; not because someone needs a girl on the team.

### The Bottom Line

Since 1SG Caldwell started her soldiering as an MOS 27D, while 1SG Crisp is an MOS reclass, the careers of 1SGs Caldwell and Crisp demonstrate that there is no single path to being a senior NCO in the Corps. The bottom line is that excellence as a paralegal specialist has its rewards, and that 1SGs Caldwell and Crisp are models for all members of the Corps to emulate. **TAL**

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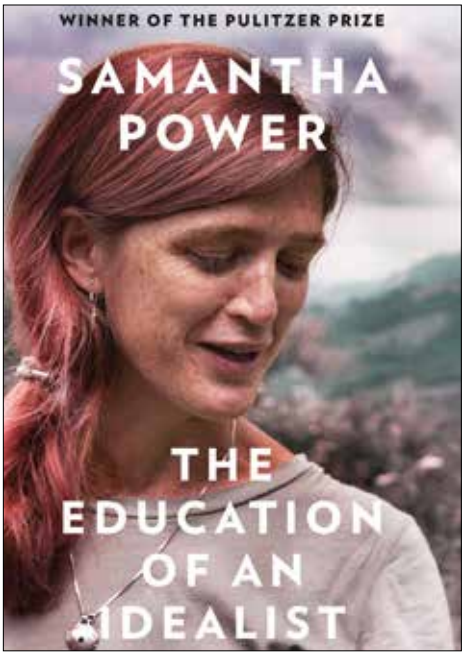
### Notes

1. E-mail from First Sergeant Cierra Caldwell to author (Mar. 11, 2020) (on file with author).

2. E-mail from First Sergeant Charlene Crisp to author (Feb. 3, 2010) (on file with author).

## AROUND THE CORPS

Members of the 82d Airborne Division Office of the Staff Judge Advocate train for the Army Combat Fitness Test. (Credit: Justin Kase Conder)




# Book Review

## The Education of an Idealist

### A Memoir

*Reviewed by Colonel Susan K. McConnell*

*The Bat Cave, John [Prendergast] explained to me, is inside each of our heads—either a place of great stillness, or, on other occasions, a place where bats fly around, flapping their wings in sometimes frantic ways. Being 'in the Bat Cave' thereby became our shorthand for times when self-doubt was intruding.*[1]

In her memoir *The Education of an Idealist*, Samantha Power takes us through the ups and downs of being an idealistic bureaucrat in the Obama administration. During this time, Power's government service culminated as the United States (U.S.) Representative to the United Nations (U.N.). Ambassador Power offers a refreshingly candid view on confronting episodes of self-doubt while navigating everything from the human rights atrocities in the world to the challenges of motherhood. She highlights the importance of building relationships with the most unlikely candidates, as well as embraces the camaraderie of like-minded individuals, particularly in a male-dominated working environment.

The first few chapters are devoted to her tumultuous childhood. Power immigrated to the United States from Ireland when she was nine years old. Despite being burdened with guilt for leaving her alcoholic father in Ireland, which she would grapple with later in therapy as an adult,[2] Power threw herself into her new American life and transformed from an awkward girl with an Irish brogue into a stand-out student and athlete in high school.[3] Even upon her acceptance to attend Yale, however, she "began to imagine all that could go wrong."[4] She bemoaned: "[w]hile I could adapt to any new environment, I did so with the latent conviction that nothing great could last."[5]

Despite her doubts, Power graduated with ease and then found a passion in journalism, jumping in as a war correspondent. Overwhelmed by the idea of regimes committing unthinkable violations inside their sovereign borders, she immersed herself in the wretched stretches of the world.[6] When she traveled to the towns of Prijedor and Banja Luka in Bosnia and Herzegovina (an area residents referred to as the "heart of darkness" because so many Muslims and Croats had been expelled or murdered) she could not help but become engrossed in the "desolate, almost apocalyptic sight of roads lined with gutted, bombed-out houses."[7] It was the Srebrenica massacre of more than 8,000 Muslims in 1995[8] that caused her to pivot toward a new career. When Chechen rebels executed her friend and humanitarian hero Fred Cuny,[9] Power left the war and attended Harvard Law School. Her goal was to become a prosecutor at the war crimes tribunal in The Hague.[10]

She admitted that she was not a quick study in law school and became flustered when called upon in class, stammering through her answers.[11] Later, a course called "The Use of Force: Political and Moral Criteria," introduced Power to the intricacies of a nation's use of military force outside its borders.[12] She debated a number of issues, from the question of when military force is justified to how a decision-maker, such as a commander-in-chief, measures the risks of action and inaction. Perhaps the most informative effect of this course, and premonition of things to come for Power, was her recognition that "[f]or the first time, a question that I had initially seen in fairly black-and-white terms—should the United States intervene militarily to stop atrocities in Bosnia?—took on a much more complex texture."[13] As a journalist in Sarajevo, Power reflected, "Just as the war had come to feel normal, so, too, had the idea that nobody would stop it."[14]

Power's description of fluttering in one's Bat Cave, that the road to happiness and success in the workplace and home begins and ends with the individual, is an underlying theme of her book. Power started to understand the physical and mental effects of pushing herself to exhaustion when working on her first book, *A Problem from Hell: America and the Age of Genocide*, and teaching U.S. foreign policy and human rights at the Harvard Kennedy School.[15] A friend recommended that she see a therapist. Powers initially questioned the usefulness of therapy,[16] but during her initial sessions—and later with her second therapist—Power began to understand that exercise and emotional well-being was imperative for her overall happiness and health.[17] Later, when she suffered debilitating back pain and spasms—as well as anxiety attacks—she came to understand that the pain could have come from a different source: her emotional discord.[18]

Another key theme in her memoir is the importance of professional relationships, particularly mentors. We are often told to seek out mentors who look like us, think like us, and talk like us. However, Power convincingly imparts how an individual, who at first blush seems like an unlikely ally, could become a lifelong mentor. After college, Power interned at the Carnegie Endowment for International Peace, a Washington policy institute.[19] She worked directly for the president, Mort Abramowitz, who was a fifty-nine-year-old

retired diplomat, with roles including ambassador to Thailand, ambassador to Turkey, and Assistant Secretary of State for Intelligence and Research.[20] From early on in her career, Power sought his advice and once called him at four o'clock in the morning just to hear his voice.[21] Over the years, she reached out to him, and he connected her with people all over the world, including his friend and then-Assistant Secretary of State Richard Holbrooke, right after President Clinton asked him to broker peace in Bosnia.[22] Many years later, as the U.S. Ambassador to the U.N., she unsurprisingly consulted Mort—her longtime mentor[23]—about the Obama administration's policy in Syria. She also consulted another longtime mentor, Jonathan Moore, who, when they met, was a sixty-year-old former U.S. official who had held positions under six presidents.[24]

On the other hand, Power welcomed the advice of her circle of female colleagues during her first National Security Council (NSC) position. Her new set of friends dramatically improved her work environment.[25] Their weekly get-togethers led to a sisterhood that assured Power she had undeniable support from a group of women who understood her struggles. Later, as the U.N. Ambassador, Power convened regular outings for the "G37" women, a name that represented the thirty-seven women—with Power as the thirty-seventh permanent representative woman—of the 193 countries.[26]

A third theme of *Idealist* is confronting downfalls and self-doubt in the workplace. While traveling to Ireland, her home country, for Barack Obama's primary campaign in 2008, Power called Hillary Clinton "a monster," during a conversation with a reporter that she thought was off the record.[27] Unfortunately, when Power called Clinton a "monster"—she was venting about Clinton's campaign—she did not realize that a reporter had left a tape on. When she did notice, she naively thought that the conversation was not for publication.[28] One unfortunate morning, the *Today Show* and *Good Morning America* led off with her "monster" comment, while the *New York Times* and *New York Daily News*—among other publications—covered the story with a headline, "Pretty Dumb!" This caused Power to resign from the campaign.

After Obama won the election and several months had passed since her mistake on the campaign, Power returned to work for then-President Obama, first as the Senior Director and Special Assistant to the President for Multilateral Affairs at the NSC. In her job as a Senior Director on the NSC, Power struggled with finding her direction and voice. She expected, but did not receive, a "tutorial on how to do [her] job" and how to "help shape U.S. foreign policy."[29] Power soon learned that the NSC, being the "central coordinating hub to inform and advise [Obama's] decision-making on national security, and intended to ensure that his foreign policy was implemented across numerous executive branch agencies,"[30] was a complex, bureaucratic machine with its own "bureaucratic lingo"[31] and a clearance process for every single paper on matters of national security.[32]

As far as discovering her voice in the NSC, even though others clearly were not the subject matter experts on the issue, Power found herself holding back in policy debates—despite her natural inclination to want to speak up, and observing others vociferously sound off.[33] Susan Rice, then-U.S. Representative to the U.N., later the National Security Advisor, advised Power not to let anyone roll her and to "act like you are the boss . . . or people will take advantage of you."[34] In 2010, she was scolded for not speaking up. After a meeting in the Situation Room about the U.S. humanitarian mission in Haiti, Power confronted Deputy National Security Advisor Tom Donilon about how there was confusion in the room about the U.S. force's mission in Haiti. Donilon reminded her, "If you hear nothing else, hear this. You work at the White House. There is no other room where a bunch of really smart people of sound judgment are getting together and figuring out what to do. It will be the scariest moment of your life when you fully internalize this: There is no other meeting. You're in the meeting. You *are* the meeting. If you have a concern, raise it."[35] A year later, learning from that lapse, when Power was initially not invited to attend the President's meeting about U.S. military intervention against the Libyan leader Colonel Muammar al-Qaddafi, she convinced Donilon to get her name on the list.[36] In that meeting, Obama heard from everyone at the conference table, as well as all of the backbenchers—including Power.[37]

Though Power's self-reflection on her errors, doubts, and hesitations is what makes *Idealist* persuasive, her feats should not be ignored. In 2003, Power was awarded a Pulitzer Prize for her book on genocide. She and her team pressed the administration and the Serbian government to intensify efforts to locate Ratko Mladic, the mastermind of the Srebrenica genocide. Mladic, who had been on the run for fifteen years, had been indicted by the U.N. war crimes tribunal.[38] Power's team also advocated for U.S. involvement in the crisis inside the Central African Republic, which resulted in the United States helping to deploy peacekeepers to the country and providing over $800 million in humanitarian aid and peacekeeping funding.[39] In supporting the Ebola crisis, and because of the overwhelming initial efforts and support provided to West Africa, Power saw the "most unified" session of the U.N. in her time as the Ambassador.[40] Thinking back to her years of reporting on atrocities as a war correspondent and her law school course on the use of force, Power conceded that dealing with other nations was not easy, but offered some hope: " on the occasions when we did push other governments to treat their citizens with dignity—something few other governments took it upon themselves to do—U.S. influence could be profound."[41]

Finally, a theme that resonates with us as men and women in the profession of arms and law is undertaking leadership. A former military leader, General (Retired) Ann Dunwoody counseled,

> Leadership makes all the difference. People in high-performing teams look for opportunities to excel, and people feel empowered to make a difference. These things don't happen by accident; they happen because of good leadership—no matter the group, no matter the mission, whether you are running a war or running a business.[42]

As an ambassador, Power ensured that she had a team of talented men and women because she remembered that her mentors surrounded themselves with people, even if "junior," who would challenge them and

generate ideas.[43] Power encouraged her team to focus on and care about the outcomes, not the inputs of just raising an issue.[44]

As a leader addressing the Ebola crisis, the United States was able to influence other countries to provide the initial wave of monetary and logistical support. However, when the United States started to take an unconstructive turn by threatening to close the borders and impose a mandatory quarantine for all American citizens returning from West Africa, Power reasoned that her advocacy would be more credible if she went to the region and spoke about what she had personally seen.[45] Before heading to West Africa, Power talked to her United States Mission to the United Nations (USUN) team and thought how "[u]naccustomed [she was] to offering this form of apocalyptic leadership."[46] Reporting from the ground, Power enthusiastically relayed that the interventions in the region were working, that she had never witnessed such creativity and rapid returns of the U.S. troops' contributions, and that countries like China, the United Kingdom, France, and Cuba, were donating.[47] She urged President Obama not to implement a policy restricting visas because other countries would then follow. Soon after her trip, the continued efforts of the contributing nations—and the region—were able to conquer Ebola.[48]

The greatest success of *Idealist* is Power's ability to go back and forth between her professional and personal life, between monumental personal accomplishments and disastrous missteps, and between moments of joy, particularly when talking about her children, and bouts of self-doubt. Power also does not hold back in her description of the frenzied business of national security, as well as that of her own frenzied mind. She freely offers:

> When I met with young women in the United States, I erred on the side of oversharing, describing my self-doubt in the Bat Cave and the tradeoffs between my dream job and the family I longed to see more of. I did not gloss over the challenges they would face if they pursued ambitious careers in public service or foreign policy, but I encouraged them to take the leap.[49]

But what is most evident is that despite Power's frequent episodes of self-doubt, her success was a result of her tenacity, hard work, and self-awareness.

In *Idealist*, a judge advocate will gain an understanding of the bureaucratic machine that is the U.S. government, supported by narratives about recent national security events— including the U.S. military intervention in Bosnia, Libya, West Africa, and Syria. And certainly still relevant for the military, Power talks about the situation in Syria throughout the second half of the book. In particular, Power exposes the convoluted deliberations of the administration in the aftermath of Assad's first use of chemical weapons against the Syrian population and then later confesses, "Those of us involved in helping devise Syria policy will forever carry regret over our inability to do more to stem the crisis."[50] Power's memoir emphasizes that there is a place for idealism in the U.S. government. The memoir reaffirms that the men and women in military service serve for the better good of our nation and to help those who cannot help themselves. **TAL**

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## Notes

1. Samantha Power, The Education of an Idealist 157 (2019).

2. *Id.* at 161.

3. *Id.* at 27.

4. *Id.* at 39.

5. *Id.*

6. *Id.* at 103.

7. *Id.* at 79.

8. Alan Taylor, *20 Years Since the Srebrenica Massacre*, The Atlantic (July 9, 2015), https://www.theatlantic.com/photo/2015/07/20-years-since-the-srebrenica-massacre/398135/. Bosnian Serb forces in the town of Srebrenica executed 8,000 Muslim boys and men and dumped their bodies into pits in the forests. *Id.*

9. Power, *supra* note 1, at 105.

10. *Id.* at 103. The day before law school started, she let out tears of relief while listening to NPR's breaking news on NATO air strikes around Sarajevo. Two weeks later, the Bosnian war came to an end. *Id.* at 106.

11. *Id.* at 108.

12. *Id.* at 120.

13. *Id.*

14. *Id.* at 96.

15. *Id.* at 123.

16. *Id.* at 126.

17. *Id.*

18. *Id.* at 157.

19. *Id.* at 51.

20. *Id.* at 50-51.

21. *Id.* at 79.

22. *Id.* at 98.

23. *Id.* at 255.

24. *Id.* at 516, 58.

25. *Id.* at 251-52.

26. *Id.* at 464-65.

27. *Id.* at 191.

28. *Id.* at 185.

29. *Id.* at 215.

30. *Id.* at 215-16.

31. *Id.* at 217.

32. *Id.* at 219. Combining the lingo and the process, "Every NSC official who was seen to have 'equity' in a statement had to be 'looped in' so that they could 'chop on,' or edit, the words that went out into the world under President Obama's name." *Id.* at 105.

33. *Id.* at 223.

34. *Id.*

35. *Id.* at 283.

36. *Id.* at 296.

37. *Id.* at 297-99

38. *Id.* at 270-72. *See* Prosecutor v. Mladić, Case No. IT-09-92, Trial Judgment Summary (Int'l Crim. Trib. For the Former Yugoslavia Nov. 22, 2017), https://www.icty.org/x/cases/mladic/tjug/en/171122-summary-en.pdf. *See also Ratko Mladić, Case Info. Sheet*, ICTY, https://www.icty.org/x/cases/mladic/cis/en/cis_mladic_en.pdf (last visited Mar. 15, 2020). After 530 days of trial, Mladic was found guilty often out of eleven counts, including for the killing of over 7,000 Bosnian Muslim men and boys of Srebrenica, and was sentenced to life in prison by the International Criminal Tribunal for the former Yugoslavia. *Id.*

39. Power, *supra* note 1, at 394.

40. *Id.* at 443. The United States and other countries ended up pledging $4 billion in supplies, facilities, medical treatments, and other components of the initial response. *Id.*

41. *Id.* at 282.

42. Ann Dunwoody and Tomago Collins, A Higher Standard: Leadership Strategies from America's First Female Four-Star General 192 (2015).

43. Power, *supra* note 1, at 350.

44. *Id.*

45. *Id.* at 446.

46. *Id.* at 449.

47. *Id.* at 453.

48. *Id.* at 453-55.

49. *Id.* at 469.

50. *Id.* at 514.

*Morning of the Battle of Agincourt*, 25 October 1415, painted by Sir John Gilbert in the 19th century.

# Practice Notes

## Law and the Morality of War Today in *Henry V*

*By Captain Anthony A. Contrada*

### Shakespeare's *Henry V*

*Henry V,* the popular and enduring historical play composed by William Shakespeare centuries ago, portrays King Henry V's campaign of 1415 to (re)take France for the English monarchy, culminating in the battle at Agincourt.[1] Henry claimed France by the "law of nature and of nations."[2] The historical Henry V was one of England's last "soldier kings" in the tradition of his predecessors, Edward III and the Black Prince, both of whom had campaigned successfully in France.

In popular culture and film, *Henry V* is often a patriotic affair, a Shakespearean precursor to today's underdog sports films, with the climactic pre-battle "band of brothers" speech in the place of a coach's pre-game pep-talk.[3] That speech also lends its name to the Stephen Ambrose book[4] and HBO series[5] that have served as grist for many an Army officer professional development session. But beyond merely lending a famous title, *Henry V* itself can serve as a rewarding and provocative read for Army lawyers and others interested in the moral, legal, and political challenges inherent to any military action.

Government actors and legal scholars have long debated whether the United States's presidency's inherent executive power is a residuum of sovereign authority once held by British monarchs.[6] Whether or not that is in fact the legal or historical basis of the U.S. President's executive authority, in practice, foreign affairs and warfare have proven to be spheres of action in which a President (and senior military commanders) can most "[b]e like a king."[7] *Henry V* is relevant in the present day due to these analogous military and foreign affairs powers.

While America's conflicts of the last two decades may—in some ways—have a distinctly modern character, there is no guarantee that future conflicts will be similar, even with carefully calibrated use of force and international media scrutiny of non-combatant deaths; thus, in a possible future of high-intensity conflicts and mass civilian deaths, the question "what is a judge advocate's role" becomes thorny.[8] One does not have to look far into America's past to see times when the moral calculus of intentionally targeting civilian populations—Japan and Germany in World War II or Hanoi in the Vietnam War—appeared more in tune with Henry V's threat to destroy a city if it remained "guilty in defense"[9] than with a calibrated use of force to achieve a narrow military or counterinsurgency objective. Therefore, although *Henry V* deals with a late-medieval monarch's military campaign, its significant themes remain uncomfortably close.

### Conflicting Interpretations

Through the hagiographic speeches of the Chorus, the formal structure of the play frames Henry as a conquering hero. Henry is referred to as a paragon, "the mirror of all Christian kings,"[10] but some commentators argue that Henry is an irredeemably ruthless battlefield commander and a Machiavellian ruler who masks his ruthlessness with a veneer of piety and justice.[11] Throughout, readers and audiences have to grapple with the question of whether

Henry—a soldier-statesman—is essentially a moral actor, a cynical political operator, or both at once.[12] We see Henry's approach on display as he justifies his decision to invade France, makes operational judgments during the campaign itself, dispenses military justice, and engages in moral bargaining with himself and others. Henry shows that he understands his ultimate political and military success may depend, in part, on his strategic control of his *jus ad bellum* narrative.

**Readers and audiences have to grapple with the question of whether Henry—a soldier-statesman—is essentially a moral actor, a cynical political operator, or both at once**

### Henry's *Jus ad Bellum*[13]

The justness (or injustice) of Henry's claim to France is a recurring theme. The play's opening immediately casts doubt on the legitimacy of Henry's war aims when the Archbishop of Canterbury privately suggests that he supports the English invasion of France because it would financially benefit the church. When the king enters moments later with his nobles, he asks for the Archbishop's counsel on the justice of his dynastic claim to France:

> My learnèd lord, we pray you to proceed
> And justly and religiously unfold
> Why the law Salic that they have in France
> Or should or should not bar us in our claim . . . .
> [T]ake heed how you impawn our person,
> How you awake our sleeping sword of war.[14]

The Archbishop lays out a long-winded and somewhat inscrutable legal-dynastic basis for Henry's claim to France. Wanting a more concise answer, Henry follows up with the question, "May I with right and conscience make this claim?"[15] Given the Archbishop's revealed economic interest, neither the audience nor Henry is likely surprised by his affirmative answer. The Archbishop goes so far as to accept all blame if his counsel is wrong: "The sin upon my head, dread sovereign . . . ."[16]

The nature of Henry's appeal to the Archbishop is especially noteworthy—the king is asking for the medieval equivalent of professional expert advice on a *jus ad bellum* question, while also benefitting from the church's moral authority. While modern-day advisors to the President and commanders do not explicitly offer to take the sin of a given action upon themselves, a similar dynamic can exist today when subordinate military or legal advisors' approvals may be central in portraying the legality or appropriateness of a particular decision. A few high-profile national security examples from the past two decades include United States Justice Department Office of Legal Counsel memos and senior military officials' statements regarding enhanced interrogation techniques[17] and the targeted killings of Anwar Aulaqi[18] and Qasem Soleimani.[19] This is not in any way to suggest that such statements or opinions are cynical or self-serving, as the Archbishop's appears to be in *Henry V*; rather, decision-making in the national security realm entails a complex interplay between the commander-in-chief, senior commanders, and their subordinate experts in determining the legal and moral proprieties of a given action; and, still today, the reality of moral responsibility for senior decision-makers is not as simple as a unitary "buck-stops-here" model. Perhaps this play highlights that the nature of these unequal dialogues[20] may be less modern or bureaucratic than one might assume.

A final comparison on these lines: Henry's reliance on the Archbishop to "sell" the justice of his war—even if the underlying basis was dubious—and his public acknowledgment of the Archbishop for his counsel, is reminiscent of President Lyndon Johnson's public acknowledgment of his senior civilian and military advisors minutes before announcing an escalation in Vietnam—advisors who, in the words of one scholar, "made possible [Johnson's] deceit and manipulation of Congress and the American people."[21]

Immediately after his exchange with the Archbishop, Henry speaks with the French ambassador. Henry takes this opportunity to place the responsibility of his imminent invasion on the French prince who sent Henry an insulting "treasure" chest full of tennis balls:

> [T]his mock of his
> Hath turned his balls to gun-stones, and his soul
> Shall stand sore chargèd for the wasteful vengeance
> That shall fly with them; for many thousand widows
> Shall this his mock mock out of their dear husbands,
> Mock mothers from their sons, mock castles down;[22]

Much later in the play, on the eve of battle, Henry disguises himself as a common soldier and speaks with his men as they nervously await the dawn. We hear the thoughts of two soldiers. One questions the justice of the king's cause, and another replies that the justice of the king's cause is "more than we should seek after, for we/ know enough if we know we are the King's subjects./ If his cause be wrong, our obedience to the/ King wipes the crime of it out of us."[23]

But the other soldier is not satisfied:

> But if the cause be not good, the King
> Himself hath a heavy reckoning to make, when all
> those legs and arms and heads, chopped off in a
> battle, shall join together at the latter day, and cry
> all "We died at such a place," . . . .[24]

Henry's answer is eloquent, but non-responsive as to the justice of his cause.[25] He changes the subject to his soldiers' responsibility for their own eternal souls:

> [I]f a servant, under his master's command transporting
> a sum of money, be assailed by robbers and
> die in many irreconciled iniquities, you may call the
> business of the master the author of the servant's
> damnation. But this is not so. The King is not bound
> to answer the particular endings of his soldiers . . . .
> Besides, there is no king, be his cause never so spotless . . .
> can try it out with all unspotted soldiers. . . .
> Every subject's duty is
> the King's, but every subject's soul is his own.[26]

Audiences familiar with the preceding play, *Henry IV, Part 2*, may have yet further doubts as to the legitimacy of Henry's claim, or his own belief in his claim.[27] Henry V's father, the ailing Henry IV, had counseled his son to take a "wag the dog" approach to calming domestic politics: "Be it thy course to busy giddy minds/ With foreign quarrels . . . ."[28] Further, in his soliloquy on the eve of battle, imploring God for his support, Henry displays doubts as to the legitimacy of his claim to the *English* throne, which casts doubt on any derivative claim to France.[29]

## Henry's Jus in Bello and Military Justice

Once on campaign, we see Henry use terrifying threats of mass slaughter against the French populace to achieve their surrender. During the siege of Harfleur, prior to ordering an assault on a breech in the town walls, Henry demands surrender by Harfleur's governor and warns him that it is the town's last chance to surrender peacefully:

> The gates of mercy shall be all shut up,
> And the fleshed soldier, rough and hard of heart,
> In liberty of bloody hand, shall range
> With conscience wide as hell, mowing like grass
> Your fresh fair virgins and your flow'ring infants.
> What is it then to me if impious war,
> Arrayed in flames like to the prince of fiends,
> Do with his smirched complexion all fell feats
> Enlinked to waste and desolation? . . .
> Take pity of your town and of your people
> Whiles yet my soldiers are in my command,
> Whiles yet the cool and temperate wind of grace
> O'erblows the filthy and contagious clouds
> Of heady murder, spoil, and villainy.
> If not, why, in a moment look to see
> The blind and bloody soldier with foul hand
> Desire the locks of your shrill-shrieking daughters,
> Your fathers taken by the silver beards
> And their most reverend heads dashed to the walls,
> Your naked infants spitted upon pikes
> Whiles the mad mothers with their howls confused
> Do break the clouds . . . .[30]

But, in the play, the overwhelmingly brutal threat is never carried out.[31] The town surrenders immediately after the threat and Henry orders his army to "[u]se mercy to them all."[32] Henry's own words implicitly recognize the wrongfulness of what he is threatening—"murder, spoil, and villainy"—though he rhetorically shifts the responsibility to Harfleur, his soldiers, and "impious war" itself.[33] Because the town surrenders, the audience is left to wonder how horrible of a slaughter Henry would have allowed—was he ready to let his soldiers rape and kill everyone, or was it just a clever tactic to ensure swift surrender and save lives?

Henry also shows his flair for the draconian in the swift military justice he dispenses on Bardolph, a soldier in his army personally known to Henry. Bardolph stole a "pax" (a metal tablet) from a church, and Henry approves of his execution by hanging.[34] He goes on to issue what amounts to a general order to his army:[35]

> We would have all such offenders so cut
> off; and we give express charge that in our marches
> through the country there be nothing compelled
> from the villages, nothing taken but paid for,
> none of the French upbraided or abused in disdainful
> language; for when lenity and cruelty play
> for a kingdom, the gentler gamester is the soonest
> winner.[36]

Through his depiction of Henry's army, Shakespeare may have intended to portray the transition from medieval chivalry to a, more, modern army.[37] For example, the English army was filled with commoner-foot soldiers who were distinct from the French army; the majority of them were mounted knights.[38] Misconduct by knights in Henry's time was dealt with in courts of chivalry, whereas a modern army of citizen-soldiers required martial justice.[39] In Bardolph's case, it was a subordinate commander—Henry's uncle, the Duke of Exeter—that sentenced Bardolph to hang. When Bardolph's friend asks a captain to intercede on Bardolph's behalf and request clemency, he is denied. Henry learns of Bardolph's sentence a few lines later and expresses his approval.[40] In its entirety, the scene displays parallels with a convening authority executing a sentence, and the commander-in-chief deciding not to exercise his clemency powers.

Shakespeare presumably intended the irony of Bardolph's hanging for a stolen pax, when Henry himself could be said to have stolen the *pax* (latin for "peace") of an entire country.[41] Henry's "lenity" approach toward the French people, the threatened slaughter of Harfleur, and his order to kill the prisoners offer contrasting examples of Henry's Machiavellian approach in finding a precise admixture of fear and kindness, or ruthlessness and mercy, to achieve his aims.[42] The suggestion that Henry's approach to either the invasion or the conduct of the war is Machiavellian is not to assume that his ultimate aims are wrongful; an effective Machiavellian approach could be

consonant with the pursuit or achievement of England's common good.[43]

Most controversial are Henry's two orders during the battle of Agincourt to kill all of his army's French prisoners.[44] First, it is uncertain why the order is given twice, each order within a different scene. One possibility is that Henry's first order was just an expression of anger in the heat of battle and the order was not actually followed, while another is that the common soldiers taken prisoner were killed while the nobles were initially spared for their ransom value, but then were subsequently killed after the second order.[45]

Second, there is the moral and *jus in bello* problem regarding the mass slaughter of prisoners. Such an act may have been seen as wrongful in Henry's time and, more likely, would have been seen as wrongful in Shakespeare's time.[46] Henry's stated reason for the first order is that the French army was reforming to renew its attack, implying that his much smaller army could not both fight a renewed French attack and guard the prisoners at the same time. In other words, it was an expedient tactical decision.

**_Henry V_ engages the audience with literary analogues for professional counsel, proto-civil-military relations, _jus ad bellum_ and _jus in bello_ controversies, and a snapshot of proto-modern military justice**

The second order to kill the prisoners is couched in the language of revenge because the French had just raided the English baggage train and killed all the English boys that had been left there. One of Henry's soldiers praises him upon hearing the second order, "[W]herefore the King, most worthily, hath caused/ every soldier to cut his prisoner's throat. O, 'tis a/ gallant king!"[47] However, this dubious justification is undermined by the sequence of events—Henry only learns of the slaughter of the English boys *after* he gave his first order to kill the prisoners. Thus, his second order to kill the prisoners may be nothing more than an effort to provide himself with a post-hoc justification for their killing.[48] These troubling scenes are often left out of stage and film productions of the play.[49] Notably, the two leading film versions, Laurence Olivier's (1944) and Kenneth Branagh's (1989), omit Henry's orders to kill the prisoners.

Finally, a secondary character—Fluellan—provides ongoing didactic commentary regarding the proper practice of war. One of Henry's captains, Fluellan expresses disapproval of siege mining as "not according to the disciplines of the war"[50] (presumably because it is unheroic or unchivalrous), and describes the French killing of the English boys as "expressly against the law of arms."[51]

## Conclusion

Henry's tendency to shift the responsibility of his actions onto others is readily apparent and is, arguably, a central aspect of his character.[52] A non-exhaustive list of examples includes many of the scenes discussed above: his initial public reliance on the Archbishop of Canterbury's assurance that his war aim is just; his blaming of the war on the French prince's insult; his speech to Harfleur in which he disclaims the slaughter he is simultaneously threatening; his non-answer to his soldier about the justness of his cause; and his blame of the French army's actions for his own order to kill the prisoners. While Henry continually tries to shift the responsibility for his decisions onto others, we hear in his soliloquy his recognition that the weight of war rests, ultimately, "[u]pon the king."[53]

To the extent the claim of a parallel between a medieval king's and American president's executive powers fails, perhaps it is due to the play's lack of an analogous institution to Congress. Or perhaps that lack makes the claimed parallel even more apt. If the English nobles in the play are the analogue to Congress, they appear to drive little or none of England's war policy. Similarly, even today's proponents of Congress's constitutional war powers typically find themselves arguing that Congress must *re*-assert constitutional powers that it has ceded.[54] Finally, apart from the executive power aspect, *Henry V* engages the audience with literary analogues for professional counsel, proto-civil-military relations, *jus ad bellum* and *jus in bello* controversies, and a snapshot of proto-modern military justice.

*Henry V* portrays both the allure and terror of war in a way that is still compelling four centuries after its first performance and in a way that can be especially engaging for military lawyers. One scholar has concluded that the play's ambivalence undercuts altogether the possibility of "just war" and instead suggests that all war is "damnable."[55] Nevertheless, *Henry V* is great fun. In the character of Henry V, Shakespeare created a "peerless charismatic" who draws the audience in; even if his actions are chilling, he somehow remains beguiling.[56] **TAL**

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## Notes

1. William Shakespeare, The Life of King Henry V (Barbara A. Mowat & Paul Werstine eds., Folger Shakespeare Library), http://www.folgerdigitaltexts.org (last visited Mar. 19, 2020) [hereinafter Henry V]. All lines quoted are from this edition; a slash (/) indicates a line break within shorter quotations; ellipses have been added to indicate omitted intervening text.

2. *Id.* act 2, sc. 4, l. 87.

3. On the eve of the Battle of Agincourt, which fell on St. Crispin's Day, Henry gives a morale-boosting speech to his men. Henry V, *supra* note 1, act 4, sc. 3 ("We few, we happy few, we band of brothers[.]").

4. Stephen E. Ambrose, Band of Brothers: E Company, 506th Regiment, 101st Airborne from Normandy to Hitler's Eagle's Nest (1992).

5. *Band of Brothers* (HBO television miniseries 2001).

6. *Compare* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231 (2001) (advancing the theory), *with* Julian Davis Mortensen, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169 (2019) (countering the theory).

7. Henry V, *supra* note 1, act 1 sc. 2, l. 286.

8. *See generally* Colonel Gail A. Curley & Lieutenant Colonel Paul E. Golden, Jr., *Back to Basics*, Army Law., Sept./Oct. 2018, at 23, 27; Geoffrey S. Corn & Rachel E. VanLandingham, *CIVCAS Reporting, Responsible Command and Feasibility*, Lawfare (Aug. 7, 2019, 9:57 AM), https://www.lawfareblog.com/civcas-reporting-responsible-command-and-feasibility (near-peer warfare presents different challenges to assessing civilian casualties).

9. Henry V, *supra* note 1, act 3, sc. 3, l. 43.

10. *Id.* act 2, Chorus, l. 6.

11. Norman Rabkin, *Rabbits, Ducks, and Henry V*, *in* Bloom's Shakespeare Through the Ages: Henry V 194 (Harold Bloom & Albert Rolls eds., 2010). Rabkin's thesis is that the play portrays an unresolved duality between an exemplary Christian king and a Machiavellian politician. *Id.* A similar view is taken by Paul A. Cantor, *"Christian Kings" and "English Mercuries": Henry V and the Classical Tradition of Manliness*, *in* Educating the Prince: Essays in Honor of Harvey Mansfield 74 (Mark Blitz & William Kristol eds., 2000). Cantor has also described Henry V's approach as a Machiavellian solution to Christian kingship, combining the appearance of a pious king with ruthless effectiveness. Paul A. Cantor, *Shakespeare's Henry V: From the Medieval to the Modern World*, *in* Perspectives on Politics in Shakespeare 11 (John A. Murley & Sean D. Sutton eds., 2006) [hereinafter Cantor's Shakespeare's Henry V].

12. Unless otherwise stated, this article focuses on Shakespeare's character Henry V, rather than the historical figure, and emphasizes the more challenging or negative aspects of Henry's character. While there are several excellent film adaptations of the play, all have cut significant scenes and tend to portray Henry in a simpler, more straightforwardly positive light than does Shakespeare's text. For a critique of the leading modern film adaption, concluding that the filmmaker (Kenneth Branagh) "resanctified" the violent royal English hegemony that Shakespeare had sought to expose, *see* Chris Fitter, *A Tale of Two Branaghs: Henry V, Ideology, and the Mekong Agincourt*, *in* Shakespeare Left and Right 259, 275 (Ivo Kamps ed., 1991).

13. *Jus ad bellum* refers to the conditions under which States may resort to war or to the use of armed force in general.

14. Henry V, *supra* note 1, act 1, sc. 2, ll. 11-14, 24-25.

15. *Id.* act 1, sc. 2, l. 101.

16. *Id.* act 1, sc. 2, l. 102.

17. Memorandum from Off. of Legal Couns. to Counsel to the President Alberto R. Gonzales, subject: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (1 Aug. 2002).

18. Memorandum from Off. of Legal Couns. to the Att'y Gen., subject: Lethal Operation Against Shaykh Anwar Aulaqi (19 Feb. 2010).

19. *E.g.*, Brakkton Booker & Philip Ewing, *Trump, Pompeo, Esper Defend Killing of Soleimani; Iranians Vow Revenge*, NPR (Jan. 7, 2020, 4:55 PM), https://www.npr.org/2020/01/07/794173642/mike-pompeo-on-drone-strike-that-killed-irans-top-military-leader-we-got-it-righ.

20. Eliot A. Cohen, Supreme Command: Soldiers, Statesmen, and Leadership in Wartime 12 (2002) (describing modern "[c]ivil-military relations" as "a dialogue of unequals").

21. H.R. McMaster, Dereliction of Duty 321 (1997).

22. Henry V, *supra* note 1, act 1, sc. 2, ll. 267, 293-99.

23. *Id.* act 4, sc. 1, ll. 134-37.

24. *Id.* act 4, sc. 1, ll. 138-42.

25. *See* Rabkin, *supra* note 12, at 206; Cantor's Shakespeare's Henry V, *supra* note 11, at 19.

26. Henry V, *supra* note 1, act 4, sc. 1, ll. 156-61, 164-66, 182-83.

27. William Shakespeare, Henry IV- Part 2 (Barbara A. Mowat & Paul Werstine eds., Folger Shakespeare Library), http://www.folgerdigitaltexts.org (last visited Mar. 19, 2020).

28. *Id.* act 4, sc. 3, ll. 372-73.

29. *See, e.g.,* John Sutherland & Cedric Watts, Henry V, War Criminal? & Other Shakespeare Puzzles 122 (2000).

30. Henry V, *supra* note 1, act 3, sc. 3, ll. 10-18, 28-40.

31. Theodor Meron, Henry's Wars and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages 89-91 (1993). The historical Henry V massacred the inhabitants of Caen following the siege of Caen in 1417. *Id.* Jonathan Sumption, The Hundred Years War IV: Cursed Kings 383 (2015). Such treatment of inhabitants of a besieged city was consistent with the code of war at that time. *Id.*; Meron, *supra*, at 102-104. By Shakespeare's time (roughly two centuries after the historical Henry V's campaign) such treatment of noncombatants likely would have been viewed more critically. *Id.*

32. Henry V, *supra* note 1, act 3, sc. 3, l. 55.

33. *Id.* act 3, sc. 3, ll. 15, 32.

34. *Id.* act 3, sc. 6.

35. The historical Henry V issued "ordinances" to his army that included, among other things, specific prohibitions against looting churches. *See* Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 Am. J. Int'l L. 1, 23-24, 32 (1992).

36. Henry V, *supra* note 1, act 3, sc. 6, ll. 109-116.

37. *See* Cantor's Shakespeare's Henry V, *supra* note 11, at 21-22. *See generally* Paul A. Cantor, *Against Chivalry*, The Weekly Standard (April 22, 2016, 12:30 AM), https://www.washingtonexaminer.com/weekly-standard/against-chivalry.

38. Paul A. Cantor, *Against Chivalry*, The Weekly Standard (April 22, 2016, 12:30 AM) https://www.washingtonexaminer.com/weekly-standard/against-chivalry; Cantor's Shakespeare's Henry V, *supra* note 11, at 29, n.20.21-22.

39. Meron, *supra* note 31, at 152, 168

40. Henry V, *supra* note 1, act 3, sc. 6.

41. Graham Bradshaw, Misrepresentations: Shakespeare and the Materialists 41 (1993); John S. Mebane, *"Impious War": Religion and the Ideology of Warfare in "Henry V"*, 104 Stud. Philology 250, 259 (2007).

42. *See* Mebane, *supra* note 41, at 262; Cantor's Shakespeare's Henry V, *supra* note 11, at 21-22.

43. *See, e.g.,* Cantor's Shakespeare's Henry V, *supra* note 11, at 26-27 (contrasting Shakespeare's Henry V's benign Machiavellianism with Shakespeare's Richard III's malignant Machiavellianism); *see also* Giovanni Giorgini, *Machiavelli on Good and Evil: The Problem of Dirty Hands Revisited*, *in* Machiavelli on Liberty and Conflict 61-62 (David Johnston et al. eds., 2017) (arguing Machiavelli's amoral methods were for the purpose of instructing rulers how to protect the state and therefore achieve the common good). *But cf.* Harvey C. Mansfield, Machiavelli's Virtue 102, 160 (1966) (not accepting that Machiavelli's prince was primarily concerned with the common good, though allowing that a Machiavellian prince's own good may be consonant with the common good, particularly when it "is a good taken from foreigners"; a prince driven by the "necessity of acquisition" will "incidentally" make possible the common good).

44. Henry V, *supra* note 1, act 4.

45. *E.g.*, Sutherland & Watts, *supra* note 29, at 115-16.

46. Meron, *supra* note 31, at 154-71. Henry V was not criticized in his own time for his decision, and one contemporary French source blamed the English killing of the French prisoners on the French army for continuing to threaten attack. Sumption, *supra* note 31, at 458.

47. Henry V, *supra* note 1, act 4, sc. 7, ll. 9-11.

48. Sutherland & Watts, *supra* note 29, at 112-13; Cantor's Shakespeare's Henry V, *supra* note 11, at 22.

49. *See generally* Mebane, *supra* note 41, at 256.

50. Henry V, *supra* note 1, act 3, sc. 2, l. 61.

51. *Id.* act 4, sc. 7, ll. 1-2.

52. Mebane, *supra* note 41, at 258; Sutherland & Watts, *supra* note 29, at 117.

53. Henry V, *supra* note 1, act 4, sc.1, l. 238.

54. *See, e.g.,* Tim Kaine & Mike Lee, *Why We're Introducing a Resolution on War with Iran*, Wash. Post (Jan. 14, 2020, 5:38 PM), https://www.washingtonpost.com/opinions/global-opinions/why-were-introducing-a-resolution-on-war-with-iran/2020/01/14/8a770aa4-36f5-11ea-bb7b-265f4554af6d_story.html; Oona A. Hathaway, *The Soleimani Strike Defied the U.S. Constitution*, The Atlantic (Jan. 4, 2020), https://www.theatlantic.com/ideas/archive/2020/01/soleimani-strike-law/604417/.

55. Mebane, *supra* note 41, at 252.

56. Harold Bloom, Shakespeare: The Invention of the Human 323-24 (1998).

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# A Voice for the Victim

## A Day in the Life of an SVC

*By Captain Chrissy L. Schwennsen*

### The Duty Phone Call

You are driving to physical training (PT) early in the morning when the Special Victim Counsel (SVC) duty phone rings. It's an old-style flip phone with a ringtone that you now, after serving as the sole installation SVC for almost a year, hear in your dreams. You pick up the phone: "Special Victim Counsel, this is Captain (CPT) Schwennsen." Your greeting is met with silence. You try again. "Special Victim Counsel, can I help you?" A meek voice on the other side says, in a soft voice, "Yes, I got your number from my victim advocate, but I'm not sure if I need your help or not …." You reassure the caller they have called the right number and collect some preliminary administrative information. Then you ask the awkward question—"Can I please get a short version of what happened? I don't need many details right now, just whatever you're comfortable with telling me." The caller goes silent again. You ask if the victim advocate is with her. She says yes, and puts her on the phone. "Ma'am, we've got a penetrative offense that happened just four to six hours ago. I'm at the hospital with her now." You tell the victim advocate that you'll be right there; you just need to stop by the office and do a conflict check. You immediately call your Deputy—you won't be making PT this morning.

The Army SVC Program was born in 2013 as part of the military-wide response to the increased reporting of sexual offenses in the military.[1] The SVC represents eligible victims of sexual assault during the military investigative process.[2] The SVC's most important function is to educate victims about the military justice process and ensure that they make well-informed decisions at each junction in that process.[3] The SVC attends every interview with Criminal Investigation Division (CID), prosecutors, and defense counsel with the client.[4] Additionally, should the case go to court-martial, the SVC may represent the victim at motions hearings concerning issues involving Military Rule of Evidence (MRE) 412—the rape shield law—and 513—psychotherapist-patient privilege.[5]

The SVC is an expressed-interest attorney; meaning, after educating the client about the advantages and disadvantages of a particular decision, the ultimate choice is theirs.[6] A client may decide against participating in a court-martial even if the evidence is strong and the chance of conviction is high. On the other hand, the client may want to push forward even though there are significant evidentiary issues that the government may not be able to overcome at trial. Success as an SVC is not determined by how many clients go through the court-martial process or how many see their offenders convicted. Success is defined by ensuring that each client receives the necessary context about the military justice process and the circumstances of their particular case; only then can they make the right decision for them personally, professionally, and emotionally. If a client ever feels that they will somehow disappoint their attorney with the decision they make, the SVC has faltered.

### The Meeting

You meet your new client at the hospital and establish the attorney-client relationship. At least, you establish as much of it as you can in the short timeframe you have in a hospital room before she goes back for the Sexual Assault Forensic Exam (SAFE). When she returns to the nurse for her exam, you tell her to call if you she needs anything—you have another client that needs to do a CID interview, and you're the only SVC on post.

### The CID Interview

You rush over to CID; the interview with your client takes about three hours. Last week, during your appointment, you thoroughly prepped your client for the types of questions the agent would ask and talked about the advantages and disadvantages of giving consent to an extraction of her cell phone. Thankfully, you do not hit any hard bumps during the interview, but you can clearly see the emotional exhaustion in your client's face. You are glad you helped her set up a behavioral health appointment for this afternoon to help process the emotional toll from the interview.

### The Hearing

You grab a quick lunch, then change into your Army Service Uniform for your motions hearing at 1330. The defense has a really good position on this MRE 412 motion, and the evidence is likely to be admitted; but, you think the admission should be limited to avoid confusing the issues for the panel. You can also block any unnecessary humiliation of your client. After hearing both parties argue, you decide there is more to be said, so you offer additional oral argument to the judge. The judge rules from the bench, admitting the defense's evidence but tailoring it to your exact request. You need to remember to "sanitize" (remove all identifying information) that motion and send it to the other SVC in your region; this judge hardly ever limits MRE 412 evidence.

### The Updates

Your day wraps up with phone calls to CID requesting updates on eight of your cases. Most of them are still in what your Regional Manager calls "investigative limbo"—the months-long period where the client has already interviewed, but CID is still conducting investigative activity based on the client's statement. You learn that one case just received a probable cause opine from the prosecutor. You reach out to the client to set up an appointment to have the hard discussion about whether he will want to move forward and potentially participate in a court-martial.

### The Reward

Right before you leave the office for the day, you get a phone call from the new client you met at the hospital this morning. She tells you, "I know I probably didn't say it this morning, but thank you for coming to see me. Your explanation of what was going to happen during the forensic exam really helped got me ready to go in there." You set up a time to meet with her the next day and hang up the phone. Her small compliment brings a smile to your face, and reminds you why your role as the SVC is vital to the Army military justice mission.

The SVC confronts the trauma caused by sexual assault in the military head-on every single day. Their clients come to them in different emotional states. Therefore, the SVC's job is to meet the client where they are, give them the necessary legal context, and then guide them to the decision that is right for that particular client. It takes superior interpersonal skills and great fortitude to build rapport with a client that has experienced trauma and to check the attorney's own personal feelings at the door about any given case. The SVC Program motto is "Vox Victimarum"—the voice of the victim. The key to being a successful SVC is to master the art of first helping the victim find their voice. **TAL**

**Success is defined by ensuring that each client receives the necessary context about the military justice process and the circumstances of their particular case**

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### Notes

1. National Defense Authorization Act of 2014, H.R. 3304, Pub. L. No. 113-66, 127 Stat. 672 (2013).

2. Special Victims' Counsel for Victims of Sex-Related Offenses, 10 U.S.C. § 1044e(a)(2)(2019).

3. 10 U.S.C. § 1044e(b)(5), (8) (2019).

4. National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 534, 128 Stat. 3367 (2014); Manual for Courts-Martial, United States, R.C.M. 701(e)(1) (2019)[hereinafter MCM].

5. MCM, *supra* note 4, Mil. R. Evid. 412(c)(2), 513(e)(2).

6. U.S. Dep't of Def., Instr. 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures encl. 4, para. 1(c)(1) (24 May 2017) ("The victim's decision to decline to participate in an investigation or prosecution should be honored by all personnel charged with the investigation and prosecution of sexual assault cases, including, but not limited to, commanders, DoD law enforcement officials, and personnel in the victim's chain of command.").

(Credit: istockphoto.com/KiroM)

# Rethinking Fraternization Regulations

*By Major Brian D. Lohnes*

On 6 November 2014, the Army republished Army Regulation (AR) 600-20, *Army Command Policy.*[1] As part of the revision to the regulation, the provisions governing relationships between Soldiers of different grades was updated, specifically prohibiting certain relationships between noncommissioned officers (NCOs) and junior enlisted Soldiers based on their status.[2] Like previous status-based fraternization offenses, violations of the current policy are punitive.[3] The creation of this new, status-based, strict liability offense increases the potential for victimless crimes and unnecessarily hampers esprit de corps among Soldiers of different grades. The Army's fraternization policy should decriminalize status-based prohibitions on relationships between Soldiers of different grades, and should focus instead on prohibiting relationships that adversely affect good order and discipline. This article briefly discusses the historical development of status-based prohibitions against fraternization, reviews the Army's current (revised) fraternization policy, highlights the problems with the current policy, discusses alternative policy options, and recommends the decriminalization of strict liability status-based fraternization.

## Historical Underpinning of Fraternization Regulations

The change to the Army's fraternization policy is recent, but the prohibition of fraternization among the ranks has been in practice since the formation of standing armies. In fact, the Army's current policy traces its lineage over 2,500 years to the enforcement of Roman social class divisions among members of the Roman Army.

The Roman Empire employed a standing army with a rank-based structure and regulated the interaction between members of different ranks.[4] Birthright and individual wealth dictated Roman societal status.[5] The rank structure of the Roman army mirrored Roman society, with commanders coming from the noble class and infantrymen coming from the lower classes of society.[6] The division among social classes extended to the Roman army to maintain the status quo of Roman society and to prevent problems with undue familiarity between the classes.

This status-based division within the ranks of European standing armies continued into the Middle Ages, when officership was still part of the aristocratic existence. The earliest explicit prohibition of fraternization between the ranks is found within the armies of King Gustavus Adolphus of Sweden. In the early seventeenth century, King Gustavus raised a standing army of over forty thousand soldiers.[7] At the time,

Swedish society was divided into four classes, a distinction maintained in the armies—with the nobles serving as officers and peasants serving in the enlisted ranks.[8] In 1621, King Gustavus enacted the Code of Articles to regulate the conduct of his armies. While the Code did not mention fraternization, Article 116 prohibited conduct "repugnant to military discipline" and was used in practice to enforce the divisions of the Swedish class structure to maintain good order and discipline within the ranks.[9]

Later, in 1686, the British Empire enacted the English Military Discipline of James the Second, borrowing heavily from King Gustavus's Code.[10] Like the Swedes, the British included provisions prohibiting conduct prejudicial to good order and discipline, and an article punishing conduct unbecoming of an officer and a gentleman.[11] These British Articles ensured a separation between officers and enlisted based on solid class boundaries of British society. By the beginning of the American Revolution, the British status-based prohibition of fraternization between officers and enlisted soldiers was as firmly rooted in the British military tradition as it was in the aristocratic British society; it mirrored the relationship between the nobility and the lower classes.[12]

Like many aspects of early American law, the American Articles of the War of 1775 were adopted nearly verbatim from the British Articles.[13] To protect the New Republic, the second Continental Congress provided for a military and directed George Washington to prepare regulations for the new American Army.[14] Washington and his assistants developed the Code of 1775, which included a general article regulating conduct prejudicial to good order and discipline and an article prohibiting conduct unbecoming an officer and a gentleman.[15] Like the preceding European codes, the American Articles did not contain an explicit prohibition of fraternization among the ranks of the new American Army.

With the Declaration of Independence, America's founders rejected the British class-based societal structure, noting that "all men are created equal." The British army's class-based fraternization prohibition was premised on social distinctions that American founders rejected as wholly un-American. Fraternization was, however, regulated in the early American Army, arguably out of simple wholesale adoption of most British regulations, which did not espouse equality for all.[16]

General George Washington cautioned his officers, "Be easy and condescending in your deportment to your officers, but not too familiar, lest you subject yourself to a want of that respect, which is necessary to support a proper command."[17] General Washington's views on senior-subordinate relationships reflect the American tradition regarding fraternization in the ranks at the seminal moment of the American military—that the purpose for separation among the ranks was to maintain good order and discipline, not to maintain a social class system.

## The Current Policy

Army Regulation Army Regulation 600-20 employs a two-pronged analysis. The first step is to determine if a relationship falls within a status-based prohibition. If the relationship falls within a prohibited status, it is a per se violation, regardless of whether any adverse effects of the relationship exist. If the relationship is not per se prohibited, the second step is to determine if actual adverse effects exist. If the relationship does not violate a status-based prohibition, and no adverse effects exist, then the relationship is not prohibited. The Army's policy applies to both same- and opposite-sex relationships and regulates Soldier conduct in relationships with personnel of other military services.[18] The current policy places the onus on commanders to ensure compliance,[19] gives examples of how relationships can become unduly familiar,[20] and expands the scope of unit-based team-building activities by specifically listing new acceptable groups.[21] The policy is punitive, and violations may be punished under Article 92, Uniform Code of Military Justice (UCMJ) as violations of a general regulation.[22]

### *Status-Based Prohibited Relationships*

The Army's policy creates three general categories of per se status-based prohibitions: business relationships, gambling, and personal relationships. Like the previous Army policy, the current regulation prohibits ongoing business relationships between officers and enlisted Soldiers[23] and adds a prohibition of business relationships between NCOs and junior enlisted Soldiers.[24] The policy also created a legacy allowance[25] for existing NCOs and junior enlisted member business relationships, so long as the Soldiers are not in the same unit or chain of command, and so long as the business relationship does not create an adverse effect.

The regulation continues to prohibit gambling among officers and enlisted and creates a new prohibition on gambling among junior enlisted and NCOs.[26] There are no exceptions to the policy prohibiting gambling.

The current regulation still criminalizes certain personal relationships between officers and enlisted Soldiers; however, it now also criminalizes personal relationships between junior enlisted soldiers and NCOs.[27] Personal relationships that are per se prohibited include dating, shared living accommodations, and intimate and sexual relationships.[28] These prohibitions mirror the previous regulation for relationships between officers and enlisted Soldiers;[29] however, the new "junior enlisted" status means that specialists (SPCs) and below can only socialize with each other.[30] Marriage is an exception to this crime, but fraternization that pre-dated the marriage is still criminal.[31] When a Soldier's promotion or selection results in a change in status, the couple is entitled to a one-year grace period in which to end the relationship or to marry.[32]

### *Adverse Effects Analysis*

Like the previous policy, the current policy includes an adverse effects analysis test. Effects-based analysis requires a commander to examine the facts and circumstances surrounding the relationship, not just the actual relationship. Relationships between Soldiers of different grades[33] are prohibited if they create any of the following five adverse effects:

1. Compromise, or appear to compromise, the integrity of supervisory authority or the chain of command.
2. Cause actual or perceived partiality or unfairness.
3. Involve, or appear to involve, the improper use of grade or position for personal gain.

4. Are, or are perceived to be, exploitative or coercive in nature.
5. Create an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission.[34]

If the relationship does not create one of these adverse effects, and the relationship was not prohibited for status-based purposes, then the relationship is not prohibited.

## Problems with the Current Policy

Upon reviewing the current Army fraternization policy, it becomes clear that several flaws exist. Particularly troubling are the misleading use of the term "grade," the random legacy allowance of some relationships, the failure to cover all personnel in the Army, and, ultimately, the creation of another victimless crime.

### *Rank Versus Grade*

In the current policy, the term "rank" has been replaced by the term "grade."[35] This shift aligns the policy to the Army's formal definition of both words, but away from the colloquial use of "rank" and "grade." Colloquially, the term "rank" refers to a Soldier's title (captain or sergeant) while the term "grade" refers to a Soldier's pay grade (O-3 or E-5). As officially defined by the Army, "[g]rade is generally held by virtue of office or position in the Army. For example, second lieutenant (2LT), captain (CPT), sergeant first class (SFC), chief warrant officer two (CW2) are grades."[36] Rank is officially defined as "the order of precedence among members of the Armed Forces. Military rank among officers of the same grade or of equivalent grade is determined by comparing dates of rank."[37] While this change from "rank" to "grade" is doctrinally correct, the shift is particularly confusing for commanders and practitioners. In paragraph 4-14(b) of AR 600-20, the policy notes, "[R]elationships between Soldiers of different *grades* are prohibited" if the relationship causes an adverse effect.[38]

This is a particularly confusing use of the word grade, and the words "of different grades" should be removed.[39] The unintended meaning of this paragraph is that relationships between Soldiers of the same grade are not prohibited and are unregulated even if they create or result in an adverse effect. This will lead to absurd results and should be addressed in a rapid action revision to the policy. For example, a brigade command sergeant major (CSM) could have a sexual relationship with a subordinate battalion CSM without running afoul of the regulation, a company commander could date his executive officer once she was promoted to captain even though he is her immediate supervisor and rater, and a SPC team leader could gamble with another SPC in his team. In each of these relationships, the Soldiers are the same grade (CSM, CPT, and SPC), yet they are different ranks (the Brigade CSM, Commander, and Team Leader all have a higher order of precedence). Removing "of different grades" from the policy means that any relationship between Soldiers may be prohibited if the relationship creates an adverse effect—the intended purpose of the policy.

### *Permanent Legacy Allowance*

Another unjustifiable creation of the Army's fraternization policy is the permanent creation of legacy allowance for business relationships between NCOs and junior enlisted Soldiers.[40] The updated policy allows these business relationships to continue in perpetuity so long as the Soldiers are not in the same unit or command and the relationship passes the adverse effects test. The regulation fails to explain why ongoing business relationships qualify for an exception but ongoing personal relationships do not.[41] This disparity is perplexing because an abuse of power derived from rank disparity, which the policy aims to prevent, is possible in both personal relationships and business dealings. Business relationships are ripe for abuse of power and exploitation of rank differences.[42] Unlike personal relationships, business relationships often occur out of sight of the command, making it difficult for commanders to prevent abuses of rank in the relationship.[43]

### *Non-Covered Parties*

While expansive in nature, the updated Army policy fails to address several populations within the Army enterprise. Specifically, the policy fails to address relationships between Soldiers, Cadets, and Civilian employees.[44]

Currently, over 35,000 Reserve Officer Training Corps (ROTC) Cadets and nearly 4,400 United States Military Academy (USMA) Cadets are in the Army.[45] The UCMJ covers USMA Cadets, yet Cadets are ignored by the fraternization policy.[46] Under the current policy, Cadets are free to fraternize with officers, NCOs, and junior enlisted Soldiers. However, as Soldiers, Cadet relationships are still subject to an adverse effects analysis. Cadets are generally treated like officers under the UCMJ, so including Cadets in the policy's definition of "officers" makes the most sense.[47]

With more than 330,000 employees, Army Civilians are an even larger population.[48] The Air Force policy considers fraternizing with Civilian employees an unprofessional relationship,[49] yet Civilians are completely unmentioned in the Army's policy. Civilians, however, play a large role in the Army, often serving as raters or senior raters for Soldiers. Under the current policy, the Secretary of the Army could date a Private, and a Battalion Commander could have a sexual relationship with her Civilian secretary. These issues could be avoided by considering Civilians when conducting an adverse effects analysis.[50]

### *Another Victimless Crime*

The most troubling issue of the current policy is the creation of a new strict liability offense for NCO and junior enlisted personal relationships that do not create an adverse effect. In such a relationship, there is no effect or impact on the command, the Army, or the Soldiers involved, thus creating a truly victimless crime. The same holds true for personal relationships between officers and enlisted Soldiers that do not create an adverse effect.[51]

If Soldiers of different rank classes keep their consensual, non-deviant relationships—whether friendly or intimate—private, then the military has absolutely no reason to criminalize such relationships. Such relationships have no direct, tangible, or adverse impact upon good order and discipline and are neither ethically nor morally wrong. These relationships form because of biological attraction and the need for human

interaction. As such, these personal relationships are different from the rest of the policy because Soldiers do not have a biological drive to gamble or a need to conduct business with other Soldiers. The Army's adverse effects analysis adequately prohibits personal relationships that are prejudicial to good order and discipline without the need to categorically deny Soldiers the ability to form relationships.

## Alternate Policy Options

Given the breadth of problems with the current policy, the Army should explore alternate options. Potential options include the total removal of status-based prohibitions and the decriminalization of status-based offenses. Each option is briefly explained and critiqued below.

***Total Removal of Status-Based Prohibitions***

The most extreme revision to the current policy involves removing all status-based prohibitions. Under this option, Soldiers could date, cohabitate, gamble, and engage in business relationships with any other Soldier, regardless of grade, so long as the relationship does not create an adverse effect. This revision would generally comport with the Army's policy prior to 1998.[52]

This policy fails to consider that some relationships, such as Soldier and trainee or recruit and recruiter, are ripe for causing prejudice to good order and discipline because of the inexperience of the junior Soldier and the significant imbalance of power. A per se effect, however, is an adverse effect violation, and this proposed policy would prohibit such relationships.

Additionally, Article 134, UCMJ (fraternization) specifically criminalizes fraternization between officers and enlisted Soldiers.[53] The terminal element of Article 134, prejudice to good order and discipline or service discrediting, is the same as an effects-based analysis. As such, any relationship that would result in a conviction under Article 134 would also violate this proposed policy.

***Decriminalization of Status-Based Offenses***

A more moderate policy option is to decriminalize purely status-based offenses.[54] This option would still list all of the status-based prohibitions, but would not make that paragraph punitive. Under the policy, if a commander becomes aware of a purely status-based relationship, the parties can be ordered to cease the relationship by the commander. If the Soldiers fail to follow the commander's order, they could be punished for violation of Article 90, failure to obey lawful order.[55]

The most likely criticism of this proposed policy is that there would be a declining respect for officers and NCOs, and that liberalizing fraternization regulations will civilianize the Army. It is illogical, however, to assume that a single enlisted Soldier's relationship with an officer or NCO will cause the Soldier to view all other officers or NCOs in a similar fashion.

A "non-effect" relationship between Soldiers of different statuses is problematic only because of the policy's artificial status restrictions. Ultimately, the status-based provisions come from an unfortunate compulsion to regulate every aspect of military life. Under this second proposed solution, commanders are able to conduct an effects analysis to determine if these relationships truly create an adverse effect on the command and, if they do, to prohibit them on a case-by-case basis. This is a more intellectually honest solution than a blanket prohibition on certain status-based relationships—especially ones that do not need paternalistic protection measures.

## Conclusion

The time has come for the Army to reconsider the need for status-based fraternization prohibitions. Days of maintaining social class structure by separating officers and enlisted Soldiers are long gone, yet the Army's current fraternization policy still traces its lineage to the maintenance of social distinctions in the armies of King Gustavus Adolphus. The eradication of this antiquated custom suffered a setback with the creation of new status-based strict liability relationships of NCOs and junior enlisted Soldiers. Fostering esprit de corps among Soldiers of different ranks is as perilous as ever, and commanders are required to enforce a policy that creates victimless crimes and could erode the vibrant mentorship that exists—or at least should exist—among caring NCO leaders and their mentee subordinates in junior enlisted ranks.

Army policymakers must consider alternate policy options and should adopt a policy that decriminalizes purely status-based offenses. At a minimum, AR 600-20 must be updated with a rapid action revision to prevent illogical results from occurring as a result of the current policy. Regardless of the future of the Army's fraternization policy, all Soldiers must recognize that leadership and obedience are founded on respect and professionalism, not antiquated artificial distinctions rejected since the founding of this country. **TAL**

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## Notes

1. U.S. Dep't of Army, Reg. 600-20, Army Command Policy (6 Nov. 2014) [hereinafter AR 600-20].

2. *Id.* para. 4-14. The term "grade" is consistently used incorrectly throughout the updated regulation.

3. *Id.* para. 4-16. "Violations of paragraphs 4–14b, 4–14c, and 4–15 may be punished under UCMJ, Art. 92 as a violation of a lawful general regulation." *Id.*

4. 1 Hans Delbruck, History of the Art of War 430 (Walter J. Renfroe Jr. trans., Univ. of Nebraska Press 1990) (1975). The Roman Empire was founded in 509 B.C. and lasted until 31 B.C., marked by the rise of Caesar. *See* Larry H. Addington, The Patterns of War Through the Eighteenth Century 26 (Indiana Univ. Press 1994) (1984).

5. John Peddie, The Roman War Machine 1 (Grange Books 1997) (1994).

6. Captain Jeffrey C. Russell, A History of the Development of Fraternization Policies (Sept. 1998) (unpublished M.S. thesis, Air Force Inst. of Tech.) (on file with the Def. Tech. Info. Ctr.), https://apps.dtic.mil/dtic/tr/fulltext/u2/a354245.pdf.

7. Addington, *supra* note 4, at 83.

8. Delbruck, *supra* note 4, at 173.

9. Code of Articles of King Gustavus Adolphus of Sweden (1621), *reprinted in* William Winthrop, Military Law and Precedents 907 (Gov't Printing Off. 1920) (1896) [hereinafter Winthrop].

10. Margaret A. McDevitt, *Wrongful Fraternization and the U.S. Air Force*, 33 Clev. St. L. Rev. 547, 555 (1984-85).

11. English Military Discipline of James II (1686), *reprinted in* Winthrop, *supra* note 9, at 28.

12. *See* British Articles of War (1765), *reprinted in* Winthrop *supra* note 9, at 929-46.

13. *Id.* at 22. Prior to Declaration of American Independence, the British Articles were adopted by six of the American colonies. Ultimately, the Second Continental Congress also adopted the British Articles on June 30, 1775. *See id.* at 953-61.

14. *Id.* at 22.

15. *Id.* at 957. Article 47 provided, "Whatsoever commissioned officer shall be convicted before a general court- martial, of behaving scandalous, infamous manner, such as is unbecoming the character of an officer and a gentleman, shall be discharged from the service." *Id.*

16. Major Kevin W. Carter, *Fraternization*, 113 Mil. L. Rev. 61, 67-68 (1986). Officers were frequently charged with drinking in the presence of enlisted men, gambling, dancing at enlisted dances, and conduct leading to undue familiarity with enlisted men. *See id.* at 68 nn. 44–52.

17. John F. Schroder, Maxims of Washington: Political, Social, Moral, and Religious 152-53 (Mount Vernon Ladies Assoc. 1953) (1859). General Washington sent this maxim to Colonel Williams Woolford in 1775. In 1777, Washington noted, "One circumstance in this important business ought to be cautiously guarded against; and that is, Soldiers and Officers being too nearly on a level." *Id.* at 159.

18. AR 600-20, *supra* note 1, para. 4-14(a). These are not changes from the previous Army policy.

19. *Id.* para. 4-14(f).

20. *Id.* para 4-14(b). Examples include repeated visits to bars, nightclubs, eating establishments, or homes. By explaining how relationships may *become* undue, the policy acknowledges that some personal interaction between Soldiers from different status classes is acceptable and inherent to the establishment of esprit de corps. *Id.*

21. *Id.* para 4-14(d). The regulation now includes fraternal associations such as scouting, youth or adult sports leagues or teams, and membership in organizations like the Masons or Elks among groups that are considered unit-based team activities. *Id.*

22. *Id.* para. 4-16.

23. *Id.* para. 4-14(c)(1). The term "officer" encompasses both commissioned and warrant officers, but not Cadets.

24. *Id.* Junior enlisted Soldiers includes Soldiers in the grades of Private (E-1) through SPC (E-4), while NCOs includes Soldiers in the grades of Corporal (E-4) though the Sergeant Major of the Army (E-9).

25. Business relationships entered into after 22 November 2014 are not eligible for the legacy exceptions.

26. *Id.* para. 4-14(c)(3).

27. *Id.* para. 4-14(c)(2).

28. *Id.* The regulation authorizes shared living accommodations if directed by operational requirements. As such, commanders can determine that because of housing limitations in the barracks, a sergeant may share a room with specialist; however, if cohabitation is not operationally required, commanders may not authorize such cohabitation. *Id.*

29. U.S. Dep't of Army, Reg. 600-20, Army Command Policy (18 Mar. 2008) para. 4-14(c)(2) [hereinafter AR 600-20 (2008)].

30. Socialization is not completely limited. Department of the Army Pamphlet (DA PAM) 600-35 authorizes personal relationships between the classes if the Soldiers are Family members. U.S. Dep't of Army, Pam. 600-35, Relationships Between Soldiers of Different Ranks ch. 2 (21 July 2017) [hereinafter DA Pam. 600-35]. Additionally, AR 600-20 notes that the "prohibitions are not intended to preclude unit based normal team building or activity based on interaction which occurs in the context of community based, religious, or fraternal associations." AR 600-20, *supra* note 1, para. 4-14(d).

31. AR 600-20, *supra* note 1, para. 4-14(c)(2)(a).

32. *Id.* The one-year grace period is calculated from the date of the Soldier's change in status. For example, a SPC and PFC would have one year from the SPC's date of rank to SGT (or lateral promotion to CPL) to end their relationship or marry.

33. The use of the word "grade" in paragraph 4-14(b) is particularly troubling and creates illogical results.

34. AR 600-20, *supra* note 1, para. 4-14(b).

35. *Compare* AR 600-20, *supra* note 1, para. 4-14, *with* AR 600-20 (2008), *supra* note 29, para. 4-14.

36. AR 600-20, *supra* note 1, para. 1-6.

37. *Id.*

38. *Id.* para. 4-14(b) (emphasis added).

39. It remains unclear why the words "of different grade" are included. The words "of different rank" are present in every version of AR 600-20 since the fraternization policy was first published in the 1971 version of the regulation. The words "of different grade" are likely a vestige of the previous versions of the regulation. *See* AR 600-20 (2008), *supra* note 29, para. 4-14(b); U.S. Dep't of Army, Reg. 600-20, Army Command Policy para. 4-14(e)(8)(30 Mar. 1988); U.S. Dep't of Army, Reg. 600-20, Army Command Policy para. 5-7(f) (20 Aug. 1986); U.S. Dep't of Army, Reg. 600-20, Army Command Policy para. 5-7(f)(28 Apr. 1971).

40. AR 600-20, *supra* note 1, para. 4-14(c)(1).

41. It remains unclear how many ongoing business relationships exist between NCOs and junior enlisted Soldiers; however, it is likely that, at the time of the update to the policy, there were far more personal relationships between NCOs and junior enlisted Soldiers. This small number of ongoing business relationship may offer a justification for the clause allowing for a legacy exception. Additionally, the regulation fails to explain why business relationships between officers and enlisted Soldiers are not legacy-authorized while those between NCOs and junior enlisted Soldiers are.

42. The Joint Ethics Regulation regulates business relationships and places limitations on solicited sales to Department of Defense (DoD) personnel and their Families who are junior in rank, grade, or position. U.S. Dep't of Def., 5500.7-R, Joint Ethics Regulation (JER) para. 2-205 (30 Aug. 1993) (C7, 17 Nov. 2011).

43. It is unlikely that a commander would learn of an NCO's abuse of rank in a business relationship unless the junior enlisted Soldier risked his finances and reported his NCO business partner's abuses. Commanders must be sensitive to abuses in these business relationships because of the private nature of such relationships.

44. There are many other groups that are not covered by the Army's policy, such as Soldier relationships with foreign service members or civilian contractors, and relationships between senior and junior officers.

45. Brigadier General Sean A. Gainey, *Our History,* U.S. Army Cadet Command, http://www.cadetcommand.army.mil/history.aspx (last updated Dec. 20, 2018); *Westpoint Class Profile,* USMA West Point (6 July 2018), https://www.westpoint.edu/admissions/class-profile.

46. *See* UCMJ art. 2(a)(2) (2018); Manual for Courts-Martial, United States, R.C.M. 202(a) (2018) [hereinafter MCM].

47. *See* UCMJ art. 133 (2018) (including Cadets in the population of Soldiers able to be punished for conduct unbecoming an officer and a gentleman).

48. *Civilian Careers,* Go Army, https://www.goarmy.com/careers-and-jobs/army-civilian-careers.html (last updated 29 Nov. 2019).

49. U.S. Dep't of Air Force, Instr. 36-2909, Air Force Professional Relationships and Conduct (14 Nov. 2019). The Air Force policy also prohibits relationships between cadets and officers or between cadets and enlisted personnel. *Id.*

50. Using this idea, relationships with Civilians would not be outright prohibited because of the Civilian's status of employment with the Department of the Army; but if the relationship created one of the five adverse effects, it would be prohibited.

51. The historical tradition of prohibiting personal relationships between officers and enlisted Soldiers can be traced to the formation of a standing American Army. This, however, is not the case for personal relationships between junior enlisted Soldiers and NCOs, as this is the first time in the nearly 245-year history of the American Army that enlisted Soldiers are prohibited from forming personal relationships with enlisted Soldiers of different ranks solely on the basis of their rank.

52. U.S. Dep't of Army, Reg. 600-20, Army Command Policy para. 4-14(a)(30 Mar. 1988). Under the pre-1998 policy, there were no status-based offenses and the adverse effects analysis simply examined whether relationships "[c]ause actual or perceived partiality or unfairness, involve the improper use of rank or position for personal gain, or create an actual or clearly predictable adverse impact on discipline, authority, or morale." *Id.*

53. UCMJ art. 134 (2018). Further, case law has expanded this article so that enlisted Soldiers may be charged with fraternization in violation of Article 134. *See* United States v. Clarke, 25 M.J. 631 (A.C.M.R. 1987), *aff'd*, 27 M.J. 361 (C.M.A. 1989).

54. A purely status-based offense occurs when Soldiers are in statuses that make their relationship prohibited, and the relationship does not cause any adverse effects.

55. This shift from a violation of failure to obey a regulation to failure to obey a lawful order would reduce maximum punishment from dishonorable discharge, total forfeitures, and two years' confinement to a bad conduct discharge, total forfeitures, and six months' confinement. MCM, *supra* note 46, ¶ 17e(1)-(2).

(Credit: istockphoto.com/porcorex)

# Why We Stay

## Three JAs and Their Commitment to the Corps

*By First Lieutenant Laura D. Jungreis, Major Elizabeth W. Boggs, and Colonel Nicholas F. Lancaster*

*Editor's note: Three judge advocates in different stages of their careers were asked recently to share why they chose to and continue to serve in the Corps. What follows are their thoughts.*

**First Lieuntenant Laura D. Jungreis**

When applying to the Judge Advocate General's (JAG) Corps, I did my homework: researched online, read all the material I could find, and spoke with current and former judge advocates (JAs). Those JAs provided valuable feedback about what it was like to practice military law and be an officer and Soldier in the Army. When I started at the Direct Commissioned Officers' Course (DCC), though, I realized that, despite my research, I really had no idea what the next few months of my life would look like as I went through initial entry training. My commissioning class completed DCC at Fort Benning, Georgia, in mid-February. As I write this, we are now just over half-way through the Office Basic Course (OBC) in Charlottesville, Virginia. So, while it is as fresh as it could be, this is one OBC student's on-the-ground view of the initial entry training experience. Perhaps these anecdotes will allow more senior JAs to both reminisce and better relate to their new lieutenants. For those considering this profession, this is much of the information I would have wanted to know while I was applying to the JAG Corps and while I was anxiously awaiting my DCC "go time," as well as some things I never would have thought to ask or consider.

***Easy Runs Are a Lie***

As of this moment, one of the most memorable takeaways I have from my as-yet brief stint in the Army is that whenever someone says that they are taking you on a "nice, easy run," they are lying to your face. On my first group run at DCC, our cadre run leader said that we would be running at an eight-minutes-and-thirty-seconds-per-mile pace, and then sped away at a seven-minute pace. My hopes of easier runs at OBC were destroyed on our first group run, when my group zoomed out to and back from the famous Rotunda on the University of Virginia grounds. I have never run so fast, so frequently. While I often find myself running much faster and farther than I would like, I cannot deny that my running has improved. Although they are not certified coaches, the professors who serve as fitness group leaders have an ability to recognize when we have more to give and when we need recovery. All this is to say that you cannot improve without making yourself uncomfortable, and while you may have some trouble pushing yourself far enough, the Army has no problem doing that for you.

***Hello and Thank You for Your Service***

During our first few days at DCC, everyone who came and spoke to us thanked us for our service. This included all of our instructors, the Fort Benning Staff Judge Advocate (SJA), Brigadier General (BG) Joseph Berger, the Commanding General of The Judge Advocate General's Legal Center and School (TJAGLCS), and others. While it may have just been lip service, it struck me as genuine, because they were the ones in the best position to understand what we were doing and why. I, and others in my class, had people in my life who could not understand why I was joining the military. Like in law school, when the only people who could really understand what you were going through were other law students and lawyers, the people who guided us through our first few days at DCC were some of the first people I met who truly understood why I had joined the military.

***Battle Buddies***

Your first day at DCC, when you are sitting in a room surrounded by strangers, look around you. These people are your battle buddies. For every time I have been able to assist a buddy, someone else has helped me figure out how to find a point during a land navigation practice test, shared a tarp

First Lieutenant Laura D. Jungreis

during a downpour, or made a joke when I needed one. They will share the same experiences with you, and they will probably share in some of your struggles. Take solace in the fact that if you are getting rained on, so are all your battle buddies. In misery, there is solidarity.

***Stay Grounded***

Although they may not totally understand why you chose this path, make sure to stay in touch with your friends and family (especially while at Fort Benning). When surrounded by the same hundred or so people all day, every day, your world becomes very small. Calls with my loved ones reminded me that there was a world beyond Columbus, Georgia, and Fort Benning.

***Patience (Hurry Up and Wait for Yourself)***

If you are not a patient person, now is an excellent time to learn that trait. As someone with no prior military experience—and who has been out of law school for almost four years—there are some things that I find difficult to master. Type-A person that I am, being bad at something, even something I have no familiarity with like land navigation, is endlessly frustrating. I realized that I achieve the best results when I step back and remain patient with myself. If you do not have a military background, there will be things (like land navigation) that take some time to get used to. Be patient with yourself, and give yourself time to get better—because you will.

***Bring Your Grown-Up-Lieutenant Pants***

There is a strange dichotomy in our training, especially at DCC. It was assumed that we knew nothing, yet we were told to "act like officers." It is a strange feeling to be held to a high standard while you are also expected to know nothing. Bottom line is that while you may not know much about being an officer, you know how to be a professional. Accept that you know very little about this new world, be kind, courteous, professional, and humble, and you will be A-Okay.

***Drinking from the Firehose***

You will hear the phrase "drinking from the firehose" a lot, and for good reason. If you are like me, you will be thrown into and completely immersed in a new culture all at once, learning things integral to that culture that you have no familiarity with, such as land navigation, orders, marksmanship, and drill and ceremony (to name but a few). Stick with it, remain calm, and drink water.

***Nothing (Much) Sticks***

As previously mentioned, if you have no military experience, this might not be the easiest transition. I have had more than one person tell me that my mistakes at DCC or OBC (of which there have been a few) will not follow me the rest of my military career. While I do not think that is entirely true, I do think that the effort you put in during training matters more than what you produce. No one should arrive expecting to be perfect; you can get everything you need from this course by showing up, trying hard, and passing the tests (because those do actually matter).

***Reputations Matter***

That being said, while the innocent mistakes you will inevitably make as you transition into this new and different lifestyle do not matter, the way you treat people actually does matter. Whether or not you are planning to serve on active duty, in the reserve, or for the National Guard, you will see many of these people again. Your reputation matters, and first impressions are lasting. As we are frequently reminded: the JAG Corps world is a small one.

***Everyone Wants You to Succeed***

The Army has spent too much money on you now to let you fail. Really though, ask for help if you need it. One of the best things I have discovered during DCC and OBC is the camaraderie. Our instructors are very aware that they are training their own future colleagues (well, subordinates), so they want us to be as competent as possible from the beginning. Your classmates are also your teammates; this is not like law school, where everyone was fighting to be at the top of the curve. My classmates have saved me more than once by reminding me about due dates or serving as a sounding board, and I try to return the favor when I can.

***Don't Take It Too Seriously***

Okay, so do take it a little seriously. This is your job now. But if you ever feel overwhelmed or anxious, remind yourself to keep things in perspective—this is probably the least amount of responsibility you will have for the rest of your life. Work hard, do what you can, but make sure to enjoy it! The memories of the more senior JAs I spoke to did not revolve around the stress of failing land navigation or the dread of waking up early for a hard run. Instead, they remembered those events with a laugh, and they had plenty more stories to tell about the relatively carefree time they spent getting to know and love their classmates.

***Ask Questions!***

One of the best things I did for myself was reaching out to current and former JAs to discuss their careers and their experiences in the JAG Corps. Their overwhelmingly positive responses are part of the reason I went through with my applications. Talk to as many people as you can, because everyone is or will be doing something different, and they can all tell you something new. At the very least, you will meet some interesting people and gather a few cool stories.

***Be Flexible***

I started my training in January 2020, right before the coronavirus disease 2019 (COVID-19) outbreak. While DCC was

unaffected by it, things really hit the fan in our fourth week at OBC. There are some things over which you will have zero control, like when there is a viral pandemic and you have to do everything via internet conferencing in your increasingly smaller and more claustrophobic hotel room. One of BG Berger's recurring reminders during this time was "remain flexible, and keep your sense of humor." I am working my way through this stay-at-home order by staying active and staying connected with my classmates and my loved ones. It is certainly frustrating, but I know that the way a person reacts to the unexpected is a better reflection of who they are than whatever it is that has been thrown at them.

***Enjoy This Time***

This is a brand new experience! Attending DCC, and to a lesser extent OBC, is a journey unlike any I have experienced before, and one I will not likely have again. I am a reserve officer, and while I am very happy with that, it does mean that I will not return to TJAGLCS for an LL.M., unlike many of my active duty counterparts. In addition, this is the least amount of responsibility I have had in years. I cannot speak for my other classmates, some of whom have families and jobs that require them to work even during training, but I enjoy the simplicity of the wakeup-physical training-school-homework (sometimes)-eat-sleep routine. Charlottesville is a beautiful city to explore, and the surrounding areas are filled with wineries and mountains (assuming that they are not all shut down due to a pandemic).

***You Are Making the Right Choice***

When I started filling out the application for the JAG Corps, it was an abstract concept. It seemed cool and interesting, but I figured that my chances of selection were slim and that I was unlikely to ever actually be accepted. Even after the happy surprise of selection, it was still two years until I left for DCC. Once I finally got the go-ahead, I was excited and nervous. How was this going to affect my life and career? Picking up and leaving for four months is not too difficult when you have a flexible job and no kids, but there were parts of me that questioned my choice. After only three-ish months, I cannot tell you what the rest of my Army career is going to look like, but I can say that I made the right choice—and you are, too. Whether you are just thinking about starting your application or if you have already been selected, choosing to serve in the JAG Corps is the right choice. You are doing or contemplating something that few people have the skills or inclination to do, which is impressive in its own right.

While there are one or two things I hope to never experience again (hello, 0300 wakeups), this time has been a genuinely enjoyable experience. That was something I had heard from others prior to DCC, and it is a sentiment that I want to repeat. Current circumstances make OBC more challenging than it might otherwise be, but they have not taken away my happiness at being here. For anyone considering applying, awaiting results, or preparing for DCC—good luck, and I look forward to seeing you around!

## Major Elizabeth W. Boggs

Over the past ten years, people have asked, "Why did you join the Army?" Whenever this occurs, I instantly fill with joy, pride, and excitement. The reasons I joined are the very reasons I choose to stay. On paper, my military career began on 4 July 2010 at Fort Lee, Virginia, when I commissioned as a first lieutenant with my classmates from the 182d Judge Advocate Officer Basic Course. In all actuality, my career of servanthood began long before that.

***Memories of Those Before Me***

This summer marks my tenth year of active duty service in the United States (U.S.) Army, but the "whys" started their service decades before me. It began with my grandparents. My grandfather, Elmer, served in World War II (WWII) in the Army Air Corps. Growing up, over countless holiday dinners and family gatherings, my grandfather enlightened me with stories of his time in the Philippines and Guam. He tested parachutes in the Pacific for an extra $20 a month, was a machine gunner on a B-29 Super Fortress, and even drove Jeeps in the Philippines jungle with a monkey! He quickly earned the rank of staff sergeant during his six years of service. Elmer's brother Bill, my great uncle, was one of the first Underwater Demolition Team sailors—the predecessors to the Navy

Major Elizabeth W. Boggs

SEALs. He was also featured in the book *Naked Warriors* and performed the underwater scenes in the movie *Frogmen*.[1] My other grandfather, Roger, served for three years during WWII as an aerial electronic engineer in the Navy. He flew numerous combat missions in some of the most horrendous campaigns the Pacific ever saw. All of these men who came before me provided examples of selfless servanthood. They paved the way for me to follow.

***The Life I Lived and the Life I Learned I Wanted***

In law school, I quickly learned that I wanted a job where I could help others and make a difference in the community. After I passed the Michigan bar exam in 2006, I immediately took a dream job with the Kent County Prosecutor's Office in Grand Rapids, Michigan. Under the leadership of Mr. William "Bill" Forsyth—who retired as the Kent County Prosecutor after forty years of service and was recently appointed as the special prosecutor to investigate Michigan State's handling of sexual abuse claims—I excelled as a young assistant prosecuting attorney. The pace of district court energized me as I worked closely with top-notch law enforcement officers and attorneys. This drove home the idea that I should continue to serve this nation.

In February 2009, I took the Florida bar exam and reconnected with my college boyfriend, James. At the time, he

was stationed at Fort Rucker, Alabama, finishing up initial entry rotary wing flight training. Awaiting my Florida bar exam results, I returned to Michigan and my job at the prosecutor's office. James and I spoke daily. Those talks made me fall in love with him and the idea of joining the military. I asked thousands of questions about the military and became a part of such an amazing family. I was won over by his stories of camaraderie with fellow Soldiers, pushing himself both physically and mentally, and the hunger to protect our freedom at all costs. The discipline, commitment, and close relationships reminded me of my collegiate basketball days. James had, and still has, tremendous love for our country, his fellow Americans, and the military. I wanted to be a part of that. But, first, I needed to learn more about joining the military and if I was a good fit for "JAG." Fortunately, I knew a few defense attorneys who were reserve judge advocates and had clerked for a reserve O-6 Navy judge advocate in Kent County during law school. Their advice and guidance truly helped me realize I was a competitive candidate and confirmed military service was the right career path.

***One of the Happiest Days***

After James and I married in July 2009, I left my job in Michigan to be with him in Alabama. While he finished flight school, I used my time to get everything together to apply for a direct commission. I set up a field screening interview in early fall 2009 in Hawaii. The timing was insane—we had just permanently changed stations to Hawaii, where James was gearing up for his second deployment to Iraq, and I was adjusting to life as an Army dependent. In other words, we had a lot going on.

I went in to the field screening interview with confidence. After all, serving my country was a family trait. It was in my blood. I was married to a Blackhawk pilot who was deploying soon, my grandfathers served, and I enjoyed serving my community—I belonged here. The adventure and variety of legal work, coupled with military service, was what I wanted.

In January 2011, I cried when my field screening officer called to tell me that I received an offer of a direct commission to the world's largest law firm. I was going to be a first lieutenant in the U.S. Army Judge Advocate General's (JAG) Corps. I immediately sent a downrange Skype message to James. We celebrated, cried, and laughed; all the emotions of what had been in the works behind the scenes for years spilled out.

***The Rest Is in the Making***

I share this story because it's the reason, background, and foundation on why I choose to stay in the JAG Corps. I stay for the service, my grandfathers, my husband, and our two children. I stay for the people, the relationships, and the camaraderie. I have served with some of the fiercest, yet most humble, leaders on this planet—including commanders, officers, noncommissioned officers, warrant officers, enlisted Soldiers, and Department of Defense Civilians. I am honored to be on their team, to wear this uniform, and to serve with them to accomplish our mission. I admire my teammates, peers, and colleagues in the U.S. Army JAG Corps. And, from deep down in my heart, I can say that I look forward to another decade of service alongside the very best legal professionals. The rest is in the making.

## Colonel Nicholas F. Lancaster

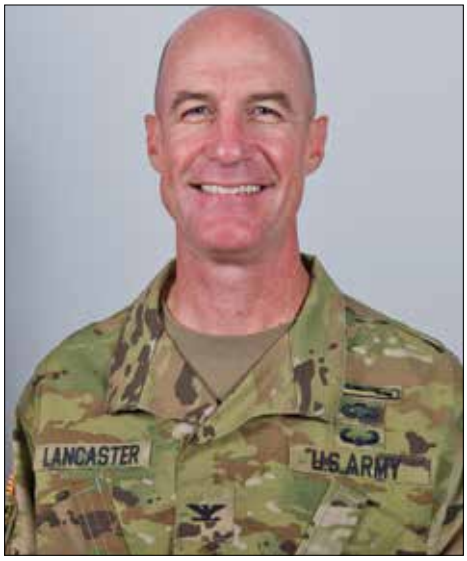
I stayed in the Army for twenty-eight years for three main reasons: the people, the opportunity to serve my country, and the incredible variety of assignments and opportunities found in our branch. As a matter of fact, I doubt that anyone was surprised when I went to college on a scholarship from the Reserve Officer Training Corps (ROTC) and became a second lieutenant. After all, I grew up as an Army brat in a military family.

I was born in an Army hospital at Fort Benjamin Harrison, Indiana and moved around with my family. We lived in Texas, Indiana, Hawaii, Virginia, and Germany. In 1988, I graduated from high school in Carlisle, Pennsylvania—the same year that my dad was a student at the Army War College. I attended Xavier University on an ROTC scholarship, and, in May 1992, I commissioned as an infantry lieutenant. As the son of an Army judge advocate (JA), I was vaguely aware of the educational delay program, and, as a political science major, I probably could have pursued that opportunity. But, I was tired of going to school and wanted to be a part of the "real Army." And that's exactly what I did.

I spent a year at Fort Benning, Georgia, learning to be an infantry officer. After that, I spent the following three years in an infantry battalion as a rifle platoon leader, mortar platoon leader, and an assistant operations officer at Fort Carson, Colorado. I enjoyed being an infantry officer; however, if I decided to stay in for twenty years, I wasn't sure that I wanted to spend 200 days out of the year sleeping on the ground in a field. It was the mid-nineties, and we trained constantly for our annual "super bowl," otherwise known as the National Training Center. Little did I know that I would spend two and a half years deployed to Afghanistan and Iraq after 9-11. Eventually, I realized two things. First, I wanted to go to law school. Second, it was a tremendous opportunity to have the Army pay for school. Once these two things were clear, I applied for the Funded Legal Education Program (FLEP) while still serving on active duty as an officer. Lucky for me, I was selected for the program and went to Indiana University's Maurer School of Law.

I would venture to say that almost everyone who stays in the Judge Advocate General's (JAG) Corps past their initial commitment would say it was because of the people, and I am no different. I have met so many fantastic people in the Corps that it would take the whole *Army Lawyer* just to list them. Instead of listing individuals, I will try to describe why I think our people are amazing. It ultimately comes down to a group of talented people who love serving their country and whose diverse backgrounds and experiences are nothing short of incredible.

I know many JAs that are just like me; in other words, they love national security law and deployments. Fortunately, though, I know just as many great JAs who are experts in criminal law or contracts, or who know how to operate in the U.S. Army Legal Services Agency (USALSA) or the Pentagon. There are people I consider close friends from my Officer Basic Course (OBC) and my first assignment. But, even better, every assignment has fantastic




Colonel Nicholas F. Lancaster

people of equal value. Every time I move to a new assignment, I connect with stunning people. When you spend years in the Army JAG Corps, you develop a vast network of contacts—mainly because Army lawyering is a team sport that not only allows, but actually demands, that you call on your brothers and sisters for assistance. I may not know every officer in the JAG Corps, and it is a good bet that I do not know many younger captains and majors, but I can guarantee I know somebody that knows every single JA. If a name comes up, I simply reach out to my network and I will get a response—often within hours. That is why we tell every basic course their JAG Corps reputation begins in OBC and follows them throughout their careers and beyond.

On a personal level, and beyond the professional competence we take for granted, people in the JAG Corps tend to be renaissance men and women. It is rare to meet somebody in our corps who does not have a secret skill or talent. We have tremendous musicians, craftsmen, athletes, and volunteer leaders. Even if one allows for the fact that lawyers can be difficult, opinionated people who all think they are the smartest person in the room, something about serving as JAs turns them into people you want to spend time with.

I stayed in the JAG Corps because I like that, rather than simply a job, we have a mission. Being an Army officer is a significant part of my identity. As a kid growing up in an Army family, I knew that my dad—and even our family—was serving our country. As an Army officer myself, I take tremendous pride in being part of the Army team. Every member of the JAG Corps is working to accomplish the mission; nobody in the Army is in it to simply draw a paycheck. The pay and benefits are good, but not good enough to motivate twenty-plus years of service on their own. People in the JAG Corps serve because they believe in our mission and enjoy working as part of a team committed to serving our country.

Finally, I stayed in the Army JAG Corps for twenty-eight years because of the personal and professional opportunities. The range of opportunities found in the Army are difficult to find in many other organizations, particularly as a lawyer. I know some judge advocates wish for more opportunities to, like civilian lawyers and their niche practices, specialize; but, I am the opposite. I love the fact that I get to change jobs every two to three years or even more often. When I first came in the JAG Corps, I was desperate to avoid any hint of operational law because I believed that my infantry background might pigeonhole me. I already knew about operations; I wanted to learn how to be a lawyer. To this end, the majority of my pre-graduate course time was spent in criminal law, and I was fortunate to be selected to teach in the criminal law department at the school for three years after the grad course.

At seventeen years of service, I was promoted to lieutenant colonel and finished my time on faculty. Regardless of where I was assigned next, my family planned to remain in Charlottesville. I tried to figure out what I could do for three more years so that I could retire at twenty years of service. To be honest, due to a torn ACL from soccer, I could not exercise the way that I wanted to. In conjunction with the surgery and the long recovery, I was depressed; so, a lot of my time at that point was spent sitting around, drinking beer, and feeling sorry for myself. Right in the middle of that, I got a call from my former Staff Judge Advocate (SJA)—then-Colonel Rich Whitaker—asking if I wanted to compete for a job as command judge advocate for a special operations forces (SOF) unit. I did not know anything about it and had never been assigned to a SOF unit, but it sounded interesting. I ended up getting that job, and it changed the direction of my JAG Corps career. I spent three years immersed in intelligence and national security law (NSL) and loved every minute of it.

The opportunity to serve in SOF changed the course of my career and opened doors I did not know existed. Without that NSL experience, I would not have been considered qualified to be the U.S. Army Special Operations Command (USASOC) SJA and probably would not have been the U.S. Forces-Afghanistan SJA a few years later. In the time that civilian lawyers complete half of their careers, few—if any—have the chance to change their area of expertise as I did in the Army JAG Corps. I am grateful for that.

After all is said and done, in the end, I stayed in the Army JAG Corps because of the people, the mission, and the opportunities for personal and professional growth that is only found in our great Corps. After a bit over twenty-eight years, I will retire this Fall. But I am proud that I will remain a Soldier for life. **TAL**

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*MAJ Boggs is currently a strategic initiatives officer, Office of the Judge Advocate General, Washington, D.C.*

*COL Lancaster is currently the Director, The Judge Advocate General's Legal Center, Charlottesville, Virginia.*

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## Notes

1. Francis Douglas Fane and Don Moore, Naked Warriors: The Story of the U.S. Navy's Frogmen (1995); Lloyd Bacon, The Frogmen (1951).

Reserve Officer Training Corps (ROTC) cadets from the Western Michigan university run to the next event during an Army ROTC Ranger Challenge Competition held at Camp Atterbury, Ind. (Credit: SSG Russell Lee Klika)

# ROTC Outreach Done Right

*By Colonel William M. Stephens*

*People, people, people—that's why recruiting is so important . . . it's the lifeblood of our business.*[1]

Recruiting is critical to ensure the Judge Advocate General's (JAG) Corps remains strong and attracts the best candidates. The Reserve Officer Training Corps (ROTC) Outreach Program is a pivotal part of this enduring effort. Launched by the Judge Advocate Recruiting Office (JARO) in 2018, this initiative educates cadets about the JAG Corps's mission and emphasizes the opportunity to become a judge advocate (JA) through the ROTC Educational (Ed) Delay Program and the Funded Legal Education Program (FLEP).[2] Offices of the Staff Judge Advocate (OSJAs) are responsible for conducting outreach events with assigned Army ROTC battalions in their region; and, they have wide latitude to shape these engagements. Ed Delay and FLEP officers have been a rich source of talent for decades, and the vitality of the commissioning sources depends on sustained, targeted outreach as part of a cohesive and effective strategy.[3] This article provides practical tips to enhance ROTC engagements and build relationships with assigned units. While this article is focused generally on the who, what, when, where, and how to connect with ROTC groups, it is merely a starting point for discussion.[4] Every ROTC battalion and host school is unique, and OSJAs should tailor their engagement plans to best connect with the cadets in their region.

## Engaging Cadets: Who? What? When? Where? How?

***Who?***

The ROTC Outreach Proram assigns OSJAs to ROTC battalions, and approximately two-thirds of the 273 Army ROTC programs nationwide currently have an assigned OSJA.[5] If there is not an established relationship between the OSJA and the assigned ROTC battalion, members of the OSJA may have to use the resources available to find the appropriate points of contact, including: social media, the garrison commander's public affairs office, or cold-calling local universities.

Senior leaders, including the senior paralegal in the office, should be engaging with ROTC cadets. Cadets who commission into their assigned branch may only interact with the battalion paralegal, as opposed to with a JA, in their first few assignments. The Noncommissioned Officer in Charge (NCOIC) of the OSJA can educate them on what a paralegal can and cannot do, as well as tell the potential future commanders what they should expect from their paralegals. In addition, consider bringing junior members from your office to various engagements, such as a recent JA accession who commissioned through an Ed Delay or FLEP. Speaking to cadets is an exceptional professional development tool for the junior personnel in your organization and can help build rapport and create resonance with the audience—especially with cadets interested in or considering the Ed Delay Program or FLEP. Further, bringing junior Soldiers from your staff will ensure that, as they move up the ranks and speak to future recruits, they will have the institutional knowledge to continue participation in these engagements.

If you are an active component JA, invite a U.S. Army Reserve (USAR) or Army National Guard (ARNG) JA to speaking engagements—or vice versa—and coordinate the timing of the speaking engagements with these other service component elements in your area.[6] The U.S. Army Reserve Legal Command (USARLC) has twenty-eight legal operations detachments (LODs) throughout the country; their teams are dispersed throughout the community.[7] The U.S Army Reserve Command has over 1,800 attorneys and paralegals dispersed throughout the country who are working in embedded slots. The ARNG units have JAs in most of the major installations throughout their respective states. Recruiting initiatives are not solely for the active component, and many ROTC

students will not pursue active duty after graduation or be offered an active-duty commission. Instead, these students may elect to pursue careers in both the private sector and in the USAR or the ARNG.

***What?***

Now that you have an ROTC engagement planned and know who will be participating, what do you talk about during the visit? With the publication of a JAG Corps brochure, and an accompanying slide presentation, JARO has made the "what" to talk about easy.[8] The brochure contains a brief description of the different areas of law, and you can use the brochure to discuss the JAG Corps's core competencies and legal functions. While discussing the core disciplines, you can highlight your experiences and your path through the different disciplines. If you are speaking to your alma mater, tell a story or two about your path from that ROTC battalion to and through the JAG Corps by using the brochure as a guide. This is also an opportunity to discuss the fun and unique things you have done in the Corps, such as schools, deployments,[9] or participating in a multinational exercise. Any engagement with the ROTC cadets should also include information on all of the components; this will inform the students of all of the potential paths in and through the Corps—including serving in a Reserve Troop Program Unit (TPU) billet in their community or serving as one of over 900 ARNG JAs throughout the various States, Territories, and Commonwealths of the United States.[10]

Other sources of conversation topics include the public affairs office or JAG Corps leadership publications, which have themes and messages for opening discussions. An easy place to start is the *TJAG and DJAG Sends*, JAG Corps social media sites, or even a casual conversation with JARO.[11] You are not bound by the four corners of the suggested talking points, but keep personal opinions about current events within the bounds of good taste. If you are still looking for a somewhere to start, begin with Lieutenant General Pede's emphasis on "*Be Ready*" as your theme. He has emphasized that each JAG Corps member must "*Be Ready*" for "battlefield next"[12]—whether that is litigation, ethics questions, or advice on the battlefield. To expand on the theme of "*Be Ready*," consider explaining how the JAG Corps quickly adapted to battle the novel coronoavirus pandemic while transforming to conduct future multi-domain operations against a near-peer adversary.[13] You could also highlight the related *Battlefield Next* podcast hosted by the Future Concepts Directorate at The Judge Advocate General's Legal Center and School.[14]

Although the pay and benefits of joining the JAG Corps may be of slight interest to ROTC cadets, it should be mentioned. The cadets have usually calculated the military's potential competitive salary as compared to the private sector and often know other benefits associated with military service—such as housing, insurance, and commissary benefits. They, however, are often not aware of FLEP, the availability of the Student Loan Repayment Program ($65,000) for Ed Delay active-duty selectees, the summer intern program, and the ability to earn certain law school scholarships, In addition, they are seldom aware of the ability to obtain a Master of Laws degree (LL.M.) during the pendency of their career.

***When?***

Cadets should be informed early in their careers about some of the hard deadlines in conjunction with their decision to apply for the Corps, especially regarding the Ed Delay Program. It is best to engage them early and often. Senior leaders may, and should, conduct outreach at any time; but, they should be aware of the timelines and appropriately tailor their presentations. When they conduct on-campus interviews in the fall, Field Screening Officers often coordinate ROTC outreach with those units located near law school campuses—especially with the Ed Delay program. United States Army Cadet Command establishes the deadline for Ed Delay program applications. The deadline is typically in the fall, and the selection board acts in conjunction with the branching process.

A potential engagement time is the first part of the fall academic semester. If you are trying to ensure the juniors are in the potential population of candidates, you should either speak to them earlier in the academic year or focus on first- or second-year students when discussing the educational delay program.[15] For seniors, you should switch your topics of discussion to the FLEP program or provide information on how to join the Reserve Component and pursue a law degree while serving in the military.

**To expand on the theme of "*Be Ready*," consider explaining how the JAG Corps quickly adapted to battle the novel coronoavirus pandemic while transforming to conduct future multi-domain operations**

Throughout the academic year, maximize the time to meet with both the battalion leadership and the cadets during the days of the engagements. This commitment will consume additional time, which is often in short supply in an OSJA; however, this investment will pay dividends for the Corps as well as for the Army in the future. If possible, try to schedule multiple times to speak to the different groups of students, even if it is on the same day. An audience of freshmen has different questions than juniors, and the timelines for accession into the Corps are different for each class. New students will probably want to hear a different story than potential recruits who are upperclassmen. Further, unless they have had contact with the JAG Corps in the past, many may not know that the military uses legal professionals. While the discussion of a JA's role is a good starting point for a young cadet, this topic may be of less interest to a junior or senior preparing to graduate who would be more interested in learning about the opportunities available to them in the Corps.

***Where and How?***

The location that you choose is integral to the cadets' participation. The ultimate goal, of course, is for the cadets to be engaged. This may not be as easy as traveling to one of the local colleges. Some ROTC programs cover multiple colleges and universities in a broad area, sometimes a few hours apart. There may be an opportunity to connect with multiple schools at a consolidated event on one of the campuses. Consider joining the cadets during a competition they attend, during a physical training session, a ruck march, or in locations that are not the classroom. Alternatively, instead of traveling to the college, consider bringing some cadets to your installation and hosting them at the office. If a smaller-scale event would be easier to manage, invite them to an event in your office to meet with your team members or invite them to view a court-martial.[16]

How you engage the cadets begins with knowing your audience, knowing yourself, and—most importantly—being yourself. It is critical to know about the battalion before walking into the room. At a minimum, you should know the name of the battalion, the Professor of Military Science, and have viewed the biographies for the ROTC leadership. If the battalion is comprised of cadets from multiple universities, it may be useful to spend some time speaking with the leadership about the relationships with other service elements in the area. For example, with which ARNG units do the cadets have dual membership in the Simultaneous Membership Program?[17] Does the battalion have a relationship with any reserve units or other service programs in the area, and what do those units do for the command? In addition to a conversation with the leadership, an easy way to familiarize yourself with the battalion is by reviewing its social media pages. The content will give you a quick snapshot of the battalion and an overview of the cadet life during the year. Finally, consider picking up the phone and speaking with the ROTC leadership—including the Professor of Military Science—and discussing major training events, the curriculum, and upcoming competitions. By tailoring your speech to relevant topics and getting to know the battalion before walking in the door, you illustrate that you care about and are interested in them.

Communicate with the Professor of Military Science, or other unit coordinator, and have honest conversations about your mutual expectations, how much time and interaction they want you to allocate, and if your topic areas will be of interest to the cadets. Ask the leadership if your brief will or could satisfy one of the battalion training requirements. For example, will it fulfill a requirement for a block of instruction on leadership or the UCMJ? If you can speak on these topics to fill a block of required instruction and tie in the JAG Corps elements, it will benefit both the cadets and the battalion leadership.

**How you engage the cadets begins with knowing your audience, knowing yourself, and—most importantly—being yourself**

While speaking to different classes on topics other than those in the block of instruction, it is essential to know your material. You should already be a subject matter expert on the topic of instruction, but you should also be a subject matter expert on the application process and program details for Ed Delay and FLEP. The Judge Advocate Recruiting Office makes being a subject matter expert easier by distributing briefing material to all SJAs during the recruiting season. The slide deck and information papers contain all of the information regarding the Ed Delay program and FLEP. Each class will have different questions about accessions, so you should know the relevant dates for each path. Review the JARO website so that you can be knowlegeable about the various tabs and the information on the webpages. The more familiar you are with the material, the easier it will be to answer any potential questions from your audience. Of course, you should always also encourage cadets to contact JARO if they have questions beyond your scope of expertise.

Similar to preparing for trial, know yourself and anticipate where you may have knowledge gaps. Anticipate questions and prepare, or at least think about, potential responses to those questions. If there are no questions at the beginning of your talk or at the end of the initial discussion, open the floor to any topics and ask questions to open the flow of dialogue. For example, what are they looking for in a military career? Cadets' questions will give you a better idea of the topics that are important to them and will give you an azimuth. If they do not have any questions, or if they are mentioned and answered earlier, talk about what "*Be Ready*" means to the Corps or discuss our Corps constants: "principled counsel, substantive mastery of the law, stewardship, and servant leadership."[18] Other areas you may want to anticipate or touch on in order to pique participants' interest are the emerging practice areas such as cyber and artificial intelligence. Cadets may have never considered being able to serve in these dynamic areas.

## Practical Tips and Follow-Up

***Visits***

In-person visits can usually be accomplished with little or no costs through the use of government non-tactical vehicles. Alternatively, subject to ethical parameters, you can engage ROTC cadets in combination with a staff or senior-leader visit to the subordinate units in the area. In short, be imaginative—within legal guidelines—and be fiscally responsible. If you or your team members are unable to speak to the cadets in person due to transportation, time, or expense, consider alternative methods of engagement—such as video conferencing platforms. Whether you appear in person or virtually, communicate with the battalion leadership on every aspect of logistics and the topics of conversation.

Determine if you will be participating in physical training or another activity with the cadets, simply briefing them in a

classroom, or both. If time permits, advocate for performing an activity with them. No briefing can replicate the breakdown of barriers that comes from sharing the sports field or working together as a team. This information will also inform your decisions what will be the appropriate attire for the visit.[19] Do not underestimate the message that your uniform and appearance may send; it could serve as a conversation piece.

Find out if you are speaking for one session of cadets of various class years or for one session for each class year. Large, mixed groups are less beneficial than a meeting with each individual year group, and these meetings will depend on their classes and availability. Ensure that you and the battalion leadership have a mutual understanding regarding how much time you will use to speak. Try to plan for a minimum of one hour for the speaking engagement; but, be aware that some classes only last fifty minutes while some classes are ninety minutes. No matter how much time you have allocated, be sure to leave approximately a quarter of your time for questions and discussions.[20]

***Follow-Up***

After speaking to the cadets, a critical element is the follow-up. Real relationships are what keep you in the Corps, and it is no different with cadets. The implementation guidance does not require more than one visit, but every OSJA is welcome to maximize engagements and go "above and beyond." In doing so, both the OSJA and the ROTC battalion leadership should endeavor to forge a genuine relationship—not a superficial one. Offer ongoing support and maximize other types of touchpoints, such as virtual engagements or individual telephonic mentoring sessions. Small group sessions over a period of time are more effective than one-time briefings to a mass audience. Real-world mission requirements and budget constraints will always compete for your time; however, the more the ROTC battalion leadership and the cadets know you or the representative in your office, the more likely they will come to that person when they have questions regarding the Corps.

If you are not able to maintain that relationship on a persistent basis, consider relying on the USAR and ARNG elements in the area. Another resource may be a JAG alumnus or alumna who teaches at the university or at the law school. Battalions will welcome your continued support. Provide them with your contact information and confirm they have yours. After the first event, go to their battalion events in the future when invited. If you have the opportunity, make a point to attend battalion dining in and dining out functions, commissioning ceremonies, and fun physical training events. Continued engagements will also help the battalion and provide continuity when they transition leadership.

**Cadets' questions will give you a better idea of the topics that are important to them and will give you an azimuth**

After each speaking engagement or event, follow up with JARO.[21] At a minimum, provide information and highlights on the ROTC battalion from the engagement. Further, provide some information on the group which can potentially be posted to social media. Keep it simple—write up a short blurb for JARO and the battalion on the engagement. A note posted to the appropriate platform is not self-aggrandizing—it is telling the story for both sides. The fastest way to "tell the story" is via social media. When you "tell the story," make it an exciting story. Instead of a long dissertation combined with a photo of a classroom, provide a short write-up and have an interesting picture. The photo serves the dual purpose of highlighting both the Corps and the battalion. If you feel camera-shy, focus solely on the battalion.[22] Most, if not all, battalions will appreciate being mentioned in a forum with Army leadership, especially if linked to their unit via hashtags or through their social media account presence. Highlighting their battalion in a national forum boosts traffic to their sites and provides them with great publicity.

## Conclusion

As leaders in the Corps, we must be deliberate in planning. After all, filling the formation after we leave is a part of our responsibility to steward our profession.[23] The ROTC Outreach Program is a component of our recruitment strategy. An immediate pool of potential JAG Corps leaders are already in the ROTC battalions in your area. Judge advocates from every component should engage cadets and educate them on the various pathways to join and serve in our Corps. From the beginning of the school term and throughout the academic year, and using every medium and platform available, engage these cadets as often as your mission allows. To do so, be prepared to travel to them. Intrigue them with specific information regarding your background and history, but also with information that educates cadets about the JAG Corps's mission and emphasizes the opportunity to become a JA through various commissioning sources. By doing so, you will ensure our Corps remains strong and attracts the best candidates for the future. **TAL**

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*COL Stephens is currently assigned as the G/3/5/7 with the U.S. Army Reserve Legal Command.*

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## Notes

1. United States Army Recruiting Command (USAREC) Public Affairs, *Army Senior Leaders: Recruiting is the 'Lifeblood' of the Army*, U.S. Army (29 Oct. 2019), https://www.army.mil/article/229070/army_senior_leaders_recruiting_is_the_lifeblood_of_the_army. This article features comments by Secretary of the Army Ryan McCarthy, Chief of Staff of the Army. The comments were originally made on 3 October 2019, at the U.S. Army Recruiting Command's Annual Leaders Training Conference. *Id.*

2. The Educational (Ed) Delay program allows senior year cadets (MSIVs) to apply for a delay of their service obligation in order to attend law school. Cadets are granted an Ed Delay commission upon graduation and placed in the Individual Ready Reserve (IRR) during law school. They must compete for the Judge Advocate General's (JAG) Corps selection during their third-year of law school. *See* U.S. Dep't of Army, Reg. 601-25, Delay in Reporting for and Exemption from Active Duty, Initial Active Duty for Training, and Reserve Forces Duty para. 2-5 (19 Oct. 2006). The Reserve Officer Training Corps (ROTC) Outreach

Program also raises awareness of future opportunities in the Funded Legal Education Program (FLEP), under which, up to twenty-five active duty officers in the grade of O-3 and below—and, starting this year, certain enlisted Soldiers—obtain a civilian legal education at the Army's expense. *See* Detail as Students at Law Schools, Commissioned Officers, and Certain Enlisted Members, 10 U.S.C. § 2004 (2011).

3. TJAG & DJAG Sends vol. 40-15, *Decisions on Strategic Initiatives Resulting from September 2019 Board of Directors Meetings,* JAGCNet (6 Nov. 2019), https://www.jagcnet2.army.mil/Sites/JAGC.nsf/homeDisplay.xsp?open&documentId=C86EE9109F-670795852584AA003EFE88 [hereinafter TJAG & DJAG Sends vol. 40-15].

4. Author's note: These practical tips were developed from personal experience with multiple ROTC Battalions throughout the country over the course of several years. Every engagement has resulted in lessons learned, including lessons that the author wishes he knew prior to the engagement.

5. Telephone interview with Lieutenant Colonel (LTC) Aaron Lykling, Chief, Judge Advocate Recruiting Office (Apr. 9, 2020). Many thanks to LTC Lykling for all his contributions to this article.

6. TJAG & DJAG Sends vol. 40-09, *AC/RC Integration Next: Total Force Readiness, Annex B, AC Centric Partner Directory*, JAGCNet (7 May 2019), https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeDisplay.xsp?open&documentId=0F-78C9466468FE91852583F3005FDF54 [hereinafter AC/RC Integration]. If you need assistance with knowing who your partners are in the Reserve or National Guard, refer on the website to AC/RC Integration, which lists all of the AC/RC/NGB partners.

7. U.S. Army Reserve Legal Command, *Vision,* U.S. Army Reserve, https://www.usar.army.mil/Commands/Functional/Legal-Command/About-Us/ (last visited Apr. 15, 2019).

8. Engage with Judge Advocate Recruiting Office (JARO) in advance of any engagement to obtain multiple copies, which can be distributed to the cadets. The Judge Advocate Recruting Office can mail the brochures to your office or to the ROTC Battalion in advance of your appearance. Further, JARO can send additional copies to the battalion throughout the year for potential distribution to future cadets.

9. Another useful topic may include explaining the role we play on a brigade or division staff during the operations process. Cadets may not realize that JAG Corps personnel deploy and enable operational commanders and staff to make legally sound and ethical decisions in a kinetic environment.

10. JARO, *Serve Your Country and Your State in the Army National Guard*, JAGCnet (13 Mar. 2013), https://www.jagcnet.army.mil/Sites/jaro.nsf/homeContent.xsp?open&documentId=E2695AA961DCFBD-F85257B2D00513222.

11. *U.S. Army JAG Corps*, LinkedIn, https://www.linkedin.com/company/u-s-army-jag-corps (last visited Apr. 15, 2020); *Army JARO*, Facebook, https://www.facebook.com/ArmyJARO/ (last visited Apr. 15, 2020). In addition, JARO is always standing by to provide the most current information on Ed Delay, FLEP, and USAR recruiting. They will help with talking points when conducting ROTC engagements or branch nights.

12. TJAG Sends vol. 40-04, *Jan 18—New Year, Same Resolution—Be Ready!*, JAGCNet (8 Jan. 2018), https://www.jagcnet2.army.mil/Sites/JAGC.nsf/homeDisplay.xsp?open&documentId=0480354BA3ADF9388525820F0057CFDB.

13. TJAG & DJAG Special Announcement vol. 40-08, *Decisions on Strategic Initiatives* (April 2019) (on file with author); *see* TJAG & DJAG Sends vol. 40-15, *supra* note 3.

14. *Battlefield Next*, TJAGLCS, https://tjaglcspublic.army.mil/battlefield-next (last visited Apr. 15, 2020).

15. Interested cadets will apply for an Ed Delay in the fall of their MSIV year. These cadets will need to prepare for and take their Law School Admission Test (LSAT) prior to the selection board. Because cadets will have cadet summer training obligations, it is recommended that they take their LSAT no later than the spring semester of their MSIII year.

16. One of the most effective meetings we were able to arrange at the Presidio of Monterey was to invite a small group of potential candidates from two different locations to the State of the Corps during an Article 6 visit. The attendees were thrilled to be invited to the installation and to meet the leadership of the Corps, including The Judge Advocate General.

17. You can find more information regarding the Simultaneous Member Program by visiting the Army National Guard's website. *See Simultaneous Membership Program (SMP)*, Army National Guard, https://www.nationalguard.com/simultaneous-membership-program (last visited Apr. 15, 2020).

18. TJAG & DJAG Sends vol. 40-16, *Principled Counsel—Our Mandate as Dual Professionals* (9 Jan. 2020) (on file with author).

19. Always look sharp and be in the proper uniform when you speak to the cadets. Consider the pros and cons with wearing the Army Combat Uniform (ACU) versus the Army Service Uniform (ASU) for each visit with the cadets. There is some value to visiting with cadets in your regular ACU duty uniform, as it reinforces all members of the Corps are Soldiers first and may help with relatability and approachability. Conversely, if you elect to wear your ASUs in the small group discussions or in the first visit with the ROTC battalion, having the proper uniform with all of the accoutrements will allow you to "sell yourself" and the Corps, as it presents a visual depiction of the experiences available in the Corps. If you are participating in a panel or forum discussion, wear your ASUs and make sure the accoutrements are fixed in accordance with the regulations. Cadets will notice when it is wrong, and the audience may focus on the uniform more than the message if there is something out of regulation. Similarly, if it is correctly put together, older or prior-service cadets may know the medals, and this may generate questions for discussions. For the physical training (PT) session, think about what you will need before you get there and ask! For example, some units perform PT in civilian clothes and others use the PT uniform exclusively. If you will be appearing in the PT uniform, ask if they use the PT belt; and, if so, see if you can find out the color—it makes a nice touch of uniformity.

20. Each side should communicate some basic information such as: Where will you park? How far is the parking area away from the speaking location? Do you need to allow for extra time to travel from the parking area to the ROTC Battalion headquarters, and how much time should you allocate? Does the university only allow parking in a limited area? For example, in one visit, I did not realize that I needed to bring quarters for the parking meters because I was used to other meters accepting cards as a method of payment. In what forum will you be speaking—a classroom or an open area? If it is in a classroom, do they/you need/want a canned PowerPoint presentation? Do you want to use an overhead projector? Do you need to bring one, or are you just speaking to the students via notecards? If you elect to use PowerPoint, is it of the caliber you need/want? Do you need to bring your laptop or use theirs? If you are showing video, do you need to ensure the video is embedded in the presentation or should you use a hyperlink?

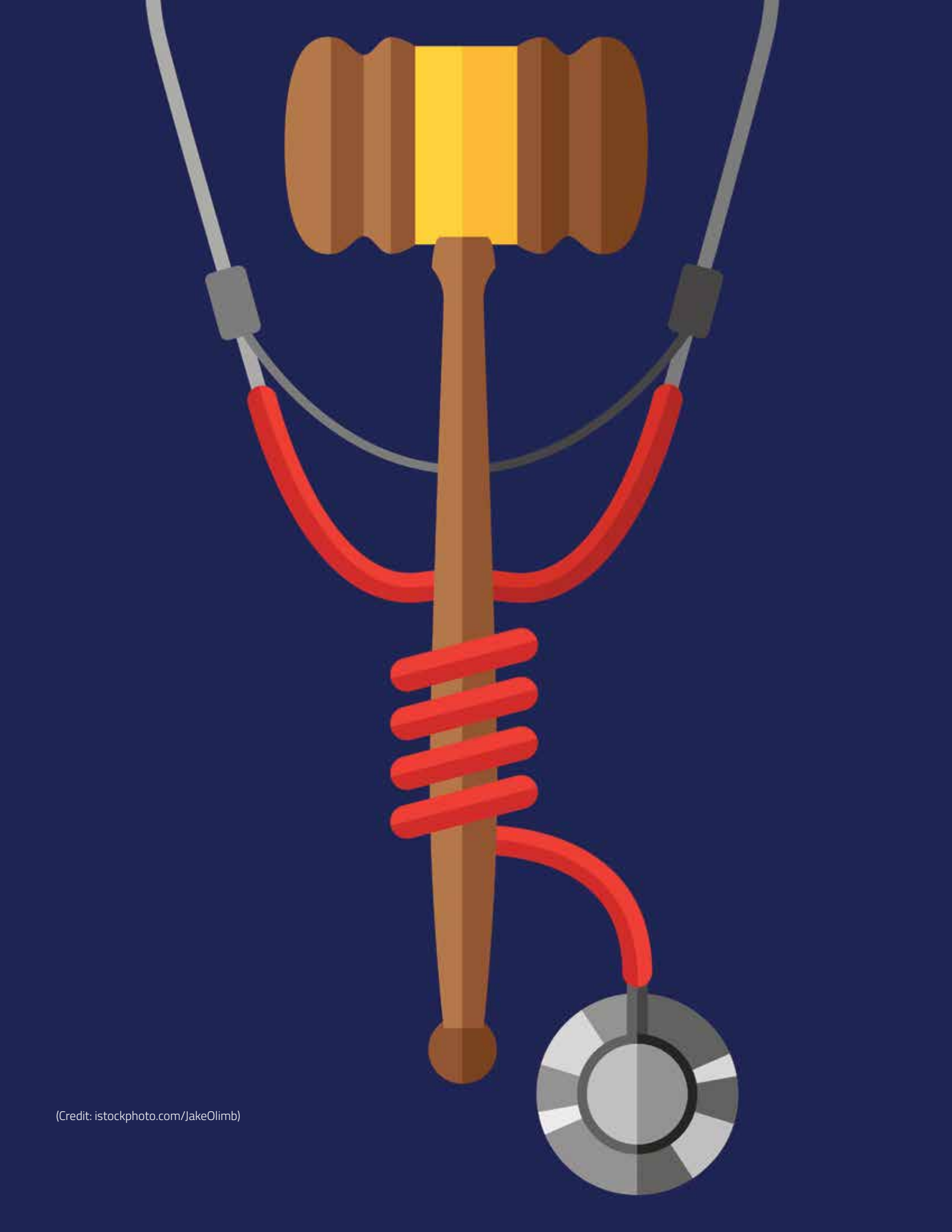
21. The Judge Advocate Recruiting Office makes it easy to send them the relevant information as they have built a model one-page slide deck (ROTC Outreach Assessment) that you can tailor for your purposes with details on the engagement. Send the completed write-up to: usarmy.pentagon.hqda-otjag.mbx.jaro@mail.mil. Consider also sending a note to the leadership so they can post something on the JARO or JAG Corps social media platforms. When sending it to the leadership, send the information to the Strategic Initiatives Office at the following address: hqda-otjag.mbx.jagcorps-info@mail.mil.

22. Ensure that you have the cadets' permission before taking their photos and sending them to JARO for posting.

23. Lieutenant General Charles Pede, *Providing Premier Counsel During #COVID19*, Facebook (Apr. 3, 2020, 7:16 PM), https://www.facebook.com/ArmyJAGCorps/videos/511758999508885/.

## AROUND THE CORPS

Members of a recent Officer Basic Course conduct PT at The Judge Advocate General's Legal Center and School. (Credit: Chris Tyree)



(Credit: istockphoto.com/JakeOlimb)

No. 1

# Tort Liability and the Pandemic Response

*By Major Richard J. Connaroe II*

An Army Reserve doctor calls the time of death for yet another novel coronavirus disease 2019 (COVID-19) patient at the Lincoln Family Hospital in the Bronx.[1] Down the hall, the notification to the family of their loved one's passing does not go well. The crying and mourning that followed their loved one's loss was expected; but the family's promise to "make that quack Army doctor pay for killing our father!" was not.

"Where are the rest?" asks the Jacobi Medical Center hospital administrator of the New York National Guard Soldiers as they deliver six ventilators—well below the twenty that the hospital requested. While the driver explains that they had to make a choice and delivered some to a different hospital, the administrator blurts out, "People are going to die here because of what you did. And when they do, I'm going to tell them to hold you accountable!"

Broken glass covers the roadway, and flashing lights flood the night. New York City firefighters pry an elderly couple out of their car, which is now firmly lodged under an Army Light Medium Tactical Vehicle (LMTV) full of undelivered medical supplies on its way between civilian hospitals. As a paramedic asks the driver his wife's name, he says under his breath, "somebody is going to pay for this."

This is an unprecedented time. Not only is the nation under quarantine, but Soldiers across the Army—active duty, National Guard, and Army Reserve—are deployed to New York, New Orleans, and across the country assisting civilians in responding to the COVID-19 pandemic. However, when the Army deploys, accidents follow. When Army doctors treat patients, some of them will die. These tragic outcomes result in inevitable civil litigation, and—in response—injured citizens seek recompense from the federal government.

Commanders and legal advisors responding to this pandemic may have questions about their civil liability. They are eager to help, but are confused about what this response may mean for their pocketbooks and professional careers. This article provides a basic framework to assist healthcare providers and their legal advisors in understanding the litigation risks and defenses in a pandemic response.[2] To do so, it is important to first understand a basic framework of tort litigation—including the defenses against liability, both under normal circumstances and during the pandemic response. Critical to understanding the Army's civil liability is a discussion of the Westfall Act, which shields federal employees from personal liability. Finally, this article uses vignettes to illustrate likely situations involving tort liability during the pandemic response, highlighting where the Army might pay, when it is immune, and some practical best practices to follow.

## "[We're] From the Government, and [We're] Here to Help"[3]

In mid-March 2020, the unthinkable happened. The United States found itself in a crisis, the likes of which have not emerged since 1918, when the deadly Spanish flu pandemic infected one-third of the Earth's population.[4] Almost one hundred years later, COVID-19 spread from an outbreak in Wuhan, China, to over 180 countries, including the shores of the United States, in fewer than 100 days.[5] After a surge of infections poised to overwhelm local hospitals, governors across the country declared states of emergency.[6] On 13 March 2020, the President of the United States declared the ongoing COVID-19 pandemic a public health emergency.[7] Since then, federal agencies have been responding to the emergency under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act).[8] The Department of Defense (DoD) is sending healthcare providers, including regular Army, reservists, guardsmen, and retirees who returned to duty, to Army field hospitals or—in some cases—to civilian hospitals to treat civilian patients.

Seeing the difficulty of their tasks—and the likelihood of significant death—Army healthcare providers have, naturally, worried whether their service exposes them to medical malpractice claims. Questions started to arise: "What is my liability? Will I be personally sued?" The short answer is 'no.' To understand why, a brief description of the Army's usual liability for accidents and negligence under the Federal Tort Claims Act (FTCA) is in order.

## "It's Good to Be the King"[9]—Sovereign Immunity and Tort Liability

As a sovereign, the United States may not be sued without its consent. [10] For a court to have jurisdiction and allow citizens to sue the federal government, a plaintiff must show that one of the limited waivers of sovereign immunity applies.[11] One such waiver of sovereign immunity is for injury or damages caused by the negligence of federal employees acting within the scope of their employment under the FTCA.[12]

The FTCA makes the federal government liable for cases sounding in tort to the same extent as a private person would be.[13] The tort must be a violation of a state substantive law, such as a traffic accident or instances of medical malpractice.[14] Though the federal government is generally treated like a private person, the government enjoys additional protections from civil suit.[15] The government is not liable for every negligent act of its employees.[16] The FTCA carves out several broad exceptions to the waiver of sovereign immunity, such as when federal employees exercise discretion in their decision making, when damages arise from the imposition of a quarantine, and when damages occur in a foreign country.[17] Notably, the government is also not liable for the criminal actions of federal employees that constitute intentional torts—specifically assault, battery, false imprisonment, false arrest, abuse of process, libel, and slander.[18] When an exception applies, sovereign immunity remains, and federal courts must dismiss the case for a lack of jurisdiction.[19] If an exception does not apply, the federal government may be liable, but—as discussed below—individual federal employees are immune from personal civil liability.

## "It's Good to [Work For] the King"[20]—Federal Employees' Protection from Civil Liability

Federal employees, including Soldiers, are protected from individual liability for their negligent acts while performing their official duties.[21] In response to the 1988 Supreme Court holding of *Westfall v. Erwin,* allowing federal employees to be liable for negligence in non-discretionary actions, Congress quickly passed the Federal Employees Liability Reform and Tort Compensation Act of 1988—commonly known as the Westfall Act—to protect federal employees from individual civil suit.[22] The Westfall Act provides that federal employees acting within the scope of their employment are immune from FTCA suits and that the United States shall be substituted for the employees.[23] Therefore, whether a federal employee is protected from liability turns on the scope of employment analysis in accordance with the applicable state law of *respondeat superior*. While there is some variance in state law, generally, *respondeat superior* provides that an employer may be liable for the negligent acts of its employees, if the employee was acting at the direction of, for the benefit of, or in the furtherance of the objectives of the employer.

What happens if a federal employee is sued in state court? If that occurs, the Westfall Act still controls; the United States is substituted for the name of the Soldier being sued.[24] If a plaintiff files a lawsuit against an individual Army employee in a state court, the United States Army Legal Service Agency (USALSA)—specifically, the Litigation Division—works with the Department of Justice (DoJ) on certification, removal, and substitution.[25]

This process is outlined in Army Regulation 27-40. First, the employee's supervisor declares that the employee was acting within scope of duty, and the employee requests DoJ representation.[26] That request is then forwarded to the Tort Litigation Branch at the Litigation Division, USALSA, which then contacts the appropriate U.S. Attorney's Office and offers the Army's recommendation as to substitution.[27] After a fact-specific analysis of *respondeat superior*, the U.S. Attorney for that district certifies that the employee acted in the scope of duty.[28] Next, the Assistant United States Attorney (AUSA) removes the case to a federal court, because the federal government only consents to suit in a federal court.[29] Finally, the AUSA substitutes the United States in place of the employee and defends the United States in the lawsuit.[30]

Once removed, the United States ideally asserts any applicable defenses in a motion to dismiss, quickly ending the matter. Regardless of whether the United States is found liable or not, the Westfall Act protects federal employees regardless of the outcome of the civil litigation. Litigation arising from the federal response under the COVID-19 pandemic would be no different in terms of processes. However, as discussed below, the Army has additional defenses from civil liability in responding to a crisis.

## "Whoever Has the Gold Makes the Rules"[31]—Federal Law Protects the Army from Tort Liability During a Pandemic

When responding to a national emergency under the Stafford Act, Congress understood that the DoD and other federal

agencies would have to make controversial life or death decisions, and fear of civil liability might cause hesitation and cost lives.[32] Therefore, Congress granted federal agencies the same protection for discretionary functions of its employees under the Stafford Act as under the FTCA.[33] Under the Westfall Act, whether working at their normal place of duty or assigned to a field hospital or civilian hospital, DoD healthcare providers are immune from individual civil liability during the pandemic; this applies when they are working within the scope of their employment.[34] However, if the federal employee was performing a discretionary function, the Stafford Act bars the court's jurisdiction to hear the case and shields the Army from liability.

Legal advisors and commanders may wonder what makes a decision, or action, "discretionary," as defined by the statute. The Supreme Court has provided a two-part test for determining whether a federal employee's conduct qualifies as a discretionary function that applies to both FTCA cases and responses under the Stafford Act.[35]

First, the conduct must be a matter of choice, meaning neither state statute nor federal regulation binds the employee to act in a particular manner.[36] This leaves the decisions of when and how to act to the employee's discretion.[37] If the statute or regulation directs a course of action, the employee has no discretion on that matter.[38] For example, traffic laws direct a speed limit. Soldiers have no discretion to disregard traffic laws when driving on roads and highways. However, a commander's decision to favor one route over another is likely discretionary.

The second area of analysis is whether the discretionary function exception was meant to shield this type of judgment from judicial second-guessing.[39] Existence of a regulation or policy that does not direct specific action creates the strong presumption of agency consideration and intentional promulgation of discretion.[40] As is evident, the federal government has strong protection during a pandemic under the Stafford Act. In addition to the protections of federal law, the government may be shielded under state law as well.

### "You Want to Get to Him, You Got to Go Through Me"[41]—State Action May Shield Health Care Providers from Civil Liability

As the COVID-19 pandemic escalated, healthcare workers across the country faced the same concerns of risk of infection and potential civil liability. New York City alone accounted for over 160,000 confirmed cases of COVID-19, and officials needed to enable treatment without doctors and nurses fearing a lawsuit.[42] The Coronavirus Aid, Relief, and Economic Security Act protects volunteer health care workers from civil liability in the absence of reckless conduct or gross negligence; but, to date, no other federal legislation protects federal healthcare providers.[43] Six states, however, have taken action either through state legislation or governor's emergency executive order to shield healthcare providers from civil liability.[44]

On 23 March 2020, the governor of New York declared healthcare providers immune from civil liability for any injury or death allegedly sustained as a result of an act or omission in response to the COVID-19 outbreak, except for cases of gross negligence.[45] State legislatures of Massachusetts and New Jersey have enacted laws, and governors of Connecticut, Illinois, and Michigan have declared orders providing similar protection for healthcare providers responding to COVID-19.[46] Just as the federal government can be sued in the same capacity as a private individual, it can also defend itself with the same defenses as a private individual. Therefore, during the pandemic, if the Stafford Act does not protect the Army from civil suits, state law or state executive orders may. In addition to these state and federal statutory defenses, common law may further protect Army medical providers with temporary duty at civilian hospitals.

### "Fired? But I Don't Really Even Work Here!"[47]—The "Borrowed Servant" Doctrine

A surviving family turns to civil action for recompense after the death of their loved one to COVID-19 and learns that the healthcare providers were Army doctors and nurses assigned to a civilian hospital. Do they sue the hospital or the Army? Setting aside the Stafford Act and state law protections, the Army doctor or nurse may qualify as a "borrowed servant," providing the United States with an affirmative defense under the common law.[48]

Generally, the borrowed servant doctrine shifts liability from a worker's general employer to the special employer, who is temporarily borrowing the employee.[49] If the special employer was in the better position to prevent the borrowed employee's negligent act that resulted in injury, liability is transferred.[50] Factors courts use to determine which master the employee was serving vary by state, but generally include the extent of control over the details and timing of the employee's duties, the degree of supervision associated with the nature of the work, the duration of the temporary work, and the source of equipment and instruments.[51] Ordinarily, Army medical providers routinely enter into training agreements with civilian hospitals. This allows military doctors to receive additional training at no cost to the government while, in essence, civilian hospitals receive a free employee.[52] In return, the civilian hospital will assume liability for any medical malpractice allegations.[53] However, such contracts are not feasible when responding to a pandemic.

Whether an employee is a borrowed servant is a factual determination; it focuses on the level of control and supervision the civilian hospital exercises. If the civilian hospital controls a healthcare provider's duties, the healthcare provider is most likely a borrowed servant; in that case, the civilian hospital—not the Army—is liable for any alleged tort, including malpractice. With the basic framework and controlling legal doctrines outlined, examples may best illustrate the Army's liability and defenses in the COVID-19 response.

### Vignettes: Civil Liability During a Public Health Emergency

While discussing the tort litigation framework is helpful, examples may provide better clarity. Turning to the situations at the beginning of the article, let's explore each in a bit more depth. In these vignettes, assume healthcare providers, including uniformed doctors and nurses, from Fort Bragg are deployed to assist a National Guard medical unit running a field hospital in New York City.

***Vignette 1***

The field hospital is treating civilian patients with COVID-19 but is overwhelmed and lacks ventilators, leading to the death of several patients, whose families sue the providers for medical malpractice.

As an initial matter, these Army providers are immune from personal civil liability under the Westfall Act.[54] If named as a defendant, the Torts Litigation Branch of the Litigation Division at USALSA will request the U.S. Attorney for the Southern District of New York to scope and certify the providers, as they were acting in their official capacity.[55] Next, Torts Litigation Branch will work with the AUSA to remove the case to federal court and substitute the United States in place of the provider.[56] Because the providers used discretion and judgment to triage and treat patients, the United States will file a motion to dismiss.[57] They would argue that, as the government is immune from liability for the discretionary function of triaging patients under the Stafford Act and the FTCA, the court lacks subject-matter jurisdiction.[58] Alternatively—and unless the providers clearly committed gross negligence—the AUSA would seek to invoke the additional protections under the New York Governor's Executive Order, granting healthcare providers immunity from liability for deaths sustained as a result of act or omission in response to the COVID-19.[59]

As a practical matter, it is important to understand lawsuits under the FTCA arise several years after the incident.[60] Therefore, as it will assist in litigation down the road, doctors and units should try to write down any sort of incidents and facts to the best of their ability. However, if that is not possible or practicable, failure to document everything that happened will not erode the protections under the FTCA—it just makes trying a case more difficult.

***Vignette 2***

A National Guard LMTV driver hits a pedestrian while delivering medical supplies to the field hospital, severely injuring the pedestrian, who files suit for civil liability.

The government driver is immune from individual civil liability because transporting the supplies was in the scope of duty.[61] As discussed previously, the Westfall Act precludes any individual liability. The driver should complete a motor vehicle accident report on a Standard Form 91 regarding the accident in a government vehicle and write a narrative for later litigation.[62] After certification, removal, and substitution—and because there is neither a statutory nor common law defense to a traffic accident—the Torts Litigation Branch will coordinate with the AUSA to litigate the case. Even if the provider had been driving between the provider's duty at the field hospital and the provider's temporary quarters, this analysis would be the same.

***Vignette 3***

Two civilian hospitals request ventilators, but the field hospital has limited supplies, and the hospital commander chooses to support the local hospital with the larger need. The lack of ventilators at the unsupported hospital results in several deaths that could have been prevented, had they received the Army's ventilators. The surviving families file suit for civil liability.

As a preliminary matter, the responsible commanders would be protected under the Westfall Act.[63] Using the two-part discretionary function test for both the Stafford Act and the FTCA, the commander made a choice in allocating the ventilators, and this is exactly the type of judgment Congress sought to protect from judicial second-guessing.[64] Therefore, because the Stafford Act provides immunity for the discretionary function of allocating the ventilators—and the New York Governor's Executive Order grants immunity to providers for deaths sustained as a result of the omission in response to COVID-19, the United States will file a motion to dismiss. Ideally, and in case the suit proceeds to litigation, the field hospital should document these decisions to the best of their ability.[65]

***Vignette 4***

Two military healthcare providers from the field hospital are assigned to a civilian hospital to treat civilian patients. One surgical nurse works hand-in-hand with a civilian physician performing cardiac surgery. The other provider, a gynecologist, leads a team of residents in running a make-shift intensive care unit. Patients of both military medical providers die, and the surviving families file suit.

As before, analysis begins with Westfall certification resulting in removal and substitution, then moving to dismiss the lawsuit pursuant to the Stafford Act and/or state substantive law providing immunity.[66] If the court denies the motion to dismiss, the United States will litigate and assert the borrowed servant defense with a full analysis of the civil hospital's control over the providers from equipment used and shifts and patients assigned.[67] With these limited details, the nurse is very likely a borrowed servant of the civilian hospital, because the hospital closely monitors her practice. However, depending on the amount of oversight and control the hospital exerts, the gynecologist may not qualify as a borrowed servant based on his field.[68]

## Conclusion: Execute the Mission with Confidence in Protection from Civil Liability

Here is the bottom line: Soldiers and commanders must not let the fear of civil lawsuits prevent their decisive action to save as many American lives as possible. As Army healthcare providers respond across the nation to this historic pandemic, and despite their very best efforts and adherence to the standard of care, some tragic outcomes will follow. Lives will be lost to COVID-19. Accidents will happen. Some family members grieving for their loved ones will file suits. While the COVID-19 pandemic poses unprecedented challenges and uncertainty, the fundamental framework shielding Soldiers from personal liability continues unabated. Commanders and providers should try to document accidents as best as they can, but that should neither prevent nor distract them from executing the mission of providing healthcare to the American people. **TAL**

*MAJ Connaroe is currently assigned as a litigation attorney for the Tort Litigation Branch, United States Army Litigation Division, United States Army Legal Services Agency, Fort Belvoir, Virginia.*

## Notes

1. Richard Sisk, *'We've Got the Energy:' Military Doctors Relieve Worn-Out Staff in NYC Hospitals*, Military.com (Apr. 15, 2020), https://www.military.com/daily-news/2020/04/15/weve-got-energy-military-doctors-relieve-worn-out-staff-nyc-hospitals.html.

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33. Nonliability of Federal Government, 42 U.S.C. § 5148 (2018); 28 U.S.C. § 2680(a).

34. 28 U.S.C. § 2679(d)(2); *see also* 10 U.S.C. 1089.

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60. Time For Commencing Action Against United States, 28 U.S.C. § 2401 (2011) (stating that a prerequisite to filing a lawsuit is filing a claim with the federal agency within two years of the incident); 28 U.S.C. § 2475 (1966) (requiring a claimant to allow the agency six months to make a final disposition before filing a claim). Therefore, two-and-a-half years can easily pass from the incident to initial filing of a lawsuit.

61. *See* 28 U.S.C. §§ 2671, 2674, 2679.

62. U.S. Dep't of Army, Reg. 385-10, The Army Safety Program para. 3-8a(6) (24 Feb. 2017).

63. *Supra* note 61.

64. *See Berkovitz v. United States*, 486 U.S. 531, 536 (1988);

65. *See* 42 U.S.C. § 5148; *supra* note 45.

66. *See supra* note 61; AR 27-40, *supra* note 24 para. 4-4; 42 U.S.C. § 5148.

67. *See Kelley v. Southern Pac. Co.*, 419 U.S. 318 (1974).

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No. 2

# Navigating Military Justice in Deployed Environments

*By Lieutenant Colonel Katherine S. Gowel, Major Lance E. Clark, Major Jeffrey L. Rothstein, Major Megan A. Herriford, Major Simone L. Jack, Major Kyle V. Burgamy, and Sergeant Keith E. Sayko*

*We need a system that is part of the Army to permit the administration of justice within a combat zone, and to permit our constitution and American legal principles to follow our servicemen wherever they are deployed. Such a system allows us to enter into agreements with foreign governments so that American servicemen accused of civilian-type crimes in foreign countries may be tried according to American rather than foreign principles of law.*[1]

To function as intended, the entire military justice system—from the punitive articles of the Uniform Code of Military Justice (UCMJ) to provisions designed to protect constitutional rights—must be deployable. Certainly, this is a great challenge; but, as General Westmoreland observed during the Vietnam War, for the military justice system to ignore American legal principles and constitutional rights would be crushingly detrimental to Soldiers and to critical Army missions abroad.

To make the military justice system deployable and functional in all environments, including combat, judge advocates must prepare to support both commanders and Soldiers within our current, robust, system.[2] Thus, judge advocates must prepare for assisting commanders with imposing non-judicial punishment, conducting investigations, and trying courts-martial overseas, as well as in maintaining American legal principles and Soldiers' constitutional rights abroad.

## Observations and Recommendations on the Administration of Military Justice Overseas

The Europe and Asia (EURASIA) region of the U.S. Army Trial Defense Service (TDS, EURASIA) provides trial defense services to every Soldier stationed and forward-deployed in Europe, Africa, and Southwest and Central Asia. Members of TDS, EURASIA, also have a front-row seat to almost every military justice action, and every court-martial proceeding, across these three continents and several forward-stationed and deployed General Court-Martial Convening Authorities (GCMCAs). Judge advocates of TDS, EURASIA, know that commanders can successfully conduct military justice in deployed environments. Conversely, TDS, EURASIA, sees frequently—recurring, universal challenges to deployed military justice.

In this article, former members of TDS, EURASIA, offer recommendations to support all judge advocates in planning, training, and preparing to administer military justice in any deployed environment, based on military justice experiences from Poland to Afghanistan, and many countries in between.

This article also outlines specific recurring challenges and pitfalls that affect all commands, legal advisors, and Soldiers overseas. It notes the consequences of not addressing these challenges, which could severely hamper commanders' ability to discipline Soldiers overseas. Finally, the article suggests ways for judge advocates to plan and train to advise commanders in administering all aspects of military justice—including protecting Soldiers' constitutional rights—in any theater or deployed environment.

## Universal Challenges to Achieving Military Justice Overseas

> Our line officer counterparts engage in realistic training to test their combat systems and [their] ability to command and control formations. We do not have that luxury. A warfighter exercise does not test our ability to investigate a crime, advise a commander, prefer charges, and conduct a court-martial in combat. Nevertheless, we must be able to accomplish that task and to do so without any formal additional training. We must ensure that we have the requisite knowledge of the law and the wisdom to know how to employ that knowledge.[3]

While judge advocates may not be sharpening cross-examination skills or advising Criminal Investigation Command (CID) agents on forensics examinations during warfighter exercises, they do have ample opportunities to train how to administer military justice in deployed environments. From an inside view of military justice across three continents, members of TDS, EURASIA, see several universal challenges to deployed military justice. These challenges are enduring, and legal advisors and commanders should expect to face them in any deployed theater. Fortunately, all judge advocates can plan and prepare for these challenges by learning from the experience gathered every day by judge advocates serving across around the globe.

There are three universal challenges to administering military justice in deployed environments: (1) supervising military justice for Reserve component units and Soldiers; (2) managing witness requirements for military justice actions and courts-martial overseas, and (3) proactively ensuring that military defense counsel assets are available to represent and advise Soldiers wherever they are deployed.

***Plan to Manage Unique Challenges of Non-Traditional Units and Soldiers***

Judge advocates must prepare to administer military justice across the spectrum for all types of units and for all types of Soldiers. Almost every mission overseas includes nontraditional units and Soldiers from the Army National Guard (ARNG) or United States Army Reserve (USAR). The Army will no longer fight or support itself with only active duty Soldiers from numbered divisions. To prepare for this challenge, judge advocates must coordinate with active duty, ARNG, and USAR counterparts and educate themselves on the intricacies of managing military justice actions from each of these perspectives.

To illustrate, ARNG and USAR Soldiers comprise almost the entire force in Camp Lemonier, Djibouti, and Kosovo, and they are a significant portion of the forces located at both Camp Buehring and Camp Arifjan, Kuwait. Those units have experienced and well-trained legal advisors and robust legal sections. However, the judge advocates within ARNG and USAR units do not spend their careers advising commanders on active duty military justice actions, or coordinating with active duty commanders serving as convening authorities. Similarly, active duty legal advisors do not spend much of their careers advising commanders on the unique aspects of managing military justice actions for reserve component Soldiers or units. This lack of familiarity results in a lack of planning on both sides, and is a significant challenge to the ultimate goal of administering military justice for all deployed units and Soldiers.

Indeed, because of a lack of planning, active duty legal advisors overseas seem to learn the hard way that ARNG and USAR Soldiers and units have very different planning factors than active duty units and Soldiers. For example, ARNG and USAR deployment timelines differ, so many Soldiers may redeploy or rotate out of theater after a short period. Their entitlements are different and very complex. After they redeploy, ARNG and USAR Soldiers usually demobilize and re-join their civilian lives; they become civilians who are spread all across the United States. These are issues that active duty, ARNG, and USAR legal advisors must jointly consider and plan for before conducting military justice actions in deployed environments.

The legal advisors for active duty convening authorities must plan, for example, how they will administer military justice if a commander decides to court-martial an ARNG Soldier. They must prepare for complex issues regarding orders extensions, pay and entitlement changes, maintaining the mobilization status of potential witnesses, and understanding how court-martial sentences or other military justice actions will affect ARNG Soldiers. They must anticipate the time frames necessary to accomplish many of these administrative tasks, and advise their commanders accordingly. They must also understand how TDS support will work for each type of action and for each type of Soldier, from action initiation through ultimate sentence or results.

Failing to plan to administer military justice across all components can leave commanders unable to administer justice effectively or efficiently. For example, some mobilized USAR and ARNG Soldiers working in senior-level headquarters across Europe have been accused of entitlements fraud. Commanders have sought to discipline the Soldiers through the military justice system. However, since active duty legal advisors typically do not understand the very nuanced and complex entitlements for USAR and ARNG Soldiers, they were challenged to provide comprehensive legal advice to commanders. In some cases, commanders initiated lengthy investigations against Soldiers who had not violated the law. Conversely, failing to understand USAR and ARNG entitlements hampers commanders' ability to discipline Soldiers who have committed fraud.

A second example involves a commander in U.S. Central Command (CENTCOM), who convened an administrative separation board for a USAR Soldier. At the board, the trial counsel argued that the board should recommend the

Soldier be separated with an Other Than Honorable discharge. However, the trial counsel had not advised the commander that the board composition was improper and that the board, as convened for a USAR Soldier, was only entitled to recommend a General or an Honorable discharge. Had the trial counsel been more familiar with the nuances of military justice actions regarding USAR and ARNG Soldiers, the commander would have had more discipline options.

There are many significant consequences when judge advocates do not properly manage USAR and ARNG Soldier witnesses for courts-martial. We discuss this in-depth below, but it is critical for judge advocates to understand that witness challenges can significantly affect commanders' ability to court-martial Soldiers. Fortunately, active duty, ARNG, and USAR judge advocates across U.S. European CommandEUCOM, U.S. Africa Command (AFRICOM), and CENTCOM address these challenges daily. Legal advisors who are planning and training to deploy must learn from brethren managing these issues and begin planning and training to meet this universal challenge.

***Develop A Plan to Ensure Witness Availability***

Another military justice challenge facing legal advisors overseas and across deployed theaters is managing witnesses. All Soldiers accused of crimes have the right to confront their accusers, as the U.S. Constitution requires.[4] At courts-martial, this means that witnesses must either travel overseas to testify regarding alleged crimes and offenses or be deposed in the United States. Furthermore, some witnesses in deployed or overseas environments may not be U.S. citizens, and cannot be compelled to testify at a court-martial. For legal advisors focusing on ensuring justice and upholding American legal principles and Soldiers' constitutional rights, these witness challenges are significant.

However, these challenges are also enduring. It is an indisputable and inescapable fact that civilian witnesses cannot be required to travel overseas,[5] and that foreign witnesses cannot be required to travel to the United States. In every court-martial tried overseas, command legal advisors must consider how they will prove charged offenses and how and where they will summon necessary witnesses. Legal advisors must assume that accused Soldiers will exercise their right to confront witnesses, and ask witnesses to speak on their behalf before sentencing at courts-martial. Some witnesses will not or cannot travel and must be deposed in the United States. And, occasionally, trial counsel must ask military judges to find witnesses unavailable. All of these challenges are predictable and enduring; nonetheless, members of TDS, EURASIA, have seen many attempted courts-martial without solid plans for witness testimony overseas..

Additionally, legal advisors often focus solely on the location of the witnesses required to prove the charged offenses, with little thought as to the availability of potential defense witnesses. While it is unreasonable to expect that the government will be able to identify every potential defense witness, trial counsel should devote some time to viewing cases from the defense perspective prior to preferral. Was a prior inconsistent statement made by the complaining witness to a civilian friend? Did a fellow USAR Soldier, who did not deploy with the unit, attend the pre-deployment party on the night in question and witness something advantageous to a potential defense theory of the case? Article 46, UCMJ, mandates equal opportunity to obtain witnesses by all parties, so legal advisors must be cognizant of potential witness production issues so they can properly advise the command.

Failure of judge advocates to recognize and train for the universal challenge of witness availability limits commanders' discipline options. For example, a trial counsel may deny a defense request for witness production of a civilian witness, and advise the commander to convene a court-martial in a forward combat zone where the civilian cannot travel. If the military judge then orders production of the civilian witness, the commander will not be able to discipline as anticipated. The commander may have to transfer the trial to another venue, or not be able to court-martial at all. Similarly, if a trial counsel does not understand that a demobilized USAR Soldier must be specifically placed on active duty orders to travel overseas for a court-martial, then she may struggle or fail to complete the process on time, and she may not be able to prove the government's case.

**It is critical for judge advocates to understand that witness challenges can significantly affect commanders' ability to court-martial Soldiers**

Overall, to be prepared to achieve military justice in deployed environments, judge advocates must be prepared to address witness travel and testimony. More importantly, they must be prepared to advise commanders that such travel and testimony will be required to achieve justice at courts-martial. Judge advocates must educate commanders concerning potential unit impacts and actual financial costs associated with holding courts-martial in a deployed environment.

Fortunately, judge advocates across Europe and Western Asia manage this complex issue daily. Indeed, witness travel and appearance are significant challenges to military justice overseas, but they are not unknown or surprise challenges. Military justice leaders must ensure that all judge advocates learn from the constant, predictable challenge of witness production overseas, so all judge advocates will be better prepared to achieve military justice in combat.

***Always Plan to Ensure TDS Support for Soldiers***

We must remember that the military justice system is an adversarial criminal process that must honor the non-negotiable constitutional protections for an accused. Our scales of justice are balanced for sound

reasons—our sacred charter is to ensure we show proper respect for both sides of the scale.[6]

Finally, to effectively administer deployed military justice, legal advisors and their commanders must proactively plan to protect Solders' rights and American legal principles. As General Westmoreland noted in 1971, and Lieutenant General Charles N. Pede, The Judge Advocate General of the U.S. Army, discussed with Congress in 2019, military justice simply cannot occur without protecting Soldiers' rights.

**To achieve military justice—the JAG Corps's statutory mission—legal advisors must always plan to make Soldiers' constitutional rights, protected by defense counsel, a critical priority**

The Judge Advocate General's (JAG) Corps today is universally challenged to protect Soldiers' rights abroad because legal advisors often do not plan for, or advise commanders on, the importance of establishing consistent legal representation for Soldiers abroad. Indeed, legal advisors themselves may not understand how TDS attorneys support Soldiers. However, for commanders to maintain discipline through the UCMJ, TDS support must be present and functional in every area of operations where significant numbers of Soldiers serve.[7] Army TDS attorneys represent Soldier-clients; they cannot do that effectively if they are not present and prepared to support Soldiers.

First, it is critically important for all legal advisors to understand how TDS attorneys support Soldiers. Army TDS attorneys are prescribed duties in three different tiers: Priority I duties include general and special court-martial representation; Priority II duties are all other assigned TDS functions, such as suspect rights, Article 15s, administrative separations, and summary court-martial advice; and Priority III duties include, such as reprimands, evaluation report appeals, and other adverse administrative actions. It is important for all legal advisors, especially those without TDS experience, to consider these priorities when evaluating the available TDS staffing and their respective resourcing when deciding whether to court-martial a Soldier.[8]

Judge advocates and their commanders must plan to proactively seek sufficient TDS support, and properly resource TDS. Army defense counsel represent commanders' Soldiers and help maintain those Soldiers' constitutional rights.. However, legal advisors currently do not train commanders to ask: Where is my TDS support? How will my Soldiers reach and stay in contact with their TDS attorneys? Do our servicing TDS attorneys have phones, paper, and copiers so they can support my Soldiers? Are the TDS attorneys given priority in terms of flights within my area of operations? How can we conduct military justice if we do not have anyone nearby to represent Soldiers? If I myself were charged with a crime, would I be satisfied with intermittent telephonic communication with a TDS attorney located in a different country?

Indeed, judge advocates must train commanders to ask these critical questions when planning their missions. But judge advocates must first train themselves to plan for this critical asset. To judge advocates, TDS support can no longer be an afterthought or a secondary consideration for deployed military justice. To achieve military justice—the JAG Corps's statutory mission—legal advisors must always plan to make Soldiers' constitutional rights, protected by defense counsel, a critical priority. All legal advisors can do this by proactively ensuring TDS is present and functional wherever Soldiers deploy.

Co-located and functional TDS support is critical to achieving military justice overseas. Trial Defense attorneys are tasked with and ethically bound to provide zealous representation and advocacy for their clients. Often, especially in court-martial cases, that representation involves investigation and interviewing witnesses. If TDS attorneys are not present in the same area where crimes allegedly occur, they are challenged to investigate and interview witnesses in a timely manner. In fact, they may not ever find critical, time-sensitive evidence necessary to defend Soldiers properly if they are not able to access alleged crime scenes. Further, if TDS support is not present alongside Soldiers, those Soldiers do not receive the robust level of representation their non-deployed counterparts doreceive. Communication problems, time differences, and the inability of Soldier-clients to have reliable, private contact with their attorneys significantly hampers TDS support for Soldiers. It is unfortunate that Soldiers in combat, who normally receive the very best from the United States Army, often do not receive the best legal representation because either TDS is not present,[9] or commanders have not prioritized Soldiers' rights.

For example, the advice during the Article 15 process is much less robust overseas. In garrison, new clients are escorted to TDS and able to watch a video informing them ofn the process while a TDS paralegal carefully reviews their individual packet. After that, they can sit down in an office to discuss potential defenses or extenuation and mitigation face-to-face with an attorney, and then easily be in contact with that attorney for follow-up meetings or calls. However, Soldiers in deployed environments often cannot meet with a TDS attorney in person. Soldiers receiving Article 15s in deployed environments are frequently denied their own individual copy of the evidence because, often, unit paralegals don't do not have the tools to provide electronic or physical copies to Soldiers. At their remote locations, they sometimes must sit at a common area desk where they are only able to discuss their Article 15 with a TDS attorney telephonically, using DSN or SVOIP phone lines that routinely go down. The witnesses they wish to call may be spread out across the area of operations, or even stateside, where they will often be asleep at the time the second reading takes place half a world away.

The several examples above illustrate the special challenges of protecting Soldiers' rights overseas and highlight the idea that all legal advisors must proactively plan and advocate for comprehensive, physically-present TDS support in all areas of operations.

Overall, these are only a few of many challenges to administering military justice overseas and in hostile areas. Certainly, legal advisors must plan for as many scenarios and challenges as possible. This article discusses three universal challenges because they are enduring. Hopefully, legal advisors can identify and plan for each when preparing for deployment. In addition, experienced judge advocates gain overseas today, in all environments, is extremely relevant to preparing for future military justice actions in all deployed environments, including combat.

## Training and Planning to Achieve Military Justice Worldwide

> *A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline.*[10]

> *The commander ensures Soldiers retain their dignity in combat. One necessary method to enforce battlefield standards is through court-martial. Indeed, at its foundation, the preservation of good order and discipline is why the commander has this authority.*[11]

To administer military justice—especially courts-martial—that promotes discipline and dignity in the Army and for Soldiers, legal advisors and commanders must employ the tools of the UCMJ and protect Soldiers' rights. However, while legal advisors and commanders appreciate and understand the importance of legal representation for Soldier-clients, they are not always adequately planning or training for it. A commitment to deployed military justice demands a full-spectrum plan for both command actions and results, as well as legal representation for Soldier-clients. Based on extensive military justice experience overseas, this section offers illustrations of how to plan to uphold American legal principles and protect Soldiers' rights abroad. Further, it discusses several different types of units and deployed environments.

### Rotational Unit in Eastern Europe

An active duty, brigade-sized unit is rotating through Eastern Europe for nine months. A brigade judge advocate (BJA) likely plans where her paralegals will sit, how commanders will administer urinalysis tests, and how First Sergeants (1SGs) will get medical support for administrative separation physicals. Those are critical issues to consider and plan for. But does the BJA plan how and where Soldiers receiving Article 15s will exercise their right to talk to a defense attorney? Does she plan for and advise commanders that Soldiers will need to arrange transportation so that they can speak privately with their TDS attorney? Does she at least arrange for phone access, internet access, and a private place for the Soldier to speak to a TDS attorney? Likely, she does not.[12]

However, commanders cannot administer military justice if Soldiers cannot exercise their constitutional rights. For example, commanders cannot conduct Article 15s or administrative separations if Soldiers haven't have not had a meaningful opportunity to consult with legal counsel. Likewise, TDS attorneys cannot adequately advise their clients if they do not have a complete copy of the Article 15 packet, chapter packet, or preferral packet, including all supporting evidence or materials being considered by the command. Judge advocates must plan to support Soldiers' right to seek legal representation, not only theoretically, but practically. Legal advisors with rotational units should seek out trial defense and legal assistance offices that support their areas of operations and plan early to establish necessary support for military defense counsel. They must plan how Soldiers will contact their attorneys not only when communications are working well, but when communications are compromised. They must establish reliable systems to ensure required documents are provided to the detailed defense attorney prior to consultations with the Soldier. They must establish procedures for making witnesses available to be interviewed by defense attorneys. These planning factors are complex but critical to administering military justice overseas. Thus, judge advocates can no longer put planning and preparing for TDS support on the backburner. To administer justice and promote good order and discipline, they must proactively prepare to support Soldiers' rights in all environments.

### Courts-Martial in Combat

A second, more complex challenge would be for a unit forward-deployed in a hostile area to conduct a court-martial. Likely, the legal advisor has prepared and trained on how he might conduct a court-martial overseas: he has thought through the mechanics of CID support for investigations, administrative support for preferral and referral, and selecting a deployed panel. But, has he considered that the Soldier being court-martialed has many rights throughout the process? Does he expect and plan for the Soldier to exercise his or her rights? Members of TDS, EURASIA, have seen very successful courts-martial tried overseas in hostile areas, but they have also seen less successful attempts.

In the former, successfully-tried cases, legal advisors considered all of the necessary factors for military justice, including protecting Soldiers' constitutional rights. They decided to hold courts-martial in developed areas in theater, where both government and defense witnesses could easily travel. They closely considered the types of offenses being tried and ensured witnesses necessary to prove their cases, as well as those that could potentially be called by the defense, would be available in theater, or deposed in a timely manner in the United States. They considered that expert witnesses might be necessary and that a military judge and court reporter would often have to travel to the theater. They closely managed timelines, knowing that they should complete the courts-martial before the units or the accused Soldiers' attorneys had to re-deploy.

On the other hand, some courts-martial were not successful. In those cases, legal advisors appeared not to consider practical challenges that inevitably arise when conducting courts-martial overseas.

Trial counsel pushed to hold courts-martial in hostile areas, where witnesses, including civilian witnesses, would have great difficulty traveling. They seemed not to consider the types of offenses being tried or whether witnesses required to prove the government's case would be available in theater at the time of the court-martial. In some cases, necessary witnesses were available in theater but were unavailable due to the high operational tempo of the ongoing mission. They did not hold depositions. They appeared not to consider the challenges for military judges and court reporters having to travel repeatedly to remote locations. They failed to establish priority of travel for witnesses, panel members, the court, and attorneys traveling to the court-martial. Ultimately, because of the one-sided focus and lack of sufficient planning, many of these cases could not be tried in forward-deployed locations. These cases resulted in alternate dispositions, requests by the government to change venue, or judges ordering them to be tried in the United States.[13]

To be prepared to conduct courts-martial overseas, and particularly in a combat or hostile area, legal advisors must consider how they will address universal challenges, such as witness appearances, and how they will protect accused Soldiers' constitutional rights. Commanders must have a complete understanding of both the legal and practical considerations so that they can make informed decisions about convening courts-martial in deployed and combat environments.

**To be prepared to conduct courts-martial overseas . . . legal advisors must consider how they will address universal challenges, such as witness appearances**

## Military Justice in Undeveloped Theaters of Operations

Planning to administer military justice in undeveloped theaters of operations, such as Africa, is especially challenging. Likely, such a theater has new senior commands: AFRICOM, for example, has only existed since 2008, and Army units and missions are still developing. The Army probably does not have good infrastructure in the theater, and Soldiers often work in joint environments, leaving them to receive legal advice from sister-service uniformed judge advocatesinsister-services.

To be prepared to administer military justice in undeveloped theaters, legal advisors must plan that most of the challenges addressed above will become more extreme. The units and Soldiers deployed to these theaters will likely heavily consist heavily of mobilized USAR and ARNG elements, and other non-traditional Soldiers and units, such as Special Operations Forces. These Soldiers will likely be in very remote locations. Further, the lack of infrastructure will make other military justice actions especially difficult. Providing TDS support will take extensive planning, as there likely will not be any TDS presence in theater, and communications infrastructure may not easily allow private communications between Soldiers and defense counsel. Additionally, should commanders plan to conduct courts-martial, legal advisors would have to prepare extensively for witness travel and administrative support. It may be extremely difficult or even impossible to convene courts-martial in undeveloped theaters, so legal advisers should be prepared to move all court-martial parties to other suitable locations.[14] Legal advisors must also plan for both government and defense counsel to be able to gather evidence and interview witnesses in theater. This likely means those attorneys and paralegals need official passports, visas, special travel documents, and maybe possibly immunizations or other medical evaluations.

Overall, in such a developing theater with little infrastructure, administering military justice, especially courts-martial, is particularly challenging. It is also probably not on the top of commanders' priority lists. But, legal advisors must specifically plan and train to administer military justice in developing theaters because it is such a challenge. And, as in any other theater of operations, military justice is incomplete and ineffective without protecting our American legal principles and Soldiers' constitutional rights.

## Conclusion

In all theaters, environments, and units, commanders must ensure discipline through military justice. Judge advocates are responsible for advising commanders on military justice in the Army. In advising commanders, judge advocates' advice must address how to protect Soldiers' rights. Military justice actions—from reprimands to Article 15s to courts-martial—must be instruments of justice themselves, or they will not promote or support discipline. If judge advocates have not planned and trained on how to ensure their commanders' actions are instruments of justice, they are not prepared to advise in combat.

Fortunately, judge advocates can train to administer military justice overseas, try courts-martial in combat, and maintain Soldiers' constitutional rights. Judge advocates have myriad opportunities every single day, in every theater of operations, that can assist them to plan and train to administer justice throughout the world and in any environment. However, judge advocates must take full advantage of these opportunities and constantly assess enduring challenges. Judge advocates must also always plan to administer military justice as a system that "permit[s] our constitution and American legal principles to follow our servicemen wherever they are deployed."[15] **TAL**

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## Notes

1. General William C. Westmoreland, *Military Justice: A Commander's Viewpoint*, 10 Am. Crim. L. Rev. 5, 20-21 (1971).

2. Certainly, other options are viable, such as working with Congress to amend the Uniform Code of Military Justice (UCMJ) to make it more expedient in deployed and combat environments. Changes might include: commanders taking actions without providing Soldiers the opportunity to consult with counsel; prohibiting Soldiers from hiring civilian defense counsel in certain combat environments; or prohibiting Soldiers from turning-down non-judicial punishment in combat or similar environments. Many judge advocate leaders have suggested these and similar courses of action, and they certainly have merit. *See, e.g.*, Major Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001-2009*, Army Law., Sept. 2010, at 12. Major John Brooker, *Target Analysis: How to Properly Strike a Deployed Servicemember's Right to Civilian Defense Counsel*, Army Law., Nov. 2010, at 7. Telephone interview with Chief of National Security Law, U.S. Army Europe (Mar. 24, 2019) (discussing the communications challenges and difficulties with trial defense representation in high-intensity conflict environments). However, the goal of this writing is to assist judge advocates in administering military justice within the existing system, accounting for the full provision of Soldiers' rights. *Id.*

3. Brigadier General Susan Escallier, *The Wisdom of Courts-Martial in Combat*, Army Law., Sept./Oct. 2018, at 3.

4. U.S. Const. amend. XI. "[T]he accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." *Id.*

5. *See*, UCMJ art. 46(b)(3) (2018). U.S. Army Reserve (USAR) and Army National Guard (ARNG) Soldiers not on active duty are treated as civilian witnesses for purposes of witness production. *Id. See also* Manual for Courts-Martial, United States, R.C.M. 703(e)(1) discussion (2019). Alternatively, these witnesses can be placed on orders for the court-martial. If so, consideration should be given to the time required, coordination, and fiscal constraints in doing so. *Id.*

6. *Sexual Assault Prosecution and the Role of the Commander: Hearing Before the H. Subcomm. on Military Pers.*, 116th Cong. 7 (2019) (statement of Lieutenant General Charles N. Pede Hearing Statement, The U.S. Army's Judge Advocate General) [hereinafter Pede Hearing Statement].

7. The author strongly recommends that, under most circumstances, Trial Defense Service (TDS) counsel should have offices in areas of operations with over 5,000 Soldiers, and a Special Court-Martial Convening Authority (SPCMCA)/brigade commander. This may not be possible in some contingency or austere environments, but it should be a goal for the Judge Advocate General's (JAG) Corps. Defense counsel can, and do, travel to meet clients and interview witnesses, and they advise clients over the phone/email. However, for contingency operations located far from the United States. or other permanent U.S. bases, TDS support to Soldier-clients will be slow and limited without physical TDS presence.

8. Legal advisors should also bear in mind that many remote TDS Field Offices are often staffed by a single attorney. Therefore, if a command convenes a court-martial in a deployed environment with only one resident TDS attorney, that court-martial will become the detailed TDS attorney's primary mission. The practical implications will almost certainly include delayed Priority II services (such as Article 15 and separations actions), which commanders and senior Noncommissioned Officers (NCO's) rightfully expect to process efficiently in order to maintain unit discipline.

9. The physical presence of TDS is dependent upon command and senior legal advisor support. Trial Defense Services cannot, alone, secure slots to fill with counsel; rather, senior legal advisors must prioritize TDS support within their commands by explaining the critical nature of TDS presence for the functional and fair implementation of military justice.

10. Westmoreland, *supra* note 1, at 8.

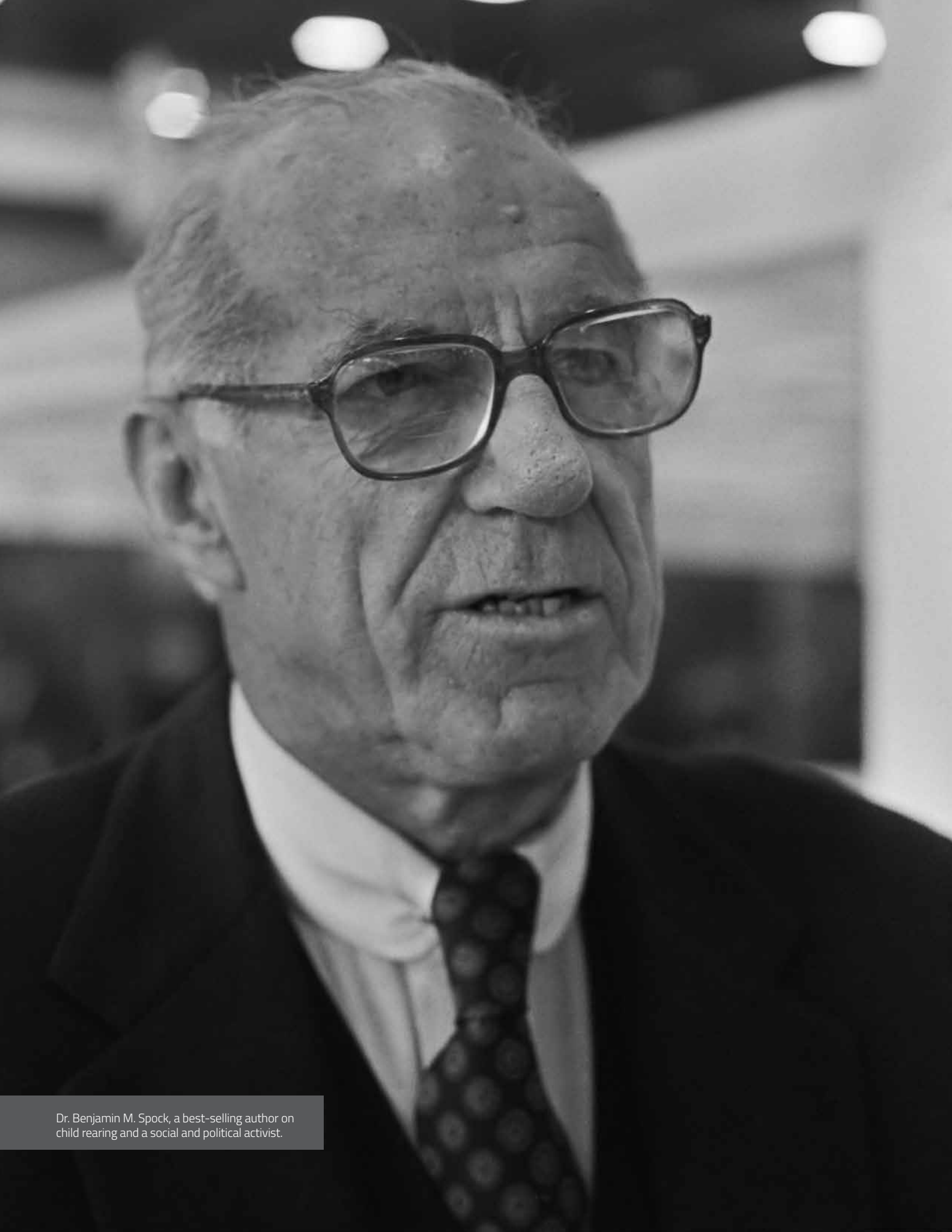
11. Pede Hearing Statement, *supra* note 6, at 4.

12. At present, TDS attorneys supporting rotational forces throughout Europe, from Norway to Ukraine, and most countries in between, rely heavily on personanel cell phones and applications, such as WhatsApp, to conduct private consultations with clients.

13. As discussed above, a second-order effect of courts-martial being unexpectedly moved to the United States is that forward-stationed TDS attorneys, having formed attorney-client relationships with Soldiers being tried, have to travel to the Continental United States unless released by their client, leaving all other deployed Soldiers without available representation for prolonged periods of time.

14. For example, a more suitable location might include necessary access to a Sensitive Compartmented Information Facility, particularly where special forces and other non-traditional Soldiers are involved in classified operations. The case may require the ability to review classified evidence. This includes extenuation and mitigation that could be expected to be presented by the defense, such as classified OERs, NCOERs, or awards.

15. Westmoreland, *supra* note 1, at 8.



Dr. Benjamin M. Spock, a best-selling author on child rearing and a social and political activist.

## No. 3

# The Supreme Court's About-Face in *Greer v. Spock*

*By Lieutenant Colonel (Ret.) Andrew J. Smith*

For military practitioners, the Supreme Court case of *Greer v. Spock* has become an important decision, standing for the proposition that installation commanders have inherent authority to limit certain types of speech that occurs on military installations because "the business of military installations [is] to train soldiers, not to provide a public forum."[1] *Greer v. Spock* reinforces commanders' broad authority to prohibit political campaigning on military installations and reaffirms commanders' power to require individuals to seek pre-approval before distributing leaflets on post. Since the military banned *all* partisan campaigning, and the leaflets at issue were not prohibited due to their content but rather for failing to seek prior approval, the case itself purported to be "content neutral."[2] While seemingly uncontroversial today, the story behind *Greer v. Spock* reveals a heated battle between diverse groups of colorful characters from both ends of the political spectrum.

The story behind *Greer v. Spock* is about a war of ideas fought between counter-cultural activists on one side and proponents of traditional military authority on the other. The story also demonstrates the Supreme Court's great indecision in applying First Amendment precedent in the military context. The Court's uncertainty resulted in the Court publishing seemingly contradictory holdings in two remarkably similar cases within a mere four years. The Court's unexplained "about-face" on the issue may be evidence of a conservative counter-reformation that occurred with the ascent of Chief Justice Rehnquist.

To understand the significance of the story behind *Greer v. Spock*, readers must understand the cultural context of the times. Beginning in the 1960s, elements of the so-called "counter-culture" began assailing traditional elements of American life, challenging everything from traditional notions of morality and sexuality to organized religion, race relations, and education.[3] One activist explained, "We questioned everything and everybody, accepted nothing—capitalism, racism, sexism, electoral politics, the plight of the poorest among us, food, music, clothes, sex."[4] Perhaps no topic galvanized the counter-culture movement more, though, than the war in Vietnam.[5] The Vietnam War has been called "America's second Civil War."[6] Anti-war activists clamored to bring their message directly to the men and women who were training to fight in the unpopular war. By 1972, activists had successfully litigated their way onto various military posts, to include posts in Texas (Fort Sam Houston)[7] and Rhode Island (Quonset Point Naval Air Station).[8] It was in this charged political environment that Fort Dix, a relatively small Army training installation of just fifty-five square miles in rural New Jersey, became ground zero in the battle between anti-war activists and military authority. At the center of the fray stood an unlikely figure—Dr. Benjamin Spock.[9]

### Presidential Candidate for the People's Party: Dr. Spock

Dr. Spock is perhaps most famous for his child-rearing publication, *The Common Sense Book of Baby and Child Care* (later simply referred to as *Baby and Child Care*).[10] His number-one rule of parenting was: "Trust yourself. You know more than you think you do."[11] The first edition was published in 1946 and was an instant bestseller, selling 500,000 copies in its first six months. Currently in its ninth printing, the book has sold over 50 million copies and is considered to be the second-best-selling work in the twentieth century, behind only the Bible.[12]

Born on 2 May 1903 in New Haven, Connecticut, Benjamin McLane Spock did not fit the stereotype of an anti-war radical.[13] His father, Benjamin Ives Spock, was a conservative railroad lawyer, and his mother, Mildred Louise Stoughton Spock, was a stern disciplinarian.[14] He grew to be a lanky, six-foot-four-inches tall, natural athlete.[15] As an English major at Yale College, he was a member of the college rowing squad that won a gold medal in the 1924 Olympics in Paris.[16] With the Olympics conquered, Dr. Spock attended Yale Medical School and later transferred to Columbia University's College, earning his M.D. in 1929.[17] After his medical residency in New York, Dr. Spock became a resident in psychiatry at New York Hospital.[18] In 1943, Dr. Spock first began writing *Baby and Child Care*.[19]

Although he would eventually become a rabid anti-war advocate, Dr. Spock joined the Navy as a young doctor during World War II in 1944. At that time, Dr. Spock held more conservative views and even supported the United Nations' intervention in the Korean conflict.[20] While serving in the Navy, Dr. Spock continued writing *Baby and Child Care* during his off hours as a military psychiatrist in military hospitals in New York and California.[21] In 1946, Lieutenant Commander Spock left the Navy and returned to his private medical practice with the manuscript of *Baby and Child* ready for publication.[22]

Although *Baby and Child Care* made Dr. Spock a millionaire, he continued practicing medicine and lecturing on pediatrics.[23] In the 1960s, he began feeling troubled with the rise of nuclear weapons and the expanding war in Vietnam.[24] He started protesting against the war—reluctantly at first, stating, "I felt acutely self-conscious and ridiculous."[25] However, as the war dragged on, Dr. Spock became "one of this country's most vociferous opponents of the exercise of military power."[26] The success of Dr. Spock's child-rearing books, coupled with his anti-war activities, led some commentators to argue that Dr. Spock was the "cradle guru of the hippies and the flower children because of his 'permissive writings.'"[27] Dr. Spock always rejected the claims that his writings were "permissive" or that he spawned the counter culture. "I'm not responsible for all those brats," he would say, laughing.[28]

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Before the Supreme Court case that bore his name, Dr. Spock was a defendant in a trial that is commonly referred to as "The Trial of Dr. Spock."[29] The 1968 trial was the first major anti-Vietnam War prosecution and was "widely regarded as a national disgrace."[30] In that criminal trial, Dr. Spock was charged with conspiracy to violate the Selective Service Act with Reverend William Sloane Coffin, Jr., and three other individuals—collectively referred to as the "Boston Five."[31] The government's prosecution seemed to have been launched primarily to chill the anti-war movement.[32] The government went so far as to argue at trial that even those who applauded during one of Dr. Spock's speeches—which advocated violation of the Selective Service Act—could be considered part of the conspiracy; this led Dr. Spock's well-known criminal attorney, Leonard Boudin to quip, "I didn't know applause was a crime."[33] Despite claims of governmental overreaching, Dr. Spock was convicted and sentenced to two years in prison.[34] On 11 July 1969, however, the Court of Appeals overturned Dr. Spock's conviction.[35] With his name thus cleared, Dr. Spock was free to begin his run at the 1972 presidency. He chose Julius Hobson, Sr., as his running mate.

By all outward appearances, Julius Hobson, Sr., seemed like the ideal running mate for Dr. Spock. Hobson was a well-known Washington, D.C., city councilman who sought statehood for the district.[36] Hobson was also a committed Marxist who was considered to be an "angry" activist who was fond of saying that he even "slept mad."[37] In his obituary in 1977, the *Washington Post* described him as "a maverick, an egomaniac, a gadfly, a hero."[38] Despite his impeccable activist resumé, and counter-culture credentials, Hobson had a secret. While by all accounts he was a fully committed activist, it was discovered after his death that he was actually a Federal Bureau Investigator (FBI) "confidential source."[39] The FBI paid Hobson on several occasions to provide information on upcoming street demonstrations and on revolutionary parties, like the Black Panthers.[40] The FBI even paid Hobson to provide confidential information on Martin Luther King Jr.'s 1963 March on Washington and the 1964 Democratic National Convention in Atlantic City.[41] While the FBI files revealed that Hobson was considered to be an "undependable leftist radical who should be left under surveillance," his secret relationship with the FBI adds an element of intrigue to the story.[42]

### Presidential Candidate for the Socialist Workers Party: Linda Jenness

Like Dr. Spock, Linda Jenness was running for the presidency in 1972. Her run for the U.S. presidency was unusual in several respects. At the time of her candidacy, she was only the second woman to have ever

run for the presidency.[43] She was only thirty-one years old in 1972, making her constitutionally disqualified for the presidency because she had "not attained the age of thirty-five."[44] This inconvenient truth did not stop her from campaigning across the country.

Jenness's politics were certainly not within the mainstream of America in 1972. As a member of the Socialist Workers Party, she held very extreme libertarian views, to include de-criminalizing all "victimless crimes" and "abolishing" the FBI.[45] She believed that black and Hispanic communities should be responsible for establishing rules on heroin and narcotic use and distribution since these "oppressed nationalities" were the communities "most affected by them."[46] Not surprisingly, she shared Dr. Spock's anti-war views, and the two routinely campaigned together, despite the fact that they were vying for the same job.[47] Thus, with their respective running mates, both Dr. Spock and Linda Jenness sought access to Fort Dix in 1972 to hold a joint campaign rally.

Andrew Pulley was Linda Jenness's running mate on the Socialist Workers Party, but he was certainly not a traditional vice-presidential candidate. Born on 5 May 1951, he was only twenty years old in 1972. Thus, like Jenness, Pulley was constitutionally ineligible to be vice president.[48] Although young, Pulley was no stranger to controversy. He was a former Soldier and Vietnam veteran who went to jail in 1969 for "attempting to organize [general infantrymen] G.I.s at Fort Jackson, S.C."[49] He was part of the so-called "Jackson 8" who faced court-martial charges stemming from their anti-war speeches on post.[50] Pulley alleged that the charges were racially motivated since he was African-American.[51] However, Pulley did make several statements in 1969 at an anti-Vietnam War conference that were inflammatory, to say the least, such as, "[T]he first thing to be done was to get the G.I.s to demonstrate peacefully, and the ideal thing would be for them to take up their guns and shoot their officers."[52] On another occasion Pulley said that "G.I.s are not ready to take up arms against their officers or to overthrow capitalism, although this is the long-term perspective."[53] As a member of the Socialists, Pulley advocated for the abolition of capitalism, perhaps using revolutionary—and even violent—methods.[54] Pulley would, ultimately, run for the presidency for the Socialist Workers Party in 1980 and receive approximately 6,000 votes, even though he was only twenty-nine years old by that time.[55]

## The Trespassing Pamphleteers

Along with the campaigners, there was a second, less prominent, group in *Greer v. Spock* who sought access to Fort Dix. John Ginaven, Donald Misch, Alan Hardy, and Robert Stanton were all members of anti-Vietnam War groups.[56] Specifically, they were all members of the Central Committee of Conscientious Objectors (CCCO) and were committed to reaching Soldiers to convince them to become conscientious objectors—and thus ineligible for military service—pursuant to Army Regulation 600-43 (31 July 1970).[57] These anti-war activists had been trespassing on Fort Dix for several years distributing literature, and Robert Stanton had been distributing anti-war pamphlets as early as 1968.[58] Ultimately, all four were "apprehended, evicted, and given notice that they were barred from the base."[59] These barred pamphleteers joined Dr. Spock in claiming that the First Amendment protected their anti-war leaflet distribution activities.

## Fort Dix Commanding Generals: General B.A.D. and General Greer

Major General Bert Alison David—who was the commander of Fort Dix in 1972—was, in many ways, Dr. Spock's polar opposite. It would be hard to imagine someone who more embodied the spirit of the traditional Army establishment than General David. He was born on the Fourth of July in 1924 in Lehighton, Pennsylvania.[60] He graduated West Point in 1946, commissioned as a second lieutenant in the infantry, and married his high-school sweetheart, Shirley Fagan, in a military wedding.[61] He then served in the Army for over thirty years until he retired on 31 August 1977.[62] During his Army career, General David had assignments in Japan, Korea, Germany, Vietnam, Washington, D.C., and, of course, Fort Dix.[63] He was a veteran of the Korean War and was a brigade commander in Vietnam.[64] He received his master's degree in Business Administration from George Washington University.[65] General David and Shirley had four sons, all of whom joined the Army as officers.[66] General David was known as a strict, but well-respected, officer.[67] His nickname was "General B.A.D." due to the initials of his name.[68] General David assumed his role as the Commanding General of Fort Dix in May 1972.[69]

General David was replaced as the Commanding General of Fort Dix by Major General Thomas U. Greer, who would go on to become the named party in *Greer v. Spock*, in February 1974.[70] General Greer was born in Colon, Panama, in 1928.[71] Like General David, General Greer was a graduate of West Point, class of 1950, and was commissioned as an infantry second lieutenant.[72] He was a battalion commander in Vietnam and earned both a Bronze and a Silver Star Medal during his combat tours.[73]

## The Initial Denial

In early September 1972, Dr. Spock called David Kairys, a prominent civil rights attorney from Philadelphia, and said, "This is Ben Spock . . . I've got a free speech case, and I need a lawyer."[74] Dr. Spock told Kairys that he was "particularly concerned about these young men going off to fight a war that has no legitimate purpose" and wanted to "talk to them" directly at Fort Dix.[75] After recovering from the shock of receiving a "cold call" from the most famous anti-war activist in the country, Kairys quickly began plotting a legal strategy for Dr. Spock and his fellow activists to gain access to Fort Dix.[76] Money would not be an issue as the National Emergency Civil Liberties Committee (NECLC) would finance the entire litigation.[77]

Kairys sketched out two potential approaches.[78] First, Dr. Spock and his allies could simply campaign at Fort Dix without permission and, likely, get arrested.[79] They could, then, challenge the criminal charges in court.[80] Alternatively, Dr. Spock could simply request written permission from the post commander and, if denied, challenge the denial in federal court.[81] Dr. Spock opted for the second approach; and so, on 9 September 1972, Spock wrote to General David to advise him that they intended to enter Fort Dix to distribute campaign material and to "discuss election issues with

service personnel and their dependents."[82] Dr. Spock stated that he would abide by any "time and place" restrictions.[83]

On 18 September 1972, General David denied Dr. Spock's request in a letter, which stated in relevant part:

> There are several compelling reasons for this denial which I shall enumerate. First, there are lawful regulations in effect which prohibit political speeches and similar activities on all of the Fort Dix Military Reservation (Fort Dix Regulation 210-26). The distribution of literature without prior approval of this headquarters is also prohibited (Fort Dix Regulation 210-27). Also, Department of the Army Regulations prohibit military personnel from participating in any partisan political campaign and further prohibits [*sic*] them from appearing at public demonstrations in uniform.
>
> The mission assigned to me as Commanding General of Fort Dix is to administer basic combat training to approximately 15,000 men at any given time. These men spend a period of eight weeks here during which they perform their training on very vigorous schedules occupying virtually all of their time. I am not in a position to dilute the quality of this training by expanding these schedules to include time to attend political campaigning and speeches. Political campaigning on Fort Dix cannot help but interfere with our training and other military missions.
>
> To decide otherwise could also give the appearance that you or your campaign is supported by me in my official capacity . . . .[84]

Fort Dix, and virtually every Army installation, had regulations that were based on Army Regulation 210-10, which prohibited "picketing, demonstrations, sit-ins, protest marches, political speeches, and similar activities. . . ."[85]

Upon receiving the general's letter, Dr. Spock and his allies responded with another letter, this time informing General David that they intended to campaign on Fort Dix on 23 September 1972, even in the face of his denial.[86] Dr. Spock also turned to the press, informing them that General David had "denied permission" for him to campaign for the presidency at Fort Dix.[87] Dr. Spock would turn to the press during each step of the legal battle to ensure their anti-war message received maximum publicity.

**While Fort Dix was normally unguarded, on 23 September 1972, General David sent representatives to the front gate to deny Spock and his entourage admittance**

While Fort Dix was normally unguarded, on 23 September 1972, General David sent representatives to the front gate to deny Spock and his entourage admittance.[88] After briefly conferring with Dr. Spock, several Army officials "quietly" denied Dr. Spock and his entourage access to the post.[89] The *Los Angeles Times* reported that Dr. Spock was "rebuffed as expected."[90] Dr. Spock defiantly told reporters, "If a soldier is allowed to vote, then he should be allowed to hear the issues and meet the candidates."[91] Dr. Spock then told the press that he planned to take legal action to gain access to the base.[92]

### The First Legal Skirmish—An Early Defeat for Dr. Spock

True to his word, Dr. Spock sought a preliminary injunction to allow him to make a political address and pass out campaign literature at Fort Dix. An emergency hearing was held on 4 October 1972. The district court judge, Clarkson Fisher, commented that it was "interesting to note" that Dr. Spock and the other campaigners have allied themselves in the litigation with the anti-Vietnam War activists.[93] This cryptic remark seemed to suggest that Judge Fisher thought Dr. Spock's political campaign was really simply a cover to spread anti-war propaganda. Judge Fisher went on to say that the "primary military mission at Fort Dix is training" and anything that would "interfere with the mission of the Command makes no sense whatsoever."[94] He then rejected Dr. Spock's injunction on 12 October 1972, holding that the military "must remain politically antiseptic."[95]

### Flower Blossoms

Not surprisingly, Dr. Spock immediately appealed the district court's decision to the U.S. Court of Appeals for the Third Circuit. The Third Circuit conceded that the military exercised jurisdiction "over the entire reservation" but concluded, "[E]xercise of such jurisdiction does not imply the power to selectively exclude persons solely on the ground of exercise of rights protected by the first amendment."[96] The court relied primarily on the 1972 Supreme Court case *Flower v. United States* to reach its conclusion. The facts in *Flower* were remarkably similar to the facts in *Spock*. *Flower* involved an anti-war activist, John Thomas Flower, who was "quietly distributing leaflets on New Braunfels Avenue" within the limits of Fort Sam Houston, Texas.[97] Just like Fort Dix, the Commanding General of Fort Sam Houston allowed civilians to travel on the military installation's streets and walk on the installation's sidewalks. Both Fort Dix and Fort Sam Houston employed no sentries or guards at the entrances. Essentially, both posts were "open" to the public. The commander of Fort Sam Houston had previously barred Flower from the post, and so Flower was arrested by the military police when he subsequently attempted to distribute "unauthorized leaflets."[98] Flower was sentenced to six months in prison.

Justice Potter Stewart wrote the *per curiam* decision reversing Flower's conviction.[99] The decision was made "without the benefit [of ] briefs or oral argument."[100] In his brief one-page decision, Justice Stewart held that the "base commander can no more order petitioner off this public street because he was distributing leaflets than

Spock, left, marches with Martin Luther King, Jr.

could the city police order any leafleteer off any public street."[101] Under "such circumstances," Justice Stewart determined that the "military had abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue."[102] Justice Stewart was so certain that the First Amendment protected such activities that he said that there was no "need to set the matter for further argument.[103]

Applying the principles announced in *Flower*, the Third Circuit easily concluded, "Fort Dix, when compared to Fort Sam Houston, is *a fortiori* an open post."[104] The Third Circuit rejected Judge Fisher's argument that the Army had to remain politically neutral and found that a "policy of antisepsis . . . would not be neutral. It would consign military voters to the category of the uninformed."[105] The Third Circuit also questioned whether the regulations at Fort Dix were really "content neutral":

> What the Fort Dix voters are protected from, practically speaking, is exposure to the political ideas of those minor candidates whose campaigns are neither prominent enough nor sufficiently well-financed to attract media coverage, and who must make do with the more old fashioned face-to-face style of campaigning.[106]

Interestingly, Fort Dix Regulation 210-26 was published in 1968, and Fort Dix Regulation 210-27 was published in 1970, so neither even attempted to incorporate the *Flower* ruling. However, the Third Circuit saw the regulations as mere "feigned neutrality" and overturned the district court's ruling.[107] Thus, on 27 October 1972, the Third Circuit remanded the case for entry of a preliminary injunction "directing the defendants to cease from interfering with the political campaigning by the candidate plaintiffs Spock, Hobson, Jenness, and Pulley or with the distribution of campaign literature on their behalf within the unrestricted areas of the Fort Dix Military Reservation . . . ."[108]

### The Supreme Court's First Position on Dr. Spock

The Solicitor General at the time, Erwin N. Griswold, immediately appealed the Third Circuit's decision to the Supreme Court.[109] Griswold was a well-respected attorney who was a "lifelong Republican with a background of Midwest conservatism."[110] Griswold is credited with compiling the first version of the Bluebook, "the paragon of citation style," as a law student in 1926.[111] Before being appointed as the U.S. Solicitor General, he was the dean of Harvard Law School for twenty-one years.[112]

On appeal, Griswold argued to the Supreme Court that allowing campaigning on a military installation would undermine "the fundamental principle that the Army must not become involved or even appear to be involved in politics."[113] On 3 November 1972, the Supreme Court denied the government's application for a stay of the judgment of the Third Circuit without explanation.[114] The majority, including Justices Powell, Douglas, Brennan, Stewart, and Marshall, all voted to deny the government's request, while the dissent, including Chief Justice Burger and Justices Rehnquist, White, and Blackmun, all would have granted the stay to allow further argument.[115] The Supreme Court's denial seemingly reinforced the validity of the Third Circuit's interpretation of the *Flower* decision.

**Spock and Hobson, though defeated in the presidential race of 1972, desired to continue political activity on the Fort Dix Military Reservation, and the barred pamphleteers desired to distribute their literature on that base**

### The First Political Campaign on a Military Installation in American History

With the Supreme Court's denial of the government's appeal, the stage was finally set for the first political campaign on a military installation in the history of America.[116] Now that they had won the right to campaign, Dr. Spock and his allies made it clear that the primary purpose of the campaign was to spread their anti-war message. Dr. Spock and Linda Jenness triumphantly informed the press that they would hold "the first *political anti-war rally* ever on an American military base."[117] The campaign/rally occurred on 4 November 1972 at a Fort Dix parking lot.[118]

The success of Dr. Spock's Fort Dix campaign rally is debatable. Kairys described the event as a "sizable gathering of [S]oldiers" and recalled the campaign stop at Fort Dix in somewhat glowing terms.[119] He recalled that there was "no trouble or any disruptions from anyone favorable or unfavorable to the speakers."[120] Kairys recalled that the candidates "addressed the crowd directly as [S]oldiers on the war and the opposition to the war."[121] Folk singer and anti-war activist Judy Collins performed as part of the campaign and spoke "movingly" about her opposition to the war.[122] Kairys recalls smoking his pipe "with great satisfaction" while listening to the candidates protest the war in the heart of a military installation.[123]

Contemporaneous news accounts of the event were less glowing. The *New York Times* reported that the rally was "uneventful" and that a crowd of only about 150 people attended the campaign rally.[124] While 150 Soldiers attending a socialist campaign on a military training base would not be a bad turnout, all things considered, the *New York Times* went on to report that fifty of the spectators were members of the press, while the other 100 attendees were "Spock supporters bussed onto the base."[125] Simple arithmetic derived from that press account would suggest that no Soldiers from Fort Dix attended the campaign.

However, the record does reflect that at least a few Soldiers attended the campaign rally. In an early draft of Justice Potter's majority opinion in *Greer v. Spock*, a deleted portion described the rally in the following manner: "Approximately 150 to 200 persons were present, including sixty to seventy-five civilians. Some thirty to forty military personnel attended the rally in uniform, in violation of an Army regulation. No violence or disruption occurred during the rally."[126]

Three days after the Fort Dix political rally, the presidential elections were held on 7 November 1972. President Nixon defeated George McGovern, Dr. Spock, and Linda Jenness by a large margin.[127]

After Dr. Spock's legal victory, counter-culture activists used the legal precedence of *Flower* and *Spock* to successfully demand access to the Presidio of San Francisco, California;[128] Fort Bragg, North Carolina; Hickam Air Force Base, Hawaii; the Air Force Academy, Colorado; and "even aboard aircraft carriers."[129] The military gates had been largely smashed down and opened to activists so they could make face-to-face appeals directly to service members. With the Supreme Court's denial of the government's appeal and the presidential election over, the story should have been over.

But it wasn't.

There is a saying by Napoleon Bonaparte, "You must not fight too often with one enemy, or you will teach him all your art of war." Not satisfied with their legal victory, Dr. Spock and his team pressed for a permanent injunction against General David and Fort Dix. As the Third Circuit noted, "Spock and Hobson, though defeated in the presidential race of 1972, desired to continue political activity on the Fort Dix Military Reservation, and the barred pamphleteers desired to distribute their literature on that base."[130] The district court complied with Dr. Spock's demands and issued a permanent injunction enjoining General David from enforcing the offending portions of Fort Dix Regulations 210-27 and 210-26 and allowing Dr. Spock and the Socialist Workers Party to be free to conduct political campaigning at Fort Dix, subject to reasonable time, place, and manner restrictions.[131]

Due to Dr. Spock's continued demand for further access to the post, the dispute was not moot.[132] It is not clear why Dr. Spock continued to push for access, although it may have been that he wanted to continue campaigning there for the 1976 campaign, or perhaps just as a matter of principle. The government claimed that the courts lacked jurisdiction to enforce the injunction, pursuant to 28 U.S.C. 1331.[133] At that time, 28 U.S.C. 1331 required that controversies meet the jurisdictional threshold amount of $10,000.[134] The government claimed that the amount in controversy was less than $10,000, and thus below the statutory threshold. Kairys argued on behalf of Dr. Spock that "free speech is by definition

worth more than $10,000" and also pointed to the cost of advertising in the area as being over $10,000.[135] The Third Circuit ultimately sided with Kairys that the jurisdictional amount was met and affirmed the lower court's permanent injunction.[136] Robert Bork, as Solicitor General, quickly appealed the case back to the Supreme Court for the final confrontation. Bork had been the Solicitor General for about three years when *Greer v. Spock* was argued.[137] Bork elected to make the oral argument at the Supreme Court himself.[138] In fact, Bork was so proud of his oral argument in *Greer v. Spock* that he included the entire transcript from his oral argument in one of his books.[139]

## The Wilting of *Flower*: The Lone Dissenter's Hidden Influence

Justice William H. Rehnquist was only forty-seven years old when President Nixon appointed him to the bench in 1971.[140] While he was the youngest justice on the Burger Court, he quickly became its "most conservative member," with *Newsweek* even calling him "The Court's Mr. Right."[141] Justice Rehnquist set a record for issuing fifty-four solo dissents during his first fourteen years as an associate justice, earning him the nickname of the "Lone Dissenter."[142] Justice Rehnquist tended to be deferential to military regulations, especially when it involved issues of freedom of expression in the military context.[143] He authored several decisions that validated the exercise of military authority, including *Parker v. Levy*—upholding the constitutionality of Articles 133 and 134 of the Uniform Code of Military Justice[144]— and *Middendorf v. Henry*—holding the denial of counsel in summary courts-martial as constitutional and issued the same day as *Spock v. Greer*.[145]

One of Justice Rehnquist's first dissents on the Court was in *Flower v. United States*, the same decision that was so heavily relied on by the Third Circuit.[146] In that dissent, Justice Rehnquist blasted the Court's "impressionistic summary reversal" that was reached "without benefit of briefs or oral argument."[147] He argued that "the unique requirements of military morale and security may well necessitate control over certain persons and activities on the base, even while normal traffic flow through the area can be tolerated."[148] He criticized the majority's view that the commander "abandoned" his claim to control access to the installation by simply allowing individuals on government property.[149] Although an unsigned *per curium* decision, Justice Potter Stewart authored the *Flower* opinion and had also voted with the majority to deny the first *Spock* appeal back in 1972. The challenge for Justice Rehnquist was to convince Justice Stewart to execute a 180-degree "about-face" on the issue.

As the 1975 term progressed, the fifty-one-year-old Justice Rehnquist and the seventy-year old Justice Stewart "continued to grow closer, both personally and professionally," and their relationship "affected the alignment of the Court."[150] Justice Rehnquist's decisions were "important, well-reasoned, and sophisticated" and often "forced the majority to address new issues or to narrow its focus."[151] When asked to describe Justice Rehnquist, Justice Stewart would simply say he was "excellent" and a "team player."[152] Justice Stewart's law clerks felt Justice Rehnquist's influence and were "not entirely happy about the way their boss seemed to have fallen under Rehnquist's spell."[153] Justice Stewart's contemporaneous files are remarkably silent about any conversations between the two justices regarding *Greer v. Spock;* however, something—or someone—fundamentally changed Justice Stewart's view on the merits of the case. Justice Rehnquist is the most likely suspect.

## Out of the Wilderness

During the *Greer v. Spock* conference, Chief Justice Warren Burger began by stating that a military installation is "not a public forum like a public park."[154] He indicated that *Lloyd v. Tanner*—which allowed a private mall to forbid certain types of speeches on its property—"has much bearing."[155] Chief Justice Burger mentioned the *Cafeteria Workers* case—in which the Court upheld the power of the military to bar entry to a base—and noted that the Hatch Act isolates civilian employees from politics.[156] Chief Justice Burger ended his comments by stating, "A base, is a base, is a base, is a base."[157]

Justice Byron White largely agreed with Chief Justice Burger and believed that the Third Circuit's decision "crosses the line against involving the military in politics unnecessarily. This is military property, and if we allow this, I don't know where to stop."[158] Surprisingly, Justice Potter Stewart seemed to agree with Chief Justice Burger and Justice White during the conference, when he said, "This is the military, and our constitutional tradition to isolate the military from politics requires this."[159]

On the other side, only Justice Douglas and Justice Marshall indicated that they were inclined to side with Dr. Spock. Justice Brennan passed but, ultimately, filed a lengthy and heated dissent.[160] Justice Douglas, who had suffered a debilitating stroke on 31 December 1975, retired before the decision, and Justice Stevens, who replaced Douglas, did not participate.[161]

Justice Rehnquist was conspicuously silent during the *Greer v. Spock* conference. According to Justice Blackmun's detailed conference notes, *every* justice that was present made comments *except* Justice Rehnquist.[162] Based on his dissents in *Flower* and the earlier *Spock* decisions, Justice Rehnquist clearly held strong views on the issue, but he chose to keep his own counsel during the conference. Among the other justices, there was still much uncertainty on how to vote. Justice Blackmun drafted a long internal legal memorandum on the issues, including a detailed analysis of *Flower*.[163] At the conclusion of the memo, he wrote, "I therefore suspect that I shall vote to affirm, but do so with some reluctance and would be pleased to see someone lead me out of the wilderness."[164] This final paragraph was subsequently crossed out in pencil with the word "No" underlined twice. Apparently, Justice Blackmun found his guide out of the wilderness and ultimately voted with the majority to overturn.

At oral argument on 5 November 1975, the *Flower* decision loomed large. Bork began his argument with a concession, "I have no trouble agreeing that if this were about civilians within a city, an ordinance like the commander's rules here would be unconstitutional."[165] He then began to distinguish the case on military grounds, "But we're dealing here with a military base, devoted to the training of soldiers. The commander of Fort Dix has the lawful power to exclude all civilians from the base."[166] Justice Rehnquist then asked, "Well, that was true in *Flower*, too, wasn't it?"[167] At

this point, Bork had two options—he could have argued that *Flower* was wrongly decided and should be overturned or he could try to distinguish the case, even though the facts were almost indistinguishable. He opted to attempt to distinguish the cases:

> Mr. Bork: It is true in *Flower* also. I think *Flower* is a different case in a variety of reasons I am going to come to. One I think; one reason, one point of difference it seems to me is that street was indistinguishable from any other civilian street indeed continued straight through from the city in the way that is not true at Fort Dix, but I think there are other reasons that *Flower* does not govern in this case.
>
> Justice Rehnquist: Well, but did not he retain that power in Fort Sam Houston in *Flower,* too?
>
> Mr. Bork: Mr. Justice Rehnquist, if I thought that *Flower* had announced . . . [a] principle so broad as to say that if the Commander let civilians on the base… he must let them on base for all purposes. That is . . . *any* access means *all* access. Then I would [,] without hesitation [,] ask this Court to modify [,] or reverse [,] or overrule *Flower*. I do not think it should be read that broadly.[168]

Kairys, of course, argued that the facts in *Flower* were indistinguishable. He began his oral argument by saying:

> First of all, I do not note anyway in which the Solicitor General actually distinguishes this base or these areas that First Amendment rights were granted in this case from either the areas at Fort Sam Houston involved in *Flower* or from the usual kinds of civilian streets. Regarding the question of Mr. Chief Justice Burger, there are also highways, state roads and county roads that go completely across the base and the one involving several the respondents here in the Wrightstown road exit which is pictured in [the] appendix . . . is certainly indistinguishable from the city. You cannot even figure out on that picture where base starts and where the city ends . . . .[169]

Kairys also claimed that the former vice president, Spiro Agnew, was the first person to give a "political speech" on a military base, proving that the Army was not really being neutral in its application in its rules.[170] Justice Stewart expressed some suspicion regarding this argument, "That speaker was the incumbent vice-president, wasn't he? . . . And one remembers a great many occasions when an incumbent president spoke almost only at military bases. . . . He is Commander in Chief and I suppose he could change any regulations that might be made at Fort Dix or anywhere else, could not he?" [171]

Kairys also argued that the Court's civilian First Amendment cases should apply, specifically *Hague v. CIO*, which held that "wherever the title of streets and parks may rest, they [are] held in trust for the use of the public."[172] Additionally, *Freedman v. Maryland* held, "In the area of freedom of expression, it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office . . . whether or not he applied for a license."[173] *Freedman v. Maryland* seemed to hold that the pamphleteers had standing to challenge the Dix regulations even though they did not first apply for permission.

After oral arguments, the justices still expressed great uncertainty on how the case should come out. Justice White wrote to Justice Stewart, "I had my doubts about the regulations insofar as the distribution of political literature is concerned, but I join your circulation of January 27, subject to what is written in dissent on the literature issue."[174] In one of Justice Stewart's subsequent drafts, someone wrote in the margins of Justice White's copy, "Justice Stewart is trying to mollify you."[175] Justice Blackmun also wrote to Justice Stewart, stating, "I shall await Lewis[ Powell]'s concurrence" before making a decision.[176]

Layered on top of the general indecision of the Court was concern over the political ramifications of the decision. Justice Stewart was uniquely concerned about the potential political fallout. On 9 March 1976, he wrote the following personal message to the Chief Justice: "One final thought. It seems to me that in this election year it would be wise to announce our decision in this case reasonably soon, whatever that decision may ultimately be."[177] Chief Justice Burger replied the same day, "Dear Potter: I quite agree with what you say and also on the essence of time. Possibly I may add a short 'snapper' concurrence."[178]

### The Final Decision: About-Face!

After much indecision, the majority finally formed around Justice Stewart's opinion, although the justices still felt the need to file two separate concurrences and two separate dissents. Ultimately, Justice Stewart's majority opinion overturned the Third Circuit. He largely adopted Bork's argument that the *Flower* precedent did not apply in this case. Justice Stewart wrote:

> Indeed, the *Flower* decision looks in precisely the opposite direction. For if the *Flower* case was decided the way it was because the military authorities had "abandoned any claim [of] special interest in who walks, talks, or distributes leaflets on the avenue," then the implication surely is that a different result must obtain on a military installation where the authorities have not abandoned such a claim. And if that is not the conclusion clearly to be drawn from *Flower*, it most assuredly is the conclusion to be drawn from almost 200 years of American constitutional history.[179]

Justice Stewart then wrote the most famous lines in the case, "In short, it is 'the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' And it is consequently the business of a military installation like Fort Dix to train soldiers, not to provide a public forum."[180] And while the controversial anti-war content of Spock's campaign may have been simmering under the surface, Justice Stewart stressed that there was "no claim that the military authorities discriminated in any way among the candidates for public office based upon the candidates' supposed political views. It is undisputed that, until the appearance of . . . Spock at

Fort Dix . . . as a result of a court order, no candidate of any political stripe had ever been permitted to campaign there."[181] Finally, Justice Stewart stressed that the literature was not denied based on its content, and, in fact, "the respondents didn't even attempt to obtain approval."[182] Justice Stewart also emphasized that the military must remain politically neutral, to avoid even the appearance of "acting as a handmaiden for partisan political causes or candidates."[183]

Justices Brennan and Marshall, the last liberal stalwarts from the Warren era, wrote harsh dissents. Justice Brennan hammered the fact that *Flower* was indistinguishable from the facts in *Spock*, even going as far as publishing the photos comparing the two posts that Kairys submitted with his brief.[184] Justice Marshall stated that he was "deeply concerned" that the majority seemed to suggest that the "Constitution does not apply to the military." He specifically pointed to the other Justice Rehnquist decision of *Middendorf v. Henry*—issued the same day as *Spock*—as further evidence that the Court has gone "distressingly far toward deciding that fundamental constitutional rights can be denied to both civilians and servicemen whenever the military thinks its functioning would be enhanced by doing so."[185]

The media's reaction to the dual decisions in *Greer* and *Middendorf* was largely negative. The *Los Angeles Times's* coverage focused on the "blistering dissent" that criticized the "'unblinking deference' to the claim that the military was a world apart."[186] The *Los Angeles Times* reported that the "result Wednesday came as a surprise since only four years ago the high court permitted political pamphleteering at Ft. Sam Houston, Tex. on the theory that civilians freely roamed the streets." The article mentioned that Justice Brennan's dissent included pictures comparing Fort Sam Houston and Fort Dix "to show that there was no meaningful distinction."[187] The *New York Times* headline read, "High Court Limits Military Rights," and implicitly criticized the decision's "sharp distinction between the rights of civilians and those of military personnel . . . ."[188]

## Aftermath

When the dust settled, the dissents' concern that *Greer v. Spock* would fundamentally change constitutional rights was, perhaps, a little overheated. However, it was a clear victory for traditional military authorities over the counter-culture. It was also a victory for Justice Rehnquist in his quest to nudge the Court a bit to the right. After the *Greer v. Spock* decision was finalized, Justice Stewart's clerks would "snipe: '*Flower* looks the other way'" whenever Justice Stewart would join one of Justice Rehnquist's "more inexplicable decisions."[189] Kairys recalls calling Dr. Spock after the decision and "bemoaning the conservative trend of the Supreme Court."[190] He believed the result of the case was as a "conservative retrenchment" regarding First Amendment rights. He also said: "Something hit me clearly that day that had been brewing for some time. Legal opinions are written in a style that emphasizes objectivity and requires results. But there is broad, though usually hidden, discretion, choices made based on values nowhere specified or required in the law."[191] This revelation underscores the importance of why knowing the whole story behind a famous case is helpful. *Greer v. Spock* stands for the commander's broad authority to control what occurs on his post, but this bedrock principle could have just as easily been curtailed if Justice Stewart had not changed his position and sided with Justice Rehnquist. Also, there is a tendency to read precedent more broadly than necessary and not challenge the underlying factual basis of a decision.

Bork's oral argument sought to distinguish the facts of *Flower* rather than seek to overturn it by arguing that the Court should confine *Flower* to the unique facts at Fort Sam Houston. This tactic is, obviously, a more persuasive technique to convince the Court—and Justice Stewart—not to follow what may appear on the surface to be binding precedence. Finally, by understanding the full story behind *Greer v. Spock*, practitioners are better able to advise commanders grappling with modern versions of the similar First Amendment issues—from the commander's ability to restrict speech on social media to limiting politically-motivated demonstrations at high-profile courts-martial. There is also a danger that practitioners who are unfamiliar with the story behind *Spock* will read the holding too broadly and forget about the limits of a commander's authority in *Flower*, which is still good law lurking in the background, waiting for the day a commander overreaches.

**Justice Stewart then wrote the most famous lines in the case, "In short, it is 'the primary business of armies and navies to fight or be ready to fight wars should the occasion arise' . . .**

The holding in *Greer v. Spock* has been applied by the Court to the civilian setting, but it stands for very different propositions, depending on who is making the argument. For example, liberal justices point to the *Spock* decision for the proposition that public schools should have the ability to restrict religious groups' ability to meet on school grounds under the theory that *Spock* stands for the proposition that "public entities have 'broad discretion to preserve the property under its control for the use to which it is lawfully dedicated.'"[192] Conservative justices, on the other hand, rely on *Spock* to uphold the government's ability to restrict speech in certain public areas, such as airports[193] and postal sidewalks.[194] For example, Justice O'Connor relied on *Spock* for the proposition that "although airports do not normally restrict public access, 'publically owned or operated property does not become a "public forum" simply because members of the public are permitted to come and go at will.'"[195] Understanding the full story and context behind the *Spock* case demonstrates how precedent can be spun and twisted on both sides of an argument to stand for broad propositions that are unhinged from the factual moorings of the actual case.

While Dr. Spock lost the case, he didn't miss a step in life. He kept advocating against the war and nuclear weapons and writing books until he retired to enjoy a life of leisure boating.[196] He passed away in San Diego on 15 March 1998 at the age of 94. Kairys, his attorney, continued practicing civil rights cases, but now is a full-time law professor at Temple University.[197]

While Bork's arguments won the day in *Greer v. Spock*, the cultural wars ultimately caught up with him. When President Jimmy Carter was elected in 1976, Bork returned to Yale Law School.[198] After President Ronald Regan was elected president in 1980, Bork was appointed to the D.C. Circuit, where he served for five years.[199] He was then nominated for the Supreme Court, where Senate democrats systematically attacked his conservative jurisprudence and defeated his nomination.[200] Clearly, the cultural wars did not end with the decision in *Greer v. Spock*, and the winners of one battle could very well be the losers in the next. **TAL**

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## Notes

1. Greer v. Spock, 424 U.S. 828, 837-38 (1976).

2. *Id.*

3. *See* Norman F. Cantor, The Age of Protest, Dissent and Rebellion in the Twentieth Century v-xiv (Walter Anderson ed., 2d ed. 1969) *see also* Robert H. Bork, Slouching Towards Gomorrah: Modern Liberalism an American Decline (1996).

4. David Kairys, Philadelphia Freedom: Memoir of a Civil Rights Lawyer 393 (2008).

5. *Id.*

6. Bork, *supra* note 3, at 21.

7. Flower v. United States, 407 U.S. 197 (1972).

8. Jenness v. Forbes, 351 F. Supp. 88 (D.R.I. 1972).

9. Gereon Zimmerman, *What Makes Dr. Spock March? in* Cantor, *supra* note 3, at 167-73.

10. Benjamin Spock, The Common Sense Book of Baby and Child Care (1946).

11. *Id.*

12. Thomas Maier, Dr. Spock: An American Life 462 (Basic Books 2003) (1998).

13. Eric Pace, *Benjamin Spock, World's Pediatrician, Dies at 94*, N.Y. Times (Mar. 17, 1998), https://www.nytimes.com/1998/03/17/us/benjamin-spock-world-s-pediatrician-dies-at-94.html.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Zimmerman, *supra* note 9, at 168.

21. Pace, *supra* note 13.

22. *Id.*

23. *Id.*

24. *Id.*

25. Zimmerman, *supra* note 9, at 167.

26. Greer v. Spock, 44 U.S.L.W. 4380, 4393 (23 Mar. 1976) (Brennan, J., dissenting).

27. Zimmerman, *supra* note 9, at 171.

28. *Id.*

29. Alan M. Dershowitz, America on Trial 382-89 (2005) *see also* Jessica Mitford, The Trial of Dr. Spock 55 (1969).

30. Dershowitz, *supra* note 29.

31. *Id.* at 382.

32. *Id.*

33. *Id.* at 385.

34. *Id.* Dr. Spock never served any of his jail time. Louise Hidalgo, *Dr Spock's Baby and Child Care at 65*, BBC (Aug. 23, 2011), https://www.bbc.com/news/world-us-canada-14534094.

35. Dershowitz, *supra* note 29, at 385.

36. Cynthia Gorney, *Julius Hobson, Sr. Dies*, Wash. Post (Mar. 24, 1977), https://www.washingtonpost.com/archive/politics/1977/03/24/julius-hobson-sr-dies/8c1edc81-9586-487a-a78b-5b6ffedab48a/.

37. *Id.*

38. *Id.*

39. Paul W. Valentine, *FBI Records List Julius Hobson as "Confidential Source" in '60s*, Wash. Post, May 22, 1981, at A1.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Belva Lockwood, Lawyer, Dies at 85*, N.Y. Times, May 20, 1917, at 23. The first woman to run for the presidency was the George Washington Law School alum Belva Ann Lockwood, who ran for the presidency in 1884 as the candidate for the "Equality Party." *Id.*

44. *See* U.S. Const., art. II, § 1, cl. 5.

45. *Hospers on Crime and the FBI*, 4 Libertarian Forum 10, 2 (Dec. 1972), https://cdn.mises.org/Libertarian%20Forum_Volume_1.pdf.

46. *Id.*

47. See Jenness v. Forbes, 351 F. Supp. 88, 90 (D.R.I. 1972).

48. *See* U.S. Const., art. II, § 1, cl. 5.

49. *Spock Will Sue to Speak at Ft. Dix*, N.Y. Times, Sept. 25, 1972, at 78.

50. David Cortright, Soldiers in Revolt: GI Resistance During the Vietnam War 59-60 (2005).

51. *Id.*

52. Socialist Workers Party v. Attorney Gen. of Unites States, 642 F. Supp. 1357, 1373-74 (S.D.N.Y. 1986).

53. *Id.*

54. *Id.* at 1357.

55. *See 1980 Presidential General Election Results,* Dave Leip's Atlas of U.S. Presidential Elections, www.uselectionatlas.org/RESULTS/national.php?year=1980&minper=0&f=0&off=0&elect=0 (last visited Mar. 24, 2020).

56. Spock v. David, 349 F. Supp. 179, 180 (D.N.J. 1972).

57. *See* Gillette v. United States, 401 U.S. 437 (1971).

58. *Spock*, 349 F. Supp. at 180.

59. *Id.*

60. *Bert Alison David Memorial Article*, West-Point.org (Dec. 1980), http://www.west-point.org/users/usma1946/15849/.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. Randy Robinson, *Bert Alison David, Eugology*, West-Point.org (May 30, 2012), http://defender.west-point.org/service/display.mhtml?u=15849&i=49743.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Maj. Gen. Thomas U. Greer Biography*, U.S. Army Pacific, http://www.usarpac.army.mil/history2/cg_greer.asp (last visited Mar. 24, 2020).

72. *Id.*

73. *Id.*

74. Kairys, *supra* note 4, at 227.

75. *Id.* at 227.

76. *Id.* at 227-28.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 227.

81. *Id.*

82. Greer v. Spock, 424 U.S. 828, 832 (1976).

83. *Id.*

84. *Id.* at 833, n.3.

85. Dennis Corrigan, *The Lonely Flower*, Army Law., June 1976, at 1.

86. Spock v. David, 349 F. Supp. 179 (D.N.J. 1972).

87. Fred Ferretti, *Fort Dix Bars Candidate*, N.Y. Times, Sept. 22, 1972, at 30.

88. *Id.*

89. *Spock Denied Entry to Ft. Dix*, L.A. Times, Sept. 24, 1972 at 5.

90. *Id.*

91. *Spock Will Sue to Speak at Ft. Dix*, N.Y. Times, Sept. 25, 1972 at 78.

92. *Id.*

93. Spock v. David, 349 F. Supp. 179-80 (D.N.J. 1972).

94. *Id.*

95. *Id.* at 181-82.

96. *Id.*

97. Flower v. United States, 407 U.S. 197 (1972).

98. *Id.*

99. *Id.* at 199.

100. *Id.* (Rehnquist, J. dissenting).

101. *Id.* at 198.

102. *Id.*

103. *Id.* at 199.

104. Spock v. David, 469 F.2d 1047, 1053 (1972).

105. *Id.* at 1055.

106. *Id.* at 1056.

107. *Id.*

108. *Id.* at 1047.

109. *Dr. Spock Given OK to Appear at Ft. Dix*, L.A. Times, Nov. 4, 1972, at 28.

110. Dennis Hevesi, *Erwin Griswold of Harvard, Ex-Soliciotor General,* N.Y. Times, Nov. 21, 1994, at 90.

111. Christine Hurt, *The Bluebook at Eighteen: Reflecting and Ratifying Current Trends in Legal Scholarship*, 82 Ind. L.J. 49, 51 (2006).

112. Hevesi, *supra* note 110, at 58.

113. *Id.*

114. Laird v. Spock, 409 U.S. 971 (1972).

115. *Id.*

116. *Spock Allowed to Go to Ft. Dix*, Wash. Post, Nov. 4, 1972, at A4.

117. *Id.* (emphasis added).

118. Corrigan, *supra* note 85, at 3.

119. Kairys, *supra* note 4, at 231.

120. E-mail from David Kairys, Prof. of Law, Temple Univ. Beasley Sch. Of Law to Author (Oct. 13, 2014) (on file with author) [hereinafter Kairys Email].

121. *Id.*

122. *Id.*

123. Kairys, *supra* note 4, at 231.

124. *Spock Campaigns in Fort Dix*, N.Y. Times, Nov. 6, 1972, at 87.

125. *Id.*

126. *Potter Stewart Papers (Call Number: MS 1367)*, Archives at Yale, archives.yale.edu/repositories/12/resources/4553/collection_organization#scroll::/repositories/12/resources/4553 (last visited Mar. 24, 2020) [hereinafter *Stewart Papers*].

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# No. 4

# Reforming Bid Protests

*By Colonel Eugene Y. Kim*

*"Litigation is the basic legal right that guarantees every corporation its decade in court."*
—Admiral David Dixon Porter, U.S. Navy

On 25 August 2015, the U.S. Army selected the Oshkosh Corporation for award of a low-rate initial production (LRIP) contract, valued at approximately $6.7 billion, for 16,901 vehicles under the auspices of the Joint Light Tactical Vehicle (JLTV) Program.[1] As envisioned, the JLTV Program will eventually provide a family of vehicles that will replace the fleets of High-Mobility Multi-Purpose Wheeled Vehicles (HMMWVs) that are utilized by the U.S. Army and the U.S. Marine Corps.[2] The experience of U.S. forces in Iraq and Afghanistan, where the HMMWVs' vulnerability to improvised explosive devices highlighted the need for a replacement vehicle, demonstrated the importance of the JLTV Program—which was approved by the Joint Requirements Oversight Council of the Department of Defense (DoD) in 2006.[3]

On 8 September 2015, Lockheed Martin Corporation filed a bid protest with the U.S. Government Accountability Office (GAO) that challenged the LRIP contract award to Oshkosh; Lockheed would later supplement its bid protest with two additional GAO protest filings.[4] On 11 December 2015—and before the GAO's Comptroller General issued a decision on the merits of Lockheed's protests—Lockheed provided notification that it intended to file another protest, this time with the U.S. Court of Federal Claims (COFC).[5] Consistent with its past practice, the GAO dismissed Lockheed's protests due to the pending litigation before the COFC.[6] On 11 February 2016, the COFC denied Lockheed's request for a temporary restraining order against the LRIP contract award; six days later, Lockheed withdrew its protest from the COFC, which enabled Oshkosh's performance on the LRIP contract to proceed.[7]

As a consequence of the multiple bid protests that Lockheed filed with the GAO and the COFC, performance on the LRIP contract was delayed by almost six months.[8] This delay has been identified as a primary reason for why the JLTV Program will be unable to achieve its original milestone of initial operating capability (IOC) by mid-2019.[9] Of equal significance, all of the time and resources that the government committed to defend the LRIP contract award was rendered substantially moot when Lockheed abandoned its GAO protest and instead sought redress from the COFC, a change that (perhaps not coincidentally) occurred as the statutory deadline for the GAO's decision was approaching. Even if the GAO had dismissed or denied Lockheed's protest, Lockheed would not have been precluded from continuing its challenge at the COFC. In the end—and notwithstanding the fact that Lockheed ultimately withdrew its protest from the COFC—the real losers in the LRIP contract award litigation were the American warfighter, who must wait longer for a safer and more capable tactical vehicle, and the American taxpayer, whose constrained resources were further depleted by a system that unnecessarily provided multiple opportunities to challenge the propriety of the award of a critical acquisition.

This article advocates for reforming the COFC's bid protest jurisdiction, based on two premises: reform is necessary to reduce costly and duplicative litigation (as exemplified by Lockheed's bid protests before the GAO and the COFC); and reform constitutes "low hanging fruit"[10] that can be cultivated in a manner that will still enable protesters to avail themselves of at least two different review fora. An overview is first provided on the three activities that are currently authorized to directly receive and review bid protests—i.e., the procuring agencies, the GAO, and the COFC—followed by a summary of recent initiatives and proposals to reform the COFC's bid protest jurisdiction; this is in the wake of a growing consensus that the current system promotes neither inexpensive nor expeditious outcomes.[11] This article culminates with a recommendation to reform the COFC's bid protest jurisdiction in a manner that eliminates multiple bites at the proverbial bid protest apple.[12]

## The Bid Protest Fora

### *The Agencies*

Bid protests before procuring agencies, hereinafter referred to as "agency-level protests," provide protesters with a relatively inexpensive and informal method to have their grievances reviewed. The foundation for the current system of agency-level protests is Executive Order (EO) 12979, which was issued on 25 October 1995 by President William J. Clinton. Pursuant to EO 12979, all executive branch agencies that are "engaged in the procurement of supplies and services"[13] are required to establish procedures "for the resolution of protests to the award of their procurement contracts."[14]

Executive Order 12979 expressly contemplates that agency-level protests will serve "as an alternative to protests in fora outside the procuring agencies."[15] While EO 12979 empowers agency heads to establish protest procedures that are tailored for their respective departments, EO 12979 also mandates that these procedures adhere to four requirements.[16] Agency-level protest procedures must encourage all parties to "use their best efforts to resolve the matter with agency contracting officers."[17] Agency-level protest procedures must also, "to the maximum extent practicable,"[18] facilitate the "inexpensive, informal, procedurally simple, and expeditious resolution of protests."[19] In addition, agency-level protest procedures must—under specific conditions—allow for a review "at a level above the contracting officer"[20] when a contracting officer's decision is "alleged to have violated a statute or regulation and, thereby, caused prejudice to the protester."[21] Perhaps most importantly from a tactical litigation perspective, agency-level protest procedures must provide for the prohibition of "award or performance of [a] contract while a timely filed protest is pending before the agency,"[22] except in cases where contract award "is justified for urgent and compelling reasons or is determined to be in the best interests of the United States."[23]

The requirements of EO 12979 are incorporated in, and supplemented by, the Federal Acquisition Regulation (FAR).[24] The intent of EO 12979, i.e., to establish an efficient and effective system for agency-level protests, is reinforced in FAR 33.103 (d), which expressly predicates the FAR's agency-level protest procedures on the need to "resolve agency protests effectively, to build confidence in the Government's acquisition system, and to reduce protests outside of the agency."[25]

Beyond specifying the procedures that are to be followed for agency-level protests—including timelines for the filing of protests[26] and the circumstances under which contract award or performance will be suspended[27]—the FAR builds upon the due process imperatives of EO 12979 in a number of key respects. For example, agency heads may grant a protester any relief "that could have been recommended by the Comptroller General had the protest been filed with the [GAO]"[28] upon a finding "that a solicitation, proposed award, or award does not comply with the requirements of law or regulation."[29] Agency heads are also authorized to reimburse protestors for the costs of their protest under specific circumstances.[30] The FAR also requires agencies to "make their best efforts to resolve agency protests within 35 days after the protest is filed."[31] Furthermore, agencies must provide decisions on protests that are "well-reasoned, and explain the agency position."[32]

Although there is a paucity of data with respect to the utilization and effectiveness of agency-level protests across the federal government,[33] several inherent advantages of the system have been recognized by the private bar.[34] From the perspective of cost, complexity, and timeliness, agency-level protests are relatively inexpensive, simple, and speedy.[35] Agency-level protests also allow aggrieved parties to challenge agency decisions without doing so in the public manner that a protest before the GAO or COFC entails.[36] In addition, agency-level protests are usually limited to two parties, i.e., the protester and the agency; in contrast, other interested parties have the ability to intervene in protests before the GAO and the COFC.[37] A pre-award agency-level protest also has the potential for preserving a protester's ability to obtain an automatic stay of contract award, but only if the protester chooses to file a subsequent protest with the GAO.[38] Although agency-level protests are not completely free of litigation risk for protesters, the system nevertheless provides both protesters and agencies with a simple and expedient method for resolving contract award challenges.[39]

### *The U.S. Government Accountability Office*

In 1926—five years after it was established as the General Accounting Office—the GAO issued its first written bid protest decision in a case alleging a procurement irregularity that, in substance, would still be familiar to twenty-first century practitioners.[40] Presented with a complaint that Panama Canal officials had issued a solicitation for a truck that created an impermissible brand name preference, the GAO—acting, ironically, without express statutory authority—considered and ultimately sustained the protest.[41] In the ninety-two years that have followed, the GAO's bid protest practice has yielded "a uniform body of law applicable to the procurement process upon which the Congress, the courts, agencies, and the public rely."[42]

Just as EO 12979 provides the basis for the current system of agency-level protests, the Competition in Contracting Act (CICA) of 1984 constitutes the statutory foundation for the litigation of bid protests before the GAO (hereinafter referred to

as "GAO bid protests").[43] The CICA had a significant impact on the bid protest system in multiple respects, not the least of which was the act's express grant of jurisdiction to the GAO to review bid protests; this constituted statutory authority that the GAO had heretofore lacked since its inception in 1921.[44] The CICA also conferred concurrent jurisdiction for bid protests upon the GAO, the U.S. Court of Claims (today's COFC), the U.S. district courts, and the General Services Administration Board of Contract Appeals; while the latter two fora have since been relieved of this authority for procurements, the GAO and the COFC's shared jurisdiction over bid protests endures.[45] The CICA further required the Comptroller General of the GAO to issue bid protest decisions "within 90 working days,"[46] except under certain circumstances. This requirement would later be amended (and made more restrictive) to the current statutory-based deadline of 100 days.[47] The CICA also mandated that, "to the maximum extent practicable,"[48] the Comptroller General is to "provide for the inexpensive and expeditious resolution of protests . . . ."[49] Of particular significance, the CICA enshrined a fundamental principle that has been at the heart of all bid protests that have been considered by the GAO, both prior to and after the enactment of the CICA: the GAO's decisions constitute only recommendations and, as such, agencies are not required to adhere to them.[50] By limiting the ability of a legislative branch official (i.e., the Comptroller General) to affect the actions of executive branch agencies, the CICA prudently avoided a constitutional minefield studded with separation of powers arguments.

In the thirty-five years since the CICA became law, caseload statistics convincingly demonstrate that the GAO is the preferred venue for bid protesters.[51] While no specific figure is available for the total number of agency-level protests that were filed during fiscal year 2018 (the most recent fiscal year where data for both the GAO and COFC is available), there were 2,607 bid protests or related cases filed with the GAO; in comparison, there were 171 bid protests filed with the COFC.[52] Based on statistics from fiscal years 2003, 2008, 2012, 2014, 2016, and 2017, the GAO's average annual bid protest caseload was approximately twenty-four to twenty-five times that of the COFC's.[53] The lopsided nature of these statistics is not difficult to explain, particularly when considering the benefits that accrue to bid protesters who choose to file with the GAO versus the COFC.

One of the prime benefits of a GAO bid protest is that it will (when filed and agency notice is provided within specific timelines) trigger an automatic stay of contract award or performance, commonly referred to as a "CICA stay."[54] Bid protests that are filed with the COFC are not entitled to a CICA stay, and, while a protester can request a temporary restraining order or preliminary injunction to stay contract award or performance, the COFC is not required to grant such a request.[55] Another advantage of litigating before the GAO is that a bid protester does not have to be represented by an attorney;[56] in proceedings before the COFC, a protester must, except under very limited circumstances, be represented by an attorney who is admitted to practice before the COFC.[57]

**One of the prime benefits of a GAO bid protest is that it will trigger an automatic stay of contract award or performance**

From a procedural perspective, a GAO bid protest is much less complex than a bid protest before the COFC; as evidence, the GAO's *Bid Protest Regulations* comprise nineteen pages, whereas the COFC's *Rules of Procedure* is 113 pages.[58] In addition, a GAO bid protest usually does not involve extensive document discovery, and most exchanges between the GAO and litigants can take place via telephone and email; these circumstances combine to make GAO bid protests substantially less costly to litigate when compared to an equivalent case before the COFC.[59] Protesters are also assured of a statutorily-required decision by the GAO within 100 days, whereas protesters before the COFC have no such guarantee.[60] Therefore, a protester who files with the GAO does not seriously risk enduring protracted delays and, in fact, can pinpoint the latest day on which a decision on the merits will be issued.

From a litigation perspective, there are credible reasons to forego a GAO bid protest in favor of the COFC (which is discussed below). Notwithstanding this circumstance, the robustness of the GAO's caseload and the procedural benefits that are inherent in its practice strongly suggest that it has been successful in providing an "objective, independent, and impartial forum for the resolution of disputes concerning the award of federal contracts."[61]

***The U.S. Court of Federal Claims***

The COFC is the gateway for protesters who seek judicial review of their challenge.[62] On the litigation spectrum, a bid protest before the COFC (hereinafter referred to as "COFC bid protests") occupies that end of the spectrum that represents complex and expensive litigation of undetermined duration; agency-level protests occupy the spectrum's opposite end, and GAO bid protests are ensconced firmly in the middle. Although the vast majority of bid protests that are filed annually are bound for the GAO, the COFC's bid protest caseload has nevertheless increased steadily over the last fifteen years;[63] this can, at least in part, be attributed to the unique statutory authorities that the COFC possesses.

For the COFC, the seminal equivalent of EO 12979 and the CICA is the Tucker Act, which was enacted in 1887 and has been periodically amended since.[64] Prior to the passage of the Tucker Act, the U.S. government was generally shielded from claims under the principle of sovereign immunity, which holds that, in the absence of an express waiver, liability cannot attach to sovereign entities.[65] The Tucker Act waived the U.S. government's sovereignty immunity for specific types of claims and assigned jurisdiction for these claims to the COFC, which had been established in 1855 as the U.S. Court of Claims, and U.S. district courts.[66] As originally enacted, the Tucker Act authorized U.S. district courts and the COFC to review "all claims founded . . .

upon any contract, express or implied, with the Government of the United States;"[67] herein lies the COFC's statutory authority to adjudicate bid protests.

The COFC's bid protest jurisdiction under the Tucker Act has been significantly altered during the last forty years by a variety of federal laws that have broadened and clarified the scope of the COFC's authority.[68] Of note, the Federal Courts Improvement Act of 1982 empowered the COFC with the discretion to grant "complete relief on any contract claim brought before the contract is awarded."[69] This confirmed the COFC's ability to stay the government's ability to award a contract through the issuance of an injunction, a powerful authority that continues to be a significant tactical consideration when choosing a bid protest forum.[70] The COFC's bid protest jurisdiction was also enhanced by the Administrative Disputes Resolution Act (ADRA) of 1996, which reinforced the COFC's authority to review both pre- and post-award bid protests.[71] Of equal importance, the ADRA contained a "sunset"[72] provision that resulted in the removal of bid protest jurisdiction from U.S. district courts on 1 January 2001,[73] leaving the COFC as the only judicial forum in the United States that may directly receive and consider a bid protest of a procurement action.[74]

Although an aggrieved party generally has to commit more resources towards a COFC bid protest than would otherwise be required for an agency-level or GAO bid protest, the pursuit of a judicial remedy provides protesters with several distinct advantages. Unlike cases involving GAO decisions, agencies are legally bound to follow the COFC's decisions; although agencies seldom fail to follow the Comptroller General's recommendations, the COFC's ability to compel agency acquiescence provides an incentive for protesters to file with the court.[75] Agencies are also required to divulge more documents in response to a COFC bid protest which, in turn, enhances the ability of protesters to obtain information that they feel is relevant to their claims.[76] In contrast to the GAO—which is statutorily constrained to use "inexpensive and expeditious"[77] procedures and, as a result, does not usually require the government to engage in extensive document production beyond an "agency report"[78]—a COFC bid protest will require an agency to submit an "administrative record"[79] that may include up to twenty-one types of "core documents."[80] Afterward, the COFC can order an agency to supplement the administrative record with additional documents.[81]

The most enticing advantage of a COFC bid protest is that, since protests before an agency and/or the GAO do not normally preclude a protester from seeking relief from the COFC, a previously unsuccessful protester is provided with yet another opportunity to challenge a contract award.[82] This provides protesters with an invaluable litigation advantage. Beyond facilitating another opportunity to challenge a contract award, a COFC bid protest subjects an agency's procurement process to increased third-party scrutiny, thereby increasing the possibility that a procedural or substantive defect (whether relevant to the merits of the protest or not) is discovered. This, in turn, increases the likelihood that the agency will (either on its own initiative, or by the COFC's direction) take corrective action, thereby resulting in a *de facto* victory for the protester.

Despite the unique procedural advantages that protesters enjoy when they file with the COFC, the GAO's consistent and overwhelming popularity as a bid protest forum calls into question the necessity for a third bid protest forum. The need to reform the COFC's bid protest jurisdiction becomes more acute when considering the costs that agencies must incur, especially in terms of the additional resources that are expended in support of complex defensive litigation, and the delays in the procurement of goods and services that can occur while a COFC bid protest is pending.[83] As explained in greater detail below, the need to reform the COFC's bid protest jurisdiction for the overall benefit of the procurement system has led to a series of initiatives and proposals that merit serious reflection.

## Recent Initiatives and Proposals to Reform Bid Protest Jurisdiction

In recent years, the DoD has undertaken several attempts to reform the COFC's bid protest jurisdiction.[84] These initiatives have come in the form of a series of legislative proposals that the DoD has submitted for Congress's consideration for inclusion in the annual National Defense Authorization Act (NDAA).[85] The DoD's initial attempt to reform the COFC's bid protest jurisdiction occurred in 2012 and was contained in a legislative proposal for the 2013 NDAA. Under this proposal, the COFC's statutory authority to review bid protests would have been amended to include a ten-day filing deadline for post-award bid protests.[86] Because the GAO has a similar filing deadline, the DoD's 2013 NDAA legislative proposal would have essentially precluded COFC jurisdiction over bid protests that had been previously litigated at the GAO.[87] Congress did not adopt the DoD's 2013 NDAA legislative proposal, nor did it adopt a similar recommendation for the 2014 NDAA.[88] As recently as 2018 and 2019, there have been unsuccessful attempts to legislate a ten-day filing deadline for post-award bid protests submitted to the COFC.[89]

The subject of the COFC's bid protest jurisdiction, as it pertains to the issue of multiple bid protest fora, has also generated persuasive proposals for reform in recent academic and professional publications.[90] Of note, in an article published in the January 2016 edition of the *Army Lawyer*, U.S. Air Force Major (now-Lieutenant Colonel (LtCol)) T. Aaron Finley suggested that the DoD's legislative proposal for a ten-day filing deadline for post-award bid protests at the COFC be changed in three respects.[91] Lieutenant Colonel Finley proposed that the filing deadline be tolled in cases where an agency does not follow the Comptroller General's recommendation.[92] Lieutenant Colonel Finley also focused on the process whereby a bid protester seeks reconsideration by the GAO of an earlier decision; he proposed a new requirement under which a higher-level GAO attorney would perform the reconsideration action.[93] Lieutenant Colonel Finley also advocated for enlarging the proposed filing deadline from ten to thirty days, since the shorter period could potentially "prove too brief for [the COFC's] more formal and rigorous filing requirements"[94] while "a thirty-day deadline would provide for a more achievable compromise."[95] Although this article will offer a recommendation that does not incorporate

all of LtCol Finley's recommendations, his analysis and anticipated result (i.e., ending multiple-bites of the bid protest apple) are, nevertheless, more than worthy of favorable consideration.[96]

The most recent—and by far the strongest—recommendations for reforming the COFC's bid protest jurisdiction have been advanced by the "Section 809 Panel,"[97] an advisory group established under Section 809 of the 2016 NDAA for the purpose of providing recommendations on "streamlining acquisition regulations."[98] Consistent with its statutory mandate, the Section 809 Panel examined the bid protest system and, in particular, the issue of multiple bid protest fora.[99] The Section 809 Panel considered the results of a congressionally-authorized RAND study on bid protests that was issued in 2018,[100] as well as input from "stakeholders"[101] that included private and corporate attorneys, the American Bar Association, government attorneys representing the DoD and other agencies, the GAO, and the COFC.[102] On 15 January 2019, the Section 809 Panel issued the third volume of its final report to Congress (hereinafter the "Section 809 Panel Report"); this volume contained two recommendations on the COFC's bid protest jurisdiction, entitled "Recommendation 67"[103] and "Recommendation 68."[104]

Under Recommendation 67, the Section 809 Panel called for "eliminating the opportunity to file a protest with the COFC after filing at the GAO"[105] and also for requiring the COFC "to issue a decision within 100 days of ordering a procurement be delayed."[106] The Section 809 Panel noted that the "expeditious resolution"[107] of a bid protest at the GAO cannot occur "if that resolution can be re-litigated at a separate forum [i.e., the COFC] that is not obligated to give any deference to GAO's findings."[108] The Section 809 Panel also noted that, by requiring the COFC to follow the same 100-day decision deadline standard that the GAO is held to, the COFC would "meet its mandate for expeditious resolution, but only when the Court has ordered a procurement be stayed pending resolution of the action."[109] Recommendation 67 is a direct reflection of the Section 809 Panel's conclusion that, "For GAO to achieve its statutory purpose, the opportunity for a second protest opportunity at COFC must be eliminated."[110]

Under Recommendation 68, the Section 809 Panel advocated limiting the jurisdiction of both the GAO and the COFC "to only those protests of procurements with a value that exceeds, or are expected to exceed, $75,000."[111] The Section 809 Panel observed that slightly over ten percent of GAO bid protests and approximately four percent of COFC protests involved procurements valued at under $100,000.[112] In highlighting a recent GAO bid protest where the procurement in dispute was valued at $8,000, the Section 809 Panel observed that, in cases involving very low dollar amounts, it was "difficult to understand how the value, in terms of transparency, outweighs the cost of resolving them."[113] By linking bid protest jurisdiction to a $75,000 threshold (a figure based on an earlier recommendation to elevate the publicizing threshold), the Section 809 Panel concluded that Recommendation 68 would prevent low dollar value bid protests at the GAO and the COFC "which consume time, resources, and taxpayer dollars that could be reinvested in delivering capability to warfighters."[114]

**The bid protest system is absolutely critical to the continued maintenance of private- and public-sector confidence in the integrity of the U.S. federal acquisition system**

### Recommendation for Reform

The bid protest system is absolutely critical to the continued maintenance of private- and public-sector confidence in the integrity of the U.S. federal acquisition system. Central to this confidence is the availability of due process for aggrieved parties, in the form of access to either a non-judicial forum (e.g., procuring agencies and the GAO) or a judicial forum (i.e., the COFC). However—and as noted by the Section 809 Panel—"a bid protest, or the threat of a protest, does delay and add costs to DoD procurement, disrupting the delivery of needed products and services to warfighters."[115]

The adverse impact of bid protests is exacerbated by the practice of consecutive protests before the GAO and the COFC, a process that the Section 809 Panel has described as "not expeditious,"[116] "costly to all parties involved,"[117] and, in certain cases, providing "no added value to the system by way of additional accountability."[118] Recent statistical data strongly suggests that Army procurements are increasingly being subjected to consecutive protests at the GAO and the COFC. For example, in fiscal year 2017, more than sixty-five percent of protests filed with the COFC had previously been litigated at the GAO; in fiscal year 2019, that percentage had increased to over ninety-two.[119] These compelling statistics—coupled with the Section 809 Panel's recommendations—provide ample support to the proposition that reforming the COFC's bid protest jurisdiction is necessary to promote the efficiency and effectiveness of the bid protest process.

Central to any reformation of the COFC's bid protest is the federal statute wherein the COFC derives its bid jurisdiction (Title 28 of the United States Code, Section 1491 (28 U.S.C. § 1491)); this statute should be amended to expressly preclude COFC jurisdiction in cases where a GAO bid protest has been filed (hereinafter referred to as an "either-or" rule). Although the proposed either-or rule differs in procedure from the filing deadlines advanced in the DoD's legislative proposals, LtCol Finley's recommendation, and the Section 809 Panel Report's Recommendation 67, the practical result is the same: bid protesters would be required to make a forum election—either the GAO or the COFC—at the outset of a protest and would be prevented from engaging in repetitive litigation at the COFC following a GAO bid protest. The proposed either-or rule would still preserve a protester's ability to file multiple protests, e.g., a protester would

be able to file a protest with the agency and, if satisfaction is not received, protest again to either the GAO or the COFC. The proposed either-or rule would also preserve a protester's ability to obtain judicial-level review of their dispute. A final benefit of the proposed either-or rule is that it would provide agencies with a much-needed degree of confidence in the finality of GAO bid protests.

## Conclusion

The problem of multiple bid protest fora is low-hanging fruit that is ripe for a solution. Reforming the COFC's bid protest jurisdiction is the most direct and effective means for significantly curtailing the time-consuming and resource-draining practice of back-to-back-to-back bid protests at agencies, the GAO, and the COFC. Furnished with extensively-researched and deliberately-considered recommendations from the DoD and the Section 809 Panel, the executive and legislative branches should capitalize on the current spirit of acquisition reform and purge the bid protest system of unnecessary procedures that only serve to facilitate costly, protracted, and repetitive litigation. Absent such decisive action, the American warfighter and the American taxpayer will continue to pay a high price for every bite of the bid protest apple. **TAL**

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## Notes

1. Andrew Feickert, Joint Light Tactical Vehicle: Background and Issues for Congress 4 (Congressional Research Service) (2020).

2. *Id.* at 1.

3. *Id.*

4. *See* Lockheed Martin Corporation, B-412056 et al. (Comp. Gen. Dec. 15, 2015).

5. *Id.* at 2. *See also* Feickert, *supra* note 1, at 5.

6. Feickert, *supra* note 1, at 5. *See also* GAO Bid Protest Regulations-Effect of Judicial Proceedings, 4 C.F.R. § 21.11.

7. Feickert, *supra* note 1, at 5.

8. Feickert, *supra* note 1, at 6.

9. *Id.* The first delivery of JLTVs to Army units occurred in January 2019. *See* Major Pete Bogart, *Army's Newest Vehicle Delivered to Soldiers at Fort Stewart,* U.S. Army (28 Jan. 2019), https://www.army.mil/article/216679/armys_newest_vehicle_delivered_to_soldiers_at_fort_stewart.

10. *See Low-hanging fruit,* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/low-hanging%20fruit (last visited Jan. 27, 2020) (defining low-hanging fruit as the obvious or easy things that can be most readily done or dealt with in achieving success or making progress toward an objective).

11. *See* 3 David A. Drabkin et al., Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations 354 (2019), https://discover.dtic.mil/wp-content/uploads/809-Panel-2019/Volume3/Sec809Panel_Vol3-Report_Jan2019_part-1_0509.pdf [hereinafter Section 809 Panel Report].

12. For an example of how the apple metaphor has been applied to the issue of multiple bid protest fora, *see* Major T. Aaron Finley, *Once Bitten, Twice Shy: How the Department of Defense Should Finally Ends its Relationship with the Court of Federal Claims Second Bite of the Apple Bid Protests*, Army Law., Jan. 2016, at 6, 15.

13. Exec. Order No. 12979, 60 Fed. Reg. 55, 171 (Oct. 25, 1995).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. The Federal Acquisition Regulation (FAR) is codified in Title 48 of the United States Code of Federal Regulations. *See* 48 C.F.R. §§ 1.000-9905.506-63 (2016).

25. *See id.* § 33.103 (d).

26. *See e.g., id.* § 33.103 (e). Protests based on alleged apparent improprieties in a solicitation shall be filed before bid opening or the closing date for receipt of proposals. In all other cases, protests shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier. Under 48 C.F.R. §33.103 (e), agencies are, under certain circumstances, also authorized to "consider the merits of any protest which is not timely filed." *Id.*

27. *See e.g., id.* §33.103 (f), which establishes procedures for suspending contract award or performance under both pre-award and post-award circumstances.

28. *Id.*

29. *See id.* § 33.102 (b)(1).

30. *See id.* § 33.102 (b)(2); *see also id.* § 33.104 (h).

31. *See id.* § 33.102 (g).

32. *See id.* § 33.102 (h).

33. *See* David H. Carpenter & Moshe Schwartz, Cong. Research Serv., R45080, Government Contract Bid Protests: Analysis of Legal Processes and Recent Developments 3 (2018).

34. *See* James Tucker, *A Road Less Traveled: Agency-Level Protests,* Morrison Foerster (Sept. 26, 2016), http://govcon.mofo.com/protests-litigation/agency-level-protests/.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *See* Daniel I. Gordon, *Bid Protests: The Costs are Real, But the Benefits Outweigh Them*, 42 Pub. Contract L.J. 3, (Spring 2013), www.jstor.org/stable/24430286. Prior to issuing its decision in the Panama Canal case, the Government Accountability Office (GAO) had considered an unrelated protest filed by the English Construction Company that alleged "unfair and unequal treatment of all the other bidders." *See* Section 809 Panel Report, *supra* note 11 (*citing* Daniel I. Gordon, *In the Beginning: The Earliest Bid Protests Filed with the U.S. General Accounting Office*, 13 Pub. Procurement L. Rev. 147, 156 (2004)). As a consequence of the English Construction Company's protest – which was ultimately dismissed—the GAO concluded it possessed jurisdiction over bid protests based on its "authority to give advance decisions to certifying and disbursing officers on the legality of payments." *Id.*

41. *Id.*

42. 4 U.S. Gov't Accountability Office, GAO-18-510SP, Bid Protests at GAO: A Descriptive Guide, at 1-71 (10th ed. 2018) [hereinafter GAO Descriptive Guide].

43. Competition in Contracting Act, Pub. L. No. 98-369, 98 Stat. 1175, 1182 (1984) [hereinafter CICA]. *See also* Carpenter and Schwartz, *supra* note 33, at 1, 4; Gordon, *supra* note 40, at 6.

44. CICA, *supra* note 43, § 1199.

45. *See id.* § 1182-1183; *see also* 28 U.S.C. § 1491 (1998); 31 U.S.C. §3554 (2011).

46. CICA, *supra* note 43 § 1201.

47. *See* 31 U.S.C. §3552(a)(1). As originally enacted, CICA permitted a "longer period" for bid protest decisions if the Comptroller General provided a written determination that specified the reasons that necessitated additional time. *See* CICA, *supra* note 43. The Comptroller General no longer has this authority. *See* 31 U.S.C. § 3552(a)(1).

48. *See* CICA, *supra* note 43. *See also* 31 U.S.C. §3552(a)(1).

49. *Id.*

50. *See* CICA, *supra* note 43. *See also* 31 U.S.C. §3552(b)(1), (c)(1).

51. *See* Carpenter & Schwartz, *supra* note 33, at 2.

52. *Id. See also* GAO Bid Protest Annual Report to Congress for Fiscal Year 2018, B-158766 (Comp. Gen. Nov. 27, 2018), https://www.gao.gov/assets/700/695707.pdf; *Statistical Report for the Fiscal Year October 1, 2017-September 30, 2018*, U.S. Fed. Cl (Oct. 29, 2018), https://www.uscfc.uscourts.gov/sites/default/files/Statistical%20Report%20for%20FY2018.pdf.

53. *See*, Contract & Fiscal Law Dep't, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Contract Attorneys Deskbook (2018) [hereinafter Contract Attorneys Deskbook]; GAO Bid Protest Statistics for Fiscal Years 2003-2007, B-158766, encl. (Comp. Gen. Dec. 10, 2007); GAO Bid Protest Statistics for Fiscal Years 2008-2012, B-158766, encl. (Comp. Gen. Nov. 13, 2012); GAO Bid Protest

Statistics for Fiscal Years 2013-2017, B-158766, encl. (Comp. Gen. Nov. 13, 2017); Adam Lasky, *Roadmap to Bid Protests at the U.S. Court of Federal Claims*, Oles Morrison (Feb. 13, 2018), https://www.oles.com/blog/roadmap-to-bid-protests-at-the-u-s-court-of-federal-claims/. According to Mr. Lasky, the "GAO handles approximately twenty-five time as many protests per year as the COFC." *Id.*

54. *See* CICA, *supra* note 43, §§ 1200-1201. *See also* 31 U.S.C. §3553.

55. *See* Carpenter & Schwartz, *supra* note 33, at 9.

56. *See* GAO Descriptive Guide, *supra* note 42, at 4.

57. *See* Fed. Cl. R. 83.1(c)(1) (2019) [hereinafter Fed. Cl. Rules].

58. *See* GAO Descriptive Guide, *supra* note 42, at 31-49. *See also* Fed. Cl. Rules, *supra* note 57, at 1-114. The figures cited for both the GAO's Bid Protest Regulations and the Rules of the COFC are exclusive of appendices. In their entirety (to include appendices), the GAO Descriptive Guide (which includes the GAO's Bid Protest Regulations) is 72 pages, while the Fed. Cl. Rules is 232 pages.

59. *See* Carpenter & Schwartz, *supra* note 33, at 10.

60. *Id. See also* Dave Nadler, *Top Ten Things Every Government Contractor Should Know About Bid Protests*, ACC (Nov. 7, 2013), https://www.acc.com/resource-library/top-ten-things-every-government-contractor-should-know-about-bid-protests.

61. *See* GAO Descriptive Guide, *supra* note 42, at 4.

62. *See* Government Contract Bid Protests, *supra* note 33, at 8.

63. *See* Lasky, *supra* note 53.

64. *See* 28 U.S.C. § 1491. *See also* Contract Attorneys Deskbook, *supra* note 53, at 18B-4; *United States Court of Federal Claims: The People's Court*, U.S. Fed. Cl., https://www.uscfc.uscourts.gov/sites/default/files/USCFC%20Court%20History%20Brochure_1_0.pdf (last visited Oct. 16, 2019) [hereinafter *The People's Court*].

65. *See Tucker Act of 1887*, Legal Info. Inst., https://www.law.cornell.edu/wex/tucker_act (last visited Oct. 16, 2019).

66. *Id. See also The People's Court, supra* note 64. The Fed. Cl. has had three different names: the United States Court of Claims (1855 to 1982), the United States Claims Court (1982-1992), and the United States Court of Federal Claims (1992 to the present). *Id.*

67. *See* 28 U.S.C. § 1491.

68. *See* Contract Attorneys Deskbook, *supra* note 53, at 18A-35.

69. Court of Appeals for the Federal Circuit Act of 1981, Pub. L. No. 97-164, 96 Stat. 25, 40 (1982).

70. *See* Contract Attorneys Deskbook, *supra* note 53, at 18A-35.

71. *See* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870, 3874, 3875 (1996). *See also* Contract Attorneys Deskbook, *supra* note 53.

72. *See* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3875 (1996).

73.*Id. See also* Contract Attorneys Deskbook, *supra* note 53, at 18A-35.

74. *See* Carpenter & Schwartz, *supra* note 33, at 8.

75. *Id.* at 7.

76. *Id.* at 11.

77. *See* CICA, *supra* note 46.

78. *See* GAO Descriptive Guide, *supra* note 42, at 36.

79. *See* Fed. Cl. Rules, *supra* note 57, at app. C, ¶ 21.

80. *See* Fed. Cl. Rules, *supra* note 57, at app. C, ¶ 22 (a)-(u).

81. *See* Lasky, *supra* note 53 (*citing* E-Mgmt. Consultants, Inc. v. United States, 84 Fed.Cl.1, 11 (2008)).

82. *See* Carpenter & Schwartz, *supra* note 33, at 11.

83. *See* Finley, *supra* note 12, at 15.

84. *Id.* at 7, 9.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 10.

89. *See* National Defense Authorization Act for Fiscal Year 2020, S. 1215, 116th Cong. § 831 (2019). *See also* Jared Serbu, *Pentagon Seeks to Limit Bid Protests in Federal Court*, Fed. News Network (May 4, 2018), https://federalnewsnetwork.com/defense-main/2018/05/pentagon-seeks-to-limit-bid-protests-in-federal-court/.

90. *See, e.g.,* Finley, *supra* note 12; Section 809 Panel Report, *supra* note 11.

91. *See* Finley, *supra* note 12, at 6.

92. *Id.* at 12-13.

93. *Id.* at 13-14.

94. *Id.* at 14.

95. *Id.*

96. *Id.* at 15.

97. *See* Section 809 Panel Report, *supra* note 11, at iii.

98. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-92, § 809, 129 Stat. 726 (2016).

99. *See* Section 809 Panel Report, *supra* note 11, at 340-360.

100. *See id.* at 340.

101. *Id.*

102. *Id.*

103. *See id.* at 345.

104. *See id.* at 355.

105. *See id.* at 345.

106. *Id.*

107. *See id.* at 354.

108. *Id.*

109. *Id.*

110. *See id.* at 346.

111. *See id.*

112. *See id.* at 355-356.

113. *See id.* at 357.

114. *Id.*

115. *See id.* at 354.

116. *Id.*

117. *Id.*

118. *Id.*

119. Interview with Scott N. Flesch, Chief, Bid Protests, Contract and Fiscal Law Division, U.S. Army Legal Services Agency, at Fort Belvoir, Virginia. (Nov. 12, 2019).

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No. 5

# When the Plain Language Is Plainly Wrong

## Codified Exceptions to Article 31(b), UCMJ

*By Major Joseph H. Wheeler III*

Judicial discretion indicates a necessity for denying its application to a situation not considered by its framers, and wholly unrelated to the reasons for its creation.[1]

Too often, military justice practitioners find themselves in the awkward position of realizing at trial that they have a different understanding from that of the military judge as to the scope of Article 31 of the Uniform Code of Military Justice (UCMJ). This often occurs when the trial counsel attempts to admit a confession or other statement of the accused and is told that it was gathered in violation of Article 31. After the inevitable back-and-forth of citing caselaw and arguing exceptions, the military judge will make a ruling that may be contrary to the expectation of the trial counsel, defense counsel, or both. This particular type of evidentiary admission determination is more susceptible than most to unpredictability because the rules of admission are driven much more by caselaw and tests that have been developed by the judiciary than by the actual words of Article 31.

Article 31 provides certain protections to members of the armed forces. Specifically, Article 31(b) requires:

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.[2]

Article 31 serves a legitimate and necessary purpose: when a soldier is questioned by his commander or other military officials, he is conditioned through his military training—and the rigid rank structure of his military environment—to simply answer their questions without ever considering his right to do otherwise.[3] However, the plain text of Article 31(b) is much broader than necessary. In fact, the plain language of Article 31(b) is violated on a regular basis when a military victim participates in a pre-textual phone call with her attacker, when a military undercover drug suppression team member asks a question of a drug dealer, or when one military member of a criminal conspiracy asks a question of another member of that same conspiracy. With a plain reading, each of these situations is a violation—whether or not the person being asked the question has any nexus to the military.

This is not a new revelation. The military trial and appellate judiciary have gone to great pains to attempt to do through

caselaw what Congress failed to do through legislation: define the boundaries of Article 31, specifically, as theypertain to the exclusion at trial of statements made in violation of its plain text.[4]

From time to time, scholarly articles are written attempting to explain the then-current state of the law as it pertains to the necessity to warn individuals of their rights under Article 31(b).[5] Unfortunately, the requirements have changed over time as the trial and appellate courts have evolved through multiple understandings of the law and provided multiple tests to determine the admissibility of statements.[6] The current test provided by the Court of Appeals for the Armed Forces (CAAF) had remained in place for decades; but, that court altered the test in 2014, changing one prong from a subjective determination to an objective one. This re-envisioned analysis did not create an entirely new test but, once again, shows that the application of Article 31 is inconsistent over time and from case to case (or, arguably, from judge to judge). As the application of Article 31 has moved further from its plain language, the inconsistency in its application should be no surprise.

Congress should pass an amendment that includes exceptions to Article 31(b) with the aim of providing clearer guidance to the armed forces regarding when the rights warning is required. Such an amendment would make both case preparation more efficient and judicial rulings more consistent. Most importantly, such an amendment would ensure that those who question Soldiers will understand this requirement even without extensive legal training. There is a way to improve this law that does not require a substantive rewrite of Article 31. Based on decades of caselaw, this article proposes an amendment focusing on providing exceptions—situations in which the broad stroke of Article 31 should not touch. In doing so, almost all the caselaw—not specifically addressing the enumerated exceptions listed in the proposed amendment—will be unaffected.

This article briefly outlines the background of Article 31 and the purposes for its presence in the UCMJ, describes some of the current exceptions that have been declared in caselaw, explores the benefits and detriments of codifying exceptions to Article 31, and provides a proposed amendment to Article 31 that is more reflective of reality.

**Background**

Article 31 first appeared with the enactment of the UCMJ in 1951. This was not, however, the first appearance of a military-specific right against self-incrimination. The Articles of War, as revised in 1916,[7] included a similar, but diluted, right in Article 24, which read,

> No witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him.[8]

A revision to the Articles of War in 1920[9] expanded this right to include informal investigations.[10] However, the version of Article 24 that came closest to the broad language of the current Article 31 was enacted by the Elston Act of 1948, which stated,

> The use of coercion or unlawful influence in any manner whatsoever by any person to obtain any statement, admission or confession from any accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission or confession shall be received in evidence by any court-martial. It shall be the duty of any person in obtaining any statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, that any statement by the accused may be used as evidence against him in a trial by court-martial.[11]

Since its inclusion in the UCMJ, the trial and appellate judiciary have repeatedly attempted to provide further guidance on Article 31's meaning and application in evidentiary admission determinations. Since its inception, appellate courts have applied three main tests to interpret Article 31: the plain language test, the officiality test, and the *Duga* test—which was recently revised. This Section explains each test in turn.

***Plain Language Test***

The first test used by the courts in interpreting Article 31 came in 1953, when the Court of Military Appeals issued an opinion in *United States v. Wilson.*[12] In that case, a military policeman named Sergeant Wang was notified of a shooting and responded to the area.[13] Another military policeman pointed out two individuals in a crowd around a fire who had been "identified to him by a group of Koreans as the men who had shot their countryman."[14] Sergeant Wang approached the crowd and, looking at the two Accused but not addressing any Soldier by name, "asked who had done the shooting."[15] The two Accused in the case made a joint admission that they had "shot the man."[16]

One of the main issues on appeal was whether this admission should have been excluded as involuntary. The statement was taken prior to 31 May 1951, when the UCMJ became law,[17] but the court was required by Executive Order 10214[18] to apply Article 31 instead of Article 24 because the trial took place after that date.[19] The majority applied Article 31 strictly to the facts based on its plain language and found that

> [t]hose provisions are as plain and unequivocal as legislation can be. According to the Uniform Code, Article 2, 50 USC § 552, Sergeant Wang was a "person subject to this code," and appellants, at the time the question was directed to them, were persons "suspected of an offense." Consequently, the statements should have been excluded in accordance with Article 31(d), and their admission was clearly erroneous.[20]

The court prefaced this explanation by stating that it "ha[d] no hesitancy in stating

categorically that there is not a scintilla of evidence in the record to indicate that these admissions were not in fact voluntary."[21]

The court then analyzed the facts to determine whether such a "clearly erroneous" admission was prejudicial.[22] The court explained that the admission in this case went beyond simply violating Article 31 based on its plain language test to the point that it violated the policy undergirding Article 31.[23] Therefore, the court stated that it "must and d[id] regard a departure from the clear mandate of the Article as generally and inherently prejudicial."[24]

***Officiality Test***

The second test for determining whether Article 31 had been violated is first found in Judge Latimer's dissent in the *Wilson* case.[25] After arguing extensively that Article of War 24, and not Article 31, should have been applied, Judge Latimer explains that the majority's interpretation of Article 31 is improper. He laid out a three-part test that must be fulfilled before Article 31's protections would become applicable;

> [F]irst, the party asking the question should occupy some official position in connection with law enforcement or crime detection; second, that the inquiry be in furtherance of some official investigation; and third, the facts be developed far enough that the party conducting the investigation has reasonable grounds to suspect the person interrogated has committed an offense.[26]

Judge Latimer went on to explain that his reason for "lean[ing] to these limitations [is that he] cannot believe Congress intended to silence every member of the armed forces to the extent that Article 31 . . . must be recited before any question can be asked."[27] Judge Latimer explains that such a test is required because preliminary inquiries must be done before enough information is gathered to determine who exactly is suspected of which particular offense. Using the facts of the *Wilson* case, he explains,

> Until the elements of the crime start to take form it would be unlikely for one asking preliminary questions to know the nature of the accusation. By way of illustration, in this case there had been a killing but at the time Sergeant Wang asked the question no one, except possibly the eyewitnesses, knew whether a crime had been committed. A shooting had taken place but a preliminary inquiry seemed in order to determine among other things who ought to be warned. A preliminary inquiry may lead to clearance as it did to a number of soldiers in this instance.

**Although the plain language of Article 31 is quite broad . . . . the courts have not interpeted it as such.**

This test is more in line with the congressional intent behind Article 31.[28] It was this test, or variants thereof, and not the majority's plain language test that boards of review used following *Wilson*.[29]

***The* Duga *Test***

The third test was originally contemplated in 1954 in *United States v. Gibson*[30] and, later that year, refined by the court in *United States v. Duga.* The facts in the *Gibson* case involved an inmate named Ferguson who was encouraged by law enforcement to garner information about the accused. When evaluating the necessity of Article 31 warnings, the court stated its belief that

> the evidence permits no conclusion other than that Ferguson was placed near the accused at the direction of agents of the Division for the sole purpose of procuring incriminating statements. The accused was unaware of Ferguson's connection with the authorities, and any incriminating statements were made in the course of what on its face was an ordinary conversation between inmates of a stockade. No question of coercion, unlawful influence, or unlawful inducement is presented.[31]

This alone would likely meet the requirements of Judge Latimer's officiality test as the informant was acting as an agent of law enforcement as part of an official investigation. However, Chief Judge Quinn, with Judge Brosman concurring, found the statement not to be violative of Article 31, as the Accused was under no compulsion to reply and his statement was voluntary.[32] Judge Brosman, in his concurrence, explained that Judge Latimer's earlier officiality test must be coupled with a showing that the person accused or suspected "ha[d] reason to be aware of the official character of the interview,"[33] thus creating a two-pronged test that requires (1) an official nature to the questioning, and (2) a reason for the suspect or accused to believe that the questioning is for official purposes.

The Court of Military Appeals later clarified this test in *United States v. Duga*,[34] announcing:

> [I]n each case it is necessary to determine whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation. Unless both prerequisites are met, Article 31(b) does not apply.[35]

This test was modified in 2014 when CAAF, in *United States v. Jones*, chose to reject the subjective nature to the second prong and substitute an objective test based on "a reasonable man in the suspect's position."[36] Therefore, the current test requires (1) the questioner to be acting in an official law enforcement or disciplinary capacity, and (2) a reasonable person in the position of the Accused to interpret the questions as more than a mere casual conversation.[37] It is this test that is still cited by military appellate courts when making admissibility

decisions on statements made in violation of the plain language of Article 31.[38]

**Current Exceptions Derived from Caselaw**

Although the plain language of Article 31 is quite broad—covering every question that any member of the armed forces may ask someone (including a civilian) who has been suspected or accused of a crime—the courts have not interpreted it as such.

This lack of clarity has led to a nearly continual string of cases requiring appellate attention, specifically on the issue of Article 31(b)'s requirements to warn. In November 2013, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) decided *United States v. Gilbreath*[39] on the issue of requirements to warn a member of the Individual Ready Reserve (IRR). In that case, various active duty personnel, including law enforcement personnel, questioned the Accused without first reading him his Article 31(b) rights regarding his theft of a weapon while he previously served on active duty.[40] The NMCCA explained that although "[r]ead literally, Article 31(b) has a broad sweep, and would apply to the situation at hand," this was not dispositive in light of caselaw.[41] The NMCCA found that

> the circumstances here clearly demonstrate that the appellant was well outside the class of persons whom Congress sought to protect with the creation of Article 31(b). As a member of the IRR, the appellant was far removed in time and place from the coercive military environment contemplated by Congress, in which he might respond to a question in the same way he was trained to respond to a command.[42]

However, in December of 2014, C.A.A.F. issued its opinion in the case, disagreeing with the N.M.C.C.A.[43] and finding that "Article 31(b), UCMJ, governs official questioning in the military justice system, and absent any statutory command to the contrary, an IRR member who is sufficiently integrated into the military to qualify for court-martial jurisdiction is sufficiently integrated so as to be entitled to the statutory protection of the article."[44] This case demonstrates the problems that can be caused by the lack of clarity in Article 31(b). If military appellate courts disagree on the reach of this protection, then unit commanders and military law enforcement personnel are likely to have similar disagreements, leading to inconsistent, and at times improper, procedures when questioning servicemembers. In light of the *Duga* test, courts have denied suppression motions based on Article 31 in many different contexts. To effectively draft proposed exceptions to Article 31, these cases are a good starting point and are explored below. This section addresses examples of the ways in which that test has been applied to categories of statements.

***Medical Personnel***

The first prong of the *Duga* test, which requires that the questioner act in his official capacity, does not mean *any* official capacity. Courts have required the "official capacity" to be that of criminal investigation or discipline. As such, medical personnel who request information as part of their official medical duties are generally exempt from the requirement to advise. Examples of medical professionals to whom this exception has been granted include doctors,[45] nurses,[46] and psychiatrists.[47]

***Operational Inquiries***

Just as courts have considered official medical capacity to be outside the scope of the "official capacity" required by the first prong of the *Duga* test, they have excluded commanders and other military personnel from requirements to warn when their inquiries are for operational rather than law enforcement or discipline purposes.

An often-cited example of this distinction occurred in *United States v. Loukas*.[48] In that case, an aircraft crewmember named Staff Sergeant (SSgt) Dryer noticed that Airman (Amn) Loukas was acting oddly during a flight.[49] He went and specifically asked Amn Loukas if he had taken any drugs and received a negative response.[50] Staff Sergeant Dryer was so convinced that Amn Loukas was performing crew duties under the influence of drugs that he continued to press the point, again asking Amn Loukas what he had taken.[51] Eventually, Amn Loukas admitted to using cocaine the night before.[52] The Court of Military Appeals determined that the questions were not asked for law enforcement or disciplinary purposes, but rather out of an effort to ensure flight safety; therefore, the accused's statements were not gathered in violation of Article 31 and admissible at trial.[53]

Other examples of official questioning that military appellate courts have found lacking to meet the first prong of the *Duga* test include a commander's request for information about charges in relation to a security clearance review[54] and a military pay technician's inquiries regarding apparent discrepancies in basic allowance for quarters entitlements.[55] However, in *United States v. Swift*,[56] CAAF has also explained that in some cases there may be a "mixed purpose" of both operational or administrative concerns as well as law enforcement.[57] When this occurs, the determination as to the requirement to advise will be made on a case-by-case basis and questioning by the chain of command is presumed to be for discipline purposes; this is subject to rebuttal.[58]

***Conversations with Victims***

Law enforcement often attempts to elicit incriminating statements through conversations between suspects and their victims. This can be done through live interviews that are surreptitiously recorded or, more commonly, through pre-textual phone calls in which the law enforcement officials are listening in or recording conversations. These conversations, in which the victims act at the direction of law enforcement and are clearly agents of such, meet the requirements of Judge Latimer's earlier officiality test.[59] However, because these conversations are reasonably perceived by the suspect to be casual conversations, the second prong of the *Duga* test is not met,[60] and these statements are routinely admitted into evidence.[61] The next section will evaluate the benefit of codifying the extensive caselaw in this area.

## Benefits of Codifying Exceptions

Any time a proposal is made to change a statute, a question as to the benefit that such a change will serve naturally arises. In this case, the argument could be made

that the courts have adequately dealt with the over-breadth of the plain language of Article 31 through judicial interpretation in caselaw. However, this argument simplifies the main concerns with poorly written statutes that are left to the courts to interpret, specifically clarity and consistency. The primary audience should be those who question service members, such as law enforcement or members of the command, because the primary focus should be ensuring statements are properly elicited. That audience is much less likely than military judges to remain current on military caselaw. By allowing caselaw rather than statute to govern this area, the focus has turned to ensuring improperly elicited statements are not admitted at trial.

***Clarity***

As explained earlier, courts have laid out a test for determining the necessity of providing notice of the protections in Article 31. However, this test is not the first test provided by the courts, and, although *stare decisis* may require otherwise, it may not be the last. Each time courts change the test being used, any cases pending at the time could be affected. In each of the cases then pending, counsel for each party are required to relook at the admissibility of statements.

Additionally, interpreting caselaw that is written by different courts over a period of decades and applying it to a certain set of facts can be more closely aligned with art than science. Lawyers will often disagree on whether a certain case more closely resembles a decided case, in which statements were suppressed, or a different case, in which they were admitted. When trial counsel and defense counsel have such a disagreement, it will likely result in a motion to suppress followed by responses and a motions hearing. Although an amendment to Article 31 will not preclude all such disagreements, any clarification to the statute will necessarily make them less common, thereby making the pretrial process more efficient.

Additionally, if military lawyers—who are well versed in researching and interpreting caselaw—routinely disagree on the scope of Article 31, it is unfair to expect law enforcement personnel to have a clear understanding of the current state of the law at any given time. Law enforcement personnel and investigators must regularly make decisions regarding when to give rights warnings; it is these decisions that are reviewed and critiqued by counsel and, afterward, various levels of the judiciary. Clarity for these initial questioners will greatly improve the entire process.

***Consistency in Rulings***

Although—hopefully—less frequent, trial judges also disagree on the proper application of caselaw to a particular set of facts. When this happens, the stakes are much higher than a simple concern over efficiency. Because jeopardy attaches in a court-martial, the possibility of appeal after trial is completely one-sided. The only opportunity that the government has to appeal a decision to suppress a certain statement is through an interlocutory appeal in accordance with Article 62, UCMJ.[62] However, due to the extensive length of time taken by such appeals, the delay in the trial is detrimental to both the government and the accused. The stakes are even higher for the accused, who may be subjected to a lengthy incarceration pending appeal, even if the appellate courts later find in his favor and overturn a conviction. The time he has lost cannot be repaid.

In general, the robust appellate caselaw in this area demonstrates that trial judges are inconsistently and, at times, incorrectly applying Article 31. This becomes even clearer when one realizes that most of the appeals are based on rulings that the defense found improper, and, rightly or wrongly, they rarely include any rulings that favored the defense at the start of trial.

When calculating the trust that service members—as well as the public—place in the military justice system, consistency of rulings is no less important than the accuracy of such rulings. While codifying some exceptions to Article 31 will never completely negate such inconsistencies, it should at least minimize them in the areas covered by such exceptions.

**The robust appellate caselaw in this area demonstrates that trial judges are inconsistently and, at times, incorrectly applying Article 31**

## Detriments of Codifying Exceptions

Ensuring that the detriments of any change to a statute is factored into the analysis of whether to make such a change is just as important as ensuring that any change to statute is done in response to a genuine need. This section discusses the three major concerns to consider before amending Article 31 to include exceptions to its general rule.

***Necessity of Defining the List of Exceptions as Exhaustive or Non-exhaustive***

Anytime a statute is to include a list, there is concern regarding clarity as to whether such a list is to be exhaustive or non-exhaustive. It is important to ensure that readers each interpret the statute in the same way. A variety of methods can be used to remove ambiguity. This article examines two options: one explicit and the other implicit.

***The Explicitly Non-exhaustive List Approach***

One parallel example to the list included in the proposed amendment is the list of exceptions found in Military Rule of Evidence (MRE) 404(b).[63] That rule reads:

> Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. This evidence may be admissible for another purpose, *such as* proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. On request by the accused, the prosecution must: provide reasonable notice of the general nature of any such

> evidence that the prosecution intends to offer at trial: and do so before trial—or during trial if the military judge, for good cause, excuses lack of pre-trial notice.[64]

The "such as" verbiage in MRE 404(b), which tracks, in pertinent part, the corresponding Federal Rule of Evidence,[65] signals that the ensuing list is non-exhaustive, in accordance with the drafter's intent.[66] Courts have consistently agreed with this proposition;[67] however, it is still common for counsel to go to great pains to contemplate into which of these enumerated pigeonholes a particular piece of evidence fits. The preferred practice would be to make the non-exhaustive nature of such a list as clear as possible.

***The Implicitly Non-exhaustive List Approach***

An alternative approach is to provide one exception that, within certain genres, will swallow the rule. This was the tack taken by the drafters of exceptions to MRE 412, commonly known as the rape shield. The exceptions subparagraph reads:

> *b. Exceptions.* In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:
> 1. evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the accused was the source of semen, injury, or other physical evidence;
> 2. evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the accused to prove consent or if offered by the prosecution; and
> 3. evidence the exclusion of which would violate the accused's constitutional rights.[68]

Clearly, the third exception is broad, excepting many different groups of constitutionally-protected evidence from the general exclusionary function of the rule.

This alternative used in drafting exceptions to Article 31 would result in a final exception to the effect of "any other situation in which the accused or suspect makes a statement that is not based on or caused by pressures unique to military society." Doing so would likely cause the resultant version of Article 31 to be even less clear and devolve into a new round of cases defining exactly what those words mean.

However, that is not to say that such consideration is without merit. Although Article 31 is not the direct result of a constitutional mandate, its primary purpose stems from the Constitution's protection against compulsion to be a witness against oneself.[69] Specifically, in *United States v. Armstrong*,[70] the Court of Military Appeals stated that it was "deemed necessary because of subtle pressures which existed in military society."[71] That court went on to explain that

> conditioned to obey, a serviceperson asked for a statement about an offense may feel himself to be under a special obligation to make such a statement. Moreover, he may be especially amenable to saying what he thinks his military superior wants him to say—whether it is true or not.[72]

With this context as a backdrop, any amendment that seeks to enumerate exceptions must not unnecessarily envelope statements that are not responsive to this concern.

***Concern over Stifling the Evolution of Caselaw***

In its 2015 Legislative Report,[73] the Military Justice Review Group (MJRG) provided a history of Article 31 and then recognized the prevalence of judicial-made law in the area:

> Given the critical role of confessions and admissions in both civilian and military proceedings, a well-developed and evolving body of caselaw exists in connection with Article 31 and the related constitutional and regulatory provisions. Article 31 has changed very little since the UCMJ was enacted in 1950. However, the caselaw concerning the statute's application has evolved over the years—particularly with respect to Article 31(b)'s warning requirements.[74]

The MJRG went on to discuss the MREs that implement Article 31's protections, recognizing that although "the rules generally track the caselaw concerning the Fifth Amendment and Article 31, . . . [t]he rules have not yet been updated to reflect the most recent developments in the caselaw concerning Article 31(b)."[75]

However, the MJRG chose to recommend that no changes be made to Article 31, out of a concern that codification might "stifl[e] a subject in which the applicable civilian and military caselaw is evolving, or in which the introduction of new language would trigger extensive interpretive litigation."[76]

The reality is that the *Duga* test has been relied upon for over fifty years and has only been amended by the CAAF once, in 2014, when it changed a subjective prong to an objective one in *United States v. Jones*.[77] While courts have found exceptions to the broad reach of Article 31's plain language during that time, each of those exceptions has been based on the understanding provided by the *Duga* test itself. To suggest that there is an ongoing dialogue between courts and practitioners in this area is an overstatement. Rather, there is confusion by at least law enforcement personnel and commanders, and, at times, by counsel. If amending the statute can ameliorate this confusion, even in part, then the effort required to do so is well warranted.

***Possibility of Overreliance on Exceptions***

Another concern is that a list of exceptions to the general prohibition in Article 31 would be confusing for counsel. For example, it may be implied that statements that fit one of the exceptions would meet the requirements to be admissible into evidence in a trial by court-martial so long as it was voluntary. In reality, such a codified list would simply denote statements that would not be suppressed based purely on Article 31. Such statements may still be suppressed if they are found to be made involuntarily,[78] based on the protections of the Fifth Amendment to the U.S. Constitution[79] or based on the protections laid out in *Miranda v. Arizona*.[80] This is important because military counsel may be accustomed to only analyzing statements through Article 31

since that requirement is typically viewed as more restrictive than *Miranda*.

Although this concern may come to fruition in some circumstances, it likely would be no more pervasive than the same concern occurring with the judicially-created exceptions to Article 31. Military counsel are not any more susceptible to improperly relying on codified exceptions than they are to researching caselaw and determining that a certain controlling case enunciates an exception to Article 31 that would permit admission into evidence without considering other possible reasons for suppression. Therefore, no serious apprehension should be given to codifying this area of the law based on a concern of misuse for this particular reason.

## Recommendation

Although the common law system allows the judiciary to produce caselaw that has the same force and effect of legislative acts, the best and clearest laws are those produced by the legislative process. Because every trial and defense counsel carries with them a copy of the *Manual for Courts-Martial* (*MCM*), it would be beneficial for the requirements, and many of the exceptions to those requirements, of Article 31 to be clearly stated by legislative act and printed within that manual. This will, most likely, assist commanders and law enforcement personnel who usually have a copy of the *MCM* in their offices.

In drafting a proposed amendment, emphasis should be placed on both excluding statements that do not trigger the concerns of the original drafters of Article 31 and excluding statements that would not meet the requirements of the *Duga* test.

Although it may be complicated to draft an amendment that succinctly encapsulates the type of statements that trigger the concerns about lack of voluntariness in light of "subtle pressures which [exist] in military society"[81] without using that language directly, using that language directly would lead to arguments in each case about whether the accused was under such pressure, which would necessarily lead to inefficiency. Courts have routinely quoted and applied this standard directly when attempting to interpret the scope of protection provided by Article 31, which has led to different tests and different applications of those tests in each case. Therefore, using this language in an amendment would be complicated and impractical.

Providing individual exceptions for each of the applications of the *Duga* test would be less comprehensive and less effective than codifying the test in a few enumerated aspects. This should be followed by examples of exceptions and clarifying language that would allow the test to be applied to each individual circumstance. Therefore, the following is a proposal for an amendment to Article 31, with the amended and added portions underlined:

a. No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
b. <u>Except as provided in subsection (c) of this section,</u> no person subject to this chapter may interrogate, or request any statement from, <u>a person subject to this chapter who is an</u> accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.
c. <u>Any person subject to this chapter who requests a statement from an accused or a person suspected of an offense is not required to inform and advise him based on the requirements in subsection (b) of this section in any of the following situations:</u>
    1. <u>The questioner is:</u>
        a. <u>not senior in rank to the accused or suspect,</u>
        b. <u>not in a position of authority with respect to the accused or suspect, and</u>
        c. <u>not serving in a law enforcement or discipline role.</u>
    2. <u>The statement would be perceived by a reasonable person in the position of the accused or suspect to be requested as part of a casual conversation in which the questioner is not acting in his official law enforcement, or disciplinary capacity.</u>
    3. <u>The questions are asked primarily for other than law enforcement, or discipline purposes. A non-exhaustive list of examples includes inquiries by medical personnel in furtherance of medical treatment, and inquiries for operational or safety purposes.</u>
d. No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.
e. No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

## Conclusion

Article 31 provides protections that are understandable when considering the original concerns it addressed—the "subtle pressures which [exist] in military society."[82] However, the broad language used in drafting these protections almost immediately led to unintended consequences that unreasonably hampered the military criminal justice system. Slowly, the courts have carved away at the unnecessarily broad scope Congress created; however, the patchwork nature of these interpretations has led to misunderstandings and inconsistencies.

Congress should pass an amendment to Article 31 that would more specifically lay out the protections it wishes service members to enjoy and that will be clear in both scope and purpose. The *Duga* test, as amended by *United States v. Jones*, is an understandable and clear test that could be applied by law enforcement and commands. However, well-meaning service members who want to follow the rule and open up an *MCM* will not find this test; rather, they will find an article of the UCMJ—the plain reading of which has not been the law for over fifty years. Making the recommended statutory amendments to Article 31 will lead to both more predictability for counsel and more consistency from the bench. More importantly, it will provide a

clear framework for investigators and law enforcement personnel who are less likely to turn to caselaw for guidance on proper procedures during their investigations. In doing so, such an amendment will provide clearer rights for those accused or suspected of an offense and will necessarily provide greater efficiency to a military justice system that has become much less efficient over time. **TAL**

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## Notes

1. United States v. Gibson, 14 C.M.R. 164, 170 (A.B.R. 1954).

2. UCMJ art. 31(b) (2012).

3. United States v. Armstrong, 9 M.J. 374 (C.M.A. 1980).

> The purpose of article 31(b) apparently is to provide servicepersons with a protection which, at the time of the Uniform Code's enactment, was almost unknown in American courts, but which was deemed necessary because of subtle pressures which existed in military society. Conditioned to obey, a serviceperson asked for a statement about an offense may feel himself to be under a special obligation to make such a statement. Moreover, he may be especially amenable to saying what he thinks his military superior wants him to say—whether it is true or not. Thus, the serviceperson needs the reminder required under article 31 to the effect that he need not be a witness against himself.

*Id.* at 378 (citing *UCMJ: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Servs.,* 81st Cong. 1183 (1949) at 984-85).

4. United States v. Cohen, 63 M.J. 45, 50 (C.A.A.F. 2006). "This Court has also interpreted Article 31(b) in a manner that recognizes the difference between questioning focused solely on the accomplishment of an operational mission and questioning to elicit information for use in disciplinary proceedings." *Id.*

5. *See, e.g.,* Major Robert F. Maguire, *The Warning Requirement of Article 31(b): Who Must Do What to Whom and When?*, 2 Mil. L. Rev. 1, 8 (1958); Captain Manuel E.F. Supervielle, *Article 31(b) Who Should be Required to Give Warnings?*, 123 Mil. L. Rev. 151, 151-214 (1989).

6. Supervielle, *supra* note 5, at 151.

7. Articles of War, 39 Stat. 619 (1916).

8. *Id.* art. 24.

9. Articles of War, 41 Stat. 77 (1920).

10. Supervielle, *supra* note 5, at 174-75.

11. Selective Service Act of 1948, ch. 625, § 214, 41 Stat. 792 (1948), https://www.loc.gov/law/help/statutes-at-large/80th-congress/session-2/c80s2ch625.pdf.

12. United States v. Wilson, 8 C.M.R. 48 (C.M.A. 1953).

13. *Id.* at 54.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Executive Order 10214, in* Manual for Courts-Martial, United States ix (1951), https://www.loc.gov/rr/frd/Military_Law/pdf/manual-1951.pdf. "This manual shall be in force and effect in the armed forces of the United States on and after May 31, 1951, with respect to all court-martial processes taken on and after May 31, 1951." *Id. See also* Exec. Order No. 10214, 16 Fed. Reg. 1303 (Feb. 8, 1951).

19. *Wilson*, 8 C.M.R. at 54.

20. *Id.* at 55.

21. *Id.* at 54. In excluding a statement that was voluntarily given, the court explained that "[i]t is, of course, beyond the purview of this Court to pass on the soundness of the policy reflected in those portions of Article 31 which extend the provisions of its comparable predecessor, Article of War 24—and no sort of opinion is expressed thereon" (citation omitted). *Id.*

22. *Id.* at 55.

23. *Id.*

24. *Id.*

25. *Id.* at 57-61.

26. *Id.* at 61.

27. *Id.*

28. *See Congressional Floor Debate on Uniform Code of Military Justice*, 95 Cong. Rec. 5, 98-99, 214 (1949) http://www.loc.gov/rr/frd/Military_Law/pdf/congr-floor-debate.pdf.

29. Supervielle, *supra* note 5; *see, e.g.,* United States v. King, 13 C.M.R. 261 (A.B.R. 1953) ("[I]t clearly appears that the sergeant's question was within the scope of his routine administrative duties and bore no relationship whatsoever to the accused's acts. In our opinion, the accused's response was in the nature of a spontaneous statement, volunteered 'without urging, interrogation or request' and must, therefore, be regarded as voluntary.").

30. United States v. Gibson, 14 C.M.R. 164, 170 (A.B.R. 1954).

31. *Id.* at 168.

32. *Id.* at 171.

33. *Id.* at 172.

34. United States v. Duga, 10 M.J. 206 (C.M.A. 1981).

35. *Id.* at 210 (citing United States v. Gibson, 14 C.M.R. 164, 170 (A.B.R. 1954).

36. United States v. Jones, 73 MJ 357, 362 (C.A.A.F. 2014) ("We now expressly reject the second, subjective, prong of that test, which has been eroded by more recent cases articulating an objective test.") (citation omitted).

37. United States v. Bishop, 76 M.J. 627 (A.F. Ct. Crim. App. 2 Feb. 2017) ("The first prong is whether the person who conducted the questioning was participating in an official law enforcement or disciplinary investigation or inquiry, as opposed to having a personal motivation for the inquiry. The second prong applies an objective standard of a reasonable person in the suspect's position to determine whether that person would have concluded that the questioner was acting in an official law enforcement or disciplinary capacity.") (citations omitted).

38. *See* United States v. Alford, 2018 CCA LEXIS 388 (A.F. Ct. Crim. App. Aug. 15, 2018); United States v. Randall, 2015 CCA LEXIS 584 (Army Ct. Crim. App. Dec. 17, 2015).

39. United States v. Gilbreath, NMCCA 201200427 (N-M. Ct. Crim. App. Nov. 12, 2013).

40. *Id.*

41. *Id.*

42. *Id.*

43. United States v. Gilbreath, 74 M.J. 11, 17 (C.A.A.F. 2014) ("Because an IRR servicemember may well feel compelled to respond to an official military questioner without considering any privilege against self-incrimination, we have no reason to depart from our case law, supported by a plain reading of the statute, its legislative history, and the fundamental purpose of the statutory protection" (internal citations omitted)).

44. *Id.*

45. United States v. Fisher, 44 C.M.R. 277 (C.M.A. 1972). It should be noted that this case was decided before *United States v. Duga*, but has been cited to the Court of Military Appeals (CMA) after the *Duga* test was announced in *United States v. Bowerman*, another case involving questioning by a doctor. United States v. Bowerman, 39 M.J. 219, 221 (C.M.A. 1994).

46. United States v. Moore, 32 M.J. 56, 60 (C.M.A. 1991) ("[T]he record shows that she acted only in a legitimate medical capacity in asking these questions and in response to appellant's voluntary request for emergency medical treatment. Such questioning is clearly outside the scope of Article 31.").

47. United States v. Raymond, 38 M.J. 136 (C.M.A. 1993) ("Here there was no interrogation by an officer, an investigative officer, or, . . . a person acting as a knowing agent of a military unit or of a person subject to the code. Mr. Winston was neither a superior officer of appellant nor a person occupying an official position such that appellant would feel compelled to answer his questions. In fact, appellant voluntarily sought counseling on a walk-in basis at the base hospital.").

48. United States v. Loukas, 29 M.J. 385 (C.M.A. 1990).

49. *Id.* at 386.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 389.

> Sergeant Dryer was the crew chief of an operational military aircraft who was similarly responsible for the plane's safety and that of its crew, including the accused, his military subordinate. In addition, his questioning of the accused was limited to that required to

> fulfill his operational responsibilities . . . [.] [T]he unquestionable urgency of the threat and the immediacy of the crew chief's response underscore the legitimate operational nature of his queries.

*Id.*

54. United States v. Bradley, 51 M.J. 437 (C.A.A.F. 1999).

55. United States v. Guron, 37 M.J. 942 (A.F. Ct. Crim. App. 1993).

56. United States v. Swift, 53 M.J. 439 (C.A.A.F. 2000).

57. *Id.* at 446.

58. *Id.*

59. United States v. Wilson, 8 C.M.R. 48 (C.M.A. 1953).

60. United States v. Duga, 10 M.J. 206 (C.M.A. 1981).

61. *See, e.g.,* United States v. Aaron, 54 M.J. 538, 543 (A.F. Ct. Crim. App. 2000) ("Even from a cursory review of the videotape meetings on 6 and 7 October 1998 and the transcripts of those meetings make it clear that the appellant perceived that he was talking with his young daughter and former lover, not an agent of the government"). United States v. Martin, 21 M.J. 730, 732 (N-M. Ct. Crim. App. 1985) ("Although Mrs. M, both in the telephone conversation and the 'bugged' discussion in appellant's office, was acting under the direction of NIS agents, her status as the victim of the alleged offenses . . . did not change . . . we find that appellant had no rational basis to believe his conversations with Mrs. M were anything more than private, emotion-ridden colloquies.").

62. UCMJ art. 62 (2012).

> An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within seventy-two hours of the order or ruling. Such notice shall include a certification by the trial counsel that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.

*Id.* a(2).

63. Manual for Courts-Martial, United States, Mil. R. Evid. 404(b) (2019) [hereinafter MCM].

64. *Id.*

65. Fed. R. Evid. 404(b). This rule reads:

> Crimes, Wrongs, or Other Acts.
> (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
> (2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:
> (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
> (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

*Id.*

66. MCM, *supra* note 63, app. 22, at A22-34.

> While providing that evidence of other crimes, wrongs, or acts is not admissible to prove a predisposition to commit a crime, the Rule expressly permits use of such evidence on the merits when relevant to another specific purpose. Rule 404(b) provides examples rather than a list of justifications for admission of evidence of other misconduct.

*Id.*

67. *See* United States v. Castillo, 29 M.J. 145, 150 (C.M.A. 1989) ("[i]t is unnecessary for admissibility that her testimony fit within a particular category listed in the rule."). *See, e.g.,* United States v. Staton, 69 M.J. 228 (C.A.A.F. 2010) ("one of the "other purposes" for which uncharged misconduct may be admissible is evidence of "consciousness of guilt.") (quoting United States v. Cook, 48 M.J. 64, 66 (C.A.A.F. 1998)); U.S. v. Hepburn, 2013 WL 5911717 (A.F. Ct. Crim. App. Oct. 28, 2013) ("'Consciousness of guilt' is one of the 'other purposes' for which uncharged misconduct may be admissible.") (quoting United States v. Cook, 48 M.J. 64, 66 (C.A.A.F. 1998)); United States v. Talkington, 2013 WL 1858584 (A.F. Ct. Crim. App. Apr. 26, 2013) ("Character evidence is admissible for purposes other than proving action in conformity therewith, to include proving state of mind.").

68. MCM, *supra* note 63, Mil R. Evid. 412(b).

69. U.S. Const. amend. V.

70. *United States v. Armstrong*, 9 M.J. 374 (C.M.A. 1980).

71. *Id.* at 378.

72. *Id.*

73. Report of the Military Justice Review Group, Part I: UCMJ Recommendations (22 Dec. 2015), https://ogc.osd.mil/images/report_part1.pdf.

74. *Id.* at 312-13 (citation omitted).

75. *Id.* at 313.

76. *Id.* at 314.

77. United States v. Jones, 73 MJ 357 (C.A.A.F. 2014).

78. United States v. Jones, 24 M.J. 367, 369 (C.M.A. 1987) (Everett, C.J., concurring).

> Of course, an accused is still free to claim that his statement was involuntary in the traditional sense of that term . . . and his perception that he was being officially questioned may be relevant to that issue. However, if a conversation is really casual and informal, it may be very difficult for the defense to contest the voluntariness of any admissions by the accused.

*Id.*

79. U.S. Const. amend. V ("[N]or shall [any person] be compelled in any criminal case to be a witness against himself.").

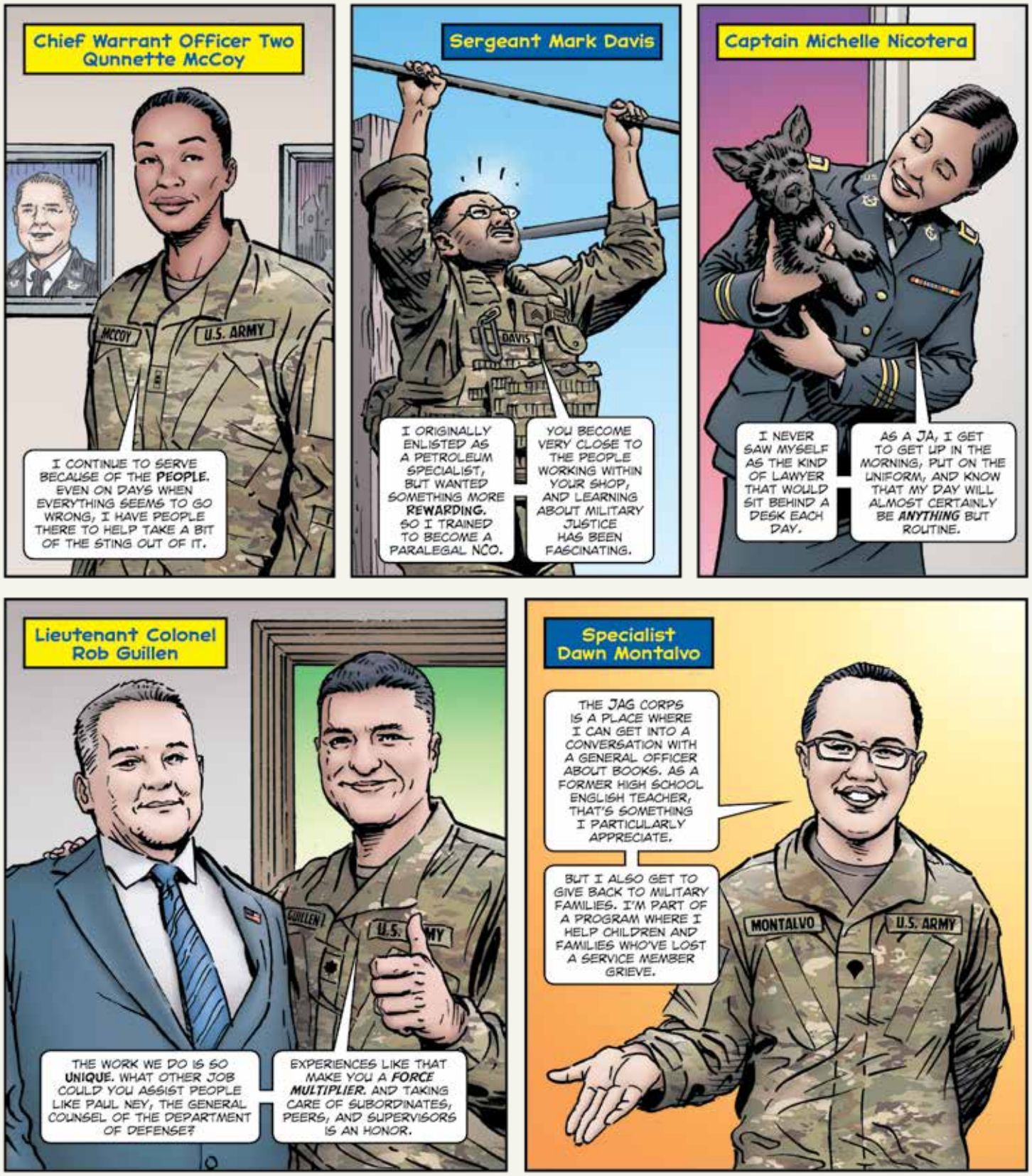
80. Miranda v. Arizona, 384 U.S. 486 (1966). *See* United States v. Jones, 19 M.J. 961, 966 (A.C.M.R. 1985) ("There is, of course, no question that the Fifth Amendment and *Miranda* apply in the military."). *See also* United States v. Tempia, 37 C.M.R. 249 (C.M.A. 1967).

81. United States v. Armstrong, 9 M.J. 374 (C.M.A. 1980).

82. *Id.*

# Closing Argument

## Your Corps, Your Career Five Members Tell Us Why They're Here and Nowhere Else

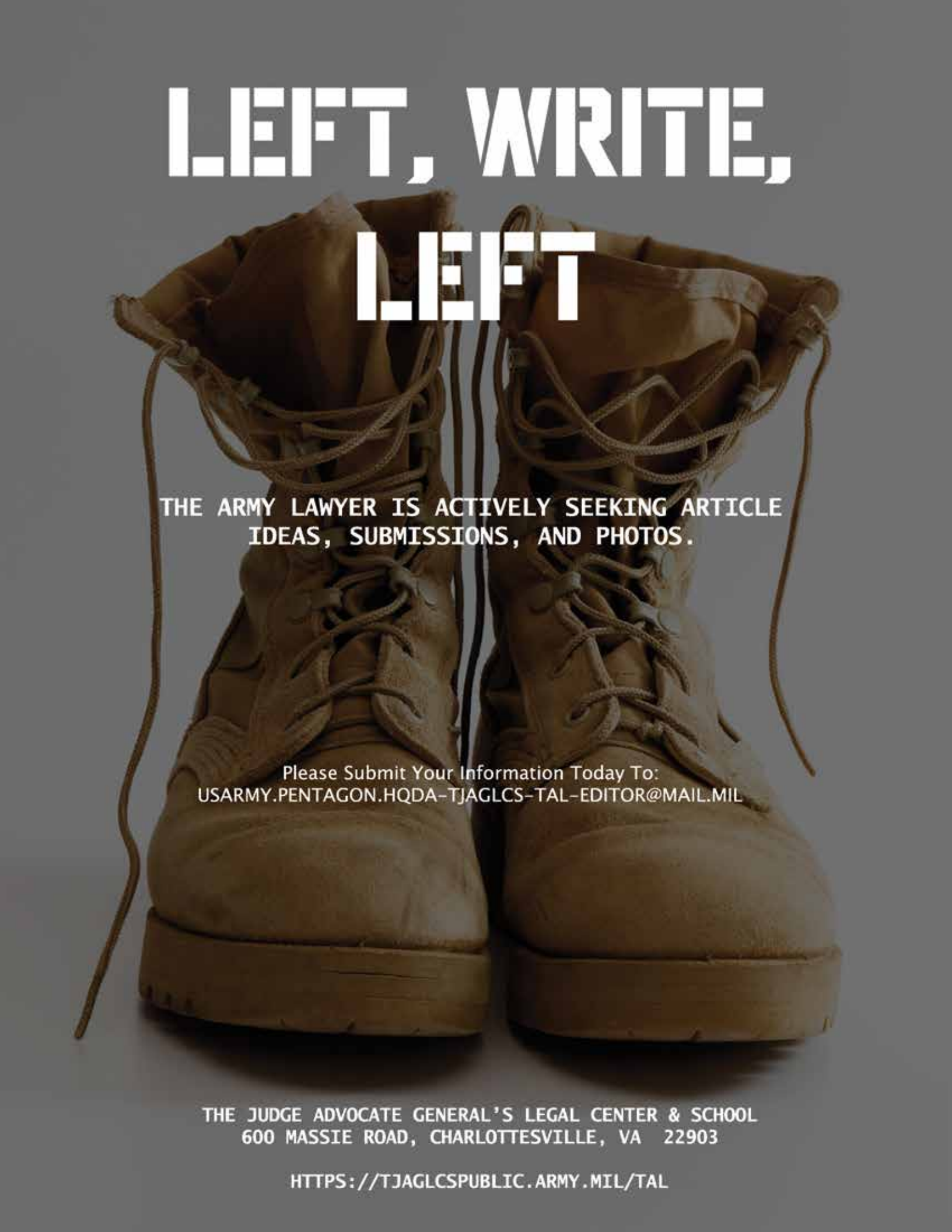



(Credit: Rob Van Hook, Bob Hardin, Joe Panico and Pete Carlsson)

## AROUND THE CORPS

Morning sun lights up the atrium inside The Judge Advocate General's Legal Center and School. (Credit: Chris Tyree)

# LEFT, WRITE, LEFT



THE ARMY LAWYER IS ACTIVELY SEEKING ARTICLE IDEAS, SUBMISSIONS, AND PHOTOS.

Please Submit Your Information Today To:
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