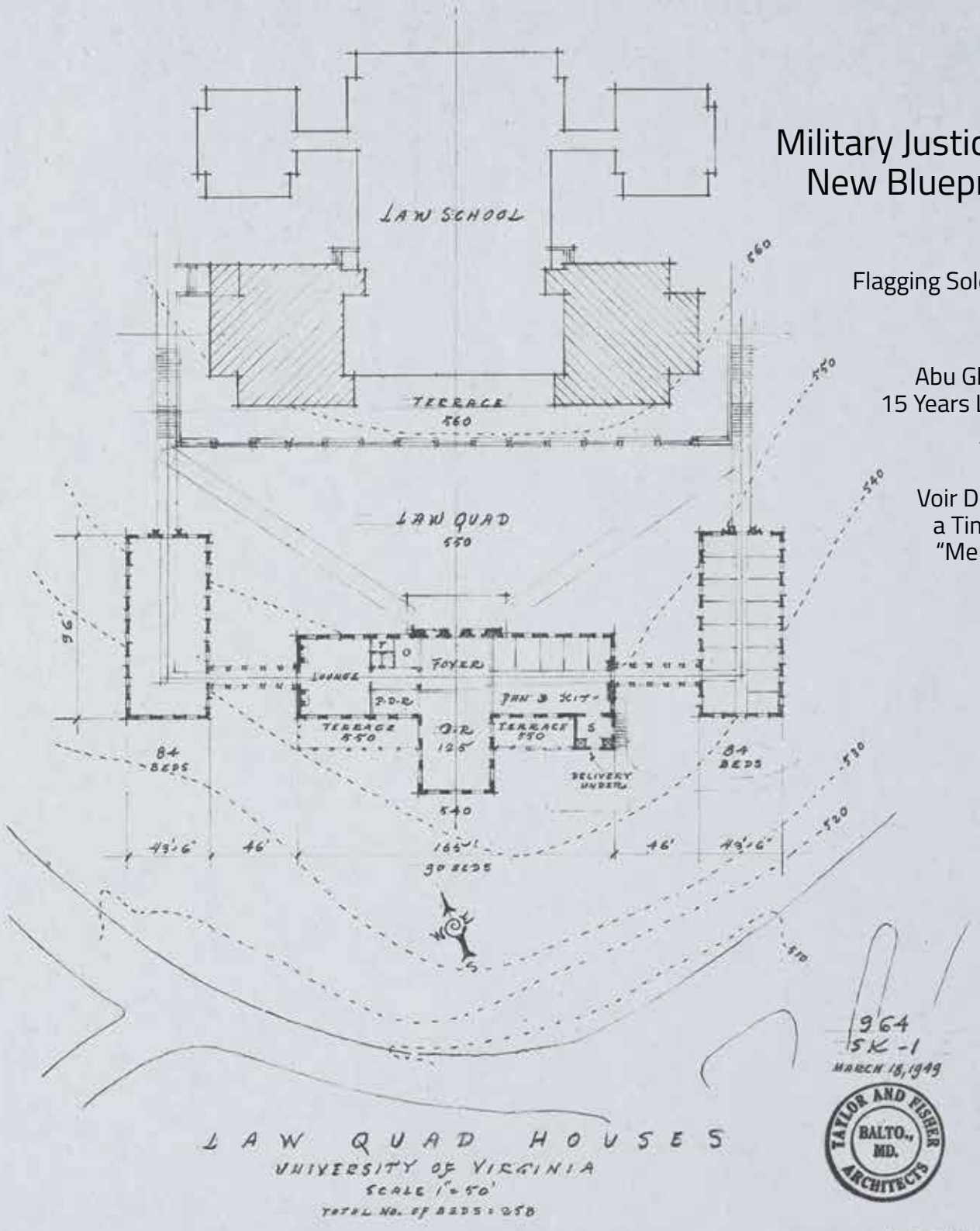
Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 4 ▪ 2019



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AROUND THE CORPS

SFC Thomas Coyne, Level 3 ACFT certified 27D NCO and current AIT instructor at Fort Lee, participates in a training session for the new Army Physical Fitness Test during last year's World Wide Continuing Legal Education.

Army Lawyer

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Issue 4 • 2019

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On the cover: The 1949 proposed plan for judge advocate officers' quarters on the Grounds of the University of Virginia, drawn here below what was then the UVA law school. The Palladian layout is similar to the law school's. The quarters were not built until 1957 to a more modern design, a simple rectangle, four stories tall. The building today stands as Kerchof Hall, which houses the university's math department. (Courtesy: Facilities Management, Geospatial Engineering Services Archives, University of Virginia)

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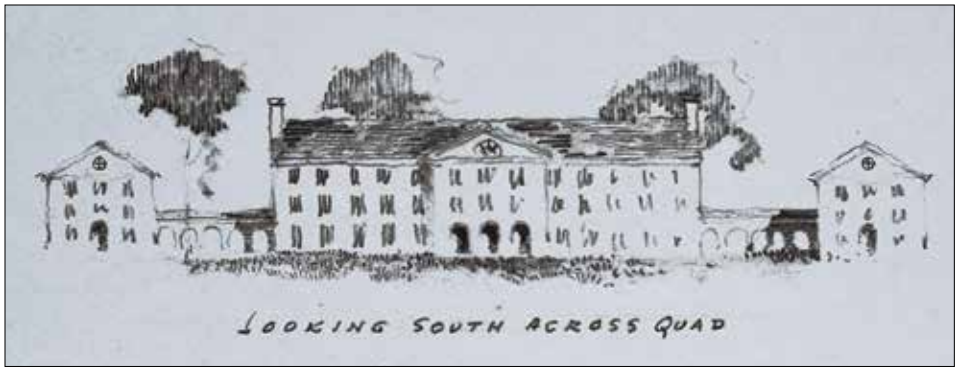


A drawing depicting a view of the 1949 proposed JAG school at the University of Virginia. The blueprint of the building plan can be seen on this month's cover. (Credit: Facilities Management, Geospatial Engineering Services Archives, University of Virginia).

Court Is Assembled

Military Justice's New Blueprint

By Lieutenant General Charles N. Pede and Major General Stuart W. Risch

In April 2019, we announced what we consider a watershed moment in military justice. We directed the redesign of our military justice support around the world. We believe this will dramatically improve the delivery of legal advice, command support, and trial expertise. Our predicate for this decision was our Pilot Program and the recommendations of the Board of Directors. As we enter the implementation phase, we want to highlight our expectations of you.

A Dynamic Practice

Our justice practice is dynamic. The court-martial practice of the '70s, '80s, and '90s is not the same as the court-martial practice of today—for many reasons.

We now practice using four versions of Article 120, Uniform Code of Military Justice, arguably the most progressive sexual assault statute in the world. That means our trial and defense counsel must master all four versions. This is, indeed, rocket science.

In 2007, sexual assault cases made up 18% of our practice. Today, 50% of our trials include a charge involving a sexual assault. Motions practice is lengthy. There are far more contested cases, which means counsel spend more time in the "crucible of the trial well" and expert witnesses are utilized more than ever before. We continue to average double digit homicide trials every year, and of course there is always the potential for capital litigation.

Trial counsel are more integrated into their formations than ever before. All of you have set an incredibly high standard—providing premier legal advice, not only "on demand," but also anticipating where your advice may be helpful to your commanders. Counsel are available 24/7, thanks to cell phones, VPNs, and Technology Next (all designed, of course, to make our lives simpler and more productive).

And, at the same time, there are other serious court-martial cases—cases that affect readiness and lethality—waiting in the wings. The age-old maxim of "touch every case, every day" is more difficult to follow when commanders are calling and a trial counsel has to decide whether to answer the phone or continue preparing a cross-examination for the next day's court-martial.

The truth is that both the commander's call and trial preparation are vital parts of our practice. While we recognize that we have talented, motivated, determined counsel out there who can successfully triage and prioritize, the question remains . . . is that the best way to practice? We believe the answer is a resounding "no." As such, we have decided to redesign our military justice practice.

This redesign is actually quite simple. Dedicated, untethered trial teams support our formations, generating expertise from investigations to findings. Dedicated military justice advisors provide comprehensive, expert service in everything else—from chapters, to boards, to nonjudicial punishment, to a General Officer Memorandum of Reprimand. The trial counsel will focus solely on litigating cases while the military justice advisor will provide legal advice to commanders and practice before separation boards. Splitting these functions between two attorneys will allow for greater expertise—both in litigation and in command advice—over time.

Developing Expertise

The focus of the redesign is to develop expert litigators and expert command legal advisors across ranks. Our litigators are among the best in the world, but as we have said before, you don't have to be sick to get better. This, again, is about improving. We should all seek to improve every day—it's a fundamental part of readiness, Soldiering, and the practice of law. This redesign gives counsel the bandwidth to do just that.

We are also mindful of our amazing Trial Defense Service (TDS) attorneys who work hard every day to represent their clients. We have begun hiring defense investigators to allow counsel an opportunity to free up time to focus on litigation. We have also said, time and again to staff judge advocates and to commanders, they must resource TDS. That is our going-in

IMPLEMENTING THE MJR

The Military Justice Redesign (MJR) separates the roles of trial counsel (TC) and military justice adviser (MJA) in order to develop judge advocates (JAs) with expertise in each role. Each MJA and TC will now have a single supervisor, generally, the Chief of Justice. Below is an outline of steps and considerations that Staff Judge Advocates should consider in crafting their plans for this new structure. While the MJR is meant for OSJAs with three or more government counsel, smaller offices will also submit a plan concerning how they will achieve the MJR's guiding principles. For more information, consult TJAG Policy Memo 19-01, 19 Jun 18.

1 ANALYZE TRIAL DEFENSE SERVICE

to ensure it has been fully resourced.

2 CHOOSE A MODEL

for prosecution teams, based upon the size of the OSJA.

MODEL 1
(FOR LARGER OFFICES)
Establish two teams, one focused on special victim cases, and the other focused on general crimes. This model is better suited for a larger OSJA.

MODEL 2
(FOR SMALLER OFFICES)
First ask: has the OSJA identified the specific mission requirements that would call for this model? If so, build only a single team to litigate cases.

3 DEFINE DUTY TITLES AND DUTY DESCRIPTIONS

Every JA and paralegal's duty title and description should conform to the MJR's business rules. Ensure these are reflected in each evaluation and record brief. SJAs must coordinate with PPTO before amending organizational documents. Coordinate with TCAP before designating an officer as an SVP or tapping an SVP to supervise TCs.

4 DECIDE THE TRANSFER POINT

between the MJA and TC. Design procedures to ensure each MJ function is assigned to a specific person and organization. Ensure duties and procedures facilitate collaboration among all stakeholders.

5 DETERMINE HOW MANY PEOPLE

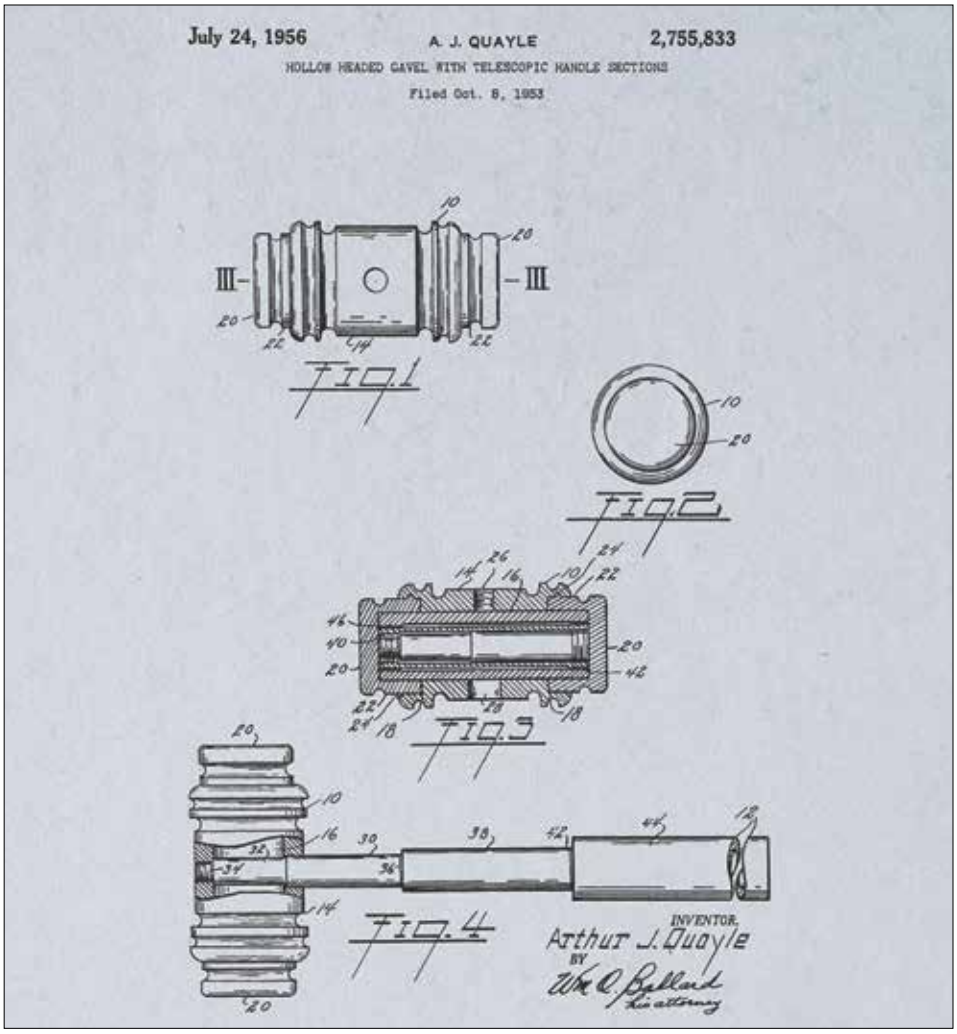
will be put in MJA and TC roles. Ensure that the office is staffed to include more MJAs than TCs to account for the MJAs' experience level and broad span of control. Generally, an OSJA should have more MJAs than TCs—consider a 55-45 percent split.

6 UNDERTAKE MJR WITHOUT ANY ADDITIONAL PERSONNEL

Each OSJA should take particular care to analyze the impact of this on TDS. To mitigate any issues, consider bringing on legal assistance attorneys (in coordination with TDS and Legal Assistance Policy Division).

7 GET APPROVAL

Each OSJA must submit their plan to the MLO in coordination with all the other OSJAs on the same installation. Offices should consider consolidation to provide greater expertise and efficiencies.



A blueprint of a gavel with a retractable handle, submitted to the U.S. Patent Office in 1956.

expectation—one that we will continually emphasize and monitor as we travel for Article 6 inspections.

The Advocacy Center

For all litigators, in all of our core practice areas—from labor, to environmental, to contracts to criminal, to torts, to civilian and military personnel litigation—we are standing up the Advocacy Center this summer. The Advocacy Center will synchronize, develop, integrate, and execute training designed to improve the litigation function and advocacy across our broad litigation spectrum.

We have some of the best training in the world—thus far, it did not effectively cross-pollinate. It has been stove-piped, for example, within the criminal law practice, or the federal litigation practice. The Advocacy Center will leverage the goodness from all of the training we do, including at our Legal Center and School, and integrate so our criminal law practitioners, for example, benefit from deposition training that our litigation division might conduct. The Advocacy Center will also enable the Personnel Plans and Training Office and our litigation professionals to look seamlessly across our Corps and see that, for example, a senior defense counsel should be assigned next as a team chief at Litigation Division—because the skill sets are the same. At present, our thinking and planning are far too compartmentalized, but the Advocacy Center will push us beyond our stovepipes to a broader utilization of attorneys and training venues in the pursuit of litigation expertise and excellence.

The Way It Has Always Been Done

Last year at this time, we were in the midst of our final push to ensure our Corps was trained on the Military Justice Act of 2016. Our extraordinary Military Training Team, led by the incomparable Colonel Sarah Root, did a phenomenal job of making certain we had the training and tools needed as a Corps to Be Ready for a historic shift in our practice. All of you, the members of our Regiment, rose to the challenge—deftly absorbing the most significant changes made to the Uniform Code of Military Justice in decades. In just a few short years from now, new members of our team will think "this is just the way it has always been done."

And so it will be with the military justice redesign. Each of you undoubtedly see the potential challenges in its implementation, but we are confident that you will also see the opportunities and will diligently and committedly work through the friction.

An "Army in Renaissance" means our formations, our weapons of war, and our warfighting doctrine are changing—as we become, once again, an Army that fights as divisions and corps. While the brigade remains the centerpiece, we recognize the pressures of resourcing legal assets at both brigade and division. The redesign is deliberately focused on addressing these many features of the present and future Army.

Change is hard. It will take time, conversations, and drumbeat persistence over many months. Not only internally, but with our clients—at all echelons. We're not the best law firm in the world merely by coincidence. We're the best because of each of you and the leadership, vision, and energy you continue to demonstrate. Now that the decision on the military justice redesign has been made, it is time to "saddle up and move out."

We have every confidence you will make the difference—as you do every single day.

Now, get after it.

Be Ready! **TAL**

From right to left: Chief Judge Stucky, Mr. Malcolm Squires, ACCA Clerk of Court, senior judge (retired) Andrew Effron, and his wife, Barbara Effron, pause for a photo during a dinner commemorating the 50th anniversary of the MJA of 1968.

News & Notes

Commemorating the 50th Anniversary of the MJA of 1968

On 3 August 2019, The Judge Advocate General (TJAG), Lieutenant General (LTG) Charles N. Pede, co-hosted, along with the Court of Appeals for the Armed Forces, the service TJAGs, and the Staff Judge Advocate to the Commandant of the Marine Corps, a dinner commemorating the 50th anniversary of the enactment of the Military Justice Act of 1968. What follows is an excerpt from LTG Pede's remarks.

What we celebrate tonight is a historic legal moment that could simply have passed without notice—without any fanfare.

'Beginning this morning, the subcommittees will hold 6 days of hearings on 18 bills designed to improve the quality of military justice. The bills would amend the Uniform Code of Military Justice . . . relating to military courts . . . to ensure that military personnel appearing before such courts . . . receive all the rights, privileges and safeguards guaranteed every American citizen under the Constitution.' [Senate Report, 89th Congress. Tuesday, 28 January 1966.]

And so, the Justice Act of 1968 began, and with it, the birth of judicial independence in our justice system.

Celebrating historic legal events is important. These celebrations serve as an invigorating reminder of where we were—and the distance traveled. Celebrations like this one also have a sort of elbow-in-the-rib quality that ensures we don't take special moments for granted—that we don't get complacent.

Important evolutions in the law are susceptible to memory lapses—often quickly, if the evolution is particularly successful. Some changes are subtle; others tectonic. Sometimes you don't know you are living through an evolution until it has passed you by. Generations can forget easily the hard-fought battles of those upon whose shoulders they stand.

And so, it could have been with the Justice Act of '68—which came into force this month in 1969—fifty years ago—and just nineteen years after the genuinely tectonic innovations of our Uniform Code in 1950. It could have been another forgotten milestone. We could have passed it by without notice.

But our judicial independence is our lifeblood. It is the heart of the rule of law. Independence from interference—whether inside the well of the courtroom or outside on the streets where our judges and their Families live. Having spent a good portion of our professional lives building rule of law capacity in foreign lands, we must never forget that by every measure, our judiciary lives and works in safety—free from the pressures that might compromise its independence. We must take nothing for granted.

And, there is no doubt, we're often accused of being slow to change—reluctant to lean forward. I enjoyed two notable observations made recently about the Army.

The first was that the Army is 244 years old—unhampered by 244 years of progress. Second, it was noted that if you strand three Army officers on an island—within two weeks they'll be working nights and weekends.

While these notions have a light-hearted ring of truth, nothing could be further from the truth about our justice system—which in my mind is the most progressive, enlightened justice system in the world.

What we celebrate tonight is a reflection of the vitality of our justice system. The innovation we know now as our independent trial judiciary was born in 1969. It is now a fixture on our landscape today—but not so then. Much like the birth of our mighty Trial Defense Service—or the birth of the still embryonic Special Victims' Counsel Program. Change in the law—evolutions or revolutions—are what we mark this evening as a collective purposeful bar. On behalf of all of our hosts, please reflect on this important moment—our judicial independence is only owed to those who strive daily to sustain it.

Let me close where I began—the blessings of the rule of law flow directly from the success or failure of each us as we practice law—daily. Whether that be in forward areas—or here at home. We celebrate tonight a remarkable innovation in military justice—whose success is illustrated by how natural, graceful, and expected judicial independence is today. **TAL**

Spouses of RAJA members pose for a photo during the association's annual meeting in Las Vegas, Nevada. Pictured from left to right are Kim Black, Kathy Huffman, Lauren Rosenblatt, and Lorraine Kennett. (Credit: Colonel (Ret.) James Rosenblatt)

RAJA Visits Vegas

By James P. Gerstenlauer

When your Army career is over and the Judge Advocate General's (JAG) Corps is a fond memory, what do you miss the most? Ask your former judge advocate friends that question, and you will hear many different answers. Some will tell you they miss serving our country, some miss meaningful military missions, some miss the varied legal work, and some long for travel and adventure. But almost everyone will tell you, "the people." Most will say what they miss most are Soldiers and their Families, and the special bonds and good times forged by common experiences and challenging situations.

The Retired Army Judge Advocate Association (RAJA) was created in 1976 to continue that camaraderie. The Korean government invited retired judge advocate veterans of the Korean War and their spouses to return to Korea to observe the tremendous progress that the country had made following the war. That reunion motivated those in attendance to return home, create RAJA, Inc., and plan the next RAJA meeting at the JAG School in Charlottesville shortly thereafter. According to Colonel John Jay Douglass, the name was "born high over the Pacific on the return flight from Seoul to the United States."[1]

For forty-four years, retired active, Reserve, and National Guard judge advocates have met annually in different locations to enjoy the company of old friends, make new friends, and simply have fun. There are currently over 300 members.[2] Over the last few years, RAJA members have accomplished that objective while meeting in Honolulu, Baltimore, Colorado Springs, Tucson, Orlando, and Savannah.

This year, RAJA traveled to Las Vegas for the annual meeting that was hosted by Scott and Kim Black (Scott Black served as The Judge Advocate General from 2005–2009), Mike and Lorraine Kennett, and Wayne Price. They put together a winning combination of fun, food, and fellowship for the 136 members who attended the 44th annual RAJA meeting.

Al Toomey teed up the Thursday events with an early morning golf tournament on the Concord Course at the Revere Golf Club. Talk about a sand trap—the entire course is surrounded by the beautiful Nevada desert. Meanwhile, a group of explorers set off on a walking tour of Las Vegas Boulevard, the Linq, and the Bellagio Conservatory and Botanical Gardens.

The Thursday night icebreaker marked the traditional start of the festivities. Fond friendships were made and renewed over great food, libations, and conversation. This year there were nine members attending their first RAJA meeting, including Jeff and Teresa Addicott, Jose and Barbara Aguirre, Dean Eveland and Lynn Siegfried, Bill and June Jones, and Edye Ulmer Moran.

Following a ten-minute business meeting ("members of RAJA still pride themselves on having the shortest possible annual 'business meetings,' with the goal of accomplishing all business in less than ten minutes"[3]) on Friday morning, RAJA members were treated to informative presentations by Lieutenant General Charles N. Pede, The Judge Advocate General (TJAG), and Brigadier General Marilyn S. Chiafullo, Commanding General of the United States Army Reserve Legal Command. "Since [the] inaugural event [in 1977], the sitting TJAG has always been invited to RAJA's annual gathering."[4] Lieutenant General Pede spoke about the State of the Corps and Brigadier General Chiafullo spoke about the State of the Reserve and National Guard components. Retired Army Judge Advocate Association is appreciative to them for spending their valuable time with us. Moreover, the presence of two serving JAG general officers at a RAJA meeting highlights and strengthens the special bond that exists among generations of career judge advocates.

After lunch, we boarded busses bound for the Mob Museum. There, in a repurposed courthouse, we witnessed the story of prohibition and the rise and fall of organized crime across the nation, including Las Vegas. Certain "criminal elements" in our

Above: RAJA members, from left to right, James "Rosey" Rosenblatt, Al Toomey, and Jeff Arnold. Right: Colonel (Ret.) James P. Gerstenlauer, RAJA president. Below: RAJA members visit the Hoover Dam. (All photos courtesy Colonel (Ret.) James Rosenblatt)

group conspired to conclude the tour in a secret room hidden behind a six-foot painting in a basement speakeasy. Friday night was free for friends to enjoy fine dining and graduate course reunions.

Saturday included a tour of the Hoover Dam, power plant, and bridge, along with shopping and lunch in Boulder City. Those who attended were impressed by the miraculous engineering of the Hoover Dam—a feat that literally transformed the desert. The camaraderie everyone experienced on the bus and during the tour could not have been better. The day's activities concluded with the traditional RAJA banquet featuring more great food and a spirited awards presentation.

Over four decades later, RAJA continues to operate without a building, paid officers, or permanent staff, but with the powerful and simple mission of continuing the camaraderie among those who completed a career of service as judge advocates. Retired judge advocates do not have to miss the good old days with JAG Corps friends. They can join them again, build new friendships, share new adventures, and continue the camaraderie as RAJA members. For more information about RAJA, visit our website at rajaassn.org or join us we when we meet in Omaha, Nebraska, in 2020, and then Charlottesville, Virginia, in 2021. **TAL**

Mr. Gerstenlauer is the circuit executive for the U.S. Court of Appeals for the Eleventh Circuit and the RAJA President.

Notes

[*] This article is written in my personal capacity and does not reflect the opinions of the Federal Judiciary or the Court of Appeals for the Eleventh Circuit.

1. Fred. L Borch III, *Camaraderie After the Corps: A History of the Retired Army Judge Advocate Association,* Army Law., Apr. 2015.

2. *Id.*

3. *Id.*

4. *Id.*

Staff judge advocates listen during a presentation at the 49th SJA Course (Credit: Jason Wilkerson/ TJAGLCS)

49th Staff Judge Advocate Course Wrap-Up

By Major Justin R. Wegner

Leadership and taking care of your people—those were the two consistent themes permeating the 49th Staff Judge Advocate (SJA) Course held at The Judge Advocate General's Legal Center and School (TJAGLCS) in June. The content of each day of the week-long course focused on a specific developmental area for rising SJAs and Deputy Staff Judge Advocates (DSJAs). This article provides highlights from the week.

The 40th Judge Advocate General (TJAG) Lieutenant General (LTG) Charles N. Pede kicked off the course with his presentation titled, "TJAG Expectations of JAGC Leaders." Lieutenant General Pede culminated his presentation and emphasized the importance of the role shared by SJAs and DSJAs when he stated, "You are in the room now." He explained that, based on assuming the role of an SJA, they will be asked to remain in the room to advise commanders in situations when everyone else is asked to leave the room. This statement also nests with one of LTG Pede's three priorities in how to "be ready." Staff judge advocates must be ready to step up and lead their offices and to be in the room to provide principled counsel on the pressing issue of the day.

Lieutenant General Pede also discussed how leaders of our OSJAs have a great "opportunity to change how people think and practice law." Again, this statement overlaps with the Corps' priorities to take care of our people and prepare the future JAG Corps to support the future Army. Lieutenant General Pede then illustrated these concepts together as he shared a story of then-Captain (CPT) Pede. He described that CPT Pede was doing what he believed to be the right thing both professionally and personally in making a decision, when he was unable to reach his SJA while deployed with the 10th Mountain Division. Despite the time-sensitive nature of the situation, when the servicing SJA heard that CPT Pede had acted without waiting for the SJA's guidance, the SJA admonished CPT Pede, saying, "You 10th Mountain guys are all the same." Upon redeploying and informing the 10th Mountain SJA of his actions and the servicing SJA's response during the deployment, CPT Pede was surprised at the 10th Mountain SJA's response: "You could have paid me no higher compliment." Lieutenant General Pede's learning point and closing comment: "We trust you; trust yourselves; trust your instincts."[1]

Continuing with the first day's leadership theme, COL (Ret.) Marc Warren followed. In advising SJAs on their working relationship with the staff, he cautioned that nobody likes to work with a careerist—someone who is only concerned about their officer evaluation report, their next job, and themselves, but not concerned about advancing the team. Instead of bragging about their relationship with the Commanding General to the staff, COL (Ret.) Warren offered that SJAs would be better served as a team player—using their relationship with the Commanding General to highlight the successes of the other staff members.

Colonel (Ret.) Warren imparted another dose of humility when he offered the following equation: PG + L = S. He explained that they all are *Pretty Good,* plus some experienced *Luck,* which allowed them to be *Successful.* Providing advice on how to lead an office, COL (Ret.) Warren strongly encouraged a personal, caring approach to the team. As part of his encouragement to follow principles-based leadership, COL (Ret.) Warren challenged the room to "set the example but have fun." He advised SJAs to "recognize your people often, always be ready to hand out a coin—even if it's a nickel, . . . write personal notes of encouragement, . . . [and] walk around the office talking to your people in person." In closing, COL (Ret.) Warren said, "Being a senior lawyer-leader is an honor, being responsible for people and the institution is a sacred trust, and [leaders should] have the heart of a Soldier and the mind of a lawyer."[2]

Wrapping up the first morning, COL Gail Curley and COL Chuck Poche led a session titled "Leadership and Management: Arriving at the OSJA and Checking Systems." They started by informing the attendees that, "TJAG chose you to be an SJA, not because you're the best lawyer, but because you're good at leading people."

Therefore, the SJAs should focus on providing leadership while allowing individual members of the OSJA the autonomy and responsibility to focus on their assigned area of the law. One area noted as ripe for the SJA to provide leadership was counseling. Again, highlighting the importance of the SJAs providing meaningful leadership to the office, COLs Curley and Poche concluded their presentation with, "Leadership is part of multiplicative function. If leadership is zero, it does not matter what else you throw at the problem—the result is zero."[3]

The second day of the 49th SJA course focused on talent management. Lieutenant General Pede started the day with a presentation on "Strategic Talent Management." He began with a discussion of the JAG Corps' developmental philosophy *expert and versatile* (vice broadly skilled). The intent with his *expert and versatile* philosophy is to have "experts in the field as the need arrives." He commented that sometimes the Corps needs to fill a specific role now and there isn't time to grown an individual into the position. This philosophy also nests with the Army 2028 philosophy: "Employing multi-domain capabilities requires the Army to attract, retain, and employ leaders and Soldiers who collectively possess a significant breadth and depth of technical and professional expertise."[4] Lieutenant General Pede stressed the importance of developing experts and building a bench behind these experts ready to step up when needed. In doing so, TJAG believes that if judge advocates (JAs) want to, they can spend 60-70% of their assignments in two practice areas. He disagreed with the rumor that it would be career-ending for individuals to fill two similar jobs consecutively. In order to develop experts, some JAs need to fill two consecutive military justice billets or two administrative law billets. In fact, TJAG said he believes JAs become experts through persistent training combined with repeated experience in one or two legal functions over a career.

At the same time, he tasked SJAs and DSJAs with identifying future experts and "building the bench." He began by saying that the assignment process is not just a Personnel, Plans & Training Office (PPTO) responsibility; it's SJAs and DSJAs reviewing their people and making recommendations to PPTO after polling their subordinate leaders. Lieutenant General Pede then informed the crowd of significant changes in the personnel arena that he expected. Under the Assignment Interactive Module 2.0, a new, double-sided officer record brief (ORB) is pending release. The front will be the ORB that everyone is familiar with, and the back will be a professional resume. Importantly, the resume portion will not be visible by promotion boards and SJAs will not have access to the resume, though he indicated SJAs might have access in the future.[5]

Colonel Warren Wells, Chief of Plans at PPTO, provided a Force Structure Essentials brief which encouraged new SJAs to pay strict attention to managing and preserving legal positions on their Tables of Distribution and Allowances (TDAs) and Modified Tables of Organization and Equipment (MTOEs). The presentation also went over the steps SJAs can take to grow additional positions at their offices. As an update on recent projects, COL Wells announced that a new version of JALS Publication 1-1, Personnel Policies, had come out in May, and noted that the Judge Advocate Continuation Pay (JACP) program is now known as the Judge Advocate Officer Retention Bonus (JAORB).[6]

In her "Managing Active Component Personnel" brief, COL Tania Martin, Chief of PPTO, explained how JAs can become "experts" in TJAG's call for expertise and versatility. She echoed TJAG's explanation that JAs become experts in a special area through persistent training and repeated experience. To this, she added that aspiring SJAs should strive to be experts in a couple areas, but also must be able to perform in all areas. She also described the downstream effect of unexpected or late assignment changes. Moving one JA causes approximately seven assignment changes. In those situations, as with all other assignments, COL Martin said PPTO will be as honest and transparent as they possibly can; however, PPTO will not disclose what caused the assignment changes if it involves private personal reasons. Regarding on-station stability, COL Martin said the norm should be three-to-four-years at one location, but not necessarily in one job. Colonel Martin also described how the stability policy is easiest to implement at the junior ranks, but gets more difficult in the field grade ranks. Lieutenant General Pede said the goal of the three-to-four-year stability serves to increase retention, since this is one of the major reasons cited by JAs considering leaving the Corps. The other goal was to help individuals feel empowered to request to stay on station longer—they should not feel "institutionally forced to move." Separately, Major General Stuart Risch, the Deputy Judge Advocate General (DJAG), commented on the reemergence of Skill Identifiers (SIs) and the concern from captains that SIs will be used to force JAs into certain careers. The DJAG assured the audience that SIs will not close the door on individuals pursuing positions in a practice area, regardless of having an SI in a different practice area. Instead, the SIs will open doors as PPTO will use them as one data point in determining a possible pool of individuals to fill billets that require a certain level of SI. This is in line with the "bench building" model for experts—as individuals continue to develop an expertise in a practice area, their SIs will increase to reflect this growing expertise.[7]

Command Sergeant Major Jeremiah Fassler, outgoing TJAGLCS CSM, provided a session on the management of paralegals on Tuesday afternoon with the goal of helping SJAs take care of their paralegals. He emphasized the importance of JA leaders reviewing the paralegal's position name within the unit manning documents. The paralegal's noncommissioned officer evaluation report (NCOER) will reflect whatever the position is named in manning documents and cannot be altered after the fact. Compared to JAs evaluations, paralegals have even fewer opportunities to receive "top block" NCOERs. Whereas officer senior raters are limited to rating 49% of individuals as Most Qualified, senior raters for enlisted are restricted to rating only 24% as Most Qualified. If an officer rates their first noncommissioned officer (NCO) as Most Qualified, they will not be able to award another Most Qualified until the ninth NCOER. Therefore, leaders should closely manage their NCO evaluation profile and be judicious in awarding Most Qualified ratings to their paralegal NCOs. As a result, NCOs have far fewer Most Qualified NCOERs. Command Sergeant Major Fassler

Lieutenant General Charles N. Pede, The Judge Advocate General, addresses members of the 49th SJA Course. (Credit: Jason Wilkerson)

also encouraged leaders to recognize the difference in officer and enlisted Soldiers being passed over for promotion. He said that even paralegals at the highest level are often two-time pass-overs to the next rank. Finally, he emphasized the importance of on-the-job training for paralegals. From their initial enlistment up to the point they are selected for Sergeant Major, paralegals only receive twenty-one weeks and three days of in-house school training.[8]

Brigadier General (BG) Joseph Berger, outgoing Commanding General of U.S. Army Legal Services Agency, started the afternoon's Talent Management and Recruiting and Board Process sessions by saying that in the JAG Corps, "people are a pacing item." Colonel Tania Martin described who actually makes up the General Officer Steering Committee (GOSC): DJAG, all three active component JAG brigadier generals, the Chief of PPTO, the Deputy Chief of PPTO, and the assignment officer for the rank being discussed. The GOSC generally determines assignments in descending rank order: first, colonel assignment selections, then lieutenant colonels (LTCs), and then majors to create a slate of proposed assignments for TJAG's approval. She said that PPTO employs a "leadership team" approach in determining the individuals who make up an OSJA leadership team. After selecting the SJA, PPTO tries to ensure that the entire foundation, including the DSJA, legal administrator, and command paralegal, has complementary skills and personalities. Regarding promotion boards, BG Berger said that first impressions count. The first thing promotion board members see is a "larger than life" DA photo. While a good DA photo alone will not get the officer promoted, it does serve as a positive first impression similar to meeting someone. Brigadier General Berger said to think of a good DA photo as saying, "Hi, I'm Joe Berger. Please take a look at my file." Brigadier Generals Berger and Pat Huston both commented on how often they see ORBs that were not updated and contained "surplus Soldier" or "known losses" in the assignment history.[9]

The third day focused on a variety of challenges and opportunities facing the JAG Corps in the future. Lieutenant Colonel Eric Widmar, Chief of Strategic Plans, Strategic Initiatives Office, and a representative from Army Futures Command began the day with a discussion of the Army's new warfighting concept—Multi-Domain Operations (MDO) 2028—and its impacts for the JAG Corps. The concept is rooted in four interrelated trends that are shaping the future operational environment: increased competition across all five warfighting domains, an increasingly lethal and hyperactive battlefield, an operational environment that is volatile, uncertain, complex, and ambiguous, and challenges to deterrence. Multi-Domain Operations 2028, which stems largely from the assumptions and guidance provided in the National Security Strategy and National Defense Strategy, explicitly identifies the return of great power competition and the rise of China and Russia as strategic competitors with the latter characterized as the leading tactical and technological pacing threat. These revanchist competitors, with new and formidable capabilities across the warfighting domains, are causing the Army—and the JAG Corps—to reevaluate how it is organized, trained, and equipped to meet the needs of the Army, both now and in the future.[10]

LTCs Dave Drake and Ted Martin provided a briefing on "Best Practices from Warfighter Exercises and Combat Training Centers." One of their recommendations was for JAs to recognize that they are staff officers and they need to perform their staff officer role by knowing and implementing the Commanding General's priorities. Lieutenant Colonel Drake recommended that JAs in operational billets know who the G3 is and understand the different warfighting functions. For those who might overlook the importance of National Security Law (NSL) within their OSJA, he cautioned that units in the field view the practice of NSL as a top priority and something the staff enjoys doing. The message was to help your subordinate JAs succeed by placing the appropriate amount of emphasis on NSL.[11]

Colonel Brian Hughes provided an update on reforms to the Military Health System as a result of the Fiscal Years 2017 and 2019 National Defense Authorization Act, which requires the Defense Health Administration to administer and manage all Department of Defense Military Treatment Facilities no later than 30 September 2021. In addition, the Army Campaign Plan directed additional reforms to the Army Medical Department (AMEDD), including the assignment of the AMEDD Center and School to U.S. Army Training and Doctrine Command; the reorganization of the U.S.

Army Medical Research and Material Command into separate organizations falling under Army Materiel Command (AMC) and Army Futures Command, and finally the tentative disestablishment of U.S. Army Medical Command as an Direct Reporting Unit to the Surgeon General. These reforms will affect legal support to the AMEDD primarily as it relates to torts and medical affirmative claims, contracting, and labor law, and as well as requiring reorganization and reassignment of the Office of Soldiers' Counsel.[12]

The third day concluded with COL Jonathan Kent providing a U.S. Army Installation Management Command (IMCOM) update. He started with IMCOM's new organization under AMC. U.S. Army Installation Management Command will now have five regional directorates: IMCOM Europe, IMCOM Pacific, IMCOM Directorate (ID) Training (U.S. Army Training and Doctrine Command (TRADOC) focused), ID Readiness (U.S. Army Forces Command (FORSCOM) focused), and ID Sustainment. Each ID will provide support to their named region and ID Training will support TRADOC installations while ID Readiness will support FORSCOM installations. As part of the transition, consolidated legal offices (CLO) will be under AMC. However, TJAG will retain qualifying authority for civilian legal assets under CLO SJAs.[13]

The fourth day of the course was devoted to military justice. Brigadier General Susan Escallier, outgoing Assistant Judge Advocate General for Military Law and Operations (MLO), began the day with Military Justice Philosophy and Management. The MLO told SJAs they must first consider their commander's justice philosophy. With the military's current focus on readiness, she offered that discipline is the foundation of lethality and readiness.[14]

The MLO was followed by TJAG and DJAG discussing strategic guidance and initiatives with military justice. Lieutenant General Pede said that winning and the length of sentence should not be the goal. Instead, SJAs should focus on the process and how well the government counsel prepared.[15]

Themes on the final day of the course mirrored the start of the course with MG Risch discussing leadership and the importance of caring for your people. Both speakers highlighted the importance of meaningful time outside of work and striving for more balance between work and life. Lieutenant General Piatt discussed the role of JAs advising commanders and how JAs facilitate unit readiness and mission accomplishment. Major General Risch provided his priorities: (1) lead, (2) develop future leaders, (3) be leaders of character (and raise your people the same way), (4) take care of your people and self, (5) just fix it, (6) develop systems and processes, (7) coordinate and communicate, (8) create, cultivate, and sustain relationships, (9) gain and maintain knowledge, and (10) inspire, excite, and motivate your people.[16]

The course concluded with TJAG and DJAG reminding the attendees of the importance of filling this crucial leadership role within the JAG Corps while ensuring they care for the individuals within their organizations who are all part of the larger JAG Corps family. **TAL**

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Notes

* Those quoted in this article consented to their name being used.

1. Lieutenant General Charles N. Pede, The Judge Advocate General, Address at the 49th Staff Judge Advocate Course: TJAG Expectation of JAGC Leaders (June 17, 2019).

2. Colonel (Ret.) Marc Warren, Former Staff Judge Advocate, Address at the 49th Staff Judge Advocate Course: Legal Leadership Principles (June 17, 2019).

3. Colonel Gail Curley, Staff Judge Advocate, U.S. Army Europe, and Colonel Chuck Poche, Staff Judge Advocate, XVIII Airborne Corps, Address at the 49th Staff Judge Advocate Course: Leadership and Management: Arriving at the OSJA and Checking Systems (June 17, 2019).

4. Training and Doctrine Command, PAM 525-3-1, The U.S. Army in Multi-Domain Operations 2028 (6 Dec. 2018).

5. Lieutenant General Charles N. Pede, The Judge Advocate General, Address at the 49th Staff Judge Advocate Course: Strategic Talent Management Guidance (June 18, 2019).

6. Colonel Warren Wells, Chief of Plans, Personnel, Plans, and Training Office, Address at the 49th Staff Judge Advocate Course: Force Structure Essentials (June 18, 2019).

7. Lieutenant General Charles N. Pede, The Judge Advocate General, and Colonel Tania Martin, Chief, Personnel, Plans, and Training Office, Address at the 49th Staff Judge Advocate Course: Managing Active Component Personnel (June 18, 2019).

8. Command Sergeant Major Jeremiah Fassler, Command Sergeant Major, The Judge Advocate General's Legal Center and School, Address at the 49th Staff Judge Advocate Course: Management of Paralegals (June 18, 2019).

9. Major General Stuart W. Risch, The Deputy Judge Advocate General, Brigadier General Joseph Berger, Commander, U.S. Army Legal Services Agency, Brigadier General Pat Huston, Commander, The Judge Advocate General's Legal Center and School, and Colonel Tania Martin, Chief, Personnel, Plans, and Training Office, Address at the 49th Staff Judge Advocate Course: Talent Management and Recruiting (June 18, 2019).

10. Lieutenant Colonel Eric Widmar, Strategic Initiative Office, Office of the Judge Advocate General, Address at the 49th Staff Judge Advocate Course: The Army Renaissance in Multi-Domain Operations (June 19, 2019).

11. Lieutenant Colonel Dave Drake, Chief, Operational Law, Mission Command Training Program and Lieutenant Colonel Ted Martin, Director, Center for Law and Military Operations, The Judge Advocate General's Legal Center and School, Address at the 49th Staff Judge Advocate Course: Legal Best Practices from WFXs and CTCs (June 19, 2019).

12. Colonel Brian Hughes, Staff Judge Advocate, MEDCOM, Address at the 49th Staff Judge Advocate Course: MEDCOM Legal Issues (June 19, 2019).

13. Colonel Jonathan Kent, Staff Judge Advocate, IMCOM, Address at the 49th Staff Judge Advocate Course: IMCOM and the OSJA (June 19, 2019).

14. Brigadier General Susan Escallier, Assistant Judge Advocate General for Military Law and Operations, Address at the 49th Staff Judge Advocate Course: Military Justice Philosophy and Management (June 20, 2019).

15. Lieutenant General Charles N. Pede, The Judge Advocate General and Major General Stuart W. Risch, The Deputy Judge Advocate General, Address at the 49th Staff Judge Advocate Course: Military Justice: Strategic Guidance and Initiatives (June 20, 2019).

16. Major General Stuart W. Risch, The Deputy Judge Advocate General, Address at the 49th Staff Judge Advocate Course: Command Expectations of the SJA and Leading the JAGC Team (two presentations) (June 21, 2019).

Photo 1: 641st Regional Support Group (RSG), Group Judge Advocate Lieutenant Colonel Sean Harshey (seated) and Paralegal Sergeant (SGT) David Calzadilla relax after completing the Danish Contingent (DANCON) March put on by the Danish Army Contingent at Al Asad Airbase in Anbar Province, Iraq, on 13 July 2019. Troops from the United States, Denmark, Norway, Poland, Lithuania, and Latvia, as well as civilian contractors, completed the challenging 14.2-mile ruck march in the July heat to earn the coveted DANCON March medal. Proceeds from the event went to support veteran and military Family charities in Denmark. Lieutenant Colonel Harshey and SGT Calzadilla are deployed in support of Combined Joint Task Force-Operation Inherent Resolve. Photo credit: 641st RSG PAO SFC Tracy Korff.

Photo 2: On 11 July 2019, members of the Offices of the Staff Judge Advocate, U.S. Army North and Army Support Activity (ASA), Fort Sam Houston, Texas, conducted officer professional development at the Center for the Intrepid (CFI). The CFI is an outpatient facility under the command and control of Brook Army Medical Center (BAMC) and specifically the Department of Orthopaedics and Rehabilitation.

In the spring of 2005, Arnold Fisher and the Board of Directors of the Intrepid Fallen Heroes proffered a rehabilitation facility. Then-Secretary of the Army Francis Harvey accepted the proffer. Funds for the facility were received from over 600,000 Americans.

The threefold mission of the CFI is to provide rehabilitation for Operation Iraqi Freedom and Operation Enduring Freedom casualties who have sustained amputation, burns, or functional limb loss, to provide education to the Department of Defense and Department of Veteran's Affairs professionals on cutting edge rehabilitation modalities, and to promote research in the fields of orthopaedics, prosthetics, and physical/occupational rehabilitation. Pictured from left to right (front row): Ms. Barbara Deleon, CPT Sara Andes, CPT Melissa Reilly-Diakun, Mr. Jenetrell Oliver (summer extern), Ms. Hillary Sayre (summer extern), Ms. Elizabeth Esqueda, MAJ John Harwood, (in rear) Mr. James Tripp, CPT Charles Eiser, and Mr. Brian Whitaker.

Photo 3: Captain Albert B. Merkel Jr. received the General Douglas MacArthur Leadership Award on 21 June 2019 at a ceremony at the Pentagon. Captain Merkel is a member of the 91st Legal Operations Detachment headquartered at the Parkhurst Army Reserve Center in Darien, Illinois. In the photo (from left to right): LTG Walter E. Piatt, CPT Albert B. Merkel Jr., and COL (Ret.) William J. Davis.

Photo 4: On 28 May 2019, The Judge Advocate General (TJAG), Lieutenant General (LTG) Charles N. Pede, hosted the first annual Military Spouse Attorney Day to recognize and celebrate the contributions of military spouse attorneys to the Armed Services and the Judge Advocate General (JAG) Corps. Recognizing that military spouse unemployment and

underemployment creates stress and influences a Family's decision to stay or leave the military—factors that ultimately hurt military readiness, retention, and recruitment. In 2014, the U.S. Army JAG Corps started its Military Spouse Attorney Hiring Program, utilizing its hiring flexibilities to fill vacant attorney positions with military spouse attorneys. Under LTG Pede's tenure as TJAG, the program has expanded to help even more JAG Corps Families. Since 2014, the JAG Corps has offered employment to over 180 spouse attorneys.

Photo 5: On 1 June 2019, Deputy Judge Advocate General (DJAG), Major General Stuart Risch, was the keynote speaker at the 2019 Joint-Combined JAG Ball in the Republic of Korea (ROK). In his remarks to the American and ROK service members, DJAG emphasized the special alliance the United States has developed with our ROK partners. He also paid homage to previous generations, including several prominent judge advocates, whose sacrifices and contributions on the peninsula helped create today's prosperous, free, and democratic Korea.

Photo 6: Colonel Gail Curley and the U.S. Army Europe's Office of the Judge Advocate (OJA) recently executed a staff ride to Normandy to study the D-Day landings and the Battle of Normandy. It was a truly moving experience as this year marks seventy-five years since Commanding General Dwight D. Eisenhower gave the order to begin the "great crusade" to liberate Europe from tyranny. The team visited Pegasus Bridge, Arromanches, Utah Beach, Omaha Beach, Sainte-Mère-Église, Saint-Marie-du-Mont, Pointe du Hoc, and Bayeux. They also walked the avenue of approach from Omaha Beach to the American Battle Monuments Cemetery. In addition to these sites, the OJA team also visited two memorials marking the location of Nazi war crimes. At the Abbey d'Ardenne, twenty Canadian soldiers were executed by members of the 12th SS Panzer Division. At the Battle of Graignes, forty-four civilians and an unknown number of prisoners of war were murdered in a church fire by the 17th SS Panzergrenadier Division. These case studies were a sobering reminder to remain vigilant in our Corps' commitment to the rule of law and to the law of armed conflict.

A Consolidated B-24 Liberator, shown flying above Maxwell Field, Alabama, sometime during the 1940s. (Credit: U.S. Air Force archives).

Lore of the Corps

Two Lieutenants and an Angry Russian Bear

Courts-Martial for Misconduct in the Soviet Union during World War II

By Fred L. Borch III

A version of this article was first published in the Spring 2011 issue of Prologue—the magazine of the National Archives.

"This court, upon secret written ballot, finds you of the charges and specifications: GUILTY." During the last week of April 1945, those fourteen words rang out in the general courts-martial of two American lieutenants. Their trials took place more than a thousand miles apart: one officer, First Lieutenant (1LT) Donald R. Bridge, tried in southern Italy on 23 April 1945; the other pilot, 1LT Myron L. King, tried in Moscow two days later. Both men were found guilty at trial—albeit for different offenses—for the same reason: both had angered the Soviets. Bridge (flying a B-24 *Liberator*) had taken off without permission from a Russian-operated airfield in Poland. A month later, King (piloting a B-17 *Flying Fortress*) had been caught in Ukraine with a stowaway aboard his plane.

That the Russians were furious about these two events is an understatement. General Aleksei I. Antonov, Chief of the Red Army Staff, complained bitterly in a letter to Major General John R. Deane, the top American military officer in Moscow, that the United States had rudely violated Soviet law and regulation. He demanded that "necessary measures" be taken immediately against the two pilots and asked to be informed of the measures actually taken. Soviet dictator Josef Stalin also complained in a meeting with U.S. Ambassador W. Averell Harriman that American pilots "were coming into Soviet controlled territory for ulterior purposes." Stalin specifically mentioned the facts in the *King* case as an example of egregious conduct.[1] Faced with a potential rupture in Soviet-American relations, including a possible loss of access to Soviet airfields, the Army decided to court-martial King in Moscow. Bridge, located in southern Italy with the Fifteenth Air Force, would be court-martialed at that command's headquarters. The bottom line was that both men had to be tried—and convicted—if the angry Russian bear was to be mollified.[2]

While the sentences ultimately meted out to Bridge and King did not include imprisonment or a discharge, permanent damage had been done to their military records. Certainly, any hopes that either pilot may have had for a military career were dashed. What follows is the strange history of these two courts-martial, details of which are found in the records of trial, the military personnel records of Bridge and King, and papers relating to the Military Mission to Moscow.

Americans in Moscow and Soviet-Occupied Territory

To understand how Bridge and King angered the Soviets, and how their actions affected U.S.-Soviet relations in World War II, it is important to look at the operations of the U.S. Military Mission to Moscow. This was because the mission not only was the point of contact for all U.S. military and naval activities in the Soviet Union, but also because this Moscow-based

military mission made it possible for U.S. Army Air Force pilots to land their aircraft on Soviet-run airfields.

The U.S. Military Mission to Moscow began on 18 October 1943, when Major General John R. Deane landed at an airfield near the Russian capital.[3] His task as chief of the mission: to work with newly appointed Ambassador Harriman in ensuring that the alliance between the United States and the Soviet Union was healthy and harmonious. After all, if Hitler's Germany were to be defeated—still an open question in late 1943—it was critical that the Americans and Russians share intelligence, operational plans, and times of their offensive campaigns so that they were mutually supportive.[4]

From the beginning, it was a difficult mission. The Soviets believed that the Russian people were suffering the most from the German war machine and consequently were suspicious of Anglo-American delays in launching Operation Overlord, the long-promised Allied invasion of France. Since the Americans and British had been stridently anti-communist (and anti-Soviet) in the 1920s and 1930s, Stalin suspected that the Anglo-American part of their alliance might secretly be holding back the start of the cross-channel attack. Why? Because the Americans and British might want to bleed the Soviet Union until it was dry and then beat the Red Army to Berlin. Even after D-Day in June 1944, Stalin and other Soviet leaders were suspicious of American and British motives, especially as the end of the war drew ever closer and Stalin began planning for Soviet-dominated governments in Eastern Europe. These suspicions—regardless of whether there was any real basis for them—provide the context for understanding what happened to Lieutenants Bridge and King.

A final point: by late 1944, as American bombers flying from England and Italy continued to pound enemy defenses in Germany and German-occupied Europe, American access to Soviet airfields became increasingly important. If B-17s and B-24s flying bombing missions against the enemy were damaged by flak, were low on fuel, or were otherwise unable to return to their home bases, they might reach safety in the Soviet Union. The Military Mission to Moscow worked tirelessly with the Soviets to identify "emergency" airfields in Soviet-occupied territory that American pilots could use if they could not return to their home airfields.[5]

Lieutenant Donald Bridge Makes Emergency Landing; Takes off Without Permission

On 22 March 1945, Donald Bridge took off from Italy. He was a pilot with the 756th Bombardment Squadron, 459th Bombardment Group. He and his B-24 crew were on a mission to bomb the Kralupy oil refinery, near Prague. It was their thirty-second mission. After successfully completing their bombing run over the target, and beginning the journey back to Italy, Bridge and his crew discovered that their airplane was short on fuel, and had serious engine problems. At first, the Americans "prepared to abandon ship," but then decided that there was sufficient fuel remaining that "they should try to make it to the Mielec Airfield in Poland." This airfield, then under Soviet control, had previously been identified as an emergency airfield for use by U.S. air personnel in distress.[6]

Bridge dropped out of formation, did a 180-degree turn, and started for Russian lines. As he approached Mielec Airfield, the Soviets fired red flares—indicating danger and that he was forbidden to land. After two or three approaches, however, the Americans finally saw a green flare, and they landed.[7]

After parking the B-24, Bridge and his crew were met by a young Russian who spoke a little English. They were taken to a Red Army colonel, the commandant of the field, and interrogated at length. The English-speaking Russian translated the answers given by Bridge to the commandant, who wanted to know why the Americans had landed on his airfield. As Bridge's B-24 showed no signs of damage, the Soviets apparently were suspicious about its arrival; they found it hard to believe that the Americans were now in their presence because of a fuel shortage.[8]

After the Soviets refueled the B-24, they told the Americans that they could leave the next morning. As the sun rose on 23 March, however, the Soviets informed Bridge that he could not depart until clearance from higher authority had been obtained. By the end of the day, Bridge and his men sensed that permission would be long in coming and that they were being wrongfully delayed. The next day, Bridge and his crew walked to their B-24, started it up, and began taxiing for take-off. Then, despite repeated attempts by the Russians—who were firing red flares—to halt their departure, Bridge and his crew made a "running take-off." The Americans returned to Italy without further mishap on 24 March 1945.[9]

A World War II Military Mission to Moscow shoulder sleeve insignia. (Courtesy: Fred L. Borch III)

Lieutenant Myron King and "Jack Smith"

Myron King's problems with the Soviets had happened the month before, on 3 February, when he made an emergency landing at the Kuflavo airfield in Soviet-occupied Poland. His B-17 had been badly damaged by enemy flak (losing two of four engines) while bombing Berlin and, believing it was too risky to attempt to return to England, King decided to try to land on a Soviet-held airfield.[10]

After successfully reaching Kuflavo, King and his fellow crewmembers were treated "like kings" while their bomber was being repaired. Two days later, on 5 February, the Americans were warming up their plane when a Russian C-47 landed at the airfield and a Soviet general stepped out of the plane. King's co-pilot, 2nd Lieutenant William Sweeney, walked over to the plane and started a conversation with the Soviet general through a young man who was

First Lieutenant Myron King, second from left, pictured with five of his crew members in Greenland (Credit: U.S. National Archives and Records Administration)

standing by the general, and whom Sweeney thought was the Russian officer's interpreter. King subsequently joined the group and the conversation with the Russian general and the interpreter continued.[11]

King informed the Soviet general that he wanted to fly his B-17 to the airbase at Lublin, located south of Warsaw. There, he hoped to get necessary repairs and refuel with the high octane gasoline needed for the bomber's engines. The Soviet general, however, insisted that the Americans must fly with him instead to Lida, which was located north of Warsaw.[12]

King acceded to the Soviet general's plan and took off in his B-17 along with the Soviet C-47. Shortly before take-off, however, the Americans discovered that the young interpreter was on board. Believing, nonetheless, that he was part of the Soviet general's staff, King decided to take the stowaway with them to Lida, where the young man could re-join his boss. The B-17 had not been in the air very long when the interpreter—who was known as "Jack Smith" because the Americans could not pronounce his Polish name—informed King that he had an uncle in England and wanted to return with them when they returned with their B-17 to England. While airborne, "Jack Smith," who apparently was wearing some type of British uniform underneath his Russian Army overcoat, took an American flight suit from the B-17's emergency kit and donned it. King later explained that, as it was minus 53 degrees Fahrenheit in the plane, the young man needed warmer clothing.[13]

As it began to get dark, both planes landed at Szczuczyn; Lida was too far and the Soviet general did not want to fly at nighttime. "Jack Smith" did not want to leave the safety of the plane, but King insisted that he come with the rest of the crew to eat in the nearby Soviet mess hall. Ultimately, the Russians discovered that "Jack Smith" was not an American and not part of King's crew, and they took him away. Under questioning, King admitted that "Jack Smith" was not part of his crew, but insisted that he had only transported the stowaway because he thought he was the Soviet general's interpreter. King also signed a statement in which he claimed that he intended to turn over "Jack Smith" after he reached his ultimate destination: the U.S. airbase in Poltava, Ukraine.[14]

King and his crew did eventually travel from Lida to Poltava. While they had hoped to obtain clearance from the Soviets to fly to either Italy or England, this did not occur. On the contrary, they were taken to Moscow on a Russian transport plane and then delivered to the Military Mission to Moscow.[15]

Bridge and King and the Case of Soviet Captain Morris Shenderoff

The Soviets were furious about the transgressions of Lieutenants Bridge and King. In a 30 March 1945 letter to General Deane, General Anatonov reminded his American colleague that it was because of their "allied relationship" that the Soviets were permitting U.S. pilots to land their bombers on "territory occupied by the Red Army." But, continued Antonov:

> we have a number of instances where crews of American airplanes and individual military personnel of the American Army rudely violate the order established by the Command of the Red Army in the territory occupied by the Soviet troops, and do not live up to elementary rules of a relationship between friendly nations.[16]

Antonov then complained that King had taken aboard a "stranger" who, in fact, "was a terrorist-saboteur brought into Poland from England." Since King's B-17 was due to return to England, this presumably would have meant that the Polish 'terrorist' would have been able to complete his mission as part of the Polish underground and report back to the Polish émigré government in London.[17]

As for Bridge, Antonov insisted in the letter to Deane that Bridge's emergency landing was a ruse and that, despite being told by the Soviets that he could not depart without permission, Bridge nonetheless "rudely violated military discipline and through deception took off from the airdrome" in his B-24. Antonov also informed Deane that the Red Army had already suffered a real loss from Bridge's misconduct: the Soviet engineer captain who had helped Bridge was so "indignant and put out" by the American's actions "that on the very same day he shot himself."[18]

Antonov closed his letter by reminding Deane that American air crews were required to strictly observe the orders of the Red Army on Soviet airbases. He not only requested that "necessary measures" be taken to avoid "a repetition of such instances," but asked to be informed of the measures taken by Deane in this matter.[19]

But there was more going on in the Kremlin regime than displeasure over the Bridge and King cases. A fifteen-page memorandum tucked away in the Military to Mission Moscow papers at the National Archives and Records Administration in College Park, Maryland, reveals that there was a third incident that was playing a role in Soviet demands for action against Bridge and King: the case of Soviet Captain (CPT) Morris Shenderoff, who had "escaped" from a Soviet-controlled airfield in Hungary by stowing away on a B-24 bomber. We know for certain that the *Shenderoff* case played a part in the *Bridge* and *King* courts-martial because Rear Admiral Clarence E. Olson, Deane's deputy at the Military Mission to Moscow, testified about Shenderoff at King's court-martial proceedings in Moscow.[20]

Morris Shenderoff's story—assuming that what he told his American interrogators is true, and there is no reason to doubt it—is both fascinating and tragic. It is worth setting out in considerable detail because it explains why the Soviets were so angry about Bridge and King—and why they insisted that action be taken against the two American pilots.

Born in Cleveland, Ohio, on 8 June 1912, Shenderoff was the son of Russians who had immigrated to the United States earlier that year. Both of Shenderoff's parents were "political revolutionaries in opposition to the Czarist regime," and both had been imprisoned for their political activities. Ultimately, however, both parents were able to leave Russia, and they settled in Cleveland, Ohio. According to Shenderoff, his father became a successful building contractor and did well enough financially to own two automobiles. Both he and his wife (Shenderoff's mother) ultimately became naturalized U.S. citizens.[21]

In 1926, Shenderoff's father "decided to visit Russia . . . intending to return to the United States in four or five months." Later that year, he wrote to Shenderoff's mother that he had decided to stay in Russia, and asked her to join him—and bring Shenderoff and his sister, Eva. While Shenderoff's mother "was not enthusiastic about leaving America," Shenderoff and Eva, then 16 and 17 years old, respectively, were curious about traveling to a faraway land. The result: in September 1927, the three Shenderoffs travelled on their U.S. passports by ship to France, and obtained a tourist visa at the Russian embassy in Paris that allowed them to enter the Soviet Union. (Since the United States and the Soviet Union did not have diplomatic relations in 1927, it was impossible for the Shenderoff family to obtain a visa prior to leaving America.)[22]

In January 1928, Morris Shenderoff, his mother and his sister finally reached Baku, Azerbaijan, where the elder Shenderoff was working as a chief engineer and overseeing the construction of factories in the area. None of the three new arrivals liked Baku. They considered it dirty and unattractive, and wanted to return to the United States. Their father, however, persuaded them to remain for a time.[23]

Tragedy then struck: young Eva Shenderoff died of typhus and her mother, emotionally distraught, announced that she would not leave her daughter's grave and would remain in Baku. At this juncture, Morris Shenderoff wanted to return to America, but was dissuaded by his father, who insisted that, as an only son, Morris should stay with his parents.[24]

Over the next two years, Morris repeatedly went to the Baku Passport Office to get the Russian tourist visa renewed in his U.S. passport; this had to be done every three months. In late 1929, after making a fifth request for an extension on his visa, the Soviet authorities took Shenderoff's American passport and refused to return it. These same officials, however, subsequently told Shenderoff's mother that he was "at liberty" to return to the United States whenever he so desired.[25]

In 1931, now 19-year-old Shenderoff graduated with an engineering degree from the Baku Engineering Construction Institute. Having determined that his future was in America, he again requested that his passport be returned and that he be permitted to depart for America. In reply, Soviet officials "wanted to know why he was so anxious to return to the United States" and "pointed out that he owed Russia a debt of gratitude for the education he had received." Shenderoff agreed to remain a year to repay this obligation.[26]

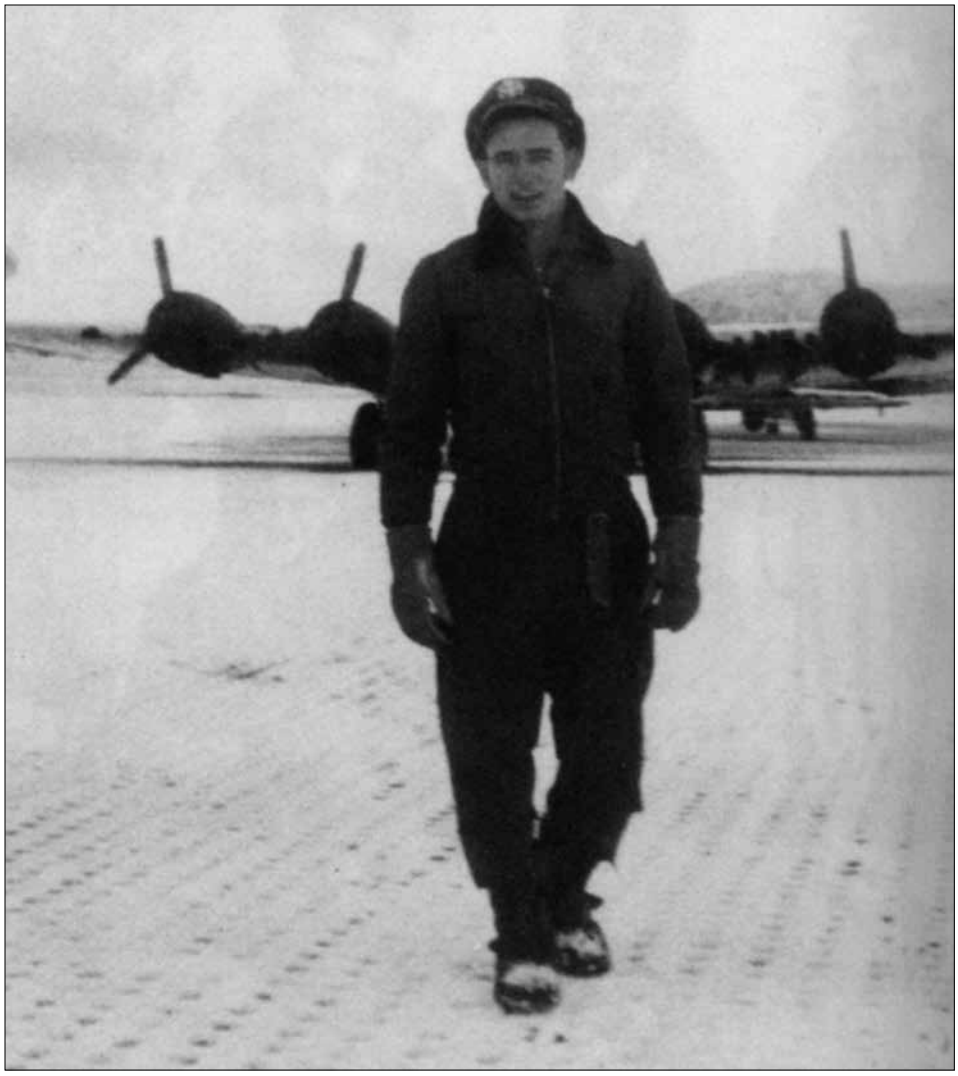
Between 1932 and 1940, Shenderoff attempted repeatedly to return to the United States, but was blocked by Soviet authorities at every turn. Matters only got worse when his father, attempting to obtain Shenderoff's passport and facilitate his son's return to the United States, was arrested as a spy and imprisoned. As a result of his father's arrest, Shenderoff lost his job in Tbilisi (he had been working there as a construction engineer). He was subsequently imprisoned for a time and, after being released, moved to Moscow. In this new home, Shenderoff found employment in an automobile repair factory project.[27]

After Germany's attack on the Soviet Union in June 1941, Shenderoff was inducted into the Red Army. As an engineer, he was assigned to the 29th Pioneers Battalion, 33rd Army, and given the rank of War Engineer, 3rd Class. (This type of rank, abolished in 1943, was equivalent to the rank of captain.)[28]

Over the next few years, Shenderoff repeatedly saw heavy combat and was wounded in action. His bravery under fire was recognized with the award of the Order of the Red Star and the Medal for Bravery. He was also promoted to major (MAJ) and given command of the 809th Battalion, part of the 35th Brigade of the 5th Army.[29] In April 1942, however, Shenderoff was "disciplined" for wrongfully killing 150 German soldiers. According to Shenderoff's own statement, his battalion had encircled 150 Germans in a fight near the Lovat River. Rather than take them prisoner, however, Shenderoff ordered his soldiers to machine-gun them. He told his American interrogator that "it would have required too many of his men to escort one hundred and fifty prisoners back to the nearest headquarters." For this war crime, MAJ Shenderoff lost his Red Star decoration and was demoted to the rank of captain.[30]

In late 1942, CPT Shenderoff and his unit were in the thick of combat. At one point, they were encircled by Germans, and for twenty-two days they were without food (surviving only by eating horse flesh); only thirty-five Russian soldiers survived, including Shenderoff, although he had been badly wounded when his legs were crushed by a tank.[31]

In January 1944, after recuperating from his injuries, Shenderoff obtained a transfer to the Red Air Force. He was assigned to the 704th Mobile Aircraft Repair Unit, located



First Lieutenant Myron King was the first—and only—American in history court-martialed in the Soviet Union. He is pictured here in Greenland, standing in front of a B-17 Flying Fortress. (Credit: U.S. National Archives and Records Administration)

at the airbase at Poltava, Ukraine, and supervised the repair of all types of military aircraft. Since the U.S. Eighth Air Force also had a small number of airmen at Poltava, Shenderoff quickly became acquainted with these Americans, given his fluent English. Once he told the Americans his story, they not only were sympathetic to his plight, but promised to "get him out of there." But any escape was impossible, because the Soviet NKVD secret police, suspicious of Shenderoff's close relationship with the Americans, watched him constantly.[32]

Not until the following year, in March 1945, did Shenderoff get his chance to escape. By this time, he had been transferred along with the 704th to Kecskemet, Hungary, where he continued to oversee work on a variety of military aircraft. This included work on American B-24 bombers, which had authority to make emergency landings at Kecskemet.[33]

On 22 March 1945, apparently with the consent of an American pilot identified in written records only as Second Lieutenant Raleigh, Shenderoff secretly boarded a B-24 and hid until the plane had taken off from Soviet airspace. A few minutes before the plane arrived in Bari, Italy, Shenderoff announced his presence. He was taken into custody and detained at a nearby refugee "transit camp."[34]

Despite a lengthy interrogation by an Army intelligence officer during the last week of March—which resulted in a fifteen-page memorandum stamped SECRET—Shenderoff was not permitted to remain in Italy. On the contrary, he was flown back to Moscow and, on 12 April 1945, handed by Military Mission to Moscow authorities to MAJ Storbanov of the Red Army. Amazingly, the Americans had Storbanov sign a "receipt" for Shenderoff.[35]

The files reveal nothing more about Shenderoff or his fate—although King heard during his time in Moscow that Shenderoff had been shot on the very day that he had returned to Soviet control. While there is no way to know if Shenderoff was executed, it would not be surprising.

In any event, the Soviets connected the three cases—*Shenderoff*, *King*, and *Bridge*—as Admiral Olson confirmed at the King trial and as reflected in the Military Mission to Moscow records at the National Archives and Record Administration. It follows that the Soviets probably believed that Shenderoff's escape on Raleigh's B-24, the presence of stowaway "Jack Smith" on King's B-17, and Bridge's suspicious landing and disobedient departure in his B-24, were not a coincidence. Was there a conspiracy to undermine Soviet authority? Were the Americans intentionally befriending Russians and convincing them to escape? At minimum, American military leaders were permitting their pilots to meddle in the Soviet Union's internal affairs. This explains the bitterness of Antonov's letter to Deane—and why Soviet pressure caused Bridge and King to be court-martialed for their misconduct.

In case General Deane did not understand the seriousness of Antonov's letter to him, the Soviets informed the Military Mission to Moscow the following day, 31 March 1945, that "all flight clearances" were suspended for American aircraft at Poltava until further notice.[36]

Bridge and King Are Court-Martialed

On the morning of 23 April 1945, Donald R. Bridge was tried in Italy at a general court-martial convened by Headquarters, Fifteenth Air Force. He was charged with two crimes: first, "wrongfully" taking off from Mielec airfield "without first obtaining proper clearance and authority" and, second, "wrongfully" disregarding "the red

flare signal," which he knew to prohibit take-off, an act that "might prejudice the relationship existing between the United States and its Ally, the Union of Soviet Socialist Republics."[37]

Since Bridge pleaded not guilty to both charges, the trial counsel called members of Bridge's crew to testify against him. The evidence at trial was not disputed: the Americans had not been cleared to leave Soviet airspace on 24 March, but believed that their departure was being unreasonably delayed; Bridge had seen red flares fired by the Soviets but ignored them; these red flares meant either that there was danger on the runway or that take-off was prohibited; Bridge nevertheless had proceeded with a "running take-off" and, once airborne, had returned to Italy.[38]

Donald Bridge elected not to testify at his trial. This probably was because he had made a written statement, prior to trial, in which he admitted seeing red flares, understood their meaning, but ignored them. But Bridge did have the benefit of his chain of command at trial: his squadron commander and squadron operations officer both testified that he was "an excellent pilot with a good reputation." Interestingly, they also testified that he had flown thirty-five missions—three of which were subsequent to the wrongful takeoff at Mielec.[39]

Shortly after 1600, on the same day that his trial had begun, twenty-two-year-old Donald Bridge was found guilty. He was sentenced to be reprimanded and to forfeit $100.00 pay per month for six months. Because Bridge earned $183.00 per month as a lieutenant, this was not a light punishment.

Two days later, and many miles away in Moscow, the general court-martial of Myron King began. The trial was unique, as it was the first—and only—time in history that an American had been court-martialed in the Soviet Union. The trial convened on 25 April 1945 in the large mansion that housed the U.S. Embassy, not far from the Kremlin in Moscow. The trial was held in secret, and the record of trial was stamped SECRET at the end of the proceedings. King was charged with the following crime:

> In that 1st Lt. Myron King . . . did, in Poland, on or about 5 February 1945, while, as Senior Pilot, operating an American aircraft under the auspices of the Soviet Army, transport, without proper authority, an alien from new Warsaw to Szczuczyn, and did, thereafter, until such alien was removed by Soviet authorities on or about 6 February 1945, permit this alien to wear U.S. Army flying clothes, and to associate himself with the American aircraft's crew under the name "Jack Smith," known to be an alias, thereby bringing discredit on the military service of the United States.[40]

At the court-martial, the trial counsel called most of King's aircrew as witnesses; they testified that "Jack Smith" had, in fact, come aboard their aircraft, had later dressed in American clothing, and had expressed a desire to come to England with the Americans. The government also introduced (as a prosecution exhibit) Antonov's letter to Deane. King's defense counsel vehemently objected, correctly insisting that the letter contained hearsay and that Soviet views on King's conduct were irrelevant. The objection, however, was overruled and the panel of ten Army officers considered the letter.[41]

The prosecution also called the Embassy's second secretary, Edward Page, to testify. He stated under oath that he had been at a 15 April 1945 meeting between Marshal Stalin and Ambassador Harriman, and had acted as their interpreter. At that meeting, Stalin had told the Americans that it appeared to him "that American aircraft were coming into Soviet controlled territory for ulterior purposes." Stalin specifically mentioned an incident in which an American airplane had landed "on a pretext of engine trouble" and, after receiving "the help and hospitality of the Russians," had "immediately flown off with a Pole on board."[42]

Page's testimony was followed by that of Admiral Olsen, who testified about the Shenderoff case. According to Olsen, the escape of Shenderoff caused "serious reaction in Soviet circles and a demand for the immediate return of this Soviet citizen." Olsen further testified that Shenderoff had, in fact, been returned from Italy to Moscow, and handed over to Soviet authorities.[43]

At the end of the government's case, King took the stand. After taking an oath to tell the truth, King testified that, while he had permitted "Jack Smith" to come aboard the B-17, he had done so only because he believed that the young man was the Soviet general's interpreter. While King agreed that he had allowed "Jack Smith" to wear American flying gear, this was only because it was so cold; he vehemently denied that there was any intent to deceive the Soviets, much less hide "Jack Smith" from them.[44]

On 26 April, twenty-three-year-old Myron King was found guilty. His punishment: to be reprimanded and to forfeit $100.00 of his pay per month for six months.[45]

Interestingly, while the panel found King guilty, the members all signed a handwritten note, asking General Deane to give "clemency" to King. But Deane refused: he approved King's sentence on 10 May, and forwarded the entire record to Washington, D.C.[46]

Aftermath

After returning home to the United States, and being honorably discharged, both Bridge and King sought to reverse their court-martial convictions. Bridge, who immediately looked for a way to appeal his case, was unsuccessful; King, however, who began the appellate process a few years later, had his conviction set aside.

Correspondence attached to Bridge's court-martial record indicated that Bridge asked Congressman Angier L. Goodwin (R.-Mass) to see what could be done by the Army to modify his conviction. On 9 November 1945, the Army replied to Goodwin that, as Bridge's court-martial was entirely legal, nothing could be done. "There is no provision of law," wrote the Undersecretary of War to Goodwin, "under which a valid sentence of a general court-martial when fully executed can be modified or set aside by administrative action." Apparently, Bridge took no further action in the matter; perhaps he decided it was best to move on with his life.[47]

As the saying goes, however, "timing is everything," and in King's case, nothing could be truer. This is because King began pursuing his appeal after the establishment of the Air Force in 1947. For King, this was a critical break, as all courts-martial conducted by the Army Air Force in World War II were now subject to review by legal

Air Force Judge Advocate General, Major General Reginald C. Harmon. Harmon vacated the findings of guilty and the sentence in King's trial. (Credit: U.S. National Archives and Records Administration)

authorities in the newly created—and very independent—Air Force. Consequently, while the Army had—as with Bridge's court-martial—determined that King's court-martial had been entirely legal, King now got a fresh look at his case from the Air Force.

In 1951, John A. Doolan, an Air Force attorney working in the Pentagon, learned about King's case and decided that it was a miscarriage of justice. Doolan analyzed the record of trial, wrote an eighty-eight-page memorandum highlighting its errors, and convinced the new Air Force Judge Advocate General, Major General Reginald C. Harmon, that King had been wronged. As a result, on 11 January 1952, Harmon "vacated" the findings of guilty and the sentence in King's trial. King got his forfeited pay restored—more importantly, his military record was cleared.[48]

While forgotten today, the courts-martial of Bridge and King remain a fascinating episode of Army (and Air Force) military legal history—and certainly foreshadow the Soviet Union's Cold War-era suspicions of American actions and attitudes. **TAL**

Mr. Borch is the Regimental Historian & Archivist.

Notes

1. Letter from General A. I. Antonov to Major General John R. Deane, Chief, U.S. Military Mission to Moscow (30 Mar. 1945) *at* National Archives and Record Administration (NARA), College Park, Md. [hereinafter Letter from Antonov].

2. As early as the 16th century, a brown bear was used as a symbol of Russia in popular literature and folklore. *Russian Bear,* Wikipedia, https://en.wikipedia.org/wiki/Russian_Bear (last visited June 17, 2019).

3. John Russell Deane (1896-1982) served in the Army from 1917 to 1946, when he retired from active duty after a distinguished career that included service in both world wars. His son, John R. Deane Jr. (1919-2013) had an even more distinguished career: commissioned as a second lieutenant in 1942, lieutenant colonel in command of a battalion three years later, and finished his time as a uniformed Soldier with four stars on each shoulder, two Distinguished Service Crosses, and two Silver Stars. *John Russell Deane Jr.*, Wash. Post, Aug. 13, 2013, at B3.

4. James Lee McDonough, The Wars of Myron King 152-55 (2009).

5. For more on the Military Mission to Moscow, see John R. Deane, The Strange Alliance: The Story of Our Efforts at Wartime Cooperation with Russia (1947).

6. Prosecution Exhibit No. 2, Investigation by Air Inspector, Testimony of First Lieutenant Donald Bridge, Record of Trial, United States v. Bridge, General Court-Martial, Fifteenth Air Force, 23 Apr. 1945, at 2 [hereinafter Bridge Record of Trial].

7. *Id.* at 6.

8. *Id.* at 3.

9. *Id.* at 7.

10. Memorandum to General Cramer, subject: Record of Trial in Case of First Lieutenant Myron King, Air Corps, CM 281131, n.d. (May 1945), at 2.

11. *Id.*

12. *Id.* at 4.

13. *Id.* at 3-4.

14. *Id.*

15. *Id.* at 4.

16. Letter from Antonov, *supra* note 1.

17. *Id.*

18. *Id.*

19. *Id.*

20. Record of Trial, United States v. King, CM 281131, 25-26 Apr. 1945, at 49-60.

21. Report on Engineer-Captain Morris Shenderoff, Incidents, U.S. and Soviets, U.S. Military Mission, Moscow *at* NARA at 2-3 [hereinafter Shenderoff Report].

22. *Id.* at 3.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 3-4.

28. *Id.* at 7.

29. Created in 1930, the Order of the Red Star was awarded for "conspicuous services performed in the defense of the Soviet Union in war or peace." The Medal for Bravery (or Valor), created by the Union of Soviet Socialist Republics in 1938, was awarded for "personal valor and courage in action against enemies" of the Soviet Union. While there is no exact equivalent for either award among U.S. armed forces decorations and medals, the Order of the Red Star is akin to a Bronze Star Medal, and the Medal for Bravery is equivalent to the Bronze Star Medal with "V" for Valor device. John D. Clarke, Gallantry Medals and Decorations of the World 204-05, 208-09 (2001).

30. Shenderoff Report, *supra* note 21, at 8.

31. *Id.* at 8.

32. *Id.* at 9.

33. *Id.*

34. *Id.* at 11.

35. Receipt for Engineer-CPT M. I. Shenderoff, Red Army, 12 Apr. 1945, U.S. Military Mission, Moscow *at* NARA.

36. Letter from General A. I. Antonov to Military Mission to Moscow (31 Mar. 1945) *at* NARA.

37. War Department Adjutant General's Form No. 115, Charge Sheet, United States v. Bridge, 23 Apr. 1945.

38. Bridge Record of Trial, *supra* note 6, at 31.

39. Bridge Record of Trial, *supra* note 6.

40. War Department Adjutant General's Form No. 115, Charge Sheet, United States v. King, CM 281131 (25-26 Apr. 1945).

41. Record of Trial, United States v. King, CM 281131 at 6-34 (25-26 Apr. 1945).

42. *Id.* at 44-48.

43. *Id.* at 49-60.

44. *Id.* at 64-81.

45. General Court-Martial Orders No. 1, American Embassy, United States Military Mission to Moscow (10 May 1945).

46. *Id.*

47. Letter from R.E. Kunkel, Chief Military Justice Division to The Office of The Judge Advocate General (31 Oct. 1945) *in* Allied Papers, United States v. Bridge, CM 283049.

48. Major General Reginald C. Harmon, The Judge Advocate General, U.S. Air Force, *Action Upon Application for Relief Under Section 12, Act of May 5, 1950*, Military Personnel Records, Myron King, National Personnel Records Center, St. Louis, Missouri.

Life Hack

The Blended Retirement System

What Leaders Need to Know

By Major Courtney M. Cohen

Rule No. 1: Never lose money. Rule No. 2: Never forget rule No. 1.
—Warren Buffett

For many years, retirement planning for military service members consisted of making sure you didn't have an unintended break in service that would cause all of those valuable years of active federal service to wash down the drain. This is still the case for the majority of the current force, but a new military retirement system is radically changing the way future generations of military members will plan for their retirement. These junior members of our armed forces will inevitably have many questions, and leaders must be armed with a baseline understanding of the new system to ensure they are empowered to make the best choices for themselves and their Families. This article highlights significant changes in the Blended Retirement System (BRS) and provides tools for leaders to mentor their subordinates in this new world of long-term financial planning.

The Legacy Retirement System

Perhaps the best way to explain the new is to start with the old. To facilitate a later comparison, I will refer to the old system as the legacy retirement system, also called the High-3 System because retired pay is based on an average of a service member's highest thirty-six months of pay.[1] Most service members fall under the legacy retirement system and are familiar with it, but there may be a few under-appreciated details that make a difference when comparing it to the BRS.

First and foremost, the legacy retirement system is all-or-nothing. Service members must serve at least twenty years of active military service to be eligible.[2] If they serve fewer than twenty years of active federal service, they are not eligible for the defined benefit annuity. If there is a break in their service, meaning they leave the service and return to military service at a later date, then calculating retirement points can be quite challenging and requires an attention to detail and proper memorialization that often leads service members to miss out on credit toward their military retirement.[3]

Second, the legacy retirement system is a defined benefit annuity. "Defined" means that the earned retirement amount is known to the government and to the service member based on a certain math equation, usually a percentage of the employee's pay. "Benefit" implies that the employer provides the retirement pay to the service member at no cost to the employee. "Annuity" refers to the retiree receives the same amount of pay at equal intervals.[4] In the military's case, retirement pay is adjusted for inflation, and retirees receive retirement pay monthly. In a way, we all know the math equation used to calculate the defined nature of the benefit, but we may not know that we know it. Service members have all but been indoctrinated to know that retirement at twenty years of service earns retirees 50% of their base pay.

But does everyone know how we come to 50%, as opposed to 40% or 60%? For the legacy retirement system, the math equation used to calculate the defined benefit is the service member's years of service multiplied by 2.5%, determining the percentage of the high-3 base pay that a retiree will receive. Twenty years of service multiplied by 2.5% equals 50%. If service members continue to serve to thirty years of service, they will receive 75% of their base pay every month, adjusted for inflation, in retirement.[5]

The problem is, only 19% of service members (across all services) actually serve to twenty years.[6] Most service members serve a certain term and do not reenlist or other-

Table 1: Defined Benefit[10]	
Defined benefit vesting	20 years of service (YOS)
Defined benefit multiplier	2.0%
Defined benefit working age annuity	Active duty: Choice of full annuity or lump sum option (50% or 25%) at retirement; National Guard/ Reserve: Lump sum based on annuity at age 60 (or earlier with creditable active service).
Defined benefit retirement age	Active duty: At 20 or more YOS; National Guard/ Reserve: After 20 or more qualifying YOS and age 60 (or earlier with creditable active service).
Defined benefit cost-of-living adjustment (COLA)	Full COLA
Defined benefit disability retired pay	Disability rating (minimum 30%) capped at 75% or 2.0% multiplier

Table 2: Defined Contribution[14]	
Defined contribution, DoD contribution rate	1% automatic, plus up to 4% matching (Max=5%)
Defined contribution, DoD contribution rate YOS	1% automatic: Begins at 60 days of service through 26 YOS Matching Starts after two TOS and continues through 26 YOS*
Enrollment	Automatic for members entering service on or after Jan. 1, 2018; automatic re-enrollment every January if member zeros out contributions
Defined contribution member contribution rate	3% automatic; full DoD match requires 5% contribution; default to Traditional TSP account, Lifecycle (L) Fund
Defined contribution vesting	Always vested in Service member contributions, DoD matching and any earnings. Vested in Service Automatic (1%) Contribution and any earning after two years in service
Defined contribution forfeit of DoD contributions	If you leave service before two years, you forfeit the Service Automatic (1%) Contribution and any of their earnings

wise continue to serve. Millions of service members volunteered to serve during the last twenty years of war, likely deployed far from their loved ones to combat, and may have participated in or seen tragic events. After serving honorably and offering significant sacrifice, they decide to move on to the next chapter of their lives. Due to the structure of the defined benefit annuity, these service members do not qualify for any retirement benefit from the federal government.

The Blended Retirement System

Congress approved a significant overhaul of the military retirement system in the National Defense Authorization Act for Fiscal Year 2016.[7] Any service member joining the service after 1 January 2018 would automatically enroll in the BRS. In addition, service members with fewer than twelve years of service as of 31 December 2017 could choose to opt in to the BRS if they so desired. No one would be required to move from the legacy retirement system to the BRS if they wanted to remain under the legacy system.[8]

So, why is this new system called "blended"? The new system blends three approaches to retirement pay to reach the government's desired balance of sustainable cost and availability to more service members.

Component 1: Defined Benefit

Beginning with the most familiar aspect to us all, the BRS preserved a defined benefit component, but it changed the equation used to calculate the percentage of service members' base pay they will receive in retirement. Instead of multiplying years of service by 2.5%, a service member's high-3 base pay will be multiplied by 2.0%.[9] You may be thinking, half a percentage point is nothing! But, this half a percentage point really adds up. Let's calculate what a Soldier with twenty years of service would receive in retirement. Twenty years of service multiplied by 2.0% is 40%. For an O-5 retiring at twenty years of service in 2019, retirement pay under the legacy retirement system would be about $4,500.00 per month, or $54,000.00 annually. With the same facts, retirement pay under the BRS would be about $3,600.00 per month, or $43,200.00 annually. That's almost $11,000.00 per year that the service member is now seeking to make up for elsewhere in their retirement income planning process. But remember, the defined benefit portion of the BRS is still all-or-nothing. If service members serve any less than twenty years of military service, they do not receive any of the benefit we just described.

Component 2: Defined Contribution

That brings us to the second component of the BRS. Considering most service members do not reach the twenty-year mark to qualify for the defined benefit retirement, the BRS offers a defined contribution aspect that allows service members to walk away from military service with some government-provided retirement pay. Here, "defined" refers to the percentage of the service member's salary used to grow the retirement pay. "Contribution" describes how the retirement pay initially accumulates—the service member and the government each contribute a defined amount to an investment account, here, the Thrift Savings Plan (TSP). Unlike the defined benefit option, where the government bears all the costs of the retirement and service members only contribute their years of service, this defined contribution method sees the cost burden shift to service members to invest a percentage of their salary, paying for a portion of their own retirement. Similar to many private employers under what is commonly referred to as the 401(k) system, the government also contributes to the investment account.

Under the BRS, service members are automatically enrolled to contribute 3% of their annual base pay to their TSP account, and they can raise and lower this percent-

age as they deem appropriate for their individual circumstances.[11] When service members reach sixty days of active federal service, the Department of Defense (DoD) will begin contributing the equivalent of 1% of the service member's base pay to the TSP.[12] When service members reach two years of active military service, the DoD will begin matching the service member's contributions into the account, up to a total of the DoD contributing the equivalent of 5% of the service member's base pay.[13] The first 1% contribution from the DoD is "free," meaning it is not matching the service member's contribution. From there, the more service members contribute, the more the DoD will contribute, up to a total of 5% from the government. This chart depicts the benefits to the service member of the matching contributions from the DoD.

Table 3: DOD Contribution & Match Amounts[15]

Your Contribution	DoD Auto Contribution	DoD Match	Total Contribution
0%	1%	0%	1%
1%	1%	1%	3%
2%	1%	2%	5%
3%	1%	3%	7%
4%	1%	3.5%	8.5%
5%	1%	4%	10%

Table 4: Continuation Pay[24]

Continuation Pay multiplier (months of basic pay)	Active duty (including AGR and FTS): Between 2.5 and 13 times monthly basic pay. National Guard/Reserve: Between 0.5 and 6 times monthly basic pay (as if on active duty)
Continuation Pay Commitment	Any member who elects to receive continuation pay will incur an additional service obligation of not less than three years, as determined by the member's Service
Continuation Pay	Eligible for continuation pay when complete between eight, but no more than 12 YOS, calculated from Pay Entry Base Date (PEBD)

Table 5: Lump Sum[28]

Lump Sum Options	May choose a lump sum of either 25% or 50% of the discounted present value of future retirement payments, in exchange for reduced monthly retired pay, until full Social Security retirement age, which for most is age 67
Lump Sum Election	Active duty: Lump sum election must be made no less than 90 days before retirement, National Guard/Reserve: No less than 90 days before receipt of retired pay
Lump Sum Eligibility	Active duty: At retirement after 20 or more YOS National Guard/Reserve: Upon becoming eligible to begin receiving retired pay at age 60 (or earlier with creditable active service)

Component 3: Continuation Pay

The final component of the BRS is a mid-career incentive bonus, or continuation pay. This component of the retirement system provides service members between eight and twelve years of service with a lump-sum continuation bonus in exchange for continued service.[16] For active duty service members, including Active Guard Reserve service members, the bonus could be anywhere from two-and-a-half times one month's base pay up to thirteen times one month's base pay.[17] For Reserve and National Guard service members, bonuses may range from half of one month's active duty base pay to six times one's month's active duty base pay.[18] Services may consider specific retention needs in determining the amount of the bonus offered to certain service members.[19] For 2019, active duty service members will be eligible for continuation pay at twelve years of service and will receive two-and-a-half times one month's base pay for all services.[20] Reserve component service members in the Army will be eligible for continuation pay at eleven years of service and will receive four times one month's active duty base pay.[21] All other services' reserve components will only receive one-half of one month's base pay, and at twelve years of service.[22] All service members accepting the continuation pay will incur an additional four-year service obligation.[23]

Component 4: Lump Sum

A final aspect of the BRS is the decision whether to receive their military retirement pay as designed, i.e., a monthly annuity, or to receive either twenty-five or fifty percent of their military retirement pay as a lump sum payment upon retirement.[25] This component of the BRS is only available to service members who reach twenty years of service and qualify for military retirement. Those who choose this option will see their monthly retirement checks decrease by twenty-five or fifty percent per month, respectively.[26] The lump sum option is likely not the best choice for most retiring service members. Keep in mind that retirement pay is adjusted for inflation as the years go by, so the future raw dollar amount retirees will receive will gradually grow over time. Compare that to the lump sum option, where the lump sum payment will be discounted to the dollar's present value. The DoD publishes the discount rates annually. The discount rate for retirements in 2019 is 6.81% and the discount rate for retirements in 2020 is 6.75%.[27] Even if a service member has an eye on a down payment for a home or other similar large expense that may look like a good investment of the lump sum, most service members will see greater value in receiving a lifetime of inflation-adjusted monthly retirement annuity payments.

Why Leaders Need to Know

Why would JAG Corps leaders, most of whom will be under the legacy retirement system, need to understand the seemingly more complex BRS? A few facts demonstrate the growing relationship between leadership and financial readiness counseling.[29] The American Psychological Association found in its annual "Stress in America" study that a majority of Americans experienced stress related to money, and specifically, retirement.[30] Further, Blue Star Families, which researches the "unique challenges of military family life," found in 2018, for the first time ever, financial issues was the top lifestyle stressor facing military Families.[31] Financial stressors can impact every facet of service members' lives, from familial relationship stability to military readiness. If not empowered to make the best decisions for themselves and their Families, service members will either suffer added stress and distraction from the mission, or they will leave money on the table, potentially adding stress to life after the military, or both. It is incumbent on all leaders to educate themselves about the BRS, not only for their own future planning, but to help lift up those around them to find the best plan to provide stability for their Families. The Army has identified this as a responsibility of leadership to the extent that it has created a pocket card for leaders to reference when they are inevitably approached with questions from members of their formations who are new to the military, new to investing, or both.[32]

Conclusion

Judge advocates, paralegal noncommissioned officers, warrant officers, and civilian paraprofessionals can all learn from the resources available on the BRS. The more service members educate themselves, even if the information is not directly applicable to that person's retirement planning choices, the more persuasive the knowledge will become. Conversations about the BRS should occur at physical training, at leader professional development sessions, at the metaphorical water fountain, and beyond. Only by discussing these options and checking in on service members enrolled in the BRS to make sure they understand the consequences of their decisions will leaders truly demonstrate their care for the development of their teams. Leaders have the opportunity to make a lasting impact on not only the future lives of service members enrolled in the BRS, but potentially for generations to come, by instilling an understanding of and dedication to deliberate financial readiness in their formations and offices. Take the leaders' pocket card, educate yourself, and empower those around you. You will not regret it. **TAL**

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WRITECOM

Next-Level PowerPoint Presentations

By Lieutenant Colonel Megan S. Wakefield

It has been said that human beings innately fear two things—snakes and speaking in public. I am not sure whether that is true or not, but it certainly *feels* true. The dry mouth, the rush of adrenaline—it happens to even the very best of speakers. Nonetheless, a sure way to calm those public speaking nerves is to show up prepared and practiced. For most of the presentations judge advocates, civilian attorneys, paralegals, and legal administrators will give, our "good friend" PowerPoint will certainly be in the mix. It can be very tempting to lean on PowerPoint in lieu of preparation and practice. Doing so, however, can lead to disaster. PowerPoint is a very useful tool, and when used in the right way, can amplify your message to your audience. Here are some tips to transform your presentations.

1. Know your audience

Have you ever found yourself sitting in an auditorium or a classroom and the presenter says something like, "This slide doesn't really apply to you. Next slide . . . "? Cue three-quarters of the audience jotting down grocery lists, scrolling through Instagram . . . doing literally *anything* other than actually listening to the presenter. The point of any presentation is to share knowledge. By knowing your audience, you can identify key (normally, but not always, three) takeaways for your presentation and build your presentation's theme around those takeaways. Identifying the takeaways should be fairly easy if you put yourself in the position of your audience and ask the question, "If I were a 'fill-in-the-blank' (Battalion Commander, Family Readiness Group member, Officer Basic Course student, etc.), what would I want to know at the end of this presentation?" If you are not familiar with your audience, consider asking the person who requested you give a presentation for more information. If, for example, you are giving a class to a group of commanders, find out which units they are assigned to and what judge advocate provides advice to that commander. Call that judge advocate and ask what they think the commander would want to know or hear about. Giving a presentation that feels tailor-made to the audience will increase the likelihood that your audience will listen and actually retain the information presented.

2. Step away from the computer

Now that you know your audience and you have made a decision as to the key takeaways from your presentation, create a road map for your presentation. Wait . . . are you reaching for your computer right now? Stop. Resist the temptation to jump onto PowerPoint. It's best to sit down with a pen and paper and sketch out your road map, analog-style. This is a tip I learned from *Presentation Zen* by Garr Reynolds, and it made all the difference in the world. By going "analog" when coming up with the ideas for your presentation, you are able to play with the flow of your presentation in a much more creative way. It also allows you to think through your presentation and actually use PowerPoint as a tool to amplify your takeaways. If you jump on PowerPoint too early, you risk using PowerPoint as a crutch, forcing you to read your slides aloud to your audience. (*Cue mental images of everyone staring blankly in your direction.*) Additionally, when not distracted by technology, you can envision what you want a slide to look like and then set about making that vision a reality.

3. Keep it simple

As we have all learned (and witnessed in many courtrooms), the best cross-examination questions are simple, direct, one-fact-per-question declarative statements. Consider doing the same with your presentations. Choose pictures that illustrate your point and are easy to digest, visually. Try using fewer words on your slide, and when you need to use words on your slide (particularly in a briefing), build in time to allow your audience to read the slide. Then, move on to slides that amplify what your audience should not just read. If you are transmitting information that is complex and words are necessary, consider putting together a takeaway product that you give your audience at the end of the presentation. That way, they aren't tempted to read the materials while you are presenting.

4. Explore the space

Go to the venue. Play with the technology. Look at how the room is arranged. You might want to change up your slides based on lighting or seating. Knowing that the colors on your slide are not visible, or that they are far too harsh, is half the battle. You want to make sure you eliminate the distraction that such little problems create for your audience so that they can focus on your message and key takeaways. Last, but not least, practice your presentation whenever possible. After all, practice makes perfect. Added bonus—if you are uncomfortable speaking in public, visiting the venue will help make you feel more at ease.

In the words of the immortal Coco Chanel, "Dress shabbily, and they remember the dress. Dress impeccably, and they remember the woman." You want your presentation to be memorable because you have made the *message* memorable, using all the tools at your disposal, to include PowerPoint, to do so. Remember, your audience needs the information and *you* are the right person to share that information. Let PowerPoint work for you; not the other way around. Best of luck out there, and remember to have fun! **TAL**

LTC Wakefield is the Chief, Strategic Communications at the Office of the Judge Advocate General.

(Credit: istockphoto.com/OSTILL)

Practice Notes

Flagging Soldiers

By Major Jenna C. Ferrell

The hypothetical conversation no Brigade Judge Advocate (BJA) wants to have with their Brigade Commander after a Commanding General (CG) meeting:
Brigade Commander: "How many of our actions did the CG sign?"
BJA: "Eight of the ten we submitted, Sir."
Brigade Commander: "What happened to the other two?"
BJA: "Well, Sir, the packets were missing the correct flags, which we were unable to get in time from the unit or the S1. Without the flags, the Staff Judge Advocate (SJA) wouldn't accept those last two packets . . . "

When a regulation says "commanders *will* impose a flag on a Soldier" under specified circumstances, commanders should waste no time in doing it. It may sound harsh, but failing to promptly impose a mandatory flag can create a host of unwanted and time-consuming problems. Judge advocates' knowledge about the flagging rules and procedures is a force multiplier.

Take, for instance, Captain Matthew Myer, the Commander whose actions at Wanat Village, Afghanistan, on 13 July 2008, were the subject of two administrative investigations.[1] The investigation looked into whether the command failed "to prepare adequate defenses for [their newly built] combat outpost . . . where a mass Taliban attack resulted in the deaths of nine Soldiers and twenty-seven wounded . . . ."[2] Procedurally, everything began without a hitch. Where the Army failed, however, was evident in what happened months after the closure of the investigations. While facing follow-on adverse administrative action, Captain Myer showed up on the O-4 promotion list, creating a flurry of consternation and attracting congressional attention.[3] Why had the subject of a General Officer Memorandum of Reprimand (GOMOR) for dereliction of duty in combat been selected for a position of greater responsibility? The reason was simple: at the time he received the GOMOR, Captain Myer was not flagged. In the words of John Plotkin, the Forces Command (FORSCOM) legal advisor, "we got smacked for the flag, for not having imposed it."[4]

Analysis

1. What?

The term "flag" is Army short-hand for the "suspension of favorable personnel actions."[5] Above all else, flags are not to be used as punishment or restriction.[6] Flags function like an administrative placeholder while the final disposition of disciplinary or other adverse action is pending.[7] There are two types of flags: nontransferable, of which there are fourteen reason code subtypes (A, B ,C, D, E, F, L, M, P, T, U, V, W, and X), and transferable, of which there are three reason code subtypes (H, J, and K).[8] For Soldiers facing one or more transferable flags, a Permanent Change of Station (PCS) move is permitted, though the flag follows the Soldier to the new duty location.[9] In addition to the different flag codes, there are five report type codes: initial (A); final report—favorable (C); final report—unfavorable (D); final report—other (E); and erroneous report (Z).[10]

Although a Soldier may be subject to multiple flags for the same underlying issue, each flag requires a reason code and a report type code.[11] Consider a Soldier who fails a random unit inspection urinalysis: as a general rule, this Soldier should be flagged using the AA (Adverse Action – Initial), BA (Involuntary Separation – Initial), and UA flag codes (Drug-Related Misconduct – Initial) code subtypes, assuming the commander intends to give the Soldier an Article 15 and initiate the separation process.

2. When?

Despite the reluctance of some commanders to impose flags, the regulatory guidance is relatively clear: "[t]he suspension of

favorable actions on a Soldier is *mandatory* when military or civilian authorities initiate any investigation or inquiry that may potentially result in disciplinary or adverse administrative action."[12]

Investigations include commander's inquiries, preliminary inquiries, Army Regulation (AR) 15-6 investigations, law enforcement investigations, and some Financial Liability Investigations into Property Loss (FLIPLs).[13] At the outset of any such investigation, flags must be imposed for named subjects, respondents, suspects, or accused Soldiers.[14] In addition, flags may become mandatory during the investigatory process for other witnesses who are suspected of misconduct.[15]

Favorable personnel actions include, but are not limited to, awards, school attendance, special passes, advance or excess leave (*not* regular leave), promotion, reassignment, reenlistment, enlistment bonuses, assumption of command, and separation or retirement.[16] Contrary to popular misconceptions, commanders do not have discretion to make exceptions for flagged Soldiers; all favorable actions are suspended for the duration of the flag, which—hopefully—motivates the Soldier to become "unflagged" as quickly as possible.[17]

3. Why?

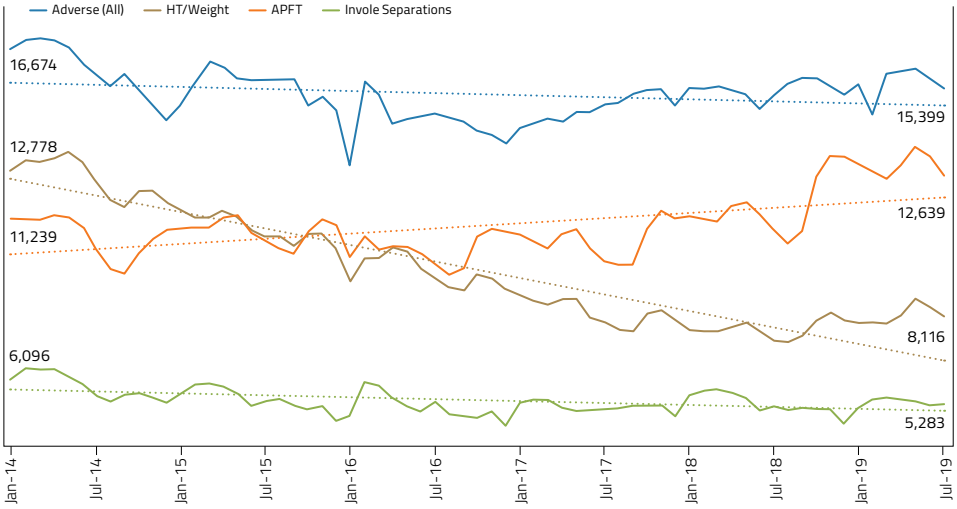
The "why" associated with flagging procedures is simple: to withhold favorable actions while Soldiers are subject to the potentially unfavorable consequences of investigative findings.[18] While an administrative or criminal procedure is still ongoing, the Army has an interest in facilitating communication with the subject and ensuring the Soldier's presence at future hearings. By imposing a nontransferable flag, the commander prevents the physical movement of the Soldier to other duty locations.[19] On a practical note, many criminal law departments will not accept CG actions for processing without a properly imposed flag and updated record brief reflecting the correct flag(s).

4. How?

Using a Department of the Army (DA) Form 268, commanders are required to impose flags within three working days after a Soldier is identified as the suspect or subject of an investigation.[20] The effective date of a flag is the date on which the circumstances requiring the flag occurred, not the date on which the commander initiates the flag.[21] Within two working days, the Soldier's commander must also notify the Soldier in writing (preferably using a DA Form 4856) of the imposition of the flag, unless doing so would compromise an ongoing investigation.[22] Finally, the commander must remove the flag within three working days after the final disposition of the underlying misconduct or deficiency.[23] For example, if an AR 15-6 investigation results in no adverse findings against the subject, the commander would lift the flag favorably, allowing the Soldier to resume his eligibility for favorable personnel actions.[24] If the investigation results in substantiated findings and the commander intends to take further action—for instance, a GOMOR—they must lift the investigation flag and impose a new flag for adverse action.

Only those officers authorized to direct the original initiation of a flag can direct the removal of the flag.[25] Under certain circumstances, however, a flag imposed on a Soldier who is already on a centralized promotion list may only be removed by the commander of Human Resources Command.[26] As a general rule, flags play a significant role in the DA promotion process due to the additional administrative procedures associated with Promotion Review Boards for officers whose flags are later lifted favorably.[27]

Active Component - Flags Trending, All Ranks



5. Pitfalls and Practical Concerns.

Flags can be an administrative headache. Attorneys and paralegals often find themselves frustrated by the speed with which units respond to requests for copies of flags because the overall processing of the underlying legal action can be delayed without an accurate DA Form 268. This may not seem like the end of the world, but when CG meetings only occur once every few weeks, legal shops scramble to submit as many packets as possible. Some shops retain access to personnel systems, which allows attorneys and paralegals to access active flags, though they typically cannot make updates or changes.

In addition, flags must be reviewed at least monthly, and battalion-level commanders are required to conduct a monthly review of all flags older than six months.[28] However, because units juggle competing demands for their time, "flag review" often falls to the bottom of the priority list. The negative consequences can be mitigated by proactive involvement of judge advocates (JAs) in what units usually call "non-deployable meetings." Flags may not be the number one priority of all commanders, but overall readiness is a metric on which units are routinely measured and compared.[29] Although there is technically no such thing as a "non-deployable" Soldier based solely on pending legal action, commanders report these Soldiers on the "administratively non-deployable list."[30] Cross-checking this list with the legal tracker helps to identify

flags that should have been lifted and those that require reason code revisions. Doing so also enhances the accuracy of the mandatory monthly flag report, which commanders sign and the S1 shop files them in the Soldier's local personnel file.[31]

Another problem associated with flags is tied to split responsibility: commanders retain the authority to impose flags, but S1 personnel process the DA Form 268s, maintain flagging records, and risk poor ratings if inspections reveal procedural deficiencies.[32] In other words, the unit commander is ultimately responsible for signing on the dotted line, but S1 shops (and even JAs) suffer the consequences of missteps in flag management. The overall effectiveness of flagging is also premised on accurate, consistent coordination between the S1 shop and various other staff sections, including security and retention.[33] In a well-oiled machine, this task is an integral part of the unit's established battle rhythm. As with monthly flag reviews, however, staying on top of this requirement during times of high operational tempo is challenging.

Conclusion

Flags are here to stay. Avoiding them or trying to "game" the system to help a Soldier benefits no one; in fact, failure to impose a timely flag may unintentionally highlight a Soldier's personal circumstances at higher levels.[34] Imposing and monitoring flags should be a priority for every unit commander and S1 shop. No commander needs to deal with the hassle of responding to an Inspector General complaint for being derelict in the management of flags, which is why JAs must remained engaged and proactive throughout the entire flagging process. By gently reminding every commander, no matter how experienced, to impose the appropriate flag at the appropriate time, JAs and paralegals can save commanders valuable time and resources to focus on the mission. **TAL**

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Notes

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3. Lieutenant Colonel John L. Plotkin, USA Retired, Remarks at The Judge Advocate General's Legal Center and School: Advanced Topics in Administrative Law Lecture (Feb. 12, 2019).

4. *Id.*

5. U.S. Dep't of Army, Reg. 600-8-2, Suspension of Favorable Personnel Actions para. 1-1. (11 May 2016) (C1, 3 July 2018) [hereinafter AR 600-8-2].

6. *Id.* para. 2-1*b*.

7. *Id.* para. 2-1*c*.

8. *Id.* para. 2-1*g*, 2-2, 2-3, tbl. 2-1.

9. *Id.* para. 2-8. The failure to maintain transferable flags can actually undermine the intent of a previously executed legal action. On this note, the author speaks from painful personal experience. For example, if a Soldier commits additional misconduct during the period of suspension associated with an Article 15 after transferring to a different unit, the Soldier's new commander cannot vacate the suspension without some knowledge of the original Uniform Code of Military Justice action. Thus, when properly utilized, the punishment flag (reason code H) puts the new commander on notice regarding the suspended punishment.

10. *Id.* para. 2-9, tbl. 2-2.

11. *See* U.S. Dep't of Army, DA Form 268, Report to Suspend Favorable Personnel Actions (May 2016). *See also* Kenneth Godfrey, *Quick Reference Flag Table*, milBook (Jan. 11, 2019), https://www.milsuite.mil/book/docs/DOC-135756.

12. AR 600-8-2, *supra* note 5, para. 2-1*e* (emphasis added).

13. *Id.* para. 2-2*a*, 2-2*b*. Although investigations are defined as "any action that may result in disciplinary action or other loss to the Soldier's rank, pay, or privileges," the term does not include Inspector General (IG) investigations, unless the IG refers a complaint to the Soldier's chain of command for a commander's investigation. *See id.* para. 2-1*i*, 2-2*a*. *See also id.* para. 2-2*a* (noting that a flag is no longer required upon initiation of a FLIPL, though it may become necessary if Soldiers are recommended for financial liability during the investigation). *See also generally* Jim Tice, *Army Updates Rules for 'Flagging' Soldiers*, ArmyTimes (May 16, 2016), https://www.armytimes.com/news/your-army/2016/05/16/army-updates-rules-for-flagging-soldiers/.

14. *Id.* paras. 2-2*a*, 2-2*b*.

15. *Id.* para. 2-2*a*.

16. *Id.* para. 3-1. Note that exceptions exist for reassignment; awards; school attendance; and unqualified resignation, retirement, or discharge. *Id.* para. 3-1*b*, 3-1*e*, 3-1*f*, 3-1*g*. *See also* U.S. Dep't of Army, Reg. 600-8-22, Military Awards para. 1-17*a*(1) (25 June 2015); U.S. Dep't of Army, Reg. 600-8-19, Enlisted Promotions and Reductions para. 1-10*a*(7) (25 Apr. 2017); U.S. Dep't of Army, Reg. 600-8-29, Officer Promotions para. 1-20*a*, 1-20*e* (25 Feb. 2005) [hereinafter AR 600-8-29].

17. *See* PartTime1SG, *Army Flags Regulation-Flagging Actions-Army National Guard*, YouTube (Oct. 9, 2017), https://www.youtube.com/watch?v=Blki8nLG—o.

18. AR 600-8-2, *supra* note 5, para. 2-1*a*(1).

19. *Id.* para. 2-1*a*(2).

20. *Id.* para. 2-1*d*, 2-4.

21. *Id.* para. 2-4.

22. *Id.* para. 2-6.

23. *Id.* para. 2-1*d*.

24. *See id.* para. 2-9*b*(9).

25. *See id.* para. 2-5, 2-9*a*(1).

26. *Id.* para. 2-9*b*, fig. B-2.

27. *Id.* fig. B-2. *See also* AR 600-8-29, *supra* note 16, para. 8-2, 8-3.

28. *Id.* para. 2-10*a*, 2-10*b*, fig. B-4.

29. *See The Army Vision*, U.S. Army (7 June 2018), https://www.army.mil/e2/downloads/rv7/vision/the_army_vision.pdf?_st.

30. *See generally* U.S. Dep't of Army, Dir. 2018-22, Retention Policy for Non-Deployable Soldiers para 4j (8 Nov. 2018). *See also* Matthew Cox, *Army Releases Deploy-or-Out Rules for Administratively Sidelined Troops*, Military.com (Nov. 13, 2018), https://www.military.com/daily-news/2018/11/13/army-releases-deploy-or-out-rules-administratively-sidelined-troops.html. *But see* U.S. Dep't of Def., Instr. 1332.45, Retention Determinations for Non-Deployable Service Members para. 3.5b(2) (30 July 2018) (describing specific types of legal actions that render service members "temporarily non-deployable").

31. AR 600-8-2, *supra* note 5, para. 2-10*b*, fig. B-4.

32. *See id.* para. 2-9*a*(4) (explaining that once removed, units or S1 offices must maintain records of the flag and the documentation justifying removal for one year). *See also id.* fig. B-4 (outlining flag management and oversight).

33. *See id.* para. 2-7*c*.

34. For example, because Soldiers cannot be retained beyond their scheduled ETS or retirement date solely on the basis of a flag, commanders sometimes fail to properly flag Soldiers already pending separation from the service. *See id.* para. 3-2.

An excavator dredges a canal. (Credit: istockphoto.com/batuhan toker)

Creek on a Leash

A Primer on the Clean Water Act's Section 404

By Captain Nathan R. Menard

You are the Chief of Administrative Law at Fort Blackacre, an expansive installation located thirty miles from the Mississippi River. In recent years Fort Blackacre has undergone a series of major construction projects in an effort to modernize the installation and restore it as one of the preeminent military training sites in the United States. Although you are new to the installation, you are aware of the modernization initiatives and look forward to making your own contributions to its success.

One morning you are summoned to the garrison commander's office. She excitedly informs you that funding has finally been approved for the construction of a large artillery range on the outer limits of the base. "This project is the final piece we need to accomplish our modernization mission," she explains as she unfolds a large map of the installation on a table and shows you the proposed site. It appears to consist mostly of undeveloped wetlands that directly abut a large creek, which flows continuously off the installation and eventually empties into the Mississippi River. When you ask whether the wetlands will present an obstacle to the development and use of the range, the commander assures you that plans are already in place to make it a viable training environment. "We will obviously have to fill in areas of the site that are extremely saturated, but there shouldn't be any major barriers we cannot overcome. So, Judge, any initial legal issues I should be considering?"

Actions arising under Section 404 of the Clean Water Act are likely unfamiliar to many judge advocates. However, as many installation projects may implicate Section 404, and violations can carry severe civil and criminal penalties, it is important that judge advocates have at least a working knowledge of the program in order to proactively identify and mitigate potential issues. This article is intended to facilitate that level of understanding. As such, it does not discuss every aspect of the Section 404 program, but rather provides a primer that will help judge advocates properly spot Section 404 issues, render appropriate counsel to commanders, and understand which personnel from other agencies can be contacted for assistance. The remainder of this article provides an overview of the statutory and regulatory framework associated with the Section 404 program, with a particular emphasis on the long-disputed issue of which waters constitute "waters of the United States"; discusses Section 404 permits and the permitting process; and illustrates the issues the Administrative Law Chief should be considering in the Fort Blackacre scenario.[1]

Legal Framework

Overview

The Federal Water Pollution Control Act (FWPCA), more commonly known as the Clean Water Act[2] (CWA or Act) after the 1972 amendments, is a landmark piece of environmental legislation, the objective of which is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[3] The CWA seeks to accomplish this by generally prohibiting "the discharge of any pollutant by any person"[4] unless the discharger "obtain[s] a permit and compl[ies] with its terms."[5] A "discharge of a pollutant" occurs when a person adds "any pollutant to navigable waters from any point source."[6] "Navigable waters" are defined simply as "waters of the United States."[7] Thus, there are four criteria required to invoke CWA jurisdiction—(i) a discharge; (ii) of a pollutant; (iii) from a point source; (iv) into waters of the United States—and each will be examined as they relate to Section 404.

The Act established two permitting regimes to effectuate its objective—Section 402, which created the National Discharge Pollutant Elimination System (NPDES) for the regulation of most pollutants, and

Section 404 for the regulation of dredged and fill material. The former is administered by the Environmental Protection Agency (EPA), the latter generally by the Secretary of the Army acting through U.S. Army Corps of Engineers (Corps) (together, Agencies) with oversight by the EPA. The Army's mandate to administer the Section 404 program stems from the Corps' longstanding mission to protect and maintain the navigability of the Nation's waterways beginning, in large part, with the Rivers and Harbors Act of 1899 (RHA). Although most of the RHA focused on restricting obstructions to navigation, Section 13 makes it unlawful to discharge any refuse into any navigable water of the United States, or tributary thereof, without a permit from the Secretary of the Army.[8] Thus, by authorizing the Corps to administer Section 404, Congress was able to leverage the Corps' experience with a similar permitting regime while also ensuring that the Corps' RHA authority would not be usurped by the expansive NPDES program.[9]

A "discharge of a pollutant" is defined to include "any addition of any pollutant to navigable waters from any point source."[10] The term pollutant is broadly construed under the CWA; however, most relevant to Section 404 is the CWA's coverage of dredged and fill materials. Dredged material under Section 404 is material that is dredged or excavated from waters of the United States and then reintroduced to a jurisdictional water.[11] Fill material is material introduced to a jurisdictional water that has the effect of replacing any portion of the water with dry land or changing the bottom elevation of the water.[12] The term "point source" is also broadly construed and encompasses nearly any medium through which pollutants are or may be discharged.[13] Simply put, anytime one takes any action that would add any dredged or foreign material to a body of water, they should consider whether they are conducting a jurisdictional act under Section 404.

Waters of the United States

The current definition of "waters of the United States" (i.e., which waters are subject to CWA jurisdiction) is the product of decades of evolution and influence from all three branches of the federal government. In order to understand where we are now, it is important to understand how and why we got here. Congress' authority to regulate navigable waters stems from its authority to regulate interstate commerce pursuant to the Commerce Clause.[14] Early statutes regulating waterways, such as the RHA, used this hook by limiting the extent of its jurisdiction to "navigable water[s] of the United States."[15] The Supreme Court initially construed this term as being limited to waters that are "navigable in fact" meaning that "they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[16]

In 1972, with passage of the CWA amendments, Congress instituted a new definition of "navigable waters"—"waters of the United States." The first Corps regulations defining this term sought to equate "waters of the United States" with prior interpretations of navigable waters under preexisting statutes such as the RHA.[17] However, in *Natural Resources Defense Council v. Callaway*, the U.S. District Court for the District of Columbia struck down the Corps' definition, holding that "navigable waters," as used in the CWA, is not limited to the traditional tests of navigability.[18] In 1986, after a number of legislative and rulemaking efforts, the Corps and EPA ultimately settled on a common definition of "waters of the United States" which, in addition to traditionally navigable waters and the territorial seas, included: interstate waters, intrastate waters that do or could affect interstate commerce, impoundments of jurisdictional waters, tributaries of jurisdictional waters, and wetlands adjacent to jurisdictional waters (that are not themselves wetlands).[19]

Three key Supreme Court decisions also informed the Agencies' interpretation of "waters of the United States." In *United States v. Riverside Bayview Homes*, the Court deferred to the Corps' assertion of jurisdiction over wetlands adjacent to "waters of the United States" because such wetlands are "inseparably bound up" with the adjacent waters and may have "significant effects on water quality and the aquatic ecosystem."[20] In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the Corps was challenged on its claim of jurisdiction over any water that was used or may be used by migratory birds crossing state lines.[21] The Court held that federal jurisdiction could not be extended to nonnavigable, isolated waters that lack a sufficient connection to a jurisdictional water on the basis of the Corps' Migratory Bird Rule.[22] Finally, in *Rapanos v. United States*, the Court further considered the degree to which a wetland may be attenuated from a navigable water while remaining jurisdictional under the CWA.[23] The case failed to produce a majority decision and yielded two competing approaches set out in Justice Scalia's plurality opinion and Justice Kennedy's concurrence. Under Justice Scalia's test, jurisdictional wetlands require a "continuous surface connection" to a jurisdictional water so that there is "no clear demarcation between waters and wetlands."[24] Justice Kennedy, however, indicated the critical factor in determining jurisdiction is whether a water has a "significant nexus" to traditionally navigable waters such that it significantly affects the chemical, physical, and biological integrity of the downstream navigable water.[25]

In 2015, the Agencies promulgated a final rule, setting forth a revised definition of "waters of the United States" (2015 Rule).[26] Utilizing Justice Kennedy's significant nexus standard as informed by the *Rapanos* plurality and previous Supreme Court precedent, the 2015 Rule grouped waters into three categories: (i) waters that are jurisdictional per se, (ii) waters that are excluded from jurisdiction, and (iii) waters subject to case-specific analysis to determine whether they are jurisdictional.[27] The 2015 Rule has been mired in litigation since its promulgation and, due to various injunctions, has never been implemented in all fifty states. As of this article's publication, the 2015 Rule is in effect in twenty-two states, the District of Columbia, and the territories of the United States. Therefore, one must determine whether the 2015 Rule or pre-2015 regulatory regime applies based on the jurisdiction in which the proposed activity will take place.

On 28 February 2017, the President of the United States issued an Executive Order directing the Agencies to review the 2015

Rule and issue for notice and comment a proposed rule rescinding or revising the 2015 Rule.[28] Consistent with the Executive Order, in July 2017, the Agencies issued a proposed rule, which, if finalized, would repeal the 2015 Rule.[29] In July 2018, the Agencies issued a Supplemental Notice of Proposed Rulemaking to clarify that, in addition to proposing the permanent repeal of the 2015 Rule, the proposed rule would also recodify the pre-2015 regulations.[30] As of this article's publication, this proposed rule has not been finalized. On 14 February 2019, the Agencies issued a separate proposed rule that would revise the definition of "waters of the United States."[31] The public comment period for this rule closed on 15 April 2019.

Section 404 Permitting

Activities that result in the addition of dredged or fill material to a jurisdictional water generally require a Section 404 permit. Section 404 and its corresponding regulations provide for multiple permit types as well as certain limited instances in which a permit is not required. This section discusses the mechanics of determining whether a water is jurisdictional and, if so, the types of permit that may be required as well as the criteria for issuing such permits.

Having determined which waters are subject to Section 404, the question remains, "what steps should be taken if one believes a water is jurisdictional?" Whether a piece of property contains "waters of the United States" is often not a simple inquiry. Although certain waters may clearly be jurisdictional (e.g., the Mississippi River), other waters due to their attenuation from a traditionally navigable water (such as the wetlands at Fort Blackacre) may be less obvious. To aid in this inquiry the Corps offers "jurisdictional determinations" (JDs) which are written documents that indicate the presence or absence of "waters of the United States" on a given piece of property.[32] Jurisdictional determinations may be either "preliminary" (PJD) or "approved" (AJD). Preliminary jurisdictional determinations are non-binding and merely advise "that there may be 'waters of the United States' on a parcel" whereas AJDs "definitively state the presence or absence of such waters" and constitute final agency action appealable under the Administrative Procedure Act.[33] Upon confirming the existence of "waters of the United States" on a parcel, the applicant needs to consider, in collaboration with the Corps, which type of permit is required.

Section 404 provides for the issuance of two categories of permits—individual and general. Individual permits are issued on a case-by-case basis and all authorizations and conditions are tailored to the specific project for which the permit is granted. As such, individual permits require a comprehensive application process which includes, among other requirements, detailed project plans and drawings, a public interest review, consideration of the 404(b)(1) guidelines,[34] and compliance with numerous other federal and state requirements including, the National Environmental Policy Act, Endangered Species Act, and National Historic Preservation Act. General permits are intended to reduce the administrative burdens on the Corps and regulated public for projects with minimal environmental impacts and thus offer applicants a more expedient and cost-effective alternative to individual permits.[35] These permits are issued on a nationwide, regional, or state basis for certain categories of activities that have been determined to be similar in nature and will cause only minimal adverse environmental effects.[36] In other words, the Corps effectively satisfies the requirements of an individual permit for an entire category of projects when it issues a nationwide permit, thereby eliminating such requirements for individual applicants.[37] The effect of this is that parties are permitted to conduct the sort of activity described by the permit without needing to seek project-specific authorization (provided they comply with the conditions of the general permit).[38] General permits are statutorily limited to a duration of five years.[39]

Notwithstanding the foregoing, the CWA provides for limited circumstances in which a permit is not required for the discharge of dredged or fill material. Section 404(f) carves out certain activities, such as normal farming, silviculture, and ranching activities, which are exempt from Section 404's permit requirements.[40] Additionally, Section 404(r) exempts certain federal projects from regulation. To qualify under Section 404(r) a project must (i) be specifically authorized by Congress, and (ii) a proper environmental impact statement is submitted to Congress prior to the actual discharge of dredged or fill material and prior to any authorizations or appropriations for such project.[41]

Pulling It All Together

Let's return now to Fort Blackacre and our Chief of Administrative Law. Upon being presented with the commander's plan for construction of the range, two primary questions need to be analyzed to determine whether a Section 404 permit is required—(i) is there a jurisdictional act (i.e., will there be a discharge of dredged or fill material) and, if so, (ii) is the discharge into a jurisdictional area (i.e., a water of the United States). The answer to the former is almost certainly yes as the commander explicitly stated that they would need to fill areas of the wetlands, which would inevitably require the addition of dredged or fill material to the site. The latter requires application of the waters of the United States criteria to determine whether the wetlands on the proposed site are jurisdictional under the CWA. Regardless of which definition of "waters of the United States" is being implemented in Fort Blackacre's jurisdiction, the wetlands here would likely be jurisdictional. Since the Mississippi River is jurisdictional by virtue of it being a traditionally navigable water, all of the tributaries that flow into it (with sufficiently regular flow) are also jurisdictional. Assuming the creek flows with sufficient regularity, it would constitute a jurisdictional tributary because it contributes flow directly into a traditionally navigable water. This, in turn, makes Fort Blackacre's wetlands jurisdictional because they directly abut the jurisdictional tributary.

At this point, there are enough red flags that the Chief should advise the commander that they likely have obligations pursuant to Section 404 that need to be resolved before construction can begin. She should make contact with her local Corps district office, which will be able to further assist her in assessing whether a jurisdictional determination should be obtained, and whether any additional wetland delineation is required. The Corps will also assist

in determining whether the project qualifies for a general permit, or if the project will have impacts sufficient to require an individual permit application. The project likely does not qualify for any of Section 404's permit exemptions. It does not meet the standard for any of the Section 404(f) carve outs, nor would it satisfy Section 404(r) unless the project was specifically authorized by Congress and an environmental impact statement was submitted to Congress prior to any authorization or appropriation.

Conclusion

Although complex in practice, Section 404 offers military practitioners the opportunity to add substantial value to their command with even a basic understanding of its structure and application. **TAL**

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Notes

1. To be sure, much of the process and analysis required by Section 404 is highly technically and will be conducted with substantial assistance from legal and regulatory experts from the U.S. Army Corps of Engineers, U.S. Environmental Protection Agency (EPA), and other organizations. That said, it is important that judge advocates are able to issue spot at a basic level so as to be able to raise issues as they arise and remain engaged throughout the process.

2. 33 U.S.C. § 1251 *et seq.* (1972).

3. *Id.* § 1251(a).

4. *Id.* § 1311(a).

5. Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 11 (1981) (citation omitted).

6. 33 U.S.C. § 1362(12).

7. *Id.* § 1362(7).

8. 33 U.S.C. § 407.

9. Section 402 authorizes the Administrator of the EPA to issue permits for the discharge of "any pollutant, or combination of pollutants" subject to two exceptions, one of which is Section 404. See 33 U.S.C. § 1342(a). For additional discussion on this topic *see* Michael C. Blumm, *The Clean Water Act's Section 404 Permit Program Enters Its Adolescence: An Institutional and Programmatic Perspective*, 8 Ecology L. Q. 409, 414-16 (1980).

10. 33 U.S.C. § 1362(12), (14).

11. *See* 33 C.F.R. § 323.2(c).

12. *See* 33 C.F.R. § 323.2(e) (noting examples such as rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States but not including trash or garbage).

13. *See* 33 U.S.C. § 1362(14) ("The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.").

14. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); *see also* The Daniel Ball, 77 U.S. 557, 563 (1870) (construing the term "navigable waters," as employed in federal statutes at issue, as covering those waters that are "used or are susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water").

15. *See* 33 U.S.C. § 401 ("It shall not be lawful to construct or commence the construction of any bridge, causeway, dam, or dike over or in any . . . navigable water of the United States until the consent of Congress shall have been obtained . . . .").

16. The Daniel Ball, 77 U.S. 557, 563 (1870). The Court subsequently expanded this definition to include waters that had been used in the past for interstate commerce, *see* Economy Light & Power Co. v. United States, 256 U.S. 113, 123 (1921), and waters that are susceptible for use with reasonable improvement, *see* United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-10 (1940).

17. 33 C.F.R §209.12(d)(1) (1974) ("The term "navigable waters of the United States" and "navigable waters," as used herein mean those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce . . . ."). The Corps explained that it believed this interpretation was "limited to that which is Constitutionally permissible" and "soundly based on . . . the judicial precedents which have reinforced it." Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,115 (Apr. 3, 1974).

18. National Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

19. *See* 51 Fed. Reg. 41,206 (Nov. 13, 1986).

20. United States v. Riverside Bayview Homes, 474 U.S. 121, 131-35, n.9 (1985).

21. 531 U.S. 159 (2001). The Court of Appeals for the Seventh Circuit found that migratory birds provided a sufficient jurisdictional hook under the cumulative impact doctrine of the Commerce Clause because "each year millions of Americans cross state lines and spend over a billion dollars to hunt and observe migratory birds." Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 191 F.3d 845, 580 (7th Cir. 1999).

22. 531 U.S. at 174. For the Migratory Bird Rule *see* 51 Fed. Reg. 41,217 (1986).

23. 547 U.S. 715 (2006).

24. *Id.* at 742 (internal quotations omitted).

25. *Id.* at 759, 780.

26. *See* 80 Fed. Reg. 37,054 (Jun. 29, 2015).

27. *See id.* at 37,057. For a complete list of waters that are jurisdictional under the 2015 Rule *see* 33 C.F.R. § 328.3.

28. Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017).

29. Definition of Waters of the United States–Recodification of Pre-Existing Rules. 82 Fed. Reg. 34,899 (July 27, 2017).

30. 83 Fed. Reg. 32,227 (July 12, 2018).

31. Revised Definition of Waters of the United States. 84 Fed. Reg. 4,154 (Feb. 14, 2019).

32. 33 C.F.R. § 331.2 (2018).

33. *Id.*; *see also* United States Army Corps of Engineers v. Hawkes Co., Inc., 136 S.Ct. 1807, 1812 (2016).

34. The 404(b)(1) guidelines provide the standards by which Section 404 permit applications are evaluated. At bottom, "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a).

35. *See* 33 U.S.C. § 1344(e). "The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Rapanos*, 547 U.S. at 720.

36. 33 U.S.C. § 1344(e). *See also* Issuance and Reissuance of Nationwide Permits, 82 Reg. 1,860 (Jan. 6, 2017) (Issuing 52 Corps-approved nationwide permits and conditions on such permits. For example, Nationwide Permit 12 authorizes discharges associated with the construction, maintenance, repair, and removal of utility lines provided certain conditions are met.).

37. *See* 82 Fed. Reg. 1,860.

38. *See* Keating v. Federal Energy Regulatory Commission, 927, F.2d 616, 619 (D.C. Cir. 1991).

39. 33 U.S.C. § 1344(e).

40. 33 U.S.C. § 1344(f).

41. 33 U.S.C. § 1344(r); *see also* Delaware Dept. of Natural Resources and Environmental Control v. U.S. Army Corps of Engineers, 685 F.3d 259, 280-81 (3rd Cir. 2012).

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Assisting Legal Assistance Clients with Digital Estates

By Major Jonathan C. Siegler

The failure to include one's digital footprint in an estate plan renders the plan incomplete.[1]
—Sandi S. Varnado

You are the Chief of Legal Assistance and one of your attorneys is out unexpectedly. You get to cover down on the attorney's appointments. The appointment calendar is full, and it looks to be a long day, but at least you are not likely to get any homework projects.

Your first appointment is a young major heading out on a deployment. He explains that he already has a will and powers-of-attorney, but just has a quick question, "I've had this blog since college. I post two or three times a week, primarily on Ohio state politics, but sometimes on sports or movies, or other things like that. I don't make any money on it at the moment, but based on my traffic stats, I know I could if I started selling ads.[2] What do I need to do to make sure my wife is able to access the blog in the event of my death?" You advise him that you will research the question and get back to him.

The next appointment is an older specialist. Her will is simple, except for one request. She explains that she has two email accounts, one for family and one for college and Army friends, "This other girl in my creative writing program went into the Navy, and we have an agreement that, if either of us dies in uniform, the other will receive all their personal papers and attempt to write a novel based on their military career. So basically, I want it formalized and legally required that, in the event of my death, number one, Petty Officer Smith gets total access to my 'friends and colleagues' email account, but also that, number two, my mom no-how, no-way has any possible access to my electronic correspondence with my battle-buddies or college or grad school classmates." You advise her that you will research the question and get back to her.

The final appointment of the morning is a private first class who does not have any questions. Coming back from the printer, you notice that he appears to be posting a photo of your colleague's candy dish to an Instagram account,[3] and you consider asking him about his use of social media generally. But you are unsure of what you should ask or what advice you would give him based on his answers.

Before lunch, you go online to search *The Army Lawyer* archives, hoping to find a primer that will help you start answering the morning's questions. This article aims to serve as that primer. The rest of the article discusses digital assets and the general challenge involved in planning for and managing their disposition, some of the applicable law in greater depth, and recommendations for a generally useful planning process.

Digital Assets

Something is "digital" when it is made of numbers—especially the numbers 0 and 1.[4] Things made of numbers are naturally and usefully thought of as being equivalent to physical objects that serve the same purposes (e.g., documents, files, books, locks and keys, currency).[5] Estate planners and financial advisors view such digital items as a special category of assets.[6]

As discussed later, most states have recently defined the term "digital assets" in a statute.[7] However, estate planners and commentators often define "digital assets" as needed for their planning, advice, or argument.[8] Probably the best definition comes from wikipedia: "anything that exists in a binary format and comes with the right to use."[9] Collectively, an individual's "digital assets"[10] comprise his or her "digital estate."[11]

Digital assets include much of what one might expect: digital music files, e-books, emails, blog posts, web-stored photo-albums, domain names.[12] Other digital assets might escape immediate notice. Consider, for example, that a decedent's (or incapacitated person's) PayPal, eBay, or Amazon account might have money left in it, or owed to it.[13] Obviously, any Soldier, Family member, or military retiree is likely

to possess a digital estate.[14] For many, the financial value of their digital assets will exceed that of their other tangible assets.[15] Of course, as with real estate and personal property, owners might value their digital assets for emotional or psychological reasons apart from financial considerations.[16]

While similar to other kinds of assets in the use and value they can have for their owners, digital assets also differ from them in some important ways. For one thing, most digital assets can be multiplied or transferred without appreciable limit or cost.[17] In this respect, digital assets differ not only from tangible assets such as real estate, vehicles, or jewelry,[18] but also from other kinds of intangible assets such as trademarks, assignable claims, or trusts.[19] Also, digital assets such as photographs or books can be fairly easily transformed into physical objects.[20] In addition to these unique characteristics, digital assets are still a relatively new phenomenon, at least as far as legislatures and courts are concerned.[21] The universe of possible digital assets is dynamic, expanding and contracting in ways that are not easily predicted.[22] Finally, digital assets are different from other types of assets in that they are the subject of even less estate planning.[23]

An estate planning client might take any imaginable attitude with regard to a particular digital asset.[24] At one extreme, a person may want a certain item or category of items to be destroyed.[25] At the other extreme, a person may wish for a digital item to be not only given to all of their survivors and friends, but also to have it made available to the general public, advertised and promoted.[26] On the continuum between, a person may wish to bequest a particular item to a particular individual, a particular set of items to a particular set of individuals, or to distribute a variety of different assets specifically to a variety of different recipients.[27]

Whatever a client's intentions for the disposal of their digital assets, accomplishing those intentions could be more difficult than the client expects.[28] Although the ability to give assets to one's heirs after death is normally considered an essential characteristic of an asset,[29] not every digital asset actually has that characteristic.[30] Moreover, for those digital assets that *can* be given to one's heirs, it is not always clear how best to do so. This is partly because digital assets are subject to "a complex web" of law from a variety of sources,[31] partly because that complex web of law is not yet well settled,[32] and partly because digital assets themselves are also complex and dynamic.[33] The next section examines applicable law in greater depth.

Law Affecting the Disposition of Digital Assets

As noted above, more than one area of law is likely to govern the disposition of a given digital estate. We next examine three of these areas in turn. First, traditional state probate law applies normally to many kinds of digital assets. Next, the terms-of-service agreements that control web-hosted or software-based assets are normally governed by contract law. Finally, there are some state and federal statutes that affect the disposition of digital assets, whether intentionally or inadvertently.

Probate

In the probate process a "personal representative"—whether an "executor" named in the will or an "administrator" appointed by the court—takes charge of the deceased's property and disposes of it.[34] Typically, the personal representative collects all the assets of the estate, pays any debts the estate may owe, and then distributes the remaining property as directed by the will or by the state's intestacy statute.[35] A state probate court oversees the personal representative's activities, requiring an accounting after the deceased's property has been distributed to new owners.[36]

From a legal perspective, the nature of the property involved is irrelevant. It could be a chain of restaurants;[37] it could be a jar full of rare coins.[38] More commonly, it could include laptop computers, iPhones, thumb drives, money in a PayPal account, or money in an online gaming account.[39] The personal representative faces different challenges in distributing physical objects such as computers or hard drives and in distributing money from intangible accounts.[40] Probate courts consider it a single effort.[41]

Fortunately, the probate process affords clients a high degree of certainty in planning the disposal of digital assets subject to it.[42] They can simply direct in their will that a hard drive among their personal property be delivered to a new owner of their choice.[43] If their representative knows about assets in online brokerage accounts, then they collect that money and distribute it the same as if it were cash.[44]

Unfortunately, the probate process by itself cannot account for all digital assets, because not all digital assets go into the deceased's estate upon their death. Instead, as discussed next, many digital assets are subject to terms-of-service agreements, which prevent them from being passed on to a user's heirs.

Terms-of-Service Agreements

Terms-of-service agreements—including end-user license agreements, clickwrap, and browsewrap[45]—govern email accounts, social media and networking accounts, loyalty points clubs, and many other types of digital assets.[46] Most people do not read these agreements,[47] but they have stirred substantial controversy among those who have.[48] Courts generally enforce them anyway.[49] As noted, many of the agreements do not permit an account-holder or user to pass an account or its contents on to his or her heirs.[50] Such prohibitions align naturally with many of the agreements' prohibitions on living persons transferring such accounts or contents among each other.[51]

Terms-of-service agreements pose yet another problem for estate planners: companies change their terms-of-service agreements with minimal or no prior notice to the consumer.[52] To add to the uncertainty, companies do not try to enforce their terms-of-service agreements in every case,[53] nor do they unvaryingly succeed in cases where they do attempt to enforce them.[54] "Hope is not a plan," but the individual user or account-holder does sometimes prevail in disputes involving terms-of-service agreements.[55]

While terms-of-service agreements share general characteristics like changeability, enforceability, and lack of readership, they often vary significantly in their specific terms. For example, Automattic (blogging website) reserves the right to display advertisements on the blogs of non-paying WordPress users,[56] but Google does not display advertisements on Blogger unless

(Credit: istockphoto.com/ipopba)

its users have opted in to use its AdSense service.[57] The blogging major from the introductory vignette would presumably find such a difference interesting. Similarly, the aspiring novelist specialist might be interested to know that, unlike an account with Yahoo![58] or Hotmail,[59] a Gmail account may be transferred to a different user.[60] The amateur photographer private first class might prefer Flickr over GooglePhotos,[61] since the license from him permitting Flickr to use his photographs continues only while he continues to use the website,[62] whereas Google claims a license that continues even if he stops using their services.[63]

Whatever the terms, individual users do not negotiate them.[64] Each of the morning's clients should receive essentially the same advice about terms-of-service agreements: "Note the specific provisions that matter to you. Then use services whose terms best match your preferences."[65]

Other Laws Affecting the Disposition of Digital Assets

So far we have discussed probate law and terms-of-service agreements, areas of law that directly govern the disposition of digital assets upon the owner's passing. We now arrive at the residual category—"other laws" affecting the disposition of digital assets. First, we review copyright and computer crimes statutes, which affect digital assets despite pre-dating them. Then we consider more recent laws aimed at solving some of the problems arising from the increasing prevalence of digital assets.

Copyright

United States copyright protections normally attach to whatever a person writes,[66] including emails, blog posts, and comments on the blog posts of others.[67] Registration of a copyright is not required, although it does provide additional benefits.[68] Copyrights also attach to photographs, including those left or forgotten on a phone.[69] Digital writings and digital photographs are equally protected by copyright as those originally existing as physical ink printed on physical paper.[70]

Most interesting for legal assistance clients, copyright in their creative original works is separate and distinct from rights they have in the works themselves.[71] For example, if the blogging major were to transfer the copyright in his collected blog posts to a publisher, he could still also leave the original document files to his wife.[72] Conversely, the aspiring novelist specialist would be able to transfer the copyright in her emails to her parents or siblings, even though her friend from school continued to hold the actual emails themselves.[73]

Computer Crimes and Data Privacy

In addition to copyright, computer crime and data privacy laws may also influence digital estate planning. Federal law makes it a crime to "access electronic communications without authorization"[74] or to "intentionally access[] a computer without authorization . . . ."[75] Based on such laws, the decedent's personal representative collecting email or other digital assets off a computer conceivably risks committing a crime. Prosecutions of estate administrators or executors appear rare or non-existent,[76] and at least one official stated that they did not intend to prosecute such cases.[77] Nevertheless, the possibility raised considerable concern among estate planners and commentators.[78] The problem of settling a digital estate in the shadow of criminal regimes protecting data privacy and computer access eventually led to the dedicated model statute discussed next.

The Uniform Fiduciary Access to Digital Assets Act (Revised)

The Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) was a long time coming,[79] but once it was finally adopted, states enacted it quickly.[80] The goal of RUFADAA is "to facilitate fiduciary access . . . while respecting the privacy and intent of the user."[81] It creates a regime where, unless the decedent expressed consent or instructions otherwise, the estate's representative is *not* permitted to access a decedent's email,[82] but *is* permitted access to digital assets other than email.[83]

A Checklist for Developing a Digital Asset Inventory Menu

Financial	Devices	Off-site storage	Email Accounts	Social Media	Social Network & Media	Online Selling	Subscriptions	Chatting/ Messaging
Cash accounts Saving accounts Credit Cards TSP Brokerage accounts Automated payments Automated receipts Budgeting services/applications (E.g., Mint, Wallet, Quicken) Recently Used Tax Preparation Software/Services	Desktops Laptops Cell phones Pads Hard drives Thumb drives Storage cards CD-ROMs	Dropbox Google Drive mediafire pSort iCloud	aol yahoo hotmail earthlink gmail outlook	Owned domain names Online Gaming accounts	Facebook[104] Google+[105] LinkedIn[106] Twitter[107] Pinterest Tumblr WhatsApp YouTube Vimeo Instagram[108] Shutterfly Flickr Imgur Photobucket Blogger	eBay Amazon craigslist etsy	Kindle/Nook iTunes/Spotify/ Pandora/SoundCloud Netflix/Hulu/Amazon News accounts (NYT/ WSJ/WaPo, Local)	Skype Hangout Messenger

The law also provides that terms-of-service agreements may be preempted by directions stated in a will.[84]

Recommended Planning Process

In view of the applicable law discussed above, this article recommends a four-step process as a generally useful framework for helping clients plan the disposition of their digital estates: (1) identify the assets; (2) decide what to do with them; (3) identify who should execute the plan; and (4) enable that person to execute it. Key to the process, and how it differs from the typical estate planning process for tangible property, is that the process should be repeated relatively frequently. A will treating solely tangible assets does not need updating unless the people named in it change; such wills can remain valid and useful for decades even as property covered by them changes substantially.[85] An estate plan for digital assets, in contrast, needs to be reviewed more frequently—a shifting portfolio of digital assets means a shifting set of access and terms-of-service requirements.

Step One: Inventory Assets

The first step in planning for the disposition of one's digital assets upon death or incapacitation is to identify and inventory the assets.[86] A menu for crafting a checklist is provided in the appendix to aid completion of this step. While not a difficult task, clients must take care to devote sufficient time and attention to it.[87] They should keep a draft checklist at hand for a week or longer, because attempting to identify and remember every digital asset of interest in a single effort is likely to result in some of them being overlooked. The client should review an entire year of activity statements for any active checking or debit account, looking for any annually-paid subscription fees that they might otherwise forget. As the use of the term "inventory" implies, the task is recurrent, not a one-time event. However, clients whose use of email, social media, and other digital services is generally stable need not undertake more than brief annual reviews of their original comprehensive inventory.

Step Two: Decide What to Do with Them

After developing a clear, accurate, and precise picture of what the digital estate holds, the client should next decide what to do with those assets. As mentioned previously, there are five basic actions a person might wish to have taken with regard to a particular digital asset: transfer, distribution, preservation, destruction, and neglect.

Transferring ownership or property is the main purpose of wills and probate law,[88] and transfer naturally remains one of the things people want to do with their digital assets.[89] As discussed, decedents can transfer many kinds of digital assets the same way they do most tangible assets.[90]

Distribution is transfer with multiple recipients. The digital nature of some assets permits distribution in a way that tangible assets do not. For example, the private first class in the introductory vignette may wish to prepare identical albums of photographs to be distributed among his aunts, uncles, and grandparents. He need not print and bind hard copies and haul them around in a footlocker, even as he continues taking additional pictures that he might also want to include in the albums. Rather, he can store the album digitally in one or more places and continue revising it conveniently. In the event of his untimely death, an up-to-date version of the album could be printed from a storage device, or could be distributed digitally simply by providing the intended beneficiaries with access to an online storage location.

Preservation is a kind of distribution with unspecified recipients. For example, the blogging major does not mean to select readers for his blog, but he does mean to have his blog available to any readers who may find it interesting. Destruction is, of course, the opposite of preservation, and, as noted above, destruction is certainly a disposition that some owners would want for their digital assets.[91]

Inaction is always one possible course of action. Neglecting digital assets is generally inadvisable, since untended digital assets are more susceptible to theft and misuse.[92] That noted, it may still be reasonable in some circumstances to simply leave certain digital assets out of one's planning. For example, many clients are probably collecting frequent shopper points on their smartphone; if their habit is to simply spend the balance down as soon as its value reaches five dollars, it would be reasonable to leave those club points out of their digital estate planning, even if they were legally transferrable to other individuals.

Step Three: Identify Who Should Execute the Plan

After having decided what should happen to the various digital assets, clients should next identify who should execute the plan. They should first consider what parts of the plan they need to execute themselves. For example, it is the clients themselves who would initiate services like Google's Inactive Account Manager[93] or Facebook's Memorialized Account.[94] Clients could also save a special set of emails or photographs to disc.[95]

The choice of a personal representative presents clients a number of options. One possibility is to select a single executor who would be willing and able to handle digital assets along with the rest of the property. It is also possible to appoint a special "digital executor" to handle the digital estate separately.[96] A third option is to authorize the executor to retain and pay a "special advisor" to assist the executor in managing an estate's digital assets, should such assistance be needed.[97]

Finally, rather than asking a family member or friend to manage and execute the digital estate plan, a client could also hire a business to perform many of the necessary tasks.[98] There is a risk, of course, that such companies can fail.[99] However, for some clients, such companies may provide a welcome solution.[100] For example, the specialist, writing a novel, might prefer to use such a service to distribute access to her email accounts, rather than ask a family member personal representative to deliver access to her friend from graduate school. For many clients, it may simply be more comfortable to hire professionals rather than select a digital executor from among friends or family.

Step Four: Enable the Representative(s)

The final step of digital estate planning is to set conditions that enable the planner's representative to execute the plan. There are two kinds of authorities or powers at issue—legal and practical. Certainly, representatives need clear legal authority to access, collect, and distribute the assets at issue. Without such authority the representative's actions may be disregarded or otherwise challenged by various stakeholders. Even where the representative's actions when taken are apparently acknowledged and accepted, if the legal authority underlying their actions is uncertain, then the finality of those actions is uncertain as well. However, legal authority alone is insufficient to enable a person to access and distribute an asset unless they also have the practical means to do so.

Legal assistance attorneys should encourage clients who decide to hire a digital estate planning service to review plans offered by several different services before selecting one, and to bring the attorney any questions the client may have about the terms-of-service.

Clients who prefer to have family or friends serve as their executors should name them in the will. Clients should provide their representatives with authorizations that state clearly and precisely exactly what the user or account holder intends for the representative to do.[101] The will should also include language expressly stating the testator's intent that it cover digital assets.[102] Next, for digital assets subject to terms-of-service agreements, the client should ensure their representative understands the relevant terms and how to meet them. If the client intends for a representative to deal with multiple different service providers, the providers' requirements should be collected and organized for convenient and effective execution.

The practical means to access an asset typically includes information such as an account number, username, associated email addresses and telephone numbers, password, and challenge questions and answers. For security while the owner is alive, the passwords could be stored separately from the rest of the information. The information should not be placed in the will itself.[103] The personal representative should be kept informed of where the information is and how to retrieve it; they can then re-combine it in order to begin assembling and distributing the assets.

Despite the overall complexity of the legal regime touching digital assets, the specific tasks required of legal assistance clients and their executors are both understandable and manageable, and clients should be encouraged to develop a digital estate plan without delay.

Conclusion

Military attorneys should advise legal assistance clients to manage and plan for the disposition of their digital assets. Although the legal, technological, and market landscapes remain subject to unexpected movement, they are settled enough to allow for generally useful planning advice. Regardless of any surprises that may be coming, the primary takeaway to leave with every client—"Don't neglect this area of your affairs"—will remain sound. **TAL**

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Notes

1. Sandi S. Varnado, *Your Digital Footprint Left Behind at Death: An Illustration of Technology Leaving the Law Behind*, 74 La. L. Rev. 719, 723 (2014).

2. Alexander Cordova, *How Much Money Can You Expect to Earn from Your Blog*, Leaving Work Behind (Oct. 3, 2017), https://leavingworkbehind.com/earn-money-blogging/ (successful blog may earn several hundred dollars a month). *See also* Elise Dopson, *The Key to Creating a Successful Blog: Evergreen Content*, The Write Life (May 17, 2017), https://thewritelife.com/evergreen-content/ ("When it comes to monetizing your blog, creating evergreen content is a simple way to ensure your articles continue to generate income even if they were published years ago.").

3. Social media applications such as Instagram are easily identified by unique logos and graphics schemes. "Whether it be big players like Twitter, Facebook, Instagram, or Snapchat, or more obscure apps like Ello, Slinger, Beme, or Keek, every social media platform has their own colors, fonts, style, feel, and flair—let's call it the mise-en-scène of the online social world." Cella Lao Rousseau, *The Evolution of the Social Media Icon*, iMore (May 20, 2016), https://www.imore.com/evolution-social-media-icon.

4. *Digital*, Merriam-Webster, https://www.merriam-webster.com/dictionary/digital (last visited July 25, 2019).

5. *See also, e.g.*, Trevor Owens, *All Digital Objects Are Born Digital Objects*, The Signal (May 15, 2012), https://blogs.loc.gov/thesignal/2012/05/all-digital-objects-are-born-digital-objects/ (discussing a useful distinction between objects that are "born digital" and others that have been "digitized").

6. Assets are "items that [are] owned or [have] value." Also, "[a]ll the property of a person (esp. a bankrupt or deceased person) available for paying debts or for distribution." *Asset*, Black's Law Dictionary (10th ed. 2014).

7. Forty-three states now define "digital asset" as "an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record." Revised Uniform Fiduciary Access to Digital Assets Act § 2(10) (2015). *See Fiduciary Access to Digital Assets Act, Revised (2015)*, Uniform Law Commission, https://www.uniformlaws.org/committees/community-home?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecdf22 (last visited July 25, 2019).

8. *See generally* John Romano, *A Working Definition of Digital Assets*, The Digital Beyond (Sept. 1, 2011), http://www.thedigitalbeyond.com/2011/09/a-working-definition-of-digital-assets/. *See also* Natalie M. Banta, *Death and Privacy in the Digital Age*, 94 N.C. L. Rev. 927, 929 (narrowing the definition of digital assets to fit her discussion); Susan Porter, *The Digital Dilemma,* Tr. & Est. L. Sec. Newsl., Summer 2013 (providing draft power-of-attorney language distinguishing "digital assets" from "digital accounts").

9. *Digital Asset*, Wikipedia, https://en.wikipedia.org/wiki/Digital_asset, (last visited July 25, 2019). Consider also this definition from Professor Varnado: " . . . any and all files and accounts, whether stored locally or online." Varnado, *supra* note 1, at 720.

10. "Virtual assets" is sometimes used in the same sense as "digital assets," but is also used to refer specifically to those assets that accrue in the "virtual worlds" of on-line gaming. *See, e.g.*, Michael Walker & Victoria D. Blachly, *Virtual Assets,* Tax Mgmt. Est., Gifts, & Tr. J. 1 (2011); Christopher K. Odinet, *Bitproperty and Commercial Credit*, 94 Wash. U. L. Rev. 649 (2017) (using "virtual assets" and "digital assets" interchangeably). *But cf.*, Scott Wisniewski, *Taxation of Virtual Assets*, 2008 Duke L. & Tech. Rev. 5 (2008); Christopher J. Cifrino, *Virtual Property, Virtual Rights: Why Contract Law, Not Property Law, Must Be the Governing Paradigm in the Law of Virtual Worlds*, 55 B.C. L. Rev. 235 (2014) (using "virtual assets" to mean only assets existing in virtual worlds).

11. *See, e.g.*, John Connor, Comment, *Digital Life After Death: The Issue of Planning for a Person's Digital Assets After Death*, 3 Est. Plan. & Community Prop. L.J. 301, 305 (2011) (using "digital estate" and "digital assets" interchangeably).

12. *See generally* Storm Tropea, Note and Comment, *Social Media is Permanent, You Are Not: Evaluating the Digital Property Dilemma in Florida Probate*, 39 Nova L. Rev. 91, 97-101 (2014) (categorizing and listing many different types of digital assets).

13. The alert legal assistance attorney may have spotted an issue here, the question of when or whether someone who sells things via such a website is actually engaged in a "private business activity," and so ineligible to receive the attorney's advice. U.S. Dep't of Army, Reg. 27-3, The Army Legal Assistance Program, para. 3–8a(2) (21 Feb. 1996). "Private business activities" are defined to exclude "the . . . sale of . . . personal belongings of the type or in the quantity usually found within a principal residence." *Id.* at Glossary, Section II Terms. This is consistent with the Internal Revenue Service's guidance for distinguishing between a business and a hobby. IRS, Frequently Asked Questions, Income and Expenses (last updated Mar. 8, 2019), https://www.irs.gov/faqs/small-business-self-employed-other-business/income-expenses/income-expenses. A line between "personal" blogging and "business" blogging would presumably be drawn similarly, based on the size of income, amount of time spent on it, the frequency or length of posts, etc.

14. *But see, e.g.*, Monica Anderson et al., *10% of Americans Don't Use the Internet. Who are They?*, Pew Research Center (Apr. 22, 2019), https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/.

15. Evan Carroll, *How Much Are Your Digital Assets Worth? About $35,000*, The Digital Beyond (July 24, 2014), http://www.thedigitalbeyond.com/2014/07/how-much-are-your-digital-assets-worth-about-35000/; McAfee, *McAfee Reveals Average Internet User Has More Than $37,000 in Underprotected 'Digital Assets,'* BusinessWire (Sept. 27, 2011, 8:00 AM), https://www.businesswire.com/news/home/20110927005661/en/McAfee-Reveals-Average-Internet-User-37000-Underprotected; Department of Defense Annual Report to the Congressional Defense Committees on the Department of Defense Policy and Plans for Military Family Readiness, Fiscal Year 2016, para. 2-3, Financial Well-Being, http://download.militaryonesource.mil/12038/MOS/Reports/FY2016-Report-on-DoD-Policy-and-Plans-for-MFR.pdf.

16. In addition to any personal value—financial, psychological, or otherwise—many digital assets are also likely to hold value as social data or historical artifacts. *See, e.g.*, Jaweed Kaleem, *Death on Facebook Now Common As 'Dead Profiles' Create Vast Virtual Cemetery*, Huffington Post (July 7, 2012), https://www.huffingtonpost.com/2012/12/07/death-facebook-dead-profiles_n_2245397.html ("One of the oldest online memorials is the U.K.-based Virtual Memorial Garden, which began in 1995. A simple, alphabetized collection of tens of thousands of paragraph-long, user-submitted memories of the dead, it's still growing."). *See also*, Greg W. Beyer, *Web Meets the Will: Estate Planning for Digital Assets*, 42 Est. Plan. 28, 31 (2015); Varnado, *supra* note 1, at 744.

17. There is no practical limit to the number of people who might use or enjoy any particular text, sound, or image file currently found on the Internet. At modest cost, an individual with scores of relatives could bequest each one a thumb-drive holding identical data (a multi-volume memoir, for example, or an hours-long documentary film).

18. Real estate, vehicles, jewelry, and the like may be transferred to multiple owners, but the limits of the resulting joint ownership are likely to be real and felt. A necklace can be worn by only one person at a time, a car can only travel one route at a time, and so on. *See generally*, John E. Cribbet et al., Property 311-384 (2002).

19. *See, e.g.*, Jeff John Roberts, *Is 'Google' Generic? Supreme Court May Decide*, Fortune (Aug. 21, 2017), http://fortune.com/2017/08/21/google-trademark-supreme-court/ ("Words like cellophane, aspirin, and thermos used to be protected brand names in the U.S. until courts found them to be 'generic' and stripped away their trademarks.").

20. *See, e.g.*, Sally Wiener Grotta, *The Best Photo Book Printing Services 2019*, Tom's Guide (July 26, 2019), https://www.tomsguide.com/us/best-photo-books,review-2651.html (reviewing and ranking eight different photo-book printing services).

21. Connecticut was first to address access to a decedent's email, in 2005, followed by Rhode Island in 2007. Chelsea Ray, *'Til Death Do Us Part: A Proposal for Handling Digital Assets After Death*, 47 Real Prop. Tr. & Est. L.J. 583, 602-03 (2013). *See also* Ajemian v. Yahoo!, Inc., 478 Mass. 169 (2017) (a case of first impression involving a dispute over email).

22. Connor, *supra* note 11, at 314 ("[T]he internet is not slowing down in order to give estate planners time to catch up to all of its flashy new services . . . . ").

23. Jamie Patrick Hopkins & Ilya Alexander Lipin, *Viable Solutions to the Digital Estate Planning Dilemma*, 99 Iowa L. Rev. Bull. 61 (2014) ("[T]he majority of Americans are vastly unprepared for their digital afterlife, unintentionally foregoing digital estate planning altogether and leaving their assets trapped in a digital purgatory."); *see also, e.g.*, Denis Clifford, Estate Planning Basics (2005) (nowhere mentioning digital assets).

24. While indifference is of course one possible attitude a person could take toward what happens after they die, inaction is inadvisable. Jamie P. Hopkins, *Afterlife in the Clouds: Managing a Digital Estate*, 5 Hastings Sci. & Tech. L.J. 209, 239 (2013) ("[T]hese services create a large repository of wealth and property, making them a prime target for digital criminals and thieves."); PBS NewsHour, *Dead and Online: What Happens to Your Digital Estate When You Die?*, PBS NewsHour (July 12, 2014, 11:00 AM), https://www.pbs.org/newshour/show/happens-digital-presence-death; Press Release, ID ANALYTICS, Identities of Nearly 2.5 Million Deceased Americans Misused Each Year, ID Analytics (Apr. 23, 2012), https://www.idanalytics.com/press-release/identities-nearly-2-5-million-deceased-americans-misused-year/.

25. Clare Cock-Starkey, *10 Writers and Artists Who Wanted Their Work Destroyed*, Mental Floss (July 12, 2016), http://mentalfloss.com/article/82874/10-writers-and-artists-who-wanted-their-work-destroyed; *See also generally,* Lior Jacob Strahilevitz, *The Right to Destroy*, 114 Yale L.J. 711 (2005).

26. Consider President Grant's well-known financial motivation for writing his memoirs:

> [T]he rascality of a business partner developed itself by the announcement of a failure. This was followed soon after by universal depression of all securities, which seemed to threaten the extinction of a good part of the income still retained, ... At this juncture the editor of the Century Magazine asked me to write a few articles for him. I consented for the money it gave me; for at that moment I was living upon borrowed money. The work I found congenial, and I determined to continue it.

Ulysses S. Grant, Personal Memoirs of U. S. Grant, Preface (1885). Anyone writing today is likely to be creating and storing digital drafts. *See, e.g.*, Ali Hale, *Pen or Keyboard—How Do You Write?*, Daily Writing Tips, https://www.dailywritingtips.com/pen-or-keyboard-%E2%80%93-how-do-you-write/ (last visited July 25, 2019) ("My grandmother (and my mother) both write

everything with pen and paper, then type it up onto a computer.").

27. *See generally* Lawrence M. Friedman, Dead Hands (2009); Elias Clark et al., Gratuitous Transfers (2007).

28. *See, e.g.*, Anthony C. Eichler, *"Owning" What You "Buy": How iTunes Uses Federal Copyright Law to Limit Inheritability of Content, and the Need to Expand the First Sale Doctrine to Include Digital Assets*, 16 Hous. Bus. & Tax L. J. 208, 220 (2016) ("The reality is that federal law is at odds with people's expectations of what they can do with their digital property at death.").

29. "In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times." Hodel v. Irving, 481 U.S. 704, 716 (1987) (citing United States v. Perkins, 163 U. S. 625, 627-28 (1896)).

30. David Horton, *Contractual Indescendibility*, 66 Hastings L.J. 1047 (2015).

31. William Bissett & David Kauffman, *Surf the Evolving Web of Laws Affecting Digital Assets*, 41 Est. Plan. 32 (2014). Similarly, Professor Horton remarks that the descendibility of digital assets "depends on a maze of legislation." David Horton, *Indescendibility*, 102 Cal. L. Rev. 543, 569 (2014).

32. "[E]ven those who believe that they have taken every precaution to affect a smooth transition from life to the digital afterlife, may find themselves on the wrong side of case-law as it emerges." Siobhán Kinealy, *Night of the Living Data: Estates Law and the Phenomenon of Digital Life After Death*, 11 Rutgers Bus. L. Rev. 35, 37 (2014).

33. *See* Connor, *supra* note 11.

34. Jesse Dukeminier & Robert H. Sitkoff, Wills, Trusts, and Estates 41-48 (2013).

35. *Id.*

36. *Id.*

37. Property in two states requires ancillary process. *Id.* at 45. *See also* Stewart E. Sterk et al., Estates and Trusts 1008 (2011).

38. *See, e.g.*, Anna Cieslik, *Diligent German Banker Spends Half a Year Counting Pennies From an Unexpected Inheritance*, Daily Break (Dec. 16, 2017, 11:20 AM), https://www.dailybreak.com/break/9400-dollars-in-pennies-counted-by-bank-teller.

39. *See, e.g.*, Dean Irvine, *Virtual Worlds, Real Money*, CNN.com International (Mar. 12, 2007, 1801 GMT), http://edition.cnn.com/2007/TECH/science/03/12/fs.virtualmoney/index.html.

40. *See generally*, William Bissett and David Kauffman, *Surf the Evolving Web of Laws Affecting Digital Assets*, 41 Est. Plan. 32 (2014); David Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. Rev. 539 (2017).

41. Stewart E. Sterk et al., Estates and Trusts 1010 (2011).

42. *See generally*, Ray D. Madoff, Immortality and the Law: The Rising Power of the American Dead 57-85 (2010). *See also*, Horton, *supra* note 40, at 546 (discussing rise of harmless error rule that enable judges to enforce decedents' wishes more often).

43. Dukeminier & Sitkoff, *supra* note 34.

44. *Id. But see*, Ashley S. Watkins, Comment, *Digital Properties and Death: What Will Your Heirs Have Access to After You Die?*, 62 Buff. L. Rev. 193, 200-02 (2014) (discussing challenges that paperless financial accounts can pose for heirs).

45. The terms are derived from "shrinkwrap," referring to adhesion contracts for software where opening the package is supposed to imply acceptance of the terms. *Browse wrap*, Wiktionary, https://en.wikipedia.org/wiki/Browse_wrap.

46. *See generally*, Natalie M. Banta, *Property Interests in Digital Assets: The Rise of Digital Feudalism*, 38 Cardozo L. Rev. 1099 (2017).

47. Shankar Vedantam, *To Read All Those Web Privacy Policies, Just Take a Month Off Work*, NPR (Apr. 19, 2012, 3:30 AM), http://www.npr.org/blogs/alltechconsidered/2012/04/19/150905465/to-read-all-thoseweb-privacy-policiesjust- take-a-month-off-work; *see also* Mike Masnick, *Supreme Court Chief Justice Admits He Doesn't Read Online EULAs or Other "Fine Print,"* tech-dirt (Oct. 22, 2010, 9:48 AM), http://www.techdirt.com/articles/20101021/02145811519/supremecourt-chief-justice-admits-he-doesn-tread-online-eulas-or-other-fine-print.shtml; Audie Cornish, *Why Do We Blindly Sign Terms of Service Agreements*, All Things Considered (Sept. 1, 2014, 4:07 PM), https://www.npr.org /2014/09/01/345044359/why-do-we-blindly-sign-terms-of-service-agreements (Interview with Omri Ben Shahar; Professor Ben-Shahar doubts whether the drafters themselves even read them.).

48. *See generally* Margaret Jane Radin, Boilerplate (2013). *See also, e.g.*, Cheryl B. Preston & Eli W McCann, *Unwrapping Clickwraps, Shrinkwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse*, 26 BYU J. Pub. L. 1 (2012); Paul J. Morrow, *Cyberlaw: The Unconscionability/Unenforceability of Contracts (Shrink-wrap, Clickwrap, and Browsewrap) on the Internet: A Multijurisdictional Analysis Showing the Need for Oversight*, 11 U. Pitt. J. Tech. L. & Pol'y 7 (2011).

49. *See, e.g.*, Nicosia v. Amazon.com, Inc., 834 F.3d 220 (2d Cir. 2016); Serrano v. Cablevision Systems Corp., 2012 WL 1040019 (E.D. N.Y. 2012) (applying New York law); Smallwood v. NCsoft Corp., 2010 WL 3064474 (D. Haw. 2010) (applying Texas law).

50. The "ranks of companies that are mandating indescendibility by fine print" are "burgeoning." Horton, *supra* note 31, at 565.

51. *See generally* Adrienne Clair Barbour, Comment, *Used iTunes: The Legality of Redigi's Model for a Secondhand Digital Music Store*, 15 Tul. J. Tech. & Intell. Prop. 165 (2012).

52. "Our Services evolve constantly. As such, the Services may change from time to time, at our discretion." *Terms of Service*, Twitter, https://twitter.com/en/tos (last visited July 25, 2019); *See also* Horton, *supra* note 31, at 565 ("In March 2013, Delta Airlines quietly deleted a right held by thousands of its customers. Although the company boasts that its SkyMiles never expire, it added the following clause to its list of events that will deactivate a frequent-flier account: 'A member is deceased.'" citing *Program Rules & Conditions*, Delta Airlines, https://www.delta.com/content/www/en_US/skymiles/program-resources/program-rules.html (last visited July 25, 2019).

53. "[In] the current legal climate[,] social-media services do not appear to be ready or willing to target more informal transfers of ownership." Kristina Sherry, Comment, *What Happens to Our Facebook Accounts When We Die?: Probate Versus Policy and the Fate of Social-Media Assets Post-Mortem*, 40 Pepp. L. Rev. 185, 238 (2012).

54. Most widely reported is the case of Lance Corporal Justin Ellsworth, whose surviving parents forced Yahoo! to provide them with his emails, contrary to Yahoo!'s terms-of-service. *Justin's Family Fights Yahoo Over Access to his E-mail Account*, http://www.justinellsworth.net/email/yahoofight.htm (last visited July 26, 2019).

55. *See, e.g.*, Rosa Marchitelli, *Apple Demands Widow Get Court Order to Access Dead Husband's Password*, CBC News (Jan. 18, 2016, 5:00 AM), http://www.cbc.ca/news/business/apple-wants-court-order-to-give-access-to-appleid-1.3405652 ("Apple[] did reach out to the Bush family and apologize for what it called a 'misunderstanding,' offering to help the family solve the problem — without a court order.").

56. "We reserve the right to display advertisements on your website unless you have purchased a plan that includes the removal of ads." *Terms of Service*, WordPress.com, https://en.wordpress.com/tos/ (last visited July 25, 2019).

57. *Terms of Service*, Google AdSense, https://www.google.com/adsense/new/localized-terms (last visited July 25, 2019).

58. *Oath Terms of Service*, Oath: A Verizon Company, https://policies.oath.com/us/en/oath/terms/otos/index.html (last visited July 25, 2019) (hereinafter Oath).

59. *Microsoft Services Agreement*, Microsoft (Nov. 12, 2018), https://www.microsoft.com/en-gb/servicesagreement/.

60. *Option to Transfer Data Between G Suite Accounts*, G Suite Administrator Help, https://support.google.com/a/answer/1041297?hl=en (last visited July 25, 2019).

61. *About Flickr*, Flickr, https://www.flickr.com/about (last visited July 25, 2019).

62. Oath, *supra* note 58.

63. *Terms of Service*, Google (Oct. 25, 2017), https://policies.google.com/terms?hl=en.

64. *See, e.g.*, Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 Mich. L. Rev. 857, 860 (2006); *see also* Sherry, *supra* note 53, at 341 ("[M]any social-media services have exhibited an unchecked audacity when it comes to testing the boundaries of public tolerance.").

65. Of course, their preferences could be based on other things apart from the terms-of-service agreements, such as the quality of a user interface or the number of other users. *See, e.g.*, Kezz Bracey, *The (Seriously) Comprehensive Guide to Choosing a Web Host*, Envatotuts (Feb. 15, 2016), https://webdesign.tutsplus.com/tutorials/the-seriously-comprehensive-guide-to-choosing-a-web-host—cms-25430.

66. 17 U.S.C. § 302(a) (2010) ("Copyright in a work created on or after January 1, 1978, subsists from its creation . . . ."). U.S. copyrights are protected internationally by treaty. *See generally*, Robert P. Merges et al., Intellectual Property in the New Technological Age 741-51 (2012).

67. *See, e.g.*, Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 Wm. & Mary L. Rev. 951 (2004).

68. *See* Merges et al., *supra* note 66, at 458-59; Craig Allan Nard et al., The Law of Intellectual Property 453-54 (2011).

69. *See generally*, Justin Hughes, *The Photographer's Copyright: Photograph as Art, Photograph as Database,* 25 Harv. J.L. & Tech. 339 (2012); Terry S. Kogan, *How Photographs Infringe*, 19 Vand. J. Ent. & Tech. L. 353 (2017).

70. The "original works" need only be "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a) (2010).

71. 17 U.S.C. § 202(a) (2011) ("Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied."). *See also* Gary Myers, Principles of Intellectual Property Law 49 (2013).

72. Similarly, President Grant's publisher had the right to publish (make copies of) his memoir, while his family kept the manuscript. *See* Library of Congress, Index to the Ulysses S. Grant Papers iv (1965), http://lcweb2.loc.gov/service/gdc/scd0001/2009/20090623002ul/20090623002ul.pdf.

73. 17 U.S.C. § 102(a) (2010).

74. 18 U.S.C. § 2701(a).

75. 18 U.S.C. § 1030 (2006). Most states also have enacted computer crime laws. *See* Fernando M. Pinguela & Bradford W. Muller, *Virtual Crimes, Real Damages: A Primer on Cybercrimes in the United States and Efforts to Combat Cybercriminals*, 16 Va. J.L. & Tech. 116, 150-88 (2011).

76. Natalie M. Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 Fordham L. Rev. 799, 842 (2014).

77. James D. Lamm et al., *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciarions From Managing Digital Property*, 68 U. Miami L. Rev. 385, 401 (2014).

78. *Id. See also, e.g.,* Varnado, *supra* note 1, at 749; Beyer, *supra* note 16, at 32.

79. *See* Tropea, *supra* note 12, 107-11 (reviewing state legislation pre-RUFADAA); Ray *supra* note 21, 596-98 (discussing one of the first state legislative efforts, in Oklahoma).

80. *See Fiduciary Access to Digital Assets Act, Revised (2015), supra* note 7.

81. Revised Uniform Fiduciary Access to Digital Assets Act 2015), Prefatory Note.

82. *Id.* § 7.

83. *Id.* § 8.

84. *Id.* § 4(c).

85. Dukeminier & Sitkoff, *supra* note 34, at 373-74 (2013) (note providing average growth of TSP value during average military career).

86. *See, e.g.*, Kevin Snyder and Jessica Ertel, *Estate Planning in a Digital Age: Protecting Your Digital Assets Today and in the Future*, Orange County Law., June 2016, at 28, 31; Jennifer A. Davis, *Counseling Clients for #Digitaldeath*, 71 J. Mo. B. 134, 137 (2015).

87. *See generally* Evan Carroll & John Romano, Your Digital Afterlife (2010).

88. Horton, *supra* note 31, at 569 ("Although this issue is fuzzy and under-theorized, we generally think of succession as mandatory: once something is descendible, it must be passed on.").

89. *But see* Banta, *supra* note 8 ("One of the gaping holes in discussions about digital assets after death is the complete lack of reliable, empirical evidence about how the majority of Americans would like their digital assets to be treated postmortem.").

90. *See generally* Naomi Cahn, *Probate Law Meets the Digital Age*, 67 Vand. L. Rev. 1697, 1703 (2014).

91. To give another example, Justice Black destroyed his conference notes because he did not believe such notes should be published posthumously. Dukeminier & Sitkoff, *supra* note 34, at 14.

92. *See supra* note 24.

93. *About Inactive Account Manager*, Google Account Help, https://support.google.com/accounts/answer/3036546 (last visited July 25, 2019).

94. *Memorialized Accounts*, Facebook Help Center, https://www.facebook.com/help/1506822589577997/ (last visited July 25, 2019).

95. *See, e.g.*, Sara Clemence, *Snap Out of It,* Wall St. J., Dec. 2017, at D11 (urging readers to develop strong habits of digital photo management in order to better enjoy their photos).

96. Rachel Pinch, Note, *Protecting Digital Assets After Death: Issues to Consider in Planning for Your Digital Estate*, 60 Wayne L. Rev. 545, 564 (2014).

97. Porter, *supra* note 8.

98. Carroll & Romano, *supra* note 87, at 159. *See also* Michael D. Roy, Note, *Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?,* 24 Quinnipiac, Prob. L.J. 376, 381 (2011).

99. *See generally* Rachel E. Ferrante, Comment, *The Relationship Between Digital Assets and Their Transference at Death: "It's Complicated,"* 15 Loy. J. Pub. Int. L 37, 56-57 (2013). *See also* Gerry W. Beyer and Kerri M. Griffin, *Estate Planning for Digital Assets*, Estate Planning Studies, July 2011, at 6 (life of online afterlife management companies is "dependent upon the whims and attention spans of their creators and creditors."). *See also* David M. Lenz, *Is the Cloud Finally Lifting? Planning for Digital Assets*, ALI CLE Est. Plan. Course Materials J., Feb. 2017, at 35 ("For awhile thereafter, greatgoodbye.com would take you to a site selling skin-care products. Now there is nothing on that website.").

100. *See generally*, Roy, *supra* note 98 (discussing pros and cons of using such services).

101. *See, e.g.*, Jean Gordon Carter et. al, *Sample Will and Power of Attorney Language for Digital Assets*, The Digital Beyond, http://www.thedigitalbeyond.com/sample-language (last visited July 25, 2019) ("At the very least a will should include specific powers to handle digital assets and a definition of digital assets.").

102. *Id.* Alternative sample language can also be found in state form books and continuing legal education course materials.

103. The will would not be changed as often as passwords should be changed. Also the will is a public document that could eventually provide the information to people other than the executor.

104. Personal Facebook accounts are not transferable, but Facebook "Pages" can be transferred simply by changing the "Admin Roles" settings. The person receiving the Page must be a Facebook user and have "liked" the Page being transferred. A Facebook account will be "memorialized" if Facebook learns of the user's death. A user can request in advance that his or her account be deleted instead, or can select a "Legacy Contact" who can "manage" a memorialized account. Immediate family members may request that a memorialized account be removed. An obituary or Memorial Card as proof of death; Power of attorney, birth certificate, last will and testament, or estate letter as proof of authority. *Memorialized Accounts*, Facebook, https://www.facebook.com/help/1506822589577997 (last visited July 25, 2019).

105. Data stored on Google may be transferred from one account to another "on a per product basis," if the person executing the transfer has account access. *Download Your Data,* Google Account, https://takeout.google.com/settings/takeout (last visited July 25, 2019). Users may use Inactive Account Manager to: (1) Select how long the inactivity must be before the account is considered inactive (3, 6, 12, or 18 months); (2) Select (a) "Trusted Contact(s)" who will have access to the account's contents for three months, prior to the account being deleted. Trusted contacts are verified by phone number, and need not be notified when selected. Google emails them with instructions upon the account being declared Inactive. *About Inactive Account Manager,* Google Account Help, https://support.google.com/accounts/answer/3036546?hl=en (last visited July 25, 2019).

106. Ownership of a LinkedIn Group is transferrable. *Transferring Ownership of a Group (Group Management),* LinkedIn, https://www.linkedin.com/help/linkedin/answer/257 (last visited July 25, 2019). Anyone may request the removal of a deceased user's profile. Requestor needs to know user's url and last job. *Deceased LinkedIn Member – Removing Profile*, LinkedIn, https://www.linkedin.com/help/linkedin/answer/2842 (last visited July 25, 2019).

107. Twitter currently permits transferring an account; the gaining user would need log-in information. Twitter Rules and Policies, Twitter Help Center, https://help.twitter.com/en/rules-and-policies#twitter-rules (last visited July 25, 2019). Twitter may remove accounts for "prolonged inactivity." Twitter will deactivate accounts when requested by an authorized representative or family member and will also remove images of deceased individuals in certain cases when requested. *How to Contact Twitter About a Deceased Family Member's Account,* Twitter Help Center, https://help.twitter.com/en/rules-and-policies/contact-twitter-about-a-deceased-family-members-account (last visited July 25, 2019).

108. Transferring an Instagram account to another user is not permitted. Businesses may possess accounts. *Terms of Use,* Instagram, https://help.instagram.com/478745558852511 (last visited July 25, 2019). Account will be memorialized upon report of the user's death. Immediate family members or authorized personal representative may request the account be removed. *How Do I Report a Deceased Person's Account on Instagram?,* Instagram, https://help.instagram.com/264154560391256 (last visited July 25, 2019).

(Credit: istockphoto.com/AndreyPopov)

A Roadmap for Leaders of SVCs

By Captain Nicholas K. Leslie and Captain Aaron R. Matthes

Like many special victims' counsel (SVC), the authors of this article work under the supervision of officers and leaders who served as trial counsel or defense counsel before the Army established the SVC program. The intent of this article is to provide supervisors with insight into the day-to-day issues SVCs face, what a typical SVC's practice looks like, and other considerations that may affect staffing or assignments.[1] Leaders looking for a detailed account of the state of the SVC program are encouraged to read Colonel Louis P. Yob's article, *The Special Victim Counsel Program at Five Years: An Overview of Its Origins and Development,* in Issue 1 of the 2019 edition of *The Army Lawyer*.[2]

The SVC's Supervisory and Technical Chains

Supervisors can help their SVCs be successful by ensuring SVCs understand the organization of the SVC Program. Special victims' counsel who understand the structure will be in the best position to know which resource to access as issues arise. Special victims' counsel often work alone, but should never work in isolation as they will often encounter issues of first impression and complex professional responsibility matters.

Special victims' counsel are legal assistance attorneys who are managed and rated within their assigned Office of the Staff Judge Advocate (OSJA).[3] The Chief of Legal Assistance (CLA) and Staff Judge Advocate (SJA) provide direct supervisory oversight of their SVCs.

Special victims' counsel also have a technical chain. The technical chain consists of the CLA, the SVC Regional Manager (SVCRM), and the SVC Office of the Program Manager (SVCOPM).[4] The technical chain does not include the SJA because the victim's interests may not align with the government's.[5] The technical chain provides policy guidance, practice advice, and professional responsibility supervision to SVCs in accordance with Army Regulation 27-26.[6] Technical chain supervision provided to an SVC is privileged communication.[7]

The SVCRM initiative was implemented in June 2018.[8] It created mid-level managers in large part to more efficiently manage conflict cases. Previously, conflict cases were routed through the SVCOPM. This initiative divided the SVC Program into five geographic regions, with each region having an assigned SVC Regional Manager. Special victims' counsel regional managers are mid-level managers in the technical chain. They assist CLAs and SVCs in their region by providing technical advice and professional responsibility supervision. They also detail clients to outside SVCs when the local office is precluded from representation due to a conflict. Regional managers also coordinate annual training for SVCs in their region and collect and analyze statistical information for their region.

The SVCOPM provides technical and policy oversight of the SVC Program for SVCs serving in the field. The SVCOPM publishes the Special Victims' Counsel Handbook, which guides the daily practice of SVCs in the field. All SVC travel and funding is also managed through the SVCOPM.[9]

What Leaders Should Know About a Typical SVC Practice

Leaders who understand what a typical SVC practice looks like will be in a better position to make personnel management decisions and identify when additional support is needed.

An SVC is rarely the first point of contact in the military justice system for a victim of sexual assault. Victim advocates, healthcare providers, and military law enforcement are the first to notify almost all prospective clients of their right to an SVC. Prospective clients may choose to consult with an SVC or continue without one. Special victims' counsel are not permitted to solicit clients.[10] Prospective clients may elect to consult with an SVC at any stage of the military justice process. Some prospective clients do not request to consult with an SVC until after they have already provided a statement to law enforcement. Others wait until a trial counsel asks for input on a plea agreement or until the eve of trial. Once the prospective client has elected to consult with an SVC, the SVC will schedule an initial consultation with the prospective client. The initial consultation typically takes place in the SVC's office within a day or two of the prospective client's election. On rare occasions, exigencies will require an early morning consultation at a medical treatment facility.

The initial consultation should be conducted face-to-face when possible.[11] There is no formula for the consultation, but it should always include checks for eligibility,

conflicts of interest (via JAGCNet's Client Information System), safety concerns, and an explanation of the SVC's role in the military justice system.[12] The SVC should also ask about collateral misconduct. Collateral misconduct is misconduct that is committed by a victim of sexual assault that has a direct nexus to the sexual assault.[13] If the SVC determines collateral misconduct is an issue, the client may be referred to Trial Defense Service (TDS). The SVCOPM has developed a procedure for TDS referrals that mitigates the risk of creating a conflict within a TDS office.[14] After all of the above has been explained, the prospective client may choose to become the SVC's client.

The attorney-client relationship is governed by a document, created by the SVC, called the "Scope of Representation." The SVCOPM provides SVCs with a template for the document in the *SVC Handbook*.[15] In general, the Scope of Representation will outline the purpose of the relationship, the limitations of SVC representation, and when the relationship will end.[16]

The time commitment required for an SVC to assist a client will vary based on the client and the facts of the case. An SVC will usually be busiest within the first few days of receiving a new client and the weeks leading up to the final disposition of the case. In the early days of a new case, the SVC will spend hours talking to the client about goals, preparing them for the Criminal Investigation Command (CID) interview, if applicable, and managing expectations. The SVC will also coordinate an interview with CID and be present during the interview.[17] After the CID interview and during the investigation phase, the amount of personal interaction with the client may decrease significantly.

The SVC will receive periodic updates and requests for information throughout the investigation from CID or the assigned trial counsel. All updates are passed along to the client.[18] If the case is preferred and later referred, the time commitment from the SVC will likely increase again. The SVC will need to be present at the Article 32 hearing, review proposed plea agreements with the client, analyze and potentially respond to Military Rules of Evidence (MRE) 412 and 513 motions, and be with the client during government and defense interviews as well as trial preparation. The SVC will also help clients draft a victim impact statement.[19]

An SVC will act as the eyes and ears of the client during trial. Although victims have the right to be present in the courtroom throughout the trial, it is a right few victims exercise. Moreover, the typical SVC client is not comfortable in the courtroom and prefers to leave after testifying. The SVC will usually remain in the courtroom, ever vigilant for MRE 412 and 513 issues, and provide updates to the client. If there is a conviction, the SVC will help the client prepare a victim impact statement and submit post-trial matters to the convening authority.

The work load of an SVC is difficult to evaluate on numbers alone. The ebb and flow of the usual SVC-client relationship-cycle can allow an SVC to carry a large client load and still provide quality legal services to all of their clients. In jurisdictions with only one SVC or when SVC coverage is limited, it is common for an SVC to be assigned multiple new clients every week. The stages of some of those new clients' journeys through the military justice system will inevitably be closely aligned and the SVC may struggle to keep up. Supervisors of SVCs should endeavor to look beyond the numbers when evaluating an SVC's work load. An SVC that can easily manage thirty cases that trickled in over a year can also become overworked if assigned five new cases in one week.

Special victims' counsel with a manageable workload can provide additional value to the organization as educators. Special victims' counsel can regularly provide training to commanders, military justice practitioners, law enforcement, or U.S. Army Sexual Harassment Assault Response Prevention representatives. Encouraging and enabling SVCs to engage in these trainings can lead to increased efficiency and functionality for both military justice practitioners and victims' services providers. For example, military justice practitioners may become more aware of their obligations toward victims and better prepared to protect their commanders from inadvertently violating a rule or regulation. These trainings also allow for a professional exchange of ideas and the opportunity to ease potential friction points between the various stakeholders.

Understanding SVC Travel Responsibilities

Special victims' counsel frequently travel to represent their clients' interests. Leaders should understand the various reasons SVCs may be required to travel and be in tune with the SVC's travel schedule to prevent lapses in local coverage while the SVC is away. One solution to ensure local coverage is to have a pool of part-time SVCs available to take on new clients while the full-time SVC is away.

Typical reasons for SVC travel include the following:

1. The client's sexual assault allegation is investigated and prosecuted in a different geographic area than the SVC is located. The SVC may be required to travel to where the case is being investigated and prosecuted until the case reaches final disposition.
2. The SVC Regional Manager details a conflict case to an SVC and the SVC is located in a different geographic area than the client. The SVC may have travel requirements such as meeting with the client in person for an initial consultation and as representation requires until final disposition.
3. The SVC's client is granted an expedited transfer to a different duty location. The SVC will retain an attorney-client relationship unless the client approves a transfer of SVC services. If the client does not approve a transfer of services, the SVC will maintain the attorney-client relationship, and will travel to the client's new duty location as representation requires until final disposition.

Potential Friction Points

Leaders should be aware of potential friction points that may arise between an SVC and other parties involved in the military justice process. Leaders who can identify friction points will be in a stronger position to ensure relationships between parties remain professional and productive.

One potential friction point is between the SVC and military justice practitioners. It is the primary duty of an SVC to represent the interests of the victim, and a friction point may arise when an SVC's client has

a divergent interest from a military justice practitioner. For example, the SVC's client may request the command dispose of a case through administrative action while the trial counsel would like to prosecute the case. In these situations, the SVC must advocate for their client's desires. A trial counsel may view the SVC's advocacy for administrative action as obstructionist, and friction between the two counsel may result.

A friction point may also arise when an SVC views that their client's rights are violated. For example, a trial counsel may violate a victim's right by failing to provide timely notice of preferral of charges or that an Article 32 has been scheduled. A trial counsel could also violate a victim's right by failing to give required documentary evidence to the victim at preferral.[20] These violations are typically not committed maliciously. They are usually committed due to a lack of knowledge of victims' rights, inexperience, or oversight. These violations may nevertheless result in friction between the SVC and the military justice practitioner.

Leaders who are aware of potential friction points may be able to mitigate them by communicating expectations to the judge advocates within the OSJA. All parties bear an equal share of the burden to develop a professional working relationship. Leaders are further encouraged to empower SVCs to provide training on the SVC program and victims' rights. Trainings may be provided within the OSJA through Leader Professional Development and roundtables. This will aid in relationship building between the sections and ensure information from the SVC program is disseminated to the involved parties. An additional benefit is training participants to work directly with their servicing SVCs to develop tenable practices and procedures within their office.

Another friction point may arise between an SVC and a commander. This can sometimes be attributed to a commander who does not fully understand the SVC's role and responsibility to the client. For example, a commander may call the SVC seeking to understand the legal advice given to the client when the client decides to not participate in an investigation. Commanders may become frustrated when an SVC refuses to disclose privileged information. This friction point can often be avoided by the SVC explaining their ethical responsibilities to the client. In rare cases, the SVC may seek assistance from the OSJA leadership to communicate the SVC's position to the commander.

Taking Care of Your SVCs

One of the most important things a leader can do to ensure the success of the SVC is to pick the right person for the job and monitor development through consistent communication. Maturity and professionalism are among the most crucial qualities to consider when deciding who will be a good fit as an SVC.

Being an SVC can be emotionally taxing. SVCs routinely interact with highly emotional, and often traumatized, clients on a daily basis. Additionally, the only subject matter that SVCs deal with is sexual assault. The combination of subject matter, heightened emotions of the clients, a heavy workload, and the incessant stream of new clients can all easily lead to burnout. Special victims' counsel also operate very independently and are not usually able to share the details of cases with supervisors. To be successful, an SVC must be mature enough to realize when they need help from their technical chain, and not be afraid to ask for it.

Leaders outside of an SVC's technical chain can also set their SVCs up for success by fostering consistent communication, scheduling regular meetings, and being genuinely interested in their wellbeing. During these meetings, leaders can ensure that SVCs have good local mentors and a healthy line of communication with their technical chain. Consistent communication also allows OSJA leadership to monitor the relationships between SVCs, trial counsel, defense counsel, law enforcement, and commanders, to help avoid the potential friction points.

Conclusion

This article provided a broad overview of information and issues for supervisors of SVCs to consider; however, the list of issues is not exhaustive and cannot replace taking the time to learn about a particular SVC's practice. By the nature of the position, SVCs will operate very independently and may not always know when they need guidance. Selecting the right people for SVC positions and ensuring they know where to get help will sustain the success of the program and empower SVCs to provide world-class legal services. **TAL**

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Notes

1. Personal experience is the primary source of information for this article. Both authors were serving as full-time SVCs since the summer of 2018 when this article was written. In addition to personal experience, travel to other jurisdictions and training alongside other SVCs has helped develop a comprehensive picture of the typical SVC practice and issues faced.

2. Colonel Louis P. Yob, *The Special Victim Counsel Program at Five Years An Overview of Its Origin and Development*, Army Law., Issue 1, at 65 (2019).

3. U.S. Army Special Victims' Counsel Program, Special Victims' Counsel Handbook Fourth Edition para. 1-2b. (9 June 2017) [hereinafter SVC Handbook].

4. *Id.* para. 1-3a.

5. *Id.* para. 1-3b.

6. *Id.*

7. *Id.*; U.S. Dep't of Army, Reg. 27-26, Rules of Professional Conduct for Lawyers, r. 1.1 (28 June 2018) [hereinafter AR 27-26].

8. The SVC Handbook was published prior to the SVC Regional Manager initiative. The SVC Handbook does not provide guidance on the SVC Regional Manager initiative as of the writing of this article. The SVC Regional Manager initiative is guided by an information paper. Colonel Louis P. Yob, SVC Program Manager, subject: Special Victims' Counsel Regional Manager Business Rules (15 June 2018).

9. SVC Handbook para. 1-6.

10. *Id.* para. 4-3.

11. *Id.* para. 42d.

12. *Id.* at 8-11.

13. *Id.* ch.8.

14. *Id.* para. 8-2.

15. *Id.* app. C, D.

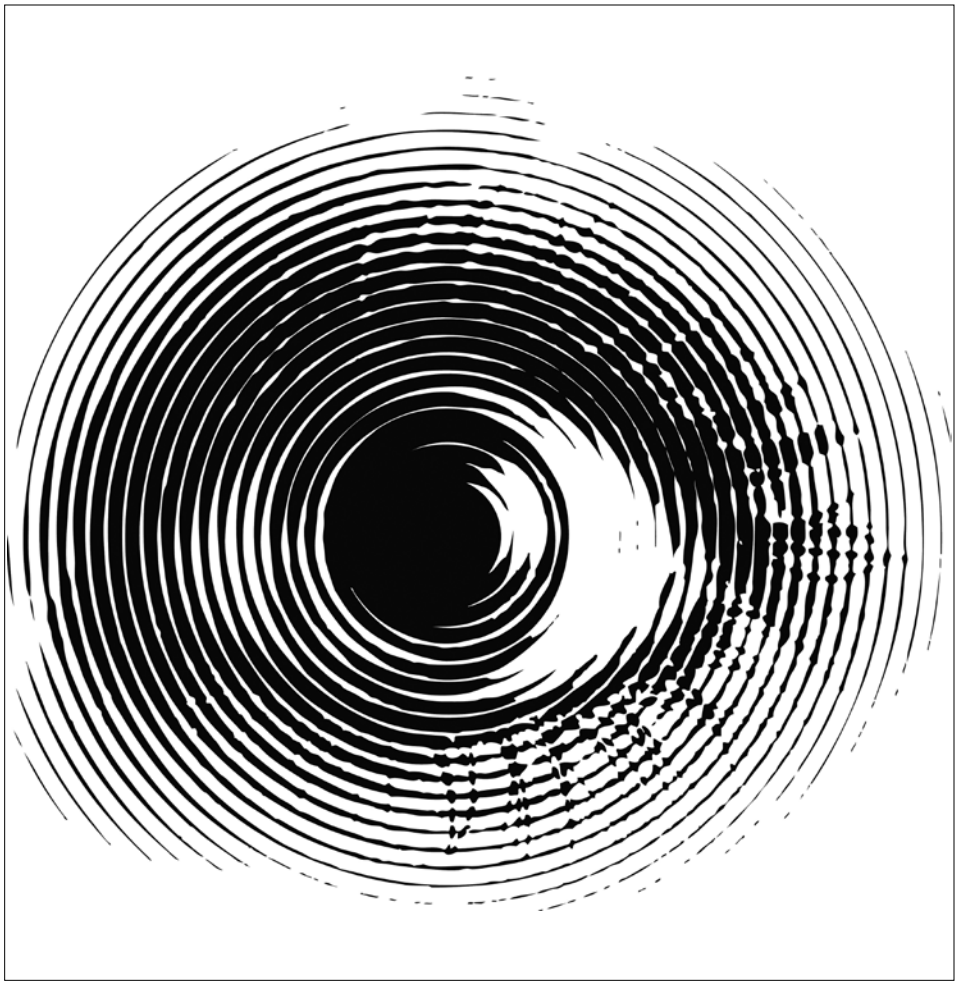
16. *Id.* ch.11.

17. *Id.* para. 6-2.

18. AR 27-26, *supra* note 7, r. 1.4.

19. SVC Handbook para. 6-5.

20. Memorandum from Lieutenant General Flora D. Darpino to Judge Advocate Legal Service Personnel, subject: Disclosure of Information to Crime Victims—Policy Memorandum 14-09, para. 4a. (1 Oct. 2014).



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Mitigating Secondary Stress in Military Justice

By Major Adam S. Wolrich

Military justice (MJ) practitioners[1] continuously immerse themselves in often the most traumatic moments of other people's lives. Whether prosecuting a sexual assault, or any other crime of violence, defending someone accused of it, or representing a victim, to do their job, and certainly to do it the *right* way, MJ practitioners delve into and revisit trauma, at length and in detail, virtually every day. As practitioners increasingly handle cases of sexual violence—cases that often result in contested trials and demand heightened attention—their professionally-required exposure to trauma increases. This required exposure comes at a price. Military justice practitioners are vulnerable to secondary traumatic stress (STS) and vicarious trauma (VT), which is harmful to them, their relationships, and can influence their ability to seek justice.[2] This article emphasizes the importance of raising awareness of STS and VT, and offers strategies MJ leaders can apply to mitigate their effects.

The Effects of Trauma on Military Justice Practitioners

Secondary traumatic stress, also referred to as compassion fatigue, is defined as the "natural consequent behaviors and emotions resulting from knowing about a traumatizing event experienced by a significant other," and "involves symptoms analogous to those seen in [Post-Traumatic Stress Disorder], i.e., re-experiencing images of the traumas of the person receiving aid, avoidance of reminders of this material, numbing in affect and function, and persistent arousal."[3] Vicarious trauma is "trauma reactions" due to exposure to others' traumatic experiences over time.[4] This aggregate effect can result from repeated exposure to trauma victims and traumatic material, such as graphic images.[5] Vicarious trauma can manifest in "physiological symptoms that resemble posttraumatic stress reactions," for example, flashbacks, nightmares, obsessive thoughts, numbness, dissociation, and in "disruptions to important beliefs, called cognitive schemas, that individuals hold about themselves, other people and the world."[6] One such significant disruption may include a "decreased sense of self-efficacy."[7] Although related, STS and VT are distinct concepts. For the purposes of this article, however, in view of the similarities in their causation and effects, they will be referred to as STS or secondary stress.[8]

There is a very real risk that professionals with regular contact with trauma victims, including social workers, police officers, sexual assault counselors, and MJ practitioners, experience STS[9] as an "occupational hazard."[10] What makes this even more hazardous to MJ practitioners is a limited understanding of STS despite so many practitioners having personally experienced or observed it.

Avoiding Discomfort

An MJ practitioner experiencing secondary stress may have difficulty dealing with victims.[11] As a result, trial counsel—perhaps without even understanding why they are feeling uncomfortable—may attempt to avoid interacting with victims. This damages their relationship with victims and, consequently, their ability to establish rapport and prosecute the case. Military justice practitioners may then lose confidence

and their ability to empathize with victims, making them less effective. Victims who sense this might not only be less effective on the stand, but also may be more reluctant to continue to participate in the trial.

Changes in World-View: Cynicism, the Jaded Practitioner, and Victim-Blaming

The same trial counsel, or any defense or special victims' counsel, repeatedly exposed to victims and their trauma, may adopt a "cynical view of humanity."[12] Many MJ leaders have observed subtle changes of their personnel's world-view as those they supervise adopt the persona of the "tough prosecutor" or "jaded defense attorney." These changes might be regarded as a harmless façade—a work-identity acquired as a rite of passage, but they could be signs that a MJ practitioner's perspective has become distorted, clouding objectivity and compromising their ability to do the job.

Additionally, MJ practitioners experiencing STS may comment, for example, that all Soldiers are "dirt bags," mock victims, or make crude attempts at humor concerning the circumstances of their cases. The same prosecutors who argue in court that victims must not be blamed, begin to resent and—in subtle, insidious ways—blame them.[13] These comments may be brushed aside, ignored or accepted as "just how it is" in a MJ shop. This is a mistake. By accepting and normalizing these comments, MJ leaders miss the opportunity to identify and address secondary stress in their personnel and maintain a culture of respect.

The Crusade

The pendulum of secondary stress' effects can swing drastically in the other direction. As opposed to resenting a victim (or a client accused of a crime), MJ practitioners experiencing STS may engage in "rescuing behaviors" and, in doing so, "fail to maintain professional boundaries."[14] Without a sufficient understanding of STS, MJ leaders may accept these behaviors, normalizing them with light-hearted comments, such as, "there they go again, on another crusade!" That is, until it is too late, and the attorney crosses an ethical line. Because it is critical to distinguish between an unhealthy crusade and zealous advocacy, MJ leaders should pay attention to the frequency with which their subordinates engage with witnesses (or clients), whether and to what degree their subordinates have become intertwined in their witnesses' (or clients') personal affairs or family, and, whether their subordinates' objectivity seems compromised.

The Struggling Practitioner

Some MJ practitioners struggle. They make mistakes and are unable to learn from them. They exhibit a lack of judgment and simply avoid work. Struggling practitioners, however, might be failing—at least in part—because they are experiencing secondary stress. The instinctive solution is to provide additional training, but this might not help. However, increasing their exposure to traumatic materials during the training, could, in fact, make things worse. Military justice leaders should develop strategies to improve poor performance while considering the possible effects of STS.

The scenarios discussed above represent some common manifestations of STS at the office. Those experiencing secondary stress, however, bring it home with them. Leaders should explore whether their subordinates' difficulties, both at work and at home—damaged relationships, health problems, difficulty concentrating, and unhappiness—are actually the effects of STS.

Why Military Justice Practitioners are Vulnerable to STS

Attorneys may be more vulnerable to STS than other professionals who regularly interact with trauma victims.[15] This may be due to the lack of training in, or awareness of, trauma and its effects; despite the fact that trauma is, for many lawyers, their business.[16] Military attorneys, generally, may be at an even greater risk of STS than their civilian counterparts.[17] And several factors suggest that MJ practitioners, in particular, are even more vulnerable to STS.

First, MJ practitioners have become specialists in sexual assault litigation. This type of material is "uniquely traumatizing."[18]

Second, despite efforts to increase MJ practitioners' expertise and experience, very often, relatively inexperienced attorneys are assigned cases involving trauma. This is "noteworthy because for many beginning mental health professionals, youth and inexperience increase the risk" of experiencing negative effects due to trauma exposure.[19]

Third, short assignments in military justice may contribute to STS vulnerability. A "periodic 'fresh start' can easily become a detriment" as personnel have a "tremendous incentive to avoid the problem in the hopes of biding their time and moving on to the next assignment."[20] Judge advocates, naturally concerned with maintaining their careers and avoiding the historic stigma associated with seeking mental health treatment, might adopt the strategy of "punting" until their next assignment rather than disclosing they are experiencing STS and seeking help.

Fourth, MJ practitioners, need to be, and are perceived to be, tough.[21] This is, to a degree, adaptive to military culture. In order to advise their commanders, trial counsel must exude resilience; in order to gain the trust of their clients, defense counsel and special victims' counsel must project confidence. Maintaining a resilient persona, however, becomes maladaptive when it prevents them from reaching out when they need help and when it obscures their leaders' and colleagues' ability to see STS' red flags.

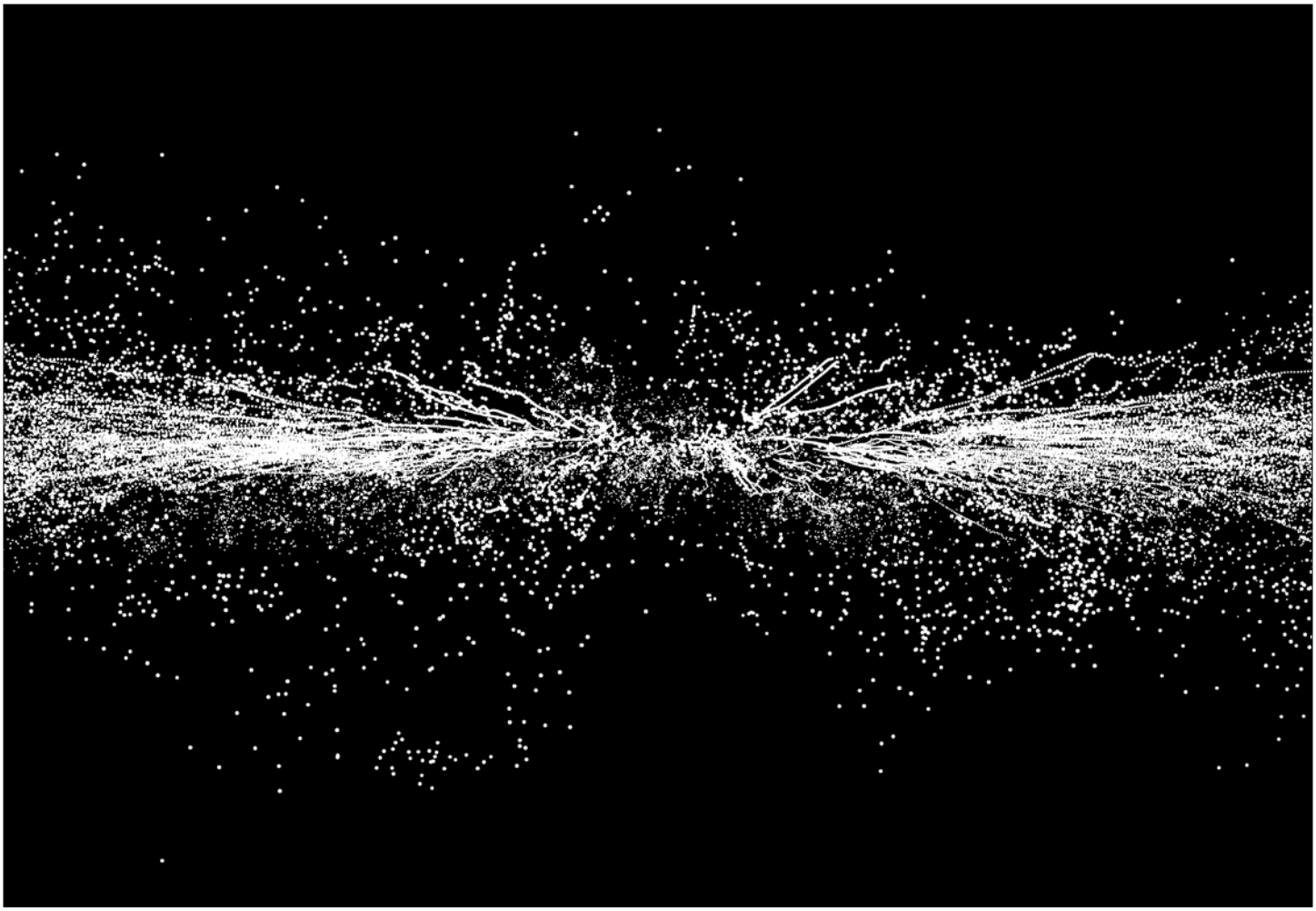
Finally, perhaps MJ practitioners' most significant vulnerability to STS results from the reduced emphasis placed on it.[22] As an example, presently, STS training is generally not required.[23]

How to Mitigate STS in Military Justice

Raising Awareness

Initially, in order to mitigate STS, leaders need to acknowledge it presents a legitimate risk to MJ practitioners. The sparce literature that focuses on STS and attorneys[24] suggests that STS is prevalent in the MJ community.[25] Military justice leaders should therefore prioritize STS training. This would require minimal time, virtually no expense, and could entail simply having personnel read and discuss articles, or sending them to training so they can share what they have learned with the rest of the office. Training not only raises awareness of secondary trauma, but also can mitigate

(Credit: istockphoto.com/StudioM1)



its effects.[26] Further, by emphasizing STS training, leaders "normalize" STS and create an environment in which MJ practitioners have "permission" to reach out for help and take care of themselves without (or with a reduced) concern of a negative stigma.[27] Once MJ leaders raise STS awareness, they can explore additional strategies to create an even more supportive environment.

Creating a Supportive Environment

Military justice leaders may consider the following in building a supportive environment to mitigate STS:

- *Balancing Caseloads.* Assigning diverse caseloads, i.e., caseloads that are not comprised of exclusively trauma-related matters, "is associated with decreased" secondary trauma.[28] This requires deviating from rigid models in assigning cases and considering the extent of traumatic material in each attorney's case load. Because senior defense counsel might have more flexibility in assigning cases, they might, very logically, be inclined to detail the same type of case to attorneys who have relevant, prior experience. Senior defense counsel should nonetheless consider STS when assigning several, similar cases (e.g., child pornography) to their attorneys because they have, at least relative to others in the office, become the "experts."
- *Using Experienced Practitioners.* Practitioners with more life and professional experience are less likely to experience STS.[29] To the extent possible, a trial team should include an experienced/older practitioner to support other team members.
- *Relying on Each Other.* Military justice leaders can transform physical training, legal training, meetings, and staff rides into opportunities for group support. Simply providing personnel with an opportunity to discuss cases, and how they think and feel about them, can mitigate STS.[30] By effectively transforming every-day events into "peer support groups," leaders can provide their personnel with the opportunity to reach out and help one another, "clarify colleagues' insights, listen for and correct cognitive distortions, offer perspective/reframing, and relate to [their] emotional state."[31]
- *Prioritizing Self-Care.* Military justice leaders should continue to emphasize self-care. Many MJ leaders already prioritize the well-being of their personnel, ensuring they take leave and have a healthy work-life balance.[32] They can take this a step further by integrating "self-care" into staff meetings. Dedicating a couple minutes to discussing how their personnel are taking care of themselves and their families nurtures the supportive environment that can mitigate STS. Military justice

leaders should also provide resources for self-care, support the use of counseling services, and provide personnel with STS self-assessment tools.[33]

Conclusion

Virtually all MJ practitioners are immersed in trauma. Some experience secondary stress immediately; others could eventually. This might be an unavoidable occupational hazard, however, there is an opportunity to address it. Doing so requires a commitment to understanding STS and treating MJ practitioners with the same degree of care with which they are expected to handle their cases. **TAL**

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Notes

1. Military justice (MJ) practitioners include trial counsel, defense counsel, special victims' counsel, MJ paralegals, and their supervisors (e.g., chief of justice, senior defense counsel, MJ noncommissioned officer in charge), referred to as MJ leaders in this article.

2. "It is noteworthy that [secondary traumatic stress] affects more than [relationships with victims and clients]; when lawyers are impaired, it affects justice." Major Evan R. Seamone, *Symposium: Sexual Assault: Military Justice, Culture, and Expectations: Sex Crimes Litigation as Hazardous Duty: Practical Tools for Trauma-Exposed Prosecutors, Defense Counsel, and Paralegals*, 11 Ohio St. J. Crim. L. 487, 491 (2014).

3. Andrew P. Levin, *Secondary Trauma and Burnout in Attorneys: Effects of Work with Clients Who are Victims of Domestic Violence and Abuse*, Commission on Domestic Violence 1 (2009), https://www.dccourts.gov/fcconference/2010_family_court_conference/articles/LevinWinter2008.pdf.

4. Marlise R. Lonn & Maria Haiyasoso, *Helping Counselors "Stay in Their Chair": Addressing Vicarious Trauma in Supervision*, VISTAS Online 2 (2016), https://www.counseling.org/knowledge-center/vistas/by-year2/vistas-2016/docs/default-source/vistas/article_90_2016.

5. Holly Bell, Shanti Kulkarni, & Lisa Dalton, *Organizational Prevention of Vicarious Trauma*, 84 Families in Society: The Journal of Contemporary Human Services 463, 464 (July 8, 2013), https://www.ce-credit.com/articles/100716/PrevVicariousTrauma.pdf.

6. *Id.*

7. Lonn & Haiyasoso, *supra* note 4, at 2.

8. Both secondary traumatic stress (STS) and vicarious trauma (VT) result from exposure to traumatic material, and "there is a consensus that STS and VT degrade the professional's ability to perform his or her task and function in daily life beyond the job." Levin, *supra* note 3. In fact, "[s]ome researchers, even those mindful of the academic distinction between all of the terms related to STS, suggest that because they are so intertwined, it is like 'splitting hairs' to delineate between [them]." Seamone, *supra* note 2, at 535.

9. Bell, Kulkarni, & Dalton, *supra* note 5, at 464-65.

10. "The continuous or repeated exposure [to traumatic experiences] is one of the factors that make vicarious trauma an occupational hazard." Lonn & Haiyasoso, *supra* note 4, at 2.

11. *Id.* at 3.

12. *Id.*

13. *Id.* at 2 (noting that "[s]ymptoms of Vicarious Trauma include cognitive distortions and changes in core beliefs"); *see also* Seamone, *supra* note 2, at 490 n. 17 ("Victim-blaming is sadly a common response in professionals who work with victimized persons."); *see also,* Mary Ann Dulton & Francine L. Rubenstein, *Working with People with PTSD: Research Implications, in* Compassion Fatigue Coping With Secondary Traumatic Stress Disorder in Those Who Treat The Traumatized 82, 87 (Charles R. Figley ed. 1995) ("The trauma worker's detachment from the survivor may result from identification with the offender, where the worker looks for culpable behavior in the survivor (e.g., 'victim blaming') and has difficulty with the victim's anger toward the offender.").

14. Lonn & Haiyasoso, *supra* note 4 (commenting that "[s]pecific to vicarious trauma, supervisors are advised to watch for novice counselors . . . engaging in rescuing behaviors"); Seamone, *supra* note 2, at 510.

15. Seamone, *supra* note 2, at 505 (concluding, based on a literature review that "[l]awyers may be more susceptible to secondary traumatic effects of sexual assault case material than even mental health clinicians" and social services workers).

16. "While lawyers do not think of themselves as trauma workers, they serve in this function by default when their duties require them to evaluate and revisit any person's trauma." *Id.* at 504.

17. "Professionals serving in uniform . . . are thought to be at greater risk than civilian professionals for developing secondary stress reactions due to both being exposed to the suffering of those they are [assisting] and to the demands associated with military operational stress." *Id.* at 531, citing Allen Rubin & Eugenia Weiss, *Secondary Trauma in Military Social Work, in* Handbook of Military Social Work 67, 69 (Allen Rubin et al. eds., 2013).

18. Seamone, *supra* note 2, at 509 (synthesizing research and concluding that "[o]n balance, the research makes it clear that sexual offenses are among the most common contributors to [Secondary Traumatic Stress] in the practice of criminal law.").

19. *Id.* at 521.

20. *Id.* at 522.

21. "This 'prideful warrior' posture is largely premised upon a singular notion of strength that can be undermined by the admission that the attorney feels overwhelmed or overcome by emotional feeling in response to evidence in a case." *Id.* at 533-34.

22. "While attorneys surely experience legal countertransference during the exercise of their duties and professional responsibilities, they rarely have the tools to detect, evaluate, or address undesirable countertransference responses and reactions." *Id.* at 497.

23. This assessment is based on my experience as a trial counsel, defense counsel, and senior trial counsel from 2011-2018; however, the Trial Counsel Assistance Program, Defense Counsel Assistance Program, and The Judge Advocate General's Legal Center and School offer relevant instruction.

24. *See* Seamone, *supra* note 2, at 503 n. 74.

25. Dr. Levin's review of the research included the following: a study of Canadian prosecutors working with sensitive cases (e.g., domestic violence, incest) "revealed symptoms of demoralization, anxiety, helplessness, exhaustion, [and] social withdrawal;" a survey of 105 judges revealed that 63% experienced symptoms of VT; and further, after one year of collaboration with domestic violence and criminal attorneys, Dr. Levin found "varying degrees of psychological distress congruent with the syndromes of STS, VT, and burnout." Levin, *supra* note 3.

26. "Trauma-specific education also diminishes the potential of vicarious trauma." Bell, Kulkarni, & Dalton, *supra* note 5, at 467.

27. *Id.* at 466.

28. *Id.*

29. "Age and experience are inversely correlated with the development of vicarious trauma" and "younger and less experienced counselors exhibit the highest levels of distress." *Id.* at 465.

30. *Id.* at 467-68.

31. *Id.* at 467.

32. Supportive environments allow for leave and other opportunities for personnel to engage in self-care. *Id.* at 466.

33. Seamone, *supra* note 2, at 548-68 (describing assessment tools).

The infamous photograph of an abused inmate at Abu Ghraib. (Credit: U.S. Army)

No. 1

Abu Ghraib Trials, 15 Years Later

By Lieutenant Colonel Jennifer L. Crawford

Fifteen years ago, a set of photos shocked the national conscience. Vivid images of prisoner and detainee abuse in Iraq brought war into American homes in a way that had not been felt since the Vietnam era. The images showed Soldiers "graphically mistreating and sexually humiliating Iraqi prisoners." The photos "depicted [Soldiers] leering and grinning as they forced naked detainees to simulate sex acts, beat them, piled them into a pyramid, put one on a leash, attached wires to a man in a pointed hood, menaced prisoners with vicious dogs, and subjected them to other abusive treatment." International news media broadcast the images on television screens worldwide. The photos dominated the covers of national newspapers and weekly U.S. news magazines. News sources from daily regional newspapers to Internet media focused their investigative power on one story, and one story only: Abu Ghraib.

National U.S.-news media outlets *60 Minutes II* and *The New Yorker* first brought allegations of prisoner abuse by U.S. Soldiers working at Abu Ghraib prison in Iraq to the public in April 2004, a month after the government initiated criminal charges under the Uniform Code of Military Justice (UCMJ) against six Soldiers still stationed in Iraq. Once the allegations came into the public eye, the government's investigation expanded exponentially, to include reviewing the individual conduct of Army General Officers and the collective U.S. interrogation policy.

But still, at the center of it all, remained the courts-martial of the six enlisted Soldiers facing dozens of charges ranging in severity from dereliction of duty to aggravated assault to indecent acts to conspiracy. The first of those original six cases was tried in May 2004, when Army Specialist Jeremy Sivits pled guilty at a special court-martial to several charges stemming from detainee abuse in November 2003. The remaining cases would be tried across three continents and last for several years.

Military counsel for the original six co-accused, defense and prosecution alike, have moved on in their legal careers. Many have retired from the military; several continue to serve on active duty and as reservists. Now, with fifteen years of hindsight, *The Army Lawyer* asks the legal teams for the government and the original six co-accused what it was like to be a part of one of the largest and most polarizing cases of Operation Iraqi Freedom.

TAL: How did you first become involved in the Abu Ghraib cases?

Lieutenant Colonel Chuck Neill, Staff Judge Advocate, 10th Support Group and U.S. Army Okinawa (then a Captain and Chief of Military Justice, III Corps): In January 2004, we deployed to Iraq for Operation Iraqi Freedom for the calendar year. Divisions and other units generally deployed for twelve months starting in the summer (I think to ensure some continuity and to avoid

all units leaving and arriving at the same time). Before we arrived, we published a jurisdiction scheme that included a 'catch all' provision. It directed that any unit in Iraq that did not fall under another General Court-Martial Convening Authority (GCMCA) in country would fall under III Corps for UCMJ purposes. When we drafted that memo, I had no idea the scope of the work we were taking on. Scattered throughout Iraq were multiple units that did not fall under a GCMCA, including the 800th Military Police Brigade. About two weeks after we arrived, Criminal Investigation Command (CID) sent me a disk with the Abu Ghraib detainee abuse pictures. I didn't have an office, so I went to a small side room in the courthouse—I sat in a folding chair with a laptop and reviewed the photos and the investigation.

Colonel John M. McCabe, Staff Judge Advocate, U.S. Army Cyber Center of Excellence and Fort Gordon, Georgia (then a Captain and Trial Counsel, 16th Military Police Brigade): [I] arrived in Kuwait on 12 January 2004, pending travel to Baghdad. On 13 January 2004, Specialist (SPC) [Joseph] Darby anonymously turned over photographs to CID at Abu Ghraib. A couple days after 13 January, the brigade commander (then-COL [David] Quantock, now-LTG(R) Quantock) called me in, told me about the possible abuse, told me the Battalion Commander at the prison was being suspended and our Brigade Deputy Commanding Officer would fly to Baghdad and temporarily take over command at the prison. I then arranged to meet with CID at Abu Ghraib and review their files on the abuse.

Colonel Robert L. Shuck, Military Judge, 3d Judicial Circuit, Fort Riley, Kansas (then a Captain and Senior Defense Counsel, Baghdad Field Office, Region IX): When I arrived in March 2003, my boss, then-Major Nate Ratcliff (Regional Defense Counsel Iraq/Kuwait/Afghanistan) handed me a thick three-ring binder and told me I was going to be representing the most senior non-commissioned officer (NCO) involved—Staff Sergeant (SSG) Ivan 'Chip' Frederick.

Mr. Fred P. Taylor, Staff Director, Trial Judiciary, Office of Military Commissions (then a Lieutenant Colonel, Regional Defense Counsel (RDC), Region IX, Trial Defense Service): [I] represented Brigadier General (BG) Janis Karpinski, Commander, 800th Military Police Brigade in the effort to respond to the findings of the Army Regulation (AR) 15-6 [Taguba] Investigation. I went TDY to Kuwait in [possibly] February 2004 and spent several days in a secure facility reading the report and crafting a rebuttal which was presented to Commander, Coalition Forces Land Component Command/3d Army. In April/May 2004, I deployed as the RDC, Region IX, where I supervised the defense effort until the cases transferred to Fort Hood.

Mr. Scott Dunn, Attorney Advisor, 5th Recruiting Brigade, Fort Sam Houston, Texas (then a Captain, Senior Defense Counsel, LSA Anaconda (Balad), Region IX): I was detailed to represent Sergeant (SGT) Javal Davis after the initial round of preferrals. I don't remember the date very well, but it was probably in April 2004. It was before it had hit the media.

Mr. Mike Holley, First Assistant District Attorney, Montgomery County District Attorney's Office, Texas (then a Major and Chief Prosecutor, III Corps, Camp Victory (Baghdad, Iraq): On stage, as The Judge Advocate General handed me my diploma at the Grad Course, he said "Holley, I think we are sending you to Iraq for some cases."

What were your initial thoughts upon reading the allegations?

Lieutenant Colonel Patsy M. Takemura, Deputy Staff Judge Advocate, 9th Mission Support Command, and Deputy State Attorney General for Hawaii (then a Captain, Defense Counsel, Camp Arifjan, Kuwait, and defense counsel for SPC Sabrina Harman): I found it incredulous that these kinds of allegations arose. I thought that there would be more accountability and oversight of Soldiers to ensure things like the allegations of abuse of detainees did not occur.

Command Sergeant Major Mike Bostic, The Judge Advocate's Legal Center and School Command Sergeant Major and Noncommissioned Officer Academy Commandant (then a Sergeant First Class (SFC), Senior Paralegal NCO, Brigade Operational Law Team, 16th Military Police Brigade (Airborne)): My initial thoughts were "how could this happen?"

Mr. Christopher Graveline, Director, Professional Standards and Constitutional Policing, Detroit Police Department (then a Major and TC, Camp Victory, Iraq): My initial inclination upon seeing the pictures in the media was to believe the Soldiers when they said these photos represented illicit interrogation practices because I didn't want to believe that our Soldiers were capable of these acts absent some justification. . . . I quickly realized my initial inclination was incorrect.

DUNN: I knew immediately that the case would be a 'big deal' and get major media coverage. The pictures were destined for notoriety, to say the least. I distinctly remember receiving the case file at the Trial Defense Service (TDS) office on Victory Base. When I accepted it, CPT Rob Shuck told me that it was going to be a huge story before I even opened the file. He was certainly right. Even so, I may have underestimated the firestorm. It went beyond my expectations. Also, I did not anticipate the broader meaning that the anti-war movement would ascribe to the incidents at Abu Ghraib. That soon became evident, however, after the story broke.

HOLLEY: I do remember my initial reaction to looking through all of the photographs in one sitting. I cried. I tried hard not to show it. But I did.

NEILL: To be perfectly honest, I was shocked by the images. I felt like the wind had been knocked out of me. But I didn't think these would be high-profile cases. It was disturbing that Soldiers were abusing prisoners and smiling while they were doing it. They seemed weirdly disconnected from what was happening. I remember looking at one picture with naked, hooded prisoners stacked in a pyramid. It was a horrifying image. In the same picture, Soldiers are standing behind the picture smiling and giving a 'thumbs up,' like they were part of some hilarious private joke. The offenses were serious, but nothing stood out to me as high profile. I remember thinking there are cases back home where corrections officers abuse prisoners. Those

cases are prosecuted but hardly make the evening news. Looking back, I had no idea how much I was misjudging the notoriety and scrutiny these cases would receive.

SHUCK: [I was] overwhelmed and terrified. Our TDS 'offices' when I first arrived consisted of a large, mouse-infested shipping container. Frequent Improvised Explosive Device (IED), mortar, and rocket attacks/explosions happened almost every morning. I was sleeping every night in a sand flea-infested large tent. Trying to get adjusted to Iraq and at the same time [being] handed a significant case was hard to manage.

How did your training as a paralegal, lawyer, or Army Soldier prepare you for your role in the Abu Ghraib cases?

TAKEMURA: Fortunately, I had been a criminal defense attorney for twelve years with the Hawaii Office of the Public Defender when I started this case. I had interactions with the local media. Nothing like the media for Abu Ghraib though. My experience as a civilian Deputy Public Defender prior to the Abu Ghraib trials gave me the foundation to tough it through and gave me a sense of my role, duties, and responsibilities. I had a strong foundation in the constitutional presumption of innocence, affording a zealous defense, seeking a fair trial, and being open-minded to a criminal defendant and their side of the story.

NEILL: Before going to III Corps, I was a TDS counsel at Fort Hood for twenty-one months. I think TDS is the best place to learn criminal law and grow as a trial attorney. I think defense work teaches you how to break down a case into its component parts and look for weaknesses. A good TDS counsel will review specifications with a fine-tooth comb, looking for omissions and ambiguity. A defense counsel will hold the government to its burden in court and looks for any cracks in the government case. In my mind, a good TC should do the same when building a case—honestly assess weaknesses, scrub the specifications for errors, and consider lines of attack. It's been my experience that, too often, TC conduct a superficial analysis of a case and give short shrift to how the defense will attack the case at trial.

An American and an Iraqi flag hang at 1ID on the Fourth of July in 2004. (Courtesy: Lieutenant Colonel Jennifer L. Crawford)

HOLLEY: The situation is analogous to the training for other Soldiers. Infantry Soldiers learn fundamentals of their craft at Basic and Advanced Individual Training (AIT). They then adapt that training to the complex, challenging environment of Iraq. Similarly, learning the fundamentals of our craft at the Judge Advocate General's School (the graduate course was particularly helpful) made all of this doable, provided the right leadership was in place—which it was.

DUNN: That's an interesting question. To a degree, there's no way to prepare for something like that. On the other hand, the actual legal work wasn't so different than any other case. There were some twists or unique aspects to it, of course, but the allegations weren't particularly complex.

BOSTIC: My training as a paralegal and senior NCO prepared me well for my role in the Abu Ghraib cases. As the lead support person to the TC, previous experiences prepared me to assist the TC and enable shared understanding of the mission.

SHUCK: I was fortunate to have had a very busy jurisdiction as a TC and almost a year under my belt as a defense counsel before being assigned to the case. I felt as qualified as anyone could be to assist SSG Frederick

and was lucky to have a competent civilian defense counsel also assigned to the case. With that said, nothing could have prepared me for Iraq in 2003.

What challenges did you face during your involvement in the case?

HOLLEY: Numerous! Our prosecution team had its hands full on every front. Everything was difficult, but resources for every challenge were ultimately provided.

BOSTIC: The challenges that I recall were typical . . . being on the legal team and having to see subjects of an investigation/accused daily; access to information and victims; and security of the case file. As with any high-profile case we keep it 'need to know.' Many personnel in the unit wanted to know what was going on and why these personnel were attached to our unit. The legal team set up with the ALOC (Administrative and Logistics staff (S1/S4)) and we shared work space and we always had to keep our files secure. We convoyed weekly to the prison to conduct interviews and training to prepare the case. Operational security and main supply route security/threats posed challenges.

GRAVELINE: As the prosecution team, one of our biggest challenges was collecting and disseminating discovery. At times during the summer of 2004, it seemed as if we were learning more about our cases from the *Washington Post* and *New York Times* since the White House, Department of Defense (DoD), and Department of Justice were releasing numerous documents concerning interrogation policy and practice due to the detainee abuses at Abu Ghraib and in Afghanistan. In order to solve this problem, the team decided that one counsel should travel back to D.C. (I drew the short straw) to collect discovery from the various federal agencies with personnel at Abu Ghraib. Being able to collect over 10,000 pages of discovery (a portion of which was classified), crafting non-disclosure documents, and delivering those documents to over a dozen defense counsel was a monumental task.

TAKEMURA: While we were in Iraq, we did not have access to certain civilian expert witnesses because they refused to come into a war zone. After transferring to Fort Hood, Texas, we did not have readily available access to witnesses and locations in Iraq because of the time and distance. It was not easy to keep track of Iraqi witnesses because they would be moved to different locations without our knowledge and sometimes could not be tracked.

DUNN: I was on a different forward operating base (FOB) from my client and all of the relevant witnesses. That imposed inherent difficulties that weren't necessarily unique to the Abu Ghraib cases, but they were considerable. Travel to Victory Base [in Baghdad] required either rotary wing travel or joining up with a ground convoy. Those means of travel were available, but not at [TDS] convenience. Traveling to Abu Ghraib prison required a ground convoy and was not the most secure location even when we were there. Phone communication between FOBs, and thus between me and [my client], was okay, but spotty. Likewise, phone communication was not always easy with my civilian co-counsel, who was in the continental United States (CONUS) most of the time. Bringing him into theater when necessary was a logistical issue in and of itself, though I give III Corps Office of the Staff Judge Advocate a lot of credit for working the logistics for us. Then-Colonel (COL) [Butch] Tate, the staff judge advocate (SJA), [was] quite reasonable about assisting us with logistical issues from the government side of the house. The same goes for the then-CPT Neill, the Chief of Justice. I thought they were very professional.

NEILL: We were very fortunate to have incredible command support. The Abu Ghraib accused were assigned to a different brigade after the investigation was completed. The unit set up an air-conditioned tent for the Soldiers, giving them privacy and space to prepare for trial. Our GCMCA supported expert assistance for each trial team. Following the initial guilty plea (in *United States v. Sivits*), we detailed a psychologist or psychiatrist to each accused. For a later guilty plea, Dr. Philip Zimbardo (of the Stanford Prison Experiment) testified via video teleconference to our courtroom on Victory Base. I think the lion's share of the credit should go to COL Karl Goetzke and then-COL Butch Tate, who convinced senior leadership that these cases needed to be tried well, and that would be expensive and time-consuming.

TAYLOR: The III Corps Rear SJA's (COL Brown, U.S. Army Reserve) response to my request for support for the five teams as they transitioned to Fort Hood and set up shop to try the cases there at Fort Hood. He accepted the request without argument and to the best of my knowledge/recollection provided the team everything we requested.

How did "mass media" affect your ability to do your job back in 2004-2005?

TAKEMURA: It was very difficult. The media would hound us in the court parking lot as soon as they saw us pull up. It would have helped tremendously to have had training by public affairs or had a public affairs officer assist [the defense] and fend off the media and allow us to do our mission.

GRAVELINE: Mass media was ever-present. Every hearing and trial were heavily covered by every major news outlet. Consequently, we were unofficial spokespersons for the Army. As an advocate, I had to be aware that any statement I made in court could be quoted and repeated many times over. Because of the continuous media presence, I made a conscious effort to be circumspect in statements that I made on the record and tried to avoid what may otherwise be harmless attempts at humor in court.

HOLLEY: Mass media was just another challenge among many. Having a talented judge advocate (JA) (Captain Rose Bleam) dedicated to handling the press was a tremendous blessing. One of the best things we did—and one that I highly recommend—was a creating a written document each day of trial or hearings to give to the press that carefully, clinically, and clearly explained what happened in the courtroom and why. These cases were the moment that I realized

how often the press gets things wrong, not intentionally, but simply because they don't have the expertise, they get in a hurry, they mishear or misunderstand, etc. (Honestly, it influences how I read news stories to this day.) For example, when the Convening Authority determined to move the *Graner* case back to Fort Hood for trial, some members of the media reported that the Regional Defense Counsel made this decision. That was not intentional, just a mistake. Providing a daily document helped increase accuracy and understanding. I also maintain that the primary trial lawyers in the case should largely if not entirely reserve their comments on the case for the courtroom, not the press room.

NEILL: After the *60 Minutes II* report (in late-April 2004), we made some logistical changes to accommodate media coverage. Our first hearings and the first guilty plea were held at a convention center in downtown Baghdad in May 2004. The facility had a huge seating area and an overflow room with closed circuit feed. At the time, it was a hassle—convoying with counsel and several accused around Iraq. But I was proud of the work we were doing and I was glad the world would get to see it. Looking back, I think the media coverage was skeptical, but fair. However, I was bothered by the implication that we only prosecuted these cases because of the media attention. It's just plain wrong. The Command preferred and referred these cases before the *60 Minutes* story. We had an approved pretrial agreement before the *60 Minutes* story. In other words, we were moving ahead at a rapid pace after getting the investigation (and well before any media coverage of detainee abuse).

BOSTIC: We knew the day before the news circuits broadcasted the allegations. Otherwise it did not affect us at all. It was interesting seeing the Secretary of Defense come 'under fire' and comment on a case I was working because of the underlying interrogation techniques that may or may not have been a significant part of the case file.

MCCABE: Mainly, I remember seeing the hysteria on the cable tv news channels. There was little interest until the *60 Minutes* show aired and that was after the [Article] 32s were almost all complete.

SHUCK: Major Ratcliff gave me the best advice for dealing with all the press inquiries and contact—just ignore it.

When you needed to run an idea by someone, on whom did you rely?

MCCABE: I immediately reached back to the Fort Bragg, XVIII Airborne Corps, Chief of Justice—the late, great COL Robert Cotell. I actually sent him copies of all the materials and got a sanity check on much that I was doing. He provided me valuable advice and mentorship. I must also say the two III Corps SJAs . . . COL [Karl] Goetzke and then-COL Tate as well as the III Corps Chief of Justice, then-CPT Chuck Neill, were all great sources of information, advice, and mentorship. There are many others who provided daily advice as well. Specifically, CPT Kyson Johnson and my brigade paralegals then-SFC Bostic and then-SGT Kary were absolutely the best, and made things happen. There would not have been success without those two and Kyson.

GRAVELINE: Then-Lieutenant Colonel (LTC) Mike Mulligan (then-head of TCAP) was a frequent confidant and provided much guidance throughout the entire process.

TAKEMURA: [There were] not many people I could run anything by. I really felt alone.

HOLLEY: [My colleagues] had an abundance of riches in talent and experience for these cases. I also leaned heavily on then-LTC Patricia Ham [former Criminal Law Department Chair at The Judge Advocate General's School] and my colleagues in the Criminal Law department at the Judge Advocate General (JAG) school. They were incredibly helpful. And they took care of my Family!

DUNN: First and foremost, of course, was my co-counsel . . . he was very committed to doing the best he could for SGT Davis. He made himself available whenever needed for late night phone calls, given the time difference between Iraq and CONUS. Apart from him, then-SGT Davis and our investigator, then-SSG Rich Russell, were the only other people with whom I could have fully privileged conversations. That said, I had a great deal of valuable interaction and feedback from my fellow defense counsel in the case. The individual interest of co-accused can come into conflict, at least in theory. In this case, the actual conflicts were somewhat minimal. I thought that the co-accused in this case, as a group, had a great deal of common interests and were all well served by cooperation among the defense counsel. I'm sure we all had certain issues for which we had to protect our attorney-client privilege, but, overall I think most of us found that our clients' best interests were served by sharing information and ideas.

For those involved in future high-profile cases, what tips can you share on how to balance stress?

BOSTIC: We all have a part in the organization's mission. Figure out how you can help in ways that you are allowed. Forward progress always eases stress, no matter how much progress. Reach out to colleagues that have "been there, done that."

MCCABE: Work hard, seek advice, and do NOT try to do it all yourself or not be willing to take advice or learn on a daily basis. It is a team effort and you have to make use of the team.

TAYLOR: If you have routines for eating, physical activity, family time, [or] work hours, don't sacrifice them for the case.

GRAVELINE: Regular exercise was a key for me—a good three- or four-mile run always puts me back into a good state of mind. Still, the stress was very real and it was important to communicate within our team to blow off some steam and to let each other know when we just needed a night away from thinking about the cases.

TAKEMURA: Do not listen to the media. They would typically get facts wrong, intentionally or not. Put your head down and do your job. Remember why you are doing

what you are doing and don't lose focus on your role as a defense attorney.

HOLLEY: Just do the next right thing. Be aware of the outside noise, but don't let it impact doing the right thing for the right reason in the right way. Lean on your team and take care of them, and they will take care of you. If you don't have the right people in place, do what's necessary to fix that quickly.

SHUCK: Don't get distracted by the noise surrounding the case. The case is like any other case—just with more people watching. Focus on the case and, as a defense counsel, your client.

NEILL: Late at night, I would walk on a third-story patio [in a palace on Victory Base] and smoke. I don't recommend smoking, but I think we all need some quiet time to think and reflect about our work. When I came home from Iraq, I kept smoking and tried to hide it from my wife. One night, . . . she asked if I was smoking. I said, "Of course not," which was arguably a lie. Then she pulled out a receipt and basically impeached me with a prior inconsistent statement. I felt terrible that I was caught red-handed, but I was incredibly proud that my wife knew how to conduct a proper cross-examination.

With so many accused, how did you avoid conflicts of interest? What internal steps did you take to put up firewalls?

TAYLOR: I discussed my supervisory responsibilities of the various defense counsel with my client and was provided permission to help each defense counsel represent their client as necessary. I made sure all my military counsel knew I represented BG Karpinski. The focus of my efforts upon arrival in theater was coordinating for administrative and logistic support for each defense team.

TAKEMURA: Unless we were actively working the case or our defenses, we did not discuss what occurred at Abu Ghraib. We would eat meals together in Iraq and sometimes hang out because the initial seven accused were a world separate and apart onto themselves. No one else wanted anything to do with us, so we only had each other. After we were sent to Fort Hood, it was just my client and me. We relied on each other to get through the case together. We became a team of two and it gave both of us strength to lean on each other.

DUNN: Any client faced with a potential conviction has at least some interest in making a deal with the government in return for testimony against other co-accused. Sergeant Davis did end up making a deal and pleading guilty to some of the charges. That said, there were many points of common interest between the co-accused. One must be mindful of conflicts, obviously, but for the most part it wasn't hard to avoid them.

SHUCK: Distance helps. Most of the other counsel were on other FOBs located throughout Iraq. The ones assigned to the case with me at FOB Victory focused on the overwhelming number of other cases we had and the nearly non-stop Article 15 and Chapter business we had.

HOLLEY: [The government] didn't necessarily have conflicts of interest, but we very carefully used immunity to proceed on the case. And, we carefully tried to adjudicate each case on its own merits. In a related matter, we did have challenges in that we didn't 'own' all the actors who would be subject to UCMJ action. Some potential accused were in other commands. In those cases, the most we could do was to recommend action to the appropriate command. This did highlight, in my mind at least, some uneven responses to accused in similar circumstances because of different convening authorities.

NEILL: In our initial batch of cases, we preferred against seven Soldiers. We negotiated a pretrial agreement early on with a generator mechanic; I thought he was the least culpable of the bunch, and he had cooperated with investigators. We had a good result with his guilty plea and other defense counsel started to talk to us about deals. One defense counsel told me, "This is just the tip of the iceberg," which sounded even more ominous than it looks on paper. I thought he was implying that there was other detainee abuse at the prison or that other people were involved. I talked to the trial team and we decided that this accused would give me a verbal proffer, and I would question him about it. We used a technique that I saw employed at the 1st Cavalry Division when I was a defense counsel. I sat down with the accused and his attorney, and we agreed these statements were pretrial negotiations and inadmissible under Military Rule of Evidence 410. I further told them that I would take notes but would not discuss the proffer with the trial team. If the accused decided to plead not guilty, or if he pleaded guilty and there was a problem with the providence inquiry, then I would not tell the trial team anything we discussed. I think this technique is great for avoiding unnecessary issues. At the time, I was concerned about derivative evidence—if I interviewed the accused with the trial team, his answers might have impacted other cases and we would have followed up on leads from the interview. At his trial, if there were any contested offenses, we would have to show the statements from negotiation were not the source of the new evidence. This technique avoided all of these potential problems.

What challenges arose in proceedings with classified and/or restricted material?

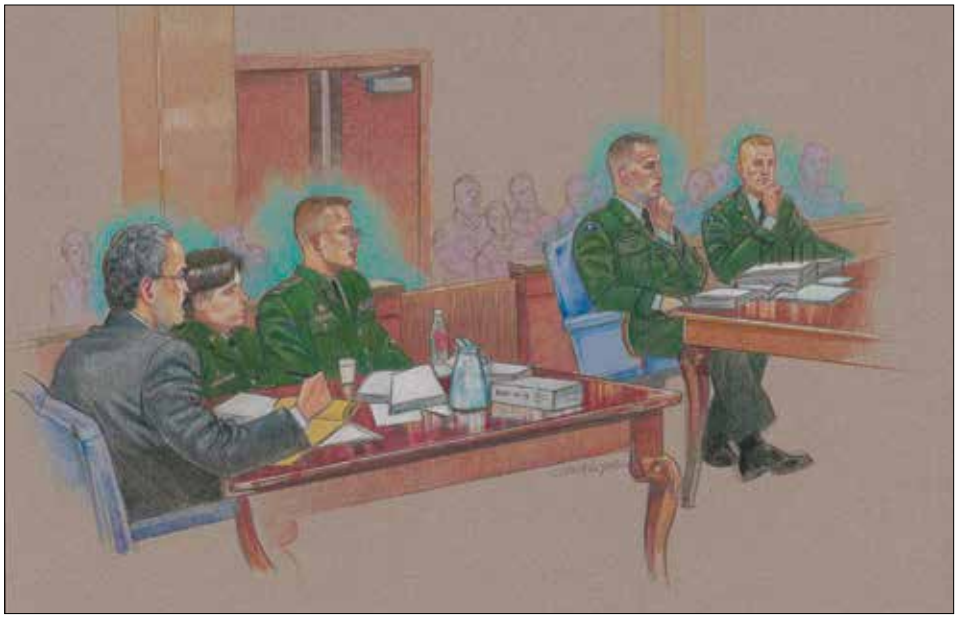
SHUCK: I had access to classified material, but my civilian defense counsel did not. Fortunately, most material either ended up being declassified or was not relevant to the case at hand. That is, we were able to shore up a defense strategy based on the non-classified matters. What was hard to deal with was the VOLUME of discovery. There were several reports done on the case, 15-6 interviews, etc. to comb through. Doing so without a paralegal was overwhelming at times and led to significant delay in the case.

TAKEMURA: Just the sheer volume of discovery was daunting. Luckily, this was the one and only case I had for a year and could single-mindedly focus on this case.

NEILL: There were multiple investigations and follow-on investigations into Abu Ghraib detainee abuse. In my opinion, these investigations were over-classified which made our discovery obligations more difficult. We were obligated to turn over witness statements and other evidence from these investigations, and most were covered with blanket "SECRET" classifications (even when nothing in an exhibit seemed to require classification).

GRAVELINE: Classified material presented significant hurdles for our team. First, the first 15-6 officer decided to classify his entire report and attachments (including over several dozen witness statements), which made disclosure, especially to civilian defense counsel, extremely difficult. Second, given the large amount of international media interest, we wanted to ensure that as much of the court-martial process as possible would be open, public hearings. Thus, we engaged the various classification authorities early in the discovery process to conduct classification reviews and were successful in declassifying all materials used in the various courts-martial. Finally, dealing with other federal agencies with classified material (Central Intelligence Agency, National Security Agency) proved challenging, but we were able to leverage higher-level DoD support to obtain that material as well. I hope that decisions we made as the prosecution team have affected future cases. We decided to take a very expansive view when it came to disclosure. We actively sought out relevant and material documents, regardless of whether they were in our physical possession in Iraq. We strongly believed that this view was the correct way to go about the discovery process and I hope that if presented with a similar situation, trial counsel now would take a similar view of their disclosure obligations.

MCCABE: One challenge I remember, I immediately allowed full access to defense attorneys at Abu Ghraib. Logistics was an immediate challenge. Security, travel, and the like. Shortly thereafter, Office of The Judge Advocate General determined that all detainees were off limits for interviews until further notice. I had to stop allowing anyone to interview detainees or possible victims. I knew defense would have objection/motions and it had to be worked out in the court.



Defense Table Abu Ghirab [sic] England Court Martial Prosecution Table, May 3, 2005. Colored pencil on gray paper. Pat Lopez. (Credit: Prints and Photographs Division, Library of Congress).

How do you think decisions regarding Abu Ghraib discovery affected future cases?

HOLLEY: I will say that the first substantive thing I did in my role was to meet with the defense counsel and commit to them to provide resources and information as freely as we could possibly provide. We wanted to provide investigative resources to the defense teams as well—and we did. I'm proud of that. I think serving in TDS prior to this assignment was helpful to me in a number of ways, not the least of which was understanding that an effective defense attorney is a prosecutor's best means to ensure that justice really is done.

NEILL: As a teaching point, I think the best way to handle classified evidence is to provide it to defense counsel and then distill the evidence into unclassified material (like stipulations of expected testimony) to be admitted at trial. Counsel should work closely with S2/G2 personnel to ensure the stipulations do not contain classified material. In our cases, some interrogation techniques were still classified at the time of trial. We turned over the classified version and worked with the defense to admit unclassified stipulations. The defense was able to admit material without challenge and we avoided the logistical challenges of a classified trial.

DUNN: Dealing with classified material was a major hassle. My office in Balad did not have a SCIF [sensitive compartmented information facility]. Even if it had, I did not have a courier card to carry classified material to it from Victory Base. I did not have SIPR [Secret Internet Protocol Router Network] access either, though I'm not sure how much of the classified material was digitized anyway. I had to go to Victory Base to view the classified material. I think the government team did what they could to facilitate access, but it was an inherently difficult thing to deal with. Merely viewing the classified parts of investigations, etc., takes time. Reviewing them sufficiently for case preparation is something else altogether. It was difficult. I think we all did the best we could.

What is your most memorable experience with the Abu Ghraib cases?

TAKEMURA: Being on active duty, coming from a Reserve status was an amazing experience. The other judge advocates I met were truly dedicated, hard-working, self-sacrificing patriots. I am honored to

A signing ceremony signifying the transfer of Joint Coordination Center Abu Ghraib in 2010 with Soldiers from the 4th Stryker Brigade Combat Team, 2nd Infantry Divison and Iraqi police. (Credit: PFC Mitchell Ternay)

be in the Army JAG Corps. For me, an immigrant who could not speak the language when I was adopted and brought to our great country, to now being an officer in the U.S. Army is truly humbling. Being mobilized for thirty months to finish up the court-martial was very difficult. But that was a choice I made . . . to not redeploy before the case concluded. I fully understand now, and empathize with, what it means to be a Soldier and all the sacrifices that come with it. We certainly ask a lot of our loved ones to allow us to do what we do.

NEILL: In November 2004, our SJA decided that I would redeploy early to help Mike Holley and Chris Graveline at Fort Hood. At the same time, the command decided the remaining cases (*United States v. Graner*, *United States v. Davis*, *United States v. Harman*, and *United States v. England*) would all be tried back in the States. I was part of the escort team that took back the Abu Ghraib Soldiers. We took a charter flight with other redeploying Soldiers. I remember walking through the Dallas airport in uniform and passing through a group of older men and women who were there to welcome us back. They were cheering and hugging us, many of them tearfully thanked us for our service. The other memorable moment was watching Jon Stewart talk about the *Graner* trial in almost real time. One day I was in court listening to the defense opening statement, and the next day Jon Stewart was quoting the opening statement on *The Daily Show*. It was surreal.

MCCABE: I will never forget [my NCO and I] going to Abu Ghraib and meeting with CID. We got the entire file (we copied everything once for our working file), we spent the night on two cots in a bay that was part of the prison. Kind of creepy for our first night there. But, we sat together on a cot, pulled up his laptop and went through every photo. This went late into the night . . . as we went through, we began to page through every photo to include the ones that would become infamous. We realized we had some serious issues, possible courts-martial, and our work load in military justice for this deployment just became our main effort.

BOSTIC: My most memorable experience was the weekly visits to the prison to train each Soldier on-site [about the] Geneva Conventions. This was our first task shortly after arriving and receiving the case file at the direction of our Brigade Commander.

TAYLOR: Traveling to the convention center in the Green Zone of Baghdad via a convoy of three Ford Explorers to conduct a site survey of the convention center as the site of the arraignment of the co-accused Soldiers. [Also, I remember] dealing with SGT Davis' civilian defense counsel who ultimately traveled to Iraq for the arraignment. As we were planning his travel, he expressed a desire to go visit Abu Ghraib.

When told it might not be possible, his retort was [that by himself he would] fly into Baghdad International Airport, get a hotel room, rent a car, and drive. There was a hotel in Baghdad where media and NGOs [non-governmental organizations] stayed, so maybe he could have gotten a room. The bigger problem with the plan was that Baghdad International Airport was not open to commercial flights; there was no Hertz or Avis desk at the airport and the route to Abu Ghraib was far from secure. (I fell out of my desk chair laughing when told of his retort.) Also, all of us [defense counsel] being told to bed down for the night in a gym-sized room the night before the arraignment. It was very difficult for my defense counsel and their clients to get any meaningful rest nor did they really have a private place to discuss the next day's events.

DUNN: The whole experience was indelible. [I remember] the initial pretrial hearings in the Green Zone. That's where I saw the media coverage in person for the first time. Plus, taking the convoy over there was memorable. [Also,] visiting Abu Ghraib, especially the cell block where the notorious "pyramid" occurred.

GRAVELINE: My most memorable experience was my first motions hearing as the trial counsel in the cases. Major Mike Holley had yet to arrive in Iraq, but we were set to hear a number of motions from the various defense counsel, so I was the only government representative present on the record. The hearing took place in the Green Zone and was covered by every major news agency with a presence in Iraq. It was during that hearing that Judge Pohl enjoined President Bush from bulldozing the Abu Ghraib prison (which the President had promised to do in a speech a few days earlier) and ordered defense counsel interviews of all members of the chain of command from the U.S. Central Command commander down to the platoon leader—all I could think of was how was I going to explain these developments to the SJA once I got back to Camp Victory!

HOLLEY: One memory, in particular, was being in the back of a C-130 flying out of Baghdad on a trip that would lead to hearings in Mannheim, Germany. I remember sitting next to Military Judge LTC Robin Hall on one side, [SPC] Charles Graner and several other accused on the other side. We were packed close together in the back of the aircraft, that green light coloring everything. A few feet away toward the rear of the aircraft was a coffin with an American Flag draped over it. Surreal. And poignant. I'll never forget that moment.

Most positive experience?

BOSTIC: My most positive experience was as the convoy commander for the first case we prosecuted. We traveled in a Rhino with tactical platforms. Judge, prosecutor, defense, escorts—all in a convoy headed to the heart of Baghdad to set up a 'courtroom' and conduct a trial.

TAYLOR: [I remember] traveling to and from the convention center via a convoy in a Rhino (up armored Winnebago) with the co-accused thinking 'this is one big target!'

SHUCK: The professional challenge. Dealing with complex, challenging, and interesting facts, witnesses, crime scenes, and law.

TAKEMURA: This case reinforced my belief that there are always two sides to a story. One can never judge by initial appearances. Always ask questions, and don't be afraid to fight like crazy for your client. Even when the odds are against you, keep at it and keep trying. I remember filing several pre-trial motions to dismiss some of the charges and specifications. While I was preparing the motions, when I was able to consult with others, several colleagues told me not to waste my time. After the hearing, Judge Pohl granted some of my motions and dismissed several charges and specifications. My client went from looking at a maximum incarceration of seventeen years to five and a half years when we started the court-martial. Judge Pohl gave me back a sense of justice, fairness, and always striving to do the 'right thing,' no matter the odds. I cannot even begin to know the pressures Judge Pohl had during these cases, but he focused on the law and was very courageous in his rulings. As long as everyone does their job, the right result will be reached.

HOLLEY: Sitting at a picnic table at the makeshift post exchange at the end of a long day drinking hot Gatorade with Butch Tate. And laughing.

NEILL: I think the best part was learning from two great SJAs and some extraordinary trial attorneys. We had two SJAs during our deployment—COL Karl Goetzke and then-COL Butch Tate. Both were patient and thoughtful and encouraged me to make decisions about military justice actions. The JAG Corps talks a lot about underwriting risk—both of our SJAs empowered their people. I was very proud that everyone expected us to follow the evidence wherever it might take us. I never felt pressured to curtail interviews or limit follow-up questioning. To the contrary, I knew every member of the SJA office expected us to get to the ground truth.

GRAVELINE: The continuing friendships we developed within the prosecution team. None of us had ever worked together before and many of us had never even met each other prior to being brought together in Iraq. We immediately meshed and have remained close friends over the years.

DUNN: I valued the sense of collegiality that reigned among the defense counsel for all the accused. I can't speak for everyone else, but from my perspective, we cooperated very well when we could do so in our clients' best interest. There were some great people representing the other co-accused, both military and civilian counsel. Collectively, I liked the co-accused as well. I won't editorialize, but I will say, that whatever one thinks of the incidents at Abu Ghraib, knowing all of the accused as real people tempers one's perspective.

Most negative?

BOSTIC: [The] embarrassment that this incident caused and how some believe a few attacks on U.S. personnel happened because of the misconduct.

TAYLOR: After the cases transferred to Fort Hood, getting all five military defense counsel back to CONUS in a timely fashion [was a challenge].

DUNN: The media firestorm. It didn't affect me directly, but it's frustrating to see extensive coverage of a case when you're acutely aware of every error made by the reporters, and there is so much incendiary and tendentious political commentary related to it.

SHUCK: Concerns from folks that TDS counsel were not going to be aggressive advocates because of [our] status as U.S. Army Officers. Nothing could be further from the truth. Our job was to focus on our clients' interests—not the U.S. government's interests in the war.

MCCABE: The misunderstanding of the events as portrayed in the media and in some historians' books. Just two years ago, I was at a book presentation at the Pentagon where the author spoke about the futility/ineffectiveness of military/government/intelligence branch support for certain interrogation techniques. Part of his presentation included Abu Ghraib photos and data from Abu Ghraib. I felt compelled to discuss with the author that in no way were these events government-sanctioned events and these were independent criminal activities. Perhaps the photos helped him sell books, but this did not reflect government-approved techniques. One other negative from back in 2004 was my thought that some generally good Soldiers got mixed up in some events that would not be typical for them. I'm not sure what drove them to some of these events, but some I felt a bit sorry for them because I thought a few were good people that did some bad things. So, I was sorry that we had to prosecute these events—but, of course, it was the right thing to do.

NEILL: Looking back, I wish I had shared more with my team. During the *Davis* court-martial, I was the media liaison. I provided read-aheads to the press pool, sat through the trial, answered questions during recesses, and worked closely with our public affairs office. My wife had a miscarriage during that trial, and I didn't tell anyone about it. We grieved privately, and I think that was a mistake.

What thoughts can you share to benefit paralegals, JAs, or *TAL* readers if they find themselves in the middle of a high-profile case?

TAYLOR: These cases are marathons. Pace yourself personally and professionally. From the perspective of the government, have a theory of the case and stick to it. Be prepared to fully support the defense function. Because the case will take a significant amount of time to conclude, don't take things personally.

TAKEMURA: Keep your head down. Remember the Army values and remember your mission.

BOSTIC: We are a unique team, trained to proficiency. We learn from our experiences and knowledge. We need to keep sharing and understanding why we do what we do.

HOLLEY: There's a time to stay with the playbook and sometimes there is a time to depart from it. Someone wise made the call early on that these cases were going to require additional help. They were right. Sometimes it makes sense to apply extra resources for certain situations. Spend those resources for officers, NCOs, equipment, facilities, investigators, etc. The other key component is leadership. I'm not sure you can effectively execute a successful prosecution in a high-profile, complex case or cases without the right SJA. The system is not built to operate without that key player in place and steering the ship. We were so fortunate to have Butch Tate at the helm. The value of competent and well-resourced defense attorneys cannot be overrated. We had them in this case by and large. Lastly, I would just reiterate the need to do the right thing for the right reason. Money, fame, and power all tend to deflect a moral compass. Be aware of that. Resist it. Stay the course.

MCCABE: Trust your team, do not act different—for the most part, and take it on as any other case. There may be some special considerations, of course, but what works for the routine usually works for the high-profile case. So, trust your instincts and training and be deliberate. Use backward planning to war game your decisions and their implication on future events.

DUNN: Try not to let the stupid, uninformed, or agenda-driven commentary distract you. Media coverage may provide a basis for unlawful command influence motions or other information relevant to the case, [b]ut paying attention is one thing and getting distracted by potentially unfair or inaccurate representations is something else. At the end of the day, the case will be decided in a courtroom, in a GCMCA's office when final action is taken on the case, and perhaps ultimately in an appellate court. Those are the venues to consider.

SHUCK: Yes, it is a 'big' case. Yes, there are more folks interested in it. It is still a case that uses the same *Manual for Courts-Martial*. Focus on the task at hand and, to the best of your ability, 'ignore the noise.'

What role did Abu Ghraib play in shaping your future career decisions?

TAKEMURA: In many ways it deepened my passion for the Army JAG Corps, criminal defense work, and the absolute total dedication that true defense attorneys have. In another way, I was very disappointed that a member of my chain of command at Fort Hood did not provide me with support that I needed as a defense counsel in order to zealously represent my client. However, I realize it was just one leader and that most of the JAG leadership was, and is, amazing.

HOLLEY: In a number of ways, but primarily it cemented my view of what a prosecutor should be and do. By that I mean that a prosecutor should take overall responsibility for obtaining a just outcome in a situation. This means providing the defense with the necessary tools to do their job. It also means not under- or over-prosecuting cases. It means getting to the right result in spite of any external pressures. The experience also taught me that pressure and stress can be managed, that public service is a high calling, and that the rule of law has to be both defended and honored.

A watch tower at the Abu Ghraib Prison in 2006. (Credit: Lt. Sean Riordan)

BOSTIC: Not so much career decisions, but [my Abu Ghraib experience] enabled me as a leader to always stay engaged in my organization and to support [my] leaders. In my opinion, most of what happened there was due to an absence of leaders and mismanaged priorities. Yes, more leader visits for such a significant mission would have possibly prevented much of the misconduct.

NEILL: No one gets advance notice of a high-profile case. Much like life, high-profile cases are unpredictable and spring out of nowhere; counsel have to nimbly react. Even the most-mundane case is a learning opportunity and a chance for critical self-assessment. More important, every counsel should be talking about cases and developing an internal compass. I believe it is much easier to do the right thing in a high-profile case when you've already become accustomed to doing the right thing in other cases. I turned twenty-nine during the deployment. I had only been out of law school for five years when I started working on the Abu Ghraib cases.

SHUCK: I ended up remaining on active duty and trying to specialize, as much as one could do during my time in the JAG Corps, on criminal justice. I also requested to deploy to Iraq in 2008 as a brigade judge advocate with the 1st Armored Division. I felt I needed a different wartime experience, one that saw the very best of America's Army everyday rather than its criminal side. [It was the] most rewarding and therapeutic thing I ever did in my career.

DUNN: Professionally, both as an attorney and as a Soldier, it was a very interesting experience. I don't mean to sound insensitive to the effect of the prosecutions on SGT Davis or any of the other co-accused. I wish things had gone better for all of them. But from a purely professional perspective, the case in some ways exemplified that uniqueness of military legal practice. I can't imagine having a comparable experience as a civilian attorney, with the exception of certain positions in the Department of Justice. A fair number of JAGs ended up touching some aspect of the Abu Ghraib cases, and many of my peers got to work on other high-profile, newsworthy cases stemming from the Global War on Terror. It's fair to say that we participated in history.

LTC Crawford is an Associate Dean at The Judge Advocate General's Legal Center and School. From 2004-2005, as a Captain, she served as the military defense counsel for SPC Megan Ambuhl, one of the original six Abu Ghraib accused.

(Credit: istockphoto.com/Evgeny Gromov)

No. 2

Prosecuting Human Trafficking

By Major Matthew T. Grady

In August 2013, Lieutenant Colonel (LTC) Raymond Valas was an Army War College Fellow attending Syracuse University.[1] Lieutenant Colonel Valas was a member of the New Hampshire National Guard at the time, and he had recently served as the commander of an exercise in El Salvador from April to June 2013.[2] Lieutenant Colonel Valas, along with members of his unit, traveled to a San Antonio hotel to review the exercise in August 2013.[3] While in San Antonio, LTC Valas visited the website www.Backpage.com.[4] Those within the commercial sex industry typically used Backpage to arrange commercial sex encounters, which ultimately drove the U.S. Department of Justice to seize and shut down the website in April 2018.[5]

Using Backpage, LTC Valas scheduled a prostitution date to occur at his hotel room while he was in San Antonio.[6] T.J., a fifteen-year-old runaway, showed up at his room.[7] T.J. met her trafficker, Marcus Wright, a few days earlier at a bus stop.[8] Since neither LTC Valas nor T.J. had a condom, LTC Valas "instructed T.J. to perform sexual acts other than intercourse with him."[9] Lieutenant Colonel Valas gave T.J. $150, which T.J. immediately provided to Wright after she left the hotel room as Wright would beat her if she did not give him the prostitution proceeds.[10]

Lieutenant Colonel Valas kept in contact with T.J. over the course of the next day, and he scheduled another prostitution date with her for early the following day.[11] This time, LTC Valas had a condom, and he had sexual intercourse with T.J.[12] After having sex with LTC Valas, T.J. ran away from Wright because of the physical abuse he perpetrated against her.[13] Law enforcement subsequently arrested Wright, two of his associates who helped recruit and train his victims, and LTC Valas.[14] The government charged all four with sex trafficking of a minor in violation of 18 U.S.C. §§ 1591(a) and (b)(2).[15] At trial, LTC Valas asserted that he did not have sex with T.J.[16] Instead, he claimed that he merely interviewed her as part of a research project for his Army War College thesis.[17] The jury found LTC Valas guilty, and the district court sentenced LTC Valas to fifteen years of imprisonment.[18]

The International Labour Organization estimates that nearly 40 million human trafficking victims exist worldwide.[19] While there is no estimate for the number of human trafficking victims that exist in the United States, many suspect that it reaches into the hundreds and thousands.[20] Human trafficking occurs within the United States in both legal and illegal industries, including "commercial sex, hospitality, traveling sales crews, agriculture, janitorial services, construction, restaurants, care for persons with disabilities, salon services, massage parlors, fairs and carnivals, peddling and begging, drug smuggling and distribution, and child care and domestic work."[21]

Given its prevalence both worldwide and in the United States, military leaders and their legal advisors need to be aware of

human trafficking and the tools available to prosecute it. Sadly, LTC Valas' case is not an outlier, as recent civilian and military prosecutions have involved other Soldiers along with Airmen and Sailors.[22] One recent federal prosecution even involved a Soldier as an identified victim of human trafficking.[23]

This article will review some of the common myths associated with human trafficking and provide background behind Congress' enactment of the Trafficking Victims' Protection Act (TVPA) in 2000. This article will then set forth the legal elements necessary to establish violations of forced labor and sex trafficking in violation of 18 U.S.C. §§ 1589 and 1591. These are the primary two statutes used to prosecute human traffickers in federal court. This article will next discuss the extraterritorial provisions associated with the federal human trafficking statutes, which can be used to prosecute traffickers who commit their crimes outside of the United States. Finally, this article will include best practices to use in prosecuting human trafficking cases and additional resources that military criminal law practitioners and law enforcement can use in assessing any potential trafficking situation.

The Road to Enactment of the Trafficking Victims' Protection Act

In 1983, authorities found two men with intellectual disabilities working on a dairy farm in Chelsea, Michigan.[24] The men were "in poor health, in squalid conditions, and in relative isolation from the rest of society."[25] One of the men had previously spent several years at a state mental institution.[26] The men worked every day, often up to seventeen hours a day, and eventually were not paid for their work.[27] Ike Kozminski, along with his wife Margarethe and their son John, operated the farm. They physically and verbally abused the men if they failed to work and threatened to return the one to his state mental hospital if he did not work.[28] The Kozminskis also failed to provide the men with adequate nutrition, housing, clothing, or medical care, and discouraged them from talking to others, including their relatives.[29]

The government charged the Kozminskis with violating 18 U.S.C. § 1584, which prohibited involuntary servitude, and argued that "the Kozminskis had used various coercive measures—including denial of pay, subjection to substandard living conditions, and isolation from others—to cause the victims to believe they had no alternative but to work on the farm."[30] After reviewing the language and statutory history of § 1584, the Supreme Court held that the statute "necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process."[31] The Court then reversed the convictions because the government had presented evidence at trial that the Kozminskis used additional nonviolent means of coercion, such as compulsion through psychological coercion.[32] This would have been an invalid basis for the jury's verdict, and forced the Court to clarify the law on involuntary servitude.

Ultimately, Congress passed the TVPA in 2000 to overrule *Kozminski* and specifically criminalize actions that compel another's service through nonviolent coercion.[33] Congress recognized that many traffickers target vulnerable victims susceptible to nonviolent coercion. Specifically, Congress found that traffickers target those who are poor, unemployed, lack education, and lack economic opportunities.[34] Congress also found that traffickers excel at isolating their victims from family, friends, religious institutions, or other sources of protection and support compounding their vulnerability.[35] Finally, Congress recognized the value of implementing a victim-centered approach to combating trafficking in persons, which includes "protecting rather than punishing the victims of such offenses."[36] Congress has subsequently amended the TVPA six times since first passing it in 2000.[37]

Despite the TVPA's nineteen-year history and efforts to raise the awareness of human trafficking, several myths about it abound. First, many people assume that trafficking victims self-identify as victims and want to be rescued as soon as possible. The unfortunate reality is that many victims are afraid to approach law enforcement or strangers for help because they may be in the country unlawfully or have engaged in illegal acts, such as prostitution, and fear prosecution.[38]

Second, the term "trafficking" conjures up the idea that movement, borders, and foreign nationals must be involved.[39] However, no federal human trafficking statute requires the government to show that someone moved across a state or federal border. For example, Ronald Evans Sr. received thirty years in federal prison after he recruited homeless individuals from Jacksonville, Florida, and forced them to work his potato and cabbage fields by threats of violence, actual violence, and imposing a series of never-ending debts.[40] None of the victims ever left St. Johns County in Florida, and all victims were U.S. citizens, yet the government still secured a conviction because none of the federal statutes are dependent upon movement across state lines or status as a foreign national.

Third, many people assume that human trafficking involves "chains, bars, and beatings."[41] This mindset could inhibit a layperson or untrained law enforcement officer from identifying a potential case.[42] The passage of the TVPA reflected Congress' view that chains, bars, and beatings are not required for a successful prosecution, and that traffickers can be convicted for employing nonviolent coercion upon their victims to compel their service.

The Federal Human Trafficking Statutes

While Chapter 77 of the United States Code contains several statutes that can be used to prosecute human trafficking, the primary ones used are 18 U.S.C. § 1589, which prohibits forced labor, and 18 U.S.C. § 1591, which prohibits sex trafficking of a minor or by force, fraud, or coercion.

Sex Trafficking

The government must satisfy the following three elements to convict someone of sex trafficking: (1) the defendant knowingly recruited, enticed, harbored, transported, provided, obtained, advertised, maintained, patronized, or solicited by any means a person, or benefitted financially from participating in a venture that did so; (2) the defendant did so knowing or in reckless disregard

> of the fact, except for advertising, that means of force, threats of force, fraud, coercion, or any combination of such means would be used to cause the person to engage in a commercial sex act, or that the person had not attained the age of eighteen and would be caused to engage in a commercial sex act; and (3) that the defendant's acts were in or affected interstate or foreign commerce.[43]

First, the ten verbs listed in § 1591 are not further defined, which means that courts are to give them their ordinary, everyday meaning.[44] The ten verbs contained in the first element are relatively broad and encompass conduct typically associated with trafficking, such as recruiting, housing, driving, and advertising victims. However, the first element also attaches criminal liability to consumers or buyers who patronize and solicit trafficking victims, such as LTC Valas.[45]

Moreover, those who are aware that a trafficker has engaged in the prohibited ten verbs listed above and benefit financially are also subject to criminal liability. For example, the government convicted a New Orleans motel owner under this theory after the evidence showed that he knew the traffickers compelled the victims to prostitute from his motel.[46] In that case, the owner charged the traffickers inflated room prices to conduct prostitution-related activities from his hotel, and he knew that the traffickers used violence against their victims to compel them to engage in commercial sex acts.[47]

Second, the government can either show that the defendant used a minor under the age of eighteen, or used force, fraud, or coercion to cause another to engage in commercial sex acts. As far as sex trafficking of a minor, the government can convict a defendant under any of the three following theories: (1) the defendant knew the victim was under eighteen; (2) the defendant recklessly disregarded the fact that the victim was under eighteen; or (3) the defendant had a reasonable opportunity to observe the victim.[48]

Reckless disregard essentially means that the defendant consciously and carelessly ignored facts and circumstances that would cause a reasonable person to question whether the victim was actually eighteen years old.[49] For example, the fact that a person was still attending high school would cause a reasonable person to inquire whether they were under eighteen.

If the defendant had a reasonable opportunity to see the victim, strict liability essentially follows per 18 U.S.C. § 1591(c).[50] Thus, if the defendant saw the victim and developed an intimate relationship with him or her, this would satisfy the "reasonable opportunity to observe" requirement.[51] Consent is also not a defense to sex trafficking of a minor, as minors cannot legally consent to sexual contact under the law.[52]

While force and fraud are undefined under § 1591 (and thus given their ordinary, everyday meanings), coercion is specifically defined in § 1591(e)(2). Congress defined coercion as "(A) threats of serious harm to or physical restraint against any person; (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (C) the abuse or threatened abuse of law or the legal process."[53] Congress further defined "serious harm" as "any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm."[54] Finally, Congress defined "abuse or threatened abuse of law or legal process" as "the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action."[55]

For example, imagine that a trafficker recruited a nineteen-year-old specialist to prostitute off Backpage and provide half of the proceeds to him. The specialist agreed to do so at first; however, she changed her mind after one week and informed her trafficker that she no longer wished to engage in commercial sex activity. In response, the trafficker threatened the specialist that he would inform her commander of her prostitution activities unless she agreed to continue prostituting. The specialist then relented and did so because she did not want her commander to find out. In this hypothetical situation, the trafficker's threat could constitute a threat of serious harm since disclosure to the commander could result in various psychological, financial, and reputational harm to the specialist. In particular, the specialist may fear that disclosure of her secret could subject her to discipline under the Uniform Code of Military Justice (UCMJ), separation from the military, and/or embarrassment and humiliation within her unit. This is precisely the type of nonviolent coercion that Congress sought to eradicate by passing the TVPA.

Finally, the government must show that the defendant's acts were in or affected interstate or foreign commerce. This is typically not a difficult element for the government to satisfy, as courts have expansively interpreted this element. For example, the use of any of the following have been held sufficient to satisfy the interstate commerce requirement: hotels that serve out-of-state customers, condoms manufactured out-of-state, the internet, cellular telephones, illegal drugs, and products that moved in interstate commerce, such as nail or hair extensions.[56]

Forced Labor

The government must satisfy the following three elements to convict someone of forced labor: (1) the defendant acted knowingly; (2) the defendant obtained the labor or services of another; and (3) the defendant did so

> [A] by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person; [B] by means of serious harm or threats of serious harm to that person or another person; [C] by means of the abuse or threatened abuse of law or legal process; or [D] by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.[57]

"Serious harm" and "abuse or threatened abuse of law or legal process" have the same definition for forced labor as sex trafficking.[58]

First, while direct evidence of the defendant's mens rea rarely exists, circumstantial evidence can be gathered to prove that the defendant acted knowingly. Such evidence could include physical assaults such as slapping, punching, choking, burning, or raping the victim. It could also include nonviolent means such as debt manipulation, verbal abuse, demeaning conduct, onerous living or working conditions, ominous comments, isolation, and withholding pay. Also, individuals who benefit financially by receiving anything of value from participating in a venture knowing that one's labor or services are compelled can also be liable for forced labor much like sex trafficking.[59]

Second, courts broadly interpret the term "labor or services" since the statute does not define it. For example, one court defined "labor" as "the expenditure of physical or mental effort."[60] The same court defined "services" as "conduct or performance that assists or benefits someone or something."[61] Thus, the broad definitions of labor and services included mentally disabled farm workers who were forced to perform videotaped sex acts[62] and a woman whose domestic partner required her to perform recorded acts of bondage, domination, and sadism.[63]

Finally, "serious harm" can again include "psychological, financial, or reputational" harm. Common nonviolent serious harm in the context of forced labor typically includes financial harm, such as threats not to pay the victim or his or her family members, or placing the victim in never-ending debt over food, housing, or travel.[64] Abuse of law or legal process is also frequently used in cases involving foreign nationals who may be in the country unlawfully, as the trafficker typically threatens victims that they will be turned over to immigration officials if they do not work as they are told.[65]

Comparing Sex Trafficking to Forced Labor

While forced labor and sex trafficking share many similarities, there are a few differences between them that are worth highlighting. First, fraud alone can serve as a prohibited means in a sex trafficking prosecution; however, fraud alone cannot legally serve as a prohibited means to support a forced labor conviction.[66] For example, if a sex trafficker lies to a victim and falsely promises that the victim will keep half of the proceeds earned from prostitution, the trafficker can be convicted of sex trafficking by fraud.[67] However, false promises as to the amount of money a worker may earn in a restaurant, for example, cannot serve as a basis for a forced labor conviction alone. Nonetheless, such false promises are typically made as part of a broader coercive scheme, pattern, or plan intended to compel the worker's labor or services. In addition, false promises alone could serve as the basis for other, related federal law violations, such as wire fraud, fraud in foreign labor contracting, or visa fraud.[68]

Second, the sex trafficking statute treats one's status as a minor differently than the forced labor statute. For example, the government does not need to prove that a trafficker used force, fraud, or coercion to compel a minor to engage in commercial sex acts. The fact that a minor engaged in commercial sex acts alone is sufficient for the government to prove that sex trafficking occurred. If the government does prove that a trafficker compelled a minor to engage in prostitution via force, fraud, or coercion, the mandatory minimum sentence that must be imposed rises from ten years to fifteen years.[69] In contrast, the government must show that a trafficker coerced the labor or services of minor labor trafficking victims, and there are no mandatory minimum sentences for labor traffickers.[70]

Third, the sex trafficking statute requires the government to show that a trafficker's acts were in or affected interstate or foreign commerce.[71] There is no such requirement in order to prove a forced labor violation.[72] This is because Congress implemented the statute prohibiting forced labor pursuant to their ability to eliminate the vestiges and badges of slavery under the Thirteenth Amendment.[73]

Extraterritorial Jurisdiction

Generally speaking, federal criminal statutes do not apply outside of the territorial limits of the United States unless Congress has specifically authorized otherwise.[74] Human trafficking is one area where Congress has specifically authorized extraterritorial jurisdiction as long as the offender is (1) a U.S. citizen; (2) a lawful permanent resident; or (3) present in the United States, regardless of nationality.[75] Thus, the government can prosecute those who fall into these three categories, even if the trafficking conduct occurred entirely overseas.[76]

For example, assume a civilian contractor, who is a U.S. citizen, lives in South Korea and works on Yongsan Garrison. Further, assume that the contractor is friends with a Thai national, who tricks Thai women into entering South Korea on the promise of legitimate, lawful employment. Upon arrival, the contractor is aware that the Thai trafficker takes the victims' passports and imposes a significant debt upon them for helping them travel to South Korea. The trafficker then tells the victims that they must prostitute in order to obtain their passports back and pay off their debt. The contractor is aware of this and aware that the trafficker threatened to harm the victims' families back in Thailand if they did not repay their debt via commercial sex. Finally, assume that the contractor assisted the trafficker by renting an apartment in Seoul to house the victims. Under these circumstances, the contractor may be criminally liable for benefitting financially from participating in a venture knowing that force, fraud, or coercion would be used to cause the victims to engage in commercial sex acts. The government can prosecute the contractor because he is a U.S. citizen, regardless of the fact that all of the criminal conduct at issue occurred entirely outside of the United States.[77]

If a Soldier was assisting the trafficker in the above scenario instead of a civilian contractor, they could be prosecuted under Article 134, UCMJ.[78] One of the most challenging aspects of extraterritorial investigations is the lack of subpoena power over victims and witnesses who are foreign nationals.[79] A potential solution to this problem is deposing cooperative victims and witnesses.[80] In the above hypothetical example, a deposition could capture a victim's account prior to leaving South Korea to return to Thailand. The best practice would be for a deposition to occur after

preferral of charges and exchange of discovery with the accused's defense counsel, as the defense attorney would have the same incentive and information to cross-examine the witness as they would at trial. Further, the deposition could then be admitted into evidence at trial to be used to convict the trafficker.[81]

In addition, the government may prosecute individuals who commit human trafficking outside of the United States while employed by or accompanying the Armed Forces or federal government.[82] Congress defined "employed by the Armed Forces" to cover civilian employees, contractors, or subcontractors of the Department of Defense (DoD), or similar federal agencies, who are present outside of the United States in connection with their employment and who are not nationals or ordinarily resident in the host nation.[83] Accompanying the Armed Forces includes dependents residing with members of the Armed Forces, civilian employees, or contractors (including subcontractors) who are not nationals or ordinarily resident in the host nation.[84] Similar definitions exist for those employed by or accompanying the federal government.[85]

For example, assume a Kuwaiti national is a DoD subcontractor who is responsible for providing janitorial services on a U.S. facility in Qatar. To staff his cleaning service, further assume that the Kuwaiti subcontractor recruits janitors from Nepal and the Philippines by false promises. The Kuwaiti subcontractor falsely promised his potential workers that they would receive $1,000 a month, and that transportation would be provided to and from their country of origin every six months so they could go back and visit their families. However, upon arrival in Qatar, assume that the Kuwaiti subcontractor informed the workers that they would actually only receive $100 a month for their services, and that they owed him for all transportation and any visa processing expenses. Finally, assume that the subcontractor threatened the workers with death and dishonor if they did not repay him by working for his janitorial services company. Under these facts, the United States could prosecute the Kuwaiti subcontractor for forced labor assuming he was not ordinarily residing within Qatar, despite the fact that all criminal conduct occurred outside of the United States.

Conclusion

Human trafficking occurs across the globe because it is such a lucrative crime.[86] It is also a devastating crime, and requires tremendous resources and patience to properly investigate. Often, multiple interviews are required to gain the trust and confidence of potential victims who may still be terrified of the treatment they received at the hands of their trafficker or of the lies and threats their traffickers made. After gaining the victims' trust, more work is required to corroborate the victims' account and bring their traffickers to justice. Nonetheless, successful convictions can lead to a sentence of life imprisonment, and under federal law, an individual convicted of sex trafficking of a minor has a mandatory minimum sentence of at least ten years' confinement while an individual convicted of sex trafficking by force, fraud, or coercion has a mandatory minimum sentence of at least fifteen years of confinement.[87] For additional information related to combating human trafficking, see the November 2017 edition of the Department of Justice's United States Attorneys' Bulletin.[88] **TAL**

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Notes

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2. United States v. Valas, 822 F.3d 228, 235 (5th Cir. 2016).

3. *Id.*

4. *Id.*

5. Press Release, The United States Department of Justice, Justice Department Leads Effort to Seize Backpage.Com, the Internet's Leading Forum for Prostitution Ads, and Obtains 93-Count Federal Indictment (Apr. 9, 2018), https://www.justice.gov/opa/pr/justice-department-leads-effort-seize-backpagecom-internet-s-leading-forum-prostitution-ads.

6. *Valas,* 822 F.3d at 234.

7. *Id.*

8. *Id.*

9. *Id.* at 235.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 234-35.

15. *Id.* at 234.

16. *Id.* at 240-41.

17. *Id.* at 240-42.

18. *Id.* at 234.

19. *The Facts,* Polaris, https://polarisproject.org/human-trafficking/facts (last visited Feb. 3, 2019) [hereinafter Polaris Facts].

20. *Id.*

21. Department of State, Trafficking in Persons Report 448 (June 2018), https://www.state.gov/wp-content/uploads/2019/01/282798.pdf.

22. United States v. Culp, No. 201400258, 2015 WL 721081, at *1 (N-M. Ct. Crim. App. Feb. 19, 2015) (upholding appellant's plea to committing one specification of attempted sex trafficking of a minor); United States v. Washington, Case No. 1:17-CR-00035-GMS (D. Del. Mar. 6, 2018) (imposing ten years confinement upon airmen who pleaded guilty to sex trafficking of a minor); Gina Harkins, *NCIS Nabs 5 Sailors on Charges of Sex Crimes, Human Trafficking in Bahrain,* Military.com (Aug. 31, 2018), https://www.military.com/daily-news/2018/08/31/ncis-nabs-5-sailors-charges-sex-crimes-human-trafficking-bahrain.html; Alex Horton, *He Returned from Afghanistan to Applause. Then He Resumed a Dark and Violent Trade,* Wash. Post (Oct. 15, 2018), https://www.washingtonpost.com/national-security/2018/10/15/he-returned-afghanistan-applause-then-he-resumed-his-violent-prostitution-ring/?noredirect=on&utm_term=.083f7eb30e37.

23. United States v. Thomas, Case No. 1:16-CR-00035 (M.D. N.C. Sept. 21, 2016); Fayetteville Observer, *Investigators: Fayetteville Man Forced Fort Bragg Soldier into Prostitution,* Times-News (Feb. 5, 2016, 9:23 AM), https://www.thetimesnews.com/news/20160205/investigators-fayetteville-man-forced-fort-bragg-soldier-into-prostitution; Monica Vendituoli, *Warrant: Man Accused of Sex Trafficking Soldier Threatened to Tell Her Commander,* Stars & Stripes: Guam (June 8, 2016), https://guam.stripes.com/community-news/warrant-man-accused-sex-trafficking-soldier-threatened-tell-her-commander.

24. United States v. Kozminski, 487 U.S. 931, 934 (1988).

25. *Id.*

26. *Id.* at 935.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 934-35.

31. *Id.* at 952.

32. *Id.* at 953.

33. *See* 22 U.S.C. § 7101(b)(13) (2000).

34. *See* 22 U.S.C. § 7101(b)(4) (2000).

35. *See* 22 U.S.C. § 7101(b)(5) (2000).

36. *See* 22 U.S.C. § 7101(b)(24) (2000).

37. *See, e.g.,* 18 U.S.C. § 1591 (Oct. 28, 2000); 18 U.S.C. § 1591 (Dec. 19, 2003); 18 U.S.C. § 1591 (Jul. 27, 2006); 18 U.S.C. § 1591 (Dec. 23, 2008); 18 U.S.C. § 1591 (May 29, 2015); 18 U.S.C. § 1591 (Apr. 11, 2018).

38. Maureen Q. McGough, *Ending Modern-Day Slavery: Using Research to Inform U.S. Anti-Human Trafficking Efforts,* Nat'l Inst. Just., Feb. 2013, at 26, https://www.ncjrs.gov/pdffiles1/nij/240701.pdf.

39. John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths,* 60 St. Louis U. L.J. 1, 21 (2015).

40. Associated Press, *Labor Camp Owner Sentenced,* Ocala.com (Jan. 27, 2007, 12:01 AM), https://www.ocala.com/news/20070127/labor-camp-owner-sentenced.

41. Richmond, *supra* note 39, at 22.

42. *Id.* at 24.

43. Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Instr. 63 (2010 Ed.) (Modified).

44. Smith v. United States, 508 U.S. 223, 228 (1993).

45. *See also* United States v. Cook, 782 F.3d 983 (8th Cir. 2015) (successful prosecution of a customer seeking to have nonconsensual commercial sex with a tortured victim); United States v. Jungers, 702 F.3d 1066, 1069 (8th Cir. 2013) (successful prosecution of a customer seeking commercial sex with a minor).

46. Richmond, *supra* note 39, at 9.

47. *Id.*

48. United States v. Robinson, 702 F. 3d 22, 32 (2d Cir. 2012).

49. *See* United States v. Phea, 755 F. 3d 255, 261 (5th Cir. 2014).

50. In essence, § 1591(c) "creates strict liability where the defendant had a reasonable opportunity to observe the victim." *Robinson,* 702 F. 3d at 32.

51. *Id.* at 35-36.

52. United States v. Elbert, 561 F.3d 771, 776 (8th Cir. 2009).

53. 18 U.S.C. § 1591(e)(2).

54. 18 U.S.C. § 1591(e)(5).

55. 18 U.S.C. § 1591(e)(1).

56. *See* United States v. Phea, 755 F.3d 255, 263 (5th Cir.2014) (holding interstate commerce element satisfied by evidence of the use of a mobile phone, advertisement for prostitution services on the internet, and a customer from out of state); United States v. Todd, 627 F.3d 329, 331, 333 (9th Cir.2010) (holding interstate commerce element satisfied by evidence of advertisements in Craigslist and Seattle Weekly); United States v. Evans, 476 F.3d 1176, 1179–80 (11th Cir.2007) ("Evans's use of hotels that served interstate travelers and distribution of condoms that traveled in interstate commerce are further evidence that Evans's conduct substantially affected interstate commerce."); United States v. Flint, 394 Fed. Appx. 273, 277 (6th Cir. 2010) (holding interstate commerce element satisfied by evidence that "Flint purchased drugs, clothing, hair extensions, and fake nails, arguably to further the prostitution activity; and Flint rented a room in a hotel that serves out-of-state travelers").

57. United States v. Dann, 652 F.3d 1160, 1167 (9th Cir. 2011); 18 U.S.C. § 1589.

58. *Cf.* 18 U.S.C. § 1589(c)(1) & (2) *with* 18 U.S.C. § 1591(e)(1) & (5).

59. *See* 18 U.S.C. § 1589(b).

60. United States v. Kaufman, 546 F.3d 1242, 1260 (10th Cir. 2008).

61. *Id.*

62. *Id.* at 1246, 1248-50, 1262-63.

63. United States v. Marcus, 487 F. Supp. 2d 289, 292-304 (E.D.N.Y. 2007).

64. *Dann,* 652 F.3d at 1170, 1171 (sufficient evidence of serious harm where victim was "an immigrant without access to a bank account and not a dollar to her name, [and] a juror could conclude that the failure to pay her—and thus the lack of money to leave or live—was sufficiently serious to compel [the victim] to continue working"); United States v. Calimlim, 538 F.3d 706, 711 (7th Cir. 2008) (threat to stop paying victim's family members supported finding of serious harm); United States v. Nnaji, 447 Fed. Appx. 558, 559 (5th Cir. 2011) ("Serious harm can include psychological coercion"); United States v. Paulin, 329 Fed. Appx. 232, 234 (11th Cir. 2009) ("Serious harm can include psychological coercion").

65. *See, e.g., Dann,* 652 F.3d at 1172.

66. *Cf.* 18 U.S.C. § 1591(a) *with* 18 U.S.C. § 1589(a).

67. *See, e.g.,* United States v. Maynes, 880 F.3d 110, 114 (4th Cir. 2018) (finding the defendant's sex trafficking convictions legally sufficient, in part, because he "convinced women to work for him through a variety of material misrepresentations, such as false promises to provide the women with homes and incomes").

68. *See* 18 U.S.C. § 1343; 18 U.S.C. § 1351; 18 U.S.C. § 1546.

69. *See* 18 U.S.C. § 1591(b).

70. *See* 18 U.S.C. § 1589.

71. *See* 18 U.S.C. § 1591(a).

72. *See* 18 U.S.C. § 1589(a).

73. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439-41 (1968); 22 U.S.C § 7101 (2000); Alexander Tsesis, The Thirteenth Amendment and American Freedom: A Legal History 3 (2004) ("The Court's holding in Jones enables Congress to pass statutes against present-day human rights violations, such as the trafficking of foreign workers as sex slaves and the exploitation of migrant agricultural workers as peons.").

74. *See* WesternGeco LLC v. ION Geophysical Corp., 138 S.Ct. 2129, 2136 (2018); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115-16 (2013).

75. *See* 18 U.S.C. § 1596.

76. *See, e.g.,* United States v. Baston, 818 F.3d 651, 656-657, 667-70 (11th Cir. 2016) (upholding the sex trafficking convictions of a Jamaican national arrested in the United States for trafficking women around the world, from Florida to Australia to the United Arab Emirates, and finding 18 U.S.C. § 1596 to be a valid under the Foreign Commerce Clause).

77. Venue would be proper in any of the following three places: (1) the district in which the contractor is arrested or first brought; (2) the district containing the last known address of the contractor; or (3) the District of Columbia. 18 U.S.C. § 3238.

78. *See* 10 U.S.C. § 934.

79. Manual for Courts-Martial, United States, R.C.M. 703(g)(3)(A) Discussion (2019) [hereinafter MCM] ("A witness must be subject to United States jurisdiction to be subject to a subpoena. Foreign nationals in a foreign country are not subject to subpoena. Their presence may be obtained through cooperation of the host nation.").

80. MCM, *supra* note 79, R.C.M. 702(a)(1)-(2).

81. MCM, *supra* note 79, R.C.M. 702(a) Discussion ("Part o[r] all o[f] a deposition . . . may be used on the merits . . . as substantive evidence if the witness is unavailable under Mil. R. Evid. 804(a)" In turn, Mil. R. Evid. 804(a) provides that a declarant is unavailable when the witness "has previously been deposed about the subject matter and is absent due to military necessity, age, imprisonment, non-amenability to process, or other reasonable cause."). *See also* United States v. Matus-Zayas, 655 F.3d 1092 (9th Cir. 2011); United States v. McGowan, 590 F.3d 446 (7th Cir. 2009); United States v. Cannon, 539 F.3d 601 (7th Cir. 2008); United States v. Abu Ali, 528 F.3d 210 (4th Cir. 2008); United States v. Siddiqui, 235 F.3d 1318 (11th Cir. 2000).

82. *See* 18 U.S.C. §§ 3261, 3271.

83. 18 U.S.C. § 3267(1).

84. 18 U.S.C. § 3267(2).

85. 18 U.S.C. § 3272.

86. Polaris Facts, *supra* note 19 ("The International Labor Organization estimates that forced labor and human trafficking is a $150 billion industry worldwide.").

87. 18 U.S.C. § 1591(b)(1) & (2).

88. United States Department of Justice, Attorneys' Bulletin (Nov. 2017), https://www.justice.gov/usao/page/file/1008856/download.

AROUND THE CORPS

Brigadier General Joseph B. Berger III, left, Command Sergeant Major Jeremiah Fassler, center, and Lieutenant General Charles N. Pede, right, The Judge Advocate General, during the Change of Command Ceremony at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. (Credit: Jason Wilkerson/TJAGLCS)

(Credit: istockphoto.com/mandygodbehear)

No. 3

Truth or Dare?

An SVC's Dilemma in Handling a Client's Potential Falsehoods

By Major David A. Thompson

Captain (CPT) John Smith, a special victims' counsel (SVC) at Fort Bliss, meets his new client an hour before her scheduled interview with the Criminal Investigative Division (CID). The day before, his client made an unrestricted report[1] of sexual assault against an active duty Soldier, and she decided to seek SVC representation. Captain Smith explains the rights afforded to her as an alleged victim under Article 6b, Uniform Code of Military Justice (UCMJ), and quickly prepares her for the pending interview. Captain Smith notices she appears nervous and asks her if she has any concerns with talking to investigators. She looks up and nervously says, "Are they going to ask about . . . ."

Getting Started

Captain Smith's decision to probe his client's nervousness about her[2] pending interview is the first step of many on an ethical tightrope that many SVCs find themselves on during the course of their representation of victim clients. As an SVC's representation progresses, they will be required to update and advise the client about the various nuances of the military justice process and how the client fits within it. The client's mental state and desired resolution may change throughout the course of the representation, particularly as greater demands are placed upon the client by the process. This article will explore specific ethical dilemmas that arise when a client injects a falsehood or misrepresentation at key points in the military justice process and will offer recommended courses of action.

The Way Ahead

While there is limited case law involving ethics pertaining to SVCs, recent changes to Army Regulation (AR) 27-26, Legal Services: Rules of Professional Responsibility (28 June 2018),[3] and the opinions in *United States v. Baker*,[4] *United States v. Battles*,[5] and *United States v. Lewis*[6] provide important benchmarks to help guide SVCs.

This article first examines AR 27-26 (2018) as it applies to the SVC role. Then, an analysis of *Baker*, *Lewis*, and *Battles* identifies key issues for SVCs in handling potential misrepresentations by a client. Finally, our hypothetical CPT Smith will face three scenarios where this tension is greatest: pre-trial interviews, in-court testimony, and the post-trial process. This article will be limited in scope and will only cover changes to AR 27-26 (2018) that pertain to SVCs, specifically relating to handling client misrepresentations.

A Clear Duty of Candor

An SVC must balance a client's desire for a specific goal (e.g., prosecution) while reacting to potential falsehoods from that client throughout the criminal process. While these challenges are not unique to SVCs, victims' direct involvement in achieving certain goals often requires greater personal exposure. For example, an accused is not required to testify to achieve an acquittal and will frequently be persuaded against doing so.[7] However, if a victim

desires that an accused be prosecuted, the victim will almost certainly have to talk to law enforcement and prosecutors, and ultimately testify under oath at trial.[8]

Under Rule 3.3 of AR 27-26 (2018), an SVC now has a clear duty of candor toward the tribunal despite representing a non-party.[9] Additionally, this duty encompasses knowledge of past falsehoods, not just contemplated future perjury, and requires remedial action including possible disclosure, if necessary.[10] Moreover, SVCs must not counsel or assist a client in committing a crime or fraud (Rule 1.2(d)), must adhere to their duty of confidentiality (Rule 1.6) while being cognizant of its exceptions and limitations, and must act fairly to opposing party and counsel (Rule 3.4).[11] It is essential that SVCs understand these ethical rules because of the inherent personal and professional consequences of failing to do so, which has consequences for themselves and their clients.[12]

AR 27-26 and Case Law

Before returning to the hypothetical posed at the beginning of this article, we must examine the professional rules and relevant cases that frame how SVCs should respond to these ethical dilemmas. For example, Army lawyers are required to comply with the professional rules in both AR 27-26 (2018) and their respective state bars.[13] The recent update to the Army professional responsibility regulation brings over two decades' worth of revisions since its last update in 1992, and thus, requires the following examination.[14]

The New AR 27-26

There are four rules which this article critically examines from the perspective of SVCs: Rules 1.6, 1.2d, 3.3, and 3.4. Each touches upon or directly controls when an SVC faces a potential falsehood from a client. Rule 1.6 is the foundation of any attorney-client representation and warrants examination first.

Rule 1.6, Confidentiality of Information

The duty of confidentiality is the bedrock principle upon which attorneys are ultimately valued and sought out for services.[15] Rule 1.6, Confidentiality of Information, states that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is required by paragraph (b)(1) or permitted by paragraph (b)(2)."[16]

Rule 1.6 was restructured so the rule and its comments clarify when a lawyer *must* disclose confidential information and when a lawyer *may* disclose it. Importantly, the comments to this rule link this duty of confidentiality and its exceptions to Rules 1.2 and 3.3, which has significant implications for SVCs.[17] For instance, one of the permissive exceptions to the duty of confidentiality is when disclosure is required by law or court order. Ultimately, while a lawyer has a duty to maintain client confidences, this rule is not absolute; a lawyer must also abide by the duty of candor toward a tribunal and must not assist a client in committing a fraudulent or criminal act.[18]

The duty of confidentiality encourages clients to be honest with their attorneys and divulge important information, such as evidence of criminal conduct or deeply personal secrets.[19] However, the rule has limits and is not intended to permit the furtherance of crimes or to incentivize clients or attorneys to violate the law.[20] Normally, during the first consultation if possible, an SVC should explain to his or her client the duty of confidentiality and its various limitations and exceptions.[21] That discussion should be memorialized in a Scope of Representation.[22]

Rule 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer

Rule 1.2(d) states, "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal and moral consequences of any proposed course of conduct . . . ."[23] While the rule is largely unchanged, there is additional language in the comments, such as Comment 10 which provides,

> The lawyer is not permitted to reveal the client's wrongdoing, except where required or permitted by Rule 1.6 or Rule 3.3. However, the lawyer is required to avoid furthering the wrongdoing, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper, but then discovers is criminal or fraudulent. Seeking to withdraw from the representation, therefore, may be appropriate.[24]

An SVC should be particularly careful with this rule. An SVC's client may or may not desire a criminal investigation or court-martial to go forward. For example, a third party might report the sexual assault on behalf of the victim despite a victim's desire to not involve law enforcement. Under current Department of Defense guidance, a victim will normally not be required to participate in the military justice process against their wishes.[25]

A victim's reluctance to participate in an investigation is often linked to the re-traumatization which can occur when recalling the sexual assault; victims may also be uncomfortable discussing certain details surrounding the assault.[26] Victims may wish for a trial to proceed, but naturally hope to avoid embarrassing or painful topics. For these and a multitude of other reasons, victims may fabricate, omit, or change certain details when speaking with investigators and attorneys.[27] An SVC will often not be aware of these omissions or falsehoods when initially made. But should the SVC become aware or have knowledge of the falsehoods, then under Rule 1.2(d), the SVC cannot aid the client in furthering the wrongdoing, such as by helping to conceal it.[28] The rule distinguishes between aiding and simply discussing the consequences; similarly, the wrongdoing cannot be disclosed unless other rules permit or require it.[29]

Rule 3.3, Candor Toward the Tribunal

The duty of candor toward the tribunal serves a critical role in protecting the "integrity of the adjudicative process" by qualifying the duties of confidentiality and zealous representation in the context of lawyers' role as "officers of the court."[30] A tribunal is defined broadly in Rule 1.0(w), but does not encompass law enforcement

investigations, which has important implications for SVCs.[31] Rule 3.3(b), a major revision to the rule, states, "A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[32] The previous version of duty of candor only required that the attorney not "offer" false evidence or "fail to disclose" when "necessary to *avoid assisting* in a criminal or fraudulent act."[33] Importantly, the new rule now requires remedial actions even for *past* criminal or fraudulent conduct.[34]

The substantial restructuring to Rule 3.3 also brings some significant changes, including modifying Rule 3.3(b) to more clearly address the responsibilities of non-party attorneys. There are several comments to the rule that are particularly important for SVCs. Comment 3 states, "There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation." Comment 10 states, "The duties stated in paragraphs (a) and (b) apply to all lawyers, including trial and appellate defense counsel and [SVC] in criminal cases."[35]

Finally, Comment 15 provides critical guidance on how an SVC may remediate a falsehood to the tribunal. Specifically, Comment 15 states,

> In such situations, the lawyer's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the lawyer must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the lawyer must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6.[36]

Before these changes, some lawyers in the Army legal community argued that SVCs did not have a duty of candor because SVCs represented non-parties and were not typically in the active role of offering or assisting with evidence at trial.[37] Rule 3.3(b) and the above comments remove any question about whether SVCs have a duty of candor.[38] If an attorney's client is involved in an adjudicative proceeding and that attorney has knowledge that any person, not just their client, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding, the attorney must take remedial measures including potential disclosure to the tribunal.[39] Accordingly, if an SVC is representing a victim in an adjudicative proceeding, such as a court-martial or administrative hearing, then that SVC has a duty of candor.

Rule 3.4, Fairness to Opposing Party and Counsel

Lawyers litigate and interact with other attorneys in an adversarial system. Rule 3.4 establishes controls to ensure the competition remains fair. Rule 3.4(b) states, a lawyer shall not "falsify evidence, counsel, or assist a witness to testify falsely."[40] While the rule specifically identifies lawyers in the context of parties, Comment 2 states, "The actions of lawyers who are not considered a party to litigation have the potential to affect the litigation process. These situations may arise in matters where a[n SVC] represents a victim who, although a client, is not a party to the litigation."[41]

The inclusion of SVCs in Comment 2 indisputably shows that SVCs are bound under Rule 3.4, despite representing a non-party. Like the duty under Rule 1.2(d), SVCs cannot counsel or assist a client in committing fraud regardless of her status as a non-party. However, Comment 2 to Rule 1.2 specifically notes the distinction between ethically advising about the consequences of specific actions, and the impermissible "recommending [of] means by which a crime or fraud might be committed with impunity."[42] For SVCs, this rule can be triggered during CID interviews, in evidence production, or when making submissions on behalf of a client to a military judge or convening authority. For example, an SVC can advise a client of the consequences of committing perjury, or lying to law enforcement, but cannot aid them in the wrongdoing.

Relevant Case Law

With the professional rules firmly established, it is now appropriate to examine how military courts have interpreted and applied these rules. While these cases predominantly address ethical and constitutional issues posed to defense counsel, they provide important guideposts for an SVC to consider when facing questions of falsehoods by a client.

United States v. Baker

In *Baker*, the appellant was convicted of various offenses contrary to his plea and on appeal alleged ineffective assistance of counsel.[43] He argued that he received ineffective assistance by his two military defense counsel during his trial testimony.[44] Prior to trial, the appellant and his counsel agreed that he should not testify due to credibility issues; but later at trial, the appellant changed his mind and insisted on testifying.[45] His counsel alerted the judge that they could no longer represent the appellant and requested permission to withdraw.[46]

In a subsequent Article 39(a), UCMJ, hearing, the military judge informed the appellant that his counsel wished to withdraw from representation.[47] The military judge explained the narrative procedure through which the appellant could testify and that his counsel would not be permitted to argue anything he said during the narrative.[48] The appellant confirmed he understood, and, after an additional consultation with counsel, proceeded to testify in the narrative.[49]

Defense counsel's basis for withdrawal included their client's prior federal convictions, the strength of evidence controverting their client's claims, and previous inconsistent and contradictory statements by appellant to counsel.[50] The appellant's unpredictable and uncontrollable behavior also made it unlikely defense counsel could properly tailor his testimony. The court held that these facts were sufficient to constitute a firm factual basis for counsel

to reasonably believe their client would commit perjury.[51]

In *Baker*, the court analyzed the criteria by which defense counsel should evaluate potential perjury issues. The court reaffirmed its previous holding, in its initial review of the same case, that counsel must act in good faith and have a firm factual basis that counsel's client intends to commit perjury.[52]

> First, the attorney should try to structure the client's testimony to avoid areas where the client will commit perjury. Should this prove impossible, the next step is to provide the court nonspecific notice the client will testify in the free narrative form. Finally, only in situations where the attorney-client relationship is irreparably damaged should counsel seek to withdraw.[53]

At present, there is no ineffective assistance of counsel claim against an SVC. Therefore, an SVC should largely be concerned with adhering to the plain language of AR 27-26, and their respective state bar professional rules of responsibility.[54] Nevertheless, *Baker* provides the framework for any potential SVC attorney-client dispute or appellate issue. Additionally, with the expanding role of SVCs and the use of writs,[55] courts could possibly apply the *Baker* standard to an SVC's determination that a client intends to, or did in fact, commit perjury.

If *Baker* applies to SVCs, then SVCs must also act in good faith and have a firm factual basis to believe their clients are lying before taking remedial actions. If a good faith basis exists, SVCs must first try to discourage their clients from testifying untruthfully. If unsuccessful, SVCs must take appropriate remedial measures, including withdrawal or disclosure if necessary. Since SVCs represent non-parties and typically do not offer testimony,[56] they are unable to utilize the narrative option or selectively tailor their client's testimony. Therefore, SVCs' options are largely limited to convincing their clients, and the trial counsels directing testimony, to correct false testimony, or withdrawal and possible disclosure to the tribunal.

Special Victims' Counsel who choose to withdraw representation of their client, must provide notice of that withdrawal to the court.[57] Therefore, if an SVC has a firm factual basis to believe that their client intends to lie, the SVC may be required to withdraw from representation. This notice of withdrawal to the court, or a "noisy withdrawal," will alert the court that there is an issue.[58] In light of *Baker*, and the cases analyzed below, an SVC should not disclose the basis for withdrawal until ordered by the military judge. Ultimately, any action taken should be done as narrowly and in the least damaging way possible to the client's interests.[59]

United States v. Battles

If *Baker* was an important benchmark for analyzing potential perjury issues, then *United States v. Battles*[60] serves as an equally important cautionary tale for SVCs regarding their duty of candor toward a tribunal. Specifically, *Battles* reinforces the knowledge requirement for SVCs while distinguishing knowledge of past perjury versus future perjury. However, in light of the aforementioned changes to the Army professional rules, SVCs must proceed cautiously in relying on *Battles*.

In *Battles*, the appellant was found guilty of committing sexual assault in violation of Article 120, UCMJ.[61] After the conviction, the victim's SVC was contacted by the Office of the Staff Judge Advocate (OSJA) about whether he still represented the victim for purposes of post-trial victim submissions.[62] The SVC made communications to the government that "implied that he was aware of perjury on the part of his client."[63]

Government counsel notified appellant's trial defense attorney about the communication who then interviewed the SVC and subsequently filed for a post-trial Article 39(a), UCMJ, hearing.[64] Defense counsel requested that the military judge determine whether the victim committed perjury at trial, sought discovery of all communications between the SVC and his former client, and moved for a new trial.[65]

At the Article 39(a), UCMJ, hearing, the court juggled the various privileges and rules implicated by the presented issues.[66] The military judge ultimately concluded, and the court of appeals agreed, that the SVC did not have actual knowledge that his client committed perjury.[67] This finding was primarily based on the fact that the SVC neither attended the trial nor witnessed any of the alleged perjured testimony.[68]

Although an ancillary issue in the case,[69] *Battles* explores an SVC's duty of candor in the context of past perjury. The court held there is no exception to the normal duty of confidentiality for past crimes while acknowledging the established exception for an attorney's knowledge of future perjury.[70] The court was critical of the SVC's handling of his client's case and reaffirmed the *Baker* knowledge requirement before attorneys may disclose confidential information. The court held that no relief was warranted and harshly criticized the behavior of the SVC and the military judge's misguided piercing of the attorney-client privilege.[71]

Battles largely hinged on the distinction that the SVC did not, nor could he have reasonably known, that his client lied under oath at trial because he was not present at trial. Additionally, the perjury, had there been any, was already completed. In short, *Battles* states that the exception to the attorney-client privilege and duty of confidentiality contemplates future perjury not past perjury.[72] Therefore, under *Battles,* an SVC would not be permitted to disclose past crimes of their client unless the adjudicative process was continuing and the attorney had a firm factual basis to believe the client intended to commit future perjury.

It's worth noting that the adjudicative process continues until a "final proceeding," which in the context of a court-martial is defined as when "final judgment has been affirmed on appeal or the time for review has passed."[73] However, as pointed out previously, Rule 3.3 was modified to extend the duty of candor toward the tribunal to attorneys with knowledge of past falsehoods. It is possible though that the appellate courts will not expand the *Baker* analysis to include that additional exception to the duty of confidentiality.

United States v. Lewis

In *United States v. Lewis*, the Army Court of Military Review analyzed the Army Professional Rules and the American Bar Association (ABA) Model Rules in evaluating the propriety of defense counsel providing confidential information when a

former client alleges ineffective assistance of counsel.[74] Whereas *Baker* establishes the framework for the firm factual basis standard, *Lewis* distinguishes the attorney-client privilege from the broader duty of confidentiality, and the duties of counsel when faced with an order from a tribunal to disclose client confidences. As such, *Lewis* is essential reading for an SVC evaluating the scope of confidentiality to a client when faced with an order to disclose from a court.

The appellant in *Lewis* was convicted of several drug-related offenses and argued that his trial defense attorneys were ineffective.[75] The court found the appellant met his prima facie burden and ordered the trial defense attorneys to provide affidavits addressing each allegation.[76] The attorneys declined to submit affidavits, but responded in motions arguing attorney-client privilege precluded them from providing confidential information to the court.

Lewis holds that military appellate courts can order defense counsel to submit affidavits providing confidential information in response to claims of ineffective assistance of counsel.[77] In *Lewis*, the court held that trial defense counsel mistakenly relied on the attorney-client privilege when their actual intended basis for refusing the court order was rooted in the broader duty of confidentiality.[78]

The attorney-client privilege is a rule of evidence that permits a client to prevent admission of confidential communications between the client and their attorney.[79] It is an exception to the normal rule, that when the client is unable to invoke the privilege, the attorney may do so on the client's behalf.[80] The attorney-client privilege does not bar disclosure of communications "relevant to an issue of breach of duty by the lawyer to the client or the client to the lawyer."[81] Moreover, the duty of confidentiality specifically permits disclosure "when required or authorized by law." The court also cites the duty of candor toward the tribunal as an additional basis to support disclosure "when required by law."[82]

While Rule 1.6(c) indicates disclosure pursuant to court order is permissive versus mandatory, the court disagreed with defense counsels' assertion that they were not required to disclose confidential information because of the permissive language. *Lewis* holds that a court order to disclose in the ineffective assistance of counsel context is lawful and must be followed. Counsel is permitted to initially decline to respond to court orders if there is good reason, but if denial is not justifiable, counsel risks disciplinary action.[83]

Like the defense counsel in *Lewis* and *Baker*, an SVC may be ordered by a military judge or court to disclose confidential information between the SVC and the client, current or past. Although the rules state that disclosure pursuant to a court order is permissive, *Lewis* makes clear the ethical rules will not save the SVC from contempt of court should the SVC refuse the order.[84] An SVC seeking to limit personal culpability should abide by the order and limit disclosure to the extent necessary to comply with the court order.

Additionally, an SVC adhering to *Lewis* must understand the difference between the attorney-client privilege and the duty of confidentiality.[85] Both the privilege and the duty may be pierced if required by law. *Lewis* and *Baker* both show that courts may order, and the law will thus require, disclosure. It is foreseeable that similar *Baker*-like disputes about attorney-client representation and confidential communications could become admissible at trial if an SVC attempts to withdraw from representation due to a known falsehood. A dispute could also arise in situations where a client is transferred to a different SVC and the former client alleges the former SVC failed to adequately represent or protect their Article 6b rights.

Hypotheticals

With the ethical rules established, we return to the hypothetical with our SVC, CPT Smith, and his client.

The CID Interview

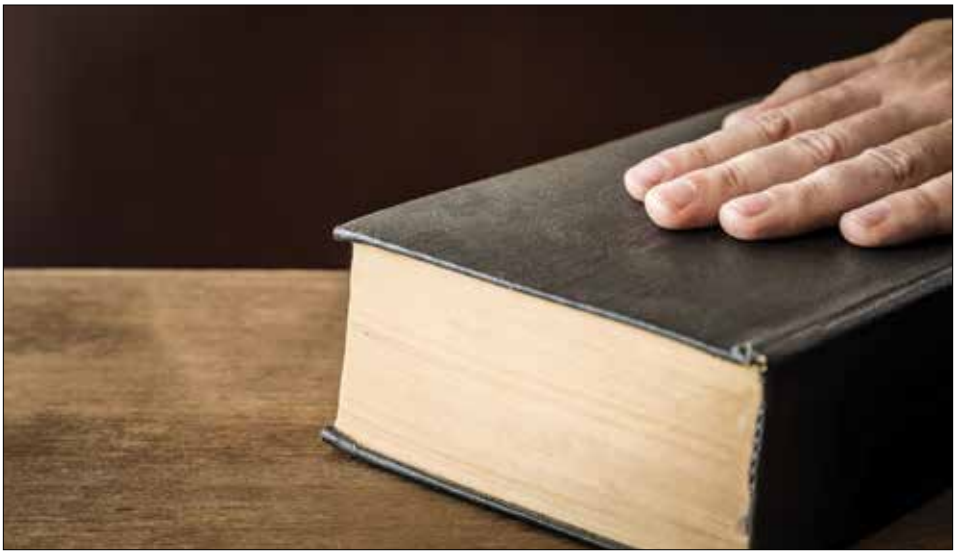
After CPT Smith fully advises his client about her rights, they travel to the CID office. During the interview, the client recounts the details of the assault to the CID agent. While exploring the nature of the relationship between her and the accused, the CID agent asks whether she consensually kissed the accused a few days prior to the assault. She denies any such kiss. The client appears distressed after extended questioning so the SVC asks the CID agent for a brief break. During the break, the client informs CPT Smith in a private room that she had lied. She admits to her SVC that she had in fact kissed the accused a few days prior to the assault. She asks her SVC, "What should I do?"

First, CPT Smith must identify what duties are triggered in this context. He has a duty of confidentiality balanced against a duty to not counsel or assist a client in committing a fraudulent act. The law enforcement setting does not qualify as a "tribunal" under the AR 27-26 (2018) definition.[86] Additionally, the lie already occurred without CPT Smith's knowledge and, pursuant to *Battles*, does not contemplate future perjury.[87] Therefore, CPT Smith is not permitted to disclose his client's past crime of lying to law enforcement. However, CPT Smith now has a firm factual basis regarding that particular material fact and must proceed cautiously to avoid aiding a future fraudulent act by his client.

Before returning to the CID interview room, CPT Smith must now consider whether he is aiding his client in a fraud by continuing to represent her and sitting with her during the interview if she does not correct the record. This basic degree of assistance alone is unlikely to constitute aiding in fraud.[88] However, CPT Smith does have a duty to advise his client of the legal jeopardy of lying to law enforcement and the risks it creates going forward.[89] Captain Smith should consider counseling his client to inform CID she previously misspoke, to correct the record, and to tell the truth going forward.

Captain Smith should also advise his client as to her other options before proceeding any further. For instance, he could verify what disposition the client is seeking and remind the client of her right to end the interview either temporarily or permanently, in order to prevent further potential falsehoods. Should the client desire to proceed with the interview, CPT Smith should emphasize that if the CID agent asks her to repeat her answer in regards to the previous falsehood, she should tell the truth. Should the client repeat the lie, the SVC may be permitted to withdraw from the representation, but is not permitted to disclose the falsehood.

(Credit: istockphoto.com/FotoDuets)



In-Court Testimony

Upon returning to the CID interview, the CID agent finishes the interview and does not ask any additional questions about the client's relationship with the accused. The client desires to proceed to trial, and, approximately eight months later the government prefers and later refers charges. On the first day of trial, the SVC's client testifies. The defense counsel cross-examines the witness and asks her questions about the nature of the relationship between her and the accused. He asks the SVC's client whether she had consensually kissed the accused. The SVC's client again denies ever kissing the accused.

In this instance, CPT Smith's duty of confidentiality towards his client is being tested by several exceptions and limitations to that duty. Specifically, disclosure of the lie is permitted if required by law or court order.[90] As of yet, there is no law or court order requiring disclosure. However, CPT Smith must consider whether he is assisting his client in a fraudulent act. While he did not have any role in offering the false statement, his continued representation or lack of action might be aiding in a fraudulent act to a tribunal. Additionally, CPT Smith knows he has a duty of candor toward the tribunal.

Pursuant to *Baker*, CPT Smith, because of his firm factual basis in believing his client lied and his ongoing duty of candor toward the tribunal, is required to take remedial steps, but has fewer options than a defense counsel in the same context (e.g., no narrative testimony or argument avoidance).[91] Captain Smith is not offering testimony and so cannot tailor his client's testimony. Similarly, a witness does not have an accused's constitutional right to testify, thereby precluding the narrative form testimony.

Captain Smith must take remedial measures. Here, he could quickly and discreetly attempt to get the attention of the trial counsel before or during a recess (before the government closes its case in chief). During the recess, CPT Smith should try to convince the client to remedy the falsehood, explain all the potential legal consequences of perjury, as well as his ethical duties, particularly his likely withdrawal, if the client refuses. If the client agrees to correct the record, then CPT Smith should inform the trial counsel that the client needs to take the stand again and correct the record on the specific question previously asked.[92]

If his client takes the stand and corrects the record then the SVC has no further obligations. However, if his client refuses to admit the falsehood, or the trial counsel declines to recall the witness, CPT Smith should request an Article 39(a), UCMJ, hearing. In that hearing, CPT Smith could inform the court he is withdrawing from his representation of his client.[93] Captain Smith would be executing a "noisy" withdrawal, which alerts the court there is an issue without immediately disclosing the wrongdoing—thereby minimizing the harm to the client's interests.[94]

Based on this notice, the court should inquire as to why the SVC is withdrawing, and CPT Smith should inform the court that "while he cannot state the exact reason he is withdrawing, he can no longer represent the client," or words to that effect.[95] If the court does not make this inquiry on its own, it may be necessary for the SVC to make the above statement on his own volition. However, CPT Smith should not disclose the lie, or his basis for withdrawal, unless ordered by the court.[96]

Post-Trial Submissions and Hearings

Assume, alternatively, CPT Smith did not previously have a firm factual basis to believe his client lied. The trial is now over. The accused was convicted of an Article 120 offense. The SVC meets with his client to discuss any post-trial submissions she would like to submit to the convening authority. During this meeting, she admits that she does not believe she was actually sexually assaulted by the accused. She tells her SVC that the sex was consensual, but she felt pressured by her new husband to lie in order to protect her relationship. However, she is still afraid that telling the truth would place her relationship with her husband in danger and she wants to submit matters requesting the Commanding General not approve any clemency and approve the findings and sentence adjudged. What should the SVC do?

As in the previous hypotheticals, CPT Smith continues to have a duty of confidentiality to his client, but here his course of action is considerably more complicated. He must now address the issue of past perjury, as well as his client's request for assistance in a future fraud. Captain Smith is aware of the disastrous consequences that faced a similar SVC in the post-trial submission setting of *Battles*. Unfortunately, *Battles* provides both guidance and potential confusion.

Battles potentially supports the argument that CPT Smith has no duty to correct past perjury because the client's perjury has already been committed. However, this contradicts the new professional responsibility rules.[97] Additionally, in *Battles*, the court determined the SVC in question had no factual basis for an exception to the duty of confidentiality.[98] Here, while CPT Smith did not have knowledge of the lie at the time the perjury was committed, he now has a firm factual basis to believe his client lied to the tribunal. Since the tribunal exists until the proceeding is affirmed on final appeal, CPT Smith's duty of candor toward

the tribunal continues.[99] CPT Smith must take remedial measures.

If the client is willing to correct the record, CPT Smith should coordinate with either government or defense counsel to request a post-trial Article 39(a), UCMJ, hearing. Additionally, CPT Smith must be cognizant that convincing his client to correct the record would essentially implicate her in the crime of perjury. CPT Smith should discuss with this client her potential need for defense representation. If the client is unwilling to admit her falsehood to the government, then CPT Smith would need to take other remedial steps, including withdrawal or disclosure.

While withdrawal remains an option, it is unlikely withdrawal would effectively remediate the effect of the lie, i.e., a false conviction. Furthermore, while withdrawing from representation prior to action by the convening authority would be unusual pursuant to the SVC handbook, it is unlikely to sufficiently draw the tribunal or either party's attention to the wrongdoing.[100] If the client insisted on maintaining the lie, then CPT Smith should advise his client of his intent to withdraw and provide notice to the court of his withdrawal. He should counsel her that this action could be sufficient to spur a court order for him to testify as to the reason for the withdrawal, in which case, he would testify truthfully.

The above actions, in regard to the past perjury issue, would naturally preclude taking any future action to effect the client's desire to commit fraud. So assume, alternatively, the client does not admit to lying at the trial, but instead only wants to submit a document, statement, or photograph that CPT Smith knows is false or somehow altered. *Battles* and Rule 1.2d contemplate the distinction between assisting a client in committing a future fraud, and simply advising a client about the consequences of committing the fraud.[101] Accordingly, CPT Smith must consider how he can properly advise and represent his client without aiding in a future fraud. His assistance in the submission of false post-trial victim matters could violate Rule 1.2(d).

As in the previous hypotheticals, CPT Smith should attempt to dissuade the client against submitting falsehoods and advise the client as to all potential consequences of proceeding with such a course of action. If the client insists on submitting matters that in some way implicate or draw upon falsehoods, then CPT Smith cannot participate in the submission or support of those matters. However, it is feasible that CPT Smith could provide other support that avoids the false evidence. This would be similar to how a defense counsel can tailor a direct examination or closing argument away from perjured testimony.[102] For example, CPT Smith might agree to submit the other matters the client wishes, assuming those matters do not repeat the falsehood or draw upon them. Captain Smith could also advise the client how she could submit her own matters directly, with the renewed admonition against submitting false information.

Finally, as a last resort, CPT Smith could withdraw if he believes he cannot adequately represent his client due to the ethical conflict.[103] As discussed above, CPT Smith may be able to continue representing his client by carefully avoiding assistance in the submission of any fraudulent materials. But, if CPT Smith does not feel he can adequately represent his client due to his ethical conflict, CPT Smith should follow the same withdrawal steps outlined previously. However, in this post-trial submission context, it may be feasible to remedy the potential wrongdoing through withdrawal without notice to the court and all parties.

Specifically, CPT Smith might reasonably execute a "quiet" withdrawal in this particular instance.[104] Withdrawal would remove CPT Smith from aiding in a potential future fraud, thus adhering to Rule 1.2(d), while minimizing any adverse consequences to the former client pursuant to Rule 1.16(d). Likewise, CPT Smith complies with Rule 3.3 because he does not know, or have a firm factual basis, the client will actually follow through by submitting false matters. If CPT Smith does have such knowledge, then a quiet withdrawal would be an inadequate remedial measure.

Captain Smith would not necessarily be required to notify all parties as to the termination, because the U.S. Army Rules of Court only require notification of withdrawal while a case is "pending."[105] Post-conviction, the case is arguably no longer pending, so an SVC would only be required to provide notice of withdrawal if the SVC Program's procedures required it.

Absent a normal trigger for termination of the attorney-client relationship, the victim generally controls termination of the representation.[106] Consequently, absent the consent of his client, and pursuant to the SVC Handbook, CPT Smith would need his supervisor and SVC Program's approval to withdraw from the representation.[107] It is important to note, that withdrawal under these circumstances only works if the SVC is operating without firm factual knowledge their client intends to commit a falsehood, and the SVC believes this withdrawal is a sufficient remedial step.

Conclusion

Many SVCs will quickly discover, like CPT Smith, that the SVC role can be an ethical minefield; however, AR 27-26 (2018) and developing case law provide important guideposts for SVCs. It is indisputable that SVCs have a duty of candor toward the tribunal. Special Victims' Counsel must understand when the attorney-client privilege and duty of confidentiality to a client applies under the rules and the law. Special Victims' Counsel cannot aid or assist clients in committing fraud and must obey orders from the court absent good reason. At every stage of the military justice process, SVCs like CPT Smith must carefully evaluate their duties to help clients achieve their unique goals while adhering to the professional rules of responsibility.

Additionally, SVCs must closely monitor updates in case law involving SVC ethical issues.[108] With the development of writs and the evolution of case law surrounding various Article 6(b), UCMJ rights, an SVC will need to draw upon cases like *Baker*, *Battles*, and *Lewis* should a client or former client assert claims against them. Finally, SVCs should also be in close contact with the SVC Program and their SVC supervisors before responding to potential ethical issues.[109] **TAL**

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Notes

1. Sexual assault victims can, in most U.S. Army cases, elect to report their assaults as either restricted or unrestricted. Generally, restricted reports allow victims to receive medical care without public exposure, while unrestricted reports trigger a criminal investigation. U.S. Dep't of Def., Instr. 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures 36 (Mar. 28, 2013) (C, 24 May 2017) [hereinafter DoDI 6495.02].

2. Victims of sexual assault and similar offenses are certainly not limited to the female gender. However, for simplicity and expediency this article will use the feminine pronoun for the hypothetical scenarios.

3. U.S. Dep't of Army, Reg. 27-26, Legal Services: Rules of Professional Conduct For Lawyers r. 1.2, 1.6, 1.16, 3.3 (28 June 2018) [hereinafter AR 27-26 (2018)].

4. United States v. Baker, 65 M.J. 691, 698–702 (C.A.A.F. 2007) (applying firm factual basis standard when considering suspected client perjury).

5. United States v. Battles, No. ARMY 20140399, 2017 CCA LEXIS 380 at *20–28 (A. Ct. Crim. App. May 31, 2017) (holding duty of candor toward tribunal and exception to confidentiality contemplates future perjury).

6. United States v. Lewis, 38 M.J. 501, 515–22 (A.C.M.R. 1993) (distinguishing attorney-client privilege and duty of confidentiality when faced with perjury).

7. U.S. Const. amend. V ("[N]or shall any person be . . . compelled in any criminal case to be a witness against himself").

8. U.S. Const. amend. VI ("[T]he accused shall enjoy the right to . . . be confronted with the witnesses against him.").

9. *See* AR 27-26 (2018), *supra* note 3, r. 3.3.

10. *Id.*

11. *Id.* r. 1.2, 1.6, 3.4.

12. *Baker*, 65 M.J. at 697 (citing Nix v. Whiteside, 475 U.S. 157, 169 (1986) (lawyer complicit in client perjury faces prosecution or disciplinary action)).

13. AR 27-26 (2018), *supra* note 3, r. 8.5(j) (Army professional rules control if, in the course of official Army duties, a conflict arises between the Army rules and a lawyer's licensing authority rules). *See also* Tex. Disciplinary R. Prof'l Conduct r. 8.05, cmts. 3–4 (under Texas professional rules, the Texas bar will not discipline out-of-state conduct unless the conduct is also a violation under Texas rules, and will normally not discipline for conflicting out-of-state conduct if said conduct conforms with that other jurisdiction's rules).

14. U.S. Dep't of Army, Reg. 27-26, Legal Services: Rules of Professional Conduct For Lawyers r. 1.2, 1.6, 1.16, 3.3 (1 May 1992) [hereinafter AR 27-26 (1992)].

15. *See* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon . . . assistance [that] can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.").

16. AR 27-26 (2018), *supra* note 3, r. 1.6.

17. *Id.* r. 1.6, cmt. 25.

18. *Id.*

19. *Id.*

20. *Id. See also* Vince Farhat & Calon Russell, *"Houston, We Have a Problem:" Clients Who Engage in Unlawful Conduct During Your Representation*, White Collar Crime Comm. Newsl. 1 (Winter, Spring 2015) ("The notion that a lawyer must not participate in a client's illegal conduct is generally known and widely accepted.").

21. U.S. Army Special Victims' Counsel Program, Special Victims' Counsel Handbook Fourth Edition (9 June 2017) [hereinafter SVC Handbook] ("The initial meeting with the victim should be in person. The victim's information shall be entered into Client Information System and a scope of representation letter (Appendix C or Appendix D) signed by the victim.").

22. *Id.*

23. AR 27-26 (2018), *supra* note 3, r. 1.2(d).

24. *Id.* cmt. 10.

25. DoDI 6495.02, *supra* note 1, at 36 ("The victim's decision to decline in an investigation or prosecution should be honored by all personnel charged with the investigation and prosecution of sexual assault cases . . . .").

26. *See* Carolyn S. Salisbury, *Therapeutic Jurisprudence in Clinical Legal Education and Legal Skills Training*, 17 St. Thomas L. Rev. 623, 636 (Spring 2005) ("[I]t is well-known that rape victims who help prosecute their rapists in criminal trials often feel as if they have been raped once again within the legal system."). *See also* Jenelle M. Beavers & Sam F. Halabi, *Stigma and the Structure of Title IX Compliance*, 45 J.L. Med. & Ethics 558, 560 (Winter 2017) (exploring various reasons victims choose to not report or pursue criminal prosecution such as social stigma, embarrassment, and privacy concerns).

27. Alleged victims, like any witness, may also unintentionally omit or provide inaccurate information, on matters material or trivial, by accident, or due to the fault of memory or trauma. Robert T. Reagan, *Scientific Consensus on Memory Repression and Recovery*, 51 Rutgers L. Rev., Winter 1999, at 275, 290–94. Actual rates of false allegations of rape are difficult to assess, but widely considered to be quite low. *See generally*, Andre W. E. A. De Zutter et al., *The Prevalence of False Allegations of Rape in the United States from 2006-2010*, 2 J. Forensic Psychol. 2017 (Netherlands statistical study which notes large discrepancy in rates of false reporting due to inconsistencies in methodology and data used).

28. AR 27-26 (2018), *supra* note 3, r. 1.2d.

29. *Id.*

30. *Id.* r. 3.3, cmt. 2.

31. *Id.* r. 1.0(w) ("'Tribunal' denotes a court, an Article 32 [preliminary hearing], administrative separation boards or hearings, boards of inquiry, disability evaluation proceedings, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity.").

32. *Id.* r. 3.3.

33. AR 27-26 (1992), *supra* note 14, r. 3.3(A)(2), (4) (emphasis added).

34. AR 27-26 (2018), *supra* note 3, r. 3.3(b) (emphasis added).

35. *Id.* r. 3.3, cmts. 10, 14 ("The obligations in this Rule also apply to counsel for witnesses and victims, including Special Victim Counsel.").

36. *Id.* r. 3.3, cmt. 15.

37. This assertion is based on the author's two years of experience as a defense counsel interacting with SVCs and subsequent two years of experience as an SVC (June 2016-July 2018) [hereinafter Professional Experiences]. Additionally, while attending the 2018 Sexual Assault Trial Advocacy Course a moderator posed this question to a group of experienced trial counsels, defense counsels, and SVCs, and there was wide vocalized disagreement as to whether the duty of candor applied to SVCs. *Id.*

38. AR 27-26 (1992), *supra* note 14, r. 1.2, 1.6, 1.16, 3.3 (focusing primarily on parties and attorneys offering evidence).

39. AR 27-26 (2018), *supra* note 3, r. 3.3.

40. *Id.* r. 3.4(b).

41. *Id.* r. 3.4, cmt. 2.

42. *Id.* r. 1.2, cmt. 2.

43. United States v. Baker, 65 M.J. 691, 693 (C.A.A.F. 2007).

44. *Id.*

45. *Id.* at 694.

46. *Id.*

47. Article 39(a) hearings are sessions of court called by military judges, conducted outside of the presence of panel members (the Army equivalent of jury members), in order to address various pre-trial and trial matters. UCMJ, art. 39 (2018).

48. *Id.*

49. *Id.*

50. *Id.* at 695–96.

51. *Id.* at 697.

52. United States v. Baker, 58 M.J. 380, 386 (C.A.A.F. 2003) (citing United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977) (establishing firm basis)).

53. *Baker*, 65 M.J. at 697 (citing *Baker*, 58 M.J. at 387–88) (internal citations omitted).

54. AR 27-26 (2018), *supra* note 3, r. 8.5(j).

55. *See* 10 U.S.C. § 806b(e)(1) ("If the victim of an offense under this chapter believes that a preliminary hearing ruling . . . or a court-martial ruling violates the rights of the victim . . . the victim may petition the Court of Criminal Appeals for a writ of mandamus.") (internal citations omitted).

56. It is possible, as the author did in one case, that an SVC could offer testimony of a client or other witness in a MRE 412, 513, or 514 motion, particularly if government counsel is not opposing defense counsel in the motion. *See* LRM v. Kastenberg, 72 M.J. 364, 370 (C.A.A.F. 2013) (the right to be heard includes "the right to present facts"). *See also* Professional Experiences, *supra* note 37.

57. U.S. Army Trial Judiciary, Rules of Practice Before Army Court-Martial, r. 4.3.4 ("During the pendency of a case, the SVC must immediately inform the judge, trial counsel, and defense counsel when representation of a client is terminated.") [hereinafter Rules of Court].

58. A noisy withdrawal is the practice of an attorney notifying the court and parties of withdrawal from representation in such a manner as to imply the existence an ethical conflict without specifically identifying

the issue. *See Baker*, 65 M.J. at 698; *see also* Paul J. Schlauch, *A Lawyer's Duty to Remain Silent and Right to Speak Out Concerning Client Misconduct*, ROCKY MT. MIN. L. INST. 7B-1 (2007).

59. AR 27-26 (2018), *supra* note 3, r. 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests.").

60. United States v. Battles, No. ARMY 20140399, 2017 CCA LEXIS 380 at *20–28 (A. Ct. Crim. App. May 31, 2017).

61. *Id.* at *1.

62. *Id.* at *22. *See also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1105A (2016) [hereinafter MCM] ("Matters submitted by a crime victim").

63. *Battles*, 2017 CCA LEXIS at *22 (citing remarks from the trial court military judge's findings of fact).

64. *Id.*

65. *Id.* at *23.

66. At the hearing, the SVC invoked the attorney-client privilege on behalf of his now former client as well as his Fifth Amendment right to not self-incriminate. *Id.* The military judge determined there was "an unwritten exception" to the attorney-client privilege when there was "direct evidence of perjury." *Id.* The appellate court did not concur with this "unwritten exception." *Id.* at *23–24.

67. *Id.* at *25.

68. *Id.* at *25–28.

69. The potential perjury issue was not presented as legal error by appellant's counsel, but submitted at the request of the appellant pursuant to *Grostefon*. United States v. Grostefon, 12 M.J. 431, 436–37 (C.M.A. 1982) (appellant defense counsel must present all matters requested by a client even if frivolous).

70. *Battles*, 2017 CCA LEXIS at *24.

71. *Id.* at *28 (holding further that the SVC's testimony as to the victim's credibility would be inadmissible human lie detector testimony).

72. *Id.*

73. AR 27-26 (2018), *supra* note 3, r. 3.3, cmt. 17 ("A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. . . . A proceeding has concluded . . . when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.").

74. United States v. Lewis, 38 M.J. 501, 515–22 (A.C.M.R. 1993).

75. *Id.* at 506.

76. *Id.* at 510.

77. *Id.* at 514.

78. *Id.* at 515–516 ("[T]he attorney-client privilege bars a court or other governmental tribunal from compelling the revelation of confidential communications between the attorney and client . . . . In contrast, the ethical duty prohibits an attorney from voluntarily revealing or using any information obtained in the course of the representation regardless of the source of that information.")(emphasis in original).

79. *Id.*

80. *Id.*

81. *Id.* at 515 (quoting United States v. Mays, 33 M.J. 455, 458 (C.A.A.F. 1991)).

82. *Id.* at 517.

83. *Id.* at 514, 516 ("The drafters did not intend that lawyers should employ the rule to disobey a valid court order.").

84. *Id.*

85. *See* AR 27-26 (2018), *supra* note 3, r. 1.6, cmt. 4.

86. AR 27-26 (2018), *supra* note 31, r. 1.0(w).

87. *Battles*, 2017 CCA LEXIS at *24.

88. AR 27-26 (2018), *supra* note 3, r. 1.6, cmt. 35.

89. *Id.* r. 1.2(d).

90. *Id.* r. 1.6(b)(2)(iii).

91. United States v. Baker, 58 M.J. 380, 386 (C.A.A.F. 2003) (citing United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977) (establishing firm basis)).

92. An observant defense counsel will be closely monitoring the SVC's interactions with trial counsel. These communications should be narrowly tailored to limit exposure on the stand. *See* United States v. Rodriguez-Rivera, 63 M.J. 372, 378 (C.A.A.F. 2006) (trial counsel cross-examined by military judge about potential coaching of key witness after recess).

93. *See generally* State v. Berrysmith, 87 Wash. App. 268, 275–76 , 944 P.2d 397, 399–400 (1997) (holding that a client's actual intent to commit perjury is irrelevant; attorney withdrawal is proper if based on reasonable belief of attorney rooted in firm factual basis).

94. *See Baker*, 65 M.J. at 698.

95. *See* United States v. Radford, 14 M.J. 322, 326–328 (C.M.A. 1982) (quoting the American Bar Association's professional rule standards, "the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner *without revealing the fact to the court")* (emphasis in original).

96. AR 27-26 (2018), *supra* note 3, r. 3.3, cmt. 19 ("In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.").

97. *See* Lieutenant Colonel Thomas G. Bowe, *Limiting Defense Counsel's Ethical Obligation to Disclose Client Perjury Revealed After Adjournment: When Should the "Conclusion of the Proceedings" Occur?*, 1993 ARMY LAW., June 1993, at 27, 29 (exploring defense counsel's obligations to disclose past perjury under 1992 Army Professional Rule 3.3, duty to candor toward the tribunal.).

98. *Battles*, 2017 CCA LEXIS at *24.

99. AR 27-26 (2018), *supra* note 3, r. 3.3, cmt. 17.

100. SVC HANDBOOK, *supra* note 21, at 23 ("[Termination of representation] [f]or courts-martial, [is effective] upon initial action by the convening authority or earlier termination of charges.").

101. *Battles*, 2017 CCA LEXIS at *24. *See also* AR 27-26 (2018), *supra* note 3, r. 1.2d.

102. An SVC must evaluate whether they can still provide competent representation in post-trial submissions if there is a personal conflict. *See* United States v. Gonzalez, No. ACM 39125, 2018 CCA LEXIS 145 at *38 (A.F. Ct. Crim. App. Mar. 22, 2018) ("a conflicted counsel is a constitutionally inadequate counsel for purposes of post-trial representation of an accused").

103. *See* AR 27-26 (2018), *supra* note 3, r. 1.16, cmt. 7. *See also* Farhat & Russell, *supra* note 20, at 9 (citing Lowery v. Cardwell, 575 F.2d 727, 731 (9th Cir. 1978) (holding perjury does not require withdrawal so long as the lawyer does not act to advance the perjury).

104. An alleged sexual assault victim has certain statutory and regulatory rights, but no constitutional right to counsel. *See* UCMJ, art. 6b (2018). *See also* U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, 82–93 (interim) (1 Jan. 2019). Arguably, the "noisy" element of a defense counsel withdrawal is based on the visible and inherently active role of defense. An SVC is not under the exact same constraints. *See* Schlauch, *supra* note 58 (discussing "quiet withdrawal" of corporate attorneys due to misconduct of client without notice to others).

105. RULES OF COURT, *supra* note 57, r. 4.3.4.

106. SVC HANDBOOK, *supra* note 21, at 22 ("Absent the client's consent, an SVC may terminate representation only IAW AR 27-26. SVC should consult with their [Chief of Legal Assistance] and [SVC Program Manager] when considering terminating representation prior to the actions identified in paragraph d of this chapter.").

107. *Id.*

108. *See* AR 27-26 (2018), *supra* note 3, r. 1.1, cmt. 7 ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice . . . .").

109. SVC HANDBOOK, *supra* note 21, at 2, para. 1-3b ("In situations where the interests of the victim do not align with the government, the [Chief of Legal Assistance] and the [SVC Program Manager] will provide technical advice and professional responsibility (PR) supervision IAW AR 27-26.").

(Credit: istockphoto.com/stockage)

No. 4

Voir Dire in a Time of "Me Too"

By Major Chase C. Cleveland

Due process as a cultural matter is influenced by legal ideas but it is really a cluster of fluid notions that arise when people in different social and political contexts react to what they perceive as unfairness, abuse, and oppression.[1]

"Me Too"[2]

Have you or a close member of your family ever been a victim of sexual assault?[3] Posed to some people, this question may provoke an emotional or overwhelming response. It may also elicit feelings of shame or embarrassment. These natural reactions can be expected when discussing such a traumatic event. Because of these feelings, victims of sexual assault may be reluctant to come forward and report these crimes.[4] While the paradigm has started to shift, the private and sometimes embarrassing nature of sexual assault still sends most victims to the shadows. This reluctance creates its own set of problems for investigating and prosecuting sexual assaults. To counteract these problems, the U.S. Army has taken a multitude of steps to improve protections for victims and encourage reporting.[5] In spite of these safeguards, there is still at least one area that falls short in providing protections to victims: voir dire.

Voir dire begins with the panel members being asked questions in a group setting.[6] Once the military judge has finished asking the panel members standard questions from the Military Judges' Benchbook,[7] the judge has the discretion to allow counsel from both sides to ask questions of the panel members.[8] The military judge will then excuse the panel members, and each party will have a chance to request individual voir dire of particular panel members.[9] While this questioning is done outside the presence of the other members, it is still done in an open courtroom with spectators, to include: commanders, noncommissioned officers, Soldiers from the accused's unit, civilians, Family members of the accused, and possibly members of the press. If a member answers affirmatively to being a victim of sexual assault or to having someone close to them who is a victim of sexual assault, the parties can question the member about the incident. While the military judge can limit the scope of these questions, the member is still required, by oath, to be truthful. Currently, no additional protections exist to protect a sexual assault victim who is being questioned during voir dire.

In today's climate, nothing has become more contentious than the delicate balancing act of the rights of the accused and the rights of the victim in sexual assault cases. This stress exists throughout the military justice process, from the investigative stages through post-trial. However, one commonly overlooked, yet important, area where this tension creates significant strains is voir dire. As society and the military become more aware of what constitutes sexual assault, more and more service members are coming forward as victims.[10] In addition to this awakening, the military has put more procedures and protections in place for victims of sexual assault.[11] However, one protection that must continue to be honored, is the protection of the court-martial process and a fair hearing for the accused.

To protect the individuals on both ends of the military justice spectrum, changes must be made to the voir dire process. These changes include adding additional questions to the panel member questionnaires, adjusting voir dire questions in the Military Judges' Benchbook, and revising Rules for Court-Martial (RCM) 912 to allow the military judge to seal portions of individual voir dire and close the courtroom during questioning. These changes are required to protect the process, the accused, and the privacy of victims by allowing panel members to feel more comfortable answering questions during voir dire that concern whether they or someone close to them has been a victim of sexual assault. The honesty and openness of panel members allow for the accused to effectively question the members and decide whether it is appropriate to exercise a challenge for cause. Additionally, the panel member who has been a victim of sexual assault or has a Family member who is a victim of sexual assault is protected from the embarrassing nature of having to discuss it in an open courtroom.

This article will explore the purpose behind voir dire both philosophically and practically. It will open with a real world example that demonstrates the importance of changing the voir dire process in sexual assault cases and then address the current rules and law pertaining to voir dire and the rights the accused has as it pertains to the process. This will include the panel members' duty to disclose and possible challenges the accused may have. It will then discuss some of the rights victims have during the investigative process and how there are currently no protections for victims when it comes to voir dire. The article will conclude by proposing changes to RCM 912, the Military Judges' Benchbook, and panel questionnaires that will help ensure the privacy of victims of sexual assault but also continue to protect the accused by providing a fair voir dire process.

Voir Dire

The Sound of Silence[12]

During a court-martial for which a Soldier was accused of rape, an enlisted panel was assembled.[13] The panel members were asked during voir dire: "Has anyone, or any member of your family, or anyone close to you personally, ever been the victim of an offense similar to any of those charged in this case?" Two officers responded in the affirmative. The remaining panel members responded in the negative. After individual voir dire was conducted with the two officers who responded in the affirmative, the defense counsel challenged both members for cause for implied bias. Both challenges were granted by the military judge. The court-martial continued, and the Soldier was convicted of rape and sentenced to over ten years of confinement.

Approximately three months later, the same panel members were selected for another court-martial for sexual assault. The same defense counsel from the previous court-martial was representing the accused. During group voir dire, when asked if any member or someone close to them had ever been the victim of a similar offense, all members responded as they had in the previous court-martial except for two enlisted members. During individual voir dire, the defense counsel questioned both members about their responses. Both members stated that they had been victims of sexual assault as children and that they had never disclosed the incidents to anyone until then. When asked by the defense counsel why they did not disclose their status as victims during voir dire at the previous court-martial, they stated that they were not ready to publicly disclose that they were victims of sexual assault. After being challenged for cause, both members were excused by the military judge.

This fact pattern creates two serious issues: one obvious and one not so apparent to those unfamiliar with military justice. The first is the unfortunate and embarrassing situation the panel members were placed in by having to reveal for the first time, in a room full of people, that they were victims of sexual assault. This disclosure, while necessary and required for justice, could have been given under circumstances that provided more privacy to the victims. The second issue raised by this fact pattern, and the one tied directly to due process, is that the accused did not receive a fair and impartial panel at the first court-martial. With some relatively minor changes to voir dire, these issues can be avoided while still protecting the process, the accused, and victims.

Voir Dire as a Shield

Voir dire can set the tone for an entire court-martial. It is arguably the most important aspect of a trial. This is especially true for the accused. Voir dire is the stage of trial where the individuals who will decide the accused's fate are determined. The Uniform Code of Military Justice (UCMJ) provides the accused the right to trial before members.[14] "As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel."[15] However, protections for the accused under the UCMJ process do not stop at being provided the right to a panel. What is even more important than having a panel, is having an impartial panel who will hear the evidence and correctly apply the law to the facts in determining whether the accused is guilty or not. Members are subject to voir dire by the military judge and counsel.[16] "The reliability of a verdict depends upon the impartiality of the court members. Voir dire is fundamental to a fair trial."[17] Fleshing out the impartiality of court members is key to a successful voir dire. Without an impartial panel, the accused loses his due process rights and the entire UCMJ process can be brought into question by the public.

Voir dire and the panel selection process is designed to serve as a shield to protect the accused by producing an impartial panel. The UCMJ has direct prohibitions on who can serve on the panel. For example, an accuser or witness for the prosecution cannot serve as a panel member in a general or special courts-martial.[18] The UCMJ also directs what member characteristics the convening authority must consider in detailing a panel. When selecting a panel, the general court-martial convening authority must select those members who, in his or her personal opinion, are "best qualified" in terms of age, experience, education, training, length of service, and judicial temperament.[19] These criteria usually lead to the convening authority selecting members who are older and have been in the military for a substantial amount of time. The one trait these

members will usually all have in common is experience. However, that experience will be vastly different from member to member.

Everyone's own personal experiences shape and define the lens through which they view most situations in life. This is especially true when it comes to experiencing any traumatic event and can apply whether the person experienced the event first or second hand. While combat is what most individuals think of when discussing trauma and the military, what is sometimes forgotten is the trauma of sexual assault and how it affects a service member's experiences and viewpoints.[20] This trauma also extends to those who have a close family member who has been a victim of sexual assault. According to the National Center for Injury Prevention and Control, nearly 1 in 5 women (18.3%) and 1 in 71 men (1.4%) in the United States have been raped during their lifetime.[21] These staggering numbers implicate all professions and demographics, including the military. The make-up of a traditional panel, as provided for in the UCMJ, increases the likelihood that a potential member is or has been married, has children, and has supervised Soldiers. This further increases the probability that a potential panel member is or knows someone who is a victim of sexual assault. This becomes more relevant in today's Army because a high number of contested courts-martial involve sexual offenses.[22] This probability creates an issue of partiality that must be further explored and challenged.

Voir Dire as a Sword

The opportunity for voir dire exists so parties can obtain information to intelligently exercise their challenges.[23] To effectuate this, parties must be able to develop effective questions and explore potential biases of members. Voir dire examination protects the accused's right to a fair trial "by exposing possible biases, both known and unknown, on the part of potential jurors."[24] Voir dire is the procedural mechanism for testing member bias.[25]

Before voir dire, the trial counsel administers an oath to panel members to "answer truthfully the questions concerning whether you should serve as a member of this court-martial."[26] In theory, this oath is the foundation for which the voir dire process is based. Court-martial members have a duty to disclose and are required to honestly answer questions during voir dire.[27] The entire procedure relies on the honesty of the panel members and their forthcoming answers. Without it, the accused cannot effectively explore the potential biases of those members who are charged with fairly hearing the case.

To challenge members for cause, the defense must show that the member has one of two types of bias: actual or implied. Actual and implied bias are based on RCM 912, which states that a member should not sit on the court-martial if serving would create a "substantial doubt as to [the] legality, fairness, and impartiality" of the court-martial proceedings.[28] In contemporary courts-martial, this is seen most in whether a panel member can be impartial in hearing a case involving sexual assault. Actual and implied bias have separate legal tests; however, they are not separate grounds for challenge.[29] A challenge for implied bias is reviewed objectively, through the eyes of the public.[30] "Implied bias exists when most people in the same position would be prejudiced."[31] The military judge should focus on "the perception or appearance of fairness of the military justice system" when applying the implied bias standard.[32] The military justice system, while possessing some similarities with the civilian justice system, has its own unique complexities that may be foreign to those who are not familiar with the military.

One perception is that the military system is inherently unfair and that military courts are just a "rubber stamp" from the command.[33] Presently, this perception is not without merit.[34] To counter this view, military judges should liberally grant challenges for cause from the defense.[35] Known as the "liberal grant mandate,"[36] this judicial directive levels the playing field for the accused. The "liberal grant mandate" and challenges for implied bias address "historic concerns about the real and perceived potential for command influence on members' deliberations."[37] Not only does the convening authority decide which cases to send to a court-martial, the convening authority also selects the panel members who will hear the case. At first glance, the convening authority's power to both refer the case and select the panel seems unjust. However, the "liberal grant mandate" counterbalances this by giving military judges leeway in granting challenges for implied bias; thereby, increasing the public's confidence in the fairness of the military justice system.

The liberal grant mandate not only addresses the fairness of the military justice system in the eyes of the public, it also advances justice by other means.

> The liberal grant mandate is part of the fabric of military law. The mandate recognizes that the trial judiciary has the primary responsibility of preventing both the reality and the appearance of bias involving potential court members. To start, military judges are in the best position to address issues of actual bias, as well as the appearance of bias of court members. Guided by their knowledge of the law, military judges observe the demeanor of the members and are better situated to make credibility judgments. However, implied bias and the liberal grant mandate also recognize that the interests of justice are best served by addressing potential member issues at the outset of judicial proceedings, before a full trial and possibly years of appellate litigation. The prompt resolution of member challenges spares the victim the potential of testifying anew, the government the expense of retrial, as well as society the risk that evidence (in particular witness recollection) may be lost or degraded over time. As a result, in close cases military judges are enjoined to liberally grant challenges for cause. It is at the preliminary stage of the proceedings that questions involving member selection are relatively easy to rapidly address and remedy.[38]

By addressing potential panel issues at the trial level, the accused, the government, and any victim benefit. The accused receives a fair trial and is able to address issues with the panel at the outset. The government benefits by saving the time

and resources that would be required for a potential retrial or *DuBay* hearing.[39] Finally, the victim benefits by not having to endure the stress and burdens of a new contested court-martial.

Victim Bias

The most common issue that arises during voir dire is implied bias. As can be expected, panel members bring their own experiences, both negative and positive, with them when they are selected for a court-martial. These experiences can range from negative or positive involvements with law enforcement or having been a witness to a crime. Sometimes these experiences are benign and leave nothing more than a fleeting memory of the events. On the other hand, some occurrences can be so disturbing or traumatic that they may be forever ingrained in the individual's memory and have lasting effects on their decision-making and opinions. These biases are the exact kind of predispositions that voir dire is designed to confront. The accused's ability to explore a member's potential bias as a victim or close relationship to a victim has been and continues to be a crucial component in sexual assault courts-martial.

An effective voir dire does not stop at just identifying an event that may affect a member. The accused must still develop questions for the members that will explore whether the member's past experiences will affect their ability to fairly serve as a panel member or cause the public to question that member's impartiality. *United States v. Terry* offers a great contrast between potential panel members' past experiences and whether there may be an actual or implied bias.[40] In *Terry*, the accused was tried for rape.[41] During voir dire, two officer members indicated that they knew family or friends who had been the victims of sexual assault, and the accused challenged both for cause.[42] The first member stated that his wife had been a victim of some form of sexual assault by a family member. However, he also stated that she had not discussed it in over five years, had reconciled with the individual, and the incident had occurred ten to twenty years earlier.[43] The court held that "a prior connection to a crime similar to the one being tried before the court-martial is not per se disqualifying to a member's service," and the military judge properly denied the challenge for cause.[44] The other officer member stated that his girlfriend (whom he intended to marry) had been raped and became pregnant.[45] Because of that experience, she broke off her relationship with the member.[46] The court held that the military judge erred in not granting the challenge for cause under the implied bias theory and "liberal grant mandate" because most persons in the member's position would have difficulty sitting on a rape trial, and an objective observer may have doubts about the fairness of the accused's court-martial panel.[47] The court found that the member's experience with rape was "too distinct to pass the implied bias muster."[48] This case exemplifies the importance of a thorough voir dire.

A detailed voir dire with forthcoming panel members benefits both the accused and the government. Even though a potential member may be a victim of a crime, they are not per se disqualified.[49] A victim of a crime similar to that being tried can sit as a member if they are unequivocal in their voir dire responses and are able to be open-minded and consider the full range of permissible findings and punishments.[50] To promote justice and ensure a fair trial, the trial counsel must also effectively examine a potential panel member to reveal bias or develop the record to support that the member can be open-minded. The exploration of potential biases by both parties is key to an efficient and fair court-martial process.

However, an honest panel is necessary to have a full and open voir dire. "Where a potential member is not forthcoming, however, the process may well be burdened intolerably."[51] The effect of a panel member's nondisclosure during voir dire can be significant and result in an entirely new trial. When a juror fails to disclose information during voir dire, the Supreme Court has held that a party must "demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause."[52] The Court further asserts that the normal procedure when a party asserts juror nondisclosure is to remand the issue to the trial court to develop a record or resolve factual controversies.[53]

Protecting Victims

Protecting victims of sexual assault has become an important facet of military justice. Recently, the Military Justice Act of 2016 has made significant changes to the UCMJ and RCM.[54] While these new rights and protections for victims and the accused are important, one overlooked area that currently does not provide any protections to victims of sexual assault is voir dire. When impaneling court members in a case involving sexual assault, a potential panel member who has been a victim may find themselves being questioned in open court about the event and how it has affected them. Being questioned about such a personal and traumatic experience can be intimidating and embarrassing. For some panel members, this may be the first time they have ever been questioned about the incident or it may even be the first time they have ever disclosed such an event.

In spite of the rights given to victims of sexual assault over the last decade, voir dire can potentially violate some of these rights. For example, victims in the military have a right to file a restricted report of sexual assault.[55] A restricted report in the Department of Defense is an option for an adult victim of a sexual assault to confidentially disclose the crime to a specifically identified individual without their chain of command being notified or having an official law enforcement investigation opened.[56] The three types of individuals authorized to receive a restricted report are a Sexual Assault Prevention and Response Office Victim Advocate, Sexual Assault Response Coordinator, or a healthcare provider or personnel.[57] Restricted reporting allows the victim to receive healthcare after the assault and gives them time to process the assault and heal.[58] This is a critical resource that is provided to victims of sexual assault. However, voir dire can deprive victims of this important right by essentially turning a restricted report into an unrestricted report. Because panel members have a duty to be honest during voir dire, they must disclose whether they are a victim or know someone close to them that is a victim of sexual assault when they are questioned under oath. However, by divulging this information in a courtroom with numerous spectators, the panel member has

inadvertently made an unrestricted report of sexual assault. This prevents victims from disclosing the sexual assault on their terms and must be remedied.

Achieving Hydrostatic Equilibrium[59]

Rarely do the interests of an accused and a sexual assault victim intersect. While the accused requires due process and the fair administration of justice, a victim requires privacy and support. The constant struggle of these competing interests is at the heart of many of the changes to the court-martial and investigative processes over the last decade. Voir dire can offer the rare forum for which this balancing act achieves its goal of benefiting the accused and victims. The below recommended protections are best implemented by making changes to RCM 912.[60] These proposals are in line with recent trends in improving victims' rights under the UCMJ and still allow for the fair and efficient administration of justice during the court-martial process.

Panel Questionnaires

For all practical purposes, voir dire begins at the panel questionnaires. Under RCM 912(a)(1), trial counsel may (and shall upon request of defense counsel) submit to members written questionnaires before trial.[61] "Using questionnaires before trial may expedite voir dire and may permit more informed exercise of challenges."[62] These questionnaires are the first opportunity for the prosecution and defense to learn about the panel members' backgrounds and start developing voir dire questions. However, counsel are limited to the somewhat narrow information provided on the forms. Even though the questionnaires contain ample information about the members' military careers, education, and basic familial facts, they provide little background into any potential personal biases the member may harbor.

When a panel member's questionnaire contains information that may result in disqualification, the defense must make reasonable inquiries into the background of the member.[63] The issue then becomes a matter of how defense counsel can make reasonable inquiries about an issue that is not identified before trial. One method to remedy this is by adding a few questions to the questionnaire that identifies whether the potential panel member is a victim of sexual assault or has someone close to them who is a victim of sexual assault. A questionnaire that provides this additional information allows the defense counsel the ability to develop appropriate voir dire questions that may reveal member bias. These new questionnaires would alert the counsel and military judge to the issue so that the questioning of the member can be avoided in a public forum. This allows the member the opportunity to be more candid, which can be beneficial to counsel from both sides.

Closing Court

To protect victims of sexual assault and encourage candor during voir dire, the court should be closed when a potential member is being examined by either party about a sexual assault. The structure for this can be found in the Military Rules of Evidence (MRE) 412 hearing procedure.[64] During a motions hearing under MRE 412, the military judge will close the courtroom.[65] In practice, the military judge will ask all spectators to leave the courtroom before the motions hearing begins. The judge will then instruct the bailiff to also leave the courtroom and ensure that no one enters the courtroom until the hearing on the motion is complete. The only individuals left in the courtroom will be the accused, counsel for the accused, government counsel, the court reporter, and the military judge. For the duration of the hearing, to include witness examination and argument, these are the only individuals who will be present in the courtroom. This closure is intended to protect the privacy rights of victims of sexual assault.

Potential panel members can also benefit from having the courtroom closed during specific portions of voir dire. To protect those individuals who have been victims of sexual assault, a new procedure should be established for this closure. When the convening order is due to the court in accordance with the military judge's pre-trial order, the trial counsel will also alert the court to whether a potential panel member has indicated on their questionnaire that they or a close family member has been a victim of sexual assault. During an RCM 802[66] session before trial, the military judge will ensure that both parties understand which potential members have indicated that they or a close family member are a victim of sexual assault. The military judge will then instruct the parties on the order of individual voir dire for those members and when during that individual voir dire session that the courtroom will be closed.

When the panel is brought in at the beginning of the court-martial, the military judge will give the standard preliminary instructions and begin group voir dire with the questions found in the Military Judges' Benchbook.[67] Because the panel questionnaires will now reflect whether or not a potential member has been a victim of sexual assault or has a close family member who has been a victim, the military judge will not ask the panel members in group voir dire if any member has been a victim of a similar crime.[68] Once group voir dire is complete, the panel members will be excused. The military judge will ask counsel from both sides which panel members, excluding the members who were discussed during the RCM 802 session, that they would like to question individually and the reasons why. Once the military judge determines which members will be individually questioned, the individual voir dire process will begin.

The military judge, at her discretion, will determine the order of individual voir dire and when the courtroom will be closed for the parties to question a particular panel member about being a victim of sexual assault.[69] By allowing the military judge to close the courtroom during voir dire, victims of sexual assault are given additional protections that have not been previously afforded to victims in this manner under the UCMJ.

Sealing the Record of Trial[70]

To further protect victims of sexual assault who serve as panel members, the portion of the Record of Trial that includes the closed session of their individual voir dire examination should be sealed. This would be done in the same manner that a motions hearing under MRE 412 or MRE 513 is sealed by the military judge.[71] Sealing the

(Credit: istockphotograph.com/JakeOlimb)

portion of the Record of Trial concerning the questions and answers of a victim of sexual assault is narrowly tailored to protect the privacy interest of the victim, and the military judge would only be sealing the portion of questioning that pertains directly to the member's status as a victim or having a close family member who has been a victim. The sealing order would address the four-part test for closing a court-martial[72] and is narrowly tailored to protect the interest of victims.

While not required, a minor change could be made to RCM 1112 to reflect the sealing of the closed individual voir dire sessions. The new RCM 1112(e)(3)(B)(ii) would read: any recording or transcript of a session that was ordered closed by the military judge, to include closed sessions held pursuant Mil. R. Evid. 412, 513, 514, or RCM 912.

Challenges

The proposed changes are not without their own difficulties. The most challenging difficulty is ensuring that the accused gets a fair trial while also ensuring that the closure and sealing are limited to only what is necessary to achieve the objective of protecting victims' rights. Arguably, the accused benefits from these protections because it encourages the potential panel members to be more open. When the panel members are more forthright in their voir dire answers, the accused can better use his challenges for cause. It is important to balance the rights of the accused and a victim while still maintaining the openness of the criminal justice process.[73] "No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the voir dire which promotes fairness."[74] This fairness to the public is in conflict with closing the courtroom and sealing the record to protect the privacy rights of victims.

In *Press-Enterprise Co. v. Superior Court of California*, the defendant was tried and convicted of the rape and murder of a teenager.[75] The petitioner moved that voir dire be open to the public and press; however, the motion was opposed by the prosecutor because the state felt that if the press was present, the responses from the jurors "would lack the candor necessary to assure a fair trial."[76] The judge agreed with the state and closed the six weeks of voir dire, except for three days.[77] The Supreme Court held that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[78]

The Supreme Court does acknowledge that some voir dire questions may implicate legitimate privacy concerns of prospective jurors.[79] The Court gives the example of a prospective juror who has been raped or has a member of her family that has been raped and declined to disclose the crime because of the embarrassment and emotional trauma that may come from the disclosure.[80] "The privacy interests of such a prospective juror must be balanced against the historic values we have discussed and the need for openness of the process."[81] To protect the privacy interests of victims and preserve fairness, the Court proposes that the trial judge should inform the prospective jurors of the sensitive nature of the questions and any juror who believes that the public questioning may be damaging because of the embarrassment it brings, may request an opportunity to present the matter to the judge in camera while on the record and with both parties present.[82]

> By requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes on a significant interest in privacy. This process will minimize the risk of unnecessary closure . . . . When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror's valid privacy interests. Even then a valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment.[83]

The privacy issues and proposal in *Press-Enterprise* are similar to those addressed in this article's proposed changes

to RCM 912. The proposed RCM 912 balances the rights of the accused, the victim, and the public by limiting the closure of the proceedings to only what is necessary to protect the privacy interests of the victims or family members of victims.

Another challenge facing this proposal is the amount of time that the new voir dire process will take. For the individual voir dire sessions involving panel members who are victims of sexual assault, the military judge will have to close and then open the courtroom each time a member is questioned about the events. Depending upon the size of the courtroom and the number of spectators, this can be very time-consuming. This is even more burdensome if a majority of the potential panel members need to be questioned in a closed session. The voir dire process, as currently constructed, can already create long days for the panel members, the military judge, and both parties. The proposed changes to the voir dire process make it likely that the long, tedious days in the courtroom may get even longer. While this is a valid concern, one could argue that this is offset by the time and resources that would be expended for a new trial or *DuBay* hearing, should a panel member fail to disclose that they were a victim of sexual assault.

Conclusion

Under the UCMJ, nothing may be as important as providing an accused due process and a fair and impartial trial. Voir dire is a significant component of this. However, in addition to protecting the accused, victims of sexual assault should also be protected. While these two parties are usually on opposing ends of the military justice spectrum, both deserve our attention. Significant strides have been made in protecting the accused and victim. In addition to creating new rights for the accused, the implementation of the Military Justice Act 2016 has provided significant rights to victims.[84] While the Army has taken these steps to provide new rights and resources to victims, voir dire has been overlooked as a potential area that can provide additional safeguards. By allowing victims of sexual assault to be questioned in an open courtroom about such a traumatic and disturbing event, we are further compounding their suffering and pain. To better protect victims, and by extension the court-martial process, changes should be made to the voir dire process. These changes include adding a section to panel member questionnaires that allows the member to note whether they or someone close to them has been a victim of sexual assault. After noting whether they are a victim or know someone who is a victim, steps should be taken to ensure they are not further embarrassed by having to discuss the event in an open courtroom. This can be accomplished by adding a section to RCM 912 that allows the military judge to close the courtroom during the examination of panel members about such matters. This closure would be limited to the questioning about the specific instance that the member disclosed on their questionnaire. After trial, that portion of the Record of Trial that contains the closed examination of a panel member, should be sealed by the military judge.

By making these proposed changes to voir dire, victims of sexual assault are better protected from unnecessary disclosure or questioning in a public setting. Furthermore, these changes also serve the accused by providing him the opportunity for a fair voir dire procedure. By allowing panel members a more private setting to discuss the sexual assault, they will likely be more forthcoming with their answers. This candor will allow the defense counsel to effectively develop their voir dire and intelligently use their challenges. This may be one of the few areas of the law where the rights of the accused and the victim intersect. By making these simple, yet important, changes to the voir dire process, we can close a gap in the rights that are provided to victims of sexual assault while also further promoting justice for the accused. **TAL**

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Notes

1. Emily Stewart, *Trump Wants "Due Process" for Abuse Allegations. I Asked 8 Legal Experts What That Means.*, Vox (Feb. 12, 2018, 3:08 PM), https://www.vox.com/policy-and-politics/2018/2/11/16999466/what-is-due-process-trump.

2. *See generally* Me Too, https://metoomvmt.org (last visited July 24, 2019) (providing a brief background on the "Me Too" movement).

3. This question is similar to a question asked of panel members by the military judge during voir dire. "Has anyone, or any member of your family, or anyone close to you personally, ever been the victim of an offense similar to any of those charged in this case?" U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook para. 2-5-1 (10 Sept. 2014) [hereinafter DA Pam. 27-9].

4. In addition to reluctance to report sexual assaults based on the personal and private nature of the event, a victim may also be reluctant to report because of the status of the perpetrator, such as a boss, family member, or significant other.

5. One of these provided protections is the ability for a Soldier to make a "restricted report" of a sexual assault. *See Restricted Reporting*, U.S. Dep't of Def. Sexual Assault Prevention and Response Off., https://www.sapr.mil/restricted-reporting (last visited July 24, 2019) [hereinafter DoD SAPRO] (providing an explanation of restricted reporting in the Army).

6. Manual for Courts-Martial, United States, R.C.M. 912(d) (2019) [hereinafter MCM].

7. DA Pam. 27-9, *supra* note 3.

8. MCM, *supra* note 6.

9. MCM, *supra* note 6.

10. *See* Thomas Gibbons-Neff, *Reports of Sexual Assault in the Military Rise by 10 Percent, Pentagon Finds*, N.Y. Times (Apr. 30, 2018), https://www.nytimes.com/2018/04/30/us/politics/sexual-assault-reports-military-increase.html; Greg Myre, *Despite Prevention Programs, Sexual Assaults Rise at Military Academies*, NPR (Feb. 14, 2019, 9:44 AM), https://www.npr.org/2019/02/14/694597943/despite-prevention-programs-sexual-assaults-rise-at-military-academies.

11. *See generally*, Military Justice Act of 2016, 114 Pub. L. No. 328, Division E, 130 Stat. 2000, 2894 (2016) (prescribing reform of the UCMJ).

12. Simon & Garfunkel, The Sound of Silence (Columbia Records 1965).

13. Some facts have been changed to protect the identities of the panel members and victims.

14. UCMJ art. 25 (2018).

15. United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001).

16. UCMJ art. 41 (2018).

17. United States v. Jefferson, 44 M.J. 312, 321 (C.A.A.F. 1996).

18. UCMJ art. 25(e) (2018).

19. UCMJ art. 25 (2018).

20. In fiscal year 2017, there were 6,769 restricted and unrestricted reports of sexual assault involving service members as either victim or subject. U.S. Dep't of Def. Sexual Assault Prevention and Response Off., Statistical Data on Sexual Assault, app. B, 8 (Apr. 2018), http://sapr.mil/public/docs/reports/FY17_Annual/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf. These figures do not include sexual assault allegations involving spouses and/or intimate partners. *Id.* at 4.

21. Nat'l Ctr. for Injury Prevention and Control, National Intimate Partner and Sexual Violence

Survey 2010 Summary Report, 1 (Nov. 2011), https://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf.

22. U.S. Dep't of Def. Sexual Assault and Prevention and Response Off., Metrics and Military Justice Indicators on Sexual Assault, app. C, 27-30 (Apr. 2018), https://sapr.mil/public/docs/reports/FY17_Annual/Appendix_C_Metrics_and_Military_Justice_Indicators.pdf.

23. MCM, *supra* note 6, R.C.M. 912(d) discussion ("The opportunity for *voir dire* should be used to obtain information for the intelligent exercise of challenges[.]").

24. McDonough Power Equipment, Inc. v. Greenwood, 104 S. Ct. 845, 849 (1984).

25. United States v. Richardson, 61 M.J. 113, 118 (C.A.A.F. 2005).

26. DA Pam. 27-9, *supra* note 3, para. 2-5. *See also* MCM, *supra* note 6, R.C.M. 807(b)(2) discussion (providing suggested oath for panel members); MCM, *supra* note 6, R.C.M. 912(d) discussion ("If the members have not already been placed under oath for the purpose of voir dire . . . , they should be sworn before they are questioned.").

27. United States v. Albaaj, 65 M.J. 167, 170 (C.A.A.F. 2007); United States v. Commisso, 76 M.J. 315, 322 (CAAF 2016).

28. MCM, *supra* note 6, R.C.M. 912 (f)(1)(N).

29. United States v. Armstrong, 54 M.J. 51, 53 (C.A.A.F. 2000).

30. United States v. Elfayoumi, 66 M.J. 354 (C.A.A.F. 2008).

31. United States v. Daulton, 45 M.J. 212, 217 (C.A.A.F. 1996).

32. United States v. New, 55 M.J. 95, 100 (C.A.A.F. 2001).

33. *See generally* Colonel James F. Garrett et al., *Lawful Command Emphasis: Talk Offense, Not Offender; Talk Process, Not Results*, Army Law., Aug. 2014, at 4 (providing a historical background of unlawful command influence and discussing the evolution of the court-martial process).

34. *See generally* United States v. Barry, 78 M.J. 70 (C.A.A.F. 2018) (holding that the Deputy Judge Advocate General of the Navy's unlawful influence tainted a service member's case); *see also* U.S. v. Riesbeck, 77 M.J. 154 (C.A.A.F. 2017).

35. United States v. James, 61 M.J. 132, 139 (C.A.A.F. 2005).

36. *Id.*

37. United States v. Clay, 64 MJ 274, 276-77 (C.A.A.F. 2007).

38. *Id.* at 277.

39. *See* United States v. Mack, 41 M.J. 51 (CMA 1994). In *Mack*, an officer member in an assault case did not mention during voir dire that he had been a victim of assault. *Id.* at 52. Even after being asked by the military judge if any member had been a victim of a physical attack, the record did not reflect any response in the affirmative or negative from the member. *Id.* After being convicted, the accused discovered during the post-trial process that the officer member failed to disclose that he had been held at gunpoint, tied up, and threatened with death during an armed robbery thirty years earlier. *Id.* at 53. On appeal the case was returned for a *DuBay* hearing to determine if there was a failure to honestly answer a material question and would the response provide a valid basis for a challenge for cause. *Id.* at 55-56. This case offers an example of the time and resources that can be spent trying to fix an issue that was not discovered during voir dire.

40. United States v. Terry, 64 M.J. 295 (C.A.A.F. 2007).

41. *Id.* at 296.

42. *Id.* at 297.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See* United States v. Smith, 25 M.J. 785, 787 (A.C.M.R. 1988) (holding that a recent crime victim is not automatically disqualified). *But see* United States v. Jefferson, 44 M.J. 312, 322 (C.A.A.F. 1996) (holding that the military judge abused his discretion by not allowing defense to reopen voir dire to explore member impartiality).

50. United States v. Basnight, 29 M.J. 838, 839 (A.C.M.R. 1989) (holding that denial of challenge for cause was proper based on member's candor and willingness to consider complete range of punishments). *See also* United States v. Reichardt, 28 M.J. 113, 116 (C.M.A. 1989) (holding that it was not error to deny challenge based on the judge's voir dire of the member and the member's unequivocal responses). *But see* United States v. Campbell, 26 M.J. 970, 971-72 (A.C.M.R. 1988) (holding that the challenge should have been granted based on the member's equivocal responses).

51. U.S. v. Mack, 41 M.J. 51, 54 (C.M.A. 1994).

52. McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (1984).

53. *Id.* at 551-52 n.3.

54. *See generally*, Colonel Sarah Root, *New Year, New Laws: What the Military Justice Act's Changes Will Mean for Judge Advocates*, Army Law., Sept./Oct. 2018, at 19 (providing an overview of changes to the UCMJ after the Military Justice Act of 2016). In addition to the Military of Justice Act of 2016, see Policy Memorandum 17-08, Office of The Judge Advocate Gen., U.S. Army, subject: Disclosure of Information to Crime Victims (1 Dec. 17); U.S. Dep't of Def., Instr. 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures (28 Mar. 2013) (C, 24 May 2017); U.S. Dep't of Army, Dir. 2014-20, Prohibition of Retaliation Against Soldiers for Reporting a Criminal Offense (19 June 2014); for examples of additional measures intended for crime victims.

55. DoD SAPRO, *supra* note 5.

56. DoD SAPRO, *supra* note 5.

57. DoD SAPRO, *supra* note 5.

58. DoD SAPRO, *supra* note 5.

59. Hydrostatic equilibrium is the balance between the thermal pressure (outward) and the weight of the material above pressing downward (inward) in a star. *Interior Structure of Stars*, Astronomy Notes (May 24, 2001), https://www.astronomynotes.com/starsun/s7.htm. A star is like a balloon in that the gas inside the balloon pushes outward and the elastic material supplies just enough inward compression to balance the gas pressure. *Id.*

60. See Appendix A for a proposed RCM 912 that incorporates the changes outlined in sections IV(A)-(B). The proposed changes are in bold.

61. MCM, *supra* note 6, R.C.M. 912(a)(1).

62. MCM, *supra* note 6, R.C.M. 912(a)(1) discussion.

63. United States v. Dunbar, 48 M.J. 288, 290 (C.A.A.F. 1998).

64. MCM, *supra* note 6, Mil. R. Evid. 412(c).

65. MCM, *supra* note 6, Mil. R. Evid. 412(c)(2).

66. MCM, *supra* note 6, R.C.M. 802.

67. DA Pam. 27-9, *supra* note 3.

68. See Appendix C for example of a change to the questions found in DA Pam. 27-9, para. 2-5-1.

69. United States v. Jefferson, 44 M.J. 312, 318 (C.A.A.F. 1996) (holding that the procedures for voir dire are generally within the discretion of the trial judge). *See also* MCM, *supra* note 6, R.C.M. 912(d) and discussion ("The nature and scope of the examination of members is within the discretion of the military judge.").

70. Appendix D contains a sample seal order that can be used by the military judge. The sample is a modification of the sample seal order that is provided in the U.S. Army Trial Judiciary, Standard Operating Procedures 38 (12 Feb. 2018) [hereinafter Trial Jud. SOP].

71. *See* MCM, *supra* note 6, R.C.M. 1113; Trial Jud. SOP, *supra* note 70, 34-35; Rules of Practice Before Army Courts-Martial 17-18 (1 Jan. 2019) (providing additional guidance on sealing).

72. *See* U.S. v. Scott, 48 M.J. 663 (A.C.C.A. 1998).

73. *See* United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) ("[P]ublic confidence in matters of military justice would quickly erode if courts-martial were arbitrarily closed to the public").

74. Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 508 (1984).

75. *Id.* at 503.

76. *Id.*

77. *Id.*

78. *Id.* at 510.

79. *Id.* at 512.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Root, *supra* note 54, at 19.

Appendix A. Proposed Change to R.C.M. 912

Rule 912. Challenge of selection of members; examination and challenges of members

(a) *Pretrial matters*.

(1) *Questionnaires*. Before trial, trial counsel may, and shall upon request of defense counsel, submit to each member written questions requesting the following information:

(A) Date of birth;

(B) Sex;

(C) Race;

(D) Marital status and sex, age, and number of dependents;

(E) Home of record;

(F) Civilian and military education, including, when available, major areas of study, name of school or institution, years of education, and degrees received;

(G) Current unit to which assigned;

(H) Past duty assignments;

(I) Awards and decorations received;

(J) Date of rank;

(K) Whether the member has acted as accuser, counsel, preliminary hearing officer, investigating officer, convening authority, or legal officer or staff judge advocate for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition; and

(L) Whether the member or a close family member or friend of the member has been a victim of sexual assault.

Additional information may be requested with the approval of the military judge. Each member's responses to the questions shall be written and signed by the member. For purposes of this rule, the term "members" includes any alternate members.

Affirmative responses to the information requested in subsection (L), above, shall not be disclosed except to the military judge; the Staff Judge Advocate, or his/her designee; the Chief of Military Justice, the Senior Trial Counsel, and Noncommissioned Officer In Charge; the Regional Defense Counsel, the Senior Defense Counsel; the trial and defense counsel detailed to the case; and, if applicable, civilian counsel for the accused. All efforts must be made to prevent unauthorized disclosure.

(2) *Other materials*. A copy of any written materials considered by the convening authority in selecting the members detailed to the court-martial shall be provided to any party upon request, except that such materials pertaining solely to persons who were not selected for detail as members need not be provided unless the military judge, for good cause, so directs.

(b) *Challenge of selection of members*.

(1) *Motion*. Before the examination of members under subsection (d) of this rule begins, or at the next session after a party discovered or could have discovered by the exercise of

diligence, the grounds therefor, whichever is earlier, that party may move to stay the proceedings on the ground that members were selected improperly.

(2) *Procedure*. Upon a motion under paragraph (b)(1) of this rule containing an offer of proof of matters which, if true, would constitute improper selection of members, the moving party shall be entitled to present evidence, including any written materials considered by the convening authority in selecting the members. Any other party may also present evidence on the matter. If the military judge determines that the members have been selected improperly, the military judge shall stay any proceedings requiring the presence of members until members are properly selected.

(3) *Forfeiture*. Failure to make a timely motion under this subsection shall forfeit the improper selection unless it constitutes a violation of R.C.M. 501(a), 502(a)(1), or 503(a)(2).

(c) *Stating grounds for challenge*. Trial counsel shall state any ground for challenge for cause against any member of which trial counsel is aware.

(d) *Examination of members*.

(1) The military judge may permit the parties to conduct examination of members or may personally conduct examination. In the latter event the military judge shall permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judge deems proper. A member may be questioned outside the presence of other members when the military judge so directs.

(2) When either party wishes to question a member about an affirmative response to the question contained in subsection (a)(1)(L), above, or when a member further discloses during examination that the member or a close family member was a victim of sexual assault, the military judge shall close the courtroom to spectators before allowing the parties to examine the member about the members' response. The closure shall be limited to only what is necessary to allow both parties and the military judge to examine the member about their specific response regarding whether they or a close family member or friend has been a victim of sexual assault.

(e) *Evidence*. Any party may present evidence relating to whether grounds for challenge exist against a member.

(f) *Challenges and removal for cause.*

(1) *Grounds*. A member shall be excused for cause whenever it appears that the member:

(A) Is not competent to serve as a member under Article 25(a), (b), and (c);

(B) Has not been properly detailed as a member of the court-martial;

(C) Is an accuser as to any offense charged;

(D) Will be a witness in the court-martial;

(E) Has acted as counsel for any party as to any offense charged;

(F) Has been a preliminary hearing officer as to any offense charged;

(G) Has acted in the same case as convening authority or as the legal officer or staff judge advocate to the convening authority;

(H) Will act in the same case as reviewing authority or as the legal officer or staff judge advocate to the reviewing authority;

(I) Has forwarded charges in the case with a personal recommendation as to disposition;

(J) Upon a rehearing or new or other trial of the case, was a member of the court-martial which heard the case before;

(K) Is junior to the accused in grade or rank, unless it is established that this could not be avoided;

(L) Is in arrest or confinement;

(M) Has formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged;

(N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.

(2) *When made*.

(A) *Upon completion of examination*. Upon completion of any examination under subsection (d) of this rule and the presentation of evidence, if any, on the matter, each party shall state any challenges for cause it elects to make.

(B) *Other times*. A challenge for cause may be made at any other time during trial when it becomes apparent that a ground for challenge may exist. Such examination of the member and presentation of evidence as may be necessary may be made in order to resolve the matter.

(3) *Procedure*. Each party shall be permitted to make challenges outside the presence of the members. The party making a challenge shall state the grounds for it. Ordinarily trial counsel shall enter any challenges for cause before defense counsel. The military judge shall rule finally on each challenge. The burden of establishing that grounds for a challenge exist is upon the party making the challenge. A member successfully challenged shall be excused.

(4) *Waiver*. The grounds for challenge in subparagraph (f)(1)(A) of this rule may not be waived. Notwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge may, in the interest of justice, excuse a member against whom a challenge for cause would lie. When a challenge for cause has been denied, the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review. Further, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review.

(5) Following the exercise of challenges for cause, if any, and prior to the exercise of peremptory challenges under subsection (g) of this rule, the military judge, or a designee thereof, shall randomly assign numbers to the remaining members for purposes of impaneling members in accordance with R.C.M. 912A.

(g) *Peremptory challenges*.

(1) *Procedure*. Each party may challenge one member peremptorily. Any member so challenged shall be excused. No party may be required to exercise a peremptory challenge before the examination of members and determination of any challenges for cause has been completed. Ordinarily trial counsel shall enter any peremptory challenge before the defense.

(2) *Waiver*. Failure to exercise a peremptory challenge when properly called upon to do so shall waive the right to make such a challenge. The military judge may, for good cause shown, grant relief from the waiver, but a peremptory challenge may not be made after the presentation of evidence before the members has begun. However, nothing in this subsection shall bar the exercise of a previously unexercised peremptory challenge against a member newly detailed under R.C.M. 505(c)(2)(B), even if presentation of evidence on the merits has begun.

(h) *Definitions.*

(1) *Witness*. For purposes of this rule, "witness" includes one who testifies at a court-martial and anyone whose declaration is received in evidence for any purpose, including written declarations made by affidavit or otherwise.

(2) *Preliminary hearing officer*. For purposes of this rule, "preliminary hearing officer" includes any person who has examined charges under R.C.M. 405 and any person who was counsel for a member of a court of inquiry, or otherwise personally has conducted an investigation of the general matter involving the offenses charged.

Appendix B. Proposed Panel Questionnaire

Court-Martial Panel Member Questionnaire

Name:

Rank: Date of Rank (ddmmyyyy):

Current Unit:

Current Duty Title:

Personal Information
Age: Gender: Race:

Marital Status: Age/Gender of Children:

Work Phone: Work Cellphone: Cellphone:

Post High School Civilian Education
Dates School Degree Major

Military Assignments (last 10 assignments) and Awards
Dates Unit Duty Title

List Current Military Awards and Decorations

Life Experience

Have you ever attended law school or taken legal classes? If so, please explain where, when, and what type of classes you attended.

Have you ever been employed in or have significant and personal knowledge in any of the following areas? (Check all that apply and explain below)

__ Law enforcement/corrections (policeman, sheriff, corrections officer, etc.)

__ Behavioral health (psychiatrist, psychologist, social worker, etc.)

__ Medicine (doctor, nurse, pharmacist, etc.)

__ Law (Justice of the Peace, attorney, etc.)

Have you or a close family member ever been a victim of any sex related crime, such as sexual assault, rape, sexual assault of a child, etc.? Please only indicate yes or no. Do not include any details. This information will be shared on a limited basis.

(The following question only applies if you answered "yes" to the previous question)
Do you feel comfortable discussing, in an open courtroom, the facts and circumstances regarding the event?

When do you expect to depart this installation? (PCS, retirement, deployment, etc.)

Do you anticipate any extended absences (greater than 14 days) from this installation over the next 9 months?

Appendix C. Proposed Change to DA Pamphlet 27-9, Military Judges' Benchbook

2–5–1. *VOIR DIRE*

MJ: Before counsel ask you any questions, I will ask some preliminary questions. If any member has an affirmative response to any question, please raise your hand.

1. Does anyone know the accused? (Negative response.) (Positive response from .)

2. (If appropriate) Does anyone know any person named in (any of the) (The) Specification(s)?

3. Having seen the accused and having read the charge(s) and specification(s), does anyone believe that you cannot give the accused a fair trial for any reason?

4. Does anyone have any prior knowledge of the facts or events in this case?

5. Has anyone or any member of your family ever been charged with an offense similar to any of those charged in this case?

~~6. (If appropriate) Has anyone, or any member of your family, or anyone close to you personally ever been the victim of an offense similar to any of those charged in this case?~~

~~7. If so, will that experience influence the performance of your duties as a court member in this case in any way?~~

~~*NOTE: If Question 7 is answered in the affirmative, the military judge may want to ask any additional questions concerning this outside the hearing of the other members.*~~

6 ~~8~~. How many of you are serving as court members for the first time in a trial by court-martial?

7 ~~9~~. (As to the remainder) Can each of you who has previously served as a court member put aside anything you may have heard in any previous proceeding and decide this case solely on the basis of the evidence and the instructions as to the applicable law?

Appendix D. Sample Individual Voir Dire Sealing Order

UNITED STATES	**)**	
	)	**Seal Order**
v. **)**		
)		
DOE, John, PFC,	**)**	
U.S. Army,	**)**	
3d Cavalry Regiment,	**)**	
Fort Hood, TX 76544	**)**	**XX Month 20XX**
)		

The following portion of the Record of Trial contains individual voir dire questions about a victim of sexual assault.

Sealing is necessary to prevent prejudice to an overriding interest in protecting the privacy of victims of sexual assault. The sealing is no broader than is necessary in scope and duration to protect that overriding interest. Reasonable alternatives to sealing, such as [specify the alternative considered], have been considered and found inadequate because [explain why the alternatives considered are inadequate].

Accordingly, the above referenced matters are hereby sealed and shall remain sealed consistent with RCM 1113. Notwithstanding that provision, the following conditions apply to the sealed enclosures:

a. No copies shall be made for any purpose without a court order.

b. The original documents, sealed, will remain in the original record of trial.

c. A copy of this order will be placed on the envelope containing the sealed enclosure.

d. A copy of this order will be placed in all copies of the record of trial.

e. For purposes of post-trial submissions and post-trial actions, the sealed documents can be opened and viewed by the accused, the accused's defense counsel, the Staff Judge Advocate, and the Convening Authority.

Questions regarding this order should be directed to the undersigned at _____.

JOHN C. SMITH
COL, JA
Military Judge

Spouses listen to a presentation during the Staff Judge Advocate Course at TJAGLCS. (Credit: Jason Wilkerson/TJAGLCS)

Closing Argument

Promoting Inclusion at JAG Corps Events

By Colonel Susan K. McConnell and Major Joshua P. Scheel

In late June, the halls and classrooms of our Corps' home at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia, filled with 132 soon-to-be Staff Judge Advocates (SJAs) and Deputy SJAs (DSJAs). But they were not the only future leaders in town. The Judge Advocate General (TJAG) invited the spouses of SJA Course attendees, specifically those spouses who'd indicated a willingness to provide volunteer service at their gaining installations, and to attend the Volunteer Leadership Course (VLC). Seventeen women and men accepted.

Taking care of our troops and their Families does not rest solely on the shoulders of senior leaders. As informal leaders, spouses frequently volunteer to share the critical role of Family support, morale, and the retention of Soldiers and their Families in our Offices of the Staff Judge Advocate (OSJA). The VLC signifies our Corps' recognition of this often-shared responsibility. Further confirming the importance of training these informal leaders, the Army granted service-endorsement of the VLC for the first time since 2013. Endorsement provided attendees the option of government-funded travel, thus reducing the financial hurdle encountered in previous years while encouraging increased participation.

After traveling to Charlottesville from various installations around the world, the spouses began the five-day course by sitting in on some of the same classes as the SJAs and DSJAs. The message to attendees was clear from the beginning—inclusion is critical to mission success. Whether it be in Lieutenant Colonel Dan Kuecker's Group Dynamics class, during TJAG and the Deputy Judge Advocate General's lunchtime fielding of questions, or Brigadier General Pat Huston's welcome address, inclusion was part of the conversation. In the spirit of this VLC theme, we felt it important for readers to receive the highlights from the capstone panel discussion on office social gatherings, entitled "Encouraging Volunteerism Within the Entire JAG Corps Family."

The panel included the following representatives: a single judge advocate, dual military judge advocates, a judge advocate and spouse with civilian employment requiring geographical separation, and a judge advocate and spouse who is a stay-at-home-mom. Panel members represented both genders and every rank from captain to lieutenant colonel. The panel did not include an enlisted or warrant officer representative, the presence of which we hope to incorporate in the future.

Mrs. Cindy Risch served as the moderator and began with the topic of recommended social events for offices. The panel mentioned hails and farewells, holiday parties, picnics, office potlucks, family-friendly events (i.e., trunk or treat), and coffees. There were several suggestions to vary times, locations, meal cost, and whether children attend to capture wider participation. One panelist raised the unique idea of an office supper club, in which every month a member of the office or affiliated group selects a local restaurant and coordinates lunch or dinner. This type of event could

Brittany Roberts, third from left, speaks about her experience as a spouse in the JAG Corps, during a panel discussion at the SJA course. Her husband, LTC Jess Roberts, is seen sitting to her left. (Credit: Jason Wilkerson/TJAGLCS)

also be held at a leader's home or even utilizing space at the office. Another idea was to focus the gathering around an event, such as an escape room, yoga, art, or local tour. This could make attendance less intimidating for the more reserved members of the office.

The second question raised was, "Who should host these events?" The default is often the SJA, DSJA, or the group leader, but it does not have to be that way. A panelist recommended encouraging volunteers from varying ranks. At one of the panelist's previous offices, hosting rotated from judge advocate to Civilian to paralegal to warrant officer, resulting in stronger attendance and excitement to hear the plan for the following month. For those of you not in a formal leadership role, this could be a great opportunity to widen the variety of activities for these social events.

The third topic covered the details of the invitation. Email seemed to be the preferred method of delivery with follow-up by word of mouth. One panelist suggested implementing a biographical data sheet for completion during in-processing at the OSJA, with the option to provide personal email addresses. Another option is an email sign-up sheet at larger events, such as an organization day. When drafting invitations, group leaders should be cautious in their use of titles and gender limitations. In one panelist's example, an invitation referenced a "spouses' coffee" and a service member's significant other felt as though she was not permitted to attend. Another example was a spouse leader's use of "ladies only" for an event, thus excluding male spouses, Family members, or significant others. As a voluntary event outside of duty hours, it is permissible to limit attendees, but panelists encouraged hosts to do so with awareness.

The fourth topic delved into whether these events created a feeling that the active duty service member's career would be negatively impacted if they or their spouse did not attend. Only two of the panelists remembered feeling pressured to attend an event, but both indicated it was the result of assumptions and was not necessarily the view of the leadership. One panelist reiterated that these are "one hundred percent voluntary events, and it is the leadership's responsibility to dispel these ideas early and often," setting the tone for their subordinates. As another panelist put it, our leaders understand some of us have young children, spouses with full-time civilian employment, or the many other things that make life complicated.

The fifth question considered the frequency of these events. The panelists did not settle on a specific amount, but instead offered that leaders should take into consideration all the factors at their individual offices. Events should not be too frequent or infrequent, but, as one of the panelists put it, "the only bad idea is not doing anything." Conflicts will occur that prevent service members and their Families from attending, but that does not mean leaders should avoid holding events entirely to prevent such conflicts. Panel members emphasized that some people will never be able to attend unless leaders vary times, locations, cost, and ability for children to participate.

The final question pertained to which JAG Corps traditions panelists saw consistently at their previous assignments. There was a consensus reached among panelists that Law Day was the most observed event. As if it was scripted, which it was not, another panel member thought the JAG Family and inclusivity were also our traditions. Several panelists commented that they thought highly of several location-specific traditions and hoped they continued.

The panel discussion during the VLC reiterated that, in comparison to a majority of the Army, our offices are small. Being small means there is greater opportunity for us to get to know and take care of one another. Voluntary events are a fantastic way to do that, along with building morale and fostering a healthy work environment. At a minimum, it is imperative to build networks so our service members and their Families have someone to turn to when needed. As one panelist stated, "If you see someone at these events that is not talking, strike up a conversation." **TAL**

COL McConnell is the Chair, National Security Law Department at The Judge Advocate General Legal Center and School, Charlottesville, Virginia. MAJ Scheel is an associate professor in the National Security Law Department at The Judge Advocate General Legal Center and School, Charlottesville, Virginia.

AROUND THE CORPS

Major Jack Cohen participates in Law Day exercises at Fort Bragg, North Carolina. Major Cohen is currently assigned to the Administrative Law Division at the Office of The Judge Advocate General. (Credit: Sergeant First Class Alexander A. Burnett, 82nd Airborne Division PAO)

The Army Lawyer is actively seeking article ideas, submissions, and photos.

Please submit your information today to
usarmy.pentagon.hqda-tjaglcs.list.tjaglcs-tal-editor@mail.mil

The Judge Advocate General's Legal Center & School
600 Massie Road, Charlottesville, VA 22903
https://tjaglcspublic.army.mil/tal