



THE ARMY LAWYER

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Reviewed by *Major Alex C. Barnett*

You Win in the Locker Room First

Reviewed by *Major Julie Worthington*

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Lore of the Corps

Native Americans in the Corps: A Very Short History of Judge Advocates with American Indian Ancestry

Fred L. Borch

Regimental Historian & Archivist

While Native Americans have been a part of Army history since the Revolutionary War,¹ the Corps has almost no information about Judge Advocates with American Indian ancestry. This ‘very short history’ seeks to change that situation by identifying three Army lawyers with Indian tribal affiliation.



Brigadier General Thomas S. Walker

Brigadier General (retired) Thomas S. “Tom” Walker, who served in the Army, Army Reserve and Oklahoma Army National Guard, is almost certainly the highest ranking Judge

Advocate with Native American ancestry. He is a citizen of the Cherokee Nation, as one of his grandmothers was Cherokee. One of his grandfathers was Wyandotte; both grandparents were born in Oklahoma Indian Territory.²

A graduate of Phillips University (1968) and the University of Oklahoma College of Law (1973), Brigadier General Walker was in private practice in Norman and Armore, Oklahoma before serving beginning a career as a District Judge in Oklahoma’s 20th Judicial District, a five county district in southern Oklahoma. He ultimately became the Chief Judge of that District and also held a concurrent assignment to Oklahoma’s Court of the Judiciary, which has the authority to remove Oklahoma judges from office.³ Brigadier General Walker is a member of the Oklahoma Indian Bar Association and also served as Chief Magistrate, Court of Indian Appeals, Southern Plains Region.⁴

As for his military career, Walker served as a soldier from 1968 to 2005. He enlisted in the Army as counterintelligence agent and served a 12-month tour of duty in Vietnam. After returning to Oklahoma and entering law school, Tom Walker joined the Oklahoma National Guard. He subsequently served in a variety of Guard assignments, including: Staff Judge Advocate and Rear Area Operations Commander, 45th Infantry Brigade; Command Judge Advocate, Oklahoma Army National Guard; and National Guard Assistant to The Judge Advocate General of the Army. Brigadier General Walker also was the first Judge Advocate in the Army to attend the Tactical Commanders Development Course. He retired from the Guard in August 2002.⁵

Colonel (COL) Robert Don “Bobby Don” Gifford, a judge advocate in the Army’s Individual Ready Reserve, is a tribal member of the Cherokee Nation. His great great grandfather signed the Dawes Rolls⁶ as a Cherokee, so he is a

¹ While some Native Americans, like the Cherokee, decided that their future was with Great Britain in 1775, most New England Indians fought with the colonists. They volunteered as Minutemen even before the outbreak of the fighting, “joined Washington’s army at the siege of Boston, and served in New York, New Jersey, and Canada” during the Revolution. Colin G. Calloway, *American Indians and the American Revolution*, NAT’L PARK SERV., https://www.nps.gov/revwar/about_the_revolution/american_indians.html (last visited Mar. 30, 2017). See also ANNIE H. ABEL, *THE AMERICAN INDIAN IN THE CIVIL WAR* (1993); JOHN D. SPENCER, *THE AMERICAN CIVIL WAR IN THE INDIAN TERRITORY* (2006).

² Telephone interview with Brigadier General Thomas Walker (Feb. 27, 2017) [hereinafter Walker].

³ *Biography, Brigadier General Thomas S. Walker*, NAT’L GUARD, <http://www.nationalguard.mil/Leadership/NGB-GOMO/bio-show/id/830/> (last visited Apr. 14, 2017) [hereinafter NAT’L GUARD].

⁴ Walker, *supra* note 2.

⁵ NAT’L GUARD, *supra* note 3.

⁶ The Commission to the Five Civilized Tribes was appointed by President Grover Cleveland in 1893 to negotiate land with the Cherokee, Creek, Choctaw, Chickasaw and Seminole tribes. *Dawes Rolls*, NATIONAL ARCHIVES, <https://www.archives.gov/research/native-americans/dawes/tutorial/intro.html> (last visited April 14, 2017). It is called the Dawes Commission, after its chairman, Henry L. Dawes, but officially is known as the “Final Rolls of the Citizens and Freedmen of the Five Civilized Tribes in Indian Territory.” *Id.* Tribe members were entitled to an allotment of land in return for abolishing their tribal governments and recognizing Federal laws. In order to receive the land, individual tribal members first had to apply and be deemed eligible by the Commission. *Id.* The first application process for enrollment began in 1896, but was declared invalid, and so the commission started all over again in 1898, forcing people to reapply. *Id.* The Commission accepted applications until 1907, with a few

direct descendant. Colonel Gifford's mother has Creek ancestry, "but her family did not sign the Rolls as a Creek member as it was frowned upon to be Indian at the time."⁷ While attending law school at the University of Oklahoma, Gifford was an editor for the American Indian Law Review and, before entering on active duty with the Corps in 1996, did legal work for the Cherokee Nation under Chief Wilma Mankiller. He also worked directly for the future Chief Chad Cortassel Smith.⁸



Colonel Robert Don Gifford

After leaving active duty in 2001, COL Gifford remained in the Army Reserve; his last Judge Advocate assignment was as the Commander, 3rd Legal Operations Detachment. As a civilian lawyer, Gifford served fifteen years as an Assistant U.S. Attorney (Western District of Oklahoma) before entering private practice. His specialty is Native American Law. Given this interest, it should come as no surprise that Colonel Gifford now serves as the Chief Judge for the Kaw Nation tribal court. He also is an Associate Justice for the Iowa Tribe's Supreme Court. As the Kaw and Iowa are completely separate tribes from the Cherokee, Gifford has no conflict of interest in serving in a legal position with either Nation.⁹

A third Army lawyer with Native American heritage is Colonel Paul P. McBride, an Active Guard Reserve officer in the Army Reserve. Born in Spain (his parents were both U.S. Navy officers), McBride received baccalaureate degrees (Biology and Chemistry) from the University of California,

additional people accepted by an Act of Congress in 1914. *Id.* The resulting lists of those who were accepted as eligible became known as the Dawes Rolls. *Id.*

⁷ E-mail from Robert D. Gifford to author (Mar. 31, 2017, 10:41 EST) (on file with author).

⁸ *Id.*

Irvine (1983), and his law degree from Loyola Law School in Los Angeles (1987).¹⁰

Colonel McBride has a criminal litigator background (as a civilian lawyer) but now is full time active duty at the Office of The Judge Advocate General in the Pentagon. He is the Chief, Reserve Component Management for the Corps and works out of the Personnel, Plans and Training Office.¹¹

Colonel McBride is registered with the Quinault Indian Nation in Washington State. The Quinault people reside on a 208,000 reservation in northwestern Grays Harbor County, on Washington's Olympic peninsula. Quinault tribal membership was 2,000 in 1990 and 2,453 in 1999.¹²

A final note. While he had no Indian blood (he was of Irish ancestry), one of the most famous soldiers with a Native American connection was Patrick J. Hurley. Hurley worked as a coal miner, mule driver, cowboy and lawyer before



Ambassador Patrick Jay Hurley

entering the Army in 1917. After serving with great distinction in Europe in World War I, Hurley left active duty--but remained in the Army Reserve and, during World War

⁹ *Id.*

¹⁰ E-mail from COL. Paul P. McBride to author (Feb.27, 2017, 16:51 EST) (on file with author).

¹¹ *Id.*

¹² QUINAULT INDIAN NATION, <http://www.quinaultindiannation.com/> (last visited April 14, 2017)

II, attained the rank of major general. But Hurley also served our Army as Secretary of War under President Herbert Hoover and served as U.S. Ambassador to China in the administrations of President Franklin D. Roosevelt and Harry S. Truman.

Hurley's connection to Native Americans is two-fold. First, he was born in Indian Territory (now Oklahoma). Second, he later provided legal advice to the Choctaw Nation. Born in January 1883, Hurley grew up very poor; his father worked in the coal fields for \$2.10 a day; young Pat joined his father in the mines when he was eleven years old. For a nine-and-one-half hour day, the boy received seventy-five cents.¹³

Later, when the coal mines closed for a time and young Hurley was without work, he spent his days in the company of Native American members of the Choctaw Nation who, along with the Creeks and Cherokees, were the most important Indian tribes in the territory. His friendship with Choctaw Victor Locke would open professional doors after Hurley became a lawyer.

Pat Hurley was still working as a cowhand when a ranch owner who had taken a liking to him arranged for Hurley to attend Indian University (today's Bascome University). He excelled as a student and obtained his bachelor degree in 1905. In 1907, Pat Hurley's friends convinced him that he should go to law school and get a degree. Hurley moved to Washington, D.C., enrolled in National University (today's George Washington University), and obtained his Bachelor of Laws degree in 1908. He was just twenty-five years old.

Returning to Oklahoma, Hurley passed the Oklahoma bar and built a successful practice in Tulsa (oil had been discovered there in 1901). In 1911, President William H. Taft appointed Hurley's boyhood friend, Victor Locke, to be the Principal Chief of the Choctaws. The new chief now appointed Patrick J. Hurley, then serving as the president of the Tulsa Bar Association, as the new National Attorney for the Choctaw Nation of Indians, at an annual salary of \$6,000.¹⁴ Since the average American earned \$750 a year during this era, this was a huge amount of money for a twenty-eight year old Oklahoma lawyer.¹⁵

At the time, there were about 28,000 men, women and children in the Choctaw Nation and real estate held communally by the tribe was worth as much as \$160 million. Since the most valuable item in that tribal property was coal and asphalt lands, Hurley's job was to ensure that any contracts involving the lease or sale of those lands were fair to the Choctaw and that any proceeds were fairly distributed to members of the Choctaw nation.¹⁶

Unscrupulous businessmen and politicians had engaged in systematic fraud against the tribe for years, mostly by making contracts with individual Indians that purported to dispose of property held communally by the tribe. Once Hurley became the Choctaw's attorney, however, he successfully fought against these and other fraudulent contracts in court. He also protected the rights of the Choctaws under various treaties with the United States, insisting that the government had a legal responsibility to protect Indian resources. Hurley was so successful that he could have remained as the Choctaw Attorney for many years.¹⁷

The Regimental Historian welcomes additional information on Judge Advocates with American Indian ancestry. Please contact him directly at frederic.l.borch.civ@mail.mil.

More historical information can be found at

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

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

¹³ DON LOHBECK, PATRICK J. HURLEY 28 (1956).

¹⁴ *Id.* at 45.

¹⁵ Meryl Baer, *The History of American Income*, EHOW, http://www.ehow.com/info_7769323_history-american-income.html (last visited Oct. 15, 2013).

¹⁶ LOHBECK, *supra* note 13, at 56, 60.

¹⁷ *Id.* at 57.

Seven Flew over the Cuckoo's Nest: Under What Circumstances is the Defense of Lack of Mental Responsibility Successful?

Major Kirk W. Otto*

“Sure there’s a catch,” Doc Daneeka replied. “Catch-22. Anyone who wants to get out of combat duty isn’t really crazy.” There was only one catch and that was Catch-22, which specified that a concern for one’s safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions... Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.¹

I. Introduction

Failure to understand fully the military’s lack of mental responsibility defense leads to abhorrent results, no matter which direction the mistake is made. Whether a sane accused walks free because he was able to con a panel into thinking he was insane, or an accused is punished for something he was incapable of understanding, the justice system suffers a black eye. Further magnifying the problem, most Army attorneys will never encounter an insanity plea, reducing the chances that they will have any practical experience when confronted with the issue. Attorneys on both sides need to know what circumstances will trigger the insanity defense, and how the military justice system and forensic psychiatry handle this inadequately understood area of the law.

Upon an initial look into the defense of lack of mental responsibility, attorneys will likely feel they are staring into a jar of mud. Yet by patiently letting the layers of dirt settle, one can actually discern meaningful takeaways. The first step is breaking down terms and the burden of proof laid out in Rule for Court-Martial (RCM) 916(k).² To this end, there is no shortage of articles discussing the procedural aspects of the defense³, and even various appellate courts’ definitions of key substantive terms and comparisons to state and federal versions of the defense.⁴ What is missing is a practical

attempt to determine when the defense actually works in the military justice system. Here is that attempt.

Digging through the cases that resulted in acquittals due to the insanity defense, and the key appellate cases affirming convictions in spite of the insanity defense, one can detect the key ingredients for its successful use. Most importantly, the seven successful insanity defense acquittals—with only one exception—involve the Government’s failure to put on expert mental health testimony to rebut the defense’s case.⁵ Also, five of the seven acquittals involved an RCM 706 board determination that the accused lacked mental responsibility for the crime.⁶ Beyond these similarities, the most interesting observation is the lack of discernible patterns, with all the procedural variety one would expect from insanity cases.⁷

First this article will examine why finding these case histories independently is an unreasonable request to make of junior attorneys. Next it walks through the basics of the insanity defense as contained in RCM 916(k) to include key terms from the psychiatry field. Finally it looks at appellate cases affirming convictions, and the seven courts-martial that led to findings of not guilty by reason of lack of mental responsibility.

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¹ JOSEPH HELLER, CATCH-22 55 (1955).

² MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(k) (2016) [hereinafter MCM].

³ See, e.g., Lieutenant Colonel Donna M. Wright, *Though This be Madness, yet There is Method in it: A Practitioner’s Guide to Mental Responsibility*

and *Competency to Stand Trial*, ARMY LAW., Sept. 1997, at 18; Major Jeff A. Bovarnick & Captain Jackie Thompson, *Trying to Remain Sane Trying an Insanity Case: United States v. Captain Thomas S. Payne*, ARMY LAW., June 2002, at 13.

⁴ See, e.g., Major Jeremy A. Ball, *Solving the Mystery of Insanity Law: Zealous Representation of Mentally Ill Servicemembers*, ARMY LAW., Dec. 2005, at 1; Captain Richard Anderson, *How Far is the Military Courtroom Door Closing for Defense Expert Psychiatric Witnesses?*, ARMY LAW., Sept. 1987, at 31.

⁵ E.g., U.S. v. Desanti, No. 9402001 (U.S. Army Air Defense Artillery Center, Fort Bliss, TX 1995).

⁶ MCM *supra* note 2, R.C.M. 706; see, e.g., U.S. v. Turner, No. 20120084 (Training and Doctrine Command, Joint Base Langley-Eustis, VA 2012).

⁷ See, e.g., U.S. v. Guarnaccia, No. 20011109 (25th Infantry Division, Schofield Barracks, HA 2001) (accused stipulating to all elements of the offenses, in exchange for government stipulating he was insane at the time).

II. Background

When trying to decipher the practical reality of the military insanity defense, one cannot simply stroll through the headnotes of easily searchable appellate cases. Several procedural issues create a situation where unfortunately much of the key insanity defense history remains hidden. First, caselaw at the appellate level has limited value for the insanity defense. Specifically, the appellate history contains zero instances of convictions being overturned due to errors related to the insanity defense. However, appellate courts deserve some credit for the valuable function of defining the key legal and medical terms and for outlining when the defense does not work via affirming convictions involving the insanity defense.⁸ Further, although they could be referred, many cases likely do not get referred because RCM 706 boards find that the accused lacked mental responsibility at the time of the crime.⁹ Thus we have no record of these facts or the RCM 706 boards involved. Most importantly the appellate record does not include the few acquittals where the defense actually worked. Therefore, physically going to the Army Court of Criminal Appeals (ACCA) to search through old records of trial from the insanity defense acquittals is the only way to find out when the defense has been successful.

There are instances where the defense of lack of mental responsibility led to acquittal. The problem is that these are rare and hard to find. Physically going to ACCA to search through old results of trials is not a practical option for practicing trial and defense counsel. Although that difficulty is very real, it also justifies this article.

An additional obstacle is the fact that there is no record of all of the sanity boards conducted. Presumably, some portion of these boards led to findings that the accused did not understand the nature and quality or wrongfulness of his actions. Although under RCM 706(c) such a finding would not prohibit a convening authority from proceeding with a case, it stands to reason that it would make it much less likely that they would do so.¹⁰

In an effort to glean more understanding of sanity boards in practice, a survey was sent out to the Army's forensic psychiatrists, resulting in five responses. Based on these responses, we can extrapolate some averages to guess how often sanity boards are done, and how often they result in findings that the accused was not mentally responsible. Between these five mental health experts, roughly 120 sanity

boards were done, with only five having a finding that the subject was not mentally responsible, which is only four percent.¹¹ Between the five experts there was only one instance where the defense used the insanity defense despite the RCM 706 board determining the subject was mentally responsible, and only two instances where the government took a case to trial where the sanity board found that the subject was not mentally responsible.¹² Based on these results, although there are assuredly some cases that we do not know about where either the Government chose not to go forward because a sanity board found the subject lacked mental responsibility, or the Government took a similar case to trial and obtained a conviction, those cases are obviously rare.

Before investigating the substantive caselaw, we need to be able to grasp the basic requirements of the insanity defense as well as the psychiatry field's understanding of the key terms contained in the defense.

A. The Defense of Lack of Mental Responsibility

To establish the defense of lack of mental responsibility under RCM 916(k), the accused must first show that he suffered from "a severe mental disease or defect" at the time of the crime.¹³ Interestingly, although RCM 706 specifically states that nonpsychotic behavior disorders are not included within the term "severe mental disease,"¹⁴ courts have ruled that statement to be unconstitutional presidential rulemaking and have specifically stated that nonpsychotic disorders are not per se disqualified from being "severe".¹⁵ Once the diagnosis threshold is crossed, the accused must show that as a direct result of that disease, he could not appreciate either the nature and quality of the act, or the wrongfulness of the act.¹⁶ The Court of Appeals for the Armed Forces (CAAF) articulated the standard in *U.S. v. Martin*:

The first portion relates to an accused who is psychotic to an extreme degree. It assumes an accused who, because of mental disease, did not know the nature and quality of his act; he simply did not know what he was doing. For example, in crushing the skull of a human being with an iron bar, he believed that he was smashing a glass jar. The latter portion of M'Naghten relates to an accused who knew the nature and quality

⁸ See, e.g., *United States v. Martin*, 56 M.J. 97 (C.A.A.F. 2001); *United States v. Collins*, 60 M.J. 261 (C.A.A.F. 2004) (remanded for additional R.C.M. 706 board based on accused's behavior during trial).

⁹ MCM, *supra* note 2, R.C.M. 706(c)(2).

¹⁰ *Id.* R.C.M. 706(c)(3).

¹¹ Survey of Army Forensic Psychiatrists (Jan. 21, 2015) [hereinafter Survey].

¹² *Id.*

¹³ MCM, *supra* note 2, R.C.M. 916(k); see also Ball, *supra* note 4, at 12 (in depth exposition of the substance of the military's insanity defense).

¹⁴ MCM, *supra* note 2, R.C.M. 706(c)(2)(A).

¹⁵ *United States v. Benedict*, 27 M.J. 253, 259 (C.M.A. 1988); see also Ball, *supra* note 4, at 11-19; *U.S. v. Proctor*, 37 M.J. 330, 336 (C.M.A. 1993).

¹⁶ MCM, *supra* note 2, R.C.M. 916(k)(1).

of his act. He knew what he was doing; he knew that he was crushing the skull of a human being with an iron bar. However, because of mental disease, he did not know that what he was doing was wrong. He believed, for example, that he was carrying out a command from God.¹⁷

Finally, the accused bears the burden of proving by “clear and convincing evidence” that he was not mentally responsible at the time of the crime.¹⁸

B. Qualifying Diseases and Severity of Symptoms

To determine what is a severe mental disease or defect, we must turn to the forensic psychiatry field. First, under the current standard for diagnosing mental illnesses—the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5)—there is no clear list of which diseases are severe and which diseases are not.¹⁹ Based on RCM 916(k)’s requirement that the accused not appreciate either his actions or their wrongfulness, we can narrow the list of diseases that will likely qualify if we sift through DSM-5 in order to find diagnoses that could involve some form of break in reality. The obvious diseases are those involving psychotic symptoms, found in the schizophrenia spectrum and other psychotic disorders.²⁰ However, by perusing through DSM-5, and based on survey responses from Army forensic psychiatrists, it becomes clear that other diseases may fit the requirement of the defense, including post-traumatic stress disorder (PTSD) involving flashbacks or dissociative-identity disorder, formerly called multiple-personality disorder.²¹ Of the five Army psychiatrists that responded to a survey sent out for this article, all provided definitions of a severe disease that emphasized a break in reality but also agreed that the type of disease mattered far less than the specific symptoms and their impact on the individual.²²

III. When the Insanity Defense Works, and When it does not

Two specific areas will help answer the question of when the insanity defense actually works in military criminal law. A look at appellate cases where convictions were affirmed

will show instances where the defense failed, and why. Next, a look at the few cases where the insanity defense has worked will illustrate key circumstances that can lead to acquittal.

A. Appellate Cases Where the Defense of Lack of Mental Responsibility Failed

There are no instances of either ACCA or CAAF overturning a guilty verdict due to improper application of the insanity defense at the trial court level. Avoiding cases that solely focus on procedural issues²³ that are discussed elsewhere,²⁴ this section will focus on the two appellate cases where the key issue was the defense of lack of mental responsibility itself. The value of digging into these cases is finding out why the defense was not successful so that they can be compared to the acquittals examined below.

1. *United States v. Martin*

a. *Background of the Case*

The seminal appellate case involving the defense of lack of mental responsibility is a CAAF case from 2001 involving an accused who was a member of the Judge Advocate General’s Corps.²⁵ Major (MAJ) Martin underwent two separate RCM 706 boards, with the second one diagnosing him with bipolar disorder and determining that during manic episodes he was unable to appreciate the nature and quality or wrongfulness of his actions.²⁶ A panel convicted MAJ Martin of seventy-seven crimes surrounding schemes to defraud his legal clients.²⁷ The CAAF took up the case to determine first whether the evidence “clearly and convincingly established that the appellant was not mentally responsible” at the times the crimes were committed, and second, whether ACCA applied too restrictive of a standard of review.²⁸ The convictions were ultimately affirmed by CAAF²⁹

¹⁷ *United States v. Martin*, 56 M.J. 97, 108 (C.A.A.F. 2001) (quoting CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW § 101, at 17 (15th ed. 1993)).

¹⁸ MCM, *supra* note 2, R.C.M. 916(k)(3).

¹⁹ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FIFTH EDITION, (2013) [hereinafter DSM-5].

²⁰ *Id.* at 87.

²¹ *Id.* at 124, 271, 292 (listing as examples of diagnostic criteria marked impairment in social or occupational functioning, and grandiosity); Survey, *supra* note 11.

²² Survey, *supra* note 11.

²³ *See, e.g.*, *United States v. Collins*, 60 M.J. 261 (C.A.A.F. 2004) (reversing because trial judge abused his discretion by failing to inquire further into inconsistent psychiatric testimony).

²⁴ *See, e.g.*, Major Edye Moran, *Pyrrhic Victories and Permutations: New Developments in the Sixth Amendment, Discovery, and Mental Responsibility*, ARMY LAW., Apr. 1998, at 106 (discussing substitute R.C.M. 706 boards and consequences of government denial of R.C.M. 706 boards).

²⁵ *United States v. Martin*, 56 M.J. 97, 99 (C.A.A.F. 2001).

²⁶ *Id.* at 100.

²⁷ *Id.* at 98.

²⁸ *Id.* at 99.

²⁹ *Id.* at 113.

b. Why Major Martin was Found Mentally Responsible

The CAAF thankfully went into excruciating detail of the court-martial testimony of both experts and lay witnesses.³⁰ Breaking down these discussions will shed light on why in MAJ Martin's case he failed to show a lack of mental responsibility. First, it was uncontested that MAJ Martin suffered from bipolar disorder.³¹ Interestingly, it appears that this first prong of the defense, diagnosis of a severe disease, pales in significance with the second prong. In other words, common sense shows that one is more likely to be diagnosed with a severe disease than to actually be unable to appreciate the nature or wrongfulness of your acts.

The court reviewed the finding of fact that the insanity defense failed under the "reasonableness standard".³² First, CAAF clarified that the second prong of the defense is disjunctive in that the accused should be acquitted if he can show either that he could not appreciate the nature and quality of the act, or that he could not appreciate the wrongfulness of the act.³³ This is significant in that it opens the door for defense counsel to focus on only one of these two elements, and requires the Government to consider both.

Finally getting to the key substantive insanity defense issues, CAAF discounted MAJ Martin's belief that his actions were not wrongful because his financial schemes may have worked, thus enriching his client-victims.³⁴ The court articulated that in order to show he was not mentally responsible an accused must show that he did not know it was either legally or morally wrong.³⁵ The court found that the trier of fact was reasonable in deciding that MAJ Martin failed to make this showing.³⁶

In not overturning the verdict, the court focused on the fact that there was legitimate evidence both to support and rebut the defense. Specifically, the court highlighted the fact that the government experts did not believe he was psychotic or delusional,³⁷ and the fact that multiple lay witnesses testified that MAJ Martin either threatened them or bribed them to conceal his crimes, demonstrating that he understood his acts were wrongful.³⁸ The former point is crucial, since unlike *Martin*, each instance save one where the defense was successful the government failed to rebut the defense with an expert claiming the accused was mentally responsible.³⁹

There are several takeaways from the *Martin* case, namely that an accused may be able to successfully prove lack of mental responsibility if he can show: that he specifically could not appreciate either the moral or the legal wrongfulness; that he was delusional or hallucinating at the exact time of the crime; and that he did not take actions such as threats or bribes to cover up his actions. But as the ACCA cases examined below will emphasize, the most pertinent detail is the fact that in *Martin* the prosecutors rebutted the defense with expert witnesses that testified that the accused was able to appreciate what he was doing at the time of the crimes.

2. United States v. Mott

a. Background of the Case

Unlike *Martin*, *U.S. v. Mott* is not an Army case, but is still relevant as the case was decided by CAAF, and is thus binding on Army courts.⁴⁰ Navy prosecutors charged Seaman Recruit Mott with attempted premeditated murder in violation of Article 80 of the UCMJ for stabbing another seaman whom the accused claimed had raped him many years earlier.⁴¹ *Mott* is a far more complicated case in that the Naval-Marine Corps Court of Criminal Appeals (NMCCA) overturned the initial conviction in 2009 for a discovery issue that will be explained below, and then CAAF overturned the second conviction in 2012 for an improperly admitted confession.⁴² Although the question of the confession was indirectly tied to the accused's mental state, it is clear that the case was not overturned for improper trial court analysis of the insanity defense. Thus, there still is not a single example of a conviction being overturned because an appellate court determined that the trial court should have acquitted due to the insanity defense. Whether there will be a third trial and conviction for Mott remains to be seen.

b. Mental Responsibility as One Issue Among Many

At an RCM 706 board, the accused was diagnosed with severe paranoid schizophrenia and was deemed incompetent

³⁰ *Id.* at 101, 102.

³¹ *Id.* at 100, 101.

³² *Id.* at 106-07.

³³ *Id.* at 107.

³⁴ *Id.* at 108, 109.

³⁵ *Id.* at 110.

³⁶ *Id.* at 110.

³⁷ *Id.* at 109.

³⁸ *Id.* at 109.

³⁹ *E.g.*, *U.S. v. Turner*, No. 20120084 (Training and Doctrine Command, Joint Base Langley-Eustis, VA 2012).

⁴⁰ *United States v. Mott*, 72 M.J. 319, 321 (C.A.A.F. 2013).

⁴¹ *Id.* at 321.

⁴² *Id.* at 333; *United States v. Mott*, No. 200900115, 2009 WL 4048019 (N.M. Ct. Crim. App. Nov. 24, 2009).

to stand trial.⁴³ At another sanity board over a year later the accused was found competent to stand trial, but also was still suffering from paranoid schizophrenia and did not understand that his actions were wrongful.⁴⁴ He was then tried and convicted for the first time, but the NMCCA overturned this conviction because the prosecutor failed to disclose the fact that the Government mental health expert agreed that the accused was not mentally responsible for the stabbing.⁴⁵ Predictably, this expert was not called by the Government to testify at trial.⁴⁶

Later CAAF overturned the second conviction, but also resolved a significant issue that they had left unanswered in *U.S. v. Martin*.⁴⁷ The court formally adopted an objective standard for the second prong of the insanity defense by deciding that, “wrongfulness is judged by societal standards, rather than the accused’s own personal moral code.”⁴⁸ This standard helps clarify RCM 916(k) going forward, but also explains an otherwise odd circumstance in this trial. In both of Mott’s courts-martial, while the defense put on mental health experts that testified that Mott was not mentally responsible, the Government did not present any expert testimony.⁴⁹ As will be shown below, although this scenario does not require an insanity acquittal, it happened in six out of seven cases where there was an insanity acquittal. But it is easy to distinguish *Mott* from the successful insanity acquittals below because in *Mott* the defense experts specifically testified that he was not mentally responsible only when judged against his own subjective moral standards.⁵⁰ Thus *Mott* further illustrates the difficulty of proving the defense, and clarifies that the accused must show that he did not understand that society believed the act to be wrongful.

3. Appellate Case Conclusions

Martin and *Mott*, as well as the absence of any appellate case overturning an insanity verdict, emphasize the difficulty of satisfying RCM 916(k) at trial. In both of these CAAF cases the substantive issues revolving around the insanity defense were resolved against the accused. *Martin* highlighted the fact that the clear and convincing burden of RCM 916(k) is hard to overcome. *Mott* shows that even without Government expert witnesses testifying, the accused will be held to the high objective standard of showing that he did not understand that society would view his action as

legally or morally wrongful.⁵¹ In short, the appellate case history sets a high bar for defendants using RCM 916(k).

B. ACCA Cases Where the Insanity Defense Led to Acquittal

Because there are only seven instances in the Army where the insanity defense has been successful, each case may be examined in to discern the factors that will likely lead to acquittal. For each case, this section will review the basic facts to provide context, and then address mental-health specific procedural and substantive issues, including results of any RCM 706 boards that were done, whether experts were admitted by one or both sides, and whether anything procedurally unusual led to the acquittals.

1. *United States v. Jones*

The oldest successful use of the insanity defense in the Army is a 1991 two-month absent without leave (AWOL) case of a Master Sergeant.⁵² Master Sergeant (MSG) Jones was found not guilty by reason of insanity of a two-month AWOL charge, and simply not guilty of a separate two-day AWOL charge.⁵³ This case is one of only two insanity defense acquittals by a panel. The convening authority ordered an RCM 706 board.⁵⁴ The board found that due to his major depression with psychotic features and alcohol dependence, the accused was unable to appreciate the nature and quality of his conduct at the time he was absent.⁵⁵ The summarized record of trial reveals that the president of the RCM 706 board testified as an expert for the defense at trial.⁵⁶ Interestingly, there was no effort by the Government to rebut the defense expert with their own expert witness.⁵⁷ This will emerge as the key takeaway in each of the insanity defense acquittals as explained below.

Thus, in the first successful acquittal there was both a sanity board and a defense expert witness asserting that the accused was unable to appreciate his actions, with no formal rebuttal by expert witness from the prosecution. In other words, the first successful acquittal involves a failure by the prosecution to present a legitimate rebuttal case.

⁴³ *Mott*, 72 M.J. 319 at 322.

⁴⁴ *Id.* at 322.

⁴⁵ *Mott*, 2009 WL 4048019, at *3.

⁴⁶ *Id.* at *4.

⁴⁷ *Mott*, 72 M.J. 319.

⁴⁸ *Id.* at 326 (internal quotation marks omitted).

⁴⁹ *Mott*, 2009 WL 4048019, at *4.

⁵⁰ *United States v. Mott*, No. 20090015, 2012 WL 1514770, at *8 (N.M. Ct. Crim. App. Apr. 30, 2012).

⁵¹ *Mott*, 72 M.J. 319 at 326.

⁵² *U.S. v. Jones*, No. 9102516 (7th Infantry Division, Fort Ord, CA, 24 June 1991).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* (listing witnesses for both government and defense which shows no expert was called by the government).

2. *United States v. Parrish*

The second successful insanity defense acquittal is a 1995 court-martial involving multiple charges.⁵⁸ This case is the only other instance of a panel finding an accused not guilty due to lack of mental responsibility.⁵⁹ The accused, Private (PV1) Michael Parrish, was found guilty of an eight-day AWOL and for wrongful use of both cocaine and marijuana.⁶⁰ The insanity defense acquittal was for a violation of Article 91 of the UCMJ for disrespect to a Non-Commissioned Officer by calling him, “a red neck son of a bitch.”⁶¹

Although the same can be said for some of the other cases, this case is unique. There was no RCM 706 board, and the defense never provided notice that it would raise the defense of lack of mental responsibility.⁶² The defense did properly notify the Government that their expert witness would testify, “that hallucinations are a serious mental defect that can render a person unable to understand the nature, quality, or wrongfulness of their conduct for up to 10 days.”⁶³ Although there is no way of knowing whether the defense counsel was trying to pull a fast one, or simply did not understand the notice requirement, it is clear that under RCM 701(b)(2) they should have explicitly provided notice if they intended to introduce the defense of lack of mental responsibility.⁶⁴ Further, there does not appear to be any other reason why the expert’s testimony would be relevant on the merits.

However the defense team found themselves in this situation, they qualified their witness as an expert in psychiatric diagnosis, and he testified that he had treated PV1 Parrish, and that it was possible that delirium and substance abuse could render a person incapable of understanding their actions.⁶⁵ Once again, the Government offered no expert in rebuttal.⁶⁶ In an Article 39(a) session the judge ruled that although the defense failed to provide proper notice of the insanity defense, the evidence raised the issue so he was going to give the insanity defense instruction.⁶⁷ As a result, for the disrespect charge PV1 Parrish was found not guilty only because of a lack of mental responsibility.⁶⁸

Although it appears the defense counsel lucked out in getting the instruction read to the panel, the fact remains that once the evidence of lack of mental responsibility was raised the Government had the opportunity to ask for a delay to seek their own expert and failed to do so. This logic was specifically articulated to the Government by the judge during the Article 39(a) session discussing proposed instructions.⁶⁹ So again this is an instance of the defense putting on an expert to testify that the accused was not mentally responsible, with no expert witness rebuttal from the Government. Another interesting fact is that this is the only insanity defense acquittal that did not involve an RCM 706 board.

3. *United States v. Desanti*

The third successful instance of the insanity defense is *U.S. v. Desanti*, a 1995 judge-alone case involving many minor specifications including failure to report in violation of Article 86, failure to follow lawful orders in violation of Article 92, and breaking restriction in violation of Article 134.⁷⁰ The accused was found guilty for roughly half of these offenses, and was reduced to the grade of E-3.⁷¹ The only charge to which Specialist (SPC) Desanti was found not guilty by reason of lack of mental responsibility was one specification of escaping custody in violation of Article 95.⁷² The one specification of escaping custody carrying a maximum sentence of one year⁷³ was a drop in the bucket on the four-page charge sheet. However, the judge found that the accused was not mentally responsible, so there is value in determining what led to that result.

Interestingly, this is the only one of the seven cases examined where there was a RCM 706 board that found the accused mentally responsible at the time of the offense of which he was later acquitted of due to the insanity defense.⁷⁴ The trial defense counsel requested a second RCM 706 board after the initial board concluded that the accused was mentally responsible at the time of the crime.⁷⁵ After the judge denied this request, the defense requested that a new psychiatrist evaluate the accused outside the formal setting of an RCM 706 board.⁷⁶ This second Army psychiatrist diagnosed SPC

⁵⁸ *U.S. v. Parrish*, No. 9500746 (U.S. Army Air Defense Artillery Center, Fort Bliss, TX 1995).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Parrish*, No. 9500746.

⁶⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701(b)(2) (1995) [hereinafter 1995 MCM].

⁶⁵ *Parrish*, No. 9500746.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *U.S. v. Desanti*, No. 9402001 (U.S. Army Air Defense Artillery Center, Fort Bliss, TX 1995).

⁷¹ *Id.*

⁷² *Id.*

⁷³ 1995 MCM, *supra* note 67, pt. IV, ¶ 19e.

⁷⁴ *Desanti*, No. 9402001.

⁷⁵ *Id.*

⁷⁶ *Id.*

Desanti with opioid dependency and a head injury with neurological effects that could account for dementia or psychosis that would result in what he termed “deficiency of judgment.”⁷⁷

During the trial on the merits, the defense qualified the second psychiatrist as an expert, and elicited testimony that at the time SPC Desanti escaped from custody he had deficient judgment due to his head injury and opioid dependency, which “rendered him incapable of understanding the nature and quality of his acts.”⁷⁸ Once again, the Government, presumably comfortable with their favorable RCM 706 board findings or caught off guard by the fact that this was a derailed guilty plea, did not offer an expert in rebuttal.⁷⁹ The judge believed the accused proved by clear and convincing evidence that he could not understand what he was doing when he escaped from custody and acquitted him of that offense.⁸⁰

This case illustrates that if defense counsel seek an independent analysis after an unfavorable RCM 706 board, it may pay off. Further, the factor that makes payoff even more likely is if the Government, due to overconfidence or laziness, fails to offer an expert to rebut the defense’s claim of insanity.

4. *United States v. Guarnaccia*

The next case stands out as the strangest procedurally. Given the other insanity defense cases that make up the field of competition, that is no small accomplishment. Major Guarnaccia was charged with kidnapping, assault, masturbation in public, and rubbing women’s legs in department stores, the kind of crimes you would expect in a trial involving lack of mental responsibility.⁸¹ In this case, one issue leaps off the page, making all other analysis somewhat unhelpful, or at least insignificant. The defense and prosecution cooperated to come up with a deal where the defense would plead not guilty, but would agree to every element of every crime in a stipulation of fact in exchange for the prosecution conceding MAJ Guarnaccia’s insanity.⁸² In other words, the attorneys crafted a deal whereby MAJ Guarnaccia would inevitably be found not guilty by reason of lack of mental responsibility in order to speed him through the process to be admitted directly from his pretrial confinement into medical custody for treatment, a kind of homemade guilty plea.⁸³

There are other relevant facts that deserve some emphasis to explain the situation. First, some of MAJ Guarnaccia’s crimes were crimes of violence making it almost inevitable that he would not walk away free after his mandatory post-trial hearing to determine whether he was a threat to society.⁸⁴ Further, there was a sanity board that diagnosed the accused with bipolar disorder with psychotic features, and that he was not mentally responsible for any of his crimes but for one incident where he presented his middle finger to a television crew.⁸⁵ Finally, presumably helping the prosecution see the futility of seeking a conviction, the accused never showed any awareness of what was happening in that he never acted surprised or tried to run away when women were screaming while he was rubbing them or masturbating near them in public.⁸⁶

In the quest to find out when the insanity defense actually works at trial, this case should almost be tossed out. It is a covert guilty plea that probably only saw a courtroom because of some strange tactical decision, perhaps it was already on the docket and this solution was simpler than having him entered into military medical treatment confinement through other means. In that regard, there are potentially many similar cases that don’t show up in the ACCA records because the accused is obviously insane and the convening authority does not send it to trial. But as in all but one of the other successful insanity defenses, the Government did not put on a rebuttal case with an expert mental health witness to rebut the defense’s case.

5. *United States v. Jones (Again)*

The fifth of seven insanity defense acquittals is another *U.S. v. Jones*, in this case Sergeant John Jones, charged in 2009 with an eight-year desertion in violation of Article 85 of the UCMJ.⁸⁷ Using the summarized transcript and paperwork from the two RCM 706 boards in the record of trial, it is easy to see that this case is yet another example of the government failing to put on a rebuttal case.⁸⁸

The defense expert witness conducted two separate sanity boards and testified at trial.⁸⁹ It is unclear why she performed a second sanity board one month after the first one, but what is clear is that she changed her opinion from mentally responsible to not mentally responsible.⁹⁰ During both boards this expert diagnosed the accused with major depression

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *U.S. v. Guarnaccia*, No. 20011109 (25th Infantry Division, Schofield Barracks, HA 2001).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*; 1995 MCM, *supra* note 67, R.C.M. 1102A.

⁸⁵ *Guarnaccia*, No. 20011109.

⁸⁶ *Id.*

⁸⁷ *U.S. v. Jones*, No. 20090056 (3rd Infantry Division, Fort Stewart, GA 2009).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

without psychotic features and PTSD with schizotypal personality features, stemming from an abusive father and traumatic childhood experiences.⁹¹

The trial was a judge-alone contest in which the Government called only three lay witnesses to prove the absence.⁹² Perhaps the trial counsel was confident they would win because there was no evidence of a psychotic episode that a layperson would expect to see in an insanity case. The alternative is that they could not find an expert to rebut the defense case, or they were simply lazy. Either way, as in the previous four acquittals, the Government did not call a mental health expert at any point in the trial.⁹³

6. *United States v. Turner*

The sixth successful insanity defense is *U.S. v. Turner*, a 2012 judge-alone attempted premeditated murder case involving a stabbing of another Soldier.⁹⁴ The accused simply walked into the victim's room and stabbed him with a pocketknife with no provocation.⁹⁵

The mental health evaluations provide an interesting view into this case. The accused was in pretrial confinement for 414 days, including a period of time where he was found to lack the capacity to participate in his trial due to his schizophrenia and refusal to cooperate with medical personnel.⁹⁶ Nine months into his pretrial confinement, after refusing to participate in multiple mental health evaluations, the accused stated he was willing to cooperate with an RCM 706 board.⁹⁷ An Army forensic psychiatrist diagnosed the accused with paranoid schizophrenia and determined that he was unable to appreciate the nature and quality or wrongfulness of his actions at the time of the offense.⁹⁸

At trial, there was no disagreement about the basic facts. The accused even signed a stipulation of fact admitting that although he doesn't remember the stabbing, he believes he did it.⁹⁹ The defense called the RCM 706 psychiatrist as an expert witness.¹⁰⁰ She testified that the accused was suffering from paranoid schizophrenia when he stabbed the victim, and that she had her diagnosis peer-reviewed by colleagues at Walter

Reed Medical Center who agreed with her assessment.¹⁰¹ On cross examination, the expert weakened the Government's consciousness of guilt evidence by explaining that when the accused lied to investigators and changed his bloody pants he was likely trying to piece together the psychotic episode in his mind so he was not outright lying.¹⁰² At trial, the Government only called one witness, the victim, to tell the story of the stabbing itself.¹⁰³ The Government offered neither mental health testimony nor any legitimate attempt to explain the motive through witnesses or closing argument.¹⁰⁴ Yet again we see the prosecution failing to call an expert witness to rebut the defense's insanity defense. Private Turner was found not guilty by reason of lack of mental responsibility and was committed to medical confinement after a post-trial hearing due to the violent nature of the crime.

7. *United States v. Stovall*

The final case is interesting in that it did not turn up in the initial search for cases because it was filed simply as "not guilty" at ACCA instead of the proper "not guilty by reason of lack of mental responsibility."¹⁰⁵ This begs the question of whether more insanity acquittals have slipped through the cracks in this manner.

Private First Class Stovall was charged with murder in a judge-alone contest for killing a Hungarian contractor in Afghanistan with no provocation.¹⁰⁶ After psychiatric evaluations with varying opinions, a third sanity board found that the accused suffered from paranoid type schizophrenia and was not mentally responsible at the time of the murder.¹⁰⁷ As in *Turner*, the accused submitted a confessional stipulation, and simply argued that he was not mentally responsible at the time of the offense.¹⁰⁸ Interestingly, this is the only case in which the Government put on mental health experts to testify that the accused was mentally responsible that did not result in a conviction.¹⁰⁹ Although this result bucks the trend in that respect, a separate significant factor favored the defense in that the most recent sanity board found that the accused lacked mental responsibility at the time of the offense. Thus, although *Stovall* demonstrates that the defense

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *U.S. v. Turner*, No. 20120084 (Training and Doctrine Command, Joint Base Langley-Eustis, VA 2012).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *U.S. v. Stovall*, No. 20110866 (III Corps and Fort Hood, Fort Hood, TX 2011).

¹⁰⁶ Interview with Captain Patrick J. Hurst, Senior Trial Counsel, 1st Cavalry Division (Mar. 11, 2015).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

can succeed even in the face of Government mental health experts, the bar is still set high in that here the sanity board favored the defense.

8. Why Did the Insanity Defense Work?

Looking back at the seven successful instances of the insanity defense one can glean a few practical trends to assist trial counsel and defense counsel in the future. First and foremost, there is only one instance of an insanity acquittal where the Government put on an expert witness to testify that the accused was mentally responsible. Now it is likely that there are multiple convictions like *U.S. v. Mott* where the defense offered a mental health expert and the Government did not, but there is no way to confirm this and it would not diminish this key takeaway. Practically speaking, in an insanity case if the Government is not able to find an expert to rebut a defense expert, they should strongly consider working with the convening authority to find an alternate disposition.

Another relevant nugget is the fact that some of these acquittals involved diseases that do not have a psychotic component. Specifically, in the 2009 *U.S. v. Jones* case the diagnosis was depression and PTSD, in *U.S. v. Parrish* it was hallucinations due to substance abuse, and in *U.S. v. Desanti* the mental disorder was behavioral impairment due to opioid use and a head injury.¹¹⁰ This is relevant because RCM 706(c)(2)(A) attempts to exclude non-psychotic diseases from the definition of serious mental diseases or defects.¹¹¹ As mentioned above, this exclusion was found to be invalid, but it is enlightening to see cases confirm that the insanity defense can be successful with a non-psychotic serious mental disease or defect.

Highlighting the fact that these cases are rare, two out of the seven acquittals were not even genuine contested insanity defense cases, leaving only five discernible successes in the history of the Army. *Guarnaccia* was an odd guilty plea, and in *Parrish* the defense did not even put the Government on notice of the defense because the issue was not raised until discussion over panel instructions at the end of trial.¹¹²

There are a few other minor circumstances worth noting. First, the most recent five acquittals were products of judge-alone proceedings, and the only two panel acquittals were for minor AWOL crimes. Second, there is a fair mix of serious or violent crimes with simpler or minor crimes, with only two serious crimes involving pre-trial confinement and the

random violence you would expect with an insanity defense.¹¹³ Two cases, *Parrish* and *Desanti*, also stand out as odd in that both were decided in 1995 at Fort Bliss under the same General Court-Martial Convening Authority.¹¹⁴ However, although the defense counsel and trial counsel were the same for both cases, there were different judges, *Parrish* was before a panel and had no 706 board, and in *Desanti* there was no notice provided that the insanity defense would be used.¹¹⁵

Another circumstance that seems almost required before an acquittal can be expected is an RCM 706 board determination that the accused was not mentally responsible at the time of the crime. This is not absolute though since in *Desanti* the only sanity board conducted determined that he was mentally responsible, and in *Parrish* there was no RCM 706 board done at all.¹¹⁶ The benefit of this observation is that trial or defense counsel will often know the outcome of any sanity board well before trial, providing them plenty of time to apply the lesson in deciding how to proceed.

IV. Conclusion

Clearing the high bar of the insanity defense is no easy task for an accused, but it can be done. The most important factor in judging the likelihood of insanity defense success is not any action by the accused, but merely inaction by the Government. Failure to put on a Government mental health expert to rebut the insanity defense happened in six out of the seven cases where the insanity defense worked. Although helpful, this alone does not guarantee success for defense, as illustrated by CAAF's treatment of *Mott*. The second most significant trend is the fact that five of the seven acquittals involved an RCM 706 board that found the accused to lack mental responsibility at the time of the offenses. What is also interesting are the many factors that do not provide helpful trends, such as the many different types of mental diseases seen or minor offenses compared to serious and violent crimes.

Beyond the simple enjoyment of examining the colorful past of insanity cases in the Army, there are practical takeaways here for junior attorneys. Trial counsel must reach out to the Army's team of forensic psychiatrists for a second opinion when confronted with a sanity board that finds lack of mental responsibility. Defense counsel must continue to press the issue if they believe their client may not be mentally responsible, whether that means asking for a second sanity board or calling around to find favorable experts, in hopes that

¹¹⁰ *U.S. v. Jones*, No. 20090056 (3rd Infantry Division, Fort Stewart, GA 2009); *U.S. v. Parrish*, No. 9500746 (U.S. Army Air Defense Artillery Center, Fort Bliss, TX 1995); *U.S. v. Desanti*, No. 9402001 (U.S. Army Air Defense Artillery Center, Fort Bliss, TX 1995).

¹¹¹ MCM, *supra* note 2, R.C.M. 706(c)(2).

¹¹² *U.S. v. Guarnaccia*, No. 20011109 (25th Infantry Division, Schofield Barracks, HA 2001); *U.S. v. Parrish*, No. 9500746 (U.S. Army Air Defense Artillery Center, Fort Bliss, TX 1995).

¹¹³ *Guarnaccia*, No. 20011109; *U.S. v. Turner*, No. 20120084 (Training and Doctrine Command, Joint Base Langley-Eustis, VA 2012).

¹¹⁴ *Parrish*, No. 9500746; *Desanti*, No. 9402001.

¹¹⁵ *Parrish*, No. 9500746; *Desanti*, No. 9402001.

¹¹⁶ *Parrish*, No. 9500746; *Desanti*, No. 9402001.

the Government, due to either laziness or inability, will fail to meet the challenge.

Appendix A. Breakdown of Key Insanity Defense Cases

Case Name	Year	Verdict	Forum	Crimes	Crimes for which Acc. was found NG LOMIR	Was there a 706?	Result of 706	Disease or Defect	Govt Psych Expert at Trial?	Def Psych Expert at Trial?	Was 706 Psych an Expert at Trial?	Odd Issues at Trial
Jones, K.	1991	NG-LOMR	Panel	AWOL (2 months)	AWOL (only charge)	Yes	LOMR	Psychotic Depression, Alcohol Dependence	No	Yes	For Accused	
Parrish	1995	NG-LOMR	Panel	Multiple (AWOL, Drug Use)	Disrespect to NCO	No	N/A	Hallucinations, Substance Abuse	No	Yes	N/A	Def did not provide notice, but instruction raised by evidence
Desanti	1995	NG-LOMR	Judge	Multiple (AWOL, disrespect, etc)	95 (escape from custody)	Yes	Sane	Head Injury, Opioid Dependency	No	Yes	No	Failed Guilty Plea due to Providence Inquiry issues
Guarnaccia	2002	NG-LOMR	Judge	Multiple (Public Masturbation, Assault, etc)	All Charges	Yes (x2)	LOMR	Psychotic Bipolar Disorder, PTSD	No	No	No	Covert Guilty Plea, not really Contested
Jones, J.	2009	NG-LOMR	Judge	AWOL (8 year)	AWOL (only charge)	Yes (x2)	LOMR	Depression, PTSD	No	Yes	For Accused	
Turner	2012	NG-LOMR	Judge	Attempted Premeditated Murder	LO of only charge	Yes (x2)	LOMR	Paranoid Schizophrenia	No	Yes	For Accused	
Stovall	2011	NG-LOMR	Judge	Murder	All Charges	Yes (x3)	LOMR	Paranoid Schizophrenia	Yes	Yes	Unknown	Only case where insanity defense worked where a govt expert testified
Martin	2001	G (Affirmed)	Panel	Multiple (Fraud based)	None	Yes	LOMR	Bipolar	Yes	Yes	No	706 said LOMR, but still convicted
Mott	2013	G (Affirmed)	Panel	Attempted Premeditated Murder	None	Yes	LOMR	Paranoid Schizophrenia	No	Yes	For Accused	No govt expert, but still convicted

Making Money out of Thin Air: Wealth Management for the Reserve Soldier

Major Jennifer R. Cave*

*The more your money works for you, the less you have to work for money.*¹

I. Introduction

Understanding wealth management is a daunting task for anyone.² It is even more complicated for Soldiers serving in the United States Army Reserves (USAR).³ Many traditional Reservists of the USAR do not realize the wide range of benefits available to them.⁴ Furthermore, a new military retirement system becomes effective January 1, 2018, requiring unprecedented wealth management considerations from every Soldier with fewer than twelve years of service.⁵ A traditional Reservist can overcome these obstacles by using a basic understanding of wealth management to maximize USAR benefits and ultimately make money out of thin air.

Wealth management encompasses more than mere investment management. Wealth is not simply defined by the amount of money in a bank account. Wealth management is the administration of an individual's investments, finances, and estate plan.⁶ Standard wealth management accounts are defined benefit plans, defined contribution plans, individual retirement arrangements (IRAs), stocks, wills, and trusts. Everyone possesses some level of wealth, and therefore

should have a working knowledge of wealth management.⁷ Traditional Reservists need to understand a variety of wealth management principles because a majority of USAR benefits are outside of the form of a monthly drill pay.⁸

Traditional Reservists' benefits vastly exceed the benefits of other part time income sources.⁹ Most notably because the Army offers traditional Reservists two retirement plans, a pension (defined benefit (DB) plan), and the Thrift Savings Plan (defined contribution (DC) plan).¹⁰ It is uncommon for an employer to offer part-time employees any retirement plan. It is even more uncommon for an employer to offer a combination of DB and DC plans.

In fact, as of 2013, only 7% of all Fortune 500 companies offered new, full-time employees a DB plan, a drop from roughly 50% in 1998.¹¹ Employers are primarily offering only DC plans to full-time employees.¹² Most part-time employees are not offered either a DC or DB plan.¹³

The retirement planning burden is clearly shifting from employers to employees, and employees are not maximizing

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¹ Idowu Koyenikan, *Money Management Quotes*, GOODREADS, <http://www.goodreads.com/quotes/tag/money-management> (last visited Feb. 23, 2016).

² David Serchuk, *Why You Need a Wealth Manager*, FORBES (Mar. 24, 2009), <http://www.forbes.com/2009/03/24/wealth-manager-adviser-intelligent-investing-financial-planning.html>.

³ Benefits earned from military service are not congruent with civilian employment benefits in the author's professional opinion.

⁴ For the purpose of this article, "traditional Reservist" refers to Troop Program Unit (TPU) and Individual Mobilization Augmentee (IMA) Soldiers of the Selected Reserve of the USAR as defined by Army Regulation 140-10. U.S. DEP'T OF ARMY, REG. 140-10, ARMY RESERVE ASSIGNMENTS, ATTACHMENTS, DETAILS, AND TRANSFERS para. 2-4a (15 Aug. 2005) [hereinafter AR 140-10]. This article does not address Active Guard Reserve (AGR) or National Guard benefits. National Guard members should contact their respective state benefit resources for information. Active Guard Reserve members receive benefits closely aligned with Active Duty Soldiers and are encouraged to read Lieutenant Colonel Samuel W. Kan's article about wealth

management. See Lieutenant Colonel Samuel W. Kan, *Setting Servicemembers Up for More Success: Building and Transferring Wealth in a Challenging Economic Environment—A Tax and Estate Planning Analysis*, ARMY LAW., Jan. 2010, at 52.

⁵ See *infra* Appendix B for details of new military retirement system contained in the Fiscal Year 2016 National Defense Authorization Act.

⁶ Richard LaCross, *The True Meaning of Wealth Management*, BUSINESS BLOG (Sept. 11, 2011), <http://www.kahnlitwin.com/blogs/business-blog/the-true-meaning-of-wealth-management>.

⁷ For example, Service Group Life Insurance (SGLI) and the Thrift Savings Plan (TSP) are available sources of wealth for all Soldiers. See *infra* Part III.B. and E.

⁸ *Transitioning to the Reserve When you leave Active Duty*, MILITARY ONE SOURCE, http://www.militaryonesource.mil/transition?content_id=271683 (last visited Feb. 23, 2016).

⁹ *Id.*

¹⁰ The Army's Defined Benefit (DB) and Defined Contribution (DC) plans are explained in further detail later in the article. See *infra* Part III.A., B.

¹¹ Brendan McFarland, *Retirement in Transition for the Fortune 500: 1998 to 2013*, TOWERS WATSON (Sept. 3, 2014), <https://www.towerswatson.com/en/Insights/Newsletters/Americas/Insider/2014/retirement-in-transition-for-the-fortune-500-1998-to-2013>.

¹² Olga Dow, *5 Ways Part-Time Employees Can Take Advantage of 401(k) Plans*, TRANSAMERICA (Dec. 15, 2014), <http://blog.transamerica.com/5-ways-part-time-employees-can-take-advantage-401k-plans#.Vk-LIP7otMs>.

¹³ *Id.*

their retirement plan contributions.¹⁴ Employees only contribute an average 7% of their income to their employer's DC plan.¹⁵ In 2013 only 12% of DC plan participants saved the highest contribution limit.¹⁶ Traditional Reservists have a rare opportunity to offset this burden by capitalizing on the Army's lucrative DB and DC plans.

The Army's DB and DC plans are not the only wealth management prospects available to traditional Reservists. This article analyzes a wide variety of wealth management benefits available to traditional Reservists. The benefits are categorized into two main topics: priceless free cheese¹⁷ and service/pre-retirement-specific wealth management considerations. This article is not meant to be the sole source of wealth management information for traditional Reservists, but rather a helpful starting point, hopefully inspiring long term ownership of a wealth management portfolio. Additionally, this article provides valuable insight for Active Duty Soldiers contemplating leaving active duty, and contemplating transferring to the USAR.

II. Priceless Free Cheese

"Priceless Free Cheese" refers to the wealth management tools the Army provides to traditional Reservists. These same tools are available in the civilian sector, but at a cost.¹⁸ Traditional Reservists who take advantage of "priceless free cheese" not only save the cost of the service, but also gain the benefit of the service itself provides. The Army's legal assistance program provides a majority of "Priceless Free Cheese" available to traditional Reservists.

A. The Army's Legal Assistance Program

The Army's legal assistance program supports the military's necessities of readiness, morale, discipline, and retention of a quality force.¹⁹ Additionally, the program has the ability to provide wealth management tools to traditional Reservists. Unfortunately, most traditional Reservists only

take advantage of this invaluable program during premobilization preparations.²⁰ This is problematic because premobilization preparations are customarily limited to a simple will and powers of attorney.²¹ More robust legal assistance services related to wealth management are available to traditional Reservists.

Traditional Reservists must be proactive in obtaining legal assistance services. They should seek out fellow USAR members in the Judge Advocate General's (JAG) Corps for legal assistance services, regardless of the judge advocate's duty assignment.²² Furthermore, traditional Reservists in a duty status are authorized access to active duty legal assistance office.²³ Military One Source online is also helpful source for locating a servicing legal assistance office.²⁴ The additional effort is worth the cost in both the short and long run.

Traditional Reservists who use legal assistance services for wealth management gain long-term financial benefits through the legal service provided, as well as save money in costs in the short term.

B. Types of Legal Services Beneficial for Wealth Management

The Army's legal assistance program offers numerous types of legal services, ranging from consultation to in-court representation.²⁵ Consultation is always the first step. In-court representation is ordinarily outside the scope of the legal assistance services provided to traditional Reservists,²⁶ but also is seldom required for wealth management. On average, traditional Reservists, on average, only need consultation and basic legal document preparation to execute a substantial wealth management plan. The future benefits and the immediate costs saved from using the Army's legal assistance services are a great example of making money out of thin air.

The principal benefit of legal assistance services for traditional Reservists is the initial consultation. Consultation with a new client is the best way to determine if and how to

¹⁴ *How America Saves 2014*, VANGUARD 26 (Mar. 31, 2014), https://pressroom.vanguard.com/content/nonindexed/How_America_Saves_2014.pdf. Vanguard is one of the nation's leading DC plan asset management companies.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Priceless free cheese is the author's term of art for any wealth management-related advice or assistance available to traditional Reservists.

¹⁸ For example, will drafting is a zero-cost benefit for eligible Soldiers and Family members that would cost money in the civilian sector.

¹⁹ U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 2-1(b)(1)-(4) (21 Feb. 1996) (RAR 13 Sept. 2011) [hereinafter AR 27-3].

²⁰ Known formally as premobilization legal preparation (PLP). A PLP includes legal assistance counseling, and the preparation and execution of necessary legal documents for reserve component members alerted for

mobilization. Additionally, their Family members are eligible for legal assistance at PLPs. A PLP is very similar to Soldier Readiness Program (SRP) processing. *Id.* glossary, sec. II, terms.

²¹ *Id.* para. 2-5a(2)(c).

²² *Id.* paras. 2-2a(4), (5), b.

²³ *Id.* para. 2-5a.

²⁴ *Military Installations*, MILITARY ONE SOURCE, <http://www.militaryinstallations.dod.mil/MOS/f?p=MI:ENTRY:0> (last visited Feb. 23, 2016). The Military Installations webpage is the official Department of Defense source for installation and state resources available to active duty, guard, and reserve service members. *Id.*

²⁵ AR 27-3, *supra* note 17, para. 3-7.

²⁶ *Id.* para. 3-7g.

proceed on any matter. Sometimes, the best way to proceed is referring the matter to a civilian lawyer. Other times, preparing a legal document is the best way to proceed.

Regardless of the resulting decision from the initial consultation, the real value is the opportunity to consult, cost free, with a lawyer. Not all civilian attorneys offer free consultation. Not only are legal assistance services cost saving, legal assistance attorneys can be an invaluable resource for wealth management advice.

Consultation often leads to document preparation for wealth management purposes. Legal document preparation includes the drafting, completion, and execution of documents. Legal assistance products include wills, trusts, powers of attorney, advance medical directives, income tax returns, and other legal documents.²⁷ Based on the availability of expertise and resources, more complex documents such as separation agreements and *inter vivos* trusts may also be prepared.²⁸ Not every legal assistance office will have the resources to offer legal document preparation for every type of legal document. The supervising attorney in each legal assistance office determines the scope of services offered to clients.²⁹

In addition to saving the cost to prepare a legal document is the long-term wealth management benefit triggered by the legal document. Executing a simple will is a case in point.³⁰ A will is the declaration by a person (the testator) of how the testator desires the testator's property to be disposed of after the testator's death.³¹ The cost of a will executed in the civilian sector can range from \$500 to \$1000.³² A will can prevent excessive probate across a multitude of estate issues, such as property disposition, tax payments, and the appointment of guardians for minor children.³³ These wealth management matters can be very costly to an estate if not planned for properly. Saving document production costs of a will combined with the long-term benefits of having a well-executed will are two more examples of making money out of thin air.

C. Types of Wealth Management Cases Serviced by Legal

²⁷ *Id.* para. 3-6b.

²⁸ *Id.* para. 3-7e.

²⁹ *Id.* para. 3-5c(1).

³⁰ See *infra* Appendix C for an example of a legal assistance will worksheet.

³¹ AR 27-3, *supra* note 19, glossary, sec. II, terms.

³² Charlie Gaston, *What does a Simple Will Cost?*, EHOW LEGAL (May 5, 2009), http://www.ehow.com/facts_5018851_simple-cost.html.

³³ See *infra* Appendix C for an example of a legal assistance estate planning worksheet.

³⁴ AR 27-3, *supra* note 19, para. 3-6.

Assistance.

The services provided to traditional Reservists through legal assistance encompass various types of cases. Family law, estate planning, real property, personal property, economic, and taxes are common types of cases related to wealth management.³⁴ Not all issues are entitled legal assistance services. Army Regulation (AR) 27-3 lists what types of cases are entitled legal assistance.³⁵ For example, estate matters regarding wills, testamentary trusts for the benefit of minors, guardianships, the designation of beneficiaries under life insurance policies, advance medical directives, and anatomical gift designations are services listed in AR 27-3.³⁶ Additional assistance on other estate matters are provided based on the availability and expertise of resources.³⁷ The key for any traditional Reservist seeking legal assistance is to inquire as to what types of cases and services a particular office provides. Inquiries cost nothing, but may help make money out of thin air.

III. Service/Pre-Retirement-Specific Wealth Management Considerations

Pre-retirement wealth management strategies dictate the amount of financial security in retirement. Fortunately, serving in the USAR provides traditional Reservists with generous wealth management opportunities. The biggest opportunities are a defined benefit plan, defined contribution plan, home loan assistance, healthcare insurance savings, life insurance benefits, and educational benefits. Vigilant planning to maximize these prospects can yield enormous dividends in retirement, and only requires minimal upfront costs.

A. Defined Benefit Plan

The Army offers a DB retirement plan to traditional Reservists.³⁸ Defined benefit plans are a rare option for employees these days, predominantly because such plans are very expensive for employers to maintain.³⁹ A DB plan delivers retirement income based solely the employee's earning history, length of service, and age.⁴⁰ These employer

³⁵ *Id.* para. 3-5c.

³⁶ *Id.* para. 3-6b. See *infra* Appendix C for an example of an estate planning worksheet.

³⁷ *Id.* para. 3-6b.

³⁸ 10 U.S.C.S. § 12739 (LexisNexis 2015). 26 U.S.C.S. § 414(j) (LexisNexis 2015).

³⁹ *What Is the Difference Between a Defined Benefit Plan and a Defined Contribution Plan?*, TIME (May 20, 2014), <http://time.com/money/2791222/difference-between-defined-benefit-plan-and-defined-contribution-plan/>.

⁴⁰ *Defined Benefit Plans (DB) vs. Defined Contribution (DC) Plans*, UTAH EDUCATION ASSOCIATION RESEARCH REPORTS (Jan. 5, 2007), <http://www.myuea.org/Uploads/files/Resources/Research/DBvsDCPlan.pdf>.

managed pension plans distribute benefits through life annuities. Life annuities pay equal periodic benefits for the life of the retiree.⁴¹ The straightforwardness of a structured retirement plan such as an annuity simplifies retirement budgeting. The periodic payments last throughout retirement and give retirees a predictable income for budget. The Army's DB plan is one of the chief means for traditional Reservists to make money out of thin air because no upfront costs are required.

The secret to successfully incorporating a DB plan into an overall wealth management strategy is twofold. First, plan participants need to understand the DB plan's basic eligibility requirements. Second, plan participants need to understand the formula used to determine the DB plan's disbursement. A traditional Reservist is vested in the Army's DB plan after twenty years of qualifying service.⁴² As with active duty, leaving the military before twenty years of qualifying service negates any DB benefits. An important characteristic of the Army's DB plan concerning traditional Reservists is that monthly disbursements do not start until age sixty.⁴³ For a traditional Reservist retiring at age forty, twenty-two years will pass before DB plan disbursements begin. The formula used to determine a traditional Reservist's monthly disbursement is based on the calculated retired pay base multiplied by the applicable multiplier percentage.⁴⁴

A savvy wealth management planner can forecast monthly disbursement payments and use them as a foundation for a retirement budget. For example, use other retirement sources' funds for living expenses and use Army pension disbursements to pay debts such as mortgages, car payments, or tuition. Income tax rates can also be projected based on disbursement payments. This is important for wealth

management because retirees have less time to recover from financial losses such as unanticipated tax increases.

B. Defined Contribution Plan

The Army offers traditional Reservists a DC retirement plan, meant to supplement the Army's DB plan.⁴⁵ A DC plan is defined as:

A plan which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.⁴⁶

There is no way to calculate exactly how much a DC plan will ultimately be worth upon an employee's retirement. A DC plan is portable, unlike a DB plan. This means employees can change jobs and easily take their existing DC plan to another company or qualifying individual account.⁴⁷

The cost of investing is a top consideration when choosing a DC plan. Small differences in costs can dramatically affect a plan's performance over time.⁴⁸ Employees are charged for two services.⁴⁹ First, there are the costs of running the plan. These include administrative expenses, paperwork, marketing, and mailings. Second, there are the costs of managing the investments. These fees account for a majority of DC plan fees.⁵⁰

The Army's DC Plan is the Thrift Savings Plan (TSP). In 2014, TSP costs, or net expenses, averaged .029%.⁵¹ Similarly-sized DC plans averaged 1.03% in net expenses.⁵²

⁴¹ *Id.*

⁴² 10 U.S.C.S. § 12739(a)(2) (LexisNexis 2015).

⁴³ 10 U.S.C.S. § 12731(f)(1) (LexisNexis 2015). Retirement payments do not start before age 60 except in the circumstance where the Soldier was recalled to active duty or, in response to a national emergency, called to certain active service after January 28, 2008. 10 U.S.C.S. § 12731(f)(2) (LexisNexis 2015). In such cases, the age 60 requirement is reduced by 3 months for each cumulative period of 90 days so performed in any fiscal year after that date. *Id.*

⁴⁴ 10 U.S.C.S. § 12739 (LexisNexis 2015). For all Army DB plans established before January 1, 2018, the retirement pay formula equals the calculated monthly retired pay base multiplied by 2.5%, up to 75%. *Id.* Base pay is based on two factors. The first factor is the applicable retirement plan in effect for the qualified retiree. Currently, only the Final Pay or the High-36 Month Average plans are in effect. *Id.* The retired pay base under the Final Pay plan is the monthly basic pay determined at the rate applicable on the day of retirement at the highest grade satisfactorily held during service. The retired pay base for the High-36 Month Average Plan is the total amount of monthly basic pay to which the member was entitled during the member's high-36 months divided by 36. *Id.* The second factor in determining base pay is the retiree's number of credible years of service for retired pay. For retirement pay purposes, years of service are determined by adding all periods of active service (counted as one point for each day) plus all points earned through qualifying reserve duty, not exceeding annual limits, divided by 360. *Id.* Any Soldier, including traditional Reservists, entering service after January 1, 2018, or Soldiers with less than twelve years of service who opt into the new plan, will receive a retirement equal

to their monthly retired base pay multiplied by 2.0%, up to 75%. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No 114-92, 129 Stat. 726 (2015).

⁴⁵ 37 U.S.C.S. § 211 (LexisNexis 2015).

⁴⁶ 26 U.S.C.S. § 414(i) (Lexis Nexis 2015).

⁴⁷ 4 *Advantages of a Defined Contribution Plan*, FINWEB.COM (Apr. 28, 2010), <http://www.finweb.com/retirement/4-advantages-of-a-defined-contribution-plan.html#axzz40jOR2WTR>.

⁴⁸ *About the TSP, Purpose and History*, THRIFT SAVINGS PLAN, <https://www.tsp.gov/PlanParticipation/AboutTheTSP/index.html> (last visited Feb. 24, 2016).

⁴⁹ Ben Steverman, *An Investor's Guide to Fees and Expenses 2014*, BLOOMBERG BUSINESS (Oct. 8, 2014), <http://www.bloomberg.com/news/articles/2014-10-08/an-investor-s-guide-to-fees-and-expenses-2014>.

⁵⁰ *Id.*

⁵¹ *Expense Ratio*, THRIFT SAVINGS PLAN, <https://www.tsp.gov/InvestmentFunds/FundsOverview/expenseRatio.html> (last visited Feb. 24, 2016).

⁵² Matthew Amster-Burton, *What Do You Think of the Thrift Savings Plan?*, NASDAQ (May 21, 2013), <http://www.nasdaq.com/article/what-do-you-think-of-the-thrift-savings-plan-cm247633>.

That means the average DC plan is thirty-eight times more expensive than the TSP. In application, the TSP averaged a mere \$0.29 in expenses for every \$1,000 invested. This pales in comparison to the \$10.30 average. For a \$100,000 portfolio, that is an annual cost difference of \$1,001. Saving that \$1,000 in costs equates to contributing an additional \$1,000 annually. That annual contribution of \$1,000 to a \$100,000 fund that compounds at 3% annually, adds an additional \$28,000 in value over twenty years.⁵³ This is a very plausible scenario for a traditional Reservist who retires at age forty with a \$100,000 TSP balance and does not continue contributing and makes no withdrawals before age sixty. Such dramatic cost savings ensure growth over time through compound interest. Undoubtedly, the TSP can help investors make money out of thin air.

A payroll deduction from monthly drill pay is obviously not sufficient income to adequately fund the TSP as a lucrative retirement benefit plan. Fortunately, there are two other ways to move money into a TSP account in addition to a payroll deduction. Plan participants may transfer money directly from another DC plan to the TSP, or participants may individually roll over money from another DC plan into the TSP.⁵⁴ In 2014, the total amount of transfers and rollovers into the TSP eclipsed \$1 billion.⁵⁵

The differences between a transfer and roll over into the TSP are negligible, but the advantages of both are substantial. First, consolidating money into the low-cost TSP avoids higher net fund expenses or low-balance fees of other accounts.⁵⁶ Second, consolidation makes it easier to monitor gains and losses and adjust investments accordingly.

⁵³ *How Much Will My Savings Grow?*, THRIFT SAVINGS PLAN, <https://www.tsp.gov/PlanningTools/Calculators/howSavingsGrow.html> (last visited Feb. 24, 2016).

⁵⁴ *Rollovers and Transfers into the TSP*, THRIFT SAVINGS PLAN, <https://www.tsp.gov/PlanParticipation/EligibilityAndContributions/RolloversTransfers/index.html> (last visited Feb. 24, 2016). A rollover occurs when a traditional IRA owner receives money from a non-TSP traditional IRA account and deposits it into the TSP's within 60 days of receipt. *Id.* Unlike payroll deductions, transfers and roll-overs are not subject to annual contribution limits. *Id.*

⁵⁵ *Summary of the Thrift Savings Plan*, THRIFT SAVINGS PLAN, <https://www.tsp.gov/PDF/formspubs/tspbk08.pdf> (last visited Feb. 24, 2016).

⁵⁶ Sandra Block, *Consolidate Your Individual Retirement Accounts*, KIPLINGER'S PERSONAL FINANCE (Mar. 2015), <http://www.kiplinger.com/article/investing/T032-C000-S002-consolidate-individual-retirement-accounts-iras.html#>.

⁵⁷ *Id.*

⁵⁸ *Annual Returns*, THRIFT SAVINGS PLAN, <https://www.tsp.gov/InvestmentFunds/FundPerformance/annualReturns.html> (last visited Feb. 24, 2016). The ten-year compound percentage for TSP Individual Funds ranged from 2.94% to 8.03%. *Id.* The TSP's Lifecycle funds also show positive historic rates of return. *Id.*

⁵⁹ *Fund Management*, THRIFT SAVINGS PLAN, <https://www.tsp.gov/InvestmentFunds/FundsOverview/index.html> (last visited Feb. 24, 2016).

Managing one account can prevent overlooking a minimum withdrawal requirement during retirement. The tax penalty for such a mistake is half of the amount that should have been withdrawn.⁵⁷ It would be a very rare case to not consolidate retirement savings into the TSP.

Effective DC plans earn positive returns on investment and offer diversification of investments. The TSP is a very stable, uncomplicated, and dependable DC plan with a history of positive returns.⁵⁸ The TSP consists of a selection of individual and lifecycle funds that offer broad market diversification.⁵⁹ One of the five individual funds is a government securities investment fund.⁶⁰ This fund is a nonmarketable U.S. Treasury security that is guaranteed by the U.S. government.⁶¹ This means that the fund will not lose money on investments.⁶² The other four individual funds are index funds.⁶³ An index fund is a type of mutual fund with a portfolio constructed to match or track the components of a market index. Each TSP index fund is invested in order to replicate the specific risk and return characteristics of its corresponding benchmark index.⁶⁴ Each TSP index fund exceeded its corresponding benchmark index's annual rate of return, when averaged over the past 5 years.⁶⁵ Each fund also carries at least a 4.2% average annual return since inception.⁶⁶

The TSP also offers five lifecycle funds, each with a particular time horizon or target retirement date.⁶⁷ Each lifecycle fund is invested in the five individual TSP funds through professionally designed asset allocations that automatically reduce risk as the date of withdrawal approaches.⁶⁸ The longer-dated lifecycle funds are expected to outperform their mutual fund category peers.⁶⁹ Overall,

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *What is an Index Fund*, INVESTOPEDIA, <http://www.investopedia.com/terms/i/indexfund.asp> (last visited Feb. 24, 2016).

⁶⁴ *Fund Management*, *supra* note 59. For example, the C Fund is "invested in a stock index fund that fully replicates the Standard and Poor's 500 (S&P 500) Index, a broad market index made up of the stocks of 500 large to medium-sized U.S. companies. *Id.*

⁶⁵ *Annual Returns*, THRIFT SAVINGS PLAN, <https://www.tsp.gov/InvestmentFunds/FundPerformance/annualReturns.html> (last visited Feb. 24, 2016).

⁶⁶ *Summary of Returns*, THRIFT SAVINGS PLAN, <https://www.tsp.gov/InvestmentFunds/FundPerformance/returnSummary.html> (last visited Feb. 24, 2016).

⁶⁷ *Lifecycle Funds*, THRIFT SAVINGS PLAN, <https://www.tsp.gov/InvestmentFunds/FundOptions/index.html> (last visited Feb. 24, 2016).

⁶⁸ *Expense Ratio*, *supra* note 51.

⁶⁹ Christine Benz, *A TSP Checkup*, MORNINGSTAR (Apr. 26, 2015), <http://news.morningstar.com/articlenet/article.aspx?id=694560>. Remarkably, the L Income fund, designed for immediate withdrawal, held much of its value during the rough financial patch in 2008 by only losing

lifecycle funds carry a positive average annual return chiefly because they are a blend of the TSP's well-performing individual funds.⁷⁰

Another big advantage of the TSP are tax treatment options for contributions. Plan participants can make traditional (pre-tax) and/or Roth (after-Tax) contributions.⁷¹ Traditional contributions are tax deferred, but any earnings are taxed upon withdrawal. Roth contributions, a recent addition to DC plans, are taxed at the time of contribution and all withdrawals are tax-free.⁷² With a Roth, upfront tax pain is traded for long-term gains.

Younger TSP participants benefit the most from the Roth because of the extended time their money grows tax-free. Low to moderate income TSP participants can greatly benefit from the Roth if they expect to have a higher tax burden from higher income during retirement.

Thrift Savings Plan participants do not have to choose just one tax treatment option. Having both options allows TSP participants to hedge their bets tax wise.⁷³

Effective January 1, 2018, blended retirement military TSP plan participants will be eligible to receive matching contributions.⁷⁴ This is a huge benefit for TSP military participants. Currently, only federal employees qualify for matching contributions, up to 5% of their income.⁷⁵ Matching contributions have no impact on income in the year of the contribution, and the matching contributions go into a traditional TSP plan.⁷⁶ As a result, distributions of matching contributions, and the earnings on those contributions, are taxable.⁷⁷ For all TSP participants, each dollar of matching contributions is free money from the government.

The savings in expenses, return rates, tax investment

5% of its value, compared to the 18% average. *Id.*

⁷⁰ *Summary of Returns, supra* note 66.

⁷¹ *About the TSP, Purpose and History, supra* note 48. Tax-exempt contributions are also possible and their earnings are subject to tax. For example, tax free deployment based contributions. *Id.* See *infra* Appendix D for a Traditional and Roth Comparison Matrix.

⁷² *Tax Treatment of Your Contributions, THRIFT SAVINGS PLAN*, <https://www.tsp.gov/PlanParticipation/EligibilityAndContributions/TaxTreatment/index.html> (last visited Feb. 24, 2016).

⁷³ If tax rates increase with time, the tax-free distributions from Roth will be the better investment. However, if tax rates fall, a tax deduction on contributions makes the traditional plan the better investment.

⁷⁴ National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726 (2015).

⁷⁵ *Summary of the Thrift Savings Plan, supra* note 55.

⁷⁶ *Agency Matching Contributions, THRIFT SAVINGS PLAN*, <https://www.tsp.gov/PlanParticipation/EligibilityAndContributions/typesOfContributions.html> (last visited Feb. 24, 2016).

⁷⁷ *Id.*

⁷⁸ *Top 10 Ways to Prepare for Retirement, UNITED STATES*

options, and agency matching contributions demonstrate how the TSP helps a traditional Reservist make money out of thin air. Experts estimate that retirees need at least 70% of their preretirement income to maintain the same standard of living in retirement.⁷⁸ The Army's DB plan enhanced by the TSP will help aid in reaching that goal.

C. Home Loans

On average, first-time homebuyers are in their early thirties, mostly unmarried, and purchasing homes that cost 2.6 times their annual income.⁷⁹ In the 1970s over half of first-time homebuyers were married, but rarely dual income, and homes cost only 1.7 times their salary.⁸⁰ Over the last few decades, increases in housing prices have outpaced increases in income.⁸¹ For prospective homebuyers, this means a greater portion of income must be set aside to make a down payment on a home. This can be especially difficult when student loans, car loans, and revolving debt repayments are also competing against saving for a home. Homebuyers lucky enough to secure a mortgage for less than 20% down are often required to pay private mortgage insurance (PMI) premiums.⁸² However, mortgage payments are affordable because interest rates for mortgages are low.⁸³ The biggest hurdle for potential home buyers is saving for a down payment, not paying the monthly mortgage payment. Fortunately, traditional Reservists can make money out of thin air by means of avoiding both PMI and a large down payment.

The Veterans Administration (VA) offers a mortgage loan program to help all Soldiers, veterans, and eligible surviving spouses become homeowners.⁸⁴ These loans are provided by private lenders, such as banks and mortgage

DEPARTMENT OF LABOR (Sept. 2015), http://www.dol.gov/ebsa/publications/10_ways_to_prepare.html.

⁷⁹ *Zillow: Average First-Time Homebuyer 33 Years of Age*, NATIONALMORTGAGEPROFESSIONAL.COM (Aug. 20, 2015), <http://nationalmortgageprofessional.com/news/55433/zillow-average-first-time-homebuyer-33-years-age>.

⁸⁰ *Id.*

⁸¹ Chris Matthews, *Young People Can Afford Homes, They Just Don't Want To Be Homeowners*, FORTUNE (Aug. 18, 2015), <http://fortune.com/2015/08/18/young-people-can-afford-homes-they-just-dont-want-to-be-homeowners/?iid=lefttrail>. Since 1990, median income has only risen \$2,000 while median home prices have jumped \$40,000. *Id.*

⁸² *Private Mortgage Insurance*, Investopedia, <http://www.investopedia.com/terms/p/privatemortgageinsurance.asp> (last visited Feb. 25, 2016). Private Mortgage Insurance is a risk-management product that protects lenders if the borrower defaults. *Id.* Most lenders require PMI when a buyer puts down less than 20% of the home's value upon purchase. *Id.* Borrowers pay PMI monthly until the lender considers the borrower no longer a high risk. *Id.* PMI payments do not go toward the mortgage. *Id.*

⁸³ Matthews, *supra* note 81.

⁸⁴ 38 U.S.C.S. § 3710 (LexisNexis 2015).

companies.⁸⁵ Lenders process VA home loans under a federally backed guarantee. The guarantee is that the federal government, not the borrower, would assume up to 25% of a VA loan if the borrower defaults.⁸⁶ These loans are not limited to first-time homebuyers, as it is a reusable benefit.⁸⁷

The most valuable benefit of VA loans is the federally-backed guarantee. This guarantee enables lenders to provide more favorable terms, including 100% financing with no PMI premium requirement.⁸⁸ Without a down payment requirement, a buyer only needs minimal cash to cover closing costs.⁸⁹ To offset the cost of VA loans to taxpayers, the VA charges a funding fee that is due at closing time.⁹⁰ Borrowers have the option of financing this minimal fee or paying it in cash.⁹¹

The VA offers two type of home loans: purchase or cash-out refinance loans. A purchase loan is meant to help secure a mortgage at a competitive interest rate, especially for borrowers with difficulty securing other financing.⁹² Cash-out refinance loans are for homeowners who want to take cash out of their home equity to take care of concerns like paying off debt, funding school, or making home improvements.⁹³ The cash-out refinance loan option can also be used to refinance a non-VA loan into a VA loan.⁹⁴ Regardless of the type of loan, if a borrower pays off a VA loan early, the lender cannot charge a penalty fee.⁹⁵ Ultimately, the VA home loan program is a great benefit for traditional Reservists who want

to purchase a home.

D. Healthcare Insurance

Healthcare insurance⁹⁶ is a massive expensive drain on the average household's income, and plans offered by employers are no exception. From 2005 to 2015, the cost of employer offered family healthcare insurance increased 61%. Employers did not completely absorb the additional costs. Employee contributions to premiums increased 85% for family coverage over the same ten-year span.⁹⁷ Forecasting family healthcare insurance premium costs in the near future will be guesswork, at best. Fortunately, traditional Reservists have access to a historically cheaper option.

TRICARE Reserve Select (TRS) is the military's health insurance plan for traditional Reservists and their families.⁹⁸ It is a relatively new healthcare insurance plan, as it only launched in 2005.⁹⁹ Three years after launching, TRS analysts discovered that family rate premiums exceeded the costs of providing program benefits.¹⁰⁰ Premium rates were adjusted accordingly, and family premiums decreased 29% in 2009.¹⁰¹ Since then, costs have increased 15% for family coverage, compared to the 27% average national rate increase during the same time period.¹⁰² Given those trends of increasing costs in monthly premiums, the TRS family plan is frequently the better alternative for employer-provided family healthcare insurance coverage. For example, in 2014, employees paid on average \$402 per month for family

⁸⁵ 38 U.S.C.S. § 3702(d) (LexisNexis 2015).

⁸⁶ 38 U.S.C.S. § 3710(e)(1)(D) (LexisNexis 2015). The VA does not set a cap on the amount a borrower can borrow to finance a home. 38 U.S.C.S. § 3703(a) (LexisNexis 2015). However, there are limits on the amount of liability VA can assume, which usually affects the amount of money an institution will lend you. 38 U.S.C.S. § 3703 (LexisNexis 2015). The loan limits are the amount a qualified Veteran with full entitlement may be able to borrow without making a down payment. *Id.* These loan limits vary by county, since the value of a home depends in part on its location. 38 U.S.C.S. § 3703(a)(1)(ii)(C) (LexisNexis 2015). For example, if a borrower needs a \$500,000 loan in a county with a maximum loan limit of \$417,000, the lender will usually require a down payment on the difference (\$500,000-417,000) because the borrower is liable for the amount above the VA loan limit.

⁸⁷ 38 U.S.C.S. § 3703(a)(1)(ii)(B) (LexisNexis 2015).

⁸⁸ *Loan Fees*, U.S. DEPARTMENT OF VETERANS AFFAIRS, http://www.benefits.va.gov/homeloans/purchaseco_loan_fee.asp (last visited Feb. 24, 2016).

⁸⁹ See *generally id.* (describing closing costs associated with VA loans).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Purchase & Cash-Out Refinance Home Loans*, U.S. DEPARTMENT OF VETERANS AFFAIRS, <http://www.benefits.va.gov/HOMELOANS/purchasecashout.asp> (last visited Feb. 24, 2016).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Health insurance is a type of insurance coverage that pays for medical and surgical expenses that are incurred by the insured. *Health Insurance*, INVESTOPEDIA, <http://www.investopedia.com/terms/h/healthinsurance.asp#ixzz40uflNpi7> (last visited Feb. 24, 2016). Health insurance can either reimburse the insured for expenses incurred from illness or injury or pay the care provider directly. *Id.* Health insurance is often included in employer benefit packages. *Id.*

⁹⁷ *2015 Employer Health Benefits Survey*, KFF.ORG (Sept. 22, 2015), <http://kff.org/report-section/ehbs-2015-summary-of-findings/>.

⁹⁸ *Reserve Members and Families*, TRICARE <http://www.tricare.mil/Plans/Eligibility/NGRMandFamilies.aspx> (last visited Feb. 24, 2016). Exceptions include: selected Reserve members eligible for or enrolled in or eligible for the Federal Employees Health Benefits (FEHB) program cannot participate in TRICARE Reserve Select (TRS). *Id.* TRICARE Reserve Select also does not cover dental and vision without purchasing an insurance supplement. *Id.*

⁹⁹ Karen Jowers, *Tricare Reserve Select Costs to plunge Jan. 1*, THE ARMY TIMES (Nov. 20, 2008), <http://archive.militarytimes.com/article/20081120/NEWS/811200326/Tricare-Reserve-Select-costs-plunge-Jan-1>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Monthly Premiums Decrease for TRICARE Reserve Select*, NATIONAL GUARD BUREAU (Nov. 20, 2008), <http://www.nationalguard.mil/News/ArticleView/tabid/5563/Article/573716/monthly-premiums-decrease-for-tricare-reserve-select.aspx>; *2015 Employer Health Benefits Survey*, *supra* note 97.

coverage.¹⁰³ Tricare Reserve Select participants only paid \$204.29 a month in premiums.¹⁰⁴ The TRS plan cost roughly half as much monthly, and saved families over \$2300 in premiums over the entire year.

The TRS plan also holds a cost savings advantage over individual premiums of average employer health insurance plans. In 2014, employees paid on average \$90 a month for individual coverage.¹⁰⁵ The 2014 TRS monthly rate for individuals in 2014 was \$51.68.¹⁰⁶ The TRS saved individuals over \$460 for the entire year because of premium rates, 42% cheaper than the average individual premium.

Health care plans can vary depending on many factors (state, size of employer, income amount, etc.). It is important to consider all possible costs besides the premium to ensure the most economical coverage. Past data shows the TRS plan as a consistently cheaper healthcare insurance option for families or individuals, and that is a good starting point for comparison. On average, the TRS will save money and any money saved is money made out of thin air, and ready for other investment.

E. Life Insurance

A life insurance policy is a contract for death benefits in exchange for premium payments.¹⁰⁷ Term insurance is a common type of life insurance. Term life insurance is designed to provide protection against a loss of income for a specific period of time, typically ten or twenty years.¹⁰⁸ The premium payment amount stays the same for the coverage period selected.¹⁰⁹ After that period, policies may offer continued coverage, but usually at a substantially higher premium payment rate. Term life insurance is generally less expensive than permanent life insurance.¹¹⁰

¹⁰³ Christina Merhar, *The Average Cost of Health Insurance*, ZANE BENEFITS, (Dec. 2, 2014), <http://www.zanebenefits.com/blog/the-average-cost-of-health-insurance>.

¹⁰⁴ Health Affairs Policy 009-13, Asst. Sec'y of Def, subject: Policy Memorandum to Establish 2014 Premium Rates for TRICARE Reserve Select and TRICARE Retired Reserve (22 Aug. 2013) [hereinafter Asst. SecDef Policy 009-13].

¹⁰⁵ Merhar, *supra* note 103.

¹⁰⁶ Asst. SecDef Policy 009-13, *supra* note 104, at 2.

¹⁰⁷ *What is Life Insurance?*, FIDELITY INSURANCE, <https://www.fidelity.com/life-insurance-planning/what-is-life-insurance> (last visited Feb. 24, 2016).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ 38 U.S.C.S. § 1965 (LexisNexis 2015).

¹¹² 38 U.S.C.S. § 1967 (a)(1)(C)(ii)(3) (LexisNexis 2015). Traditional Reservists paying for SGLI receive full time coverage, meaning the benefit is paid regardless of duty status at death. 38 U.S.C.S. § 1965(5)(B)

Servicemembers Group Life Insurance (SGLI) is the military's term life insurance.¹¹¹

The maximum coverage amount is \$400,000.¹¹² The current basic SGLI premium rate is \$.07 per \$1,000 of insurance. The rate includes an additional \$1.00 per month for Traumatic Injury Protection (TSGLI) coverage, totaling \$29 a month for maximum coverage.¹¹³ Both insurers and financial experts agree that SGLI is a good value for the cost.¹¹⁴ In addition to the benefit of being a value, SGLI is guaranteed regardless of health.¹¹⁵ This is important because health conditions are often deciding factors regarding coverage in term life insurance plans outside the military. The Army also provides a tax free one-time lump sum Death Gratuity of \$100,000 to the designated beneficiary or beneficiaries of a traditional Reservist who dies while in a duty status.¹¹⁶ Its purpose is to help aid survivors in meeting immediate expenses incurred.¹¹⁷

Deciding how much total life insurance an individual needs depends on many factors, but mainly debt. The Death Gratuity and SGLI are both excellent benefits that can contribute considerably to a comprehensive life insurance strategy. The Death Gratuity can cover immediate costs while SGLI can cover income gaps. The availability of the SGLI to traditional Reservists at low premiums frees up monthly income for other wealth management interests.

F. Educational Benefits

Traditional Reservists list educational related incentives as the second most important reason to join the military.¹¹⁸ Student loan debt comprises of almost 40% of the debt for consumers aged twenty to twenty-nine.¹¹⁹ Fortunately, for traditional Reservists, there are multiple education benefit

(LexisNexis 2015).

¹¹³ 38 U.S.C.S. § 1971 (LexisNexis 2015). SGLI Premiums, U.S. Department of Veterans, <http://www.benefits.va.gov/insurance/index.asp> (last visited Feb. 24, 2016).

¹¹⁴ Karen Jowers, *Single, no dependents: Do you need life insurance?*, MILITARYTIMES (Feb. 6, 2016), <http://www.militarytimes.com/story/life/2016/02/06/single-no-dependents-do-you-need-life-insurance/79196364/>.

¹¹⁵ 38 U.S.C.S. § 1967(a) (LexisNexis 2015).

¹¹⁶ 10 U.S.C.S. § 1475 (LexisNexis 2015). Also, if death is within 120 days due to a service-connected illness or injury. *Id.* The Death Gratuity can be designated in increments of \$10,000 to a maximum of ten beneficiaries. *Id.*

¹¹⁷ *Death Gratuity Benefit Fact Sheet*, MYARMYBENEFITS, http://myarmybenefits.us.army.mil/Home/Benefit_Library/Federal_Benefits_Page/Death_Gratuity_.html?serv=147 (last visited Feb. 24, 2016).

¹¹⁸ PEW RESEARCH CENTER, WAR AND SACRIFICE IN THE POST-9/11 ERA 39 (Oct. 5, 2011), <http://www.pewsocialtrends.org/files/2011/10/veterans-report.pdf>.

¹¹⁹ *Students & Debt*, DEBT.ORG, <https://www.debt.org/students/> (last visited Feb. 24, 2016).

programs that range from tuition assistance to full scholarships to student loan repayment.¹²⁰ Certain educational benefit programs are also available to family members. For wealth management purposes, these earned military benefits can bolster or replace a tax-sheltered college fund.

Tuition Assistance is financial assistance for traditional Reservists for voluntary off-duty education programs.¹²¹ Students have the option of pursuing disciplines related to their professional development or personal goals. Tuition assistance is payment for all or a portion of the tuition and expenses up to the established Army standardized tuition assistance fiscal policy.¹²² Tuition assistance is offered at zero cost to the recipient as it is an earned benefit through service.¹²³

Traditional Reservists also qualify for multiple full scholarship programs, with the Post-9/11 GI Bill being the most lucrative one. The Post-9/11 GI Bill benefits include financial support for tuition/fees, books/supplies, and housing.¹²⁴ Approved training under the Post-9/11 GI Bill includes graduate and undergraduate degrees, vocational/technical training, on-the-job training, flight training, correspondence training, licensing and national testing programs, entrepreneurship training, and tutorial assistance.¹²⁵ The Post-9/11 GI Bill also allows the transfer of all or some unused benefits to a spouse or dependent children.¹²⁶ It can replace the need to save for the cost of one child's college education at a qualifying school. That benefit cannot be underestimated from a wealth management viewpoint.

The Student Loan Repayment Program (SLRP) is another educational benefit. It is an incentive program available in the USAR that helps traditional Reservists pay student loan debts while serving in the USAR.¹²⁷ When used properly, this program can greatly reduce educational debts. The amount of money available under SLRP depends on the traditional Reservist's occupational specialty in the Army. This program is also offered at zero cost to the recipient, as it

too is an earned benefit through service.

Many states offer non-federal education assistance benefits as well. These benefits are allotted, funded, and managed by each state.¹²⁸ They are subject to change because of state laws and available funding. State education services offices have the most current information concerning state education benefits. Traditional Reservists can benefit greatly from state level educational benefits.

This article only addresses major education benefit programs. Other federal and state programs and independent institutional programs are also offered to traditional Reservists. Additionally, educational benefits change annually. For example, the very popular Reserve Educational Assistance Program (REAP) was discontinued in fiscal year 2016.¹²⁹ The Web-Enabled Education Benefit System (WEBS) is the Army's official website for USAR education benefits and a rich source for information.¹³⁰ Additionally, traditional Reservists should visit their servicing Army Continuing Education office for the latest educational benefit offerings. Student loans can squander away even the highest earning investments.

Preventing them will pay dividends for wealth management planning purposes.

IV. Conclusion

Wealth management starts by developing a plan that will maintain and increase wealth throughout a lifetime. It requires balancing financial risks and knowing where wealth management opportunities exist. A good wealth management plan requires a lifelong commitment. Wealth management plans affect future family generations. The USAR offers numerous wealth management tools for traditional Reservists that will enhance any wealth management strategy.

Legal assistance is an excellent source during any step in the wealth management planning process. Legal consultation is a beneficial source for wealth management questions.

¹²⁰ See goarmyed.com for the most up-to-date benefits summary and contact information. GOARMYED, <https://www.goarmyed.com/> (last visited Feb 23, 2016).

¹²¹ 10 U.S.C.S. § 2007 (LexisNexis 2015). *See also* U.S. DEP'T OF ARMY, REG. 621-5, ARMY CONTINUING EDUCATION SYSTEM para. 5-1 (11 Jul. 2006) (RAR 6 Sept. 2009).

¹²² 10 U.S.C.S. § 2007(c) (LexisNexis 2015).

¹²³ 10 U.S.C.S. § 2007(e)(2) (LexisNexis 2015).

¹²⁴ 38 U.S.C.S. § 3313 (LexisNexis 2015). Individuals qualify with at least ninety days of aggregate, active duty service on or after September 11, 2001, or an aggregate period of ninety days to thirty-six months, or with a service-connected disability after thirty days' active duty service. 38 U.S.C.S. § 3311 (LexisNexis 2015).

¹²⁵ 38 U.S.C.S. § 3315 (LexisNexis 2015) and 38 U.S.C.S. § 3315A (LexisNexis 2015).

¹²⁶ 38 U.S.C.S. § 3319 (LexisNexis 2015).

¹²⁷ 10 USC § 16301 (LexisNexis 2015).

¹²⁸ For example, Texas offers a Hazelwood Grant and Georgia offers a Hope Grant for educational benefits. *See Hazelwood Act*, TEXAS VETERANS COMMISSION, <http://www.tvc.texas.gov/Hazlewood-Act.aspx> (last visited Feb. 24, 2016), *Hope*, GEORGIA STUDENT FINANCE COMMISSION, <http://gsfc.georgia.gov/hope> (last visited Feb. 24, 2016).

¹²⁹ 10 U.S.C.S. § 16167 (LexisNexis 2015). REAP is an education benefit program designed to provide educational assistance to members of the Reserve Components called or ordered to active duty in response to a war or national emergency (contingency operation) as declared by the President or Congress. *Id.*

¹³⁰ *Web-Enabled Education Benefit System*, DEPARTMENT OF DEFENSE, <https://selfservice.rcms.usar.army.mil/EBOHome.aspx> (last visited Feb. 24, 2016).

Wealth management decisions are frequently captured in legal documents that are available through legal assistance. The proactive traditional Reservist who seeks out legal assistance services for wealth management issues will profit greatly.

Traditional Reservists have access to wonderful wealth management benefits. The Army's DC and DB plans are

lucrative retirement plans. The TSP is a low-cost plan with solid return averages. The Army's DB plan is also a very rewarding wealth management tool, and the type rarely offered to employees. Home ownership is an affordable option for traditional Reservists through a VA loan, as well as health insurance and higher education. Ultimately, traditional Reservists are provided with a unique opportunity to help make money out of thin air.

How can my Army Reserves benefits help my wealth management plans?

1. Do I have all my personal legal documents completed?
 - 1.1. Wills, Powers of Attorney, Healthcare Directives, SGLI Designations, and any other specific documents requiring legal assistance?
2. Where is my legal assistance office? Who is my unit JAG?
 - 2.1. What services do they offer?
 - 2.2. What types of cases will they consider?
3. Retirement Finances
 - 3.1. When do I want to retire?
 - 3.2. How much money will I need to retire?
 - 3.3. What retirement investment plans do I have?
 - 3.3.1. How much do I pay annually for my retirement plan?
 - 3.3.1.1. Is the TSP cheaper?
 - 3.3.1.2. Do my retirement investments plans offer traditional and Roth tax treatment options?
 - 3.3.1.3. What tax treatment fits my retirement plan? Pay taxes now or later? Both?
 - 3.3.2. Is the TSP a cheaper alternative?
 - 3.3.3. When do I want to start withdrawals?
 - 3.3.3.1. Should I transfer other accounts into the TSP?
4. What assets am I trying to obtain?
 - 4.1. Do I need to buy a home or refinance one?
 - 4.2. How much do I want to spend on a home purchase?
5. What debts do I have?
 - 5.1. Do I have enough life insurance for my family?
6. How effective is my healthcare insurance?
 - 6.1. Do my premiums fit my budget?
 - 6.2. Does TRICARE offer cheaper premiums that fit my family's healthcare needs?
7. Do I need more education to pursue personal or professional goals?
 - 7.1. Do my family members need education benefits?
 - 7.2. Do I know where my servicing Army education office is located?

(Sec. 631) Provides a government-matching Thrift Savings Plan (TSP) retirement benefit for those who enter uniformed service on or after January 1, 2018, or a member serving before that date who makes a voluntary election to opt-in to the new plan.

(Sec. 632) Establishes a new military retirement defined benefit that, when combined with the government-matching TSP established by this bill, would comprise a new hybrid retirement system.

(Sec. 633) Permits the voluntary election of lump sum payments of retired pay for those serving for 20 or more years.

(Sec. 634) Directs the Secretary concerned to provide continuation pay to service members, serving under the new military retirement system who reach 12 years of service and agree to serve another 4 years.

(Sec. 635) Permits the Secretary concerned to modify the years of service required for retirement under the new military retirement system for particular occupational specialties or other groupings in order to facilitate force shaping or to correct manpower shortages within an occupational specialty. Requires Congress to be notified one year in advance of using this authority

¹³⁰ National Defense Authorization Act for Fiscal Year 2016, Pub. L. No 114-92, 129 Stat. 726 (2015).

CLIENT INFORMATION:

Your Full Name (first, middle, last): Nicky Rage, Rank: COL(R), *SSN: 234-56-7890
 Present Address: 95210 Kelly Lane, Cary, NC
 Male, Female; U.S. citizen? Yes No; State of Legal Residence: NC
 *Unit of Service Member: NA
 Duty Phone: NA, Home or Cell Phone: (910) 123-4567, *ETS: NA, *PCS: NA

(If You Have a Prior Will or Estate Plan, Check This Block)

MARITAL STATUS (select the most appropriate):

- A. Married once, and my spouse is alive.
- B. Married and spouse is alive, but were married before (a prior spouse died or was divorced)
- C. Widow/ widower.
- D. Previously married, but now divorced and single.
- E. Single, never married.

Spouse's full name: Allison Kim SSN: 345-67-8901 Is spouse a U.S. citizen? Yes No

CHILDREN: Yes No; If yes, is any child a minor (under 18 years)? Yes, No;

If no, are you expecting a child? Yes, No

Please list your children's **full names, ages, sex,** and their **relation** to you, i.e., whether they are your **biological, adopted, or stepchild:**

1. NAME: Clark Kent Rage AGE: 3 SEX: M RELATION: Son
2. NAME: Lois Lane Rage AGE: 5 SEX: F RELATION: Daughter
3. NAME: _____ AGE: _____ SEX: _____ RELATION: _____
4. NAME: _____ AGE: _____ SEX: _____ RELATION: _____

any biological child from a previous relationship? Yes No. Does any child have special needs? Yes No If you have adopted children or stepchildren, do you wish to treat them the same as your natural children? Yes No

INTERVIEW NOTES: Testator wants:

- (1) A Credit Shelter Trust for the benefit of his wife and children that is fully funded by formula.
- (2) His wife to have a "5 & 5" Power to withdraw assets from the marital deduction trust only. (3) The Trustee to have power to liquidate trusts with a value under \$100K.

VALUE OF ESTATE: To determine what type of will is appropriate for you, we need an estimate of the value of your estate.

Include the value of all of the property you own in your name, and if married, the value of your spouse's property. If any of your property secures a debt (for example, a mortgage on your home), include only your equity in the property. Also include the value of your life insurance policies (SGLI, VGLI, etc.). Note that life insurance ordinarily does **not** pass according to your will; it will go to the beneficiaries you designated in the policy. The policy's face value is usually included in determining whether estate taxes will apply in your case.

Approximate value of your estate (not including life insurance): \$ 2 Million Value of life insurance (self): \$ 1 Million

DO YOU OWN A FAMILY FARM/FAMILY-OWNED BUSINESS: Yes No

DO YOU OWN ANY REAL ESTATE Yes No (If no, skip to next section); If yes, what is its value? \$100,000

If yes, who do you own it with? NAME: NA RELATION: _____

In what state is the real property located? NC

To whom do you want to give the real estate:

- A. All to the spouse, if he/she survives
- B. to one or more different beneficiaries.

NAME: _____ RELATION: _____

NAME: _____ RELATION: _____

- C. all real estate is to pass as part of the residuary estate, rather than being separately devised
- D. just the Testator's home to the wife (with other real estate passing as part of the residuary estate)
- E. the wife is to have a life estate.

GIVING AWAY YOUR PROPERTY

PERSONAL EFFECTS AND TANGIBLE PERSONAL PROPERTY: How do you wish to give your personal property?

SELECT ONE ONLY

- A. All to my spouse (If you wish to give everything to your spouse, OR to disinherit spouse check (D))
- B. As per a schedule of specific bequests or a personal property memorandum (with items not listed passing to spouse). (List specific bequests on a separate piece of paper.)
- C. As per a schedule of specific bequests or a personal property memorandum (with items not listed passing to residuary estate) (List specific bequests on a separate piece of paper.)
- D. As provided with regard to the residuary estate – SELECT THIS IF SINGLE.

RESIDUARY ESTATE: Your residuary estate is whatever property remains after paying debts and expenses of administration, and any specific bequests. Because most people do not make specific bequests, the "residuary" usually describes all the property left to your beneficiaries. To whom do you want to leave your residuary estate? SELECT ONE ONLY

¹³¹ The United States Army Judge Advocate General's School Administrative and Civil Law Department 2015 Client Services Deskbook

- A. ___ All to my spouse if he/she survives me, and if not, then to my children and issue.
 B. A marital deduction trust f/b/o the spouse (or if she predeceases, to the child and issue)
 C. ___ A minimum bequest to my spouse, (disinheriting them to the fullest extent of the law, with the remainder going to child(ren) or other person(s). List person(s) to whom you wish to give your property under (D)
 D. ___ Various other types of dispositions listed on top of back (**check D if you are single and see selections top of back**).
 A. ___ All to one specific beneficiary. NAME: _____ RELATION: _____
 B. ___ To more than one beneficiary. If you have more than one beneficiary, are they:
 1. ___ Specific people who are to share equally. NAME: _____ RELATION: _____
 NAME: _____ RELATION: _____
 2. ___ A group of people described as a class (e.g., "my brothers and sisters") who are to share equally.
 Explain: _____
 3. ___ Some other unequal division between the beneficiaries (e.g., 50% to one beneficiary and 25% each to two others). Explain: _____
 4. ___ Other. Explain: _____

MINORS: If any of your beneficiaries is a minor, at what age do you want them to receive their gift? ___ 18; ___ 21; ___ 1/2 @ 21 and 1/2 @ 25; ___ 1/3 @ 21, 1/3 @ 25, 1/3 @ 30; ___ Some other age: 30 (please indicate the age) (NOTE: Selecting an age greater than 21 will likely require a trust, which may cause your estate to incur additional expenses for the administration of the trust. These would lower the amount available for your beneficiaries. Please **READ LEAVING PROPERTY TO MINORS** below.

SECONDARY/CONTINGENT BENEFICIARIES: If all of the beneficiaries you designated above (spouse, children) die before you, to whom do you wish to leave your estate?

- 1st Contingent-NAME: _____ Bull Rage _____ RELATION: Brother _____ % 60
 NAME: Sally Rage _____ RELATION: Sister _____ % 40
 2nd Contingent-NAME: _____ RELATION: _____
 Last Resort- NAME: _____ RELATION: _____

GRANDCHILDREN: If you had grandchildren would you want them to receive your child's share if your child did not survive you?
 Yes ___ No

EXECUTOR: Your Executor (or "personal representative") ensures your estate is settled upon your death. This ordinarily involves going through "probate", a court-administered procedure for settling an estate as provided in your will or under State law. Whom do you wish to have as your executor (cannot name a minor)? (CHECK ONE and follow instructions)

- A. ___ My spouse. NO NEED TO LIST SPOUSE'S NAME.
 B. ___ My spouse and a co-executor. Name co-executor below.
 C. ___ My spouse and a successor executor. Name successor executor below.
 D. ___ One executor other than my spouse. Name executor below.
 E. ___ Two co-executors, neither of whom are my spouse. Name two co-executors below.
 F. One executor and a successor executor, neither of whom are my spouse. Name one executor and a successor below.
 NAME: Big Rage _____ RELATION: Father _____
 NAME: Betty Rage _____ RELATION: Mother _____

GUARDIAN: Do you wish to appoint a legal guardian for a minor child other than the child's other natural parent?

- A. One guardian for any child when I die. NAME: Bull Rage _____ RELATION: Brother _____
 B. ___ One guardian and a successor guardian. NAME: _____ RELATION: _____
 SUCCESSOR NAME: _____ RELATION: _____
 C. ___ Two co-guardians. Co #1 NAME: _____ RELATION: _____
 Co #2 NAME: _____ RELATION: _____

CUSTODIAN OF PROPERTY: Would you like the child's guardian, regardless of who it is, to be the custodian of the child's property? ___ YES ___ NO. If no, who: NAME: Sally Rage _____ RELATION: Sister _____

LEAVING PROPERTY TO MINORS: Instead of giving your estate directly to a MINOR beneficiary, you may give it to a Trustee, IN TRUST, for the benefit of the minor until they reach the age you designate. The trustee will manage the trust under court supervision. Although the trustee's primary purpose is to safeguard the inheritance, the money can also be used for any minor's health, education, welfare, or maintenance, at the trustee's discretion. For many people, a trust is unnecessary because, under the Uniform Gifts to Minors Act (UGMA/UTMA) language in your will, gifts to beneficiaries under 18 (or, if you prefer, 21) will be controlled by your executor initially, and guardian after probate, without establishing a trust. The executor and/or guardian can still use the minor's inheritance for the benefit of the minor, and this is ordinarily less complicated and less expensive than a trust. Unless you have children from a prior marriage, disabled children, or a very large estate, you might prefer not to use a trust. One disadvantage, however, to the UGMA is that your estate will be divided in as many equal shares as there are minor beneficiaries designated; each minor will receive the remainder of their share as they turn 18 or 21, at your option. A trust may be more appropriate if you do not want your child to get property until after age 21.

Do you want a trust? Yes ___ No. (If yes, would this be: One trust for the benefit of all beneficiaries ("pooled" trust), or ___ Individual trusts for each of the beneficiaries. NOTE: Individual trusts can be very expensive.

IF YES WHO DO YOU WANT AS TRUSTEE? (Please list name and relationship):

- A. ___ One trustee. NAME: _____ RELATION: _____
 B. ___ Two co-trustees. NAMES: _____ RELATION: _____
 RELATION: _____
 C. One trustee and a successor. NAME: Big Rage _____ RELATION: Father _____
 NAME: Betty Rage _____ RELATION: Mother _____
 D. ___ One trustee and a co-trustee who is to be later appointed by the executor.
 NAME: _____ RELATION: _____

OFFICE USE ONLY		Attorney: _____	Date: _____
Date Briefed: _____	Briefed by: _____	Location: _____	Mode: CS (SRPC); CD(Demob); CL(Reg.Appt.); CE (ERDE); CN (NEO); CM (Mob Depl Read Ex); CP (Premob); Case: WW (Will), WA (AMD), WS (SGLI); Services: SW(Will prep); ST (Will w-trust/guardian); SV (AMD); SC (Counsel)

Tax Treatment of Your Contributions:
Traditional/Roth Comparison Matrix

Compare the effects of traditional and Roth contributions.

The Treatment of...	Traditional TSP	Roth TSP
Contributions	<i>Pre-tax</i>	<i>After-tax</i> ¹
Your Paycheck	<i>Taxes are deferred*</i> , so less money is taken out of your paycheck.	<i>Taxes are paid up front*</i> , so more money comes out of your paycheck.
Transfers In	<i>Transfers</i> allowed from eligible employer plans and traditional IRAs	<i>Transfers</i> allowed from Roth 401(k)s, Roth 403(b)s, and Roth 457(b)s
Transfers Out	<i>Transfers</i> allowed to eligible employer plans, traditional IRAs, and Roth IRAs ²	<i>Transfers</i> allowed to Roth 401(k)s, Roth 403(b)s, Roth 457(b)s, and Roth IRAs ³
Withdrawals	<i>Taxable</i> when withdrawn	<i>Tax-free</i> earnings if five years have passed since January 1 of the year you made your first Roth contribution, AND you are age 59½ or older, permanently disabled, or deceased

The TSP will keep your traditional balance and your Roth balance in separate "buckets" in your TSP account for the purposes of tracking contributions and transfers into your account. However, you cannot just tap one or the other balance when you request transactions such as contribution allocation changes, interfund transfers, loans, and withdrawals. All transactions will include a proportional amount from each balance.

* If you are a member of the uniformed services receiving tax-exempt pay (i.e., pay that is subject to the combat zone tax exclusion), your contributions from that pay will also be tax-exempt.

¹ Roth contributions are subject to Federal (and, where applicable, state and local) income taxes, while traditional contributions are not taxed until withdrawn. However, both Roth contributions and traditional contributions are included in the amount of wages used to calculate payroll taxes (e.g., Social Security taxes).

² You would have to pay taxes on any pre-tax amount transferred to a Roth IRA.

³ Transfers to a Roth IRA from a Roth TSP are not subject to the income restrictions that apply to Roth IRA contributions.

Non-Support Complaints: A Judge Advocate's Guide to Helping Commanders Respond

Major Kathy T. Denehy*

I. Introduction¹

As the legal advisor to an Army unit commander, a Judge Advocate (JA) is certain to encounter non-support complaints against Soldiers in the unit.² For commanders and Soldiers alike, non-support complaints can be significant mission-detractors.³ Prompt and accurate resolution of non-support complaints is critical to return the unit and Soldier to mission readiness and to prevent potential financial hardship for the complaining Family members. Poorly handled complaints can exacerbate the impact on mission readiness.⁴ Although Army Regulation (AR) 608-99 (Family Support, Child Support, and Paternity) provides fairly detailed guidance on evaluating and responding to non-support complaints,⁵ it is not all-inclusive, and its provisions can easily be overlooked, misinterpreted, or misapplied.⁶ The proactive involvement of a knowledgeable JA can ensure a commander promptly and accurately responds to non-support complaints to promote unit readiness.

This primer is intended to help JAs advise their commanders through non-support complaints. The primer will begin by providing the basis for commanders to involve themselves in their Soldiers' personal affairs. Subsequent sections will guide the JA through the process of providing initial advice to the commander upon receipt of the complaint, guiding the inquiry, evaluating the non-support complaint, responding to the complaint, and finally, discussing various follow-up actions that may be appropriate for certain complaints. At the conclusion, JAs should have the tools to confidently and competently guide their commanders through the process of responding to non-support complaints so that they are handled properly with minimal impact on mission readiness.

II. Background: The Commander's Role in Family Support Matters

Commanders not only may, but in some circumstances actually must, involve themselves in the personal affairs of

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¹ Many of the statements and recommendations presented throughout this primer are based on the professional experiences of the author assisting with multiple non-support complaints while serving as a legal assistance attorney from April 2008 to June 2009 and as a command legal advisor from July 2012 to July 2015 [hereinafter Professional Experiences].

² Non-support complaints may be filed through various channels, but are commonly received through the Inspector General (IG) office or directly by the Soldier's commander. U.S. DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY para. 3-1a (29 Oct. 2003) [hereinafter AR 608-99]; Professional Experiences, *supra* note 1. For 1st Special Forces Command (Airborne) (Provisional) (1st SFC(A)(P)), an Army command consisting of nine active duty brigade-sized special operations units with approximately 16,710 Soldiers, the command IG office processed sixty-seven non-support complaints in fiscal year 2015. Brigadier General Darsie Rogers, 1st Special Forces Command (Airborne)

(Provisional), at slide 11 (PowerPoint presentation) (on file with author); e-Mail from Lieutenant Colonel Shane Dillow, Inspector General, 1st Special Forces Command (Airborne) (Provisional), to the author (Feb. 25, 2016, 07:57 EST) (on file with author) [hereinafter Dillow E-Mail]. Non-support complaints comprised approximately twenty-five percent of the 1st SFC(A)(P) IG caseload compared to approximately fifty percent for conventional Army units, such as the 82nd Airborne Division. Dillow E-Mail. Additionally, conventional units are estimated to have about twice as many overall IG complaints filed as 1st SFC(A)(P), a difference attributed to the greater age, maturity, and rank of the Soldiers in special operations units. *Id.* In the author's experience advising three special operations units, the number of complaints filed directly with the command was generally about equal to the number of complaints filed through the IG office. Professional Experiences, *supra* note 1.

³ Time spent investigating and responding to these matters diverts command resources away from maintaining mission readiness. Professional Experiences, *supra* note 1. Further, Soldiers against whom non-support complaints have been filed are likely to be distracted from their military mission. *Id.*

⁴ Mishandled complaints may adversely impact the unit in several ways. Inadequately resolved complaints are likely to result in follow-up complaints from unsupported Family members that require additional inquiry. Conversely, Soldiers erroneously ordered to pay more support than required may suffer from financial hardships that affect personal readiness. Additionally, a false complaint filed for vindictive purposes may result in unwarranted adverse action against the Soldier if the inquiry is insufficient to reveal the true nature of the complaint. *Id.*

⁵ See generally AR 608-99, *supra* note 2.

⁶ An Internet search of milBook, an internal military knowledge management site, for "608-99" returns numerous entries from military legal personnel seeking guidance on interpreting and applying the provisions of AR 608-99. See generally MILBOOK, <https://www.milsuite.mil/book/search.jspa?q=608-99> (last visited Feb. 23, 2017).

their Soldiers. This command responsibility is well established in Army regulations. Specifically, AR 608-99 requires commanders to intervene when Families break down in order to ensure Soldiers are meeting their Family support obligations.⁷ Additionally, under AR 600-20 (Army Command Policy), commanders have specific obligations for ensuring both the military and personal readiness of their individual Soldiers in order to maintain unit readiness.⁸ Further underscoring the Army's emphasis on Family readiness is the fact that non-compliance with AR 608-99 may result in adverse action for both Soldiers and commanders.⁹ With this knowledge in hand, a JA should be well prepared to advise a commander on the need to take non-support complaints seriously and give them adequate attention.

III. Initial Actions upon Receipt of a Non-Support Complaint

Upon the receipt of a non-support complaint, the JA should immediately advise the command on certain preliminary matters to ensure the smooth and proper handling of the inquiry. This section will discuss some of the key issues a JA should address.

A. Judge Advocate's Role as an Advisor

As the advisor to a command, a JA's client is the Army, not the individual members of the unit.¹⁰ Commanders may mistakenly believe their JAs are able to provide legal advice to all members of the unit; however, providing legal advice to the Soldier against whom the complaint was made would

create a conflict of interest for the commander's JA.¹¹ Such a conflict would generally prevent the JA from further advising the command.¹² The JA should advise on this professional limitation early in the process to prevent inadvertent conflicts and provide the commander alternatives for assisting the individual Soldiers.¹³

B. Promoting Command Neutrality and Fairness Pending Investigative Results

To maintain good order and discipline in their units, commanders are obligated to inquire into any complaint or allegation that a member of their command may have engaged in misconduct.¹⁴ Pending the results of an inquiry, a commander should refrain from taking any adverse or corrective action against the Soldier based solely on the allegation of misconduct.¹⁵ To do otherwise would contradict a most basic tenet of our justice system—that an accused is presumed innocent until proven guilty.¹⁶ The JA should remind the commander from the outset that there should be no actions taken against the Soldier unless warranted by a completed inquiry. Commanders must also be cautious not to direct their subordinate commanders to take any particular disciplinary action against a Soldier regardless of the outcome of the inquiry in order to maintain the fairness and impartiality of the military justice process.¹⁷

Promoting fairness in the inquiry also requires the command to ensure the accused Soldier is advised of and afforded the right to invoke his¹⁸ protection against self-incrimination.¹⁹ Commanders who fail to properly adhere to

⁷ "Soldiers are required to manage their personal affairs in a manner that does not bring discredit upon themselves or the U. S. Army." AR 608-99, *supra* note 2, para. 1-5b. This includes "[p]roviding adequate financial support to [F]amily members." *Id.* Commanders are required to ensure their Soldiers are aware of the regulatory support obligations, to respond to all inquiries alleging Soldiers are not complying with the support provisions of AR 608-99, and to take appropriate corrective action when needed. *Id.* para. 1-4f, 1-4g.

⁸ See U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY paras. 1-5c, 5-5, 5-10 (6 Nov. 2014) [hereinafter AR 600-20]. Commanders are obligated to "provide assistance to establish and maintain [Soldiers'] personal and Family affairs readiness" under the Army Total Family Program. See *id.* para. 5-10. Additionally, commanders must require certain Soldiers to maintain Family care plans to ensure adequate care of their dependents when military duty prevents the Soldier from doing so personally. See *id.* para. 5-5.

⁹ Soldiers who violate the support provisions of AR 608-99 may face disciplinary action for violating a lawful general regulation. See AR 608-99, *supra* note 2, para. 1-6. Disciplinary action may include minor administrative actions, such as a reprimand or punitive action under the UCMJ, such as non-judicial punishment. See generally U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 3-4 (19 Dec. 1986) [hereinafter AR 600-37]; UCMJ art. 15 (2012). Similarly, commanders who fail to follow or enforce regulations may be found derelict in their duties and could face adverse action, including relief from command. See generally UCMJ, art. 92 (2012); AR 600-20, *supra* note 8, para. 2-17.

¹⁰ U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS Rule 1.13 (1 May 1992) [hereinafter AR 27-26].

¹¹ *Id.* Rule 1.7.

¹² *Id.* Rule 1.16(a)(1).

¹³ The command should refer Soldiers to a Legal Assistance attorney who can advise them regarding non-support allegations. AR 608-99, *supra* note 2, para. 3-4b(1)(b).

¹⁴ See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 303 (2012) [hereinafter MCM]; AR 600-20, *supra* note 8, para. 5-8.

¹⁵ The credibility of the command disciplinary authority depends on the command demonstrating fairness, justice, and equity in promoting unit discipline. AR 600-20, *supra* note 8, para. 4-1.

¹⁶ Coffin v. United States, 156 U.S. 432 (1895) (stating that the "presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law").

¹⁷ AR 600-20, *supra* note 8, para. 4-7c.

¹⁸ Masculine pronouns are used throughout this primer for simplicity.

¹⁹ UCMJ art. 31 (2012) ("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."). Since violations of AR 608-99 may be punished under the UCMJ, Article 31 protections must be afforded to Soldiers accused of family support violations. AR 608-99, *supra* note 2, para. 3-3a(1).

the requirements of Article 31 risk compromising the validity of their inquiries and limiting their ability to take certain disciplinary actions.²⁰ The JA should remind the commander that the Soldier should be advised of his rights using the appropriate form before the Soldier is questioned about the allegation.²¹

C. Routing the Complaint to the Appropriate Commander

As a general matter of policy, commanders should, when possible and appropriate, delegate responsibility and authority down to subordinate commanders.²² In the case of complaints alleging violations of AR 608-99, the regulation specifically provides that the inquiry be routed to the Soldier's company commander for resolution.²³ The company commander is required to personally review the inquiry and sign the written response to the complainant.²⁴ In cases of a complaint alleging a repeated or continuing violation of AR 608-99 would the inquiry be escalated to the battalion command level.²⁵

D. Flagging and Counseling the Soldier

The commander of the Soldier who is the subject of a non-support complaint will have certain obligations regarding flagging and counseling the Soldier. The JA should ensure that the commander is properly advised about the requirement to place a flag on the Soldier to suspend favorable personnel actions pending the results of the inquiry.²⁶ While commanders may be reluctant to flag a Soldier based solely on an allegation,²⁷ the regulation leaves little discretion in this

matter.²⁸ The JA will need to ensure that the commander is aware the flag should be placed on the Soldier within three days of receiving the complaint and should be lifted within three days of resolution of the matter.²⁹

The commander will also have a requirement to counsel the Soldier regarding the complaint against the Soldier. First, the commander must notify the Soldier in writing within two days of the flag being placed on him.³⁰ The commander must also inform the Soldier of the nature of the complaint against him and the inquiry being conducted.³¹ Corrective counseling may ultimately be required depending on the results of the inquiry; but at a minimum, the commander will need to counsel the Soldier about his legal obligations under the regulation and what actions the Soldier must take to comply with the regulation.³² Even if the allegations are unsubstantiated by the inquiry, the JA should be prepared to help the commander determine what the Soldier's support obligation is so that the requisite counseling may be completed.

IV. Guiding the Inquiry

After providing initial advice to the commander, the JA must focus on helping the commander initiate an inquiry that will allow the commander to evaluate and respond to the complaint. This section will describe several ways in which a JA can assist with the inquiry.

²⁰ See MCM, *supra* note 14, R.C.M. 304, 305 (prohibiting the use of evidence against an accused when that evidence was obtained in violation of the right against self-incrimination).

²¹ Article 31, UCMJ rights advisements should be completed using Department of Army, Form 3881, Rights Warning Procedure/Waiver Certificate (Nov. 1989) [hereinafter DA Form 3881]. This form provides a script for advising the Soldier of his rights and then memorializing the Soldier's elections regarding his rights. *Id.*

²² AR 600-20, *supra* note 8, para. 2-1b.

²³ AR 608-99, *supra* note 2, para. 3-1b.

²⁴ *Id.* para. 3-1d.

²⁵ *Id.* para. 3-1b.

²⁶ Flags are intended to prevent certain favorable personnel actions for Soldiers whose conduct may have fallen below the expectations of good standing. U.S. DEP'T OF ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAG) para. 2-1 (23 Oct. 2012) [hereinafter AR 600-8-2]. Only those actions specifically listed in the regulation are prohibited while a Soldier is flagged; prohibited actions include activities such as reassignment, reenlistment, promotion, receipt of awards, attendance at military or civilian schools, receipt of enlistment bonuses, and assumption of command. *Id.* para. 3-1.

²⁷ Professional Experiences, *supra* note 1.

²⁸ The initiation of any investigation that may result in disciplinary action for the Soldier requires a flag. AR 600-8-2, *supra* note 26, para. 2-2a. Given non-support complaints require an inquiry, and substantiated

violations may be punished under the UCMJ, flagging requirements apply to Soldiers against whom non-support allegations have been made. AR 608-99, *supra* note 2, paras. 2-5, 3-1. Judge advocates encountering command resistance to flagging a Soldier for a non-support complaint may draw a parallel to the requirement to flag Soldiers who fail to create or maintain adequate Family Care plans. See AR 600-8-2, *supra* note 26, para. 2-21. The intent behind AR 608-99, similar to Family Care plans, is to ensure Soldiers provide proper care and support for their dependents. See generally AR 608-99, *supra* note 2, para. 1-5; AR 600-20, *supra* note 8, para. 5-5. Additionally, the JA may remind the commander that he is obligated maintain discipline according to applicable regulations. AR 600-20, *supra* note 8, para. 4-1c. Commanders who fail to follow or enforce regulations may be found derelict in their duties and could face adverse action, including relief from command. See generally UCMJ, art. 92 (2012); AR 600-20, *supra* note 8, para. 2-17. If a complaint is received through IG channels, the IG will monitor the resolution and may open an investigation into the command if it finds the commander is failing to adhere to Army regulation and policy. U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES para. 6-3a(5) (29 Nov. 2010) [hereinafter AR 20-1].

²⁹ AR 600-8-2, *supra* note 26, para. 2-1d. Flags are initiated and lifted using Dep't of Army, Form 268, Report to Suspend Favorable Personnel Actions (Flag) (Oct. 2012) [hereinafter DA Form 268].

³⁰ AR 600-8-2, *supra* note 26, para. 2-6.

³¹ AR 608-99, *supra* note 2, para. 3-4a.

³² *Id.* para. 3-4b(1)(a).

A. Preparing the Commander for the Investigation

Despite legal advice, some commanders may remain reluctant to conduct an inquiry into a non-support complaint.³³ The JA must be prepared to convince the commander that an inquiry for a non-support complaint is required not only by AR 608-99,³⁴ but also by AR 600-20³⁵ and Rule for Courts-Martial (RCM) 303.³⁶

B. Selecting the Type of Inquiry and the Investigating Officer

Army Regulation 608-99 does not specify any particular type of inquiry that must occur in response to a non-support complaint, only that an inquiry must occur.³⁷ Generally, a commander may direct inquiry under the more formal requirements of an AR 15-6 investigation³⁸ or under a less formal commander's inquiry (CI).³⁹ The JA should be prepared to advise on which type of inquiry is appropriate for a particular complaint. Given the short suspense for responding to non-support complaints,⁴⁰ the less formal CI offers the benefit of being able to be completed more quickly and is often the more suitable choice.⁴¹ However, there may be unique circumstances that justify the use of an AR 15-6 investigation⁴² and the JA should be prepared to articulate why an AR 15-6 investigation is or is not recommended.

The JA must also be prepared to advise the commander on selecting an appropriate Investigating Officer (IO) for the inquiry. Utilizing a CI offers the commander a wider range

of personnel from which he can select an IO since there are no formal limitations on who may be appointed to serve as the IO.⁴³ However, the JA should ensure the commander selects an IO who is both qualified and appropriate for the inquiry.⁴⁴ If a non-commissioned officer (NCO) is to be appointed to conduct a CI, the JA should advise that the NCO be at least a Sergeant First Class (SFC), consistent with other Army investigative guidance.⁴⁵ Although no formal appointment memo is required for a CI, the JA should consider recommending one and offer to draft it to ensure the basic guidance for the IO is documented. A sample CI appointment memo is included at Appendix A.

C. Briefing the Investigating Officer

The JA should recommend that the IO receive a legal brief prior to beginning the inquiry. An IO who has been properly briefed will be better prepared to conduct a prompt and sufficient inquiry. While some proceedings may require separate legal advisors for the commander and the investigating entity,⁴⁶ there is no formal prohibition on the unit JA advising both the commander and the IO in a non-support complaint inquiry. The unit JA must be mindful of any factors that may impact his neutrality in a non-support matter and be prepared to recommend an alternate legal advisor for the IO if the JA suspects he may be unable to provide impartial guidance.⁴⁷

³³ Professional Experiences, *supra* note 1.

³⁴ AR 608-99, *supra* note 2, para. 3-6a.

³⁵ AR 600-20, *supra* note 8, para. 5-8b. "When commanders are apprised of complaints or accusations against military personnel, they will be expected to inquire into the matter and attempt a resolution." *Id.*

³⁶ MCM, *supra* note 14, R.C.M. 303 (providing that "upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses"). Additionally, for complaints forwarded through IG channels, the JA may also engender support for an inquiry by reminding the commander that IG will be reviewing the command's handling of the complaint. AR 20-1, *supra* note 28, para. 6-3a(2).

³⁷ AR 608-99, *supra* note 2, para. 3-6a.

³⁸ *See generally* U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (1 Apr. 2016) [hereinafter AR 15-6].

³⁹ *See* MCM, *supra* note 14, R.C.M. 303. Commanders must conduct a preliminary inquiry into alleged or suspected conduct by members under their command that may be punishable under the UCMJ. *Id.* The Army currently does not provide specific guidance for conducting a commander's inquiry, so a commander has the discretion to direct an inquiry that is as formal or informal as needed for the situation.

⁴⁰ "[T]he responsible commander will send a reply in response to each inquiry within fourteen days of its receipt." AR 608-99, *supra* note 2, para. 3-5a(1).

⁴¹ A commander's inquiry (CI) does not require any of the mandatory administrative elements that can add to the processing time for an AR 15-6

investigation, such as organizing and marking exhibits, compiling an investigative report, completing a standardized Army form, or obtaining a written legal review. *See generally* AR 15-6, *supra* note 38.

⁴² An AR 15-6 investigation may be deemed more appropriate when there are complex or serious ancillary allegations presented with the non-support complaint or when the rank, position, or other aspect of the subject of the inquiry is such that a more formally documented inquiry is desirable. *See id.* The remainder of this primer will provide guidance assuming a commander's inquiry is conducted. Judge advocates should reference AR 15-6 for additional processing requirements if their commander directs an AR 15-6 investigation.

⁴³ There are no specific requirements for a CI Investigating Officer (IO). By contrast, the IOs for AR 15-6 investigations must be "commissioned officers, warrant officers, or Department of the Army civilian employees permanently assigned to a position graded as GS-11 or above." *Id.* para. 2-3b.

⁴⁴ Generally, IOs must outrank the subjects they will be investigating and have sufficient education, maturity, and experience to fully and fairly conduct the inquiry. *See generally id.* paras. 2-3a, f.

⁴⁵ *See, e.g.,* U.S. DEP'T OF ARMY, REG. 735-5, PROPERTY ACCOUNTABILITY POLICIES para. 13-27a (10 May 2013) [hereinafter AR 735-5].

⁴⁶ *See, e.g.,* AR 15-6, *supra* note 38, para. 5-1d. A formal investigating board will have an impartial legal advisor as a nonvoting member. *Id.*

⁴⁷ If the availability of legal personnel allows, it may be best to provide a separate legal advisor for the IO to preclude any potential issues. Professional Experiences, *supra* note 1.

When providing the IO's legal brief, the JA should begin by reviewing the directions in the appointment memorandum⁴⁸ and directing the IO to review the applicable provisions of AR 608-99. During the investigation, the IO may require on-going legal advice as the information develops. The JA should encourage the IO to keep him apprised of the status of the inquiry and the evidence that develops so that the JA can help the IO quickly identify any additional investigative efforts he should pursue.

The JA should also ensure the IO understands that the inquiry must result in a finding of whether the subject is in compliance with AR 608-99, and if not, the IO's recommendations for handling the non-compliance. The JA must explain the standard of proof⁴⁹ applicable to the IO's findings and may wish to refer the IO to AR 15-6 for general guidance on conducting an inquiry.⁵⁰ Finally, the JA should help the IO develop an investigative plan which includes identifying witnesses and evidence, and guidance on talking to both the complainant and the subject.

1. Witnesses and Evidence

The JA should help the IO develop a list of witnesses and evidence for the inquiry. For non-support complaints, the witnesses frequently may only include the complainant and the subject Soldier. There may also be important documentary evidence the IO needs to request from each witness to corroborate their claims.⁵¹ A list of sample questions and common documents to request is provided at Appendix B.

2. Talking to the Complainant

The IO should most likely begin the inquiry by talking with the complainant to ensure he understands the full extent of the complaint. The JA may want to prepare the IO for this

by informing him that the complainant is often an unhappy estranged or ex-spouse⁵² and that, while talking to the complainant may be difficult, it is necessary to get the information needed to complete the inquiry.⁵³ The IO should take notes during the interview and be prepared to document the interview in a sworn statement or memorandum, should the complainant be unable or unwilling to provide a statement personally.⁵⁴

3. Talking to the Soldier

Once the IO understands the complainant's exact allegations, he must interview the accused Soldier. The IO must understand the requirement to provide Article 31 warnings to the Soldier prior to any questioning.⁵⁵ If the commander has not already done so, the IO should also determine whether the Soldier authorizes the release of his personal information to respond to the complaint.⁵⁶

Assuming the Soldier has waived his Article 31 rights and agreed to speak with the IO, the IO should thoroughly question the Soldier about the complainant's allegations. The IO should be alert for information that is inconsistent with the complainant's statements and attempt to resolve those matters. If the Soldier asserts that he is complying with his support obligations, the IO should request copies of documents proving that payments were made.⁵⁷

D. Evaluating the Sufficiency of the Evidence

The JA should encourage regular contact with the IO during the inquiry so that the JA can evaluate the evidence, make recommendations for further inquiry, and assist the IO with applying the regulatory support provisions to the evidence. Although a legal review is not mandatory for a CI, the JA should consider reviewing the final investigative

⁴⁸ The JA should ensure the IO understands the nature of the complaint, his deadline for completing the inquiry, and what he should do to request an extension if he will not be able to complete his inquiry on time. *Id.*

⁴⁹ In general, the standard of proof for administrative findings is a preponderance of the evidence. In explaining this standard, AR 15-6 provides that findings "must be supported by a greater weight of evidence than supports a contrary conclusion . . . [after] considering all evidence." AR 15-6, *supra* note 38, para. 3-10b. The weight of the evidence is evaluated based on factors that impact the credibility and veracity of the information gathered during the inquiry. *Id.*

⁵⁰ *Id.* paras. 3-7 to 3-11.

⁵¹ For example, the IO should request copies of any applicable court orders that would impact the compliance determination or copies of documents proving support payments were made. *See generally* AR 608-99, *supra* note 2.

⁵² Professional Experiences, *supra* note 1.

⁵³ In general, the IO should attempt to keep the complainant focused on providing information relevant to investigate the non-support complaint. However, if the complainant makes allegations of ancillary misconduct, such as adultery or abuse, the IO should record the basic facts of the allegations and tell the complainant that he will inform the commander so

that the commander may determine how to address the ancillary issues. Professional Experiences, *supra* note 1.

⁵⁴ *See* AR 15-6, *supra* note 38, para. 3-8c (detailing the methods for taking witness statements for an AR 15-6 investigation).

⁵⁵ AR 608-99, *supra* note 2, para. 3-3. The rights advisement should be properly documented for the file using DA Form 3881. DA Form 3881, *supra* note 21.

⁵⁶ *See* AR 608-99, *supra* note 2, para. 3-2b "Before being questioned . . . [S]oldiers will be given the opportunity to complete [Department of the Army (DA)] Form 5459 (Authorization to Release Information from Army Records on Nonsupport/Child Custody/Paternity Inquiries)." *Id.* Consistent with the Privacy Act, the Army must protect the private personal information of Soldiers from unauthorized release. *See generally* Privacy Act of 1974, 5 U.S.C. § 552a (2015); U.S. DEP'T OF ARMY, REG. 340-21, THE ARMY PRIVACY PROGRAM (5 Jul. 1985) [hereinafter AR 340-21]. Privacy Act issues are addressed in more detail in this primer in Section VI, which discusses the requirements for responding to the complainant.

⁵⁷ *See* AR 608-99, *supra* note 2, para. 3-6b(2).

packet for any deficiencies or significant errors before it is provided to the commander for action.⁵⁸

V. Evaluating the Claim

While many of the provisions of AR 608-99 are fairly straightforward, an IO or commander may easily overlook or misinterpret some of these provisions when making their findings. Additionally, some unique Family situations may not be encompassed by the rules in AR 608-99, leaving no clear guidance on how to make a determination. The JA can help ensure accurate findings by reviewing the proposed findings for each case, and providing legal advice when a particular fact pattern is not adequately covered by AR 608-99.

A. The Basic Support Requirements

For many non-support complaints, the calculation of the support obligation and the compliance determination may be fairly easy to ascertain.⁵⁹ The basic provisions of AR 608-99 establish a hierarchy in which support obligations are governed first by court order, or then by written support agreement, if either exists.⁶⁰ In the absence of a document establishing a support amount, AR 608-99 provides support calculation guidelines that cover a wide range of commonly occurring family situations.⁶¹ At the most simplified level, Soldiers owe an amount equal to the non-locality basic allowance for housing at the with dependents rate (BAH II-WITH), currently known as BAH RC/T-WITH,⁶² to their Family unit as support.⁶³ In situations where a Soldier has multiple Family units or Family members residing in different locations, each supported Family member is entitled to a pro-rata share of the BAH RC/T amount.⁶⁴ Army Regulation 608-99 also provides guidance for determining when the support

⁵⁸ See generally AR 15-6, *supra* note 38, para. 2-7 (providing the basic requirements for a legal review of an investigation).

⁵⁹ See generally AR 608-99, *supra* note 2, paras. 2-3 to 2-6.

⁶⁰ See *id.* paras. 2-3 to 2-4.

⁶¹ See *id.* para. 2-6. AR 608-99 also provides multiple examples of support cases that show the proper application of the support provisions to various Family situations. *Id.* Appendix B.

⁶² Non-locality basic allowance for housing (BAH) is currently called BAH RC/T and is set at With Dependents and Without Dependents rates for each pay grade. MILITARY COMPENSATION, http://militarypay.defense.gov/PAY/Allowances/bah_types.aspx (last visited Feb. 23, 2017). Non-locality BAH RC/T amounts are adjusted each calendar year and may be found online. *Non-Locality BAH Allowances*, DEF. TRAVEL MGMT. OFF., http://www.defensetravel.dod.mil/site/pdcFiles.cfm?dir=/Allowances/Non-Locality_BAH/. BAH II is the previous name for BAH RC/T. See generally AR 608-99, *supra* note 2, para. 2-6.

⁶³ AR 608-99, *supra* note 2, para. 2-6d.

⁶⁴ *Id.* para. 2-6e.

⁶⁵ For example, the obligation begins when the Family members cease living with the Soldier. *Id.* para. 2-7.

obligation begins and ends,⁶⁵ how to calculate partial month obligations,⁶⁶ when support is due, and acceptable forms of payment.⁶⁷

B. Unique Situations That Affect the Support Calculation

As previously mentioned, AR 608-99 cannot and does not provide guidance for every conceivable fact pattern that may arise in a non-support complaint. The examples provided below describe a few situations that may be easily misinterpreted when applying the provisions of AR 608-99 or are simply not covered by the provisions at all. These examples are intended to give JAs options for helping IOs and commanders resolve unique non-support cases, and to encourage creative problem solving when other novel fact patterns arise.

1. Court Order That Does Not Cover All Family Members

In some circumstances, an estranged spouse may have obtained a court order setting child support for the children, but there is nothing addressing spousal support. This type of situation is not clearly envisioned by AR 608-99, and applying the rules to this situation can result in differing opinions on whether the Soldier owes additional Family support and in what amount.⁶⁸ If a JA encounters a situation where the provisions of AR 608-99 have multiple possible interpretations, the easiest solution for advising the command may be for the JA to contact the Legal Assistance Policy Division (LAPD)⁶⁹ or to consult the LAPD Community of

⁶⁶ Partial month support obligations are calculated “based on a pro-rata daily share.” *Id.* para. 2-8.

⁶⁷ For example, Soldiers may choose to pay support by cash, check, money order, electronic funds transfer, or voluntary allotment. *Id.* para. 2-9a. Support payments are due “not later than the first day of the month following the month to which the financial support payment pertains.” *Id.* para. 2-9b.

⁶⁸ There may be multiple potential interpretations regarding an additional support obligation in this scenario. Professional Experiences, *supra* note 1. If the court that issued the child support order had jurisdiction to set spousal support, a valid interpretation is that nothing additional is owed since the provisions of AR 608-99 are only intended to provide interim support until a court order or support agreement is in place. AR 608-99, *supra* note 2, para. 1-5d. If, however, the court that issued the child support order did not have jurisdiction to address spousal support, then the assessment becomes more complicated. One possible interpretation is that the spouse is still owed a pro-rata share of BAH RC/T as spousal support, regardless of the amount of child support ordered. *Id.* para. 2-6e(1)(d). Alternatively, another possible interpretation is that the Family unit is still owed an amount equal to BAH RC/T, so the Soldier would owe the difference between BAH RC/T and the court-ordered child support, assuming the child support did not exceed BAH RC/T. *Id.* para. 2-6d(1).

⁶⁹ Legal Assistance Policy Division (LAPD) contact information is available at <https://www.jagcnet2.army.mil/LegalAssistance> (last visited Feb. 23, 2017).

Practice on milBook.⁷⁰ The particular scenario presented here is addressed at length in the LAPD Community of Practice, providing multiple answers for several unique fact patterns.⁷¹ Sometimes, JAs must be prepared to seek outside input in order to provide their commanders with the best advice possible.

2. Dependents in On-Post Privatized Housing

When Family members are living in on-post housing, the JA must also ensure that the correct analysis is conducted. An IO or commander may easily conclude that Families living in on-post housing are not entitled to any additional support under the provisions of AR 608-99.⁷² However, this conclusion overlooks the fact that most on-post housing is now privatized⁷³ and not considered government family housing under AR 608-99.⁷⁴ When the Family is in privatized on-post housing, the JA must ensure that the IO verifies whether the locality BAH-WITH rate for the installation⁷⁵ equals or exceeds the BAH RC/T amount.⁷⁶ If the Soldier is stationed at one of the few installations where the locality BAH is less than BAH RC/T rate, then the Soldier will owe his Family members the difference between the two rates.⁷⁷

3. Children Splitting Time Between Parents

One issue that may arise that is completely unaddressed by AR 608-99 is the possibility that dependent children may be splitting time fairly evenly between the Soldier and the other parent. Following a strict application of the rules of AR 608-99, the Soldier gets no credit for the support he provides while the children are in his custody. At best, this results in an injustice for the Soldier; and at worst, it creates an

unmanageable financial burden that the Soldier is unable to sustain. Should this situation arise, the JA should be prepared to offer the commander options. The commander could simply decline to enforce the support requirements; however, this is highly inadvisable since it puts the commander at risk.⁷⁸ It is also unnecessary if the JA is ready and able to provide alternative options. For example, when counseling the Soldier, the commander may encourage the Soldier to seek legal assistance to obtain a court order setting child support that would take into account the time the children spend with each parent.⁷⁹ Alternatively, the commander could encourage and endorse a request from the Soldier to have his spousal support obligation modified by the Special Court-Martial Convening Authority (SPCMCA) to compensate for the situation.⁸⁰

C. Assessing Whether the Soldier is in Compliance

After the IO has completed the inquiry, the commander will have to make a determination of whether he finds the Soldier to be in compliance with AR 608-99. If the JA has guided the IO well, the commander will likely be able to simply accept the IO's findings. If, however, the IO failed to conduct a thorough inquiry or made findings inconsistent with the provisions of AR 608-99, the JA should be prepared to advise the commander on making his own final determination that will form the basis of the response to the complainant.

VI. Responding to the Claim

A. General Response Requirements

The requirements for the commander's response are thoroughly detailed in AR 608-99.⁸¹ In general, the

⁷⁰ LAPD Community of Practice on milBook is available to military users at <https://www.milsuite.mil/book/groups/army-legal-assistance> (last visited Feb. 23, 2017).

⁷¹ milBook message thread, *AR 608-99 and court order not covering all family members*, MILBOOK (Jun. 29, 2012, 10:52 AM), <https://www.milsuite.mil/book/message/444428>.

⁷² AR 608-99, *supra* note 2, para. 2-6d(2) (providing that "Family unit[s] residing in Government family housing" are not entitled to additional financial support). Similarly, when there are multiple Family units, any Family members residing in government family housing will not be entitled to additional financial support. *Id.* para. 2-6e(1)(c).

⁷³ OFF. OF THE DEPUTY UNDER SECRETARY OF DEF., MILITARY HOUSING PRIVATIZATION, <http://www.acq.osd.mil/housing/faqs.htm> (last visited Feb. 23, 2017) (stating that approximately 75% of military housing is covered by the Military Housing Privatization Initiative of 1996).

⁷⁴ AR 608-99, *supra* note 2, Glossary, sec. II (specifying that government family housing "does not include on-post housing that the [S]oldier leases from a Government-approved private contractor").

⁷⁵ Locality BAH-WITH rates for all military installations for 2016 are available at <http://www.defensetravel.dod.mil/Docs/perdiem/browse/Allowances/BAH/PDF/2016/2016-With-Dependents-BAH-Rates.pdf> (last visited Feb. 23, 2017).

⁷⁶ Non-locality BAH RC/T rates for 2016 are available at <http://www.defensetravel.dod.mil/Docs/perdiem/browse/Allowances/Non->

[Locality_BAH/2016-Non-Locality-BAH-Rates.pdf](#) (last visited Feb. 23, 2017).

⁷⁷ As an example, the 2016 non-locality BAH RC/T for an E5 is \$919.50, but the 2016 locality BAH-WITH rate for an E5 is \$840.00 for Fort McClellan, AL, and \$912.00 for Fort Knox, KY. Locality BAH-WITH rates, *supra* note 78; non-locality BAH-WITH rates, *supra* note 79. Rent paid to a contractor-managed housing unit counts toward the Soldier meeting his support obligation. AR 608-99, *supra* note 2, para. 2-9d(1)(a). So, a Soldier with Family in privatized on-post housing would owe an additional \$79.50 in support at Fort McClellan, AL, or an additional \$7.50 at Fort Knox, KY.

⁷⁸ Commanders must maintain discipline in their units according to applicable regulations. AR 600-20, *supra* note 8, para. 4-1c. Commanders who fail to follow or enforce regulations may be found derelict in their duties and could be relieved of command. *See* UCMJ, art. 92 (2012); AR 600-20, *supra* note 8, para. 2-17. Furthermore, the regulation will take no action to encourage or facilitate violations of AR 608-99. AR 608-99, *supra* note 2, para. 1-5c.

⁷⁹ AR 608-99, *supra* note 2, para. 3-4b(1)(b).

⁸⁰ Commanders who are a Special Court-Martial Convening Authority (SPCMCA) may reduce or release a Soldier's spousal support obligation under AR 608-99, paragraph 2-6, when it is justified as a "matter of fundamental fairness." *See id.* para. 2-15.

⁸¹ AR 608-99, *supra* note 2, paras. 3-5 to 3-6.

commander must send a signed,⁸² written response to each non-support complaint received under AR 608-99 within fourteen days of receipt of the complaint, and the response must contain certain specific information.⁸³ The JA should consider offering to draft the response letter. By drafting the letter, the JA is not only ensuring compliance with regulatory requirements, but also the JA is able to ensure the factual accuracy of the response, manage the tone of the response, and ensure the response is completed within the provided timeline. Should the commander wish to draft the response personally, the JA should at a minimum offer to review the letter for legal sufficiency.

B. Format, Content, and Tone of the Response

As with all military writing, the response letter should conform to the standards in AR 25-50 (Preparing and Managing Correspondence).⁸⁴ The response should be prepared on official letterhead⁸⁵ and should be formatted as a letter rather than a memorandum.⁸⁶ The identified point of contact for the letter⁸⁷ must be the Soldier's commander and the letter must provide complete contact information for the commander.⁸⁸

The body of the letter must include information that is "helpful and responsive" to the complaint, including a specific statement of whether the Soldier was found to be in compliance with AR 608-99.⁸⁹ If the Soldier was found not in compliance, the letter must indicate what actions have been taken to resolve the non-support issue.⁹⁰ If the Soldier was found in compliance, the letter must include either a summary of the payments made⁹¹ or an explanation of why no support was owed.⁹² The response must not include the release of personal information about the Soldier that is protected by the Privacy Act.⁹³ Even if the Soldier authorized the release of

information, the response should only include personal information to the extent necessary to respond to the non-support complaint.⁹⁴ Regardless of the findings of the inquiry, the response should offer advice on other courses of action for the family, such as pursuing legal action to obtain a court order for support.⁹⁵

Additionally, the tone of the response must remain professional regardless of the results of the inquiry. For the complainant, the commander's response represents the official response of the Army; any hostile or dismissive tone in the letter may reflect poorly on the Army and undermine the Army's efforts to promote the care of Families. Even if the complainant is found to have blatantly lied about the Soldier, it is important that the response maintain a professional and courteous tone while providing the factual results of the inquiry.

C. Addressing Other Matters in the Response

The commander may also wish to address ancillary matters in the response, such as allegations of abuse or adultery, if they were raised with the non-support complaint. The JA should advise the commander to offer the complainant alternate courses of actions for ancillary matters that were unsubstantiated by the inquiry or that fall outside of the commander's purview.⁹⁶

D. Sending the Response

When the response letter is complete and the commander has signed it, the letter should be mailed to the complainant. The letter should be sent Certified mail with return receipt requested in order to maintain proof of dispatch and delivery.⁹⁷ If the complainant fails or refuses to provide a

⁸² *Id.* para. 3-1d.

⁸³ *Id.* para. 3-5.

⁸⁴ See DEP'T OF ARMY, REG. 25-50, PREPARING AND MANAGING CORRESPONDENCE (17 May 2013) [hereinafter AR 25-50].

⁸⁵ *Id.* para. 1-15.

⁸⁶ See *id.* ch. 3.

⁸⁷ See *id.* para. 1-12.

⁸⁸ AR 608-99, *supra* note 2, para. 3-5b(1).

⁸⁹ *Id.* para. 3-5c.

⁹⁰ *Id.* para. 3-6c(3)(b).

⁹¹ *Id.* para. 3-6c(3)(a).

⁹² *Id.* para. 3-6c(2).

⁹³ See AR 608-99, *supra* note 2, para. 3-2; Privacy Act of 1974, 5 U.S.C. § 552a (2015). Generally, for non-support complaints, the relevant personal information that must be protected includes addresses and phone numbers, names of Family members, marital status, and medical data. AR 608-99, *supra* note 2, para. 3-2c(7)(a). Regardless of whether the Soldier authorized the release of personal information on DA Form 5459, an adequate response

generally does not need to include any personal information that would require authorization to release. See AR 608-99, *supra* note 2, para. 3-2b; Professional Experiences, *supra* note 1.

⁹⁴ For example, while a complainant must be informed of the actions taken to correct a substantiated non-support allegation, the complainant has no right to know what, if any, disciplinary actions have been taken to punish the Soldier as this personal information is not relevant to resolving the non-support complaint. AR 608-99, *supra* note 2, para. 3-6c(3)(b); telephone interview with Major Emily Roman, Associate Professor of Administrative and Civil Law, The Judge Advocate General's Legal Center and School (Feb. 25, 2016).

⁹⁵ *Id.* para. 3-5c.

⁹⁶ For example, a spouse failing to provide proof of adultery may be encouraged to reengage the command if new evidence becomes available. Similarly, a spouse alleging abusive behavior may be encouraged to contact law enforcement if a threatening situation with the Soldier arises. Professional Experiences, *supra* note 1.

⁹⁷ See generally UNITED STATES POSTAL SERVICE, <https://www.usps.com/ship/insurance-extra-services.htm> (last visited Jan. 21, 2016).

mailing address, it may be acceptable for the commander to scan a signed copy of his response and send it to the complainant via email. Regardless of how the letter is dispatched, the JA should request the commander provide a scanned copy of the signed response letter and the applicable proof of dispatch for the file in case there are future inquiries about how the command responded to the complaint.

VII. Additional Actions Following the Response

Once the response has been sent to the complainant, there may be a few additional matters for the commander to address. The JA should ensure the commander is aware of any follow-up actions that are necessary or advisable to close out the non-support complaint.

A. Closing the Loop with IG

If a non-support complaint is received via IG channels, then the command must close the loop with IG by confirming when the response has been sent.⁹⁸ The IG will generally request a copy of the response letter for its records.⁹⁹ Depending on the command and the relationship with the IG office, the JA may offer to perform this function or otherwise may remind the command to do so. If the response is not going to be complete within the fourteen-day requirement,¹⁰⁰ the JA should ensure that the IG is notified of any delay and the reasons for it. Keeping the IG informed during the inquiry can help the IG communicate with the complainant if there is additional contact regarding the status of the complaint.

B. Following up with the Soldier

The Soldier's commander should follow up after the inquiry is complete to inform the Soldier of the results and any action the commander is taking to correct any deficiencies that were revealed.¹⁰¹ Assuming the commander previously counseled the Soldier about the non-support complaint¹⁰² and that the inquiry found that the Soldier was in compliance, the follow-up counseling may simply confirm that the inquiry was completed and direct the Soldier to continue managing his Family affairs properly. The JA should also remind the

commander to lift the flag on the Soldier and notify the Soldier when that has occurred.¹⁰³

C. Enforcing the Support Obligation

If the inquiry reveals that the Soldier is not in compliance with AR 608-99, the JA must be prepared to advise the commander on corrective actions that the commander may direct to address the issue. If the Soldier failed to pay support in prior months, the commander may only encourage, but not order, the Soldier to pay those arrears; however, the Soldier may be punished for having failed to provide support when it was due.¹⁰⁴ The commander should order the Soldier to comply with AR 608-99 going forward, and, in some cases, he may direct the form and timing of the support payments.¹⁰⁵ If the Soldier refuses to provide support as ordered, there is no mechanism for the commander or the Army to involuntarily take money from the Soldier and provide it to his dependents; however, the Soldier may be punished for disobeying his commander's order.¹⁰⁶

D. Disciplinary Actions

The JA must also be prepared to advise the commander on the options, appropriateness, and ramifications of punishing a Soldier who is in violation of AR 608-99. In considering whether punishment is appropriate, the commander should consider multiple factors, such as whether the violation was willful, how long the violation had been going on, the hardship the violation created on the Family, the financial situation of the Soldier, the Soldier's ability to pay the full amount of support, and any other relevant facts the inquiry revealed that would make the Soldier more or less culpable for the violation. In particular, JAs may want to remind their commanders that any punishment that would take rank or pay from the Soldier will mean less money that is available for the Family.¹⁰⁷

E. Releasing the Soldier from the Support Obligation

During a non-support complaint, the commander may inquire about the possibility of releasing the Soldier from the support requirements of AR 608-99. The JA must be prepared to advise the commander on when release is authorized and whether it may be appropriate for a given case. Under the

⁹⁸ AR 20-1, *supra* note 28, para. 6-3a(2).

⁹⁹ Professional Experiences, *supra* note 1.

¹⁰⁰ AR 608-99, *supra* note 2, para. 3-5a(1).

¹⁰¹ *Id.* para. 3-4b(1).

¹⁰² *Id.* para. 3-4a.

¹⁰³ AR 600-8-2, *supra* note 26, para. 2-9b(9).

¹⁰⁴ See AR 608-99, *supra* note 2, para. 2-5c (Failure to provide support when due may be punished under Article 92, UCMJ.); UCMJ art. 92 (2012) (A Soldier may be punished for "failure to obey [an] order or regulation.")

¹⁰⁵ AR 608-99, *supra* note 2, para. 3-6b(3). The commander may direct the form and timing of support obligations arising under AR 608-99, paragraph 2-6; the commander may not alter support requirements established by court order or written support agreement. *Id.*

¹⁰⁶ See UCMJ art. 90 (2012). A person may be punished for "willfully disobeying [a] superior commissioned officer." *Id.*

¹⁰⁷ Commanders may take pay and, for some Soldiers, rank in non-judicial punishment proceedings. UCMJ art. 15 (2012).

provisions of AR 608-99, only battalion commanders and SPCMCA's may authorize release from support requirements.¹⁰⁸ A release may only be authorized after the commander has sought input from the affected Family members and obtained a written legal opinion.¹⁰⁹ Battalion commanders may release Soldiers from support requirements only in certain specified circumstances; in some limited circumstances, this may include release from the child support requirement.¹¹⁰ Commanders who are SPCMCA's have authority to reduce or release the spousal support obligation anytime a preponderance of the evidence convinces the SPCMCA that doing so is required as a "matter of fundamental fairness."¹¹¹

VIII. Conclusion

Hopefully this primer has highlighted the multiple facets involved in responding to a non-support complaint and the implications of getting it wrong. When commanders fail to adequately inquire into and resolve non-support complaints, they not only jeopardize their own commands and unit readiness, but they jeopardize the financial stability and well-being of their Soldiers and Family members. While AR 608-99 provides extensive guidance on processing non-support complaints, its provisions necessarily leave some gaps. Further, it would be unrealistic to expect a busy commander to know or personally review the provisions of AR 608-99 each time a complaint is filed. Instead, the JA is in a unique position to assist the command by ensuring regulatory requirements are followed and offering practical solutions when the regulations leave gaps. In this way, the knowledgeable and proactive JA can become an invaluable tool for the command in responding to non-support complaints.

¹⁰⁸ Eligible commanders may only release a Soldier from the regulatory support obligations arising under AR 608-99, paragraph 2-6; commanders never have the authority to modify or release a Soldier from court-ordered support or a written support agreement. AR 608-99, *supra* note 2, paras. 2-12, 2-15a.

¹⁰⁹ *Id.* para. 2-12b.

¹¹⁰ For example, the battalion commander may release a Soldier from the spousal support requirement if the spouse's income exceeds the military pay of the Soldier or if the Soldier has been the victim of substantial abuse by the spouse. *Id.* para. 2-14b. A battalion commander may release a Soldier

from the regulatory child support requirement if the child is in jail or is in the custody of a person who is not the lawful custodian. *Id.*

¹¹¹ *See id.* para. 2-15. For example, a SPCMCA may determine fundamental fairness justifies releasing a Soldier from the spousal support obligation where there are no children of the marriage, the evidence shows the spouse made false allegations of abuse to get the Soldier removed from the marital home so that she could move a new romantic partner into the home, and the spouse is actively avoiding divorce proceedings so that she can continue to receive support payments from the Soldier. Professional Experiences, *supra* note 1.

OFFICE SYMBOL

MONTH 201#

MEMORANDUM FOR [RNK First Last], XXXX Company, XXXX Battalion, XXXX Brigade, Fort XXXX, XX ZIP

SUBJECT: Commander's Inquiry IAW Rules for Courts-Martial (RCM) 303

1. You are hereby appointed to conduct a Commander's Inquiry IAW RCM 303 to investigate an allegation that [RNK First Last], XXXX Company, has failed to provide adequate support to [his/her] Family IAW Army Regulation (AR) 608-99. This investigation is your primary duty until completed and takes precedence over all other duties and assignments.

2. Prior to beginning your inquiry, you must obtain a legal brief from [CPT First Last]. [CPT Last] will be your legal advisor during your inquiry.

3. In conducting your inquiry, you should interview any witnesses who you believe possess relevant information. You may refer to Chapters 3 and 4 of AR 15-6 for general guidance on conducting an investigation, but you are not bound by the requirements of AR 15-6. Witness statements should be taken using a DA Form 2823 whenever possible, but do not delay your investigation to obtain sworn statements. Telephonic interviews are acceptable. You should collect copies of any documentary evidence that you believe are relevant.

4. Prior to interviewing [RNK Last], you must advise [him/her] of [his/her] rights under Article 31, UCMJ, using DA Form 3881. You must also have [him/her] indicate whether [he/she] authorizes the release of [his/her] personal information to respond to this inquiry using DA Form 5459.

5. When you have completed your inquiry, you will submit a report of your findings and recommendations to me. You must submit your findings no later than 7 days from your appointment. If you believe you will require additional time to complete your inquiry, you must request an extension from me.

FIRST LAST
RNK, BR
Commanding

Appendix B. Sample Questions for Non-Support Inquiries

1. Determine the following information by asking both the complainant and the Soldier:

- When did the separation begin?
- How many children are there? Are any of the children from other relationships?
- Where are the dependents living? Do all of the dependents live together?
- Who is paying for the residence where the dependents are living? If the Soldier is paying, is the Soldier on the mortgage or the lease? Who is paying for the essential utilities?
- What, if any, support has the Soldier provided? When?
- Are there any court orders setting support?
- Are there any written agreements that provide for support amounts?
 - Has either party filed for divorce yet? If not, do they intend to file for divorce?
 - Do the dependents have access to any joint banking accounts, or credit or debit cards?

2. Documentary evidence to request.

- Copies of any relevant court orders (support, divorce, etc.).
- Copies of any proof of payments that have been made or received.
- Copy of proof that an allotment has been set up.
- Copy of any written support agreement(s).
- Copies of any payments-in-kind that have been made.

Appendix C. Sample Response Letter

NOTE: All official military correspondence should be prepared on official unit letterhead which includes a mailing address in accordance with AR 25-50, para. 1-15.

Month ##, 201#

Commander, XXXX Company
First Last (Name of the Complainant)
Address
City, ST Zip

Dear *Mr./Ms. Last*:

I am writing in response to your inquiry regarding support from your [*spouse, Rank (RNK) Name of Soldier*]. Thank you for bringing this issue to my attention. I take matters involving family members very seriously and want to ensure your concerns are addressed.

I have investigated your inquiry in accordance with Army Regulation (AR) 608-99, *Family Support, Child Custody, and Paternity*. After reviewing all of the evidence, I find that [*RNK Name of Soldier*] [*is/is not*] providing adequate support. I have determined that in accordance with AR 608-99, paragraph [*X-X*], [*RNK Name of Soldier*] is required to provide you with [*\$XXX.XX*] per month as support based on [*his/her*] rank. [*Provide additional details regarding how the determination was made, when support payments are due, whether there are arrears, etc.*]

[*RNK Name of Soldier*] [*has/has not*] authorized the release of [*his/her*] personal information to respond to your inquiry. Additionally, [*Rank Name of Counselor*] counseled [*RNK Name of Soldier*] on [*Date*] regarding [*his/her*] support obligation; [*provide summary of the content of the counseling, including any corrective actions taken, orders given, etc.*]

Finally, I would encourage you to seek legal advice regarding your options. [*Provide any additional recommendations for the complainant, such as seeking a court order to set child support and/or establish wage garnishment, contacting law enforcement if there are safety concerns, contacting the commander to submit future proof of non-support or misconduct, etc.*]

I trust that this responds to your concerns. If you have further questions, you may reach me at [*Telephone Number*].

[*Company Commander's Name*]
[*Rank*], U.S. Army
Commanding

The Silo Effect: The Peril of Expertise and the Promise of Breaking Down Barriers¹

Reviewed by Major Alex C. Barnett*

I. Introduction

Silos can be deadly. On September 11th, 2001, nineteen individuals, financed and directed by an international terrorist organization, used American passenger planes to kill nearly 3,000 people on U.S. soil.³ The 9/11 Commission, set up in the aftermath of the attacks to investigate the circumstances leading up to them, discovered systemic failures within the federal government.⁴ These failures allowed the hijackers to carry out their deadly mission from within the United States and under the noses of U.S. intelligence and law enforcement agencies.⁵

Subsequent to the bombing of the U.S.S. Cole in 2000, and into the summer of 2001, the U.S. intelligence community assessed that al Qaeda was planning a spectacular attack, but the when, where, and how were unknown. However, different governmental agencies possessed pieces of information, which if connected, could have helped to answer these unknowns.⁶ For example, Zacarias Moussaoui, the so-called twentieth hijacker, was arrested in Minnesota in August 2001 for violating immigration regulations, and subsequently raised officials' suspicions because of his interest in learning to fly commercial airplanes.⁷

However, this information was not connected to increased reporting on a forthcoming al Qaeda attack.⁸

Information such as that concerning Moussaoui may have given the government some prior warning that the September 11th attacks were coming, but because of the silos that existed within the government at the time, information that should have been shared among different agencies was not.⁹

In simple terms, silos are divisions within organizations that hold something important, and make it hard for others access.¹⁰ In the case of the U.S. Government, agencies

created during the Cold War and designed to confront the Soviet Union, suddenly didn't work when confronting a diffuse, worldwide terrorist organization.¹¹ It took the September 11th attacks to show how deadly these silos within our own federal government could be.¹² In *The Silo Effect*, Gillian Tett takes on the issue of silos, illuminating them through multiple case studies to provide the reader a framework for understanding what they look like, how to evaluate them, and how to eliminate, or at least, limit their effects. In Tett's view we live in an interconnected world, but despite this, many organizations are fragmented into silos, or insular worlds of specialized expertise, which fail to communicate or collaborate with one another.¹³ As a result of this, the people in these silos, and the organization relying on those people, suffer from a kind of myopia that prevents them from seeing risks or opportunities that they might see without this fragmentation.¹⁴ Tett does not maintain that silos are necessarily harmful to organizations; in fact, she acknowledges that they can be both necessary and good in the correct context.¹⁵ However, she does maintain that it is necessary for organizations to recognize that silos exist, and develop a framework for recognizing whether they help or harm the organization.¹⁶

II. The Framework

Tett organizes her ideas around the view that since silos are really systems for organizing information into a logical framework, and the field of anthropology is inherently focused on the way cultures organize themselves, anthropology provides the best framework for studying them.¹⁷ She gives six reasons for this: first, anthropologists take a bottom up view of the world; second, they attempt to see how different parts of a society interact together; third, because they are interested in cultures as a whole, anthropologists often examine aspects of culture that may

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¹ GILLIAN TETT, *THE SILO EFFECT* (2015).

² THOMAS J. KEAN & LEE H. HAMILTON, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES: THE 9/11 COMMISSION REPORT, EXECUTIVE SUMMARY (2004), http://govinfo.library.unt.edu/911/report/911Report_Exec.pdf.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Vijay Govindarajan, *The First Two Steps Toward Breaking Down Silos in Your Organization*, HARV. BUS. REV., <https://hbr.org/2011/08/the-first-two-steps-toward-breaking-down-silos> (last visited Apr. 19, 2017).

¹¹ KEAN & HAMILTON, *supra* note 3.

¹² *Id.*

¹³ TETT, *supra* note 1 at 13-14.

¹⁴ *Id.*

¹⁵ *Id.* at 19.

¹⁶ *Id.*

¹⁷ *Id.* at 19-20.

seem innocuous, but turn out to have a significant effect on that culture; fourth, they listen to people and contrast people's statements with what they actually do; fifth, they look at cultural systems with new insight because they compare them to other systems; and sixth, they acknowledge that there is more than one correct way of doing things.¹⁸ Tett then applies this framework to seven case studies: three studies of silo's detrimental effects on organizations and four discussing individual or organizational responses to silos.

III. The Case Studies

Chapters 2, 3, and 4 of the *The Silo Effect* focus on three organizations overcome by their institutional silos. In chapter 2, Tett examines how at the turn of the last century, Sony Corporation, the company that invented the Walkman portable cassette player, failed to be competitive in the digital music delivery market, in spite of their earlier success with the Walkman. Sony's different departments were so insular and non-collaborationist that two separate departments, the consumer electronics department and the Vaio computing department, each created and released digital music offerings without consulting with the other department. This damaged Sony's potential for innovation and was confusing to industry watchers and consumers.¹⁹ Chapter 2 represented one of Tett's stronger chapters. She very clearly illustrates how silos developed within Sony over time, and how the company's history, structure, and leadership all inadvertently helped to keep them in place to the company's detriment. Using the anthropologist's tool of comparing societies, Tett is able to contrast the situation at Sony with that at Apple, a company that became the giant in digital music delivery at the same time that Sony entered its decline. In Tett's view, this was due to Apple, and specifically, Apple CEO Steve Jobs', imposition of a culture of collaboration and cohesiveness in his company that did not exist at Sony.²⁰ Tett supports this claim by showing that Sony ran profits and losses by individual departments within the company, rather than as Apple did, on a company-wide basis.²¹ This created a perverse incentive for departments to be overly protectionist of their own developing technologies and ultimately resulted in the dueling digital music devices fielded by Sony.²²

Chapter 3 examines the case of UBS, the Swiss banking giant, and how its structural silos concealed significant financial risk when one department started buying up risky mortgages that were not properly collateralized by the bank and were actually ignored by the bank's risk managers.²³ In chapter 4, Tett examines how economists, as a distinct social group, failed to foresee the 2008 financial crises. Essentially,

while the way that economists understood the financial system was sound if viewed from within their particular areas of expertise, they failed to account for fundamental changes occurring within the financial system outside their rigidly constructed mental silos.²⁴ Because of this, they missed some of the cues that problems were developing within the economy.²⁵

While useful, chapters 3 and 4 suffer from a significant defect: in a book that relies on humanities for its overarching argument, Tett uses technical examples from the financial industry and macroeconomics, without providing sufficient explanation of these systems.

For the reader unfamiliar with the worlds of finance and economics this can make for daunting reading. It is not without trying that she does this, as can be seen in this excerpt:

A few months earlier, UBS had created a department in the New York office dedicated to trading something called "collateralized debt obligations" or CDOs. This was a particularly specialized field in the business of securitization. Essentially, it revolved around the craft of taking bundles of different loans and bonds, and turning these into complex new financial products. One way to visualize this process is with the image of how a butcher makes sausages. Instead of simply grabbing a carcass and selling steaks, a butcher will sometimes take numerous different joints, chop them up, and mix them according to somebody's taste, and then sell it inside new casings. The process of creating CDOs echoes this, in financial terms. The banks start by amassing loans they have made to customers (companies or consumers), break these down into different pieces of lending risk, mix them up, and sell them to new customers in new cases called CDOs.²⁶

For anyone unfamiliar with the world of finance, the sausage example may create an interesting visual analogy, yet it sheds little light on the actual processes Tett refers to. It is unfortunate that Tett could not illustrate her point with examples that were as accessible as the Sony example in chapter 2.

¹⁸ *Id.* at 251.

¹⁹ *Id.* at 54, 62-63.

²⁰ *Id.* at 63-64.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 91, 97.

²⁴ *Id.* at 108-09.

²⁵ *Id.*

²⁶ *Id.* at 88-89.

Tett moves on in chapters 5 through 8 to discuss four cases of individuals or organizations overcoming silos. Chapter 5 concerns Josh Goldstein, an executive with the internet start-up OpenTable, who was motivated by the September 11th attacks to do something which made him feel like he was contributing more to his community.²⁷ Goldstein quit his job at OpenTable and was accepted into the Chicago Police Department's police academy. He later, parlayed his analytic skills into a position within the department's headquarters where he developed a way to forecast where violent crime was most likely to occur in the city.²⁸ Tett's stated purpose in telling this story is to illustrate how individuals can combat silos, and as she points out, "one of the most basic steps that we can make to fight the risks of silos starts ... inside our heads."²⁹ However, other than this single story, Tett fails to provide much insight on what we might do *in our heads* to combat silos. This is unfortunate, because as Tett rightly states, organizations are collections of people, and because of this fact, it seems the more dangerous type of silo would be the mental silo that perpetuates the structural silos in organizations.³⁰

In chapters 7 and 8, Tett provides examples of two organizations, one consciously preventing and the other breaking down, institutional silos. In the case of FaceBook, managers specifically set out to avoid the pitfalls that affected Sony.³¹ The company began a systematic training regimen for all incoming employees in order to inculcate FaceBook's institutional values and create a sense of shared purpose before employees moved on to their specialist teams within the organization. In addition, FaceBook developed a program it called "Hackamonth" where an employee who had been in the same job for about a year would move to another team of their choice for a month and at the end, was given the option to stay with that team or go back to their original team. According to Tett, this prevented teams from developing into hardened silos within FaceBook.

In the case of the Cleveland Clinic, one of the nation's premier hospitals, rather than rotating professionals within the organization, the hospital altered the old system of classifying medical professionals by their particular skills, and instead reorganized them around specific parts of the human body or specific illnesses. So, rather than maintaining a delineation between surgeons and physicians for example, the hospital placed everyone responsible for treating the brain, or a certain type of cancer, in to one interdisciplinary team.³²

The big takeaway from both the Cleveland Clinic and the FaceBook examples seems to be that organizations who spend a lot of time and effort looking inward and using creative

strategies to prevent or breakdown silos in their organizations will be rewarded with better performance. However, neither organization's tactics should be taken as a panacea since their solutions to the issues their organizations faced were very specific to their purposes: medicine and technology. What these examples do is provide a good example for how an organization might seek to look within itself and creatively limit silos.

In chapter 8, Tett attempts to show what she means by silos blinding organizations to "exciting opportunities."³³ She moves back again to the world of finance, explaining how a hedge fund called Blue Mountain Capital took advantage of silos within its competitor's organizations to play the market and make money at the competitor's expense.

Unfortunately, just as in chapters 3 and 4, chapter 8 is so riddled with jargon that it is hard to follow for the average reader. The only real takeaway for those unfamiliar with the finance industry is likely to be *one can use a competitor's silos to their own advantage*. It seems there are other more accessible examples Tett could have used to illustrate this point. A prime one, taken from one of her earlier chapters would be how Apple's management style took advantage of Sony's rigidly hierarchical organization to become the market leader in portable music technology.³⁴ This would have given Tett the opportunity to not only examine how apple exploited Sony's silos, but to examine in more depth how Apple is organized in a way that prevents silos from forming within itself.³⁵

IV. The Takeaway

In Tett's view five lessons emerge from the case studies she presents. First, fluidity within organizations, that is, ensuring people are able to move or communicate freely within organizations, e.g. FaceBook, can help prevent the development of silos. Second, organizations should be careful to not incentivize sub-organizations to be noncollaborationist, that is, to take heed of the example of Sony where each department maintained its own separate profit and loss sheets. Third, developing information sharing systems among departments can help avoid organizational risk, such as happened at UBS when the right hand did not know what the left was doing. Fourth, that people should be willing to re-examine the classification systems they are given and not just accept them based on precedent. And finally, using the wealth of data the information has provided us

²⁷ *Id.* at 139.

²⁸ *Id.* at 139, 152-57.

²⁹ *Id.* at 142.

³⁰ *Id.*

³¹ *Id.* at 169.

³² *Id.* at 205.

³³ *Id.* at 247.

³⁴ *Id.* at 63-64.

³⁵ Tim Bajarin, *Three Ways Apple Sets Itself Apart from the Competition*, TIME, <http://techland.time.com/2012/07/30/3-things-that-set-apple-apart-from-the-competition/> (last visited Apr. 19, 2017).

access to can be an important tool in breaking down silos, such as in the example of Brett Goldstein's crime forecast.³⁶

While these are useful lessons, Tett could have given more attention to their opposing arguments. For example, when does fluidity within organizations create efficiency issues?

In the example of the FaceBook Hackamonnth process, at what point are the returns from this process diminished by the disruption it causes among teams? In her preface, Tett tells the story of the city of New York using multitudes of data it collects on its citizens to determine what buildings could house fire hazards. But as The Guardian newspaper has pointed out, one thing Tett might also want to ask is what the downside could be to government agencies, or corporations for that matter, collecting and using large amounts of data on individuals?³⁷ As Tett acknowledges at the outset, sometimes, silos are necessary.³⁸ However, she fails to provide examples of what a necessary silo looks like versus one that should be broken down. The most relevant example to Army Judge Advocates being the Army's Trial Defense Service, which is itself a silo, for good reason.³⁹ It would have been nice if Tett had provided some insight on where the tipping point lies between useful silos and damaging silos.

V. Conclusion

The Silo Effect is a compelling work that will hold the interest of anyone who has ever been part of a large organization. It is thought provoking in that it defines a problem that people are likely to recognize exists, and provides a framework for devising solutions to that problem. However, the book does have flaws that limit its usefulness and should be read with this fact in mind.

³⁶ TETT, *supra* note 1 at 247-50.

³⁷ Steven Poole, *The Silo Effect by Gillian Tett Review – A Subversive Manifesto*, THE GUARDIAN (Oct. 17, 2015), <https://www.theguardian.com/books/2015/oct/17/the-silo-effect-why-putting-everything-in-its-place-isnt-such-a-bright-idea-gillian-tett-review>.

³⁸ *Id.*; TETT, *supra* note 1, at 13.

³⁹ *U.S. Army Trial Defense Service – History*, U.S. ARMY TRIAL DEF. SERV., <https://www.jagcnet.army.mil/Sites/USATDS.nsf/homeContent.xsp?open&documentId=C440AF1C1F5589C285257B490069B306> (last visited Apr. 19, 2017) (explaining why TDS exists as a separate organization outside the purview of unit/installation SJAs).

You Win in the Locker Room First¹

Reviewed By Major Julie Worthington*

*True leaders don't create followers. They create more leaders.*²

I. Introduction

You Win in the Locker Room First outlines seven practical concepts all beginning with the letter “C” for leaders “to build a great team.”³ The seven C’s are: culture, contagious, consistent, communicate, connect, commitment, and care.⁴ The premise of *You Win in the Locker Room First* is that “success happens by focusing on the process, not the outcome. You win by cultivating the right culture, leadership, expectations, beliefs, mindset, relationships, and habits before you even the play the game. You win in the locker room first.”⁵ The concepts, while intended for coaches, is a self-help book with practical foundational leadership principles applicable to all military leaders. Although the authors failed to adequately address a family and work balance and the book’s content was repetitive, *You Win in the Locker Room First* provides foundational leadership principles for every leader to incorporate both in their professional and personal life.

II. Summary

You Win in the Locker Room First is not a verbose book filled with empirical data from leadership studies. Rather, it is a personal account by co-author Mike Smith, the overall winningest coach in Atlanta Falcons’ history, examining his successes and failures with the Falcons while integrating motivational examples from the corporate world and other sports.⁶

The Falcons were in “turmoil” when Coach Smith took over as the Head Coach in 2008.⁷ Prior to Coach Smith, the

Falcons and their fans had never enjoyed “back-to-back winning seasons” in all their 42 years.⁸ The book details how Coach Smith effectively utilized the seven C’s to create a successful, winning team and what he and the Falcons failed to do in the last two seasons that led to his termination in 2014.⁹

You Win in the Locker Room First differs from other popular leadership books such as *The Rocket Model* and *Leading Change* by concentrating primarily on how to effect self-change rather than organizational change.¹⁰ Organizational change takes years if not decades to accomplish.¹¹ With frequent military leadership position changes resulting in different subordinates, peers, and superiors, a military leader does not have decades with the same people to affect this change. *You Win in the Locker Room First* is more applicable to military leaders on how to display exemplary leadership traits for their subordinates, peers, and superiors to emulate, which will then create improved leaders within the military.

III. Strengths

You Win in the Locker Room First is particularly germane in today’s military with an abhorrence of toxic leadership. The seven C’s are especially pertinent for members of the U.S. Army Reserve and National Guard to utilize as those organizations have “experienced more toxic leadership than did their active-duty military counterparts.”¹² It is fundamentally impossible for a leader to utilize the seven C’s and have the label “toxic leader” assigned to them.¹³ While all the seven C’s are contrary to the traits of a toxic leader,¹⁴

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¹ JON GORDON & MIKE SMITH, *YOU WIN IN THE LOCKER ROOM FIRST* (2015).

² GORDON & SMITH, *supra* note 1, at 121.

³ *Id.* at xii.

⁴ *Id.* at vii-ix.

⁵ *Id.* at xi. Coach Smith wanted to coach “as long as possible and win as much as” they could, so he focused on the process, not the goal or season’s outcome. *Id.* at 13.

⁶ *Id.* at book jacket, 24-25, 27, 97, 117, 137. Jon Gordon also co-authored *You Win in the Locker Room First*. *Id.* at book jacket. He “is the author of numerous bestselling books” and is an “inspirational” speaker as well as a “consultant to numerous college and professional teams.” *Id.*

⁷ *Id.* at 3.

⁸ *Id.* From 2000–2007, five different men coached the Falcons. *Id.* In 2007, the year before the Falcons hired Coach Smith, the current head

coach “resigned after twelve games—three quarters through the season.” *Id.* Additionally, the quarterback and “the face of the franchise,” was headed to federal prison. *Id.* On December 10, 2007, a United States District Court Judge sentenced Michael Vick, “the former Atlanta Falcons star” and quarterback to twenty-three months in prison for “his involvement in a dogfighting ring.” Juliet Macur, *Vick Receives 23 Months and a Lecture*, N.Y. TIMES, (Dec. 10, 2007), www.nytimes.com/2007/12/11/sports/football/11vick.html?_r=0.

⁹ GORDON & SMITH, *supra* note 1, at xi.

¹⁰ GORDON CURPHY & ROBERT HOGAN, *THE ROCKET MODEL* (2012); JOHN P. KOTTER, *LEADING CHANGE* (2012).

¹¹ KOTTER, *supra* note 10, at 150.

¹² Colonel George E. Reed & Lieutenant Colonel Richard A. Olsen, *Toxic Leadership: Part Deux*, MIL. REV., Nov.–Dec. 2010, at 58, 60.

¹³ Colonel George E. Reed, *Toxic Leadership*, MIL. REV., July–Aug. 2004, at 67.

¹⁴ *Id.* There are “three key elements of toxic leadership syndrome. . . 1. An apparent lack of concern for the well-being of subordinates. 2. A personality

nothing highlights the differences more than the chapter devoted to “[c]are” and its enlightening discussion on the differences between a “transactional coach” and a “transformation coach.”¹⁵ The “transactional coach” discussed in *You Win in the Locker Room First* is akin to the military’s toxic leader.¹⁶ “Transactional coaches” do not see people; they see “numbers who are meant to help them succeed and win.”¹⁷ Self-interest motivates toxic leaders and they “rise to their stations in life over the carcasses of those who work for them.”¹⁸ When a leader cares for their subordinates, their thoughts are primarily of their subordinates, not of themselves.

“Transformational coaches” are the antithesis of toxic leaders.¹⁹ They develop team members to “become the best version of him or herself” by helping them grow in “skill and character.”²⁰ Military doctrine echoes these attributes of a transformational leader. Army doctrine urges leaders to “develop individual subordinates” by “teaching, counseling, coaching, and mentoring” them.²¹ Although toxic or transactional leaders may be “effective in a short sighted sense,”²² “their approach is not sustainable.”²³ Alternatively, transformational leaders realize lasting success because they “develop people . . . and transform lives.”²⁴

The book not only echoes the Army written leadership principles but also reiterates the practice of good Army leaders. *You Win in the Locker Room First* reinforces the tenets of taking responsibility for your subordinates’ failures,²⁵ requiring a complainant to have a solution before approaching a leader with a problem,²⁶ and praise in public and punish in private.²⁷ As a leader, Coach Smith took ownership of the Falcons’ failures.²⁸ Coach Smith stated he allowed the pressure to “steer” him “away from the very things that made us successful.”²⁹ He failed when he did not

fight for his team and his culture.³⁰ This lesson reinforces two important principles. First, a true leader takes responsibility. Second, once the leader builds the culture, they must “value it, live it, reinforce it, and fight for it.”³¹ The authors gain credibility early in the book with the concept of “focusing on the process, not the outcome” by addressing what went wrong in Coach Smith’s last two seasons when the Falcons won only 10 games combined.³² In the 2012 National Football Conference championship game, the Falcons while playing against the San Francisco 49ers fell ten yards short of winning the game and winning a trip to the Super Bowl due to Matt Ryan’s two incomplete passes.³³ After that game, the Falcons changed from a culture focused on the process to one focused on the goal.³⁴ The Falcons became “obsessed” with the goal of winning the Super Bowl.³⁵ The next season instead of setting milestones such as concentrating on having a productive practice and taking it one game at a time, the Falcons concentrated on “getting back to the playoffs,” which led to a losing record and ultimately Coach Smith’s termination.³⁶

Another great strength of *You Win in the Locker Room First* is its diverse applicability. It is not simply a leadership book. Its principles, especially the chapter on consistency, are also applicable to parental relationships as all parents are leaders to their children. A leader or parent “must be consistent” in their “leadership style, approach, attitude, philosophy, and tactics” whether things are going well or bad.³⁷ The authors warn leaders against changing with the wind and instead recommend being a “strong-rooted tree that does not waver, regardless of what is happening around it.”³⁸ This is not a new concept. Arguably, one of the best and most prolific leaders of all times, Jesus Christ, was a consistent and unwavering leader.³⁹ However, consistency is not often related to producing trust, as it is in *You Win in the Locker*

or interpersonal technique that negatively affects organization climate. 3. A conviction by subordinates that leader is motivated primarily by self-interest. *Id.*

¹⁵ GORDON & SMITH, *supra* note 1, at 103-19.

¹⁶ *Id.* at 115.

¹⁷ *Id.*

¹⁸ Reed, *supra* note 13, at 67-68.

¹⁹ GORDON & SMITH, *supra* note 1, at 115.

²⁰ *Id.*

²¹ U.S. DEP’T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP para. 7-4 (1 Aug. 2012) (C1, 10 Sept. 2012) [hereinafter ADP 6-22].

²² Reed, *supra* note 13, at 67.

²³ GORDON & SMITH, *supra* note 1, at 116.

²⁴ *Id.*

²⁵ *Id.* at 99. Coach Smith urges leaders to “never put blame” on the other coaches or players; leaders take responsibility. *Id.*

²⁶ *Id.* at 35-36. “If they had a complaint they could bring it me if they also had a suggested solution to the complaint.” *Id.* at 35. “If you are

complaining, you are not leading. If you are leading, you are not complaining.” *Id.* at 36.

²⁷ *Id.* at 101. “As the great NBA coach Chuck Daly would say, shout praise in public and whisper criticism in private.” *Id.*

²⁸ *Id.* at 17-20.

²⁹ *Id.* at 17.

³⁰ *Id.* at 19.

³¹ *Id.* at 20.

³² *Id.* at xi.

³³ *Id.* at 16.

³⁴ *Id.* at 17.

³⁵ *Id.* at 16.

³⁶ *Id.* at 17.

³⁷ *Id.* at 39.

³⁸ *Id.* at 41.

³⁹ *Hebrews* 13:8 (King James). “Jesus Christ the same yesterday, and today, and forever.” *Id.*

Room First.⁴⁰ Consistent discipline as well as consistent love in good times and bad engender trust from a child. The same principle applies in creating trust from subordinates. Consistency, which produces trust, provides children and subordinates alike the security to make mistakes and learn in the process without fear of a harsh punishment for being human.

IV. Weaknesses

The principal criticism of the book is that it does not adequately address how a leader balances their work and family. Coach Smith provides contradictory guidance by stating “[c]ommitment [s]tarts at [h]ome”⁴¹ while at the same time explains leaders “should serve their teams” and “[g]reat leaders . . . are great servants.”⁴² His conclusory statement that it is possible to be committed to the team and to the “‘team’ at home” “[y]ou just have to make both a priority” lacks any type of meaningful explanation on exactly how to make both a priority without one suffering because of the attention given to the other.⁴³

The authors did not provide guidance perhaps because they have never concurrently made “both a priority.”⁴⁴ The authors cite Jesus’ washing of feet as an example of a leader’s service and commitment to those He served.⁴⁵ However, “[n]o man can serve two masters” highlights the argument that a leader cannot fully commit themselves to their team without their family suffering and vice versa.⁴⁶ The inference that Coach Smith did not adequately balance his work and family besides the glaring lack of explanation is that his aspirational goal when he returns to coaching will be to commit to the football team and “do a better job of committing” to his home team.⁴⁷ Furthermore, both authors took substantial time off work to rededicate themselves to their family.⁴⁸ The overwhelming majority of leaders do not have the luxury to balance their work and family relationship

by concentrating fully on their work for a number of years and then sitting out of their employment field for a year or two to recommit themselves to their family.

An additional criticism of the book from a military perspective is while coaches actively recruit and choose their team members based on talent and character,⁴⁹ military leaders are assigned their subordinates and staff members.⁵⁰ The military suggests to “coach, counsel, and mentor” subordinates.⁵¹ Similarly, *You Win in the Locker Room First*, states a leader will “[c]oach to develop character.”⁵² However, the military and *You Win in the Locker Room First* diverge on the consequence when the team or unit member does not fit within the culture. The answer is simple in the civilian world. You cut the team member or fire the employee.⁵³ In the military, those not exemplifying the leader’s culture will stay in the unit until a change of assignment, administrative separation, or until the service member satisfies their contractual obligation. Military leaders spend an inordinate amount of time dealing with the “energy vampires” who with their negativity can by themselves disrupt and break the team.⁵⁴ The idea that “[o]ne person can’t make a team but one person can break a team”⁵⁵ may cause consternation for military leaders who do not choose their members and who despite their best efforts to “coach, counsel, and mentor”⁵⁶ are at the mercy of the “energy vampires.”⁵⁷

Finally, the last criticism is the book’s organization. *You Win in the Locker Room First* contains seven chapters with each chapter devoted to one of the seven C’s. However, the book devotes the last 30 substantive pages to “The Big C,” “The Other Big C” and “Beyond the 7 C’s.”⁵⁸ The authors tout the segment devoted to coaching as bringing “all the other C’s together.”⁵⁹ In actuality, the section is a restatement of the seven C’s attempting to motivate the reader to put the concepts to use in their life and serve as an example.⁶⁰ The

⁴⁰ GORDON & SMITH, *supra* note 1, at 41.

⁴¹ *Id.* at 90.

⁴² *Id.* at 89.

⁴³ *Id.* at 91.

⁴⁴ *Id.* After Coach Smith’s termination he “chose not to coach” and to stay at home with his wife and daughter. *Id.* at 90. Jon Gordon, a few years before writing *You Win in the Locker Room First*, “turned down a number of speaking engagements” because his “wife and teenage children were struggling at home.” *Id.* at 91. His wife was “stressed and having trouble managing it all.” *Id.* “I wanted my wife to be able to handle it all.” *Id.*

⁴⁵ *Id.* at 88.

⁴⁶ *Matthew* 6:24 (King James).

⁴⁷ GORDON & SMITH, *supra* note 1, at 91.

⁴⁸ *Id.* at 90-91.

⁴⁹ *Id.* at 5.

⁵⁰ ADRP 6-22, *supra* note 21, para. 7-84. “Army leaders do not have a hand in selecting team members, but have the responsibility to ensure the team forms into a high performing unit.” *Id.*

⁵¹ *Id.* para. 6-51.

⁵² GORDON & SMITH, *supra* note 1, at 127.

⁵³ *Id.*

⁵⁴ *Id.* at 33-34.

⁵⁵ *Id.* at 33.

⁵⁶ ADRP 6-22, *supra* note 21, para. 6-51.

⁵⁷ GORDON & SMITH, *supra* note 1, at 34.

⁵⁸ *Id.* at 121, 125, and 129. The “Big C” is coaching. *Id.* at 121. “[Y]ou must lead to develop, mentor, encourage and guide them. . . . [I]t improves you and your relationships, connections, and organization.” *Id.* “The [o]ther [b]ig C is character.” *Id.* at 125.

⁵⁹ *Id.* at 121.

⁶⁰ *Id.* at 123.

“The Other Big C,” segment on character, stresses that leaders focus on the team member’s character to build the culture the leader desires⁶¹ but is merely a repetition of the first chapter, “[c]ulture.”⁶² When building a team a leader should not only look at the talent the person possess but also their character.⁶³ The authors already addressed this matter in chapter 1, “[c]ulture,” when stating they not only evaluated players based on “football skills” but also their “character and attitudes.”⁶⁴ They looked at the “intangibles” or character of the team members and changed the roster accordingly.⁶⁵ The authors could have easily added “The Other Big C” segment to the first chapter instead of reiterating the precepts at the end of the book.⁶⁶

V. Conclusion

You Win in the Locker Room First is a well-written, concise, and constructive leadership book for which noncommissioned officers and officers may glean foundational leadership principles to incorporate into their leadership philosophy for their professional life as well as their personal life. The book is an excellent complement to the Army’s leadership principles and should be on every leader’s reading list, including and especially leaders in the U.S. Army Reserve and National Guard. Leaders lead either by example or by fear.⁶⁷ Once leaders utilize the seven C’s from *You Win in the Locker Room First*, they will lead by example, create more leaders, and therefore, realize “true greatness” as it “is achieved when a leader brings out the greatness in others.”⁶⁸

⁶¹ *Id.* at 125.

⁶² *Id.* at 1.

⁶³ *Id.*

⁶⁴ *Id.* at 5.

⁶⁵ *Id.*

⁶⁶ *Id.* at 125.

⁶⁷ Reed, *supra* note 13, at 68 (quoting Dick Winters, STEPHEN E. AMBROSE, BAND OF BROTHERS: E COMPANY 506TH REGIMENT, 101ST AIRBORNE FROM NORMANDY TO HITLER’S EAGLE’S NEST 17 (1992)).

⁶⁸ GORDON & SMITH, *supra* note 1, at 89.

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