

Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 4 • 2020

Principled Counsel

2

Command Authority &
COVID-19

24

Advising Ethics

26

Assessing Leaders

60





AROUND THE CORPS

The first, mostly virtual WWCLE, brought on as a result of the COVID-19 pandemic, required a number of workarounds to the annual event at TJAGLCS in September. Here, LTG Charles N. Pede, The Judge Advocate General, hovers above MG Stuart W. Risch, the Deputy Judge Advocate General, via Zoom during a plenary session held in Decker Auditorium. (Credit: Jason Wilkerson/TJAGLCS)

Army Lawyer

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Issue 4 • 2020

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On the cover: A statue of Lady Justice stands near the entrance to the NCOA Academy at TJAGLCS. (Credit: Chris Tyree)

Table of Contents

Departments

Court Is Assembled

- 2 **Putting Principled Counsel into Action**
By Lieutenant General Charles N. Pede, The Judge Advocate General

4 News & Notes

Book Review

- 8 **The Mosaic Principle**
By Nick Lovegrove
Reviewed by Major Matt D. Montazzoli

Azimuth Check

- 11 **You Asked Me How I Feel**
One Man's Perspective on Current Events
By Command Sergeant Major Michael J. Bostic

Lore of the Corps

- 16 **From Shining Shoes to CW5:**
The First Chief Warrant Officer Five in the JAG Corps
By Fred L. Borch III

In Memoriam

- 20 **George Bahamonde**
By David E. Graham

Practice Notes

- 24 **War, Peace, and Pandemic: Commander's Authority During COVID-19**
By Captain Amanda L. Perry
- 26 **Advising the Ethical Playing Field: The Confluence of Profession, Ethics, and Principled Counsel**
By Major Jack B. Cohen
- 34 **An Antidote for Toxic Complaints**
By Colonel Terri J. Erisman
- 38 **Why Scholarly Publishing Matters for JAs**
By Professor Matthew J. Festa and Lieutenant Colonel Patrick M. Walsh
- 44 **Using RCM 703A to Build a Better Case**
By Captain Ethan B. Murphy

Features

No. 1

- 52 **Considerations for the New Contract Trial Attorney:**
A Primer on Costs, Fees, and Interest in Contract Appeal Litigation
By Major Meghan E. Mahaney

No. 2

- 60 **Assessing Leaders from the Bottom Up**
By Major Patrick R. Sandys

No. 3

- 70 **Exceptions to Ex Parte Communications:**
A Primer to No-Contact Rules
By Lieutenant Colonel (Retired) Benjamin K. Grimes

No. 4

- 82 **Jack of All Trades, Master of One:**
Why Military Justice Experts Need Experience in Other Areas of Military Law
By Lieutenant Colonel Jeffrey A. Gilberg, Major Michelle E. Borgnino, Major Robert E. Murdough, and Major Angel M. Overgaard

No. 5

- 92 **How 9/11 Changed the JAG Corps Forever**
By Colonel (Retired) Lorianne M. Campanella

Closing Argument

- 102 **The Calm in the Storm:**
Judge Advocates Must Have the Courage That Principled Counsel Requires
By Major General (Retired) Thomas J. Romig



(Credit: istockphoto.com/Elizabeth M. Ruggiero)

Court Is Assembled

Putting Principled Counsel into Action

By Lieutenant General Charles N. Pede

*“Sir, you can’t fire on that target!”
Or, “You can’t buy ammunition for the Iraqis...”*

The quotes above might resonate for a law of armed conflict (LOAC) opinion or an ethics or fiscal law dilemma; but, in the day-to-day give-and-take practice of law with the best clients in the world, rarely is it so clear cut.

Instead, there’s nuance and context. And context always matters. Take questions like: How do we find a way to fund food and fuel for the Peshmerga to ensure they tend their border areas, when they don’t “fit” our current view of U.S. legislation’s intended beneficiaries of funded support? Can we spend U.S. dollars in an unfriendly Afghan village—for cooking oil for the

villagers or a carpet for the local mosque—in an attempt to at least ensure safe passage for Soldiers? Do pragmatic interpretations of fiscal law embrace principled counsel?

What about releasing detained Iraqis—captured during operations—who are known to have murdered fellow Iraqis and Americans? While properly detained, the host nation leader now seeks their release, from U.S. and host nation partnered detention, to pursue reconciliation with the opposing party. After weeks perfecting your case through raids and witness identification and preservation, now your job is to convince the local judge to reverse

the properly imposed detention order for policy reasons.

Simply put, what does principled counsel look like in the fog and chaos of war? Nearly thirty years ago, I served as a legal advisor during Operation Restore Hope—a U.S.-led, multinational effort to create a protected environment for conducting humanitarian operations in southern Somalia. My chief duty was to sit with the battle captain recording radio transmissions—a duty I’d assumed for the 1st Brigade from my indomitable predecessor, Captain Roger Cartwright. Like Roger, I quickly learned how to capture the details, wordsmith for the truncated log, and—when appropriate or when asked—to give advice on the then-fairly novel rules of engagement. Shoot at crew-served weapons on sight? Use deadly force or warning shots at penetrations into our wire? And, what about targeting highly-mobile truck-mounted mortars in dense urban terrain with our airborne scout-weapons team?

Roughly two months before the now infamous October raid to capture the Somali warlord Farrah Aidid, the radio crackled at the desk I shared with the battle captain, and a voice screamed “Grenade!” Somalis were swarming an engineer column. The chatter on the radio was charged. Colonel (COL) Dallas, who commanded 2d Brigade, 10th Mountain Division, strode into the tactical operations center (TOC) directly from his overflight of the area and slammed his rifle onto the large plywood plans table, frustrated the staff hadn’t yet brought firepower to bear to relieve the convoy in distress.

A subtle sergeant major quietly removed the magazine and chambered a round from the commander’s rifle as the S3 operations officer updated him. “Tell the pilot to open up,” COL Dallas told the battle captain. I looked up at COL Dallas from the TOC log. He wasn’t asking for anyone’s input—or options. Americans could die, or worse, be captured and tortured. But all of us also knew the streets in Mogadishu were a chaotic mixture of women, children, and armed Somalis. My mind raced for some clear notion of applicable LOAC that I could offer to COL Dallas. I found none.

So I said, “But Sir.” That’s it. Brilliant, right? I was not consciously thinking about

principled counseling when I did speak. And I am sure what I said has been said by judge advocates thousands of times over in our Corps's history. To me, it has become the very epitome of principled counseling.

Colonel Dallas looked at me, then the battle captain. "Direct him to fire warning shots into the wall." The bird opened up on the wall—dispersing the "swarm." The convoy accelerated safely home.

Is that what principled counsel really looks like? Is that it? No grand show? No Hollywood moment? No real insight or command of the law?

Yes. And that is all commanders often need.

Principled counsel comes in many forms. In my experience, it comes from your heart and your extended heart—your gut. It starts with a developed and deep moral sense of what is right, shaped by the rules of civil society. And that foundation informs the topic at hand.

Be Patient

Our principles are infused with what the law and ethics tell us are normative values. We give these notions life through the lifelong development of habit of doing the right thing when no one is looking, based upon those values. We pick up trash on the sidewalk, even if it is not ours, because it's the right thing to do. Why? Because we've seen someone else do it—and we admire them for it. We know it makes our community a better place.

We counsel how to care for our loathsome enemy prisoners of war because we know it's the right thing to do—because we'd want to be treated properly as well and we hope for a measure of reciprocity in the next fight.

This is where our sense of principle emanates. It is from our shared cultural wellspring of what right looks like.

Principled counsel is also collaborative. Colonel Dallas was already there, waiting for me to catch up to help. He simply needed some friction, some alternative, a momentary pause to give himself another option. And without missing a beat, he found his option on his own. The mark of an exceptional field commander.

The Drumbeat

Which is why we drumbeat the constant of Principled Counsel. I offer these various personal examples—told here for the first time—to give some context to the constant we drumbeat as a Corps and celebrate in this issue of *The Army Lawyer*. From humanitarian missions in Somalia, Haiti, Bosnia, and Kosovo to contingency operations in Iraq and Afghanistan, the last thirty years are replete with timeless examples of principled counsel. I can say that, just from my foxhole, having lived it. These timeless examples, however, are only a small piece of our Corps's history and our members have been providing principled counsel on the battlefield from our very inception. The battlefield and the weapons may change, the rules of engagement and the fiscal authorities may look different, yet the value of a judge advocate saying, "But, Sir" remains the same.

For the past three years, we have showcased our Constants—Principled Counsel, Mastery of the Law, Stewardship, and Servant Leadership—and have depicted them, visually, as points of a North Star. This was deliberate—guiding principles that point the way through the darkness, toward the light. And as we have been an Army in transition and transformation—and know more transitions are still to come—we chose our Constants to lead our way.

As I type this, I am sitting in the study of my house rather than at my desk in the Pentagon. As you read this, months from now, think back to May 2020 and where we were in the COVID-19 fight. We have done much work as a Corps, as an Army, and as a Nation—but there is much work to be done. As states begin to reopen and return to a "new normal," there is also much uncertainty. As we face uncertainty, we as a Regiment must turn to our Constants as our guide.

Our Corps's doctrine defines "principled counsel" as "professional advice on law and policy, grounded in the Army Ethic and enduring respect for the Rule of Law, effectively communicated with appropriate candor and moral courage, that influences informed decisions."¹

Professional advice on law and policy is expert, well-researched, and delivered at the speed of war. Principled counsel influences

a commander's exercise of discretion to apply sound judgment and fuels the commander's intent.

In a crisis, principled counsel is a challenge. As the temperature rises and the pressure builds, commanders want to get after the problems, to solve them and deliver results. In the case of COVID-19, commanders want more than anything to keep people safe. What could be more important than that?

In the rush to solve the problem, you must possess the calm, cool head.

As I know you've all heard from me, "If you can keep your head, when all about you are losing theirs."²

Our charge as judge advocates is to bring the rule of law to the forefront and to provide the commander with options. As in my all-but-accidental case with COL Dallas, allowing commanders to pause, even for a moment, to reassess and reattack the problem can bring down the temperature and relieve the pressure. Never is principled counsel more vital to your commander than in a crisis. But it is often not as lofty or aspirational or refined as you'd like it to be. That is OK. I trust you will have your moment, and take it, as I was lucky enough to have done, to say, "But, Sir." You too will likely have your moment to say, "But Sir..."

Be Ready! **TAL**

Notes

1. LIEUTENANT GENERAL CHARLES N. PEDE & MAJOR GENERAL STUART W. RISCH, *TJAG AND DJAG SENDS*, VOL. 40-16, PRINCIPLED COUNSEL—OUR MANDATE AS DUAL PROFESSIONALS (Jan. 9, 2020).
2. RUDYARD KIPLING, *If*, in *REWARDS AND FAIRIES* (2010).



COL Jerrett W. Dunlap Jr. speaks to the 211th OBC graduating class inside Decker auditorium at TJAGLCS.

News & Notes

211th OBC Graduation Speech

By Colonel Jerrett W. Dunlap Jr.

On 2 July 2020, the outgoing Dean at The Judge Advocate General's School, Colonel (COL) Jerrett W. Dunlap Jr., addressed the 211th Officer Basic Course (OBC) graduating class. This was COL Dunlap's final duty as Dean before he departed to become the Staff Judge Advocate, V Corps, Fort Knox, Kentucky.

The staff and faculty are proud of the discipline, motivation, and grit you have demonstrated during this very challenging period. You spent most of your time largely isolated, without the

daily face-to-face interaction with staff and faculty that has been a staple of the OBC for generations. We have missed this interaction as we enjoy spending time with you.

Army training is often designed to create a crucible experience, one that tests your limits and builds your confidence once complete. Although unplanned, the majority of your time with us has been a crucible experience that has tested your discipline, motivation, and grit. I'm proud of you for excelling at all three.

Earlier this week, Brigadier General Joseph Berger spoke to you about the Army Ethic. Army Doctrine Publication (ADP) 6-22, *Army Leadership and the Profession*,¹ the doctrinal foundation of leadership in the Army, describes the Army Ethic as “the Heart of the Army”² and the seven Army Values as “the practical application of the Army Ethic.”³ I want to talk about the third of the Army Values: Respect—treat people as they should be treated.

Army doctrine teaches, “The Army Values reinforce that all people have dignity and worth and must be treated with

respect.”⁴ This type of respect refers not only to military rank structure, which calls for us to respect the position and authority of those superior to us in rank. More importantly, it refers to the basic human dignity of all people. Our “Nation was founded on the ideal that all are created equal. In the Army, each is judged on the content of their character. Army leaders should consistently foster a climate that treats everyone with dignity and respect, regardless of ethnicity, gender identity, sexual orientation, creed, or religious belief.”⁵ Leaders searching for how to execute this ideal need look no further than APD 6-22, which explains: “Fostering a positive climate begins with a leader’s personal example. Leaders treat others, including adversaries, with respect.”⁶

The legal education you have received is designed to ensure these ideals are put into practice. Whether it is court-martial procedure, the law of armed conflict, equal opportunity, or the myriad of topics you have studied, they are centered around fostering a climate that treats everyone with dignity and respect.

As with any aspirational ideal, we fall short as individuals, as an Army, and as a nation. The current national struggle is an example of the importance of respect and the price we pay when we fail to treat people the way they should be treated.⁷ We should continually strive to change as individuals, as an Army, and as a nation to live our ideals.

My friend, noted Army War College historian and retired Marine Corps F-18 pilot Colonel (Col) Doug Douds, recently appeared in the History Channel’s miniseries on the life of Ulysses S. Grant, based on Ron Chernow’s book.⁸ Colonel Douds recently wrote an opinion piece entitled, “There’s a Little Grant in All of Us.”⁹ Colonel Douds says it’s easy to gloss over the hard aspects of Grant’s life and focus on the victories, his rise to lieutenant general (the first since George Washington—that is my mandatory Washington reference). But there is much to learn from Grant’s many imperfections and his struggle to overcome them. Colonel Douds says:

Grant is an imperfect person who lived in an imperfect time. He is

human. He has issues with his father and father-in-law—one an abolitionist, one a slave owner. He infamously struggled with alcohol whenever separated from his beloved family. He failed at multiple vocations and possessed a terrible business sense. *All these render Grant more ordinary than extraordinary.*¹⁰

Then Col Douds gives us the lesson we need to learn: “Peering into the past at the sum of a person like Grant gives insights to ourselves and our own time. . . . He reminds us that failure is not final. It never has been in the United States.”¹¹ Highlighting Grant’s infinitely relatable, even mundane, struggles and shortcomings and understanding that he—like us—had problematic relationships, and made several career missteps, makes a success story like Grant’s military service accessible to us. “Struggle and failure are necessary components of learning and developing stores of resilience that enable us to bounce back in the face of setbacks,”¹² Col Douds explains. Knowing those details, those very ordinary-life moments in an ultimately great historical figure’s life, helps us work through our own setbacks to keep striving for success. And, as Col Douds points out, we need those reminders: “Grant reminds us that those daily struggles prepare us for crisis.”¹³

Colonel Douds’s words remind us that struggle—crucible experiences—can give us the grit we need to change our selves, change our Army, and change our nation. That change starts with respecting ourselves and respecting others.

Respect requires that we treat people as they should be treated. “In the Soldier’s Code, we pledge to ‘treat others with dignity and respect while expecting others to do the same.’”¹⁴ We are taught that “[r]espect is what allows us to appreciate the best in other people. Respect is trusting that all people have done their jobs and fulfilled their duty.”¹⁵ Granting people this type of trust is an important form of respect. Finally, we must strive to respect ourselves to bring out the best in ourselves and our teammates. “Self-respect is a vital ingredient with the Army value of respect, which results from knowing you have put forth your best effort. The Army is one team, and each

of us has something to contribute.”¹⁶ This fundamental recognition that each of us has intrinsic value to a team is the foundation of the Army Value of Respect.

The Army, and particularly the JAG Corps, values people as our greatest weapons system. Our Soldiers, Civilians, and our Families are an indispensable part of the greater JAG Corps Family. As members of the JAG Corps Family, we must strive to treat others with dignity and respect and expect the same of others.

The members of the 211th Judge Advocate Officer Basic Course are the bright future to whom we look to continue to develop and change as individuals, as an Army, and as a nation. I challenge you to take your great reputation of discipline, motivation, and grit to your next assignment and change that team. As you do, you will continue to set yourself apart as Soldiers and leaders. I’m proud of you for a job well done. **TAL**

Notes

1. U.S. DEP’T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP AND THE PROFESSION (31 July 2019) (C1, 25 Nov. 2019) [hereinafter ADP 6-22].

2. *Id.* fig. 1-2.

3. *Id.* para. 1-70.

4. *Id.* para. 2-8.

5. *Id.*

6. *Id.*

7. See, e.g., David French, *America’s Racial Progress*, NAT’L REV. (July 9, 2020, 11:48 AM), <https://www.nationalreview.com/magazine/2020/07/27/americas-racial-progress/>.

8. *Grant*, HISTORY CHANNEL (2020) (drawing largely from Ron Chernow’s 2017 book, *GRANT*).

9. Colonel Douglas Douds, *There’s a Little Grant in All of Us*, PENNLIVE.COM (June 24, 2020), <https://www.pennlive.com/opinion/2020/06/theres-a-little-grant-in-all-of-us-opinion.html>.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Army Values*, ARMY.MIL, <https://www.army.mil/values/index.html> (last visited July 23, 2020).

15. *Id.*

16. *Id.*

Photo 1

The 25th ID OSJA practiced social distancing and promoted CPL Michael Rangel, 1-27 Infantry Regiment “Wolfhounds,” to sergeant. From left to right: SFC Andrew Kelleher, 2d Infantry Brigade Senior Paralegal NCO; SGT Michael Rangel; and MAJ Samuel Grabill, BJA. The OSJA Ohana joined them via Microsoft Teams.



Photo 2

SGT Cornelia S. Johnson, Fort Buchanan Installation Legal Office, was promoted to the rank of staff sergeant in a ceremony held at BG James A. Buchanan’s conference room at the garrison headquarters on 7 May 2020. U.S. Army Garrison Commander, COL Joseph B. Corcoran III, hosted the promotion ceremony while following mandated COVID-19 preventive measures.

Photo 3

CPT Erik Hoyle, 78th LOD, Los Alamitos, California, provides a USERRA brief to the Western Medical Area Support Group (WEMARSG) unit in San Diego. This rapid response SRP was in response to COVID-19. Soldiers of the WEMARSG unit practiced appropriate social distancing and ensured proper wear of PPE.



Photo 4

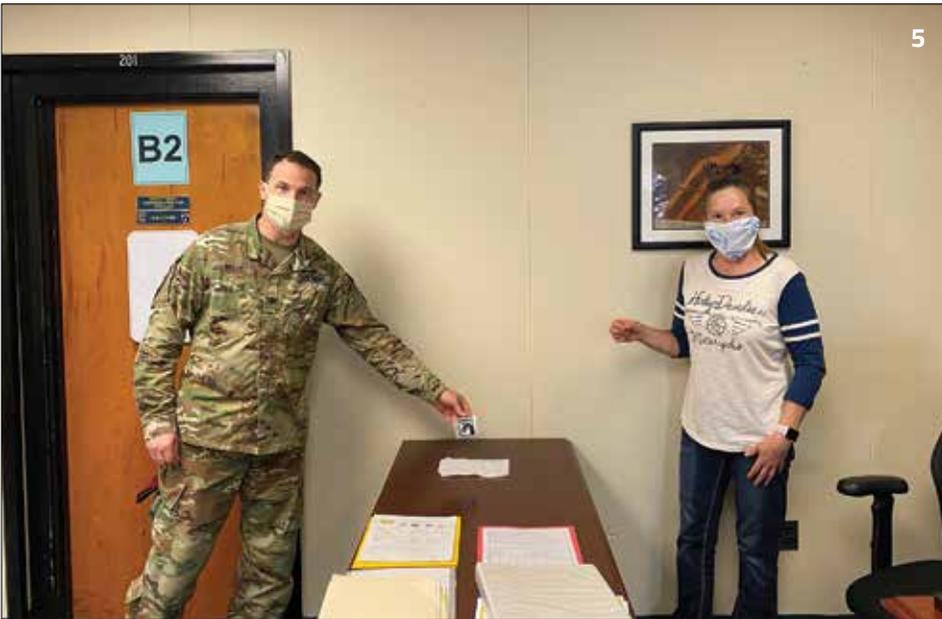
The 25th ID OSJA conducted an on-line-broadcasted promotion of (from left to right) CPT Alex Vanscoy, PFC Lelia Contee, and CPT Charley Ogden in front of the 25th ID Memorial.

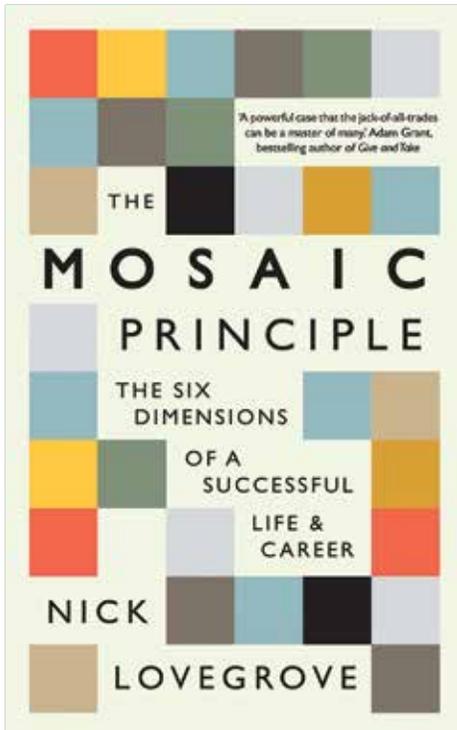
Photo 5

COL Wells, XVIII ABN Corps SJA, presents a coin to Ms. Nina Shockley, Administrative Law Paralegal, on her last day with the XVIII ABN Corps & Fort Bragg OSJA. Ms. Shockley will be moving over to 1st Special Forces Command (Airborne), where she will undoubtedly continue providing world-class paralegal and court reporter support.

Photo 6

SGT Ababio, 151st LOD, Alexandria, Virginia, during a recent SRP mission in Richmond, Virginia.





Book Review

The Mosaic Principle

Reviewed by Major Matt D. Montazzoli

A human being should be able to change a diaper, plan an invasion, butcher a hog, conn a ship, design a building, write a sonnet, balance accounts, build a wall, set a bone, comfort the dying, take orders, give orders, cooperate, act alone, solve equations, analyze a new problem, pitch manure, program a computer, cook a tasty meal, fight efficiently, die gallantly. Specialization is for insects.¹

Nick Lovegrove's *The Mosaic Principle*² makes a compelling argument that breadth is the secret to professional success and personal fulfillment. In a “world increasingly obsessed with the power of narrow specialist expertise,” Lovegrove encourages the reader to branch out, to make a conscious effort not to stay only in one’s lane, but to swim in the entire pool.³ Lovegrove’s book is full of stories about extraordinary polymaths who rose to the top of their fields and discovered deep personal satisfaction in the process; however, the book often feels long on anecdotes, but short on hard data. The author’s recommended framework for breadth also features an expert’s level of depth as a key ingredient, somewhat undercutting his thesis. The six principles he advances as the formula to leverage breadth are common-sensical and as amorphous as one might expect from a career corporate consultant; but, the blandness of Lovegrove’s prescription does not undercut the accuracy of his diagnosis: in our modern world, “specialist expertise is often necessary but certainly not sufficient.”⁴ This review will explore Lovegrove’s thesis that breadth trumps depth, and seeks to apply his framework to the judge advocate career model.

Diagnosis: The World of the One Trick Pony

Lovegrove argues that “in shaping our lives, each of us does have a choice: greater breadth or greater depth.”⁵ He identifies modern society’s preference for depth over breadth, as most people “want to put our fate in the hands of qualified specialists, because we know they have invested their careers and their lives in deep knowledge and specialist proficiency, and that matters to us.”⁶ This bias towards deep expertise seems, at first glance, imminently reasonable. If one is experiencing a problem with her knee, it is common sense and human nature to seek out an orthopedic surgeon with sufficient experience to diagnose and repair that particular joint, versus a general surgeon, a family practitioner, or a plumber. This reliance on professionals is particularly understandable in light of the popular notion that it takes 10,000 hours of

practice to master a simple task.⁷ However, Lovegrove worries that the modern world has drifted so far into a preference for hyper-specialization that “[m]ore of us are experts, but few of us have the coping skills to succeed in our ever-changing, more complex, and diverse society.”⁸

Lovegrove is not anti-expertise or anti-intellectual, but merely opposed to excessive specialization, the dangers of which he identifies as including “hubris, blinkered vision, unmerited credibility, and a lack of foresight.”⁹ Lovegrove illustrates the perils of excessive depth through the experiences of ex-Chief Executive Officer Jeffrey Skilling, the man who presided over the spectacular, scandalous collapse of Enron and earned a twenty-four year prison sentence for his role in the firm’s demise.¹⁰ Although “the conventional wisdom is that avarice and outright fraud brought down the company, Lovegrove notes that “Enron under Skilling’s leadership exemplified the increasingly pervasive belief that highly talented people, working in narrowly defined specialist silos, can achieve miracles.”¹¹ He explains how Enron’s culture of hubris caused employees to develop financial products of unfathomable complexity and opacity, and argues this unmerited faith in the power of narrow expertise ultimately brought the company down. The leaders at Enron lacked the breadth of experience to question their sinecure of experts, and the enterprise as a whole suffered from blinkered vision—a phenomenon whereby “[t]echnical specialists know only what they see and see only what they know.”¹² The regulators and auditors who should have discovered Enron’s problems lacked a broad, holistic view of the company and thus accorded unmerited credibility to the experts who had created the financial instruments that caused Enron’s problems in the first place. The sight apertures of those who were supposed to provide oversight were too narrow to view the big picture because they lacked “the broad experience and perspective to address the challenge.”¹³

Lovegrove contrasts Enron’s perilous depth with mini-biographies of numerous luminaries in various fields, focusing particularly on the physician and philanthropist Dr. Paul Farmer, a man who “made

broad and imaginative choices about how he wants to live his life and affect those of others—choices that have taken him well beyond the conventional tramlines of his chosen profession.¹⁴ Dr. Farmer chose as an undergraduate to major in both medicine and anthropology, and sufficiently developed his interests in those fields to become a professor of both disciplines at Harvard. In addition, he splits his time between a medical practice in Boston and a public health charity he founded to provide healthcare, housing, education, and clean water for poor people in Haiti. Lovegrove chalks up Dr. Farmer's success to his breadth, typified by a "practice of splitting his time across a broad and complex portfolio of interests."¹⁵

Lovegrove organized the book well, with an explanation of the principle, a chapter dedicated to each of the six dimensions that he identifies as key to breadth, and a conclusion that discusses the ways people of different ages and at different points in their careers could apply the principle to their work and life. The author draws almost entirely from interviews and his own experience, and the anecdotes skew heavily toward the sorts of high-flyers he encountered during a career as a corporate consultant.¹⁶ The definition of breadth is also stretched to include people who are only broad in the sense that they have played multiple roles at investment banks. Lovegrove's definition of breadth is also largely limited to people he identifies as "tri-sector athletes" who move between the worlds of business, government, and non-profits at an elite level.¹⁷ It makes sense that a book about crafting a remarkable life would focus on remarkably successful individuals, but the absence of more workaday people—who nonetheless embody the principle—is palpable. If the reader is curious as to how a nurse or a teacher could apply the principle, as opposed to a hedge fund manager, the book may leave her wondering. Despite these limitations, Lovegrove makes a compelling argument that breadth is not just good for the soul. It contributes to worldly success because "the evidence shows that the complex, multidimensional challenges we face in modern society are much better tackled with a broadly gauged approach."¹⁸

Prescription: How to Broaden Yourself

The Mosaic Principle lays out six dimensions necessary to achieve a broad, integrated, remarkable life and career: applying a strong moral compass; building a robust intellectual thread; developing transferrable skills; investing in contextual intelligence; building an extended network; and having a prepared mind.¹⁹ None of these concepts standing alone is revolutionary, and all are consistent with (if not prerequisites for) military and legal leadership.

The construction of a robust intellectual thread is simultaneously the most interesting aspect of the theory, as well as the dimension that most feels as if the author is hedging his bets. Lovegrove asserts "you are more likely to be successful if your broader experience is underpinned and even enabled by a robust intellectual thread—a knowledge or skill that you can carry between different walks of life."²⁰ He describes this as a "T shaped approach," where "[t]he T is a visual metaphor for a hybrid of breadth and depth—a broad generalist with a deep intellectual thread."²¹ The crossbar of the letter T represents breadth of experience and an ability to work outside of one's core discipline, while the vertical stroke of the letter T stands for a functional area, discipline, or specialty in which one cultivates a depth of specific experience and expertise.

This robust intellectual thread dimension suggests a person's area of subject matter expertise can be the anchor point for a broad swath of diverse experiences, and the sum of breadth and depth will be far greater than the component parts.²² For example, an attorney might discover during an assignment as a prosecutor that he enjoys and has a talent for criminal litigation. The standard specialization model might have him refine his skills in advocacy and employing the rules of evidence by continued service as a defense counsel or in a senior prosecutorial position, perhaps ultimately rising to a judgeship. Rather than burrowing into the depths of criminal law to the exclusion of other opportunities, *The Mosaic Principle* advocates for that attorney to leverage the transferrable skills acquired prosecuting criminals to a wholly different area of expertise. Lovegrove

would suggest the attorney try insurance defense, patent prosecution, or commercial litigation because the resultant diversity of experience will make him better able to solve complex, multidimensional problems. Lovegrove would also advise this barrister to employ the extended network of contacts he develops to be on the lookout for other opportunities to employ his skills in business, government, or the non-profit sector, achieving the vaunted tri-sector athlete designation.

The idea of developing a robust intellectual thread sounds suspiciously like developing expertise; it is an inescapable fact that *The Mosaic Principle* requires serious, expert-level depth as a condition precedent to achieving the vaunted breadth that unlocks a high functioning, happy life. Lovegrove deals head-on with the criticism that cultivating a robust intellectual thread is contrary to his larger thesis, arguing "[t]he real question is, How can I be a broad specialist or a deep generalist? How can I be a successful hybrid between breadth and depth?"²³ Lovegrove's rejoinder that success requires "a focused body of knowledge and experience that provides leverage and relevance to your breadth" is convincing.²⁴ Without sufficient expertise, one is merely a dilettante, but "[i]f you have only...the deep subject-matter expertise...you will be imprisoned by the narrowness of your experience and perspective."²⁵

Judge Advocates: Utility Infielders or Designated Hitters?

The Mosaic Principle is applicable to professionals and leaders of all stripes and stations, but it is especially relevant to judge advocates. Judge advocates are members of dual professions: law and arms. As attorneys, judge advocates serve as "counselors, advocates, and trusted advisors to commanders and Soldiers...subject matter experts in all the core legal disciplines."²⁶ Judge advocates are also Army officers, and diversity of experience is an intrinsic aspect of officership, in that "[s]erving as an officer differs from other forms of Army leadership by the quality and breadth of expert knowledge required, in the measure of responsibility attached, and in the magnitude of the consequences of inaction

or ineffectiveness.²⁷ The modern battlefield is a place where “the legal profession and the profession of arms meet, evolving as to how to most effectively work together.”²⁸ To that end, the Judge Advocate General recently evolved from seeking to “develop, employ, and retain Broadly Skilled Judge Advocates”²⁹ (BSJA) to creating a corps of professionals “who combine the versatility to practice in every legal function with the expertise to do so at the highest possible level in one or more particular functions.”³⁰

The BSJA concept was not without critics, particularly those who argued that BSJAs lacked the expertise to provide top-notch representation within specific legal functions, most vociferously military justice.³¹ The current versatile and expert judge advocate (VEJA) framework, with an express desire for specialist-level expertise in *at least* one legal function, aligns solidly with Lovegrove’s ideal of a “jack-of-all-trades, master of *some*.”³² Lovegrove asserts that appropriate breadth can actually fuel increased, or at least increased quality, of depth because

[e]ach area you have mastered will stay with you—not to the same extent but rather like a language you once spoke well. You may not be as current or as fluent as you were when you were speaking it every day, but you will feel confident that after a quick refresher you could pick it up again.³³

The VEJA framework is a welcome antidote to the BSJA concept’s perceived obsession with breadth at the expense of depth, but Lovegrove would probably advise our corps that the VEJA model must be carefully calibrated to allow officers to find their “breadth sweet spot—the ideal point that reflects [their] intrinsic capacity and character for breadth...where [they] can be most effective at addressing complex and multidimensional problems.”³⁴ There is some danger VEJA could swing the pendulum too far toward depth, and leaders must be vigilant that the new openness to development of expertise does not compromise the breadth necessary to “anticipate the needs of your clients so that you’re able to bring our considerable abilities to bear in

whatever operating environment you may find yourself.”³⁵

Conclusion

The Mosaic Principle is an engaging book that contains useful, if axiomatic, advice for judge advocates at any stage of their career. Lovegrove’s concept of essential breadth fueled by a necessary depth is especially impactful for the Corps as we adjust our career model to foster the versatile expertise required to be ready for an uncertain future operating environment. Even beyond immediate professional development potential, this book is recommended reading for anybody with a desire to “overcome your external constraints and internal doubts to build a broader, more interesting, more impactful, more enjoyable, and fundamentally better life and career.”³⁶ **TAL**

MAJ Montazzoli is a student at Command and General Staff College in Fort Leavenworth, Kansas.

Notes

1. ROBERT A. HEINLEIN, *TIME ENOUGH FOR LOVE* 265–66 (Ace Books 1988) (1973).
2. NICK LOVEGROVE, *THE MOSAIC PRINCIPLE: THE SIX DIMENSIONS OF A REMARKABLE LIFE AND CAREER* (2016).
3. *Id.* at 1.
4. *Id.* at 22.
5. *Id.* at 1.
6. *Id.* at 19.
7. MALCOLM GLADWELL, *OUTLIERS* 67 (Back Bay Books 2011) (2008). *But see* Brooke N. Macnamara et al., *Deliberate Practice and Performance in Music, Games, Sports, Education, and Professions*, 25 *PSYCH. SCI.* 1608, 1610 (2014) (concluding that Gladwell’s 10,000 rule is less applicable to professions and activities that are not rigidly structured).
8. LOVEGROVE, *supra* note 2, at 2; *cf.* TOM NICHOLS, *THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS* 3 (2017) (worrying that society is “witnessing the ‘death of expertise’: a Google-fueled, Wikipedia-based, blog-sodden collapse of any division between professionals and laymen, students and teachers, knowers and wonderers—in other words, between those of any achievement in an area and those with none at all.”).
9. *Id.* at 39.
10. *Id.* at 14–15. *See also* Press Release, U.S. Dep’t of Just., Former Enron CEO Jeffrey Skilling Resentenced to 168 Months for Fraud, Conspiracy Charges (June 21, 2013), <https://www.justice.gov/opa/pr/former-enron-ceo-jeffrey-skilling-resentenced-168-months-fraud-conspiracy-charges>.
11. LOVEGROVE, *supra* note 2, at 17.
12. *Id.* at 40.

13. *Id.* at 44.
14. *Id.* at 16.
15. *Id.* at 11.
16. *Id.* at 303 (“McKinsey has shaped every dimension of my professional life and personality—and that is reflected throughout this book.”).
17. *Id.* at 49; *see also* Nick Lovegrove & Matthew Thomas, *Why the World Needs Tri-Sector Leaders*, *HARV. BUS. REV.* (Feb. 13, 2013), <https://hbr.org/2013/02/why-the-world-needs-tri-sector>.
18. LOVEGROVE, *supra* note 2, at 22.
19. *Id.* at 24–29.
20. *Id.* at 26.
21. *Id.* at 111.
22. *Id.* at 109.
23. *Id.*
24. *Id.*
25. *Id.* at 113.
26. U.S. DEP’T OF ARMY, *FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY* para. 1-12 (18 Mar. 2013).
27. U.S. DEP’T OF ARMY, *ARMY DOCTRINE REFERENCE PUB. 6-22, ARMY LEADERSHIP* para. 2-8 (1 Aug. 2012).
28. A. Edward Major, *Law and Ethics in Command Decision Making*, 92 *MIL. REV.* 61, 61 (MAY-JUNE 2012).
29. U.S. DEP’T OF ARMY, *JUDGE ADVOCATE GENERAL’S (JAG) CORPS PUB. 1-1, PERSONNEL POLICIES* fig 1-2 (19 Sept. 2016) (superseded).
30. U.S. DEP’T OF ARMY, *JUDGE ADVOCATE LEGAL SERVICE PUB. 1-1, PERSONNEL POLICIES* para 5-1b (May 2019) (emphasis in original).
31. *See* Major Jeffrey A. Gilberg, *The Secret to Military Justice Success: Maximizing Experience*, 220 *MIL. L. REV.* 1, 61 (2014) (advocating “a military justice career track...that both preserves the broadly skilled judge advocate model while also recognizing the need to maximize the Corps’ military justice experience.”) https://loc.gov/tr/frd/Military_Law/Military_Law_Review/pdf-files/220-summer-2014.pdf.
32. LOVEGROVE, *supra* note 2, at 267 (italics in original).
33. *Id.*
34. *Id.*
35. *TJAG and DJAG Special Announcement 40-04: Announcement of Decisions on Strategic Initiatives*, JAGCNET (20 Apr. 2018) (on file with author).
36. LOVEGROVE, *supra* note 2, at 109.



(Credit: istockphoto.com/hapabapa)

Azimuth Check

You Asked Me How I Feel One Man's Perspective on Current Events

By Command Sergeant Major Michael J. Bostic

I am who I am; I CANNOT change that.

You asked how I feel; I will tell you, but you will never personally understand.

Teammates, you have asked me recently, “How do you feel about racism, social injustice, police brutality, discrimination, and inequality in America toward Black Americans?” My first response to this question was: “Why do you want to know?” You are asking about an open wound—be careful what you ask for, because the answer may be more than you are prepared to digest. I’m not perfect—no one is. This note is intended to be *raw*; not have any specific flow or design. It is a way for me to share with my teammates that I, too, have fears of sorts that I have kept locked away for some time. Until recently, Soldiers have

not been comfortable, allowed, or encouraged to communicate our feelings and talk about how these issues affect us, regardless of race.

The purpose of this writing is twofold. First, I want you to know Mike Bostic, the man—the Black man—so I will answer the question asked of me over the past few weeks. A question that has never been asked of me in over twenty-six years of active duty service. A question about a topic I never thought I would have to entertain, much less answer. A topic that no one I know in the Army profession has ever addressed the way American society has lately.

Second, I want you to know that there is no difference between Mike Bostic and Command Sergeant Major Bostic. All of our teammates have more going on than what you see at the office. The most important responsibility of any Army leader is to “take care of Soldiers.” In our Corps, the most important duty is to take care of all of our teammates. Which means you must really know them. As a leader and as the senior enlisted member at our premier educational and training institution, it is my duty to help guide our future. Many of us feel deep hurt and anger over the current state of racism in America. These emotions will not hold us back—they must light a fire to move us forward.

Many of you might be thinking—like I was, at first—“Where do we go from here?” The recent tri-signed letter to the force on civil unrest told us to “listen to your people, but don’t wait for them to come to you. Go to them. Ask the uncomfortable questions. Lead with compassion and humility, and create an environment in which people feel comfortable expressing grievances. Let us be the first to set the example.”¹ And that is what we’ll do.

Past and Present

To know how I really feel, one would have to live in my life and in my skin and live all that I have seen, heard, and experienced. I will share the raw thoughts that I’ve had over the years and the ones that are a direct result of what has happened in America and around the world. I do this because most of you will never experience how I feel; but, if I share my thoughts, perhaps others will be able to empathize and understand why I feel the way that I do.

My whole adult life I have had to be STRONG, be resilient, and “suck it up.” This is not uncommon for Black Americans. This expectation has existed for centuries. To suffer indignities without reacting—for centuries. To be paid less for the same work—for centuries. To be doubted, to be suspected, to be accused—for centuries. To have to prove, to have to be perfect, to have to be more deserving just to get the baseline—for centuries.

The recent and public killings of Black Americans include names of people we should not have to know. The only reason

we know their names is because of the method of their demise. We must know their names now. Especially the final and publicized eight minutes and forty-six seconds of the life of George Perry Floyd Jr. He was a father of three, forty-six years old, a Black man, and allegedly passed a counterfeit twenty-dollar bill. I am a father of two, forty-five years old, a Black man, and could also pass a counterfeit twenty-dollar bill. To date, I have not watched the video of his attempted arrest and murder—I do not have to. No matter how I view it, my first thoughts still are: Why now, in 2020, and why did he have to die? My second thought: That could have been me. I choose not to speculate on how he lived his life and dare not compare it to mine. The law enforcement officers knew what they knew at that time and did what they did.

I joined the Army to challenge myself and find my strengths. I could have struggled financially in college, but, instead, a recruiter—a Black man—showed me a way to get away from a small rural area in South Carolina. That said, I do seriously believe that I could find myself in an area

I joined the Army to challenge myself and find my strengths. I could have struggled financially in college, but, instead, a recruiter—a Black man—showed me a way to get away from a small rural area in South Carolina

where I might face similar treatment by law enforcement authority simply because I am Black and face similar fates of judgment because of a stereotype or false perception of danger.

Today, information travels faster than the collective response to an action. We all see on our screens what is happening, but many of us will never know the immediate and visceral response to visuals of racism and discrimination, like the video of George Floyd—the way Black Americans do.

Through that lens of information technology, we can see that in some communities, Black Americans are under assault through policing, hate groups, politicians, businesses, media, and others. The

communities I identify with are fighting to live and appreciate the societal opportunities granted by the Constitution of the United States—a country established on a continent that drowns in controversy of how it was occupied and later founded.

Protests and Riots

Protests have been known to bring attention to crises in our culture. There have been protests for issues across the political spectrum. These protests often spur change. And, frequently, that's the end of the story. The issue is moot. Protesting is how Blacks have fought for civil rights for decades. But why? Why was this issue not resolved during the Civil Rights Era, filled with peaceful protests? Why do Black Americans keep having to come back to the table and speak up again and again for fair and equal treatment? I hope that these current protests reach our elected officials and empower them to enact fair and impartial laws and not just place Band-Aids on the year 2020 and the problem with race in America.

Rioting embarrasses me, and I neither understand nor support it. Stealing

and destroying communities and business establishments is not the right thing to do; however, I realize it is sometimes how those who feel most disenfranchised choose to exert some small amount of control over what is right in front of them—even when counterproductive. I simply pray that, as a collective, we choose other, more peaceful ways to draw attention—like speaking out on social media and supporting “blackouts” that illustrate the numbers of supporters of racial equality. We have to model other ways to support causes and express ourselves than attempting to solve violence with more violence. Martin Luther King Jr.'s protests—always planned as peaceful gatherings—brought about huge change in

American law and society during the Civil Rights Era. Sometimes, though, I wonder if his speeches about love begetting love and hate begetting hate would work today. Black Americans have endured and even excused latent as well as blatant racism for fifty more years beyond King's dream for a future America—different treatment based on the color of our skin has taken a toll on Black Americans' energy and patience. For us Black Americans, this movement is not about *special treatment*. This movement for us Black Americans is simply about *fair and equal treatment*. Yes, we speak of hope for equal treatment of all races by all races, but the Black community also feels exhausted and sometimes hopeless after centuries of fighting for something that should be a given—*equality*.

Emotions and Children

Every time social media tells me that another Black person has died, I am hurt. When I read and watch about the violence of the Civil Rights Era and Slavery, I am emotionally devastated. I feel rage, despair, fear, and sadness. Today, 23 June 2020, I still feel angered about all that has played out publicly regarding police brutality, race in America, and equality for Black Americans and others. For many years, I have watched with disgust the way a class of people that I belong to has been treated by the law enforcement and criminal justice systems; and, on a larger scale, how long-standing systems have emplaced obstacles that prevent this class from achieving the same opportunities as others.

All of the recent killings, protests, and riots have ignited a locked-away trigger that controls my fear, anxiety, sorrow, and anger deep in my heart. Until now, no one knows about this trigger. During my childhood, my parents told me that they went to a segregated school, where only Blacks attended, and there were no buses—they had to walk a few miles. I visited this school, and it was nothing compared to the schools I had the privilege to attend. I often think about what my kids learn in school today compared to what I did not learn in school about a culture that is so much a part of me.

Today, I choose to take the time to educate my children about Blacks, American society, racism, discrimination, and

what police brutality means; after all, if they don't learn it from me, then who will teach them? They will have yet another viewpoint to support what they will learn on their own, or in their schools. Before now, I refrained from speaking to my children about some topics because of the fear and anxiety that arise when these images appear on the screen. I must be in a great mood to speak with them. I believe that I must present a strong and fearless image to them. But lately, whenever Black violence (to or by) is broadcasted, I turn off the television and change the subject or leave the room. I should not have to do this. But this is the unspoken expectation of Black Americans, just like I said before, to "suck it up," pretend it's not happening, and drive on. Not anymore. Now, I am talking to my children about what we all have endured so that they can better understand the unique lives and privileges they enjoy as young Black children.

Experiences and Micro-Aggressions

While I am not the first Black man or Black 27D to achieve success in my career, many times I have been—and still am—the only Black leader in an organization, meeting, formation, or gathering. It would not be truthful of me to say that I never felt strange. Sometimes I count the ethnicities of people in the room, in photos, at challenging events, and in formations. I am always looked at as being strong for what I have accomplished in the military. I am expected to be an example and often-times have to resist addressing topics that truly are elephants in the room, but feel meaningless to point out.

Do I fear being a Black man in America, in Charlottesville, Virginia, in and out of uniform? Yes. I feel looks of skepticism and dislike from time to time—it's something that you just can't ignore. In establishments in and out of uniform as the only Black person, I have been denied smiles, eye contact, and had my receipt or change placed on the counter instead of in my hand and the customer service voice sparingly used when compared with the person in front of me in line. I hate to notice these things, but most of us do. In the past, I have attended recruiting and leader speaking engagements, and White people have said to me and about me:

"He speaks so well"; "You sounded White on the phone"; "You don't act like the others." My image and professionalism restricted me from responding with anything other than a thank you from the U.S. Army. I know those people making those remarks were being truthful and didn't see anything wrong with what they were saying; they expressed incredulity that I differed from the stereotypical Black man they have in their minds. In those instances, my anger does sometimes turn to sadness, pity, and hopelessness when a frank remark like that reveals this type of passive yet insidious racism.

There have been three times I have been pulled over for speeding in my life. The first two, I offered my military iden-

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tification along with my license. Not as a TTP to get out of the citation and solicit leniency, but rather for potential self-presentation, cautioning the officer that I was not just a Black man driving a nice car, but a Black man that served in the military and drove a nice car a little faster than I should. All three times I was afraid and did what has been taught—be quiet, sit still, and hands on the wheel. All three times I received a fine. Why should this even matter if we are all supposed to be treated fairly and equally?

During one of these incidents, I was living in Germany. It's embarrassing to admit but, as a Black American man, I was treated far better in that country than I have ever been treated in my life. Even though I was the only Black American amongst many others, I genuinely felt more appreciated because of the color of my skin than I did—and I do—living in America. I wonder why this is. Is it because they do not have the same recent history of enslaving a people based solely on the color of their skin? Is

it because they do not continue to perpetuate and endorse government systems that suppress that same population through modern times?

Instead of whole-heartedly rejecting the stain of slavery and racism in America at the end of the Civil War, this country looked the other way as the Jim Crow Era supplanted slavery, and the next system replaced Jim Crow, and so on. Each new system became smarter than the last and stopped using certain words or tactics, but still achieved many of the same end states of discrimination. This history acts as a poison in American society, and it still reverberates today—in the form of racism against Black Americans and the resulting anger

and exhaustion a Black person naturally feels because of that discrimination. I have achieved much in my military career. Being a Black man, though, it feels like I have always had just one more obstacle to overcome to reach those achievements.

Influences and Experiences

Currently, everything that I do reflects on the military and its culture, where discrimination and racism are not to be tolerated simply because of Army Regulation 600-20. Service members are restricted by a plethora of punitive policies that shape our behavior on and off duty. So why doesn't America reflect certain behaviors of the military?

When I think about our forty-fourth President—a Black man—and how challenging his presidency was publicly, and how he had to fight daily with other elected officials, I feel like he was stripped of the power that should have come with that office. They would publicly berate him because of his politics, but also because he was Black—his female Secretary of State was treated

similarly due to her gender. Think about his position during his two terms compared to other Presidents—why was there so much disparate treatment in our society, even amongst our most powerful?

Every time a Black person dies of inconsiderate, intolerable—and sometimes even criminal—treatment by the government or through police brutality and violence, I feel angered. It is the visible sign of the fact that Black Americans must be perfect, extra respectful, extra “good,” just to have the best chance at receiving something resembling equal treatment—and it is hard to immediately identify when Black Americans can simply be our normal, respectful, good selves, and when

a caveat. I am Mike Bostic. I am not every Black man. I have experienced racism and the effects of prejudice in my everyday life—both personal and professional. But I am not every Black person; there are many people whose lives are much more and much less affected by racism. This is my story.

Soldier and Duty

I have been publicly silent about controversial topics because I am not quite sure how one additional voice can affect this problem. Now that I have inked these thoughts, I am sure I will find out. I also know that I have a public and Family image in the Army; therefore, when it comes to controversial topics dealing with

position and with a more public platform, to ask questions and to provide an insight that will inform my perspective; in turn, that may inform my leaders’ perspectives. This is what all members of our Corps should do. It is imperative that our members “lead up”—and down and around—by sharing your perspectives with others.

Leadership and Obligation

Remember, I am not perfect—no one is—and I do not think I have done as much as I can. I do believe I have been doing what I could, when I could. Over the years, I have aspired to be the example of a good Black person: a Black man, a Black husband, a Black father, and a Black Soldier. Why so many titles? I have never been rowdy, disrespectful, or innately intolerable. Is this the right example to set? Is it all that I could have done? I wonder sometimes. One thing I do know is that the military has not always welcomed Black Americans. Others died for the right I have to serve my country, for the right I have to my career of choice, and for the quality of life I deem my own. I do not know if I am doing enough; whether I am able or not. What I do know is that even though I hold all these titles, they all describe one person. I wrote this article to share my story and show you that I am all of these personas. For those of you who only know me as the quiet and professional sergeant major, I have shared with you the raw emotion. I have shared with you the stew of feelings of anger, sadness, and resentment for the unfairness and inequality Black Americans suffer daily. I have let down my guard and taken off my stoic mask. I have showed you that I am one person, capable of feeling deep, complicated, messy emotions while displaying professionalism at the same time. My hope is that by taking this step, you will feel less alone. We all put on masks and guard ourselves. It’s okay if you do, too. And it’s okay if you decide to remove that mask when you feel it could make a difference.

Another thing I know for sure is that I will proactively continue this conversation on race as a necessary part of the professional development of our Corps. From my foxhole as a Judge Advocate General’s Corps sergeant major, I will do my part to contribute to—and maintain—a climate in

For leaders, especially staff judge advocates and command and chief paralegal noncommissioned officers, it may be awkward or uncomfortable to talk about race—especially if you’re White. “Suck it up.” Get over it

we must turn on the “extra.” Because we do not know whose latent racism will affect whatever is happening, the wrong decision can cost a Black person their life; so, most of us opt for the extra effort all the time. To act and to put on an air of perfection at all times, in every situation, is draining. I believe that right now, in this moment, Black Americans are simply exhausted from all that has happened in our lives.

Black people are stereotyped, especially with the advent of social media. Back in 2005, during Hurricane Katrina, my unit was alerted at Fort Bragg to prepare for a deployment to render aid. We never went; but, I am reminded of how the media turned the storm’s aftermath into a racial conundrum of haves and have-nots. Before, and since then, Black Americans are portrayed as inferior and not deserving of living fair or prosperous lives in America—on this continent.

I’ve been asked a lot of questions these last few weeks, most pertaining to how I feel. I am answering them now because I am ready to share those sentiments, those emotions. But this conversation does come with

race and discrimination, I am cautious about pushing non-mission agendas, ideas, and feelings upon others. These topics often lead to politics, but I do not understand why the issue of racial equality is political. Given our ethical and equal opportunity-based restrictions on posting to social media and speaking publicly about these and other sensitive topics, many military leaders cannot and do not understand these topics and are rarely—if ever—confronted with the challenge to understand them.

Our Sergeant Major of the Army shared a powerful story, that he is Black—having a Black father and White mother—and faces a dilemma when he has to check a race box on forms. I appreciated this story and, in my mind, I wonder what he has experienced—since he visibly appears White. What has he experienced as a Black man in America, much less in the U.S. Army? To answer that question, and because what he shared moved me to connect, I reached out to him for mentorship.

This is one action I have taken as a Soldier, reaching out to someone in a higher

my organization that doesn't just allow, but encourages, our members to put down the heavy ruck sack of hurt, anger, guilt, resentment, and pressure. When it comes to the burden of racism, our members should not "suck it up." They should know that their leaders will listen and respond with compassion, empathy, humility, and—even if they can never truly comprehend—a desire to understand.

You and Support

I believe the voices of all those that have spoken out about racism and equality in America. There must be multiple lines of effort to bring about the change in behavior necessary to achieve what the nation needs. We sometimes don't have the words—that's okay. We do not always have the information and answers either.

We are what we know. We cannot control what we experience, see, or hear. We can control how we react to what we experience, see, or hear. This is what the "old heads" told me growing up. Now I am one of the "old heads," trapped in my feelings and leveraging opportunities to share how I feel, aspiring to calm myself and inspire others. You can keep listening, keep asking, and keep an open mind with the information you receive. Some of my friends and colleagues have given book or movie recommendations in social media, or otherwise, to help us understand each other when it comes to the perspective of Black Americans. It is important that we keep up the dialogue, keep learning, and keep sharing experiences.

For leaders, especially staff judge advocates and command and chief paralegal noncommissioned officers, it may be awkward or uncomfortable to talk about race—especially if you're White. "Suck it up." Get over it. You have advised commanders and senior enlisted advisers on the most sensitive issues our Army grapples with—ethical failures and sexual assault to only name a couple. You must be willing to be as candid with your team as you are with your boss. For the benefit of your team, you must be willing to overcome the discomfort. The candor you show to your boss about sensitive legal issues shows what kind of a lawyer or paralegal you are. The candor

you show to your team shows what kind of leader you are.

I began this article with the statement that you, the reader, will never personally understand my experience: this is true of everyone. I will also never understand exactly what you are feeling. But I have told you that I am open to asking, to finding out, and to learning—I have been my whole life. Now that you are asking me as well—and I feel encouraged to be honest about my experiences—it is a two-way conversation. Let's talk.

Closing and Thank You

I thank you for asking me how I feel. I thank any reader who appreciates me, my viewpoint, and what I offer—regardless of how I look. I ask that you do the same of others as they have always done for you. I accept—and so should you—that I will never know what it is like to be a White person, as you may never know what it is like to be a Black person. Trying to empathize is the next-best thing. If we continue to seek understanding from each other, we will all get through this, and we will be stronger in the end. **TAL**

CSM Bostic is the Command Sergeant Major of The Judge Advocate General's Legal Center and School and the Commandant of the Noncommissioned Officer Academy in Charlottesville, Virginia.

Notes

1. Letter from Command Sergeant Major Michael A. Grinston, Gen. James C. McConville & Sec'y of the Army Ryan D. McCarthy, to Soldiers, Civilians, Family members and Soldiers for Life (June 3, 2020), https://www.army.mil/article/236157/a_message_to_the_army_community_about_civil_unrest. after (June 3, 2020).



Now retired CW5 Rosauro L. Lindogan stands beside CW5 Tammy Richmond, Command Chief Warrant Officer at the Legal Center and School. (Courtesy: Fred Borch).

Lore of the Corps

From Shining Shoes to CW5 The First Chief Warrant Officer Five in the JAG Corps

By Fred L. Borch III

Warrant officers (WO) have served alongside Army lawyers as early as the 1920s, but were not officially a part of what was previously known as the Judge

Advocate General's (JAG) Department—now known as the JAG Corps—until World War II, when the Department received its first warrant officer authorizations.¹ Since

that time, the judge advocate (JA) WO has evolved from being a “Legal Administrative Technician” who processed court-martial cases and handled clerical details to today’s “Legal Administrator” who is responsible for a wide variety of management duties in a staff judge advocate’s office, including the post-trial processing of courts-martial, budgeting and finance, information management and technology, library and files management, civilian and military personnel administration, and security.²

For many years, the highest rank that a legal administrator could attain was Chief Warrant Officer Four (CW4).³ All that changed in 1991, when Congress created the rank of Master Warrant Officer Five—subsequently renamed Chief

Warrant Officer Five (CW5).⁴ This meant that senior legal administrators in the JAG Corps were now eligible for promotion to this new WO super grade; on 1 January 1995, Rosauro L. Lindogan made history as the first member of the Regiment to be promoted to CW5.⁵ What follows is the story of Lindogan's remarkable career in the Army and the Corps.

Born in Bacolod City, Philippines, on 30 August 1936, Rosauro Lucenio Lindogan was the youngest of thirteen children. He grew up in poverty and, from the age of ten, began making money by shining shoes after school. He usually earned ten pesos at the end of each day; he gave this money to his mother to help with the family's expenses. Later, in addition to shining shoes, Lindogan worked as a house boy during school breaks. This allowed him to earn an additional thirty pesos a month. But "Lindy," as he was known to colleagues and friends, recognized the key to success was to obtain an education. Consequently, despite his impoverished circumstances, he completed elementary, middle, and high school in the Philippines.⁶

Determined to have a better life, Lindogan thought about enlisting in the Philippine Army. But, at five feet four inches tall and 112 lbs., nineteen-year-old Lindogan was "too skinny and too short." However, in the Philippines in the 1960s, a unique provision in United States (U.S.) law permitted Filipinos to enlist in the U.S. Navy.⁷ Convinced that a sea-going career was for him, Lindogan went to see a recruiter at the Naval Station in Sangley Point, a facility near Manila Bay. He had an interview, passed the enlistment exam, and was on orders to report to Navy boot camp in Orlando, Florida.⁸ But then, a week before Lindy Lindogan was to report to Florida, his petition was approved for him to come to the United States to join his older brother who had immigrated and was living in Hawaii. With the plan that they would rejoin him after he was settled, Lindogan left for the United States while his wife and three children stayed in the Philippines.

Although his brother advised him that he could enlist once he arrived in Hawaii, Lindogan never joined the Navy. Why? Because, while processing through

immigration in Hawaii, Lindogan signed an immigration form that made him subject to the draft. Within months, he was drafted into the Army for two years. He reported for duty on 13 March 1962.⁹

After completing basic and advanced individual training for MOS 11B Infantry at Schofield Barracks, then-Private Lindogan served briefly at the 25th Infantry Division before deploying to Korea for the first of two tours. He was with the 1st Cavalry Division at Camp Howze from August 1962 to August 1963 and with the 2d Infantry Division at Camp Casey from January 1964 to January 1965.

With the Vietnam War in full swing, Specialist Five Lindogan—now working as a legal clerk with MOS 71D—arrived in Saigon in the summer of 1965. He served eighteen months with 1st Logistical Command before leaving in December 1966 for a short tour of duty in Germany. Lindogan returned to Vietnam in May 1967, and spent an unprecedented twenty-nine months at U.S. Army, Vietnam (USARV). While on this second tour in Southeast Asia, now Specialist Six Lindogan received a message from the Red Cross that his wife had died. He took emergency leave to travel to the Philippines to see his children before returning to USARV to resume his duties as a legal clerk.

While Lindogan enjoyed his tours in Vietnam as a legal clerk, the experience was not without danger. As Richard H. Black, a retired JA colonel and one of Lindogan's former bosses tells it, on one occasion

Lindy...was asked to drive three JAG officers to the barracks. He drove them there and was sitting in the Jeep waiting, when they decided to invite him into the barracks to have a beer with them. As soon as Lindy got to the barracks door, the Jeep exploded. A bomb was planted in the vehicle. I guess you could say his life was saved by circumstance. That story was legendary in the JAG Corps.¹⁰

In November 1969, he returned to American soil—along with his new wife, whom he had met and married in Vietnam. Now Sergeant First Class (SFC) Lindogan joined the 7th Infantry Division

at Fort Ord, where he was the military justice noncommissioned officer in charge (NCOIC). The division had an extremely busy court-martial practice, chiefly because of significant amendments to the Uniform Code of Military Justice (UCMJ) ushered in by the Military Justice Act of 1968.¹¹

Prior to 1 August 1969, the effective date of changes made by the Act to the UCMJ, there were no judge advocates at special courts-martial. There also was no such thing as a military judge at special courts-martial. Rather, the "law officer" (a quasi-judicial official who was akin to today's military judge but had much more limited authority) sat only at general courts. This meant that prior to the 1969 changes to the UCMJ, trial and defense counsel at special courts were line officers with no legal qualifications; all trials were with panels (because there was no military judge who could conduct a bench trial) and a line officer—the president of the panel—ran the proceedings. Now, however, judge advocates were at special courts where they prosecuted and defended Soldiers; a military judge presided over the trial. Also, for the first time, court reporters certified by The Judge Advocate General (TJAG) were recording testimony and producing much more lengthy records of trial (ROT's).

All this meant that SFC Lindogan was handling many more ROT's than had any previous NCOIC in the Office of the Staff Judge Advocate (OSJA). Another factor contributing to Lindogan's workload was that Fort Ord had a large confinement facility, and its presence also meant that the 7th Infantry Division was trying more courts-martial. Lindogan excelled in this high pressure environment as the NCOIC, and, recognizing that his talents made him an ideal candidate to be a Legal Administrative Technician, the 7th Infantry Division's SJA encouraged him to apply for an appointment as a WO. The result was that SFC Lindogan was honorably discharged on 28 May 1975, after 158 months enlisted service, to accept an appointment as a Warrant Officer One (WO1) the following day.¹²

After pinning on his new rank (JA WOs did not attend Warrant Officer Candidate School in this era, but simply exchanged stripes for bars at the time of



In 1995, Rosaura L. Lindogan became the first legal administrator to attain the rank of CW5 (Courtesy: Fred Borch)

appointment), WO1 Lindogan reported to Fort Rucker, Alabama, where he served one year before being reassigned to the Army's Retraining Brigade at Fort Riley, Kansas. During his twenty-three months at Riley, Lindy enrolled at Wichita State University (WSU). It was a two hour commute from Fort Riley to Wichita, but Lindogan took college courses at the end of the duty day. Ultimately, he earned a two-year degree from WSU in 1981 and a Bachelor of Science degree in Business Administration from Orange Coast College in 1986.

After yet another tour in Korea with the 2d Infantry Division at Camp Casey, now-Chief Warrant Officer Two (CW2) Lindogan was assigned to the U.S. Army Garrison, Presidio of San Francisco in July 1979. Twelve months later, CW2 Lindogan returned to the 7th Infantry Division, Fort Ord, where he served for twenty-nine months.

In December 1982, now-Chief Warrant Officer Three (CW3) Lindogan arrived at Fort Clayton, Panama, for duty with the 193d Infantry Brigade. Now designated as a "Legal Administrator," Lindy would spend a total of thirty-two months in Panama. To say that he loved this assign-

After forty-six months at Fort Ord, CW4 Lindogan was assigned to the Joint Readiness and Training Command, Fort Polk, Louisiana. While all recognized his excellence in the workplace, Lindogan made a name for himself at Polk as "an outstanding example of physical fitness" because he

No one in the Corps in Lindogan's era—officer or enlisted—had forty-seven months of duty in Vietnam, and only a handful of individuals in the Regiment even had two twelve-month tours in Southeast Asia

ment is an understatement, and Lindogan discovered that he enjoyed long distance running. He began competing in ultramarathons and was one of the few Americans who was willing to race in the intense heat of the jungle.

After Panama, CW3 Lindogan spent thirty-three months as the legal administrator at Fort Huachuca, Arizona, before returning once again to the 7th Infantry Division at Fort Ord in July 1988. Then-Lieutenant Colonel Richard H. Black was the division SJA. A self-described "tough taskmaster," Black asked the newly-promoted CW4 Lindogan to be his office legal administrator. Black remembers that when he and Lindogan "first talked, he listened and had recommendations for everything [he] wanted to accomplish. [He] knew [that Lindogan] was the warrant officer [he] not only wanted, but needed." At Fort Ord, Lindogan made "things happen for the better when no one else could."¹³

The SJA office was in an old, dilapidated building, and it needed major renovation work. In addition to funding for this project, Lieutenant Colonel Black wanted money so that his judge advocates could attend continuing legal education (CLE) courses. Within months, to Dick Black's amazement, CW4 Lindogan had convinced the installation budget officer to allocate \$300,000 for the renovation and attorney CLE. When the renovation was complete, remembers Black, it looked like "a big corporate law firm" had its offices at Fort Ord.¹⁴

could "outrun everyone in the [SJA] office." Lindogan loved competing in long distance road races, especially "double marathons" (52.4 miles).¹⁵

He was at Fort Polk when an Army board of officers selected him to be promoted to CW5. He pinned on this new rank on 1 January 1995. His last assignment before retiring in May 1998—with thirty-six years active duty—was as the senior legal administrator at the U.S. Army Legal Service Agency, then located in Falls Church, Virginia.¹⁶

Looking back at Lindy Lindogan's career, it is not difficult to understand why he was the first WO legal administrator selected for promotion to CW5. There were other highly qualified legal administrators in the Corps in the 1990s, and no doubt more than a few with outstanding officer efficiency reports. But, there were no WOs in the Corps who had the breadth of experience that Lindogan had, much less his highly unusual overseas assignment history. No one in the Corps in Lindogan's era—officer or enlisted—had forty-seven months of duty in Vietnam, and only a handful of individuals in the Regiment even had two twelve-month tours in Southeast Asia. No one had nearly four years in Vietnam plus thirty-six months on the Korean peninsula—especially when Korea during the Cold War era was considered by Soldiers to be a hardship tour (because it was unaccompanied). Lindogan had all this overseas time plus thirty-two months in Panama. When he was, finally,

selected for promotion from CW4 to CW5, Lindogan had been on active duty for more than thirty-two years.¹⁷

After leaving active duty, Lindogan embarked on a second career as a Federal civilian employee. He first worked, briefly, as an Administrative Officer in the Criminal Law / Tax Division at the Department of Justice before transferring to the Department of the Army to take an Administrative Officer position at Walter Reed Army Medical Center (WRAMC). Lindogan worked at WRAMC from 1998 to 2010, and, when his job moved to the Office of the Command Judge Advocate, Regional Health Command-Atlantic at Fort Belvoir, he moved with it. After eighteen years as a civilian employee, Lindogan retired from the civil service on the last day of September 2016. When combined with his time as a soldier, he had more than fifty-four years of service to the United States.¹⁸

In the early 1960s, Lindy Lindogan had promised his father and his mother that when he came to the United States, he would work hard. He said, “Dad, I will promise that I will try to be successful.” According to Lindogan, his decision to join the Army allowed him “to show [that he is] trying to be faithful and love [his] country... [his] new adopted, country. [He] would be faithful and serve as much as [he] could do and help people who needed help. That’s [his] mentality.”¹⁹

This can-do, positive attitude about himself, the Army, and America helped Lindogan when he faced both overt and subtle racism during his career. In the 1960s and 1970s, some white Americans in uniform were unwilling to treat a Soldier born in the Philippines as an equal, and Lindogan remembers being called an “animal,” an “alien,” and worse names. Even when the overt signs of racism disappeared in the 1980s and 1990s, CW5 Lindogan sometimes felt he was the victim of more subtle forms of discrimination because of the color of his skin and his Filipino accent. But he never let this racism deter him from doing his best as a Soldier and legal administrator for more than a half century.²⁰

Today, Lindy Lindogan and his wife, Iderlina, live in Maryland. While he is approaching eighty-five years of age, he continues to keep physically fit by running

several times a week. Lindogan is immensely proud of his six children, all of whom have been successful in their lives.

For those members of the Regiment who want to know more about CW5 Lindogan and his remarkable career, two members of the 68th Graduate Course, Majors Daniel Ray and Mitchell Suliman, conducted an oral history with him in late 2019. A transcript of their interview will be available in mid-2020. **TAL**

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

Notes

1. On June 24, 1948, Congress changed the name of the Judge Advocate General’s (JAG) Department to the JAG Corps. JUDGE ADVOCATE GENERAL’S CORPS, U.S. ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775-1975*, at 198 (1975).
2. U.S. DEP’T OF ARMY, PAM. 600-3, OFFICER PROFESSIONAL DEVELOPMENT AND CAREER MANAGEMENT (3 Apr. 2019) [hereinafter DA PAM. 600-3] (providing a description of the “officer characteristics” and “unique skills” required of Warrant Officers (WO)); U.S. DEP’T OF ARMY, PAM. 611-21, MILITARY OCCUPATIONAL CLASSIFICATION AND STRUCTURE para. 8-270a (6 Dec. 2019) [hereinafter DA PAM. 611-21] (providing specifics on skills required for MOS 270 Legal Administrator).
3. The Warrant Officer Act of 1954 established Warrant Officer grades W1 through W4. Warrant Officer Act of 1954, Pub. L. No. 379, 68 Stat. 157, <https://www.govinfo.gov/content/pkg/STATUTE-68/pdf/STATUTE-68-Pg157.pdf#page=9>.
4. Warrant Officer Management Act of 1991, Pub. L. No. 102-190, § 1101, 105 Stat. 1290, 1298 (codified as amended at 10 U.S.C. § 571 (2010)). This Act created the paygrade of W5 and the separate rank of Master Warrant Officer (CW5), since renamed as Chief Warrant Officer Five. *Id.*
5. Other CW5s in Corps history include (in alphabetical order): Kristi B. Estes, Russell “Rusty” Ferrell, Carol Hauck, Scott Higdon, Richard “Rick” Johnson, Michael “Mike” Lanoue (the second CW5 in history), Mark W. Mishoe (ARNG Oklahoma), Brian Peterson (ARNG California), Edward Peterson, Charles “Charlie” Poulton, Ronald “Ron” Prescott, James “Jim” Steddum, Craig Sumner, Sharon Swartworth (3d CW5 in Corps, first female CW5, and most highly decorated WO in Corps history), Dale Trexler, and Tommy Worthy. The newest CW5 in the Corps is Tammy Richmond, who was promoted in summer 2020.
6. G. H. Cureton, *Legal Trailblazer Ready For Next Adventure—At 80*, U.S. ARMY (30 Sept. 2016), https://www.army.mil/article/176102/legal_trailblazer_ready_for_next_adventure_at_80.
7. Bureau of Naval Personnel, *Filipinos in the United States Navy*, U.S. NAVY (12 Sept. 2017),

<https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/f/filipinos-in-the-united-states-navy.html>. On 14 March 1947, the United States and the Philippines agreed that the U.S. Navy would be able to recruit Filipino citizens to voluntarily enlist as Sailors. Under the Military Bases Agreement signed by both countries, Article XXVII permitted up to 2,000 Filipinos to enlist every year. The provision was unique because it did two things. First, it permitted men to enlist without first immigrating to the United States and second, it applied only to the Navy. *Id.*

8. See *supra* text accompanying note 5.
9. Officer Record Brief for Rosauro L. Lindogan (9 Nov. 1994) (on file with author) [hereinafter Lindogan ORB].
10. Cureton, *supra* note 6.
11. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335).
12. Lindogan ORB, *supra* note 9; U.S. Navy, DD Form 256A, Honorable Discharge, Warrant Officer 5 Rosauro Lucenio Lindogan, (28 May 1975) (on file with author).
13. Cureton, *supra* note 6.
14. Jennie L. Ilustre, *U.S. Army Legal Trailblazer Lindogan Retires*, MANILA MAIL, (Nov. 2016) (on file with author).
15. C. Eric Farris, *JAG’s Eagle Corps’ First CW05*, GUARDIAN (1994) (on file with author).
16. Lindogan ORB, *supra* note 9.
17. *Id.*
18. Program, Retirement Ceremony in Honor of Mr. Rosauro (Lindy) Lindogan, (30 Sept. 2016) (on file with author).
19. Cureton, *supra* note 6.
20. Majors Daniel Ray & Mitchell Suliman, Executive Summary and Oral History, CW5 Rosauro Lindogan (2019) (unpublished manuscript) (on file with author).



George Bahamonde, second from left, stands next to the author, David E. Graham. (Courtesy: Fred Borch).

In Memoriam

George Bahamonde

By David E. Graham

It was the fall of 1974, and I was teaching a class in International Law to the Advance Course—now, the Graduate Course. As was the case for all U.S. Army The Judge Advocate General’s School courses at the time, the class took place in Clark Hall—the old University of Virginia Law School. A few minutes into my

instruction, the door opened in the rear of the room, a man entered, stood there for a moment, and then took a seat in the back row. He folded his arms, crossed his legs, and listened intently for the remainder of the hour. As the class ended and the students departed, this gentleman remained. When the room had cleared, he approached

me, held out his hand, and said, “Hi, I’m George Bahamonde.” I shook his hand and he remarked, “I’m with the International Affairs Division in the U.S. Army Europe Office of the Judge Advocate (USAREUR OJA) in Heidelberg. You should come work with me.” And that was how I met George. Little did I know at the time what a defining moment in my professional career that encounter would become. Accordingly, what follows is a highly personalized tribute to a singular man.

George Bahamonde was a New Jersey native, who attended Columbia Law School. In my conversations with him, he would often make references to Lou Henkin, the noted legal scholar and Columbia Law professor. “Brilliant guy,” he would say. “I learned so much from him.” Many years later, when making a presentation at the Aspen Institute, I had the privilege of meeting Professor Henkin. There, I relayed

to him George's oft-stated admiration. And, of course, I took pleasure in later letting George know of this encounter.

After graduation from law school, George served as an enlisted Soldier in Europe in the 1960s—a not unusual occurrence during this Vietnam era—and was discharged in France, where he took a position as an Army Civilian attorney with U.S. Forces stationed at Fontainebleau. When Charles De Gaulle later forced North Atlantic Treaty Organization (NATO) forces from France, George was tasked with handling all legal issues associated with terminating U.S. Army operations in that country. He worked with the Military Liquidation Section at the U.S. Embassy in Paris. It was there that he met Ada, an embassy employee who would become the love of his life.

As U.S. Army European military operations moved from France to Campbell Barracks, Heidelberg, Germany, so did George. Working in the International Affairs Division (IAD), in the USAREUR OJA, he assumed the position of Opinions Branch Chief in the late 1960s. It was in this capacity that he began establishing his reputation as an indispensable source of expertise and advice on all legal matters pertaining to any aspect of U.S. Army operations in Germany and the other NATO-contributing countries with troop presence throughout Europe, known as Sending States (United Kingdom, Canada, Belgium, and Netherlands). Colonel (Ret.) Charlie White, who was serving as the IAD Chief at the time, tells of George (who had become known by those close to him as “the Baha”) having twenty-one safes of classified materials and opinions in his office—and opening each safe—with a different combination, each morning, by memory. All the while, he was traveling by train each Friday afternoon from Heidelberg to Paris, to be with Ada, returning on Sunday evening.

As U.S. operations in Vietnam drew to a close, the then-The Judge Advocate General (TJAG), Major General (MG) George Prugh—who had benefitted from George's advice when serving as the USAREUR Judge Advocate (JA)—recalled that George had successfully “turned off the lights” for U.S. Army operations in France. Accordingly, adding credence to the

adage of no good deed going unpunished, MG Prugh dispatched George to Saigon in January 1973, tasking him with closing down legal operations at U.S. Military Assistance Command, Vietnam, and U.S. Army Republic of Vietnam. Under chaotic conditions—and facing an end-of-January departure deadline mandated by the Paris Peace Accords—to no one's surprise, George again came through.

With my arrival in Heidelberg the summer of 1975, my exposure to the now legendary Bahamonde wisdom, management style, and wit began. Settling in on my first day, still recovering from jet lag, George's voice rang out. As I entered his office, he looked up, and, with that smile on his face that I came to learn meant that he was particularly pleased with the mission he was about to assign, he said “All squared away?” Then, before I could respond, “Good. The DCINC (the Deputy Commander in Chief of USAREUR) has questions about these Geneva Protocols

summer, discussing these Protocols with various countries?”

I mumbled a “Yes.”

“Did you not just recently write a law review article about these very Protocols?”

“I did.”

“Then, tell me; who do you think is better qualified in this office to speak to the DCINC's concerns? Go answer his questions. Someone will tell you how to find him.”

This encounter was my introduction to Bahamonde Management 101. He had the ability to know well—and call upon—the strengths of every individual in his office. In doing so, he prepared his young attorneys for success. His trust in their abilities was both evident and transparent. He empow-

Charlie White, who was serving as the IAD Chief at the time, tells of George (who had become known by those close to him as “the Baha”) having twenty-one safes of classified materials and opinions in his office—and opening each safe—with a different combination, each morning, by memory

they've been negotiating—what we now know as the 1977 Additional Protocols to the 1949 Geneva Conventions. You need to go provide him with answers.” I paused for a moment, and then, looking at him with a mixture of disbelief and mild panic, I said, “George, this is my first day in Heidelberg. I don't even know how to find the DCINC's office. Are you sure?” This admittedly tepid response resulted in a characteristic Bahamonde gesture. He slowly removed his glasses, tossed them on his desk, leaned back in his chair and said:

“Did you not travel all over Southeast Asia with TJAG (MG Prugh) this past

ered his captains. And, in response, these attorneys doubled down in their efforts to justify the trust and responsibilities he afforded them. Most importantly, George never failed to stand behind the actions and decisions of those who worked for him, even in those inevitable cases when we made mistakes. We never doubted that he would have our backs.

I quickly came to appreciate that the widely held respect for George's expertise in all matters related to the NATO status of forces agreements and the German Supplementary Agreement was well earned. Indeed, his knowledge was encyclopedic in nature. The opinions on such subjects

issued by the office were filed under each article of the supplementary agreement to which a particular topic related. A controversy would arise; a request for an opinion would be made; and George would note on the assignment slip: “Look under Article 53. There should be several opinions dealing with essentially this same subject, around the 1969 and 1974 timeframes.” True enough, there they were. He had an amazing recall of issues and the relevant law. New matters did arise, of course—or new twists on previously addressed subjects. When this occurred, nothing pleased George more than one of his captains ap-

his patience and guidance during the many days I spent formulating the USAREUR Directive implementing the Case Act—legislation mandating stringent accountability in the U.S. negotiation of international agreements. He honed my writing skills immeasurably.

In 1976, to the great benefit of U.S. Army forces stationed throughout the Federal Republic of Germany (FRG), as well as to that of the other U.S. Services and the Sending States, George was made the Special Assistant to the USAREUR JA. With this significant expansion of his portfolio of responsibilities, he was now

assembled. He was fluent in French, and, although he always professed otherwise, he also spoke and read German—a talent he used to great advantage in bi-lateral negotiations with unsuspecting German officials.

The benefits that younger attorneys derived from time spent with George were not exclusively related to the development of our legal skills. He had his own way of both exercising and demonstrating what it meant to lead. I can remember the time when, hearing someone loudly berating our young secretary, each of us made our way to her workstation. George was there before us, staring down a lieutenant colonel from another staff directorate who had been haranguing the young woman for failing, through no fault of her own, to present paperwork he was seeking. George pointed a finger at the lieutenant colonel: “Get out of this office. No, wait; get out of this entire building, and don’t come back.” Then, spotting his somewhat stunned captains: “Nothing to see here; get back to work.” George never failed to protect his own.

My most memorable Bahamonde lesson in leadership, however, occurred following a tongue-lashing administered by a senior colonel to a lieutenant colonel Division Chief, one of many that he had endured over several months. This time, however, the incident occurred not behind closed doors, but in the main hallway for all to hear. Moments later, George assembled his attorneys in his office. “Okay, what you just heard is simply unacceptable. When you become supervisors, in or out of the Army, I hope you understand that one of your fundamental responsibilities as a leader is to treat all who work for you with respect. Never denigrate or humiliate your subordinates. To do so is much more a reflection on your lack of personal discipline than it is on the shortcomings of someone you mistreat.” George never failed to practice this admonition. Indeed, he was years ahead of the times in terms of both racial and gender equality.

Ada, George’s great love, and unabashed Francophile, had moved from Paris to Heidelberg following their marriage in the early 1970s. They continued to own an apartment in Paris, however, and graciously shared this, on occasion, with young USAREUR OJA couples who were

He had the practiced ability to assess issues through the eyes of a commander, always weighing how a legal position would impact the ability of that commander and his troops to successfully accomplish their assigned missions

proaching him with a “novel” idea on how a provision of the supplementary agreement could be interpreted so as to benefit U.S. forces and other Sending States. These ideas seldom proved to be workable, or novel; but, on that rare occasion when they did, George took a special interest in assisting a young attorney in pursuing their newly conceived approach. As was the case when any of his attorneys gained a small victory for the office, he had already paid a visit to the General to ensure that the credit for the success achieved went directly, and exclusively, to the individual concerned.

One of George’s seldom noted attributes was the fact that he was a master wordsmith, capable of composing just the right phrase, reducing complex legal arguments to easily understood paragraphs. Yet, his was not a simplistic writing style. “I don’t care if you use the passive voice, if it best fits the narrative. Don’t shy away from a compound subjunctive sentence, if it appropriately conveys the point you’re trying to make.” And, yes, he really could school you on dangling participles and split infinitives. I had drafts returned that looked as if an entire bottle of ink had been spilled on my efforts. Well, do I remember

in a position to bring his combination of analytical legal skills, negotiating savvy—and oft-displayed—common sense to a wide array of U.S. defense concerns. He had the practiced ability to assess issues through the eyes of a commander, always weighing how a legal position would impact the ability of that commander and his troops to successfully accomplish their assigned missions. Recall that, unlike today, with its large number of forces present in the FRG and elsewhere in Europe and rather than U.S. European Command, USAREUR was the dominant U.S. defense player. This meant that a legal position taken by USAREUR on any given issue became that adopted, almost uniformly, by the other U.S. Services and Sending States operating within the FRG and elsewhere in the region. And George was always at the forefront of crafting these positions. Not only was he the much sought-after counselor to every USAREUR staff directorate, he regularly served as such for the other Services’ legal offices and those of the Sending States. When these entities assembled for their bi-annual Sending States meetings, I witnessed time and again the persuasive power of George’s intellect and the respect afforded him by the others

attempting to see the “City of Lights” on a captain’s salary. My wife and I were recipients of this generosity on more than one occasion, with Ada eagerly leading us from one flea market to another—once ending the day at a performance by the London Royal Shakespeare Company. Thanks to Ada and George, we and others collected memories that have lasted us our lifetimes.

George was not without his special brand of humor—often acerbic, but never cruel. As one worked with him and came to understand this, you realized that he also appreciated a well-placed retort aimed at him. These exchanges made working with him particularly enjoyable. On one occasion, however, my fellow captains feared that I had crossed the proverbial line. George was a runner—jogging essentially every day. This entailed him leaving Campbell Barracks—often running to a distant U.S. housing area and back. Upon returning to the Barracks, he would—of course—be required to present his identification to gain re-entry. Denied entry, he instructed the guard to call his office, whereupon someone would confirm his identity and the fact that he did indeed work there. The phone rang, and I answered. The guard explained that a gentleman was at the front gate, a George Bahamonde, who said that he worked in the USAREUR OJA. He had no identification, however. Could I confirm his identification? Instantly, I realized that this situation presented me with an opportunity that could not be resisted. As my office cohorts listened curiously, I asked the guard: “What did this fellow say his name was?” I heard the guard query George: “Sir, you did say your name was Bahamonde, right?” Then, to me. “Sir, yes, his name is Bahamonde.” “Bahamonde, Bahamonde,” I said to the guard. “How does he spell that?” The guard was about to relay this question when George suddenly realized what was happening. “Who are you speaking with, Sergeant? Is that Graham? Give me that phone!” At which point, I hastily said, “Oh, that Bahamonde. Sure, Sarge, he works here,” and quickly hung up. As I did so, my office mates were staring at me with a combination of disbelief and regret for the fate that they were certain was to befall me. In just minutes, the door at the end

of the hall swung open, and George, still in his running clothes, strode down the corridor, yelling, “Graham, Graham; where are you Graham?” At this point, people on both sides of the hall were exiting their offices. I stepped into the corridor, as George approached. “Are you looking for me, George?” He rushed up with a scowl on his face, pointed his finger in my chest, and then, transitioning into a broad smile, simply said, “Good one!”

George toiled at USAREUR OJA for thirty-five years, twenty-six of those as the Special Assistant to the USAREUR JA. As such, he was the principal architect of U.S. Army legal policy for not only Germany, but for the entire European region. He is the single individual most responsible for preserving and enhancing the interests of Army forces stationed throughout this critical area of the world, a legacy that continues to this day. He counseled Generals, Ambassadors, and, very importantly, young captains and majors—guiding all of them, shaping their thinking, and, very often, saving them from themselves. He was an extraordinary attorney, public servant, and personality. And, while I managed to convince him to grudgingly participate in Fred Borch’s Oral History Program at the Legal Center and School, in an effort to capture his many accomplishments, he characteristically proceeded to minimize each of his remarkable achievements.

After well over three decades of service, George retired in 2002. He lost Ada in 2017. On 31 March 2020, at the age of eighty-six, we lost George. He is buried next to Ada at the Montparnasse Cemetery, in Paris. As I’ve thought back over the outsized influence that George had on my career, I have repeatedly recalled what he so often said many years ago of Professor Lou Henkin. “He was a brilliant guy. I learned so much from him.” Back at you George. You were the sage; you were the guru; you were, indeed, “the Baha.” Those of us who were fortunate enough to work with, and to call you a friend, will forever be in your debt. As will the nation you served. **TAL**



Practice Notes

War, Peace, and Pandemic Commander's Authority During COVID-19

By Captain Amanda L. Perry

In January 2020, when the novel coronavirus (COVID-19) began sweeping across mainland China and the world quickly thereafter, command teams immediately started to plan their attack against the spread of the virus. The initial messaging focused on remaining calm and instructing people that washing their hands and

cleaning surfaces would be enough to slow—if not stop—the virus's spread. While positive messaging was being sent out to the world, Army commanders were asking their judge advocates what powers they had to protect the force, Families, and installations if the situation progressed into a worldwide pandemic. This article addresses

Engineers with the Combat Capabilities Development Command - Soldier Center at U.S. Army Natick Soldiers Systems Center in Natick, Massachusetts, fabricated 10,000 cloth face coverings after the secretary of Defense authorized the wear of cloth face coverings to prevent the spread of COVID-19. (U.S. Army photos by Markeith Horace, Fort Benning Maneuver Center of Excellence Public Affairs).

the commander's inherent authority; it also addresses the Department of Defense Instruction (DoDI) that is the bedrock of a pandemic outbreak and, specifically, what actions the senior commander at Fort Bragg, North Carolina, took to protect the force, Families, and the installation that look to him, as the Commanding General (CG), for protection and guidance.

Inherent Authority

First and foremost, a commander has the inherent authority to maintain good order and discipline of their Soldiers.¹ A senior commander,² such as the CG of XVIII Airborne Corps in Fort Bragg, holds authority over an installation which is "necessarily extensive and practically

exclusive, forbidding entrance and controlling residence as the public interest may demand.³ Further, Army Regulation (AR) 600-20, Chapter 4, specifically states that a senior commander's authority includes all that inherent in command. This includes the authority to maintain good order and discipline of Soldiers both on and off the installation. It also states that, in the case of communicable diseases, a senior commander can choose to quarantine Soldiers who may be infected or at risk for infection.⁴ While the corresponding DoDI 6200.03 provides the regulatory guidance on the military response to a pandemic event in the context of a public health emergency, the authorities themselves are generally inherent in the role of the senior commander.

What specifically does inherent authority allow a senior commander to do in a situation like COVID-19? With respect to Soldiers, the CG was immediately able to limit leave and pass privileges; implement travel restrictions; define "essential travel"; and cancel non-mission essential activities and non-mission essential leave. The CG's authority over Soldiers is particularly broad, and the authority can take any reasonable measure necessary to prevent or limit the transmission of a communicable disease and enhance public safety, including ordering Soldiers into quarantine, isolation, or conditional release.

Department of Defense Instruction 6200.03

When it comes to responding to a communicable disease like COVID-19, DoDI 6200.03 is the true King of the Battle. It provides substantial regulatory guidance regarding the military response to a pandemic event. When a public health emergency occurs, the senior commander assesses the impact of the emergency on the installation, considers whether to declare an installation-wide public health emergency, and decides what subsequent actions to take to protect the health and welfare of the force, Families, and installation community. The Public Health Emergency Officer (PHEO) for the installation assists the senior commander in making these determinations.⁵

If both the senior commander and the PHEO believe that a public health

emergency declaration on the installation is necessary, the commander will declare the public health emergency in writing. The staff judge advocate will ensure the declaration is within the scope of the senior commander's authority and the public affairs officer (PAO) will consult with the senior commander to ensure adequate publication of the order. A declaration must be immediately reported through the chain of command to the Secretary of Defense and to all installation personnel within twelve hours. Unless renewed and re-reported, public health emergency declarations within the Department of Defense (DoD) will terminate automatically in thirty days. A PHEO must also evaluate the threat as a potential public health emergency of international concern.

Upon declaration of a public health emergency, the senior commander is authorized to take "relevant emergency actions to respond to the situation to achieve the greatest public health benefit while maintaining operational effectiveness."⁶ These measures can include, but are not limited to, directing Soldiers to submit to medical examinations or testing; closing, directing the evacuation of, or decontaminating any asset or facility that endangers public health; controlling evacuation routes on, and ingress and egress to and from, the affected DoD installation or military command; and restricting movement to prevent the spread of communicable disease.⁷

One type of reasonable and necessary response is the restriction of movement—either through quarantine or isolation—to prevent or limit transmission of a communicable disease. Quarantine is defined as "the separation of an individual or group that has been exposed to a communicable disease, but is not yet ill, from others who have not been exposed, in such manner and place to prevent the possible spread of the communicable disease."⁸ Isolation, on the other hand, is defined as "the separation of an individual or group infected or reasonably believed to be infected with a communicable disease from those who are healthy."⁹ Said more simply, if an individual or group is showing symptoms or is known to be infected, then whoever is infected should be isolated; however, if someone is potentially infected but it is not yet

confirmed, then they should be quarantined until a final diagnosis is made.

In conjunction with orders from higher levels, the senior commander at Fort Bragg instituted numerous reasonable measures to weaken the spread of the virus—such as ordering immediate quarantine for Soldiers returning from high risk countries, limiting the local leave radius to no more than fifty miles, and ordering all Soldiers to wear face coverings over their noses and mouths when entering a post exchange or commissary facility.

Conclusion

Senior commanders have a significant amount of inherent authority to protect the force and protect good order and discipline, but they also have an important weapon in their commander's ruck sack—DoDI 6200.03. Many of the measures taken by the senior commander at Fort Bragg during COVID-19 grew from the language in the DoDI; however, they fell under his inherent authority as a senior commander.

CPT Perry is an administrative law attorney at XVIII Airborne Corps in Fort Bragg, North Carolina.

Notes

1. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY ch. 4 (6 Nov. 2014) [hereinafter AR 600-20].
2. Note the 2014 version of AR 600-20 replaced the term "Senior Mission Commander" with "Senior Commander." *Id.*
3. See *Cafeteria Workers v. McElry*, 367 U.S. 886 (1961).
4. See AR 600-20, *supra* note 1, para 5-4(c)(3).
5. According to the Department of Defense Instruction 6200.03, the military commander will direct the Public Health Emergency Officer (PHEO) to (a) determine the existence of cases suggesting a public health emergency affecting the installation's population, (b) ensure that sources of the health hazard are investigated, (c) define the distribution of the illness or health condition, and (d) recommend implementation of proper mitigation and/or control measures. U.S. DEP'T OF DEF., INSTR. 6200.03, PUBLIC HEALTH EMERGENCY MANAGEMENT WITHIN THE DEPARTMENT OF DEFENSE, para 3.1(d) (27 Sept. 2010).
6. See *id.* para 3.2(a).
7. See *id.* para. 3.2(b).
8. See *id.* at Glossary.
9. *Id.*



(Credit: istockphoto.com/sodafish)

Advising the Ethical Playing Field

The Confluence of Profession, Ethics, and Principled Counsel

By Major Jack B. Cohen

[E]thics seem to serve as both the first line of defense in maintaining order and the last line of defense in preserving honor. Ethics also prove difficult to teach, because instilling an idea in someone that they must subsume their own identity into something larger and more important than themselves is a task to which not all are equal.

The concept of a profession is rooted in a field of expert knowledge coupled with the trust society instills in the profession in exchange for internal regulation and dedication toward supporting the common good.² A profession

is also a specialized functional group with binding characteristics related to expertise, responsibility, and corporateness.³ From the junior enlisted members to senior officers, all members of today's United States armed forces are members of a profession; and, as

such, must take their professional responsibility to uphold the public trust seriously.⁴

A 2015 monograph published by the Strategic Studies Institute and U.S. Army War College entitled *Lying to Ourselves: Dishonesty in the Army Profession* sent shock waves through the Army officer corps.⁵ The monograph's premise is that Army officers have become ethically numb after repeated exposure to overwhelming demands that cause them to put their honor on the line to maneuver Army bureaucracy.⁶ The monograph posits that the result of an Army required to pick which standards to actually follow—and which standards to simply lie about following—is a culture of dishonesty in the U.S. Army and, likely, across the U.S. military.⁷ Some might balk at an assertion that overly burdensome administrative requirements have eroded the Army's warrior

ethos, but the article highlights the particularly challenging ethical environment that the armed forces present.⁸ Based on the monograph's thesis, we must ask, "Are judge advocates susceptible to the same ethical challenges that could result in ethical dilution?"⁹ And, if not, why; and what can judge advocates offer the Army to curb ethical dilemmas?

Judge advocates can effectively navigate an *arguably* ethically faded Army bureaucracy by the professional application of principled counsel.¹⁰ Principled counsel infuses legal advice with the virtues of honor and integrity.¹¹ Though difficult, the Army charges judge advocates with providing ethical counsel in an environment riddled with documented systemic untruthfulness and internal pressure.¹² The nature of their dual profession as well as their doctrinal mission makes judge advocates the ideal moderators to teach ethical decision making and to influence their Army client when and where most needed. The tipping point between decisions best for the Army bureaucracy and decisions that stay the ethical midfield reside with commanders making daily choices impacting the climate and culture of the Army.¹³ As legal advisors, judge advocates enjoy advantageous placement to coach and mentor commanders through high-stakes decisions on the ethical playing field.

As a demonstration of where judge advocates can assert their well-placed influence to overcome a potential ethical quandary—and provide value to our Army client through the application of principled counsel, recent newsworthy events are highlighted in the first section of this article. The next section provides a discussion of what it means to be a professional, how the Army views itself in the spectrum of professionalism, and how the Judge Advocate General's (JAG) Corps can claim to be dual professionals. Next is an accounting of the sources of ethical authorities obligating judge advocates and how those authorities make the JAG Corps both resilient to systemic ethics breakdowns and qualified to coach the ethical playing field. Finally, by transitioning to doctrine, this article reviews the ethics practices indoctrinated in the Army (starting with Army Doctrine Publication (ADP) 6-22, *The*

Army Leadership and the Profession) and then explain why judge advocates are well positioned to positively influence Army leaders making ethically high-risk decisions.¹⁴

Implications of Ethically High-Risk Decision Making

In the monograph *Lying to Ourselves: Dishonesty in the Army Profession*, the authors posit that recent ethical dilution in the Army is due to bureaucratic pressure inducing officers to lie about the completion of routine tasks.¹⁵ If commanders are willing and able to lie about mandatory requirements involved in the Army Force Generation process or the quarterly sexual assault prevention training, they are setting themselves up for the slippery slope of lying about the non-routine.¹⁶ For example, readers of this article may personally or professionally relate to the proposition of not answering the full truth on the amount of rest they will receive when filling out a Travel Risk Planning System (TRiPS) report.¹⁷ The possibility of "pencil-whipping" the dates for periodic counseling requirements on an Officer Evaluation Report (OER)/Noncommissioned OER Support Form might sound familiar.¹⁸ Or even "checking the block" on the initiation of a multi-source assessment and feedback (MSAF) 360 process for an OER Support Form because the website would not work.¹⁹ Likely, no one will ever know that these low-level dishonest acts took place, and there will be no tangible repercussions. But there is no way to measure what low-level dishonesty does to an individual's propensity toward ethical decision-making on future high-risk decisions.

Initial reports of the 2017 mission in Niger—which left four U.S. service members dead—described that, due to inaccurate concept of the operations paperwork, junior and mid-level leaders incorrectly routed approval for the mission to a lower level authority than required.²⁰ The original concept of the operations appeared to be routine reconnaissance; but, the true nature of the mission was to hunt a known Islamic State leader.²¹ An investigation found "[t]he paperwork that was submitted, the packet was identical to a previous [concept of operations]...[s]o it was done hastily, and there was a lack of attention to detail...[i]t wasn't

a deliberate intent to deceive."²² Whether intentional or a lack of attention to detail was to blame, high-stakes errors like these are the costs of ethical fading warned about by the authors of *Lying to Ourselves*.²³ A similar situation described in the monograph is when the administrative requirements imposed on junior leaders in a combat zone drove officers to cut corners on routine products, the result of which could have serious consequences.²⁴ Most Army officers reading the news of the incorrectly routed concept of operations in Niger, leading to a lower level of approval authority, probably made their own assumptions about whether this act was done in error or as a routine way to side-step bureaucracy. The investigation found that there was no intent to deceive, but the fact that those reading the reports make an assumption toward the all-too-commonplace deception, is telling.

In 2012, a YouTube video surfaced showing four Marine snipers urinating on the bodies of dead Taliban fighters during a 2011 deployment to Afghanistan.²⁵ An academic study of the incident found that the Marines associated with the urination were in a condition of "ethical blindness," as they "accepted the behavior as normal: urinating on dead enemies was not a desecration, or a war crime, but a strong victory statement made against an extremely cruel enemy."²⁶ Ethical blindness occurs "when an individual becomes unable to see the ethical dimension of the decision-making process."²⁷ Both the investigation and academic study following this event found that the unit to which these Marines were assigned implemented a training program that incorporated ethics instruction in every aspect of their preparation, to include two hours per week of dedicated ethical coaching, leading up to the deployment.²⁸ The Marines involved in this situation were, arguably, the most ethically trained unit to deploy during the Global War on Terror.²⁹

Even with the system of ethical training the Marines endured, they did not avoid poor ethical decision-making. With DoD and Army regulations falling short of requiring ongoing ethical training at the unit level, and falling short of providing a program of study, judge advocates should shoulder the role of guiding units and commanders through areas of high-risk

ethical decision making. This application of principled counsel should inform every judge advocate-to-commander relationship. In addition, judge advocates should facilitate this mindset and application at the unit level in preparation for high-risk operations like domestic assistance, humanitarian assistance, and direct action intervention—much the same way judge advocates brief rules of engagement or the code of conduct. To understand the trust and responsibility the public instills in the profession of arms and why it matters in the above examples, an examination of what it means to be a profession and a professional is required.

The Military as a Profession

The concept of a profession is critical because of the trust it denotes between professionals and society. The definition of a profession is “a vocation requiring knowledge of some department of learning or science.”³⁰ Samuel P. Huntington’s 1957 book *The Soldier and the State* provides the groundwork for how and why modern military academics view the U.S. military, and other western militaries, as professions.³¹ Huntington defines professionalism through the three concepts of “expertise, responsibility, and corporateness.”³² Through his examination of the American military in the 1950s, Huntington declares, “The modern officer corps is a professional body and the modern military officer a professional man.”³³

What Does It Mean to Be a Professional?

Academics have traditionally classified the term “profession” as associated with the law, clergy, and medicine.³⁴ Adopted from the tomes of Huntington, discussed above, Morris Janowitz’s *The Professional Soldier* and Sir John W. Hackett’s *Profession of Arms* contain the modern analysis of how the military meets the definition of, and qualifies as, a profession.³⁵ Modern scholars mostly agree on some variation of the definition of a profession involving the following criteria: “(1) a body of expert knowledge on which basis (2) the public accords certain privileges in exchange for (3) an understanding that the members of the profession will self-regulate and (4) operate for the common or public good.”³⁶ Following that definition, calling the U.S.

military a profession requires that members of the military hold a body of expert skills and knowledge, that they distinguish themselves from the public in some meaningful way, that they follow a code or have a way to internally regulate their conduct, and that the execution of their duties benefits the public or common good they serve.

The perceived dual identity of the military as a bureaucracy sometimes obscures the professional nature of the military.³⁷ Bureaucracies often produce organizations full of non-expert jobs, repetitive situations, close supervision, irrelevant worldview, and a focus on efficiency.³⁸ Especially in times of peace, personnel draw-downs, and budget restrictions, the military can ebb toward the feel of a typical government bureaucracy.³⁹ Maintaining a balance that favors the professional military over a bureaucracy is essential, especially when the overall goal is to allow the American public to enjoy the benefits of military discretion: allowing the development of expert knowledge related to combat that is capable of death and destruction, coupled with the required discipline, to be let loose among a population.⁴⁰

How the U.S. Army Views Itself on the Spectrum of Professionalism

Former Chairman of the Joint Chiefs of Staff General (Ret.) Martin Dempsey sees our military as a profession granted by the American people and believes that more than just military officers fit the definition.⁴¹ Current Army doctrine puts forth as fact that the Army is a profession and being a member of the U.S. Army makes an individual a professional, regardless of whether that individual is an officer, an enlisted Soldier, or an Army Civilian.⁴²

The Army definition of a professional focuses on the development of expertise, the earning and maintaining of trust with society, self-regulation, and professional ethics.⁴³ The Army lists the military among the traditional professions of law, theology, and medicine.⁴⁴ Foundational principles make clear the intent that the public not consider the Army a bureaucracy by articulating that professions, unlike mere routine and repetitive labor, create and work in the medium of expert knowledge.⁴⁵ The Army sees itself as requiring

expert problem solvers who are capable of operating on their own and in unpredictable environments. Army doctrine focuses on the Army ethic because its status as a profession generates from the unique grant of trust from the American people to carry out lethal force in the application of land power.⁴⁶ Self-regulation of this ethic derives from encouraged moral principles in the form of the Army values⁴⁷ enforced by the Uniform Code of Military Justice (UCMJ), Army regulations, and policies.⁴⁸

The concept of “essential characteristics” indoctrinates the unique trust granted by the American people in the Army.⁴⁹ Those characteristics are trust, honorable service, military expertise, stewardship, and esprit de corps.⁵⁰ These guiding principles and characteristics advance General (Ret.) Dempsey’s argument that all members of the Army, not just officers, must be professionals because every member is required to be capable of independent decision making on an unpredictable battlefield.

The Judge Advocate Profession

Unlike the debate surrounding the treatment of the military as a profession, there is little question that those who practice law are members of a profession; this is due to the very nature and tradition surrounding the work.⁵¹ “The mission of the Judge Advocate General’s Corps (JAGC) is to develop, employ, and retain one team of proactive professionals, forged by the Warrior Ethos, who deliver principled counsel and mission focused legal services to the Army and the Nation.”⁵² The legal profession has a well-organized system of enforcing standards and ethics. Judge advocates have the benefit of being both lawyers and military officers; they are subject to both sets of professional obligations.

Dual Professionals

Concurrently comprised of legal professionals and Army officers, the JAG Corps certainly views itself as a dual profession.⁵³ Without regard for the level of command a judge advocate is serving, the lawyer has numerous roles. They perform the normal functions of a government attorney as a counselor, advocate, and trusted advisor to their client, and are also “Soldiers, leaders, and subject matter experts in all of the core

legal disciplines. In every aspect of their professional lives, judge advocates serve the Army and the Nation with their expertise, dedication, and selflessness.⁵⁴

The JAG Corps is a special branch of the United States Army constituted by 10 U.S.C. 3072 and is comprised of commissioned officers of the Regular Army.⁵⁵ As Army officers, judge advocates are subject to the same requirements of professional conduct with which all Army officers must comply, including following the exemplary conduct statute, the UCMJ, Army regulations, and several echelons of policies.⁵⁶ In order to be a judge advocate in the United States Army, an attorney must have graduated from an accredited law school and be admitted to the practice of law before the highest court of any State, Territory, Commonwealth, or the District of Columbia.⁵⁷ Judge advocates must also be members in good standing of their bar—this is determined by their individual licensing authority.⁵⁸ Additionally, at some point in their careers, judge advocates must swear to an oath to perform their duties faithfully.⁵⁹

As discussed within the above sections, a settled aspect of a profession is self-regulation.⁶⁰ Being a member of two different professions, the Army Judge Advocate General's Corps is subject to myriad regulations, codes, and obligations. Keeping in mind how these regulations form a backbone that enables judge advocates to deliver principled counsel to their clients, the next section will illuminate what those obligations are.

Ethical Authorities Obligating Judge Advocates

In addition to the professional conduct rules for their applicable state bar associations, judge advocates are specifically subject to Army Regulation (AR) 27-26, *Rules of Professional Conduct for Lawyers*. These rules for professional conduct govern the ethical conduct of judge advocates practicing under the UCMJ, the *Manual for Courts-Martial*, or under the supervision of the four "Senior Counsels" as classified in AR 27-26.⁶¹ The rules found in AR 27-26 govern the professional and ethical conduct of "[a]ll Regular Army Judge Advocates with military occupation specialty (MOS) 27(A), regardless of whether serving in a legal MOS billet."⁶²

The preamble to AR 27-26 states, "An Army lawyer is a representative of clients, an officer of the legal system, an officer of the Federal Government, and a public citizen having special responsibility for the quality of justice and legal services provided to the Department of the Army and to individual clients."⁶³ As employees in the Department of Defense, and active duty regular military officers, judge advocates are subject to the *Joint Ethics Regulation* (JER).⁶⁴ In fact, the rules for professional responsibility remind judge advocates of their obligations to the JER with respect to conflicts of interest, gifts to lawyers, and in communications concerning a lawyer's services.⁶⁵

The stated mission of the Army JAG Corps is to "[p]rovide principled counsel and premier legal services, as committed members and leaders in the legal and Army professions, in support of a ready, globally responsive, and regionally engaged Army."⁶⁶ The senior leadership of the JAG Corps makes a concerted effort to create a culture that fosters virtues and morals, with the intent to therefore produce principled counsel. The first policy memorandum for the current Judge Advocate General of the Army concerned professional responsibility.⁶⁷ The memorandum specifically defines the expectation of "an unwavering commitment to the highest standards of ethical conduct...integrity and absolute compliance with established professional responsibility...to uphold honor and maintain the dignity of our profession of law."⁶⁸ The policy memorandum requires attorneys who fall within the purview of The Judge Advocate General to complete three hours of professional responsibility training each year, as well as mandating all non-lawyer personnel to complete one hour of training.⁶⁹ This requirement is in addition to any state bar association continuing legal education requirements with which attorneys must comply to remain in good standing.

With this framework of ethical obligations for the Army's legal advisors, the next step is to explore the program of ethical indoctrination and continuing education that other Army professionals receive. Through this review, this article identifies areas judge advocates can be particularly effective in providing counsel to commanders making ethically high-risk decisions and also makes

recommendations on how best to enable principled decision-making.

Army Ethics Doctrine and Authorities

"And the military must deal virtuously with one of the greatest vices: killing human beings."⁷⁰ Despite doctrine rooting the Army to the ethical requirements expected of a profession, there is no comprehensive continuing ethics education training program. The next several subsections will provide a review of the ethics programs in the Army and identify areas for improvement.

Army Ethics Doctrine

Army Doctrine Publications 1 and 6-22 serve as the backbone of the Army's view of applied ethics. The ADPs communicate the ethics vision and framework. With the Army being both a military department of the government and a profession, ADP 1 emphasizes trust among members of the Army and the special trust shared with the American people.⁷¹ Meanwhile ADP 6-22 is the source of explanation for the Army values of loyalty, duty, respect, selfless service, honor, integrity, and personal courage.⁷²

While ADP 1 provides the framework for Army doctrine on ethics and values, ADP 6-22 provides the detailed implementing guidance. This publication provides the link between the Army values and the legal and moral ethical foundation of the Army profession.⁷³ The Army ethic "is the set of enduring moral principles, values, beliefs, and laws that guide the Army profession and create the culture of trust essential to Army professionals in the conduct of missions, performance of duty, and all aspects of life."⁷⁴ One of the essential characteristics of the Army profession described by ADP 6-22 is stewardship of the profession.⁷⁵ The doctrine describes stewardship in two ways. The first is a call for true professionals to police their own members,⁷⁶ and the second—using context for stewardship—is the creation and implementation of professional development programs to advance expertise, apply ethics, and improve the institution.⁷⁷ Although this Army doctrine does not provide the timing and curriculum, it implores senior Army leaders to "[s]trategic stewardship includes establishing the directives, policies, programs, and

systems that provide for the purposeful development of people, resource management, and preparation for the future—while preserving the customs, courtesies, and traditions of the Army.⁷⁸

Army Ethics Training

The United States Military Academy at West Point and Reserve Officers' Training Corps generally provide instruction on the Army values and ethics.⁷⁹ Similarly, enlisted initial entry training provides training on the Army values. The Army regulation driving initial entry, commissioning, and recurring training requirements is AR 350-1, *Army Training and Leader Development*. The regulation broadcasts that “[a]ll training, education, and leader development actions occur within the Army culture, a culture which embraces values and ethics, the Warrior Ethos, standards, and enduring principles and imperatives.”⁸⁰ Specifically, the regulation charges leaders to infuse the initial training of Soldiers and Army Civilians with core values, ethics reasoning, and the Soldier's Creed or Army Civilian Corps Creed.⁸¹ Once a member of the Army completes the initial phases of training—and outside of an institutional training environment—the continuing requirements to talk about morals, virtues, or ethics vanishes.⁸² Furthermore, the regulation charges the Chaplain Corps with providing ethics and moral leadership training at Army schools.⁸³ Table F-1 of AR 350-1 lists the required training, whether annually, biennially, ongoing, pre/post deployment, semiannually, or optionally.⁸⁴ However, ethics training is not listed in this table. Training in ethics resides in Table F-2, *other Requirements for selected personnel*.⁸⁵ Rather than listing an ethics training requirement, this table implores personnel to comply with ethics rules and regulations associated with the JER.⁸⁶ Aside from initial entry training, ethics training requirements are only specifically tied to requirements of individuals who file either an Office of Government Ethics (OGE) Form 278 or an OGE Form 450.⁸⁷ These filing requirements primarily apply to senior government officials or individuals required to file financial disclosure forms because of the specific requirements of their job.⁸⁸ Unlike nearly all the other training topics listed, the regulation neither lists a

reference authority nor a Headquarters, United States Department of the Army point of contact for ethics.⁸⁹ The only specific cross-reference related to training is from the section related to noncommissioned officer professional development, which encourages seniors to coach their subordinates “to be totally committed to U.S. Army professional ethics, Warrior ethos, and the Soldier's creed per doctrinal products (see ADP 6-22).”⁹⁰

Army Leadership Ethics

Army Doctrine Publication 6-22, *Army Leadership and the Profession*, presents a chapter devoted to leadership by being an individual of personal character.⁹¹ This chapter lists the following concepts as integral to developing a leader's character: Army Values, Warrior Ethos and Service Ethos, empathy, and discipline.⁹² The reference publication goes so far as to devote sections to discussing character and ethics, ethical reasoning, and ethical orders.⁹³ For the first time, Army doctrine on ethics involves legal advisors by imploring a leader to seek legal counsel when confronted with a complex question surrounding the ethics of a military order.⁹⁴ This advice seemingly contradicts the direction of AR 350-1, which puts the training of morals and ethical leadership in the hands of the Chaplain Corps.⁹⁵ Ultimately, ADP 6-22 provides a foundation of concepts of which leaders should seek further development; but, it is not an authority providing a comprehensive program instructing ethics and principled decision making. In the hierarchy of authorities, when Army doctrine and regulations are silent on ethics training, the superior level of authority to consult is the head of the government agency: the Department of Defense.

Advising the Ethical Playing Field

In AR 27-26, there is a clear reference and application to how a lawyer's counsel can be useful beyond strict legal advice:

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 with a client.⁹⁶

Judge advocates are members of a commander's personal and special staff.⁹⁷ As a member of a commander's personal staff, judge advocates have a special relationship where they are under the direct control of the commander and have direct access to them.⁹⁸ By regulation, “[t]he commander and the staff judge advocate shall, at all times, communicate directly on matters relating to the administration of military justice, including, but not limited to, all legal matters affecting the morale, good order, and discipline of the command.”⁹⁹ That relationship places the judge advocate in a unique and advantageous position to provide legal advice and to counsel commanders on moral and ethical decision making.

Although chaplains are also members of a commander's personal staff, they are not as invested in the moral and ethical implications of the decisions being made by the command—most of which carry legal consequences. The role of the chaplain is to assist the commander “in providing for the free exercise of religion and religious, moral, and ethical leadership.”¹⁰⁰ While true that some commanders may be more comfortable or more accustomed to talking through moral issues with a member of the clergy, it is the responsibility of judge advocates to form relationships with commanders that will allow the attorneys the chance to influence high-risk decision-making. The chaplain is not aware of all the laws and regulations in the Army and how they implicate ethical decision making.¹⁰¹ Judge advocates, on the other hand, are stakeholders in this decision-making because of their role on a staff. In the end, they are responsible for the administration of investigations and facilitating the command's application of administrative and punitive consequences of inappropriate actions, command climate, and decision-making.

Except in specific limited roles, “an Army lawyer...represents the Department of the Army (or the executive agency to which assigned) acting through its authorized officials.”¹⁰² Despite the close advisory relationship judge advocates must form

with commanders, under most circumstances, they are not forming a privileged or confidential attorney-client relationship with commanders; rather, they are forming the bond with the institutional Department of the Army as a client.¹⁰³ This relationship, established by the rules of professional conduct, does not have a chilling effect on the ability of commander and judge advocate to have open, candid, and honest discussions.

Because judge advocates have an obligation to the Army, their clients allow them the opportunity to stay neutral and above the fray. In turn, the commander can rely on the judge advocate to give advice representative of the virtues of the larger organization, the Department of the Army.¹⁰⁴ Further, judge advocates, who as Army officers are subject to the orders of their superiors, are protected by the rules of professional responsibility to thwart the influences commonly found in a military command and control-driven environment.¹⁰⁵ A judge advocate is “expected to exercise unfettered loyalty and professional independence during the representation consistent with these Rules and remains ultimately responsible for acting in the best interest of the individual client.”¹⁰⁶

Conclusion

The revelations of *Lying to Ourselves* are shocking because the dishonesty cuts at the professional fabric of the armed forces woven by the trust instilled in the profession from the people of the United States. Even more than the majority of military officers, the special nature of the judge advocate’s position implies a professional backbone of regulations, policy, and culture that both require and enable judge advocates to act ethically in difficult situations.¹⁰⁷ The Army calls upon its leaders to make ethically high-stakes decisions. Those leaders’ professional relationships with their judge advocates can help them navigate those waters. Army and professional doctrine place judge advocates in the unique position to give impactful advice and train the force on ethical decision-making. Lessons from breakdowns in ethical decision-making help develop a program of study and implementation where judge advocates provide value-added training on decision making to their clients and the force.

Judge advocates must navigate the challenges of an Army bureaucracy by practicing principled counsel. Infusing advice with the virtues of honor and integrity provides value to the Army client. Not only should judge advocates assert themselves when in their well-positioned advisor role, but they are also uniquely equipped to add ethical decision-making context to the Army’s warrior ethos.

To provide valuable input and principled counsel to their clients, judge advocates need not find themselves in a metaphorical David versus Goliath situation like Major General Thomas J. Romig, Colonel Willis Everett, and Captain Aubrey Daniels.¹⁰⁸ The pressure and environment faced by our clients create an extreme and unenviable expectation to perform at a high level and accomplish the mission. As the Marine sniper urination incident shows, even the best training does not always overcome the circumstances that create ethical blindness.¹⁰⁹ Judge advocates should take responsibility for developing awareness in decision-makers at their units by relying on academic articles like *Lying to Ourselves* and *Casualties of Their Own Success*; these provide examples of systemic ethical choices going wrong. As these situations indicate, when it comes to culture, leaders make impactful decisions at all echelons. Judge advocates have the professional makeup, the professional training, and the professional proximity to infuse ethics, virtues, and morals into the advice and training they provide to their Army client. **TAL**

MAJ Cohen is assigned to the Ethics, Legislation, and Government Information Practices Branch in the Administrative Law Division of the Office of The Judge Advocate General at the Pentagon.

Notes

1. REDEFINING THE MODERN MILITARY: THE INTERSECTION OF PROFESSION AND ETHICS 5 (Nathan K. Finney & Tyrell O. Mayfield eds., 2018).
2. Pauline Shanks-Kaurin, *Questioning Military Professionalism*, in REDEFINING THE MODERN MILITARY, *supra* note 1, at 9-10.
3. SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS

7-10 (Belknap Press rev. ed. 1981) (1959) [hereinafter HUNTINGTON]. The author defines corporateness as:

The members of a profession share a sense of organic unity and consciousness...[t]his collective sense has its origins in the lengthy discipline and training necessary for professional competence...the sense of unity manifests itself in a professional organization which formalizes and applies the standards of professional competence and establishes and enforces the standards of professional responsibility.

Id.

4. MARTIN E. DEMPSEY, AMERICA’S MILITARY – A PROFESSION OF ARMS WHITE PAPER 4 (2012) (“The distinction between ranks lies in our level of responsibility and degree of accountability. We share the common attributes of character, courage, competence, and commitment. We qualify as professionals through intensive training, education, and practical experience.”) [hereinafter DEMPSEY].
5. See generally Mark Thompson, *Army: Too Many Regulations Lead to Too Many Lies*, TIME (Feb. 25, 2015), <http://time.com/3722363/army-regulations-lying/>; Kevin Lilley, *Report: Army Officers Admit to (and Defend) Their Lying*, ARMY TIMES (Feb. 19, 2015), <https://www.armytimes.com/news/your-army/2015/02/19/report-army-officers-admit-to-and-defend-their-lying/>; David Barno & Nora Bensahel, *Lying to Ourselves: The Demise of Military Integrity*, WAR ON THE ROCKS (Mar. 10, 2015), <https://warontherocks.com/2015/03/lying-to-ourselves-the-demise-of-military-integrity/>.
6. LEONARD WONG & STEPHEN J. GERRAS, LYING TO OURSELVES: DISHONESTY IN THE ARMY PROFESSION 2 (Strategic Studies Institute (U.S.) et. al. eds. 2015) [hereinafter WONG & GERRAS].
7. *Id.*
8. U.S. DEP’T OF ARMY, TRAINING CIRCULAR 3-21.75, THE WARRIOR ETHOS AND COMBAT SKILLS para. 1-1 (13 Aug. 2013). The Army’s Warrior Ethos: “I will always place the mission first. I will never accept defeat. I will never quit. I will never leave a fallen comrade.” *Id.*
9. See WONG & GERRAS, *supra* note 6, at 3

[T]he U.S. military is simultaneously a functioning organization and a practicing profession, it takes remarkable courage for a senior leader to acknowledge the gritty shortcomings and embarrassing frailties of the military as an organization in order to better the military as a profession. Such a discussion, however, is both essential and necessary for the health of the military profession.

Id.

10. TJAG AND DJAG SENDS, PRINCIPLED COUNSEL—OUR MANDATE AS DUAL PROFESSIONALS, Vol. 40-16.

Principled Counsel is professional advice on law and policy grounded in the Army Ethic and enduring respect for the Rule of Law, effectively communicated with appropriate candor and moral courage, that influences informed decisions. Professional advice on law and policy is expert, timely, relevant, researched, and accurate advice that distinguishes legal advice from policy advice. Effectively communicated advice is clear and succinct content delivered with appropriate means, composure, and interpersonal tact that creates a shared understanding. Principled Counsel, therefore, should

inform a client or commander's exercise of discretion to apply sound judgment and enable the commander's or client's intent rather than obstruct it.

11. Lieutenant General Charles N. Pede, *Principled Lawyering*, ARMY LAW., July–Aug. 2018 7, 8 (discussing timeless virtues).

12. WONG & GERRAS, *supra* note 6.

13. Memorandum from Sec'y of Def. to All Dep't of Def. Employees, subject: Ethical Standards for All Hands (4 Aug. 2017) (on file with author) ("I expect every member of the Department to play the ethical midfield. I need you to be aggressive and show initiative without running the ethical sidelines, where even one misstep will have you out of bounds.").

14. U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP para. 3-1 (31 July. 2019) (C1, 25 Nov. 2019) [hereinafter ADP 6-22].

15. WONG & GERRAS, *supra* note 6.

16. *Id.* at 5. "[I]n order to satisfy compliance with the surfeit of directed requirements from above, officers resort to evasion and deception. In other words, in the routine performance of their duties as leaders and commanders, U.S. Army officers lie." *Id.* at 8.

17. *Id.* at 10.

18. *Id.* at 11.

19. *Id.* at 31.

20. *General, Five Others Reprimanded in Connection With 2017 Niger Ambush that Left Four Dead*, STARS AND STRIPES (Nov. 5, 2018), <https://www.stripes.com/news/general-five-others-reprimanded-in-connection-with-2017-niger-ambush-that-left-four-dead-1.555288>.

21. Dan Lamothe, Missy Ryan, & Alex Horton, *Military Investigation of Niger Disaster Finds Numerous Failures in Planning*, WASH. POST (May 10, 2018), https://www.washingtonpost.com/world/national-security/military-investigation-of-niger-disaster-finds-numerous-failures-in-planning/2018/05/10/4a43cddc-4359-11e8-ad8f-27a8c409298b_story.html?noredirect=on&utm_term=.39e286df7ba6.

22. Tara Copp, *Niger Investigation: What Went Wrong, What's Being Done to Fix It*, ARMY TIMES (May 10, 2018), <https://www.armytimes.com/news/your-army/2018/05/10/niger-investigation-what-went-wrong-whats-being-done-to-fix-it/>.

23. WONG & GERRAS, *supra* note 6, at 17 ("Ethical fading occurs when the 'moral colors of an ethical decision fade into bleached hues that are void of moral implications."), quoting Ann E. Tenbrunsel and David M. Messick, *Ethical fading: The Role of Self-Deception in Unethical Behavior*, SOCIAL JUSTICE RESEARCH, Vol. 17, No. 2, June 2004, at 224.

24. WONG & GERRAS, *supra* note 6, at 15, explaining:

One widespread recurring requirement for junior leaders in Afghanistan and Iraq was the storyboard—a PowerPoint narrative describing unit events and occurrences...however...[e]very contact with the enemy required a storyboard. People did not report enemy contact because they knew the storyboard was useless and they didn't want to go through the hassle...So what ended up happening was [that] after about the first couple of months, you're saving your storyboards, and as soon as you had an incident that [was] somewhat

similar to what you already had, it became a cut and paste gig.

Id.

25. Paolo G. Tripodi & David M. Todd, *Casualties of Their Own Success: The 2011 Urination Incident in Afghanistan*, 47 U.S. ARMY WAR C. Q., PARAMETERS, no. 3, 2017, at 65.

26. *Id.* at 66.

27. *Id.* at 71.

28. *Id.* at 68.

29. *Id.* The unit's ethical training program was described as the following:

The battalion's ethical warrior program sought "to develop high performing individuals and small units who are morally, psychologically, and emotionally resilient in order to operate, live and thrive on an austere battlefield defined by fog, friction and severe stress." Small unit discussions and ethical decision games were conducted. An ethical warrior reading list was posted to the battalion's shared drive. The program continued during combat operations in Afghanistan. Significantly, prior to and following each mission, small-team leaders were to address and debrief potential or encountered ethical dilemmas, making the "harder-right" a matter of "muscle-memory." Finally, the program helped post-deployment marines develop resilience and minimize posttraumatic stress. The marines of 3/2 probably completed more ethics training than other units who had deployed to either Afghanistan or Iraq. Moreover, the ethics training concept, which focused on small group discussions led by leaders in the platoon and in smaller units, was sound.

Id.

30. *Profession*, Dictionary.com, <http://dictionary.reference.com/browse/profession> (last visited Nov. 25, 2018).

31. HUNTINGTON, *supra* note 3, at 8.

32. *Id.*

33. *Id.* at 7.

34. Shanks-Kaurin, *supra* note 2, at 10.

35. See generally HUNTINGTON, *supra* note 3; MORRIS JANOWITZ, *THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT* (Free Press rev. ed. 2017) (1971); GENERAL SIR JOHN HACKETT, *THE PROFESSION OF ARMS* (Macmillan 1983) (1962).

36. Shanks-Kaurin, *supra* note 2, at 10.

37. Don M. Snider, *The U.S. Army as Profession*, in *THE FUTURE OF THE ARMY PROFESSION* 13 (Lloyd J. Matthews ed., 2d ed. 2005) (2002).

38. *Id.* at 14.

39. *Id.*

40. *Id.* at 15.

41. DEMPSEY, *supra* note 3, stating:

All service men and women belong to the profession from the junior enlisted to our most senior leaders. We are all accountable for meeting ethical and performance standards in our actions and similarly, accountable for our failure to take action, when appropriate. The distinction between ranks lies in our level of

responsibility and degree of accountability.

We share the common attributes of character, courage, competence, and commitment. We qualify as professionals through intensive training, education, and practical experience. As professionals, we are defined by our strength of character, life-long commitment to core values, and maintaining our professional abilities through continuous improvement, individually and institutionally.

Id.

42. ADP 6-22, *supra* note 14, para. 1-2.

43. *Id.* paras. 1-3 to 1-9.

44. *Id.* para. 1-6.

45. *Id.*

46. *Id.* para. 1-8.

47. *Id.* Figure 1-2.

48. *Id.* para. 5-42.

49. *Id.* para. 1-14 ("The Army's trust with the American people reflects their confidence and faith that the Army will serve the Nation and accomplish missions ethically. This trust is earned and reinforced as the Army contributes honorable service, demonstrates military expertise, and exercises responsible stewardship.").

50. *Id.* para. 1-55.

51. ORRIN N. CARTER, *ETHICS OF THE LEGAL PROFESSION* 13 (1915) ("The duties and responsibilities of the lawyer are most grave and important. Interests of vast magnitude—property, liberty, and character, and even life itself—are entrusted to him. His profession has in all ages been considered a favored calling. His should, therefore, guard with jealous care not only his own reputation, but that of his profession as well.").

52. U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 1-1 (18 Mar. 2013) [hereinafter FM 1-04]. FM 1-04 is the manual providing a "foundation for Judge Advocate General's Corps (JAGC) personnel to build upon to provide principled counsel and mission focused legal support to the operational Army." *Id.* at intro.

53. Pede, *supra* note 11.

54. FM 1-04, *supra* note 52, para. 1-12.

55. Judge Advocate General's Corps, 10 U.S.C. §§ 3072, 3064(a)(2) (2012).

56. Requirement of Exemplary Conduct, 10 U.S.C. § 3583 (2012) "All commanding officers and others in authority in the Army are required...to show in themselves a good example of virtue, honor, patriotism, and subordination." *Id.*

57. UCMJ art. 27(b)(1), (2) (2016) ("[Judge advocates must] be certified as competent to perform such duties by the Judge Advocate General of the armed forces of which he is a member.").

58. U.S. DEP'T OF ARMY REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 3-3(d) (24 Jan. 2017). In addition to being a member of a bar, judge advocates are subject to the following:

[I]s subject to the jurisdiction's disciplinary review process; has not been suspended or disbarred from the practice of law within the jurisdiction; is up-to-date in the payment of all required fees; has met applicable CLE requirements which the jurisdiction has imposed

- (or the cognizant authority has waived those requirements in the case of the individual); and has met such other requirements as the cognizant authority has set to remain eligible to practice law.
- Id.*
59. UCMJ art. 42(a) (2016).
60. Shanks-Kaurin, *supra* note 2, at 10.
61. U.S. DEP'T OF ARMY REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 7(a) (28 June 2018) [hereinafter AR 27-26]. These rules for professional conduct also apply to lawyers practicing under "Section 1044, Title 10, United States Code (10 USC 1044), other laws of the United States, and regulations of the Department of the Army, including AR 27-1, AR 27-3, and AR 27-10." *Id.* The four Senior Counsel "denotes the General Counsel of the U.S. Army, The Judge Advocate General of the U.S. Army, the Command Counsel of the U.S. Army Materiel Command, and the Chief Counsel of the U.S. Army Corps of Engineers." *Id.* App. B Rule 1.0(s).
62. *Id.* para. 7(a)(1)(a).
63. *Id.* para. 6(a).
64. U.S. DEP'T OF DEF., 5500.7-R, JOINT ETHICS REGULATION (JER) para. 1-209(b) (30 Aug. 1993) (C7, 17 Nov. 2011) [hereinafter JER].
65. AR 27-26, *supra* note 61, Rules 1.8, 7.1.
66. *United States Army Judge Advocate General's (JAG) Corps Mission and Vision*, JAGCNET (9 MAR. 2012), <https://www.jagcnet.army.mil/cnet.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentId=DEE613DFEC84B73B852579BC006142CE>.
67. Policy Memorandum 17-01, Headquarters, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, subject: Professional Responsibility (1 Dec. 2017).
68. *Id.*
69. *Id.*
70. JAMES H. TONER, TRUE FAITH AND ALLEGIANCE: THE BURDEN OF MILITARY ETHICS xi (Univ. Press of Ky. ed. 1995) (1946).
71. U.S. DEP'T OF ARMY, DOCTRINE PUB. 1, THE ARMY para. 1-5 (31 July 2019) .
72. ADP 6-22, *supra* note 14, para. 1-71.
73. *Id.* para. 1-6.
74. *Id.* para. 1-44.
75. *Id.* paras. 1-32 to 1-37.
76. *Id.* para. 1-35.
77. *Id.* para. 1-32.
78. *Id.* para. 1-35.
79. *See Character*, UNITED STATES MILITARY ACADEMY WEST POINT, https://www.usma.edu/character_new (last visited Jan. 28, 2019).
80. U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT para. 1-10 (10 Dec. 2017) [hereinafter AR 350-1].
81. *Id.* para. 1-11(a)(1).
82. *Id.* tbl. F-1. Institutional training includes schools like Initial Entry Training, Basic Officer Leaders Course, Noncommissioned Officer Education System, Officer Education System, School for Command Preparation, and Civilian Education System. *Id.*
83. *Id.* para. 2-18(m).
84. *Id.* tbl. F-1.
85. *Id.* tbl. F-2.
86. *Id.*; *see generally* JER, *supra* note 64.
87. AR 350-1, *supra* note 80, Table F-2.
88. Danica Irvine, Standards of Conduct Office, Office of the General Counsel, Department of Defense, Financial Disclosure, at slides 11, 38-41 (Feb. 21, 2019) (unpublished PowerPoint presentation) (on file with author); *Public Financial Disclosure Guide*, U.S. OFF. OF GOV'T ETHICS, <https://www.oge.gov/Web/278eGuide.nsf> (last visited Mar. 11, 2019); *Confidential Financial Disclosure*, U.S. OFF. OF GOV'T ETHICS, <https://www.oge.gov/web/oge.nsf/Confidential%20Financial%20Disclosure> (last visited Mar. 11, 2019).
89. AR 350-1, *supra* note 80, tbl. F-2.
90. *Id.* para. 5-20(c)(6).
91. ADP 6-22, *supra* note 14, paras. 2-1 to 2-32.
92. *Id.* para. 2-3.
93. *Id.* paras. 2-17 to 2-19.
94. *Id.* para. 1-22.
95. AR 350-1, *supra* note 80, para. 2-18(m).
96. AR 27-26, *supra* note 61, para. 1.2(d).
97. FM 1-04, *supra* note 52, paras. 4-9, 4-22
98. U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS para. 2-105 (5 May 2014) (C2, 22 Apr. 2016).
99. *Id.* para. 2-113.
100. *Id.* para. 2-107.
101. *See generally* U.S. DEP'T OF ARMY, REG. 58-1, MANAGEMENT, ACQUISITION, AND USE OF MOTOR VEHICLES (RAR 12 June 2014).
102. AR 27-26, *supra* note 61, Rule 1.13.
103. *Id.* Comment (2).
104. *Id.*
- When the officers, employees, or members of the Department of the Army make decisions for the Army, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not, as such, in the lawyer's province.
- Id.* Comment (3).
105. *Id.* Rule 5.4.
106. *Id.* "This Rule recognizes that a Judge Advocate is a commissioned military officer required by law to obey the lawful orders of superior officers." *Id.* Comment (3).
107. WONG & GERRAS, *supra* note 6, at 3 (quoting U.S. DEP'T OF ARMY, PAM. 600-2, THE ARMED FORCES OFFICER 3 (Feb. 1988) (on file with author))
- The nation expects more from the military officer: It expects a living portrayal of the highest standards of moral and ethical behavior. The expectation is neither fair nor unfair; it is a simple fact of the profession. The future of the services and the well-being of its people depend on the public perception and fact of the honor, virtue and trustworthiness of the officer corps.
- Id.*
108. Pede, *supra* note 10; *see generally* Major General Thomas J. Romig, USA Retired, The Thirty-First Charles L. Decker Lecture in Administrative and Civil Law (May 8, 2013) (transcript available 221 MIL. L. REV. 277 (2014)). Major General Romig describing his principled struggle within the Department of Defense in 2003 when as the Army TJAG he opposed the Office of Legal Counsel "torture memos":
- Each TJAG submitted a very strong dissent to the opinion of the Office of Legal Counsel. Our opinions were classified Secret and were not declassified until late 2004 or early 2005. After we submitted our written opinions, we were told by the DoD General Counsel that the Secretary of Defense had considered our opinions and decided to withdraw the working-group report. A year-and-a-half later, we learned the report had not been withdrawn and that our objections were nowhere to be seen on the report.
- Id.*
109. Tripodi & Todd, *supra* note 25, at 71.



(Credit: istockphoto.com/tzahiV)

An Antidote for Toxic Complaints

By Colonel Terri J. Erisman

Revenge is a kind of wild justice, which the more man's nature runs to the more ought law to weed it out.¹

It is an unfortunate reality that some complaints are filed for wicked reasons. Every Soldier has a powerful voice to correct wrongs, and individuals have multiple tools through which they can raise issues to—or in some cases about—the chain of command. But these processes can be weaponized to deflect allegations of misconduct or to inflict revenge for just discipline. There is no process to screen malicious complaints, particularly when they are not obviously implausible.

A commander who elects not to investigate a complaint bears the risk of future allegations of failure to address wrongdoing. A determined complainant can amplify any allegation with an email, or two, or hundreds, to the most senior leaders. These complaints trigger lengthy processes, during which careers hang in limbo and discipline is ultimately undermined. All of these factors together allow even

deliberately false allegations to have serious disruptions to careers and units.

The underlying objective of these “toxic complaints” is usually the same—to use the system designed to ensure fairness and due process to intimidate and hamstring the command. The most typical example is the deliberate filing of a complaint with the Inspector General’s (IG) office prior to disciplinary action being taken to enable a follow-on reprisal allegation—claiming that the disciplinary action was taken as a result of the complaint. Extreme cases involve the strategic filing of successive complaints, through multiple avenues, in an effort to overwhelm the process and trigger processing errors by the command. A judge advocate plays a crucial role in these cases to protect the command and the process, so that fairness and objectivity leads to a just result.

Foundational Strategic Principles

The overarching focus for a judge advocate is the truth—objectively and definitively. A judge advocate’s most important objective in a toxic complaint case is to ensure the truth is clearly established in a manner that leaves no room for question or doubt. Toxic complainants try to defeat this objective by using multiple tactics in an attempt to deliberately obscure the truth. There are several key strategies for judge advocates to assist their commands in successfully navigating such a case.

Strategy #1—Document Everything

Document all of the facts to the greatest extent possible. While this seems obvious, it is easy to get it wrong or be incomplete. As soon as it is apparent that such a case is starting, judge advocates must start planning systems needed to enable the command’s response. Judge advocates should ensure the command keeps accurate and comprehensive records; nothing should be left to memory or the assumption that later decision-makers will understand what happened. Particularly in dealing with allegations of reprisal, the timing and rationale for decisions are critical facts requiring documentation. The volume of complaints, emails, and corresponding documents can quickly become overwhelming, so it is important to organize and record everything. Stay ahead of complaints, enabling the command to provide documentation and objective explanations for every action taken.

Two key considerations are: (1) How to manage existing documents, and (2) which documents should be created. Look to establish a system for documenting and recording receipt of communications and attachments. Brigade judge advocates and chiefs of administrative law must develop systems that give the staff judge advocate (SJA) and the command the visibility they need through standard and reliable products. Do not build a new product for every investigation, but develop one that judge advocates and paralegals can use each time.

Documents such as email trackers—with dates, recipients, and subjects—and complaint trackers—again with dates, recipients, and subjects—are crucial to keeping accurate records of when communications

occurred, and ensuring that organization and all regulatory requirements are met. Creating documents such as memoranda for record and timelines to record rationales for decisions, subjects of discussions, and dates of key events is important—especially in responding to subsequent complaints of reprisal or toxic leadership.

Moreover, it is important to aggressively investigate complaints, affirmatively working to document the facts. It is tempting to resist initiating an investigation for what is a clearly false allegation. Investigations require resources and that the subject be flagged, so it is natural to want to avoid that process for a toxic complaint. However, it is important to view complaints neutrally and let the process take its course. Significantly, one of the most effective ways to deflate a toxic complaint is to fully investigate every allegation and provide a meaningful opportunity for the complainant to provide specific details to support the accusations.

Vague allegations of toxic or counterproductive leadership, bullying, or discrimination are difficult to disprove in the abstract, so requiring specific details is crucial to getting to the truth. This tactic achieves two goals. When a complaint is spurious, a complainant will likely decline to cooperate or even invoke his right against self-incrimination. Self-incrimination is generally not at issue for the complainant; however, the veracity of the complaint is at issue. Lobbing broad-brush accusations but declining the opportunity to provide detail may be evidence of the allegations' falsehood—doing so maintains the toxic complainant's desired leverage in the power dynamic over the subject of the complaint while also failing to facilitate, if not impeding, the search for the truth. Additionally, a full, documented investigation serves to answer future, repeat complaints which are often made by toxic complainants who refuse to let an issue be closed. The best practice is for judge advocates to advise the command to use all investigative tools necessary. An investigation under Army Regulation 15-6 is one option, but if criminal allegations are made, law enforcement agencies should be notified. Full examination and transparency removes the power of the toxic complaint

and determines the accurate truth, both in the present and the future.

Strategy #2: Zealously Protect the Process

The second key principle is to zealously protect the process, ensuring every requirement is met and every step of due process received. The more attractive shortcuts appear, the more they should be resisted. These cases can become exceptionally frustrating as false accusations continue to accumulate, and disparaging emails continue to be sent. Judge advocates can assist by consistently counseling the need for tactical patience and zealously following every step of required processes. Where a complainant is attempting to weaponize the system, it is essential to get every step of the process right.

Judge advocates must go back to source documents and regulations to verify the correct procedures by actually reading the controlling regulations to ensure every requirement is meticulously followed. For example, commanders must impose required flags when conducting any inquiry or investigation, regardless of whether the allegation appears credible. At times, commanders and judge advocates discuss whether a flag is required, particularly when conducting what is labeled as a "preliminary inquiry." It is the surest course to impose a flag when there is any question, to ensure the correctness and unassailable objectivity of the process. This is especially true in cases dealing with toxic complainants.

This is not the right time to rely on memory or the "usual" procedure. It is the perfect time for systems checks to ensure that the "usual" procedure is correct. For instance, in cases involving Equal Opportunity complaints, there are very specific timelines for completing investigations, providing updates and the results of the investigation to complainant, and offering the opportunity to appeal. A good practice for judge advocates is to review these requirements and assist the Equal Opportunity office in meeting the deadlines. Likewise, review procedures for release of information in these investigations to ensure only the required information is given. In an effort to ensure fairness, commanders or judge

advocates may err on the side of releasing everything in an investigation. However, these documents are official records and require positive authority to be released. This will require judge advocates to know and effectively advise other offices such as Equal Opportunity and Sexual Harassment/Assault Response and Prevention (SHARP).

In some cases, regulations may have conflicting requirements that apply to the same issue—choose the interpretation that gives the maximum due process to the complainant. If the regulation is unclear, interpret it within the spirit of the regulation; this gives the benefit of the doubt to the complainant. In what is likely a long, contentious process, it is tempting to take whatever route is fastest in the short term. However, judge advocates protect the process by reminding commanders that taking shortcuts risks prolonging the entire process by giving rise to appeals or later findings that the process was incorrect or inadequate. It is better to take a few more days to safeguard the process in the short term than to cause an issue that adds months in the long term.

In any process allowing for a submission by the complainant—which includes actions taken against him for which he can submit a rebuttal—the command will likely face repeated requests for delay. The best course is to recommend granting reasonable requests for extensions to ensure there is no doubt that the Soldier was afforded his complete due process. Reasonable extensions, however, do not require the command to allow the process to be held hostage. The analysis should be made through a critical lens and the perspective of what an objective party would view as reasonable. The most useful perspective is to view the question through the eyes of an objective third party who has drawn no conclusion as to the veracity of the complaint.

Once the final deadline is set, with clear notice to the complainant that no more delays will be approved, judge advocates can assist commanders in tracking these deadlines closely and by advising the command to strictly enforce them. Toxic complainants will continue to inject chaos into the process by intentionally submitting matters after clear deadlines in an attempt

to force the command to backtrack on the stated deadline. Well-documented history of approved, reasonable, delays—and clear advance notice of the final deadline—will enable commanders to maintain control of the process.

An important tool in protecting the process is the use of independent actors to supply objective review. First, ensure that no reasonable person would question the neutrality of any investigating officer. Obviously, an investigating officer should have no prior knowledge of any events. In some particularly toxic cases, there may be multiple complaints and multiple investigations. It will seem easier to use the same investigating officer where facts will clearly overlap, but this could allow an investigation to ultimately be questioned. Multiple independent investigating officers arriving at the same conclusion, while more cumbersome, only lend additional credibility to the investigations. In some cases, it may be necessary to go outside the command entirely to prevent even the appearance of bias. If a legal office is heavily involved in advising the investigating officer throughout the investigation, the best practice is to have a separate legal office, such as that of the higher command, provide an independent legal review to ensure there is no question as to its objectivity.

In a particularly toxic case, judge advocates should advise the command to consider independent review for any action involving the complainant. For example, while the suspension of a security clearance or command-directed mental health examination may be warranted—or even demanded—by the circumstances, these are also actions that may be alleged to be additional reprisal. An independent review by objective actors can protect the integrity of the process and the command. The ultimate guiding perspective must be the route that insulates the process from any doubt as to fairness.

Critical Roles for Judge Advocates

In addition to the two foundational strategic principles of documenting the facts and protecting the process, judge advocate leaders should be aware of the unique position they have to take a holistic view of the issue. Staff judge advocates and other

leaders should see themselves as both a coach for their team and a coordinator of the investigation process, in order to ensure there is an integrated, thoughtful command processing of toxic complaint cases.

Critical Role #1: Coach

Toxic complaint cases are typically too cumbersome and too complex for one person; such cases are best handled through a team approach. Leaders must build the team carefully, selecting each member and ensuring they are in the right position. Once selected, the best course is to ensure each member of the team is fully knowledgeable about the case and empowered in strategizing how to proceed in the volatile and unpredictable situation. Paralegals play a critical role, especially if they are made integral team members from the beginning. Their technical and organizational skills are vital to the documentation necessary to be successful in this case. It will also enable them to seamlessly prepare documents and provide legal support for any follow-on disciplinary procedures.

Leaders must think strategically, helping their team understand the second- and third-order effects of any command action. They should impress upon legal advisors that providing advice for investigations is not a spectator sport; they must zealously ensure that all questions are answered and the facts fully documented, with all relevant context provided. Investigative documents should be thoroughly reviewed by all team members, including the questions investigating officers are directed to answer. Cutting and pasting from previous appointment memorandums or drafting questions that sound conclusory can lead to mis-framing the investigation from the start. The appointment memorandum can set the tone for any investigation and raise questions which are not at all relevant to the subject of the investigation. While a judge advocate should draft the appointment memorandum, the commander appointing the investigation must also thoroughly review and shape the scope through a command lens. Investigations are not purely a legal or a command function, so judge advocates must be able to see them from both perspectives.

Leaders should oversee all products and results. Always read the complete investigation before it becomes final to confirm that there are no outstanding questions and no ambiguity which would allow someone to obscure the truth. The most effective perspective is that of an audience who is looking to find something negative. The review should include a determination of whether all facts, good and bad, have been presented accurately. The judge advocate's role is to ensure a complete and accurate investigation, always remembering that the investigation will likely be scrutinized multiple times.

Critical Role #2: Coordinator

Judge advocate leaders also serve as the coordinator for the case. The SJA, or brigade judge advocate, is usually the one person on the staff who knows every aspect of the case and therefore is in the best position to advise on how to proceed. Leaders must view the big picture and how every decision fits within it. Other staff sections should still manage their portions: G1 controls Officer Evaluation Reports, the Provost Marshal controls force protection, and G2 controls security clearances. However, the judge advocate should advise on the practical way forward, such as when to bring in independent review, when to appoint additional investigations, drafting important documents, and when and how to respond to communications.

At the same time, judge advocates must be careful to distinguish between legal advice and command decisions. Provide the range of options to the commander, with corresponding risk, and ensure the commander makes the decision. In extreme cases, even decisions unrelated to the case can be the subject of additional complaints, so the legal office should be alert to any possible vulnerabilities. Command decisions are almost always judgment calls based on assumption of risk. This is a time to be particularly conservative, not creative, in “getting to yes.”

The analytical foundation must always be grounded in doing what is right, while playing the long game and understanding the long-term objective. Regardless of how provocative a complainant becomes, it is important to counsel the command to

consistently follow the primary principles of documenting the facts and protecting the process. Judge advocates can assist the command by advising on how to control the narrative, not letting an emotional, toxic complainant provoke deviation from the process or any response which could be spun as unprofessional. All communication should be thoughtful, viewed as though it will be widely publicized. Likewise, it is important to have a thorough understanding of the optics of any decision—even if the command can take a particular action, should they? Will it cause an objective observer to have any question about the command's motives, even if the action itself is legal?

Another function of the judge advocate as coordinator is to know when to use the resources of other offices. The legal technical chain is an indispensable sounding board and source of perspective. Brigade judge advocates should never feel that they advise the command on an island; rather, they should stay plugged in with the division chief of administrative law, the deputy SJA, and the SJA. Likewise, SJAs can benefit greatly from the objective sounding board of higher level SJAs. While in the middle of what can seem like an extremely adversarial process, it is not always easy to maintain objectivity. The leaders and peers in the technical chain can provide a dispassionate view of how decisions can be perceived and practical advice on how to proceed. Other offices such as the IG, Criminal Investigation Command, U.S. Army Medical Command, Human Resources Command, the Office of the Judge Advocate General, and Trial Defense Service can all bring needed expertise or services to ensure that the process is complete and fair. It is always important to remember to adhere to the process and not focus on the individual; it should never be personal, regardless of how personal it may feel. Resist being distracted by the noise of all the words and provocation; focus on ensuring the process is protected and the truth is documented.

Some final thoughts for leaders who are advising the command in these cases. Be unemotional regarding complaints about you or your team. If you or your command receive anything that can be perceived as an allegation of professional misconduct or

mismanagement about anyone in the legal team, forward it to your technical supervisor and move on; be completely transparent and trust the process. Also, and even more importantly, force protection should be paramount; so be sure to follow normal safety procedures. The more prolonged an extreme situation becomes, the more “normal” it seems and the more likely that regular procedures will not be followed. Just because a disruptive procedure—like leaving unsolicited packages—is repeated does not mean it should be considered harmless. Do not let chaos become normalized and assume nothing will happen; heighten, rather than lower, safety precautions.

Various administrative processes enable Soldiers to complain to their chain of command—such as the IG, the Equal Opportunity and SHARP systems—as well as multiple law enforcement agencies—such as the Military Police or the Criminal Investigation Command, or their congressional representatives. These mechanisms are crucial to uncovering injustices that may have otherwise remained secret, hurting Soldiers and undermining the strength of the military. To ensure Soldiers are freely able to use these avenues, the Whistleblower Reprisal Act prohibits restricting this communication or taking of any adverse personnel action in response to a Soldier filing a complaint through any of these avenues. All of these processes lead to transparency, which enables the Command to identify and correct issues, while also ensuring Soldiers receive the leadership they deserve.

Judge advocates always have a unique role in ensuring justice is done and due process is followed. This role is just as important when an individual uses the processes designed to protect to inflict harm. The key to managing toxic complaint cases is just that—management. Put together a team of talented folks to work out the details of the legal issues. The best focus for a judge advocate is strategic: counseling tactical patience to the command to ensure the process is vigorously complied with and the facts are fully documented. In the end, what you are creating is your command's and, in many cases, the Army's record of what happened. Document the facts to provide

evidence of the truth and zealously protect the process to ensure a just result. **TAL**

At the time this article was written, COL Terri Erisman was the Staff Judge Advocate in the 25th Infantry Division at Schofield Barracks, Hawaii. She is currently the Deputy Chief of the Plans, Programs, and Training Office at the Pentagon.

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Notes

1. FRANCIS BACON, OF REVENGE (1625), <http://people.brandeis.edu/~teuber/bacon.html>.



(Credit: istockphoto.com/Ivan Pantic)

Why Scholarly Publishing Matters for JAs

By Professor Matthew J. Festa and Lieutenant Colonel Patrick M. Walsh

Military lawyers often have valuable experiences and original ideas that could make important contributions to the law, the military, and society; but, it takes motivation and—some may argue—knowledge of the inside game to get those ideas published and shared. This article is designed to help you, a military lawyer or a practitioner in the field, to publish your writing—either in our military law journals or in civilian venues. Regardless of your career stage, you have practiced in an exciting area of the law that is relevant to—but sometimes hidden from—the larger discourse of our dual military and legal professions. By writing and publishing your ideas, you can develop, refine, and share your thoughts, as well as add to our professional base of knowledge. The following is a guide to some of the “tricks of the trade” and will give you some insider information about law review placement in civilian journals. This may also be useful to aspiring legal academic authors, regardless of military experience.

Your contributions can help polish and expand the thinking behind our practice for judge advocates, scholars, civilian practitioners, and policymakers. We, the authors, offer these observations based on civilian academic experience, and our own efforts to publish. While we believe they are based on the conventional wisdom of legal academia, they are our opinions. We hope this article will help you understand the process of publishing in both civilian and military academic journals.

Why Publish: Because You Can and You Should

Military legal professionals stand at the crossroads of important knowledge and experience in law, the military, and society. There is a great need in the academic community for more practical information and timely analysis of the topics that military lawyers work on. The goal of this article is to encourage you to share your ideas and refine your expertise

through research, writing, and publication. Publishing your written work can be professionally and personally rewarding; but—more importantly—it can contribute to the advancement of knowledge and understanding in both of our professions, and with society at large. All military lawyers have both analytical skill and valuable experience, so you should consider publishing your written work. Enhancing military practitioners’ knowledge in the law is one aim, but another distinct goal of academic publication is to mingle our ideas with those of civilian practitioners and scholars on a given legal topic. The Judge Advocate General (TJAG) mandates, “flood the zone,” illustrating our senior leaders’ encouragement to actively participate by contributing to the dialogue pertaining to military and international law. To that end, this article offers a practical guide to publishing in civilian law journals and other venues.¹

Purpose

As a military lawyer, you are immersed in one of the many fields of military law and practice, a key contributor to military operations, and also a participant in the real world of applied public policy. You might be a junior or senior in the ranks; you might be in a sister service; you might be on active duty or serving in the reserve component. Perhaps you are an LL.M. student or a full-time professor at The Judge Advocate General’s Legal Center and School (TJAGLCS), or a student or scholar at West Point, a branch school, the Command and General Staff College, or a senior service college. Regardless of your level of experience or current assignment, you have experiences and can generate ideas that could be helpful to our dual professions, or to the civilian academic and policy communities at large. You should contribute your knowledge and experience through scholarly research and writing. This article will encourage you to try to refine and share your ideas by publishing and provide an introduction to the publishing process in civilian law journals.

Our colleagues in the military, the policy arena, the practitioner community, and the civilian legal academy, can benefit from your experience and your scholarly writing on the topics in which you have

developed unique expertise. The wider world is interested in what you have done, and what you've thought about, so you should consider publishing your ideas in our JAG Corps and military publications;² you should also consider publishing in civilian law journals.

A Long Journey: Why and Where to Publish?

Judge advocates (JAs) should publish because they have the expertise, they will benefit from the experience, and the scholarly discourse needs to hear their voice. There are areas of the law where JAs are among the most experienced practitioners in a specific legal field. National Security law, government contract law, military personnel law, and—of course—military justice are areas of expertise for many practitioners within the JAG Corps; however, most of the scholarly writing is done by those outside the military. At certain points in your career, you will be one of the experts, and you need to develop, organize, and share your knowledge. At that moment, you should take the opportunity to add your expertise and knowledge to legal scholarship. Judge advocates have the knowledge and experience to be effective contributors to the legal scholarship, and the scholarship will benefit from the insights and experiences of JAs.

Publishing your ideas is a key factor in making your mark as a serious scholar in your field. Scholarly writing also gives you an opportunity to take a deep dive into one area of the law and further refine your writing skills. We all recognize the need to be a versatile lawyer with the ability to advise commanders on all the various legal matters they face. Writing a law review article provides an opportunity to focus narrowly, and expertly, on one specific area of the law. Judge advocates can be both versatile in multiple areas of the law, and also expertly focused on a subject matter of our choosing. Writing is also hard. Law reviews require an author to refine and develop writing skills that many of us have not exercised since law school or the U.S. Army's Graduate Course. Going through the process of scholarly writing will make you a better writer in academic and non-academic environments.

When judge advocates contribute, legal scholarship can also benefit. Often, JAs write while immersed in the subject, living in the area of the law they are writing about. This perspective is a valuable addition to academia, and it is important to continue to add this voice to legal scholarship. No amount of research by a civilian can replicate the total immersion into an area of the law that a judge advocate is sometimes required to experience.

While the above are all valid reasons to publish, the greatest reason to do so is that you want to have tangible proof that you can engage in legal scholarship at its highest levels. You want to be accepted as a legal scholar among your peers, and you want to contribute to the academic discourse on a matter in which you are an expert. So, make the decision to research, write, and publish.

Where to Publish?

Now that you have made the decision to publish, you need to decide what the best forum is for your article. There are many factors to consider when choosing where to submit your article for publication. These include the length and format of your article and the likely or intended audience. Another consideration is the level of "prestige" you hope to achieve with this publication. You must think through these issues to find the right publication for your scholarly writing.

The format and length of your article will play a significant role in deciding where to submit your article for publication. If you have a fifty-page article on a specific area of the law with hundreds of footnotes, you have written a traditional law review article. If your article is part law and part something else (doctrine, policy, or current events), you may want to consider something other than a traditional law review, like a non-legal academic journal, a periodical, magazine, or even a well-respected online publication. If your article is meant to be a useful explanation of an area of the law or designed to help practitioners understand and apply the law in their profession, then you want to look at publications written by practitioners for practitioners. Let's explore some common publications that are looking for scholarly writing by JAs.

Keeping It in The Military

The Army JAG Corps, and its sister services, have some fantastic scholarly publications that are perfect for a military-focused audience. They are also easy to submit to for consideration. The *Military Law Review (MLR)* is the U.S. Army's premiere law journal, and it has a tradition of quality editors and timely articles. Many of the articles come from students in the U.S. Army's Judge Advocate Officer Graduate Course, an LL.M. degree-granting program for mid-career military lawyers, but the *MLR* is always looking for quality writing from others. If you have a well-written article that is timely and designed for an audience of military lawyers, the *MLR* is a great place to publish.³

The sister services also have a premiere law review. After a short hiatus, the Naval Justice School publishes the *Naval Law Review*, and the Air Force Judge Advocate General's School publishes the *Air Force Law Review*. Both accept submissions⁴ and have detailed guidelines for articles. While there are some topics that are of greater interest to one of these publications than the others, all three accept and publish articles on topics of military interest from all service members and civilians.

There are also military publications for shorter articles. The *Army Lawyer* and the Air Force's *The Reporter* are periodicals that focus on timely, practice-oriented legal articles. There are also military publications that are a good fit for some legal articles written for a broader audience. The *Small Wars Journal*, the *Military Review*, and even blogs like Lawfareblog, JustSecurity and Opinio Juris will gladly accept JA writings geared toward international law or national security. There are many other publications—some focused on special operations, some on military contracting, some on military personnel law, and some on other topics. Internal collections of writings, after-action reports, and other collections may not be classified as "publications," but they are great resources for JAs who may face the same legal, tactical, or operational problems that you successfully managed.

There are several reasons that a JA may choose to publish in a military publication. These publications are looking for authors like you; they are read by your superiors,

peers, and subordinates and—more than likely—the subject you are writing on will be of interest to a military audience. They are also easy to submit to, allow free submissions, and you may even know the editors who are working on the publications. Despite this ease of use, JAs should also consider publications outside the military when they are deciding where to place their article. It is not as easy to submit, but with the right article and a little knowledge of the inside game, you can have success publishing outside of the military.

Venturing into the Civilian World

There are several reasons why military lawyers might consider submitting articles for publication in civilian law reviews. First, if an author has already published in the *Military Law Review* or the *Army Lawyer*, it is a good idea to add some variety to your publication record. Second, publishing in a civilian journal could widen the potential audience for our professional military legal writing. Many civilian scholars and practitioners out there want to know what you think. Publishing in a civilian law review brings the military experience and perspective to a larger civilian audience. Finally, you might be surprised at how many options you have.

Types of Civilian Law Journals and Prestige Hierarchy

The most common publishing venue is the general-interest primary law review that almost every law school publishes. Next are the specialty-interest law reviews, or “secondary” law school journals, which specialize in certain subject-matter areas (e.g., international law, criminal law, public policy, etc.). Less common, but often more prestigious, are peer-reviewed journals; some of which are at law schools, but they are edited by faculty scholars rather than students. The relative “prestige hierarchy” goes something like this:

1. Primary law reviews of top twenty ranked law schools,
2. Leading peer-reviewed journals,
3. Primary law reviews of top fifty ranked law schools,
4. Secondary/specialty journals in the top ten ranking in their field,

5. Primary law reviews of top one hundred ranked law schools, and
6. All other primary and specialty journals.

There are, of course, some gray areas between these categories, and some academics have different opinions on the relative value of a particular publication. You can get a general sense of the prestige of any primary journal based on the law school’s *U.S. News and World Report* ranking.⁵ There is more complex data behind the rankings of specialty journals at the Washington & Lee Law Library’s law journal rankings.⁶ The higher the ranking, the more prestige you will acquire as an author; this may lead to a higher chance of your article gaining traction. In other words, you may end up attracting the attention of more readers.

Playing the Game: Submissions and Placement

General

Here’s where we move from the noble idea of the intrinsic value of scholarship to the intensely practical side of figuring out the actual system and playing the game. Law review placement is a crazy enterprise, and the process may be slightly uncomfortable for a military lawyer. It involves multiple (dozens or more) simultaneous submissions, followed by an intense jockeying process of expedited reviews, with great attention to timing. It is also likely that you will have to spend money to use the preferred submission system. We want to make sure that you have the chance to learn the “inside game” that civilian academics know and live by. Those who are new to this system sometimes find certain aspects of it to be distasteful, but it is how the academic world works. If you play the game, you will be in good company, and you can generally expect a placement for any well-written article. Get to know this system and, again, don’t be afraid to play the game.

The Submissions Game

To get your work published, you have to submit it to journals in accordance with their publication processes. While each journal is entitled to its own policies, there are some general trends in the submissions

process regarding methods, timing, and publication offers. One distinguishing feature is that while most non-law (humanities, social science, and of course science, technology, engineering, and mathematics) academic journals require exclusive submissions subject to scholarly peer review, most law reviews allow multiple simultaneous submissions, and the articles are reviewed and offers extended by the student editors. Another important point is the timing: student-run law reviews tend to operate in “cycles”; other journals have a more open calendar for submissions. A third feature is the acceptance process: law review authors can often “expedite” their articles to other journals during the submissions cycle. Because of these characteristics, even scholars from other disciplines—let alone practicing lawyers—often find the law journal submission process to be disconcerting. But, with a little bit of effort, you can figure out how to succeed in this process.

Most law reviews *prefer* or *require* that you use an electronic submission service. Some will allow you to email the digital copy, but most want you to submit through ExpressO⁷ or Scholastica.⁸ The best advice is to use these services, and to submit to multiple journals at the same time.⁹ Most civilian law schools cover these costs for faculty. You could consider asking for reimbursement as a professional expense; but, even if you have to spring for it yourself, it is probably worth the one-time, out-of-pocket cost to have the convenience and efficiency of mass electronic submissions.¹⁰ While some publications indicate you may email them your submission directly, they might not accept it; or, more likely, the email may be ignored. The two submission services make it easier on the law review student editors, so your best chance to get the best placement is if you use these services. So, go ahead and splurge for the electronic submission—it will be worth it to have the broadest range of publishing options, and it will become relevant to expediting your article.¹¹

Article Submission Methods and Services

Most journals require electronic submission through a web service. The Berkeley Press ExpressO service was, for years, the leading submission format. It

is simple to use. You create an account, upload your article, and submit your curriculum vitae (CV) and cover page (see below). Submitting through ExpressO has the added advantage of being able to track your submission status, request expedited reviews, and withdraw—all on the website. Additionally, once you have an ExpressO account, you can track your downloads and other readership statistics.

Many law reviews, including many of the top tier law reviews, have moved to a newer service called Scholastica.¹² Anecdotal evidence indicates that Scholastica is becoming a requirement for many top journals and is migrating down to a greater number of quality journals below the top tier. You should consider submitting through Scholastica for the journals that indicate that preference. Journals usually list their preference on their website or directly on ExpressO or Scholastica.

A few elite schools require that you submit directly through their law review website portal—NOT by email. Harvard, Yale, and Stanford are among these schools. While these journals are a reach for even the most renowned legal scholars, you might consider keeping this option in mind—especially if you have reasonable success in the expedite process.

Many of the most selective peer-reviewed journals do NOT accept electronic submissions, nor do they consider articles submitted simultaneously to other journals—that is, they expect exclusive review. Authors should go the electronic, mass-submission route. Unless you have a specific reason to send it to an exclusive-submission venue, your chances of an offer are much higher if you go this route.

Keep in mind that most journals will never read your manuscript, and this is increasingly true as you move up the rankings list. Due to the multiple-submission norm, the top general-interest journals receive thousands of submissions per year. Regardless, you should pay careful attention to the journals' preferred or required procedure, or else you can almost guarantee that the article will never be reviewed. The electronic submission services ensure that your article is in their inbox, so that they can access it if—and when—you contact them with an expedite request.

When to Submit Your Article

Getting a publication offer is easier—and possibly quicker—than you might think, so long as you submit your article on the proper timeline. The bottom line of submission timing is that for student-edited law reviews, there are generally two “windows” or “cycles” where the students will consider articles for publication: spring (February-March) and fall (August-September). You should plan to submit your articles during these windows, with a few exceptions, or else you risk being ignored. Here is another advantage of the electronic submission services, ExpressO and Scholastica will advertise when a particular publication is open to receiving articles, and when they are closed.

The spring window is the main submission cycle, with two-thirds or more of article placements occurring then. This is because the newly-elected student editorial boards take over and begin their task of filling the next volume of books that they will edit and publish during their third year. Traditionally, this window was in March; but, in recent years, it has slowly crept leftward on the calendar into early February. March is still a primary zone, with a small but increasing number of articles accepted in February, and some as late as mid-April. If you want to “shop up” your article, then the earlier you submit, the better your chances are.

There may also be something of a late-spring window. Based on our own anecdotal experience, we believe that there is an under-appreciated late-market aspect to the window. Perhaps this is because some journals lose their pieces to higher-ranks journals on expedited review and then are in a bind to find new, uncommitted pieces before the student editors' final exams begin in late April and May. In other words, there is a possibility of a late-cycle acceptance. Still, the best advice is to submit early.

The second “window” is the fall submissions cycle. The journals that have not yet filled next years' slates will accept new article submissions when they return to law school in the fall semester. The fall window starts in early August and extends to mid-September. There are fewer chances in this window, but sometimes there might be an opportunity to fill a slot with a journal

that lost a piece on expedited review in the spring. Again, there is the similar possibility of a late-cycle acceptance. But, the best advice is still to submit in early August if you can. This will give you the most opportunities with journals before they fill up and to be able to expedite.

Some journals permit year-round submissions. There are a few law-school journals, and a number of peer-reviewed outlets, that accept submissions year-round or during specially-offered times. You should check with those journals to ascertain whether they will accept or encourage off-cycle submissions. One prominent example of this is our own JAG Corps publications. The *Military Law Review* and the *Army Lawyer* both have open, year-round submissions. However, if you've been through the Graduate Course, you probably know that at certain times of the year, the editors have a larger batch of LL.M. theses, scholarly papers, or book reviews to consider for publication. Civilian journals may, likewise, have their own internal rhythms and specific considerations that affect their review cycles. Sometimes this information is posted on the journal's website, or on its submissions policy statement on ExpressO or Scholastica. If you cannot find this information, that is another reason to consider the general-submission route during the primary submission windows.

Other times, a journal might make a special announcement of an off-cycle or “exclusive submissions” window, where they might review articles conditioned upon the author's promise to accept a publication offer. A law review may be organizing a symposium, where the accepted authors are invited to speak at the symposium and have their article published. These special windows could be a great opportunity for a new author to get a guaranteed publication slot before mastering the expedite game. You might find such announcements on the journal websites, ExpressO, or popular weblogs such as The Legal Scholarship Blog.¹³

If at first you don't succeed, try, try again. It is entirely permissible to decline and resubmit your article the next year if you don't get an offer, or if you are not satisfied with the offers that you received during the previous year. Student editorial

boards typically turn over in the winter, prior to the next spring's submission cycle. Of course, additional editing and peer review can be helpful during the interim, but you should not be discouraged from holding the article back and then resubmitting it the following year. If there is a turnover window, consider changing the title of the piece—it's not just a practical strategy, it might also prod you to rethink the utility of the title that you are shopping. Because editors might think that it makes the article seem more relevant to a wider audience, sometimes publication offers might be based on having a catchier or punchy title.

Expedited Review, "Shopping" the Offer, and the Placement Game

"Shopping around" for the best publication is where the process becomes uncomfortable for most JAs. The law journal culture of allowing multiple submissions creates competition on the back end. In other words, if you get one or more offers, you—the author with an offer—are in the driver's seat; the journals compete with each other to secure your acceptance so that they can fill their books—and permit the student editors to get on with their classes and exams. When you receive an offer, the next step to consider is to "shop it up" to higher-ranked journals. When extending a publication offer, most journals give the authors some time, typically around two weeks, to decide whether to accept their offer. Using ExpressO or Scholastica, you can simultaneously submit "expedited review" requests to other journals with a few clicks. This alerts the other journals that you already have an offer, signaling publishable quality, as well as a deadline. An expedite request tells the other journals with whom you would like to publish that you have an offer; it also tells them that you would still like to publish with them, but they have to act fast.

Generally, once you receive an offer from, say, a fourth-tier journal, you should immediately send an expedite request to journals in the higher tiers; be sure to let them know of your offer and your deadline. They will take your deadline seriously. If they aren't interested, they may never respond; but, if they are, they will get back to you within the deadline that you have conveyed. If you receive an offer from a

higher-ranked journal, you can decline the offer from the lower-ranking school and start the expedited process again, and again, until you get the best offer in light of that journal's deadline. While this may seem odd to a new author, the editors know that this is the game, and they expect you to play it.

Requesting an expedited review is important because the higher-ranked journals might not bother to read a manuscript, unless they receive a request for an expedited review with a pending offer from another journal. The higher-ranked journals look for these signals of acceptance from other journals before they give serious consideration to a piece. It is not uncommon for a law review editor to lose half of the pieces that they had carefully vetted, argued about, and voted to accept to higher-ranked journals on expedited review. This is where the game shifts to the authors' benefit.

When you get to the point that you either have the "best" offer you can expect, or you run out of deadlines, then it is time to accept. By all means, you should consider factors other than the journal's relative prestige ranking; things such as timing of publication, the editorial process, ancillary considerations like themed issues or related articles, or even your gut feeling about the future working relationship with the editors can be imperative considerations in deciding to accept a publication offer. The default norm, though, is to go with the higher-ranked journal.

The placement—and expedite-tournament—is not something that most of us, as military lawyers, are used to doing. It involves constant monitoring, a good bit of flattering, perhaps some self-promotion, and an unseemly gaming of the system. But this placement game is the normal way of doing things in the civilian legal academy, and we all learn to live with it. In fact, it has a strong upside in terms of accessibility—especially for new scholars.¹⁴ Despite much criticism, this system has some tangible benefits for the accessible production of a wide scope of informative writing that can contribute to the ongoing discourse in our dual professions. Even if this game strikes a military lawyer as strange, these are the rules of the game; the journals all play by them, and they expect the same from you. So, don't worry about it and go for it!

Marketing Yourself: Tools to Help Publish the Article

Abstracts

Most journals prefer to read abstracts—ExpressO and Scholastica will prompt you to insert one in text form in a special box on their page. This is a significant part of the initial decision about whether to read the article itself. Law review abstracts have averaged around 260 words for the last few years, so an approximately 260-word abstract will look "normal" to editors.¹⁵ DO NOT SIMPLY COPY AND PASTE YOUR INTRODUCTORY PARAGRAPH—editors dislike that—and do not dash off something at the last minute. Take some time to polish your abstract, keeping in mind that editors will read this and may never read your article if they dislike your abstract. A template for an abstract, or something similar, might look like this:

- 1) "The conventional wisdom in X field of law is _____. 2) Nevertheless, most [scholars/courts] recognize [an unresolved problem with the conventional wisdom], which is _____, despite _____.
- 3) This article [offers a novel solution, insight, or empirical evidence to resolve the problem or challenge the prevailing view]. 4) Using [your supporting arguments, evidence, surveys, cases, legislative history, etc.], this article will demonstrate that [my thesis is probably true]. 5) Conclusion – "Ultimately, the result is ____" or "In light of this new evidence, I offer some normative proposals and suggestions for further research" [or something like that].¹⁶

Cover Letter

Write a one-page cover letter, describing your article in the first paragraph. Do not simply use your abstract or introductory paragraph. *Describe* your article as you would to a potential publisher over the phone. Your second paragraph can explain why this article is novel, nonobvious, useful to other professors, judges, and practitioners, and timely. Your third paragraph can summarize aspects of your CV you

particularly want to bring to the law review's attention.

Curriculum Vitae

Your CV should feature your areas of expertise or specialization and your best placements and publications. If you do not include a CV, law review staff will just Google you, so there is no reason NOT to include your CV, especially if you don't have a web presence. If you don't have a CV, make one. It's basically an expanded academic resumé. Most professors have their CVs linked on the biography section of their webpage, so you can use those as examples.

Author Footnote

The author footnote on the first page of the article is vital because law review editors know it will be the first thing that potential readers will look at. It signals not just who you are, but what you've done. There is, indisputably, an element of snobbery in this; but, again, it's how the game is played. We strongly recommend that you do not, as is the typical practice for our military legal journals, list a reverse chronological resumé of military assignments. Instead, lead with your current title, whether it's "Associate Professor, U.S. Army Judge Advocate General's Legal Center and School," "Brigade Judge Advocate," or whatever your current title is. Trust us, it's impressive in civilian academia. Then, list your academic credentials. Last, list a few relevant or significant gigs—e.g., deployments or military job assignments that add credibility to your topic—but not your entire career list. Listing your reverse resumé makes perfect sense when you are writing explicitly for the JAG Corps; but, generally, the third year editors of the law review where you want to publish do not care about the six months you did in legal assistance in your first assignment at Fort Hood ten years ago—unless, of course, it is relevant to your article on legal assistance issues. Use your judgment and the author notes of articles in the top journals for examples.

You should mention any conference, workshop, or any other forum where you presented the ideas in the paper—even if it was at an early stage of the research. Use the author footnote to thank (1) every

person who read a draft and (2) anyone—especially scholars, and particularly if they are well known—who helped you or with whom you discussed the ideas. This is critical both for the article selection process, and for ultimately persuading potential readers to give your article a look.

This should also encourage you, if you weren't already doing this, to circulate your article among trusted colleagues and reach out to other scholars in the field. This is also typical in civilian academia, and scholars are normally generous in reading others' drafts. Start with people you know who work in the area you're writing about. While some of us are reluctant to "cold call" a person we don't know, perhaps you can ask someone else to make the introduction. Especially if your paper draws heavily upon their work, many would consider it a proper courtesy for you to let them know about yours, even—or especially—if you're critiquing theirs. Finally, if you want to thank your spouse, family, or friends for personal support, you can add that to the final published version, but leave it out when shopping the paper.

Polishing and Publicizing the Article

Once you've been selected for publication, the editing rounds begin. This can be a varied process, depending on the journal and the individual editor or editing team. In general, you should be familiar with Track Changes. You should consider accepting most, if not all, happy-to-glad changes the editor suggests. Do insist on seeing all edits and keep a copy of previous marked-up drafts—but do these things graciously. If any proposed changes give you pause, make sure you think about and understand why the editor is recommending the edit. Of course, ask editors why they proposed the edit if it's not clear from comments on the article. Most likely, there won't be any topic-altering changes you'll have to consider in this polishing stage. Once polished and about to be published, it's now time to publicize the article.¹⁷

Conclusion

The thoughts and advice contained in this article intend to help military lawyers who might be interested in publishing their research in civilian law reviews.

These observations are our own, from our experience in the civilian legal academy and in military service. We are proud to be a part of three professions, as Soldiers, lawyers, and scholars. All three of these experiences are available to you as well. More importantly, the military, legal, and policymaking communities truly need the benefit of your experiences, insights, and advice. We hope that you continue to think about, write about, and publish the original and informative thoughts that you have gained through your practice, experience, and intellectual efforts.

Military lawyers who publish help contribute to the scholarly debate, and our voices can shape legal scholarship in ways that have a lasting benefit. If you publish, you have demonstrated that you are a scholar and expert who is willing to share your knowledge and experience and to engage in scholarship at its highest level. You can and should continue to research and write. Then, when you're ready, "play the game" to publish your work and to contribute to our collective body of knowledge in the law, the military, and society. **TAL**

Prof. Matthew J. Festa is a Professor of Law at the South Texas College of Law in Houston, Texas.

LTC Walsh is an Adjunct Professor in the Criminal Law Department at The Judge Advocate General's Legal Center and School. As a civilian, he is the Senior Counsel to the National Criminal Investigations Training Academy.

Notes

1. See *Publishing Articles in Law Reviews and Journals*, GEO. L. LIBRARY, <https://guides.ll.georgetown.edu/c.php?g=273426&p=1825109> (last updated Dec. 2, 2019). There is a wealth of information available to authors about publishing articles in law reviews and journals. Googling "publishing in law review" or a similar phrase yields hundreds of pertinent results. *Id.*
2. See *The Military Law Review (MLR)*, *The Army Lawyer*, etc.
3. If you want to submit an article for consideration in the MLR, email it to the Editor, *Military Law Review*, at usarmy.pentagon.hqda-tjaglcs.list.tjaglcs-mlr-editor1@mail.mil. If electronic mail is not available, please forward the submission, double-spaced, to the *Military Law Review*, Administrative and Civil Law Department, The Judge Advocate General's Legal Center and School, U.S. Army, 600 Massie Road, Charlottesville, Virginia 22903-1781.
4. See 64 NAVY L. REV. 1, 187 (2015). Naval Law Review Submission guidelines and contact information is listed

in the last page of each Naval Law REV., *Id.* See also *Submission Guidelines*, AIR FORCE L. REVIEW <https://www.afjag.af.mil/Portals/77/documents/Law%20Review/Law%20Review%20Submission%20Guidance.pdf?ver=2018-10-10-170004-627> (last updated Oct. 2018).

5. See *2021 Best Law Schools*, U.S. NEWS & WORLD REPORT, <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited May 26, 2020).

6. *W&L Law Journal Rankings*, WASH. & LEE UNIV. SCH. OF L., <https://managementtools4.wlu.edu/LawJournals/> (last visited May 8, 2020).

7. *ExpressO*, BEPRESS <http://law.bepress.com/expresso/> (last visited May 8, 2020). ExpressO also has a guide available for .pdf download with several publishing tips. *Id.*

8. SCHOLASTICA, <https://scholasticahq.com/> (last visited May 8, 2020).

9. There is a cost for individuals to use these services that may limit your desire to submit to one hundred journals.

10. See *supra* notes 7-8. As of this writing, authors without an institutional account are charged \$3.10 per submission on ExpressO, and \$6.50 per submission on Scholastica. *Id.*

11. The authors do not endorse either ExpressO or Scholastica.

12. See *supra* note 8.

13. LEGAL SCHOLARSHIP BLOG, <http://www.legalscholarshipblog.com/> (last visited May 8, 2020).

14. One of the chief benefits of the multiple-submission, student-edited system is—for the purposes of this discussion—the fact that legal writers who are not yet prominent scholars have a fair shot at getting published. This is virtually impossible in the peer-review world of other academic fields, where inside knowledge and predominant schools of thought and scholarly trends tend to dominate in the article selection process within a much smaller range of disciplinary journals.

15. Professor Dru Stevenson has compiled this statistic through surveying and averaging the word counts of top-journal abstracts over several years.

16. 1 JOHN M. SWALES & CHRISTINE B. FEAK, *ABSTRACTS & THE WRITING OF ABSTRACTS* (2009).

17. Consider creating a free account at www.ssrn.com. You can post all of your published articles as well as your (almost) ready to publish drafts. Scholars can search for, find, and cite your articles. You can also search for articles by other scholars. *Tomorrow's Research Today*, SSRN, <https://ssrn.com/index.cfm/en/> (last visited June 16, 2020).



(Credit: istockphoto.com/peshkov)

Using RCM 703A to Build a Better Case

By Captain Ethan B. Murphy

An unknown suspect. An uncorroborated eyewitness account. An encrypted device. What is the common thread between these unrelated investigative issues? The solution to all three can often be found in digital evidence maintained by third-party service providers. Evidence that trial counsel can now obtain.

On 1 January 2019, the Military Justice Act of 2016 (MJA16) went into effect, bringing sweeping reforms to nearly every facet of the military justice process.¹ While a great deal of attention has understandably been given to the many new offenses and significant updates to the trial phase,² none of the changes show as much potential to affect investigations as the introduction of two new “pre-referral tools”: the Rule for Courts-Martial (RCM) 703A electronic communications’ court order and that RCM’s warrant.³ Indeed, after nearly a year of trial and error at the 25th Infantry Division, these tools have proved invaluable to the digital evidence collection process, leading to the conclusion that they should

be used to improve nearly every investigation. The purpose of this article, therefore, is to provide background on the new RCM 703A tools and a “brass tacks” guide on their use, including a series of scenarios in which they would be valuable.

Highlighting the Need: The Long Road to RCM 703A

In order to appreciate the vast utility of the new RCM 703A tools, one needs only to look at the shortfalls of digital evidence collection before their existence. As the Department of Justice long ago identified, “virtually every class of crime can involve some form of digital evidence.”⁴ Criminal communications, admissions, and confessions are made through text messages, Wi-Fi- or cellular data network-enabled instant messaging services like Apple iMessage,⁵ and social media direct messaging features.⁶ Pictures, videos, and audio recordings are made, sent, and stored over innumerable applications (apps). Global Positioning System (GPS) data abounds:

cell phone cell-site location information keeps a record of an individual's location, social media platforms keep a record of "geotags" and locations from which the user logged in, and services such as Google Maps maintain a "timeline" of destinations mapped and routes traveled.⁷ Even financial transactions are carried out remotely, through networks.⁸ This digital evidence, and that of hundreds of other unnamed sources, is often held in storage not only by the users of such apps and services (usually on their personal electronic devices) but also in backups and records maintained by the service or app providers themselves ("service providers").⁹

Before 2019, however, Army prosecutors and investigators had the internal authority to pursue only half of that evidence—the part held by users. For military justice teams strictly utilizing their own resources, digital evidence searches began and ended with commander- or military magistrate-authorized searches of a subject's or witness's personal electronic device.¹⁰ That process essentially involves the authorized seizure and "opening" of an electronic device, often times with the use of data extraction software to search for and create a copy of its digital evidence.¹¹

While device searches continue to be an integral part of Army criminal investigations, the unfortunate reality is that they are time-intensive and unreliable processes.¹² With the introduction of each new model, device encryptions become more complex and harder to crack,¹³ and device makers are often unwilling to assist law enforcement agencies in their attempts.¹⁴ When devices are finally cracked open, investigators are often disappointed to find that expected digital evidence is either partially or entirely missing¹⁵ or altered beyond recognition.¹⁶

When those difficulties occurred in the past, trial counsel and Army investigators had little recourse. For decades, federal and state prosecutors and law enforcement agencies have been able to seek troves of stored digital evidence from all sources via authorities granted to them and their courts by the Stored Communications Act (SCA).¹⁷ Military justice practitioners, however, had no statutory right to serve judicial process on, and therefore obtain evidence from, service providers.¹⁸ As a result, before the

passage of MJA16, military justice teams had two options: (1) ask state and federal partners to seek evidence from service providers on their behalf, a tactic that carried significant constraints of its own,¹⁹ or (2) rely on whatever evidence they were able to obtain directly from users. The result, as many would expect, was often deeply unsatisfactory, and—for at least the last decade—a number of our predecessors suggested Congress extend the SCA's judicial processes to military courts.²⁰ Congress finally did so in passing MJA16, empowering military judges to review and issue RCM 703A court orders and warrants for electronic records and communications, starting on 1 January 2019.

Given this history, the arrival of the pre-referral tools should be viewed not just as the addition of a few more arrows in a military justice practitioner's quiver, but also as the beginning of a new era in evidence collection and case development. Digital evidence and records are stored by service providers more than ever, and that evidence is just waiting to be obtained through these new judicial processes. Whether that evidence is used to solve, or simply bolster a case, it is out there. The onus is now on military justice practitioners to learn how to get it.

The Starting Point: The Preservation Letter

In any investigation potentially involving stored digital evidence held by service providers, the first step is to send an RCM 703A(f) preservation letter to the service provider. Since no law requires service providers to preserve digital evidence,²¹ most only do so for their own purposes, and for a finite (and often short) period of time. As such, failure to issue a preservation letter may result in the loss of evidence before an order or electronic warrant can be obtained and issued. What the preservation letter allows, and standards for its use, are as follows:

1. Use to obtain: Preservation of electronic records and/or the contents of electronic communications.
2. Legal standard: None—just a request. RCM 703A(f) states: "A provider of wire or electronic communication services

or a remote computing service, upon the request of a federal law enforcement officer, trial counsel, or other authorized Government counsel, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of an order or other process."²² Upon receipt, the provider must retain such evidence for a period of ninety days, and that period can be extended an additional ninety days upon renewed request by the Government.²³

3. Service: Trial counsel or the investigating agent should issue the preservation letter to the relevant service provider custodian of records, most of whom can be found, free of charge, on the National Consortium for Justice Information and Statistics website.²⁴
4. Forms: While a template preservation letter can be found in the SCA templates folder on the JAGConnect MJA16 Mobile Training Team (MTT) milSuite page, in reality many providers require that their own forms or formats be used, many of which can also be found on the National Consortium for Justice Information and Statistics website.

Uncertain Ground: Avoid Using Pre-Referral Investigative Subpoenas for Digital Evidence Held by Service Providers

Before diving into RCM 703A court orders and warrants, it is worth taking a brief moment to address why using pre-referral investigative subpoenas to obtain digital evidence held by service providers is not recommended. First, it is questionable whether the Uniform Code of Military Justice (UCMJ) actually grants military practitioners the authority to obtain such evidence via pre-referral subpoena. Second, the use of a subpoena could result in disclosure to the subject prior to apprehension, thereby compromising the investigation and potentially resulting in the destruction of evidence.

With respect to legal authority, RCM 703(g)(3)(b), which defines the type of evidence that may be produced by UCMJ subpoenas, states: "A subpoena shall command each person to whom it is directed to... produce evidence—including books, papers, documents, data, writings, or other

objects or electronically stored information.”²⁵ At face value, this definition appears to allow trial counsel to seek stored digital evidence with merely a subpoena, a notion encouraged by the fact that our federal counterparts, under the authorities granted to them by the SCA, *can* pursue some basic categories of stored digital evidence (basic subscriber information and some non-content records) with administrative, trial, and grand jury subpoenas.²⁶

Plain readings of UCMJ Articles 30 and 46 and RCM 703A and its analysis,²⁷ however, clearly dictate that any type of stored digital evidence covered by the SCA (as discussed above, including all stored communications and records held by telephone, internet, email, and social media providers) can only be obtained with RCM 703A electronic warrants and court orders. Indeed, because RCM 703A specifically requires a court order for those same records that a federal prosecutor or investigator could obtain with a subpoena, it can be inferred that the rule makers intentionally deprived

evidence—such as personal electronic devices—before a suspect can be apprehended. Accordingly, it is again recommended that pre-referral investigative subpoenas not be used to pursue digital evidence held by service providers.

Building Blocks and Loose Ends: Pursuing Basic Subscriber Information and Non-Content Records and Logs with RCM 703A Court Orders

After consulting with the Criminal Investigation Command (CID) investigator, trial counsel sent preservation letters to every service provider that may be in possession of relevant stored digital evidence. What is the next step? Determining whether a court order or warrant is the most appropriate tool to employ.

When it comes to returns, RCM 703A warrants may seem superior to court orders. While court orders may only obtain non-content information such as a user’s name, address, and form of pay-

Instead, the military judge must merely be provided with “[s]pecific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.”³¹ This is a much lower standard than that for obtaining a warrant.³² Second, as the information they seek is often already kept by the service providers in record and log form, the returns are usually provided sooner than warrant returns, which may take weeks to assemble.³³

Standards for an RCM 703A order:

1. Use to obtain: Basic subscriber information, logs and records, including source internet protocol (IP) addresses, length and source of service, payment information, records of session times, and lengths of service.
2. Legal Standard: A court order does not require probable cause. Instead, it merely requires “[s]pecific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.”³⁴
3. Application: The investigating agent’s affidavit, sufficient to establish “specific and articulable facts” in support of issuance of the order, can be incorporated into MJA16 milSuites’ 2703(d) order template. The submitted document includes the Application, an Attachment A to the Application specifying the username or account at issue (Part I of Attachment A) and the non-content data to be seized (Part II of Attachment A), and draft orders, potentially including a non-disclosure order, for the judge to sign. The investigating agent submits the signed request to the military judge through the relevant trial counsel.
4. Forms: A template RCM 703A court order, as well as a non-disclosure order, can be found in the SCA templates folder on the MJA16 milSuite page.³⁵

Human interaction has moved to cellular- and internet-based messaging platforms. These platforms provide advantages that past generations only dreamed of—they allow users to send messages instantaneously, around the globe, often for free. At the same time, by virtue of their very existence, these platforms have enabled all types of criminal communications

trial counsel, who are new to this area of practice, of the right to use subpoenas for such evidence.

As to potentially compromising an investigation, while 703A court orders and warrants may be accompanied by a non-disclosure order issued by the military judge,²⁸ pre-referral investigative subpoenas may not. As such, using a pre-referral investigative subpoena for stored digital evidence runs the significant risk that the recipient providers may alert the target suspects and witnesses to the subpoena’s existence, potentially leading to the destruction of other

ment, as well as all other non-content data maintained by the provider, such as logs, session times, connect times, disconnect times, and more,²⁹ warrants can be used to obtain everything a court order can and all sorts of “contents” of electronic communications, including the content of messages, sent and stored video and image files, and GPS data.³⁰

Yet, RCM 703A court orders have at least two distinct advantages over warrants. First, they seek records and logs not protected by the Fourth Amendment and, therefore, do not require probable cause.

Useful Times to Obtain An RCM 703A Order

The Building Block: Identifying an Unknown Suspect

It is undisputed that a great deal of human interaction has moved to cellular- and internet-based messaging platforms. These platforms provide advantages that past generations only dreamed of—they allow users to send messages instantaneously, around the globe, often for free. At the same time, by virtue of their very existence, these platforms have enabled all types of criminal communications—indecent and threatening language to name a few—and behaviors—such as cyberstalking—to move from the real world to the internet, often accompanied by a level of anonymity that was much harder to achieve in the past.³⁶

This may manifest itself in investigations in numerous ways, but a few examples include: (1) anonymous suspects sending threatening or indecent messages to victims; or, (2) anonymous suspects sending indecent communications to undercover agents (UCs) that they believe are children. When this occurs, the easiest way to obtain the identity of the suspect is by filing an RCM 703A court order seeking the basic subscriber information and logs associated with the suspect's username.³⁷ When the returns come back, they will likely either identify the suspect directly (subscriber email, name, etc.) or, even if the suspect is savvy enough to have masked his identity when he originally submitted the basic subscriber information, provide the IP address of the source, which can subsequently be traced to an internet service provider (ISP) through another court order, and then to the suspect's origin (typically their residence).³⁸

Obtaining such crucial information is the first step in building out the rest of the investigation, which usually culminates in a search authorization for the seizure of a suspect and their personal electronic devices.

The Loose End: Obtaining the Missing Text Logs

Now consider the opposite hypothetical. Trial counsel have built a strong case against a known suspect and, after his arrest, CID seized his cellphone to confirm

the existence of incriminating or criminal text messages. Disappointingly, the phone extraction reveals nothing, as it appears the messages have been deleted and wiped entirely. While law enforcement still has the text messages from the victim's side of the conversation, the Government is reluctant to prefer charges and possibly go to trial without more evidence confirming that the Accused did in fact send the messages from his device.

An option is to obtain an RCM 703A warrant for a copy of the suspect's messages maintained in cloud storage (further defined below). If that fails, however, another option is to send an RCM 703A court order to the telephone service provider (AT&T, Verizon, T-Mobile, etc.) seeking "text logs." These logs are a record, kept by all major phone providers, which details the basic information (time sent, time received, phone number of sender and receiver, etc.) for all messages received and sent during a given timeframe. While these logs would not include the content of the texts, they would affirmatively prove whether or not the Accused in fact sent the messages.

Unlimited Potential: The RCM 703A Electronic Communications Warrant

Long utilized by federal law enforcement and prosecutors, the advent of social media and cloud storage in the 2000s only served to make the electronic communications warrant that much more crucial to investigations. Whether used to directly solve computer crimes (child pornography, indecent communications, wire fraud, etc.), or in support of solving general crimes (messages in violation of military protective orders, conspiracy, cell site location information), every trial counsel should ask the same question at the beginning of an investigation: can we use an RCM 703A warrant to help solve this case? Following is a quick reference guide to help answer that question:

1. Use to obtain: The contents of electronic communications, including email and text message contents, pictures, videos, and other media maintained by service providers; GPS data and cell site location information.

2. Legal Standard: Probable cause to believe that the information sought contains evidence of a crime.
3. Application: A sworn affidavit by the requesting agent is required. All required forms are submitted as a package by the agent, through the relevant trial counsel, to the military judge. Each affidavit must include: A facts section setting forth probable cause for the criminal evidence to be found; Attachment A, setting forth the place to be searched (examples include user names, account numbers, email addresses); Attachment B, part I, setting forth the particular³⁹ evidence to be disclosed by the service provider to the Government for review; and Attachment B, part II, setting forth the evidence of the crime to be properly seized by the Government after a review of part I. Optional: Non-disclosure order for the judge's signature, with a recommended non-disclosure period of one year.
4. Forms: (1) DD 3057 Application for Search and Seizure Warrant to be signed by investigating agent and submitted by trial counsel; (2) Affidavit in support of the warrant drafted and signed by the investigating agent and reviewed and submitted by trial counsel; (3) DD 3056 Search and Seizure Warrant to be signed by the military judge.

Useful Times to Obtain An RCM 703A Warrant

Solving an Encrypted or Wiped Device: Obtaining Cloud Storage⁴⁰ Backup

In the course of a recent investigation, the trial counsel obtained a magistrate authorization to search a suspect's device for indecent communications that he allegedly sent over a social media direct messaging service, but one of two things happened: (1) the encryption proved too difficult to crack, or (2) the phone's contents were wiped, either before it was seized or remotely afterward. What to do?

If the trial counsel previously sent a preservation letter to the phone's cloud storage provider,⁴¹ they can follow up with an RCM 703A warrant for portions of its cloud backup. When enabled on smart phones, cloud storage "backs up" a nearly identical copy of a phone's contents.⁴² If the

suspect backed up his phone until the point of seizure, the trial counsel would likely find the communications stored in residual “app data.”

Solving an Encrypted or Wiped Device Part II: Obtaining Evidence Directly from the App

Taking the previous hypothetical one step further, assume that the suspect both wiped his phone and had cloud storage disabled on his device, thus preventing Government investigators from obtaining the messages from a backup. Even then, the

In investigations that hinge on the suspect’s whereabouts at the time of the alleged offense, obtain a warrant for cell site location information through phone providers, and/or GPS location data through cloud storage or other providers

Government still has a chance to obtain the communications from the Accused’s social media account if it sends an RCM 703A warrant to the social media provider. While every provider has a different data storage policy, many retain the contents of communications sent by users for a period of time. Additionally, and as mentioned earlier, the warrant returns would provide subscriber information that could likely be used to tie the suspect to the account.

Checking an Alibi: Cell Site Location Information and GPS Data

Cell site location information creates a record of a cell phone user’s geographic location based on the phone’s continuous connections with nearby radio antennas, called “cell sites.”⁴³ Last year, the Supreme Court determined that suspects retain a reasonable expectation of privacy in the record of their physical movements as captured in cell site location information.⁴⁴ As such, any searches for cell site location information and GPS data maintained by service providers will require an RCM 703A warrant. In investigations that hinge on the suspect’s whereabouts at the time of the alleged offense, obtain a warrant for cell site location information through phone providers, and/or GPS location data through cloud storage

or other providers (Apple Maps, Google Maps, Facebook location services, etc.).

Conclusion

A tool is only as good as the skill of its user, and a case is only as strong as the evidence that supports it. Stored digital evidence is everywhere, and MJA16, through the new RCM 703A’s court order and warrant provisions, has finally given military justice practitioners the ability to obtain it. Now, the onus is on military justice practitioners across the Corps to invest the time and

resources to learn, alongside their investigative partners, how to properly and skillfully employ these assets to their greatest advantage. Ensuring the preservation of relevant data, determining what elements of the data are most important, and identifying the best and most appropriate means to obtain that data based on the factors present in each case are the keys to that mastery. This article provides a starting point for practitioners to begin employing these new—and long overdue—tools. **TAL**

CPT Murphy is presently assigned as a Special Assistant United States Attorney in the 25th Infantry Division and U.S. Army in Hawaii.

The author would like to give a very special thanks to Army Major Cybercrime Unit (MCU) Special Agent Jon Reinecke and MCU Counsel Gary Korn for their invaluable mentorship and contributions to 25th ID’s work in this subject area.

Notes

1. See Meghann Myers, *Here’s What You Need to Know About the Biggest Update to UCMJ in Decades*, MILITARY TIMES, (Jan. 15, 2019), <https://www.militarytimes.com/news/your-army/2019/01/15/heres-what-you-need-to-know-about-the-biggest-update-to-ucmj-in-decades/>.
2. *Id.*

3. Statutorily enacted through the Uniform Code of Military Justice articles 30(a)(1)(B) and 46(d)(3)—implemented in the 2019 edition of the *Manual for Courts-Martial (MCM)*. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M 703A (2019) [hereinafter 2019 MCM]. The R.C.M. 703(g)(3)(C) pre-referral investigative subpoena is also discussed below, but for reasons provided, it is not recommended that investigative subpoenas be used to pursue stored digital evidence, held electronic communication service, or remote computing service providers. *Id.*

4. OFFICE OF LEGAL EDUCATION, EXEC. OFFICE FOR U.S. ATTYS, COMPUTER CRIME AND INTELLECTUAL PROPERTY SECTION CRIMINAL DIVISION, U.S. DEP’T OF JUSTICE., SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS IX (3d ed. 2009) [hereinafter SEARCHING AND SEIZING COMPUTERS]. Based on the universal nature of digital technology use in 2019, a definition is not likely necessary, but nonetheless, digital evidence can be defined as: “information and data of value to an investigation that is stored on, received, or transmitted by an electronic device.” NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, ELECTRONIC CRIME SCENE INVESTIGATION: A GUIDE FOR FIRST RESPONDERS IX (2008), <https://www.nij.ojp.gov/library/publications/electronic-crime-scene-investigation-guide-first-responders-second-edition>.

5. See *About iMessage and SMS/MMS*, APPLE.COM, <https://support.apple.com/en-us/HT207006> (last visited May 19, 2020).

6. See *Direct Messaging*, INSTAGRAM, <https://help.instagram.com/1750528395229662> (last visited May 19, 2020).

7. See *Google Maps*, GOOGLE, <https://www.google.com/maps/about> (last visited May 19, 2020).

8. See *In re Application of the United States of America for an Order Pursuant to 18 U.S.C. § 2703(d)*, 2018 U.S. Dist. 52183 (D.D.C. 2018) (holding Royal Caribbean Cruises’ on-board network used by its passengers for financial transactions was considered an electronic communications service).

9. For the purposes of this guide, and in accordance with *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010), no practical distinction will be made between electronic communication service (defined in Title I of the Electronic Communications Privacy Act (ECPA) at 18 U.S.C. § 2510(15)), and remote communication service providers (defined in Title II of ECPA (Stored Communications Act)) at 18 U.S.C. § 2711(2)).

10. For an explanation of the military search authorization process for personal electronic devices, see Major Jacqueline DeGaine, *Digital Evidence*, ARMY LAW., May 2013, at 9-12.

11. SEARCHING AND SEIZING COMPUTERS, *supra* note 4, at 77-78.

12. *Id.* at 76-79.

13. Apple recently published a ninety-two-page white paper on its most updated operating system’s security functions, which included the following description of its device encryptions:

By setting up a passcode, the user automatically enables Data Protection....The passcode is entangled with the device’s UID, so brute-force attempts must be performed under attack. A large iteration count is used to make each attempt slower. The iteration count is calibrated so that one attempt takes approximately

80 milliseconds. This means that it would take more than five and a half years to try all combinations of a six-character alphanumeric passcode with lowercase letters and numbers.... To further discourage brute-force passcode attacks, there are escalating time delays after the entry of an invalid passcode at the Lock screen. If Settings > Touch ID & Passcode > Erase Data is turned on, the device will automatically wipe after 10 consecutive incorrect attempts to enter the passcode.

See iOS SECURITY: iOS 12.3, APPLE, https://www.manuals.info.apple.com/MANUALS/1000/MA1902/en_US/apple-platform-security-guide.pdf [hereinafter iOS SECURITY] (last visited May 19, 2020).

14. The most public example of this phenomenon was Apple's refusal to assist the Federal Bureau of Investigation (FBI) in cracking the iPhone 5C that belonged to one of the shooters involved in the December 2015, San Bernardino attack. Ironically, the FBI's mishandling of the device prevented them from potentially obtaining "backups" in iCloud storage accessible with a stored communications warrant. See *Breaking Down Apple's iPhone Fight With the U.S. Government*, N.Y. TIMES, (Mar. 21, 2016), <https://www.nytimes.com/interactive/2016/03/03/technology/apple-iphone-fbi-fight-explained.html>.

15. Evidence can often be destroyed by the intrusive search itself, or by remote destruction initiated by the user. iPhone users, for example, have the ability to remotely "wipe" their devices of all stored digital evidence. See iOS SECURITY, *supra* note 13, at 82.

16. SEARCHING AND SEIZING COMPUTERS, *supra* note 4, at 78.

17. The Stored Communications Act is Title II of the Electronic Communications Privacy Act of 1986. See 18 U.S.C. §§ 2701-2712 (1986). It established both statutory privacy rights for customers in the evidence held by third party service providers and a series of judicial processes (subpoenas, court orders, and warrants—the federal analogs to the Army's new pre-referral tools) by which federal prosecutors and investigators could compel that evidence. See SEARCHING AND SEIZING COMPUTERS, *supra* note 4, at 115-138.

18. Before the passage of the Military Justice Act of 2016 (MJA16), military courts were long ago determined not to be "courts of competent jurisdictions" for purposes of the Stored Communications Act (SCA), and military judges were therefore unable to issue 18 U.S.C. § 2703 warrants and court orders. See Major Sam C. Kidd, *Military Courts Declared Incompetent: What Practitioners (Including Defense Counsel) Need to Know About the Stored Communications Act*, 40 REPORTER, no. 3, 2013 at 17, 20-21.

19. Even when willing, federal and state authorities often could not provide assistance due to jurisdictional or investigation threshold issues. See Lieutenant Colonel Thomas Dukes Jr. & Lieutenant Colonel Albert Rees Jr., *Cyberlaw Edition: Military Criminal Investigations and Stored Communications Act*, 64 A.F. L. REV. 103, 111 (2009) (Examples of such scenarios would include uniquely military offenses, such as desertion, which may only be prosecuted by court-martial; cases where no federal or state court has jurisdiction over the offense being investigated; and cases that are technically within the jurisdiction of a federal or state court, but which fall below prosecutorial thresholds, such as drug cases involving minimal amounts of controlled substances.).

20. *Id.* at 118-19.

21. SEARCHING AND SEIZING COMPUTERS, *supra* note 4, at 78.

22. See 18 U.S.C. § 2703(f) (federal analog).

23. 2019 MCM, *supra* note 3, R.C.M. 703A(f)(2).

24. *ISP List*, SEARCH, <https://www.search.org/resources/isp-list/> (last visited May 18, 2020). Also known as SEARCH, this organization's internet service provider list function offers a wealth of free information on service providers and their respective legal policies.

25. The exact definition is found in previous versions of the MCM, well before Congress turned military courts into "courts of competent jurisdiction" under the SCA. See MANUAL FOR COURTS MARTIAL, UNITED STATES, R.C.M. 703(e)(2)(B) (2016). Such a subpoena, if used before the enactment of the MJA16, would have been unenforceable if the service provider refused to turn over the evidence in question. For a more in-depth discussion, see Kidd, *supra* note 18, at 20-21. The Rules for Courts-Martial further fail to distinguish between the types of information that are sought with a pre-referral investigative subpoena vice a trial subpoena, leading one to conclude that they serve the same function.

26. See 18 U.S.C. § 2703(c)(2) (2018).

27. See 2019 MCM, *supra* note 3, R.C.M. 703A, app.15.

28. See *Id.* R.C.M. 703A(d)(2).

29. *Id.* R.C.M. 703A(a)(4)(A)-(F). While R.C.M. 703A(a)(2) and (3) purportedly allow court orders to be used to obtain certain "contents," including contents of electronic communications that have been held in storage for more than 180 days, these provisions are out of line with the decision in *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010), which held that a warrant is required to pursue any electronic communications' contents, no matter the source or age. Since *Warshak* is followed by virtually every Federal court, and thus almost assuredly to be adopted by military courts in the near future, practitioners are advised not to use RCM 703A court orders to obtain content.

30. 2019 MCM, *supra* note 3, R.C.M. 703A(a)(1)-(4).

31. *Id.* R.C.M. 703A(c)(1)(A).

32. *Id.* The House Report accompanying the 1994 amendment to 18 U.S.C. § 2703(d), the Federal analog to the RCM 703A court order, states: "This section imposes an intermediate standard to protect on-line transactional records. It is a standard higher than a subpoena, but not a probable cause warrant.... The intent of raising the standard for access to transactional data is to guard against 'fishing expeditions' by law enforcement." SEARCHING AND SEIZING COMPUTERS, *supra* note 4, at 131.

33. While evidence of this advantage is anecdotal, our office has received order returns faster than warrant returns.

34. 2019 MCM, *supra* note 3, R.C.M. 703A(c)(1)(A).

35. *JAGConnect—MJA16 MTT*, MILSUITE, <https://www.milsuite.mil/book/groups/jagconnect-mja16-mtt> (last visited June 24, 2020).

36. Some social media platforms, such as Whisper, encourage, or even require, their users to remain anonymous or semi-anonymous. See *Explainer: What is Whisper?* WEBWISE, <https://www.webwise.ie/parents/explainer-whisper/> (last visited May 19, 2020).

37. If the victim or undercover agent informed CID or the prosecutor of the messages, but for whatever reason lacks originals or even copies of said messages although remembers the suspect's username (most commonly the case when victims previously deleted the messages for a multitude of personal reasons), the government might very well lack probable cause (dependent on the judge) for a warrant and need to use a court order. Alternatively, even if the messages are provided and the government has probable cause for a warrant, it may be more advantageous to utilize a court order, which can be quickly assembled and sent to the military judge, and likewise quickly returned by the service provider.

38. See Dukes & Rees, *supra* note 19, at 113-14.

39. Respect for a suspect's Fourth Amendment rights dictates that warrants "particularly describe the place to be searched, and the persons to be seized." U.S. CONST. amend. IV. For guidance on particularity as it pertains to digital evidence searches, see *United States v. Richards*, 76 M.J. 365 (C.A.A.F. 2017).

40. While there are many sub-definitions, Cloud storage can generally be defined as the storage of data on hardware (often servers in warehouses) maintained by third-party service providers, accessible via the internet. See *Cloud Storage: What is it and how does it work?* HOW IT WORKS (Apr. 25, 2019), <https://www.howitworksdaily.com/cloud-storage-what-is-it-and-how-does-it-work/>. Cloud storage has grown exponentially over the last decade, providing individuals and businesses with vast benefits, including the ability to securely store data without using limited (and fragile) device hardware space, and to access that data from many devices. *Id.*

41. Cloud storage is typically provided by the personal electronic device maker's parent company. See *Back Up or Restore Data on Your Android Device*, GOOGLE, <https://support.google.com/nexus/answer/2819582?hl=en> (last visited May 19, 2020); *Manage and Access your Samsung Cloud Storage*, SAMSUNG, <https://www.samsung.com/us/support/answer/ANS00060518/> (last visited May 19, 2020).

42. On default settings, Apple's iCloud backup includes the following: "app data, Apple Watch backups, [d]evice settings, HomeKit configuration, [h]ome screen and app organization, iMessage, text (SMS), and MMS messages, [p]hotos and videos on your iPhone, iPad, and iPad touch, [p]urchase history from Apple services, like your music, movies, TV shows, apps, and books, [r]ingtones." *Here's What iCloud Backup Includes*, APPLE (Jan. 16, 2020), <https://support.apple.com/en-us/HT207428>.

43. See *Carpenter v. United States*, 138 S.Ct. 2206 (2018).

44. *Id.*





AROUND THE CORPS

Paralegal specialist PVT Martina Scott, wearing a bite suit, is helped off the ground by a military working dog handler during coordinated training with the 210th Field Artillery Brigade's judge advocate's office last year at Camp Casey, South Korea. (Credit: Sgt. Yesenia Barajas)



(Credit: istockphoto.com/bbrrn)

No. 1

Considerations for the New Contract Trial Attorney

A Primer on Costs, Fees, and Interest in Contract Appeal Litigation

By Major Meghan E. Mahaney

You are the newest trial attorney in the Army's Contract and Fiscal Law Division (KFLD). You've gotten up to speed on all the ongoing cases you inherited upon your arrival and are working through the issue of entitlement for a particular appeal before the Armed Services Board of Contract Appeals (the Board or ASBCA). After days of case law research, Rule 4 file¹ review, phone calls with the contracting officer, and number-crunching your way through Excel spreadsheets, you think you know the Army's chances of winning the appeal if it goes to hearing before the Board. You sit down at your computer, pull up a litigation risk assessment example to help guide you in drafting your own, and begin typing. You are almost finished with your risk assessment when you spot a section in the template for "litigation costs" and stop. What litigation costs should you be considering? If the Board were to sustain the appeal (i.e., the Army were to lose), would there be costs beyond the underlying claim amount affecting your client's financial exposure in the case?

For judge advocates (JAs) practicing contract appeal litigation for the first time, there can be a steep learning curve. While the skills required to assess a contract appeal on the merits are

not so different from those required to assess issues in non-contract-related litigation, reaching a conclusion about the overall financial risk to which the Army will be exposed by taking a case to hearing—especially if the appeal is sustained—is not necessarily intuitive for first-time practitioners.

This article will provide new JA trial attorneys an overview of some common costs and fees associated with ASBCA litigation, including those associated with the loss of a case. The purpose is to help the new JAs better understand the Army's financial exposure in any given appeal and to prepare them to better litigate before the Board, even after a loss on the merits. A trial attorney who is familiar with the costs that should be included in a financial risk assessment will be more successful in navigating the appeals to which they are assigned. Throughout the life cycles of those appeals, the trial attorney will be efficacious in providing thorough and useful advice about best courses of action to contracting officers and KFLD's Chief Trial Attorney. The article first discusses one of the most common considerations associated with losing on the merits in ASBCA litigation—the costs and attorney's fees associated with litigating against small-business appellants. These

costs and fees are statutorily derived from the Equal Access to Justice Act (EAJA),² and the discussion addresses EAJA's purpose, its relevant costs and fees, which appellants are eligible for reimbursement of those costs, and under what circumstances. The article then addresses the interest of the Contract Disputes Act (CDA)³—how it is calculated and how it can increase the Army's exposure to financial risk in litigation—as well as the general litigation costs often associated with taking an ASBCA appeal to hearing on the merits.

The Equal Access to Justice Act

The EAJA was originally enacted in 1980 as Public Law 96-481.⁴ Signed into law by President Jimmy Carter, the legislation “provides small businesses with ‘equal access to justice’” and is designed to “strike a fair balance between the Government’s obligation to enforce the law and the need to encourage business people with limited resources to resist unreasonable Government conduct.”⁵ Due to a sunset provision within the act, the legislation needed to be “permanently reauthorized” to survive past September 1984.⁶ Congress ultimately reauthorized the legislation and President Ronald Reagan signed the permanent EAJA into existence on 8 August 1985.⁷

At its core, EAJA was designed to “ensure access to justice for individuals and small businesses and organizations who are involved in civil disputes with the Federal Government.”⁸ Practically, it allowed small businesses that defeated the federal government in litigation to recover their costs,⁹ in order to “eliminate the possibility of...Pyrrhic victories”¹⁰ for businesses that would prevail on the merits of a case, but bankrupt themselves in the process. Though EAJA has endured multiple amendments since its permanent reenactment in 1985,¹¹ in practice, its effect remains largely the same: enabling small businesses to recover costs and attorneys’ fees accrued during litigation against the federal government when certain prerequisites are met.¹²

Prerequisites to Recovery Under EAJA

A party litigating against the United States (U.S.) government—such as an appellant in ASBCA litigation—is eligible to recover

“fees and other expenses incurred” in connection with the proceedings if the party meets the size requirement and is considered a “prevailing party,” so long as the position of the government was not “substantially justified.”¹³ The following sections explain how to determine a party’s EAJA eligibility based on size, how to determine whether a party has “prevailed” in a proceeding, and what constitutes a “substantially justified” position on the part of the government.

Eligible “Party” (i.e., Size Requirement)

Whether an appellant meets the definition of a “party” eligible for reimbursement under EAJA depends upon the appellant’s net worth (i.e., size) at the time of the filing of the appeal.¹⁴ The net worth cutoff amount to qualify as a small business under EAJA depends on whether the appellant seeking EAJA recovery is an individual or a business.¹⁵ For an individual, the net worth must not exceed \$2 million; for a business, the net worth must not exceed \$7 million.¹⁶ Moreover, in addition to the \$7 million cap on net worth for a business, it must also have had no more than five hundred employees at the time of the filing of its appeal.¹⁷ If an appellant has not exceeded these caps, if it “prevailed” in the litigation, and if the position of the government during that litigation was not “substantially justified,” then it is an eligible “party” for EAJA purposes and can seek recovery of fees and expenses from the government.¹⁸

“Prevailing” Party Status

While the text of EAJA defines an eligible “party” for practitioners, it does not explicitly define the term “prevailing.” What constitutes a prevailing party for EAJA award purposes has been established over the years through case law from federal circuit courts, the ASBCA, and the Supreme Court.¹⁹ Case law from the ASBCA describes a “prevailing party” as one that “succeed[s] on any significant issue in litigation which achieves some of the benefit the party sought in bringing the suit.”²⁰ In order for an appellant to establish “prevailing party” status for EAJA purposes, there must be “a Board decision sustaining the appeal” or “a consent judgment, providing a material alteration in the legal

relationship of the parties.”²¹ Notably, a Board order dismissing an appeal as moot, or a Board order dismissing an appeal by joint stipulation of the parties, will not establish prevailing party status for EAJA purposes.²² The appeal of *Tech Projects, LLC*, illustrates the type of situation in which such distinctions matter.

During the pendency of the *Tech Projects, LLC*, appeal, the contracting officer involved came to the conclusion that it was in the best interests of the Army to amend the final decision upon which the appeal was based.²³ In amending the final decision, the contracting officer agreed to pay the appellant the amount sought in its original claim, plus accrued interest.²⁴ As a result, the Army filed a motion to dismiss the appeal as moot “inasmuch as the contracting officer had granted the relief sought by Tech Projects in its claims.”²⁵ The Board granted the dismissal and denied Tech Projects’ subsequent EAJA application for fees and expenses.²⁶ Tech Projects argued that “because the government ‘surrendered before the merits hearing, giving [appellant] everything it had claimed,’” Tech Projects was the “prevailing party” for those claims.²⁷ The Board rejected this argument, clearly stating that “because Tech Projects did not secure either a decision sustaining its appeal, or a consent judgment, it lacks ‘prevailing party’ status.”²⁸ A year and a half later, the Board stood by its prevailing party analysis when it denied Tech Projects’ motion to reconsider its determination.²⁹

The Board shows no indication of shifting its approach to evaluating prevailing party status. As recently as July 2019, in the appeal of *Patriot Group International*, the Board declined to determine prevailing party status for an appellant whose appeal was dismissed as moot after the government paid the claims upon which the appeal was based.³⁰ The Board has made clear that “an EAJA applicant must show that it obtained an enforceable judgment on the merits or a court-ordered consent decree that materially altered the legal relationship between the parties....”³¹ For this reason, practitioners should be ready to combat any argument made by opposing counsel that a Board dismissal is sufficient to establish the status necessary for an award under EAJA.

*Government Position Not
“Substantially Justified”*

If an appellant qualifies as a party eligible for reimbursement under EAJA, and the appellant is also a prevailing party, then the government will reimburse the appellant for “fees and other expenses incurred...in connection with that proceeding, unless... the position of [the government] was substantially justified or...special circumstances make an award unjust.”³² In other words, while succeeding on the merits in an appeal will generally allow the appellant to be reimbursed under EAJA, it is not always the case. As noted by the ASBCA in the appeal of *Job Options, Inc.*, EAJA “was not intended as an automatic fee-shifting device.”³³ The burden to prove substantial justification, however, lies with the government³⁴ and is determined using the “administrative record [of the appeal], as a whole...”³⁵ The government positions that must be substantially justified are those leading to the litigation and those taken by government counsel during the course of the appeal.³⁶ A position is considered substantially justified if it has “a reasonable basis in law and fact,” meaning that in some circumstances, “a position can be justified even though it is not correct.”³⁷

For example, the appeal of *Job Options, Inc.*, is an appeal in which the appellant prevailed on the merits; however, the Board denied recovery under EAJA because it found the government’s position in the litigation to be substantially justified.³⁸ The Board based its substantial justification determination on several factors: its merits decision turned on close questions of fact that the Board alone could resolve; “the pre-hearing documentary record established a *prima facie* case supporting the government’s” pre-litigation actions; and the positions taken by the government during litigation were “supported by legal precedent” from cases involving similar underlying facts.³⁹ The Board further explained that it is not uncommon to find the government substantially justified in litigation where “the evidence supporting [a] contractor’s position was primarily developed and established at hearing,”⁴⁰ rather than developed during the compilation of the Rule 4 file and during discovery.

Another appeal decision that sheds light on when the government’s position will be considered substantially justified is that of *Maggie’s Landscaping, Inc. (Maggie’s)*. In *Maggie’s*, while the appellant succeeded on the merits, its success was due only to the Board searching the administrative record on its “own initiative” to find evidence to support a theory that the appellant failed to put forward.⁴¹ In situations where the basis of the appellant’s success on the merits “differs from that considered or argued by either party, and was first advanced by the Board,” it is not unreasonable for the government’s litigation position to be considered substantially justified.⁴² In *Maggie’s*, the Board denied the requested EAJA award, finding the government’s “conduct and its litigation position” reasonable in fact and law, and therefore, substantially justified within the meaning of EAJA.⁴³

Note that even if the government’s position is found to be not substantially justified, there are certain limited circumstances in which “an award of attorney’s fees still may be denied” to an appellant.⁴⁴ Denial of fees under EAJA may occur in the event that the Board determines “special circumstances” exist that would make the award “unjust.”⁴⁵ However, pinning down what constitutes such a special circumstance is challenging. The legislative history related to the original EAJA legislation tells us that the special circumstances exception is a:

...safety valve [that] helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.⁴⁶

The Board referenced this safety valve in an EAJA application opinion from 1992, in which it determined that an appellant’s conduct did establish special circumstances within the meaning of EAJA.⁴⁷ In that case, the Board explained that “[t]he sheer unreasonableness of [appellant’s] claiming for double the amount [appellant] knew

or should have known it was entitled to requires” denial of an EAJA award on the basis of the special circumstances exception.⁴⁸ Since that mention in 1992, however, it does not appear to be a theme in further ASBCA case law.

A little more clarity on what constitutes special circumstances under EAJA can be found in opinions from the Court of Federal Claims (COFC). In a 2011 opinion, COFC stated that “[c]ourts look to equitable principles such as the doctrine of ‘unclean hands’ in determining whether there are special circumstances that would make an Equal Access to Justice Act... award unjust.”⁴⁹ Specifically, in that 2011 opinion, COFC describes “unclean hands” as situations where “a plaintiff purposefully takes advantage of government misconduct and subsequently challenges that same misconduct,”⁵⁰ using as an example a case in which “a plaintiff successfully overturned a regulatory fine on procedural grounds but knowingly violated the governing statute.”⁵¹ This gives the impression that situations qualifying as unjust under the special circumstances exception of EAJA appear to be those in which appellants try to game the system or circumvent principles of fairness.

Given the dearth of ASBCA EAJA award cases that turn on the special circumstances exception, a new trial attorney should know that the exception exists and be ready to consider arguing the exception if the appellant’s conduct implicates it. However, until such a time presents itself, that trial attorney will be much better served by focusing their time on understanding the three EAJA prerequisites already discussed—eligible party status, prevailing party status, and substantial justification. With an understanding of those three prerequisites, a new trial attorney will be well on their way to seeing the whole picture when it comes to evaluating the government’s risk exposure for any given case.

Recoverable Fees and Expenses

If an appellant is a prevailing party within the meaning of EAJA, and the government failed to show its position was substantially justified, that appellant is entitled to “fees and other expenses incurred...in connection with” the appeal.⁵² The Equal Access to Justice Act states that recoverable fees

and expenses include reasonable expenses associated with experts, studies, analyses, engineering reports, or tests “necessary for the preparation of the party’s case,” as well as reasonable attorney or agent fees.⁵³

The statute caps recoverable attorney and agent fees as \$125 per hour. In the absence of special circumstances, it caps recoverable expert witness compensation at the “highest rate” paid by the government to its own expert witnesses.⁵⁴ Note that expenses incurred in preparation of the claim upon which an appeal is based are generally not reimbursable under EAJA, only those expenses incurred while preparing to file the appeal and during its subsequent litigation.⁵⁵ Moreover, the Board may reduce or deny the award of any expenses incurred due to an appellant “engag[ing] in conduct which unduly and unreasonably protracted the final resolution of” the appeal.⁵⁶ The following sections examine the limits on the recoverable fees and expenses described above.

Recoverable Attorney Fees

As noted above, recoverable attorney fees generally cannot exceed \$125 per hour. However, EAJA allows for recovery of more than this \$125 rate in certain limited circumstances.⁵⁷ A prevailing party will be reimbursed for attorney fees exceeding the \$125 rate if the government concludes “by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agency for the proceedings involved, justifies a higher fee.”⁵⁸ In a 2017 ASBCA decision, the Board made it clear that it cannot approve the cost of living or special factor increases absent a government agency determination.⁵⁹ As noted in the appeal of *ABS Baumaschinenvertrieb, GmbH*, the Board will not award attorney fees exceeding the statutory \$125 rate where “the Department of Defense has not issued such a regulation authorizing enhancement of fees based on cost of living or any other special factor.”⁶⁰ Practically, this means that a government trial attorney is usually safe to use the \$125-per-hour rate for attorney fees to estimate potential reimbursement by the appellant pursuant to an EAJA award.

Appeal and Hearing Preparation Expenses

Aside from fees recoverable due to the billable hours of attorneys, certain expenses associated with legal work are also recoverable. These recoverable expenses include, but are not limited to: legal assistants, copying costs, attorney travel costs, hearing transcript costs, phone bills, and trial exhibit preparation.⁶¹ The reasonableness of these expenses is determined by the “prevailing market rates for the kind and quality of the services furnished” and not limited by government travel and per diem rates.⁶² Generally, the Board will award reimbursement of reasonable travel expenses to a prevailing party so long as those expenses are “itemized and documented.”⁶³

Witness Expenses

In addition to reasonable expenses incurred from the legal work involved in an appeal, certain witness expenses are also recoverable—for example, reasonable expert witness fees.⁶⁴ These fees are capped at the amount paid by the government to its own expert witnesses in the case.⁶⁵ Travel expenses associated with expert witnesses are also generally recoverable when those expenses are reasonable and “itemized and documented.”⁶⁶ The standard for reasonableness is based on “prevailing market rates” and is not limited to government travel and per diem rates.⁶⁷

Expenses for fact witnesses, however, are generally not recoverable,⁶⁸ though “certain payments to non-employees and consultants may be compensable.”⁶⁹ One example of such a case is in *Optimum Services, Inc.* In *Optimum Services, Inc.*, the Board awarded the appellant reasonable expenses associated with a non-employee consultant who had been paid to do work related to the appeal.⁷⁰ Generally speaking, unless a fact witness for the appellant is a non-employee consultant of some type, expenses for that witness will not be reimbursable under EAJA at the Board.

The Procedural Process

A government trial attorney will want to be aware of how recovery under EAJA works as early as the initial risk assessment phase of litigation. However, in practice, the detailed potential recovery of the appellant under EAJA will not become the primary

focus for that attorney until the “final disposition” of the appeal has been reached.⁷¹ An appellant has thirty days from the date of its “final disposition” decision on the merits to submit its EAJA application to the Board.⁷² The application should show that the appellant is “a prevailing party and is eligible to receive an award” under EAJA, and should include “the amount sought, including an itemized statement[s]...stating the actual time expended and the rate at which other fees were computed.”⁷³

Once the government receives the EAJA application filed by the appellant, it has thirty days to file an answer.⁷⁴ If the government fails to answer the application within those thirty days—absent requesting an extension or filing a statement of intent to negotiate—the Board has the discretion to treat the non-answer “as a general denial to the application.”⁷⁵ If the government files its answer in a timely manner, the appellant has fifteen days to reply—should they choose to do so.⁷⁶ Generally, the Board will decide the EAJA application based on the arguments of the parties in the application, answer, and reply, along with the evidence submitted in support of those arguments.⁷⁷

Addendum I to the Board Rules is designed “to assist the parties in the processing of EAJA applications for award of fees and other expenses incurred in connection with appeals” and provides detailed information for parties litigating an EAJA application at the conclusion of an appeal.⁷⁸ If a trial attorney finds themselves in receipt of an EAJA application, this addendum is the first place they should look to familiarize themselves with the requirements of the impending process. Once familiar with the procedural and substantive requirements for an appellant to recover under EAJA, post-merits litigation should be easily manageable.

Contract Disputes Act Interest

Another cost associated with the loss of government contract litigation is Contract Disputes Act (CDA)⁷⁹ interest. “Accrued interest associated with disputes against the United States is generally not recoverable unless expressly allowed by a statute or the underlying contract.”⁸⁰ The CDA, however, is just such a statute, and it allows recovery of interest accrued on a claim found due

against the government.⁸¹ Specifically, the CDA states: "Interest on an amount found due a contractor on a claim shall be paid to the contractor for the period beginning with the date the contracting officer receives the contractor's claim...until the date of payment of the claim."⁸² In other words, if the appellant succeeds in an appeal at the ASBCA, the Army will need to pay the appellant interest on the amount it is owed, dating all the way back to the original claim that formed the basis of the ASBCA litigation.⁸³

The four factors involved in calculating the interest owed by the government to the appellant on a meritorious claim under the CDA are: the date the contracting officer received the appellant's claim that led to the litigation; the date the Army will pay the amount found due; the amount found due to the appellant; and the appropriate interest rates.⁸⁴ The CDA instructs that, "[i]nterest shall accrue and be paid at a rate which the Secretary of the Treasury shall specify as applicable for each successive [six]-month period."⁸⁵ These rates specified by the Secretary of the Treasury are published in the Federal Register twice a year⁸⁶ and are also located on the Department of the Treasury website.⁸⁷ In practice, those who regularly engage in government contract litigation will use the rates published by the Secretary of the Treasury to create some version of an interest calculator for use with claim amounts found due.⁸⁸ Trial attorneys who are new to an office such as KFLD should use whatever CDA interest rate calculator is preferred by their workplace.

Because cases litigated in front of the ASBCA can take years to resolve,⁸⁹ the practical effect of taking a case to hearing and losing is that the government may pay much more than the original amount claimed by the appellant. For example, the CDA interest on a claim of \$250,000 over a five-year period between January 2015 and January 2020 would amount to \$32,672.24.⁹⁰ The CDA interest on a claim of \$2 million over that same five-year period would amount to \$261,377.89.⁹¹ For contractor-appellants performing expensive government contracts, it is not abnormal for appeals to involve claimed amounts of over \$10 million.⁹² For a claim

of \$15 million over the same five-year period as used in previous examples, CDA interest would amount to \$1,960,334.18.⁹³ Depending on the size of the amount found due to the appellant, and the time it took to move from claim submission to appeal decision by the Board, the government could face significant extra costs in the event of a post-hearing loss. Trial attorneys should consider estimated CDA interest as part of the overall risk to which the Army is exposed when analyzing any given case on their docket.

Litigation Costs, Generally

In addition to the statutorily based costs discussed earlier, there are other litigation costs that a trial attorney should consider when assessing the government's overall risk for an appeal moving forward to hearing. Those include costs associated with discovery, depositions, and witnesses testifying at hearings.

With respect to discovery and depositions, costs will depend on a number of factors. Factors with significant impact include: range and complexity of information needed to determine entitlement in a case; level of difficulty for locating documents crucial to entitlement; and whether expert reports are required. If the issues underlying an appeal are complex and entitlement hinges on answering many close questions of fact, greater costs become more likely. To answer close factual questions, a trial attorney may have to search for and evaluate more documents, as well as find and talk to more potential witnesses. As the number of people identified with information necessary to understanding the underlying facts of a case goes up, so do deposition costs. Once an attorney can identify the number of individuals they intend to depose, calculation of costs associated with those depositions are simple to estimate. The costs include the hiring of a deposition or court-reporting firm to transcribe and record the depositions and produce transcripts of those depositions, as well as potential travel costs for the trial attorney(s) taking the depositions. These costs combined can easily result in the deposition of just one person costing several thousand dollars.⁹⁴

In some instances, a lengthy period of time between contract performance and filing of a claim by the appellant can create unexpected costs. For example, if the government has since stopped using a particular electronic filing system or software relevant to issues in an appeal, the government may need to hire a contractor to locate or retrieve documents relevant to the litigation. While such a scenario will not apply in every case, it illustrates that a trial attorney should be ready to issue-spot circumstances unique to each appeal that may affect costs in atypical ways.

If a trial attorney anticipates taking the appeal to a contested hearing, costs related to fact witnesses will depend on the number of individuals the government will need to call to testify at the hearing. A trial attorney can anticipate the per-person cost of government fact witnesses to range on average from around \$2,000 to around \$4,000.⁹⁵ In some cases, entitlement will turn on an issue requiring expert assistance or an expert report. In such cases, a cost estimate will depend on the type of expertise required, as well as market rates for the type of expertise and report needed. This is something that a trial attorney will need to research as it comes up in a particular appeal, understanding that these expert-related costs can far exceed those for fact witnesses.

In practice, many of the dollar amounts used to estimate these litigation costs will come from an office's institutional knowledge and experience. A new trial attorney need only walk down the hall to the office of one of their teammates and ask what average costs have been for deposition transcript services, or witness costs, or any cost they have identified as relevant to an appeal on which they are working. Chances are that one of their colleagues will have recent numbers for them to use as a starting point for their own cost estimates. With a little time and—unfortunately—a little math, that trial attorney will be well on their way to identifying the total costs impacting the overall financial risk to which the government could be exposed.

Conclusion

When beginning an assignment in a new area of practice, a JA will have a lot of information to digest and apply in order to be successful. The sooner a new trial attorney understands that there are litigation costs beyond those attributable to an appeal's underlying claim, the sooner they will be able to provide an accurate assessment of financial risk to stakeholders in the appeals process, such as the relevant contracting officer and the Chief Trial Attorney, KFLD. A solid litigation strategy will always involve understanding the risks present in a given case, financial or otherwise. By understanding the various factors that can affect overall financial risk in a case—awards of attorney fees, statutory interest owed, and discovery, deposition, and hearing costs—an attorney will be better situated to strategize with their client, anticipate potential litigation issues, mitigate risks, and steer an appeal to its best possible outcome. **TAL**

MAJ Mahaney is currently the Chief of National Security Law in Fort Drum, New York.

Notes

1. The "Rule 4 file" is the appeal file compiled by the parties that consists of the documents that the government and the appellant believe to be "relevant to the appeal, including: (1) The decision from which the appeal is taken; (2) The contract, including pertinent specifications, amendments, plans, and drawings; [and] (3) All correspondence between the parties relevant to the appeal, including any claim in response to which the decision was issued." ARMED SERVS. BD. OF CONT. APPEALS, RULES OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS, rule 4(a) (July 21, 2014), <http://www.asbca.mil/Rules/forms/Final%20Rule%20Formatting%20pgl.pdf#page=20>. See also 48 C.F.R. Ch. 2, App. A, Pt. 2.
2. Equal Access to Justice Act, 5 U.S.C. § 504 (2018).
3. 41 U.S.C. §§ 7101–7109.
4. Lowell E. Baier, *Reforming the Equal Access to Justice Act*, 38 J. LEGIS. 1, 22 (2012).
5. *Id.* at 22–23 (citing Presidential Statement on Signing H.R. 5612 into Law, 16 WEEKLY COMP. PRES. DOC. 2381 (Oct. 21, 1980)).
6. *Id.* at 23.
7. *Id.* at 23–24.
8. *Id.* at 24 (citing 131 Cong. Rec. 16,916 (1985) (statement of Rep. Kastenmeier)).
9. *Id.* (citing 131 Cong. Rec. 20,354 (1985) (statement of Sen. Bumpers)).
10. *Id.* (citing 131 Cong. Rec. 20,354 (1985) (statement of Sen. Domenici)).

11. *Id.* at 25.
12. 5 U.S.C. § 504. See also Major Shay Standford, *The Equal Access to Justice Act: Practical Applications to Government Contract Litigation*, ARMY LAW., Apr. 2012, at 4, 4.
13. 5 U.S.C. § 504(a)(1).
14. 5 U.S.C. § 504(b)(1)(B). See also ARMED SERVS. BD. OF CONT. APPEALS, RULES OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS, ADDENDUM I, para. (c)(2) (21 July 2014), <http://www.asbca.mil/Rules/forms/Final%20Rule%20Formatting%20pgl.pdf#page=20> [hereinafter ASBCA RULES: ADDENDUM I].
15. 5 U.S.C. § 504(b)(1)(B). The "business" category includes "any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization..." *Id.*
16. *Id.* Note, however, that certain non-profit organizations and charitable cooperative associations—as well as small entities defined in 5 U.S.C. § 601 (for purposes of 5 U.S.C. § 504 (a)(4))—can be eligible parties "regardless of the [ir] net worth." *Id.*
17. *Id.*
18. 5 U.S.C. § 504(a)(1), (b)(1)(B).
19. See, e.g., Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res., 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001); Rice Services, Ltd. v. United States, 405 F.3d 1017, 1025 (Fed. Cir. 2005); Brickwood Contractors, Inc. v. United States, 288 F.3d 1371 (Fed. Cir. 2002), cert. denied, 537 U.S. 1106, 123 S. Ct. 871, 154 L. Ed. 2d 775 (2003); Lasmer Indus., Inc., ASBCA No. 56411, 2010-2 BCA ¶ 34,491, 170,123.
20. Maggie's Landscaping, Inc., ASBCA No. 56748, 2012-1 BCA ¶ 34,974, 171,917 (citing Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)).
21. See *Lasmer Indus., Inc.*, 2010-2 BCA ¶ 34,491, 170,123; see also Tech Projects, LLC, ASBCA No. 58789, 2016-1 BCA ¶ 36,443, 177,616.
22. See Patriot Grp. Int'l, Inc., ASBCA No. 60950, 2019-1 BCA ¶ 37,399, 181,807.
23. *Tech Projects, LLC*, 2016-1 BCA ¶ 36,443, 177,615.
24. *Id.*
25. *Id.*
26. *Id.* at 177,616.
27. *Id.*
28. *Id.*
29. Tech Projects, LLC, ASBCA No. 58789, 2018-1 BCA ¶ 36,946, 180,041.
30. Patriot Grp. Int'l, Inc., ASBCA No. 60950, 2019-1 BCA ¶ 37,399.
31. *Tech Projects, LLC*, 2018-1 BCA ¶ 36,946 (citing Rice Services, Ltd. v. United States, 405 F.3d 1017, 1025 (Fed. Cir. 2005)).
32. Equal Access to Justice Act, 5 U.S.C. § 504(a)(1) (2018).
33. Job Options, Inc., ASBCA No. 56698, 2011-1 BCA ¶ 34,663, 170,761 (citing Gavette v. OPM, 785 F.2d 1568, 1578–79 (Fed. Cir. 1986); Gava v. United States, 699 F.2d 1367 (Fed. Cir. 1983)).
34. *Id.* (citing Cmty. Heating & Plumbing Co. v. Garrett, 2 F.3d 1143, 1145 (Fed. Cir. 1993); Oneida Construction, Inc., ASBCA No. 44194 et al., 95-2 BCA ¶ 27,893).
35. 5 U.S.C. § 504(a)(1).
36. Maggie's Landscaping, Inc., ASBCA No. 56748, 2012-1 BCA ¶ 34,974, 171,918.
37. *Id.* (citing Pierce v. Underwood, 487 U.S. 552, 566 n.2, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)).
38. See *Job Options, Inc.*, 2011-1 BCA ¶ 34,663.
39. *Id.* at 170,761.
40. *Id.*
41. *Id.* at 171,919.
42. *Id.* (citing Henry Angelo & Co., ASBCA No. 43669, 95-1 BCA ¶ 27,426, 126,684).
43. *Id.*
44. Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part Two)*, 56 LA. L. REV. 1, 93 (1995). See also Ideal Electronic Security Company, ASBCA No. 49547, 99-1 BCA ¶ 30,228, 149,545.
45. Equal Access to Justice Act, 5 U.S.C. § 504(a)(1) (2018).
46. Sisk, *supra* note 44, at 93–94 (citing H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11 (1980)).
47. Coastal Dry Dock & Repair Corp., ASBCA Nos. 31894 & 36754, 92-1 BCA ¶ 24,494, 122,244 (where the Board denied appellant's EAJA application in its entirety because (1) appellant was ineligible due to number of employees and (2) appellant performed only half the work required in its contract but submitted a claim requesting payment for performance of the entire contract).
48. *Id.*
49. Greenhill v. United States, 96 Fed. Cl. 771, 778 (2011) (citing Air Transp. Ass'n of Can. v. Fed. Aviation Admin., 156 F.3d 1329, 332 U.S. App. D.C. 301 (D.C. Cir. 1998)) (where the Court of Federal Claims determined there was no evidence that plaintiff's incorrect answer on a government form was intended to deceive the Department of Justice, and therefore the incorrect answer did not constitute special circumstances that would make an EAJA award unjust).
50. *Id.* (citing Oguachuba v. INS, 706 F.2d 93, 98 (2d Cir. 1983); United States Dep't of Labor v. Rapid Robert's, Inc., 130 F.3d 345, 349 (8th Cir. 1997)).
51. *Id.* (citing United States Dep't of Labor v. Rapid Robert's, Inc., 130 F.3d 345, 349 (8th Cir. 1997)).
52. 5 U.S.C. § 504(a)(1).
53. 5 U.S.C. § 504(b)(1)(A).
54. 5 U.S.C. § 504(b)(a)(A).
55. See *Arapaho Communications, Inc.*, ASBCA No. 48235, 98-1 BCA ¶ 29,563, 146,544. In *Arapaho Communications*, the Board stated, "We have previously held that fees incurred prior to receipt of the contracting officer's final decision should not be reimbursed in the absence of a specific showing that they were attributable to the adversary adjudication which is the subject of the Act." *Id.* (quoting Harrell Patterson Contracting, Inc., ASBCA Nos. 30801, 30802, 30803, 32025, 32208, 33740, 33741, 88-1 BCA ¶ 20,510).
56. 5 U.S.C. § 504(a)(3).
57. See 5 U.S.C. § 504(b)(1)(A).

58. 5 U.S.C. § 504(b)(1)(A) (emphasis added).
59. *Optimum Services, Inc.*, ASBCA Nos. 58755 & 59952, 2017-1 BCA ¶ 36,816, 179,430 (citing *Freedom NY, Inc.*, ASBCA No. 43965, 2009-1 BCA ¶ 34,097, 168,595; *ABS Baumaschinenvertrieb, GmbH*, ASBCA No. 48207, 2001-2 BCA ¶ 31,549, 155,826–27; *Arapaho Communications, Inc.*, 98-1 BCA ¶ 29,563, at 146,544).
60. *ABS Baumaschinenvertrieb, GmbH*, 2001-2 BCA ¶ 31,549, 155,826–27.
61. *See Optimum Services, Inc.*, 2017-1 BCA ¶ 36,816, at 179,431.
62. 5 U.S.C. § 504(b)(1)(A).
63. *Optimum Services, Inc.*, 2017-1 BCA ¶ 36,816 (citing *Arapaho Communications, Inc.*, 98-1 BCA ¶ 29,563; *Jay-Brant General Contractors*, ASBCA No. 51891, 2017-1 BCA ¶ 36,816, 179,430).
64. 5 U.S.C. § 504(b)(1)(A).
65. *Id.* (“no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved”). Note that expert fees will not be capped at a lower limit imposed by a Department of Defense regulation if the government exceeds the limits of the regulation when paying its own experts in the case. *See Optimum Services, Inc.*, 2017-1 BCA ¶ 36,816, at 179,430. In *Optimum Services, Inc.*, the government argued that appellant’s expert witness fees should be limited to the GS-15 pay scale limit set forth in the Defense Federal Acquisition Regulation Supplement, which stated that “payment to each expert consultant for personal services under 5 U.S.C. § 3109 shall not exceed the highest rate fixed by the Classification Schedules for grade GS-15.” *Id.* (quoting 5 C.F.R. 304.105(a) (2018)). The Board rejected the government’s argument because the government “admitted that it paid its own experts in excess for the DFARS cap” and found that the appellant was “entitled to be compensated up to the same rate paid by the government.” *Id.*
66. *Optimum Services, Inc.*, 2017-1 BCA ¶ 36,816, at 179,431.
67. *Id.*
68. *Id.* (“The Board has long held that fees of lay witnesses are generally not reimbursable.”) (citing *Walsky Constr. Co.*, ASBCA No. 41541, 95-2 BCA ¶ 27,889, 139,137). *See also* *K&K Indus., Inc.*, ASBCA No. 61189, 2019-1 BCA ¶ 37,353, 181,629.
69. *Optimum Services, Inc.*, 2017-1 BCA ¶ 36,816.
70. *Id.*
71. Equal Access to Justice Act, 5 U.S.C. § 504(a)(2) (2018).
72. *Id.*
73. *Id.*
74. ASBCA RULES: ADDENDUM I, *supra* note 14, para. (j) (1).
75. *Id.*
76. *Id.* para. (k).
77. *See id.* para. (l)(1) (noting that “further proceedings will be held only when necessary for full and fair resolution of the issues arising from the application”).
78. *See generally id.*
79. Contract Disputes Act, 41 U.S.C. §§ 7101–7109 (2018).
80. Lieutenant Colonel (Retired) Timothy A. Furin, *An Overview of the Judgment Fund and How Its Availability can Impact Claim Settlements*, ARMY LAW., Issue 3 2019, at 31, 32.
81. *Id.* (citing 41 U.S.C. § 7109(a)).
82. 41 U.S.C. § 7109(a)–(b).
83. If an appellant raises the issue of Prompt Payment Act (PPA) interest in an appeal, it is important to remember that the rules governing Contracts Dispute Act (CDA) interest owed during a contract dispute are different than those for Prompt Payment Act (PPA) interest during a dispute. Prompt Payment Act, 31 U.S.C. §§ 3901–3907 (2018). Under the PPA, the government generally must pay interest to contractors on “payments [that are] otherwise due and owed [but] are paid late.” *Innovative Refrigeration Concepts*, ASBCA Nos. 48625, 49475, 2001-1 BCA ¶ 31,250, 154,336 (citing 31 U.S.C. §§ 3901–3907). However, unlike interest under the CDA, interest under the PPA does not accrue when the delay in payment is due to a bona fide dispute between the government and contractor “over the amount of the payment or other issues concerning compliance with the terms of a contract.” 5 C.F.R. 1315.10(c)(1); *see also* FAR 32.907(a). This means that PPA interest generally will not have as significant an impact on an appeal’s overall financial risk as CDA interest will. *Id.*
84. 41 U.S.C. § 7109(a)–(b).
85. 41 U.S.C. § 7109(b).
86. CONTRACT & FISCAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, CONTRACT ATTORNEYS DESKBOOK ch. 20, pt. V, para. B.4.b (2019).
87. *Id.* ch. 20, n.10 (citing *Interest Rates*, U.S. DEP’T OF THE TREASURY, <https://www.fiscal.treasury.gov/prompt-payment/rates.html> (last visited Feb. 15, 2020)).
88. *See, e.g., CDA Interest Calculator*, CROWELL MORING, <https://www.crowell.com/Practices/Government-Contracts/Claims/CDA-Interest-Calculator> (last visited June 4, 2020) [hereinafter *CDA Interest Calculator*].
89. For example, while working as a trial attorney at the Army’s Contract and Fiscal Law Division (KFLD), one of the author’s assigned appeals involved at least one claim filed with a contracting officer in the summer of 2014, a hearing at the Armed Services Board of Contract Appeals (ASBCA) in 2017, and a post-hearing brief filed that same year. The ASBCA issued its decision for the case on 12 May 2020, approximately three years after the hearing.
90. *CDA Interest Calculator*, *supra* note 88 (input 250,000 as claim amount; 19JAN15 as the start date; 20JAN20 as the end date).
91. *Id.* (input 2,000,000 as claim amount; 19JAN15 as the start date; 20JAN20 as the end date).
92. *See, e.g., Appeal of Kellogg Brown & Root Srvc. Inc.*, ASBCA No. 58175, 2018-1 BCA ¶ 37,006, 180,219 (where appellant asserted a claim of \$11,483,487 against the government); *Appeal of Kellogg Brown & Root Srvc. Inc.*, ASBCA No. 58081, 2017-1 BCA 36,595, 178,234 (where appellant asserted a claim of \$14,707,191 against the government).
93. *CDA Interest Calculator*, *supra* note 88 (input 250,000 as the claim amount; 19JAN15 as the start date; 20JAN20 as the end date).
94. Based on the experience of this author while working as a trial attorney in government contract litigation at KFLD between 2015 and 2017.
95. Based on the experience of this author while working as a trial attorney in government contract litigation at KFLD between 2015 and 2017.



(Credit: istockphoto.com/oatawa)

No. 2

Assessing Leaders from the Bottom Up

By Major Patrick R. Sandys

Our sons and daughters of this nation deserve good leadership. If you look at readiness, if you look at combat power, the most important element of that is not technology. It's not the guns, the planes, the ships. It's not the weapons. It's not the computers. It's the people, and, most importantly, it's the leaders.¹

In November 2019, 534 judge advocates responded to a survey about the impact that leaders have on subordinates in the Judge Advocate General's (JAG) Corps.² Ninety percent of respondents agreed that leaders were an important factor when deciding whether to remain on active duty, and nearly two-thirds of respondents agreed that they thought about leaving active duty because of experiences with past or present leaders.³ In addition, sixty-six percent indicated that if they had the chance to comment on a leader's ability, they would. The results of this survey, and comments provided by respondents, strongly indicate that good leadership is imperative to enhancing the strength of the JAG Corps. Further, it shows a clear appetite of junior judge advocates to provide feedback about their leaders. Which raises the questions: Can the JAG Corps leverage junior judge advocates to better assess their leaders, and what would that process or procedure look like?

The Army approaches the assessment of its leaders from the top down; that is, the Army vests total responsibility in an officer's rater and senior rater when assessing a subordinate's leadership ability. This method, however, ignores a vital player in the assessment of a leader: subordinates led by the evaluated officer. By eschewing this vital information, the Army only assesses its young leaders through the lens of a superior who has no personal

experience working *for* the evaluated officer. This gives rise to the very realistic possibility that poor leadership qualities go unidentified until they rise to a level requiring greater scrutiny.⁴

Though not insulated from these concerns, the JAG Corps is in a unique position to address this blind spot. The Judge Advocate General (TJAG) of the Army has statutory and regulatory authority over his Corps that allows him to create additional methods of management and assessment to better identify quality leaders and to help those who need to remedy their shortcomings.

This article proposes TJAG implementing a form of "subordinate review"⁵ that will require subordinates to provide feedback regarding their immediate supervisor's leadership successes and shortfalls. This will provide much-needed information to better develop leadership skills and desirable qualities of the individual. Moreover, when aggregated, these reviews will enhance the JAG Corps's ability to develop and identify leaders of the future. The benefits would extend well beyond these two practical applications by creating "employee engagement"⁶ and improving what psychologists refer to as an increased sense of "procedural justice."⁷ This is more than a convenient thought experiment. Rather, multiple studies and real-world initiatives identify and elaborate on the positive effects of engaging subordinates and the benefits of seeking their feedback.⁸

This article begins by identifying the blind spot inherent in the Army's assessment of leadership and discusses TJAG's authority to create and implement meaningful initiatives within the Corps to correct the deficiency. Next, it examines the reasons why subordinate review is critical to the development of leaders within the JAG Corps, highlighting the many positive effects that occur when an organization seeks to increase employee engagement. Finally, a proposal lays out a simple form of upward feedback, and it addresses the multiple concerns identified in comments respondents made in the Survey.⁹

Army Leadership Doctrine's Blind Spot

Army Doctrine Publication (ADP) 6-22 defines leadership as "the activity of influencing people by providing purpose, direction, and motivation to accomplish the mission and improve the organization."¹⁰ This description intimates that the Army believes leadership is a skill that can be developed, rather than an unchanging quality one possesses or does not possess.¹¹ To this end, the Army has created Army Regulation (AR) 600-100, *Army Professional*

necessary."¹³ To achieve this goal, a leader must effectively, "through words and personal example...inspire purpose, provide direction, and when required motivation."¹⁴ Doctrine describes purpose, direction, and motivation.

Purpose is something that "gives subordinates a reason to achieve a desired outcome."¹⁵ Direction is the ability to communicate "what to do. Providing effective direction requires that leaders communicate the desired end state for the direction they provide."¹⁶ Finally, for a leader to motivate people in the organization, he or she must "understand others' needs and desires, to align and elevate individual desires into team goals, and to inspire other[s] to accomplish those larger goals."¹⁷ Notable in each definition is the requirement of a leader to affect his or her subordinates in a positive and meaningful way.

How, then, does the Army and, more specifically, a rater or senior rater, know whether a leader is effectively influencing his or her followers? The Army places the responsibility for evaluating the leaders of tomorrow on officers senior to the rated officer.¹⁸ Yet, a rater and senior rater have no meaningful or systematic way to query a

discussed in both company grade²³ and field grade²⁴ OERs, are the core competency of "Leads" and the core attribute of "Character." To assess both the "leads" competency and the "character" attribute, a rater and senior rater must consult both definitions in ADP 6-22 and comment on the rated officer's ability to meet both definitions.²⁵ The OER is the primary (and some would argue the sole) means through which an officer's leadership abilities and potential are evaluated.²⁶

A rater and senior rater have extensive guidance on how to evaluate their subordinates. A review of AR 623-3, as well as the associated Department of the Army Pamphlet (DA Pam) 623-3, shows that it makes no mention of a rater or senior rater's obligation to seek input from a leader's subordinates. Instead, both documents are replete with advice empowering a rater or senior rater to render an "independent assessment of how well the rated Soldier met duty requirements and adhered to the professional standards of the Army's Officer Corps."²⁷ The Army tells rating officials that "[p]erformance will be evaluated by observing actions, demonstrated behavior, and results from the point of view of the Army Leadership Requirements Model and responsibilities identified on evaluation reports and support forms."²⁸ This guidance does not contemplate the involvement of subordinates or encourage a rating official to seek and consider such information; but, the lack of subordinate input does not stop with the evaluation process.

The Army's Method of Assessing and Developing Leaders—Experiential Learning

When it comes to developing leaders, Army doctrine effectively ignores those most affected by the superior. Doctrinally, the Army recognizes three "developmental domains that shape critical learning experiences: operational, institutional, and self-development."²⁹ The Army describes each domain as "dynamic and interconnected,"³⁰ requiring "a continuous cycle of education, assessment, and feedback...from various sources to maximize mission readiness and to develop Army professionals."³¹ These three domains operate cyclically or simultaneously for leaders to draw lessons from to develop themselves.

When it comes to developing leaders, Army doctrine effectively ignores those most affected by the superior

and Leadership Policy, to guide the force and provide a methodology by which to develop leaders.¹² These documents focus on how an officer leads subordinates. They, however, do not provide or contemplate an avenue for subordinates to comment on their supervisor's performance. Examining how the Army defines a leader, and a brief recitation of the evaluation process, reveals that the Army's method of assessing its leaders—who grow tremendously through experiential learning—contains a glaring gap: one TJAG can fix.

Army Leadership Defined

The Army expects a leader to influence people by providing purpose, direction, and motivation. Influence is the process of "persuading people to do what is

leader's subordinates to check how he or she is performing. Instead, the primary assessment tool is an annual Officer Evaluation Report (OER) with required or recommended counseling leading up to the OER.¹⁹

Officer Evaluation Process

To aid senior officers in evaluating their subordinates, the Army created the "Leadership Requirements Model."²⁰ The model articulates the standards used to measure an officer's performance, outlining the institutional expectations of those in leadership positions.²¹ The model centers "on what a leader is (attributes—BE and KNOW) and what a leader does (competencies—DO)."²²

Most relevant to this article, and the common attribute and competency

Though AR 600-100 recognizes that feedback from multiple sources is required to properly educate and mold a leader, it provides little guidance from where that feedback should derive. There is no mention of feedback or subordinate-like review in either the “institutional” or “self-assessment” domains, and only a single mention of “assessment” and “feedback” in the subparagraph dealing with operational assignments.³² According to this paragraph, “the majority of professional development occurs while in operational assignments, learning from role models, and experience as a result of performing assigned duties.”³³ Though not explicitly stated, it would appear that assessment and feedback in this context means commentary from those senior to the developing leader.

Throughout AR 600-100 and ADP 6-22, there is no articulated way for a leader to learn from subordinates. This is not to say that all leaders are ignoring subordinate input. Undoubtedly, some seek it out informally. Until a mechanism exists that allows subordinates to provide meaningful input into their immediate leaders’ abilities, though, this knowledge gap will almost certainly persist. The result will be officers continuing to cycle through the three domains of development without an opportunity to identify their strengths and weaknesses from the perspective of those they lead.

Similarly, rating officials will continue to operate without critical information necessary to rate a subordinate, as well as information to identify meaningful avenues of mentorship and coaching. The solution is a formal mechanism to allow for subordinate input, which in the case of the JAG Corps, TJAG does have authority to implement.

The Judge Advocate General’s Authority to Implement Change

The Judge Advocate General has the ability to implement subordinate review without seeking additional authority or permission from any higher headquarters. Notably, TJAG possesses statutory authority to “direct the members of the Judge Advocate General’s Corps in the performance of their duties.”³⁴ As the leader of a “special branch”³⁵ within the military, TJAG in fact

has statutory and regulatory responsibility to manage and supervise the members of the Corps.³⁶ This statutory and regulatory language provides TJAG plenary authority (and responsibility) to assign, educate, manage, and direct the officers within his or her Corps.

Given this authority, TJAG can implement additional forms of assessment that augment the Army’s established assessment and evaluation processes.³⁷ The proposed questionnaire is not a departure from the structure of current Army assessments; it does not seek to redefine the Army’s method of assessing leadership. Instead, the questions seek to understand the assessed officer’s current abilities as defined in ADP 6-22 and provide meaningful information to the rated officer’s supervisor to help create efficacious education, tailored mentorship, and thoughtful

self-assessment. As such, an Upward Feedback Survey (UFS) is simply another method of information gathering to feed into and inform this “continuous cycle of education, assessment, and feedback.”³⁸ The JAG Corps would not be the first global organization to embark on improving leaders through subordinate feedback.

Allowing Subordinate Review Will Enhance Leadership Development and Create Meaningful Engagement

The idea of allowing subordinates to provide feedback about their superiors’ abilities is not a novel one. For decades, behavioral psychologists have studied the effects of seeking and encouraging followers to comment on the efficacy of a specific leader or an organization’s

leadership in general.³⁹ Empirical studies conducted in academic experiments,⁴⁰ as well as real-world initiatives conducted by businesses like Google,⁴¹ well document the multitude of positive effects on morale, employee engagement, and leadership development. The JAG Corps can easily adopt and adapt these methods within the current assessment methodologies employed to develop and identify leaders. The key is to study and understand past experiments, adapt these efforts to fit the JAG Corps, and implement the methodology with strong JAG Corps member buy-in.

Google’s Project Oxygen: Managers Do Matter!

In 2009, Google asked a simple question: Are managers necessary?⁴² The resounding answer was “yes.”⁴³ This simple inquiry led Google to reevaluate how it identified,

The idea of allowing subordinates to provide feedback about their superiors’ abilities is not a novel one. For decades, behavioral psychologists have studied the effects of seeking and encouraging followers to comment on the efficacy of a specific leader or an organization’s leadership in general

promoted, and trained managers within its organization. By doing so, Google’s *Project Oxygen* definitively proved that managers do matter and that subordinates are an integral part of a manager’s development and an organization’s ability to train and identify leaders internally.

Google’s approach to evaluating managers is remarkably straightforward: *Project Oxygen* led to the identification of eight attributes common among the highest-performing leaders within the organization.⁴⁴ “Upward Feedback Surveys”⁴⁵ measure leaders’ ability to embody these attributes. A UFS asks employees to respond to statements using the *Likert*-type scale; the participants choose options that range from “strongly disagree” to “strongly agree” to represent their answers.⁴⁶ A neutral party

within the organization then collects the surveys and compiles a report.⁴⁷ The manager receives the report to review it with his or her superior.⁴⁸ Google also gathers, aggregates, and analyzes the information to identify general trends throughout the organization.⁴⁹ With this information, Google created a massive database of leadership initiatives and training events available to all employees and managers.⁵⁰

The impact of *Project Oxygen* was substantial and unequivocal. The UFS method showed sustained improvements in all levels of organization, and, most notably, the results of individual evaluations showed that the lowest-performing managers improved the most over time.⁵¹ In the first year alone, Google saw team morale and productivity increase, and retention of quality personnel skyrocketed.⁵² Though the methodology has continued to be fine-tuned, other organizations—ranging from businesses to governmental agencies—have used the findings and practices of *Project Oxygen* with similar results.⁵³ The bottom line is simple—seeking and receiving input from subordinates improves the quality of leadership within the organization on both the micro and macro levels.

So, what can the Army JAG Corps learn from Google and *Project Oxygen*? In the following subsections, this article explores how implementing a UFS system similar to Google's would (1) be an effective tool to develop and shape leaders within the Corps; (2) enable shaping the leadership education and doctrine for the JAG Corps in general; and (3) act as a catalyst for increasing engagement across the Corps.

Subordinate Input Will Fill the Knowledge Gap Currently Present in the Evaluation Process

Like Google, the Army's method of evaluating its leaders limits input of subordinates, and thus misses a critical source of information. Implementation of a standardized UFS would provide superior officers inimitable insight into the abilities of their subordinate leaders. Candid and honest feedback from those who have worked for the leader, gathered at regular intervals throughout the leader's tenure, would augment the superior's knowledge of the rated leader's strengths and weaknesses. In turn, a

superior would use the feedback to develop the strengths of the subordinate and begin to remedy what problems may exist.

Similarly, the information provided by subordinates could guide the assessed leader toward appropriate self-development, as envisioned in Army doctrine. Over time, a rater could assess his or her subordinate's improvement and receptiveness to the feedback given to them. Assuming a leader took the information to heart and made honest attempts to remedy flaws and foster strengths, this would lead to tangible, positive, changes in the way the leader engages with his or her present and future teammates.⁵⁴

The Results of Upward Feedback Surveys, When Aggregated, Will Improve Leadership at All Levels Within the JAG Corps

Implementing a UFS across the JAG Corps would benefit the Corps as a whole. With the creation of the Leadership Center embedded within the Legal Center and School, TJAG signaled that developing leadership excellence within the Corps is a priority. Though its full mandate is not yet formed, the Leadership Center will undoubtedly be tasked with identifying both the strengths and weaknesses of leaders within the JAG Corps, as well as creating curriculum and doctrine to better educate the force at all levels. With aggregated information collected from a standardized UFS across the JAG Corps, the Leadership Center would be the central institution tasked with analyzing and identifying the developmental needs of the Corps's leaders.

Additionally, the JAG Corps Personnel, Plans, and Training Office (PPTO) would benefit from the information gathered from a regular UFS. The information gathered would facilitate managing leadership talent, ensuring that the leaders best qualified are placed in positions of trust and supervision. Similarly, PPTO could use the feedback to identify leaders who would benefit from additional training and mentoring under trusted leaders. Finally, for those attorneys who continually fail to improve their leadership abilities, but who are otherwise highly skilled, PPTO could ensure their talents benefit the needs of the Corps; likewise, PPTO could make certain they do not have the negative effect on subordinates

they may otherwise have if placed in positions of direct leadership.

There is a clear appetite among mid-level judge advocates for this type of action. Many respondents to the Survey recognized the importance of providing input regarding their leaders' abilities, as well as having that input used to enhance leadership across the Corps.⁵⁵ The benefits of a UFS system, however, would not be limited to the development of individual leaders and leadership doctrine within the Corps.

The Benefits of Creating Engagement by Providing Subordinates a Voice

The benefits of implementing a standard UFS would extend well beyond the immediate collection of information. When an organization provides its employees the ability to voice their opinions and present information relevant to a decision that affects the organization as a whole, those employees become more engaged, and their perceptions of fairness and self-importance increase; this results in higher morale and productivity.⁵⁶ Scholars call this "employee engagement." Defined as "a positive attitude held... towards the organization and its values,"⁵⁷ the positive effects of elevated employee engagement include significantly higher productivity, higher levels of retention, and greater morale.⁵⁸ Researchers have also found significant links between high employee engagement and increased efficacy of the leaders for whom the employees work.⁵⁹ Finally, studies have confirmed that when companies engage their employees, they tend to trust the decisions of their leaders and the direction of the organization.⁶⁰

Increasing Employee Engagement Increases the Belief in Procedural Justice

Where the JAG Corps is concerned, the importance of recognizing the significance of employee engagement and encouraging an employee to speak is not just another thought experiment. One of the major effects of a disengaged workforce is a belief that the decisions made above them are unfair. Put another way, because the employees have no "say" or voice in the decisions being made, whatever the decision may be is viewed skeptically, and often the workforce believes it to be against their own good. The

Survey comments reflect a similar opinion among junior judge advocates.⁶¹

When asked, sixty-five percent of mid-level judge advocates indicated that they would want to provide input regarding a superior's leadership ability.⁶² A similar percentage (sixty-two) also indicated that they did *not* have a meaningful way to voice an opinion regarding the same subject.⁶³ In the comments of the Survey, many feared that any feedback would either not be taken seriously or would lead to retaliation—such as negative OERs or a negative reputation.⁶⁴ This trust—or lack thereof—is a well-measured effect of engagement called “procedural justice.”⁶⁵

One of the most significant impacts of depreciated engagement is a corresponding dip in the employees' belief in procedural justice. The side effects of low procedural justice include low morale, decreased productivity, and a significant drop in employee retention.⁶⁶ The 333 responses provided in the Survey contain a fair amount of cynicism and distrust for any system that the JAG Corps might create that would allow for upward feedback.⁶⁷

This cynicism is a symptom of diminished engagement, a decidedly poor result from current JAG Corps mid-level officers. A solution is to increase junior and mid-level judge advocates' sense of procedural justice.

Therefore, this finding is not all bad. Just as Google was required to build trust before and during the implementation of subordinate review in the early stages of *Project Oxygen*,⁶⁸ the process of overcoming a lack of trust in an organization's leadership is not impossible. The primary remedy is giving the employees a say, and doing so in a way that both protects the employee from retaliation and controls the feedback provided to avoid commentary that is counterproductive and likely to lead to the superior becoming defensive (thus failing to accept the feedback given). Both the form of the questions asked on the UFS, and the education provided to JAG Corps members prior to implementation, can mitigate such detrimental emotional reactions.

Increased Engagement Creates Effective Leaders, Fostering Further Engagement

Social and behavioral psychologists have studied the continuing benefits of

engagement on the efficacy of the managers of engaged employees. When employees are engaged in their organizations, the result is elevated work performance, retention, and morale. Put another way, with increased engagement comes a significant increase in positivity within the work environment. Studies have shown that engaged and positive employees have a similar effect up their chain of supervision, the most important of which is the increase in manager efficacy.⁶⁹

A mutually beneficial cycle develops. When a leader or organization fosters engagement, the increased voice of employees correspondingly increases productivity and morale. The increasingly engaged workforce motivates the leadership to find new

and better ways to increase and encourage engagement. Over time, the cycle has the potential of becoming self-perpetuating, leading to sustained growth in businesses that focus on developing effective managers, and encouraging further employee engagement.⁷⁰

Subordinate Review for the JAG Corps: Upward Feedback Surveys and the Implementation Process

Combating the apparently low sense of procedural justice with an aim of increasing engagement and the efficacy of the JAG Corps's leaders must be a priority of the JAG Corps moving forward. The first step toward this goal is to give subordinates a voice within the institution. The JAG Corps can achieve this by creating a standardized UFS. This section explains the key steps of creating and implementing a UFS and addresses how each step will mitigate concerns identified within the Survey.

The Questionnaire

The first step is the creation of a UFS questionnaire that addresses leadership attributes most relevant to the JAG Corps

and the Army leadership model. As a base, both the *Project Oxygen* questions⁷¹ and the Gallup Workplace Audit (GWA)⁷² questionnaires are instructive. The goal of the questions is to identify the strengths and weaknesses of a superior's leadership ability—and nothing more. Narrowly tailored to the specific attributes, the questions would focus on the key qualities that make an effective leader.

One way to focus feedback employed by both Google and the GWA is limiting the freedom of responses the subordinate can make. In both the Google and GWA surveys, all but two questions use the *Likert*-type scale, and only one of those questions asks about the technical com-

petence of the superior.⁷³ The majority of questions focus on leadership attributes and how a supervisor's performance has affected the respondent's emotional and psychological role within the organization. By using limited, introspective questions, a leader is able to gauge the effect he or she has on the engagement and morale of subordinates.

Though these questions are the backbone of the survey, there still must be questions that allow for answers that specifically address the strengths and weaknesses of the assessed leader. Therefore, there must be questions allowing the subordinate to comment specifically on the leader's abilities. Again, Google's approach is instructive. In its UFS, Google includes two questions: (1) “What would you recommend your manager keep doing?” and (2) “What would you have your manager change?”⁷⁴ Narrowly scoped, these questions focus on issues of leadership. The call of the question does not allow the respondent an opportunity to attack the leader or to identify specific past grievances; otherwise, the answer would be outside the scope of the question and properly dismissed as unresponsive.⁷⁵ In this way, the UFS would

When asked, sixty-five percent of mid-level judge advocates indicated that they would want to provide input regarding a superior's leadership ability

be a self-assessment tool for the assessed leader, a coaching and mentoring asset for rating officials and mentors, and a source of information to assist with talent management across the Corps.

Who Qualifies as a Leader for the Purpose of a UFS?

Next, the JAG Corps would need to identify who qualifies as a leader, requiring a UFS.⁷⁶ *Project Oxygen* grew out of a survey system that Google was already using, in which the company asked all employees to rank their supervisors, regardless of that supervisor's

evaluates its employees annually. By administering the UFS bi-annually, Google was able to provide managers with timely leadership feedback, and then provide those leaders with the necessary tools to develop any identified weaknesses within one rating period.⁸²

The Army JAG Corps should implement its UFS in the same manner. Judge advocates generally have a permanent change of station (PCS) during the summer. Leaders assuming new responsibilities would have approximately six months to settle into their positions, after which

which they accepted as a reasonable risk, rationalizing that the eight attributes that led to better leaders were naturally formulaic.⁸⁴ Just like the Army, Google employees change positions on a regular basis. Google found that with each new boss, the UFS system benefited the development of the team, requiring leaders to adjust to their new subordinates and the new team's dynamics.⁸⁵

Use of the UFS Feedback by the Rater and Senior Rater

When asked whether to use subordinate feedback for evaluating a leader, Survey comments varied greatly, and identified multiple concerns.⁸⁶ This section addresses the three most prevalent concerns and argues that the results of the UFS must be available and useable for the purpose of evaluations.

Results of Subordinate Feedback Must Be Available for Use in the Evaluation Process

Simply put, the results of the UFS must be available for the purpose of evaluations. First, it would be disingenuous to believe that a rater, having seen and discussed the results of a series of UFSs, could or would disregard what he or she had read when evaluating a subordinate. Second, the JAG Corps and, more generally, the Army's focus on leadership development—and the need to identify and promote the best leaders—demands the collection of the best information. Third, and most obvious, is the fact that the ability to lead is a core competency on an officer's OER. Raters are required to comment on a subordinate's ability to lead. Thus, the information gleaned from multiple UFSs would easily translate to commentary within an OER. Moreover, the metrics available to the rater when commenting on a subordinate's ability to lead would be of great assistance when attempting to discriminate among officers during promotion and assignment selection. Finally, the JAG Corps could take a page from Google and use the results to enhance doctrine and training of its own to address clear gaps in leadership throughout the Corps. This would be impossible if UFSs were held at the local OSJA and used solely for mentorship and guidance.

By regularizing feedback, the JAG Corps would reinforce the fact that the UFS exists to help a superior develop leadership abilities. Over time, subordinates would see changes in their superior's actions and regularly be able to provide feedback about those changes

position or title within the company.⁷⁷ In the JAG Corps, identifying individuals within leadership positions that would benefit from the use of a UFS is slightly more complicated. There has to be a sufficient pool of subordinates working for the leader. With too few subordinates, the information gathered from the UFS would be limited in its scope and foundation. Similarly, using rank as a discriminator would not work.⁷⁸ As such, a combination of the two would likely be the best way to assess where to implement a UFS. In whatever way the JAG Corps implements the UFS system, assessed leaders would need to be in identified positions of leadership with a number of subordinates sufficient to provide meaningful feedback.⁷⁹

Timing of the UFS

The next question is how often to administer the UFS.⁸⁰ Google found that administering a UFS every six months was most effective for assisting in identifying strengths and weaknesses, and then assessing how the leader at issue adjusted (if needed) to the feedback they received.⁸¹ Just like the Army, Google formally

time the Office of the Staff Judge Advocate (OSJA) would administer a UFS. The results of that survey would provide the rater of the leader—as well as the assessed leader—an understanding of his or her current strengths and weakness and be a part of regular counseling and mentoring.⁸³ The rated leader would then be assessed again just before an annual OER.

Creating a regular schedule for UFS administration alleviates several concerns voiced by surveyed judge advocates by reinforcing the purpose of the UFS within the JAG Corps's leadership development process. By regularizing feedback, the JAG Corps would reinforce the fact that the UFS exists to help a superior develop leadership abilities. Over time, subordinates would see changes in their superior's actions and regularly be able to provide feedback about those changes. Allowing for such consistent feedback provides raters and senior raters invaluable insight into the progress of their subordinates and the morale of the office.

One could argue that such regularity may result in the UFS becoming redundant or leadership becoming formulaic rather than genuine. Google had similar concerns,

Notwithstanding these reasons for using UFS results for official purposes, concerns remain. Many Survey respondents voiced concern that leadership would become a popularity contest, resulting in leaders refusing to make difficult decisions.⁸⁷ Some believed that the UFS would become a means for subordinates to voice specific grievances for which there are better avenues of redress.⁸⁸ However, the greatest concern identified was the fear of retaliation by the assessed leader against anyone who voiced a negative opinion.⁸⁹ These concerns and related issues will be addressed in turn.

Fallacy 1: Leadership Would Become a Popularity Contest

There is a clear misconception in the Survey that the UFS would become the sole means of evaluating an officer's leadership ability. This is not the case. The intent of the UFS is to fill in the identified knowledge gap discussed above. The UFS will not replace Army doctrine; instead, it would supplement existing means of assessing leadership. To this end, a leader's rater and senior rater still have the ultimate responsibility to review and evaluate a subordinate's leadership ability. That rater and senior rater would still review their subordinate's ability to complete his or her mission, work up and down the chain of command, provide principled counsel, along with many other determinations a rater and senior rater must make when assessing a subordinate. Thus, if any particular leader became overly concerned with pleasing subordinates at the expense of the mission, that would presumably be noticed and commented on by the subordinate's rater and senior rater.

Fallacy 2: The UFS Is Redundant to Other Methods of Complaint

Multiple respondents voiced concern that a UFS would become another avenue to complain, similar and redundant to the purpose of the Inspector General (IG)⁹⁰ and Command Climate Surveys⁹¹ (among other ways to raise concerns in the Army). As an initial matter, a UFS respondent's ability to voice specific complaints about a leader would be limited by the nature of the questions asked and the narrow purpose of the

survey.⁹² Beyond that, there is a fundamental difference between an IG complaint and a survey requesting information to assess a supervisor's ability to lead.⁹³ There is miniscule overlap between the two, if any.

Similarly, a UFS has little in common with a Command Climate Survey. Notwithstanding the fact that few judge advocates are in a position of command, the primary purpose of the UFS is as an assessment of a supervisor's leadership strengths and weaknesses. Although a supervisor's ability to lead may have an effect on the climate within a particular section, and the results of the UFS may improve that climate, this is not the purpose of the UFS. Frankly, if a UFS indicates a need for such a climate survey, that would be a positive second-order effect of a UFS.

Fallacy 3: Feedback Cannot Be Candid Unless It Remains Anonymous

A large number of respondents voiced concerns about providing any feedback at all, out of fear that any critical information would result in retaliation by the superior against the subordinate.⁹⁴ This is a tragic response to see in such a high volume throughout the responses in the Survey, and it supports the need for additional means of assessing leadership within the JAG Corps. Under no circumstances should this be a subordinate's fear, so long as the feedback provided is both thoughtful and professional. With that said, as discussed extensively in previous sections,⁹⁵ the structure of the UFS—coupled with targeted education regarding its purpose and use—should alleviate concerns of reprisal. The UFS is not a mechanism for a subordinate to voice issues outside of the questions posed, and all of the feedback would be condensed and provided to the leader through the medium of a rater-subordinate counseling.

The most interesting issue that the concern of reprisal brings to light is whether the feedback itself and, more specifically, who provided the feedback would remain anonymous. Of the 333 respondents contributing written comments to the Survey, approximately forty percent identified that their willingness to provide candid and meaningful feedback would be directly affected by whether the leader would know

what was said and who said it.⁹⁶ Several identified that to avoid this concern, the information provided to the leader should be anonymous, but that the information provided to the rater and senior rater need not be.⁹⁷ By making this distinction, a rater and senior rater could judge the veracity of the feedback provided, and properly construct commentary during counseling and mentoring, as well as on an OER.

For its part, Google elected to keep the feedback non-anonymous, trusting in the professionalism of their managers and believing that their managers would be truly interested in the feedback provided.⁹⁸ However, Google did not simply implement the UFS system in a void; instead, they made concerted efforts to "socialize" the entire program among its employees.⁹⁹ It is clear from the comments to the Survey that a similar socialization effort would be required prior to full implementation of a UFS within the JAG Corps.

Conclusion

Leadership is the bedrock of the Army's ability to achieve its mission and retain the best Soldiers and officers within its ranks. Though a unique and professional Corps within the Army, the JAG Corps is no different. As such, the JAG Corps is susceptible to the same gaps in knowledge as the Army at large. One such gap is the systemic failure to look to subordinates when assessing a leader. The Army defines leadership as the activity of influencing people; yet, the Army provides no way for those influenced to identify the failures and successes of those leaders.

The JAG Corps has the ability to remedy this problem without altering the Army's overall evaluation framework. It is TJAG's unique and plenary authority over his Corps that allows him to implement any method of assessment or feedback that would further the development of attorneys under his charge, so long as it does not circumvent the prescribed methods of assessment already in place. Additional methods of assessment, specifically regarding leaders' ability to lead, are necessary.

Creating a UFS so that subordinates can provide information to the rater and senior rater of their supervisor is the answer. Practically speaking, a UFS provides critical

information about a supervisor's leadership abilities—closing the knowledge gap unaddressed by current Army assessment methodologies. Moreover, the information gathered from around the Corps would be instrumental in the development of leadership doctrine and training.

The benefits are not limited to the practical results of the UFS. Giving employees a voice, allowing them to engage in the development of an organization—especially in the context of leadership—has benefits far beyond simply identifying who is a good leader. Giving a subordinate a voice allows that person to better connect with people with and for whom he or she works. When employee engagement increases, the benefits to the organization are real; productivity increases, morale flourishes, and personnel turnover plummets.

Nevertheless, as the Survey reflects, skepticism remains. The JAG Corps should neither ignore nor dismiss these results, but must similarly avoid allowing them to paralyze innovation. The Judge Advocate General should consider implementing an upward feedback survey for the benefit of the Corps and those aspiring attorney-leaders waiting to serve and lead. **TAL**

MAJ Sandys is currently the Deputy Director of the Leadership Center at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

Notes

- Michelle Tan, *Army Chief to Leaders: Winning is Everything in Combat*, ARMY TIMES (Apr. 22, 2016), <https://www.armytimes.com/news/your-army/2016/04/22/army-chief-to-leaders-winning-is-everything-in-combat>.
- This assertion is based on a survey the author conducted between 24 Oct. 2019 to 13 Nov. 2019 (on file with author) [hereinafter *The Survey*].
- Id.*
- See generally Daniel Zwerdling, *Army Takes On Its Own Toxic Leaders*, NAT'L PUB. RADIO (Jan. 6, 2014), <https://www.npr.org/2014/01/06/259422776/army-takes-on-its-own-toxic-leaders>; Carl Forsling, *The Military Has A Toxic Leadership Problem*, TASK AND LEADERSHIP (Aug. 23, 2017), <https://taskandpurpose.com/military-toxic-leadership-problem>; Dr. Jarrod Sadulski, *It's Time To Address Toxic Leadership In The Military*, IN MIL. (Dec. 11, 2018), <https://inmilitary.com/its-time-to-address-toxic-leadership-in-the-military/>.
- New York Daily News, *Rating Your Boss: It's for His Own Good*, CHI. TRIB. (Mar. 7, 1985), <http://www.chicagotribune.com/news/ct-xpm-1985-03-07-8501130323-story.html>.
- Solomon Markos & M. Sandhya Sridevi, *Employee Engagement: The Key to Improving Performance*, 5 INT'L J. BUS. & MGMT. 89 (2010).
- E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCH. 952 (1990). Both increased employee engagement and an elevated sense of procedural justice lead to greater productivity, morale, and personnel retention. See Markos, *supra* note 6.
- David A. Garvin et al., *Google's Project Oxygen: Do Managers Matter?*, HARV. BUS. SCH. CASE 313-110, Oct. 2013.
- This article does not comment on the Army's definition of a leader, and it does not argue for a dramatic change in the definitions of leadership or ways in which the Army ultimately evaluates a leader. Instead, this article simply identifies a significant shortfall in the information used to assess leadership, offering a simple way to correct that problem.
- U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP para. 1-74 (1 Aug. 2019) (C1, 1 Nov. 2019) [hereinafter ADP 6-22].
- Id.* para. 1-73.
- U.S. DEP'T OF ARMY, REG. 600-100, ARMY PROFESSION AND LEADERSHIP POLICY (5 Apr. 2017) [hereinafter AR 600-100].
- ADP 6-22, *supra* note 10, para. 1-75.
- Id.*
- Id.* para. 1-76. Army Regulation 600-100 recognizes that providing purpose to both the individual and the organization is critical for the core competency of "Leads others," often requiring a leader to provide "a common purpose" to his or her subordinates. AR 600-100, *supra* note 12, para. 1-11(b)(1).
- ADP 6-22, *supra* note 10, para. 1-77.
- Id.* para. 1-79. In his address to the 49th Staff Judge Advocate Course in 2019, the Deputy Judge Advocate General, Major General Stuart Risch, charged the leaders of the JAG Corps to "inspire, excite, and motivate" their subordinates. Major Justin R. Wegner, *49th Staff Judge Advocate Course Wrap-Up*, ARMY LAW., June 2019, at 8, 11.
- U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM para. 1-8 (14 June 2019) [hereinafter AR 623-3].
- Id.*
- ADP 6-22, *supra* note 10, para. 1-82.
- Id.*
- Id.* para. 1-84.
- U.S. DEP'T OF ARMY, DA Form 67-10-1, Company Grade Plate (O1 - O3; WO1 - CW2) Officer Evaluation Report (Nov. 2015).
- U.S. DEP'T OF ARMY, DA Form 67-10-2, Field Grade Plate (O4 - O5; CW3 - CW5) Officer Evaluation Report (Nov. 2015).
- AR 623-3, *supra* note 18, para. 2-12(i).
- Id.* para. 1-8(a)(4)(a).
- Id.* para. 1-9.
- Id.*
- AR 600-100, *supra* note 12, para. 1-1.
- Id.* para. 1-9(c)(1).
- Id.* para. 1-9(c).
- Critical to the efficacy of operational assignments is "repetitive performance...coupled with self-awareness, assessment, and feedback," allowing a leader to refine their skills. *Id.* para. 1-9(c)(2)(b) (emphasis added).
- Id.*
- Judge Advocate General, Assistant Judge Advocate General, and general officers of Judge Advocate General's Corps [JAG Corps]: appointment; duties, 10 U.S.C. § 3037 (2006).
- Special Branches, 10 U.S.C. § 3064 (2010).
- U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 2-1 (5 Apr. 2017).
- AR 600-100, *supra* note 12, para. 2-10(c).
- Id.* para. 1-9(c).
- Lind, *supra* note 7. See also JOHN W. THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975); James R. Detert & Ethan R. Burris, *Can Your Employees Really Speak Freely?*, HARV. BUS. REV., Jan.-Feb. 2016.
- See generally Lind, *supra* note 7; Markos, *supra* note 6; Fred Luthans & Suzanne J. Peterson, *Employee Engagement and Manager Self-efficacy Implications for Managerial Effectiveness and Development*, 21 J. MGMT. & DEV. 376 (2001).
- Garvin, *supra* note 8.
- Id.* at 4.
- Id.* at 6.
- Id.* Compare Will Meddings, *A Breath of Fresh Air: Project Oxygen and the British Army*, THE ARMY LEADER (Nov. 11, 2019), <https://thearmyleader.co.uk/project-oxygen-british-army/> (The number of attributes has since expanded to 10: (1) Be a good coach, (2) Empower the team, do not micromanage, (3) Create an inclusive team environment, showing concern for success and well-being, (4) be productive and results-oriented, (5) be a good communicator—listen and share information, (6) support career development and discuss performance, (7) have a clear vision/strategy for the team, (8) have key technical skills to help advise the team, (9) collaborate across the organization, and (10) be a strong decision maker), with AR 600-100, *supra* note 5, para. 1-11(b) (The Army provides a similar list of ten attributes, which the Army calls "core leader competencies" and which "all leaders are responsible for demonstrating consistently"). See also ADP 6-22, *supra* note 10, para. 1-31.
- Garvin, *supra* note 8, at 7.
- Id.* See also RE:WORK WITH GOOGLE, <https://rework.withgoogle.com/guides/analytics-run-an-employee-survey/steps/understand-structured-vs-open-ended-questions/> (last visited Dec. 9, 2019).
- Garvin, *supra* note 8, at 7. To collect and synthesize Upward Feedback Surveys (UFSs), Google relied on a newly created division within the company they called, "people analytics." *Id.* at 4.
- Id.* See generally Garvin, *supra* note 8, Exhibit 7.
- See Garvin, *supra* note 8, at 8.
- Id.* at 8-9.
- Id.* at 10.

52. *Id.* at 9.

53. RE:WORK WITH GOOGLE, *supra* note 46.

54. This proved to be true for Google after it implemented the Upward Feedback Survey (UFS) system. Within two years, the median UFS score increased by five percent, and the improvements held true across all levels of managers. Garvin, *supra* note 8, at 10. For example, a particularly high-earning manager received a particularly low UFS score during his first round of ratings. This manager went through the training, and then implemented many of the suggested changes to his leadership style with great success. *Id.* This anecdote is not a one-off: “other Google managers were equally surprised after receiving their first set of scores.” *Id.* In addition, many of those managers saw equally positive results after implementing basic changes to their leadership style based on that feedback. *Id.*

55. “Bottom-up feedback is a vital part of leadership.” The Survey, *supra* note 2, comment 110; “the more information senior leaders are armed with, the more they will be able to mentor and develop the officers who serve under them,” *Id.* comment 143; “The [JAG Corps] should focus more not only on teaching leadership but also trying to recognize, tag, and track naturally-good leaders.” *Id.* comment 189.

56. Lind, *supra* note 7, at 952.

57. Markos, *supra* note 6, at 90.

58. Lind, *supra* note 7, at 957.

59. Luthans, *supra* note 40.

60. Lind, *supra* note 7, at 952.

61. “Input from me will surely make no difference,” The Survey, *supra* note 2, comment 131; “It’s [sic] reputation, primarily based on who you know or who you worked for, that matters as much, if not more, than actual performance when it comes to promotion/assignment,” *Id.* comment 129; “clearly the [JAG Corps] does not really care about leadership, because they do not already ask for feedback ON THE PERSON’S LEADERSHIP,” *Id.* comment 140.

62. The Survey, *supra* note 2, Question 6.

63. *Id.* Question 7.

64. In the JAG Corps, one’s reputation is often referred to as “the third file.” In the written responses to the Survey, nearly fifty percent of respondents who were concerned about their reputation voiced their concern in the context of a poor entry in their “third file.” See The Survey, *supra* note 2. “[T]he assignment and rating system in the JAG Corps, specifically, the ‘third file,’ makes it highly unlikely a [j]udge [a]dvocate who wants to continue service will provide candid feedback to supervisors,” *Id.* comment 170; [i]n the Army, everyone realizes that the person above you can make or break your future, even if they aren’t retaliating. I believe the ‘third file’ is a real thing—especially in the [JAG Corps].” *Id.* comment 266.

65. See generally THIBAUT, *supra* note 39; Laurens Walker et al., *Reactions of Participants and Observers to Modes of Adjudication*, J. APPLIED SOC. PSYCH. 295 (1974).

66. V. Kumar & Anita Pansari, *Measuring the Benefits of Employee Engagement*, MIT SLOAN MGMT REV., Summer 2015, at 67, 68.

67. See *supra* note 62.

68. Garvin, *supra* note 8, at 8.

69. Luthans, *supra* note 40, at 379.

70. *Id.* This result is the same in the medical field. A recent study proved that the better a physician is as a leader the better the care patients will receive from both the physician as well as the physician’s staff. Dhruv Khullar, M.D., *Good Leaders Make Good Doctors*, N.Y. TIMES (Nov. 21, 2019), <https://www.nytimes.com/2019/11/21/well/live/good-leaders-make-good-doctors.html>.

71. Garvin, *supra* note 8, at 18.

72. *Q12 Employment Engagement*, GALLUP, <https://www.gallup.com/access/239210/employee-engagement-survey.aspx> (last visited Dec. 2, 2019).

73. Garvin, *supra* note 8, at 8.

74. Jeff Haden, *Here’s How Google Knows in Less Than 5 Minutes if Someone Is a Great Leader*, INC. (Apr. 19, 2019), <https://www.inc.com/jeff-haden/heres-how-google-knows-in-less-than-5-minutes-if-someone-is-a-great-leader.html>.

75. Structuring the questionnaire in this focused way is imperative to the process and addresses a primary criticism mentioned in The Survey: that feedback would become another Multi-Source Assessment and Feedback (MSAF) 360. To start, a UFS shares very few similarities with the MSAF 360. The UFS would consist of no more than twenty questions, total, compared to the MSAF 360’s 150 questions. Second, unlike the MSAF 360, the assessed leader would not be allowed to choose who provides feedback, and the feedback would be given to the leader’s rater. As discussed further below, the UFS would be conducted twice a year. See discussion, *infra* Part V, Section C. The results of a UFS would be used to identify leaders for future assignments; further, the information would be aggregated to create leadership training and doctrine.

76. The UFS could be used by anyone at any time; this article contemplates only the creation of a system in which the UFS is mandated by The Judge Advocate General.

77. Garvin, *supra* note 8, at 7.

78. Many field grade officers are in positions where they supervise no one or have no rating authority over those who report to them. Such a position has limited “leadership” aspects to it, and may not benefit from a formal UFS.

79. If a particular manager had fewer than three subordinates, they were not provided a report of the UFS feedback. Garvin, *supra* note 8, at 8.

80. During the early stages of *Project Oxygen*, Google had significant concerns about how often to conduct a UFS. Garvin, *supra* note 8, at 11.

81. *Id.* at 8.

82. Google developed these trainings by teaming with academics and analyzing all of the UFS from across the company. The trainings were not mandatory, and they were open to any employee, manager or otherwise. Garvin, *supra* note 8, at 8-9.

83. AR 623-3, *supra* note 18, para. 2-12.

84. Garvin, *supra* note 8, at 11. When reflecting on the question, Laszlo Bock, the senior vice president of people operations, remarked:

We are not trying to change the nature of people who work at Google. That would be presumptuous and dangerous. Instead, we are saying, “here are a few things that will lead you to be perceived as a better manager.” Our managers may not completely believe in the

suggestions, but after they act on them and get better UFS scores, they may eventually internalize the behavior.

Id.

85. Meddings, *supra* note 44.

86. See *infra* notes 87-89 and accompanying text.

87. “This would disrupt too severely the necessary chain of command structure.” The Survey, *supra* note 69, comment 41; “[a UFS] might also limit a supervisors [sic] willingness to make the hard decisions and rate people fairly if they are concerned about how they are reported.” *Id.* comment 159.

88. “If we had a system to allow for these types of complaints we would overwhelm senior leaders with a lot of nonsense and reinforce the behavior,” *Id.* comment 93; “when junior and mid-career Soldiers are given an opportunity to provide input on their superiors’ performances, it often turns into a complaint-lodging session....These often spark unfounded investigations.” *Id.* comment 184; “[w]e also have the IG, EO, and open door complaint systems if things get bad. I’m not sure why adding a fourth complaint system would be helpful.” *Id.* comment 273.

89. *Id.*

90. See generally U.S. DEP’T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES (29 Nov. 2010) (RAR, 3 July 2012) [hereinafter AR 20-1].

91. U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY app. D (6 Nov. 2014).

92. See *supra* Part V, Section A.

93. This is because an Inspector General (IG) complaint is accustomed to identifying a specific wrong within the IG’s purview requiring an investigation and potential administrative action. AR 20-1, *supra* note 91, para. 1-6.

94. The Survey, *supra* note 2.

95. See *supra* Part V, Section A.

96. The Survey, *supra* note 2.

97. “[I]n my opinion a subordinate’s comments about their rater should ‘not’ be anonymous with [regards] to their rater’s rater...it should be kept anonymous from their rater.” *Id.* comment 116; “[i]f feedback provided to a supervisor’s superior were [sic] not anonymous and/or invisible to my immediate supervisor, I would not feel comfortable providing candid feedback.” *Id.* comment 115.

98. Garvin, *supra* note 8, at 12.

99. Google held seminars and workshops at every level of the company to educate employees and managers to ensure everyone was on the same page, both in the purpose of the UFS and the company’s expectations for its use. *Id.* at 13.

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No. 3

Exceptions to Ex Parte Communications

A Primer to No-Contact Rules

By Lieutenant Colonel (Retired) Benjamin K. Grimes

[The no-contact rule] contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.¹

In the military justice system, the defense counsel serves many functions for an accused during the pendency of investigation and trial: teacher, navigator, counselor, agent, confidant, supporter, and—sometimes—friend. One function that an accused most appreciates, and of which defense counsel are often most proud, is that of shield against government inquisition. A phone call to the trial counsel is often enough to cut off inquiry of the accused and give him a measure of relief, knowing that Criminal Investigation Command (CID) investigators will not continue their quest to draw information directly from him. For example, defense counsel might tell the prosecutor, “If you want to talk to SPC Snuffy, you need to go through me, and we’ll discuss it. Tell CID to leave him alone. I represent Specialist Snuffy.” What would happen if the trial counsel responded, “So what?” This may not be the answer that comes to mind, but such a response would be valid.²

This article examines an overlooked aspect of Army Regulation (AR) 27-26, *Rules of Professional Conduct for Lawyers*, Rule 4.2. Like the American Bar Association (ABA) analogue, Model Rule of Professional Conduct 4.2, this rule protects

an attorney-client relationship from interference; but, it simultaneously carves out an exception for certain ex parte communications which are commonly misunderstood to be improper.

The first section of this article offers a brief overview of ethical rules governing contact with represented persons, comparing service rules to ABA Model Rule 4.2, and contrasting the wealth of civilian case law interpreting the scope of the rule’s “authorized by law” exception to the dearth of interpretation in military courts. The article progresses to describe the practical utility of a more nuanced understanding of the rule for both trial and defense counsel. Finally, it answers two potential questions in the application of the “no-contact” rule. These questions are unique to military practice, and this portion of the article suggests an appropriate resolution to those questions. In the end, practitioners will be better equipped to provide fuller, more effective representation to both the United States and the Soldiers whose liberties hang in the balance. To add practical context to this examination, consider the following hypothetical:³

The rule prohibiting attorneys from engaging in or directing ex parte communications with a person known to be represented is one of the most well-known of professional obligations governing legal practice

- On Saturday night, Private First Class (PFC) John Holmes and his friend PFC Marc Watson decided to amp up their normal weekend video game marathon by adding a few bowls of marijuana to their weekly routine of splitting a case of beer. Holmes's wife arrived home to their apartment after work at about two o'clock in the morning and discovered Holmes passed out and Watson performing oral sex on him. Watson was startled but convinced Mrs. Holmes to smoke a few bowls with him. Mrs. Holmes blacked out. Watson forcibly engaged her in intercourse.
- The next day, Mrs. Holmes remembered what she had observed PFC Watson doing to her husband and recalled "flashes" of her later encounter with him. Despite PFC Holmes's initial reluctance to do so, Mrs. Holmes reported the assaults to CID. She and PFC Holmes obtain representation by a special victim counsel.
- During the course of an initial interview, PFC Watson denied oral sex with PFC Holmes, admitted to sexual intercourse with Mrs. Holmes (claiming it was consensual), and hinted that he had obtained the marijuana from Sergeant (SGT) Dionne Marshall—with whom he has distributed marijuana in the past. Sergeant Marshall is separately under investigation, but not yet charged, for on-post drug distribution and is represented by a Trial Defense Service (TDS) attorney and civilian counsel.
- After his initial interview, PFC Watson visits his local TDS office and obtains counsel. They, in turn, send this message to the trial counsel: "I represent PFC Watson. Tell CID to leave him alone. If you want to talk to him, you need to go through me, and we'll discuss it."
- Despite his knowledge that PFC Watson and SGT Marshall are represented,

trial counsel wants to direct CID to facilitate a pretext phone call between Mrs. Holmes and PFC Watson; set up a secure-text drug transaction with SGT Marshall; and facilitate a recorded call to PFC Holmes via another friend because PFC Holmes is increasingly reluctant to participate in the investigation.

History and Interpretation of the "No Contact" Rule

The rule prohibiting attorneys from engaging in or directing ex parte communications with a person known to be represented is one of the most well-known of professional obligations governing legal practice. Although the rule may have originated as a courtesy between professionals, it is known as a principal tenet of legal practice under English common law.⁴ Since its adoption in modern codes of professional ethics, the rule is understood to "provide[] protection of the represented person against overreaching by adverse counsel, [and] safeguard the client-lawyer relationship from interference by adverse counsel. It also reduces the likelihood that clients will disclose privileged or other information that might harm their interests."⁵ These interests are just as relevant to military practice as to civilian criminal practice. However, due to the inherently coercive nature of military authority, there may be a stronger interest in protecting Soldiers from overreach. Army Regulation 27-26, Rule 4.2, and its commentary provide:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, *unless* the lawyer has the consent of the other lawyer or is *authorized to do so by law or a court order*.⁶

Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter. *Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings.* When communicating with the accused in a criminal matter, an Army lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.⁷

The text of the rule and emphasized text of the comment is based on and identical to ABA Model Rule 4.2. Nearly every licensing jurisdiction in the country has a comparable rule.⁸ This version of the rule—or one substantially equivalent—has also been adopted by the other military services.⁹ The rule is a fundamental tenet of legal practice, and a basic understanding of it is required knowledge for all young lawyers. Unfortunately, without specialized instruction or practical exposure, many young prosecutors neither understand nor take advantage of the permissibility of certain ex parte communications contained in the rule's final phrase: "*unless authorized to do so by law or a court order*."¹⁰ The section "Civilian Interpretations of the 'Authorized By Law' Exception" presents representative case law from civilian circuit courts of appeal. The case law illustrates the comment's explanation of the scope of the "authorized by law" exception. The second section, "Comparing Service Rules to ABA Model Rule 4.2," offers a brief comparison of service "no-contact" rules with AR 27-26 and the ABA Model Rule. Finally, the last section—"Military Case Law Addressing the 'No-Contact' Rule"—presents the handful of military appellate cases which touch on Rule 4.2, none of which address the "authorized by law" exception.

It is critical to remember that the Rules of Professional Conduct are designed to govern the practice of attorneys of all stripes—legal assistance, administrative law, and national security law attorneys, as well as practitioners of military justice. Though a fundamental piece of legal practice, the Rules are only part of the obligation lawyers owe to clients, the court, and the public. The final sentence of Comment (6) to Rule 4.2 makes this clear, stating, “The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.”¹¹ This idea will be addressed again later; but from the outset of this discussion, judge advocates (JAs) on all sides of the courtroom must remember their responsibilities are layered, and multiple issues and obligations must be analyzed in determining a permissible and prudent course of action.¹²

Civilian Interpretation of the “Authorized By Law” Exception

Current understanding of the Rule’s exception for certain ex parte communications developed over time. As discussed below, and translated for purposes of this discussion into the context of military justice matters, the “authorized by law” exception to Rule 4.2 permits certain investigative ex parte communications with a represented person, prior to arrest¹³ or prefferal of charges. Most civilian circuit courts have case law which supports this interpretation.¹⁴ Three such cases, which explain the contours of the exception, are discussed here. Each makes clear that rules governing lawyer communications with represented persons apply to prosecutors working toward law enforcement. They acknowledge a balance between the public interest in law enforcement and the obligations of attorneys to abide by the requirements expected of all members of the profession. Also, because the communications in these cases were made by a person other than the attorney who faced potential professional liability, each case is a reminder of an attorney’s vicarious responsibility for the conduct of others.¹⁵ Trial counsel should not read themselves into these cases as a substitute for the cooperating witness who, in each case, engaged the subject of the

investigation in ex parte communications. Instead, trial counsel should see themselves as overseeing the CID investigation that might use a variation on these tactics.

United States v. Kenny

In *United States v. Kenny*, defendants were convicted of conspiracy, fraudulent government contracting activities, bribery, and tax evasion.¹⁶ Kenny owned a business providing technical writing and documentation services to government and industrial clients near San Diego.¹⁷ Kenny’s firm was contracted by the Navy to perform some work, and it is under those contracts that Kenny’s criminal conduct occurred.¹⁸

One of the more dramatic items of evidence offered by the prosecutor at trial was a tape recording made by [a

the sorts of ethical problems addressed by [ethics rules].²¹

The court acknowledged that an attorney’s obligations must yield to the unique responsibility of the Government to enforce the law. This responsibility is meaningless without concurrent ability to investigate allegations of wrongdoing. As the Ninth Circuit later recognized in *United States v. Carona*, “[i]t would be antithetical to the administration of justice to allow a wrongdoer to immunize himself against such undercover operations simply by letting it be known that he has retained counsel.”²²

United States v. Ryans

Ryans was charged with violating the Sherman Act by restraining and suppressing competition for moving services around Fort Sill, Oklahoma.²³ He sought suppress-

The court acknowledged that an attorney’s obligations must yield to the unique responsibility of the Government to enforce the law. This responsibility is meaningless without concurrent ability to investigate allegations of wrongdoing

cooperating co-conspirator] of a telephone conversation he had had with Kenny prior to Kenny’s indictment. The tape was played before the grand jury that returned Kenny’s indictment; later, it was played before the trial jury, at the close of the prosecutor’s cross-examination of Kenny, for purposes of impeachment.¹⁹

On appeal, Kenny argued, among other things, that the recording was made in violation of Disciplinary Rule 7-104(A) (1) of the ABA Model Code of Professional Responsibility,²⁰ which is functionally similar to AR 27-26, Rule 4.2. In assessing whether the prosecutor violated any ethical obligations, the court focused on the “non-custodial environment, prior to Kenny’s charge, arrest, or indictment,” noting: “In our view, the Government’s use of such investigative techniques at this stage of a criminal matter does not implicate

sion of recordings made by a government informant, asserting, in part, that the recordings violated the then-current “no contact” rule²⁴—which is substantively the same as AR 27-26, Rule 4.2. The trial court found that two of three recordings occurred after prosecutors became aware of Ryans’s representation in the matter, and these were suppressed as an improper violation of the ethical prohibition on contact with represented parties.²⁵ Even though Ryans had not yet been indicted, the court found that he was represented for purposes of the “no contact” rule.²⁶

The Tenth Circuit took up the issue of whether this sort of ex parte recording violates such an ethical prohibition. After examining relevant case law in other circuits, the court concluded:

During the investigative stage of a criminal proceeding, counterveiling [sic] policies militate against a broad

Like the Army, each of the other military services has adopted a set of rules of professional conduct to guide the practice of JAs and other attorneys subject to service jurisdiction

reading of [the ‘no contact’ rule]. We agree with the majority of courts which have considered the question that [the rule] was not intended to preclude undercover investigations of unindicted suspects merely because they have retained counsel.²⁷

The court then went on to make its position crystal clear:

On these facts, we hold that the adversarial process had not yet begun. Although Ryans had been targeted for investigation and had been served with a grand jury subpoena duces tecum, he had not been charged, arrested or indicted, or otherwise “faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.”²⁸

While the court suggested in passing that the adversarial process might be a factor in determining when investigative ex parte contacts are no longer permissible, it quickly defined that idea more precisely. The formal beginning of the adversarial process—and the point at which investigative ex parte communications are no longer permissible—is when the target is “charged, arrested or indicted.”²⁹ Only at this point has the government so fixed its purpose as to preclude further investigative ex parte contacts with an accused.

United States v. Cope

Two brothers—Randall and Terry Cope—were charged, tried jointly, and convicted of multiple counts of attempted murder.³⁰ They were each sentenced to more than 500 months’ confinement.³¹ While Randall was awaiting trial on other matters, he and Terry took several steps to retain the services of “the Hungarian,” a

supposed hitman who they thought could murder witnesses against Randall.³² While working to arrange a meeting with “the Hungarian,” Terry arranged a meeting with another potential hitman named Bill.³³ Bill was an undercover Federal Bureau of Investigation agent.³⁴ Bill recorded their meeting.³⁵ Meanwhile, another confidential informant had recorded jailhouse conversations with Randall about his proposed murder-for-hire plans.³⁶ On appeal, Randall claimed the informant’s jailhouse recordings were made in violation of the applicable “no contact” rule.³⁷ The court disagreed.³⁸

Randall has cited no authority, nor have we found any, to support his contention that the government’s working with confidential informants to elicit incriminating information from a represented defendant violates [the ‘no-contact’ rule].³⁹

In reaching its conclusion on this issue, the court cited a dissenting opinion in *United States v. Heinz*.⁴⁰ There, Judge Parker noted, “The use of informants to gather evidence against a suspect will generally, if not almost always, fall within the ambit of the ‘authorized by law’ exception to [the ‘no-contact’ rule].”⁴¹

Here, Randall Cope had been indicted on other matters, but investigation into his attempted murder-for-hire scheme was ongoing. This case is an example of the courts permitting investigative ex parte contacts with a represented person, so long as that person has not been arrested or indicted for the conduct under investigation.

Comparing Service Rules to ABA Model Rule 4.2

Like the Army, each of the other military services has adopted a set of rules of professional conduct to guide the practice of JAs and other attorneys subject to service

jurisdiction.⁴² As noted above, the Army’s version of the “no-contact” rule is identical to that proposed by the ABA. The Air Force and Coast Guard rules are identical to the Army and ABA rules.⁴³ The Navy and Marine Corps use the same formulation of the rule, substituting “covered attorney” for “lawyer”:

In representing a client, a covered attorney shall not communicate about the subject of the representation with a party the covered attorney knows to be represented by another attorney in the matter, unless the covered attorney has the consent of the other attorney or is authorized by law or court order.⁴⁴

There is, however, some modest variation between the explanatory comments adopted—or not adopted—by each service. Comment (6) to the Army rule—again essentially identical to the ABA Model Rule⁴⁵—offers some shape to the “authorized by law” exception. This shared language makes interpretation of the Army rule more reliable. In contrast, the Coast Guard has chosen not to promulgate any explanatory comments to their Legal Rules of Professional Conduct, leaving interpretation of the phrase to the judiciary and prudent practice.⁴⁶ Even so, the broad consensus of rule interpretation presented here suggests that the Coast Guard rule should be interpreted in the same way as the Army rule. The Navy-Marine Corps and the Air Force rules each demonstrate a slightly different approach with their explanatory comments. Comment (2) to Navy-Marine Corps Rule 4.2 provides a formal description of the scope of the exception, noting,

The “authorized by law” exception to the Rule is also satisfied by a constitutional provision, statute or court rule, having the force and effect of law, that expressly allows a particular communication to occur in the absence of counsel, such as court rules providing for service of process on a party, or a statute authorizing a government agency to inspect certain regulated premises.⁴⁷

Regrettably, this does not offer the practitioner much guidance beyond an admonition to adhere to other constitutional or statutory protections. The most useful comment, that seems to cabin the permissible conduct contemplated by the rule even more than the Army rule, comes from the Air Force. Discussion paragraph two to Air Force Rule 4.2 provides, “Communications authorized by law may also include investigative activities advised upon by government lawyers, which are done by investigative agents prior to the preferral of charges.”⁴⁸

Importantly, this comment omits reference to conduct by the attorney—permitting only “activities advised upon by government lawyers.”⁴⁹ The Air Force comment seems to explicitly exclude the possibility of an Air Force attorney personally engaging in “authorized by law” ex parte contacts. As a practical matter, this is likely of little concern. Air Force JAs are unlikely to find themselves in a position to take part in such communications. But this comment is also important in another way. It translates the civilian concept of “commencement of criminal or civil enforcement proceedings” to a military context, defining the expiration of this exception to the rule as “preferral of charges.” In clearly defining when the “authorized by law” exception should expire in the context of military practice, the Air Force offers a model the other services would benefit in following.

Military Case Law Addressing The “No-Contact” Rule

Military courts have only seldom addressed the obligation of attorneys to abstain from ex parte communications with represented persons; none of them address the permissibility of such contacts under the “authorized by law” exception. A brief description of each follows.

United States v. Lewis

Following a conviction for offenses related to wrongful distribution of cocaine, Lewis alleged ineffective assistance of counsel.⁵⁰ In seeking to gather information to rebut that allegation, the trial defense counsel contacted Lewis after the appellate defense counsel had assumed representation.⁵¹ While denying Lewis’s claim

of ineffective assistance of counsel, the Army Court of Military Review noted in a footnote that such conduct constituted a violation of AR 27-26, Rule 4.2.⁵²

United States v. Evans

Evans was convicted, among other things, of fraternization and adultery.⁵³ Evans also claimed ineffective assistance of counsel on appeal.⁵⁴ Among his complaints about his trial defense counsel was that counsel “spent too much time delivering messages from the prosecutor trying to get the appellant to accept an administrative discharge in lieu of court-martial and testify against [his paramour].”⁵⁵ In finding against

of the office, and engaged the appellant in an unseemly verbal dispute.⁵⁸

The Court of Appeals for the Armed Forces agreed with the Court of Military Review that the trial counsel’s conduct was “inappropriate.”⁵⁹ Trial counsel presumably lacked civilian defense counsel’s consent to address Meek.

Why the “Authorized By Law” Exception Matters

A more nuanced understanding of the permissibility of certain ex parte contacts is useful as more than a simple academic exercise. Understanding the scope, limitations,

Understanding the scope, limitations, and exceptions to the “no-contact” rule is important to both trial and defense counsel for practical reasons. The most obvious is that trial counsel may work with CID to engage in more aggressive investigations of alleged criminal conduct

Evans, the court noted, “[defense counsel] was obligated to pass all government offers to the appellant, [because] the government could approach the appellant only through his counsel.”⁵⁶

United States v. Meek

Meek was convicted of stealing various pieces of military property and of violating a lawful order.⁵⁷ His court-martial included this dynamic scene outside the courtroom, where witnesses had gathered for trial:

The civilian defense counsel (CDC) was interviewing the appellant and his wife when the DC [military defense counsel] entered the office and profanely declared that the CDC was ineffective, had not talked to the witnesses, and that the [DC] would ‘have no part of it.’ The DC was quickly followed into the office by the TC [trial counsel], who, in agreeing with the DC and stating to the appellant that the CDC was ‘misrepresenting’ him, rudely ordered the appellant’s wife out

and exceptions to the “no-contact” rule is important to both trial and defense counsel for practical reasons. The most obvious is that trial counsel may work with CID to engage in more aggressive investigations of alleged criminal conduct. For defense counsel, too, understanding the rule matters. A comprehensive understanding of the rule—and its implications for governmental investigative conduct—should inform defense counsel’s advice to the accused. All defense attorneys tell their clients some version of “*don’t talk to anyone about this case except me!*” While that is, of course, useful advice, the emphasis on the issue, forcefulness of delivery, and level of periodic follow-up should be different. Further, understanding this rule can change the nature of defense counsel’s plea negotiations, in certain cases. The next section details these three benefits.

Trial Counsel Can Potentially Guide More Fruitful Investigations

Soldiers suspected of criminal misconduct are, themselves, often ripe sources of the

evidence necessary to secure a conviction. Their conduct and statements, observed or obtained directly, and presented by credible witnesses, are the “gold standard” of evidence in the minds of most panel members.⁶⁰

Using our hypothetical case as an example, CID might have already obtained cell phone records of communications between PFC Watson and PFC Holmes. Statements would have been taken from other Soldiers and neighbors. A pretext⁶¹ phone call or text message exchange might have been arranged between Mrs. Holmes and PFC Watson, seeking to draw out an

whether it is permissible for the trial counsel to direct affirmative communications with PFC Watson now that he is known to be represented, rather than wait for unknown “good citizen” witnesses to come forward. In the end, trial counsel should remember that these tools remain available to them, even though PFC Watson is now represented.

Of course, trial counsel—and particularly those JAs in more open-ended support roles (e.g., assigned directly to brigades)—should remember that this exception is limited to law enforcement investigations prior to “criminal or civil enforcement

to CID. Whether guilty or innocent, your words can hurt you.

Once defense counsel has a more thorough appreciation for the investigative permissibility built into the “no contact” rule, that counseling might sound a little different:

*Listen, Watson, don't talk to anyone about this investigation. Not your roommate, girlfriend, gym buddy, platoon sergeant, or your favorite bartender. You only get to talk to one person about what's happening here. Me. You might think all those other people are on your side, but they might report anything you say back to CID. And more than that, they might already be working with CID, asking you questions or bringing things up just to get you to open up. So, it's more than just watching what you say, it's also being careful about what people are saying to you. Don't get sucked into a conversation about any of this stuff. Whether guilty or innocent, your words can hurt you. And that goes for all your social media contacts, too!*⁶⁶

These are minor additions to defense counsel's advice, but meaningful ones. Telling an accused to watch what they say puts them on guard against themselves. But understanding that the government can and might seek to engage in ex parte contacts should trigger a heightened sensitivity. The accused should be on guard against being lured into admissions, in addition to being cautious about their spontaneous statements. The internal caution will be—and should be—supplemented with an external wariness.

This is not obstruction. This is reminding the accused that they should protect themselves, and that the government should be forced to make its case without their help. Understanding this, and giving such advice, is protecting the client's interests.

The Accused Might Offer an Investigative Benefit in Exchange for a “Better” Deal

The hypothetical scenario presented offers another opportunity for defense counsel's representation to be of significant value to PFC Watson. If he comes to TDS before

Soldiers suspected of criminal misconduct are, themselves, often ripe sources of the evidence necessary to secure a conviction

admission from PFC Watson. However, on most installations—when defense counsel notified the trial counsel that PFC Watson was now represented—attempts to communicate directly with PFC Watson likely ceased.

It would not be inappropriate to terminate direct communications with PFC Watson once he is known to be represented. This would constitute an ethically conservative course of action; and, while such a choice will always be permissible, it is not required. As made clear by the discussion in the first section of this article, prior to preferral and almost regardless of representation, the “no-contact” rule permits investigative ex parte contacts.⁶² This opens further opportunities for investigations to obtain more “gold standard” evidence.

In the case of PFC Watson, pretext phone calls could continue, even after defense counsel made known their representation. Alternatively, CID could arrange for another friend of PFC Watson's to approach him in the barracks to ask about what happened at PFC Holmes's residence, or to solicit drugs from him. Each of these tactics could also be pursued via social media or digital communications. The method of communication is—largely—immaterial to the analysis;⁶³ the question is

proceedings.”⁶⁴ Trial counsel and brigade judge advocates are often called to advise upon, oversee, or otherwise guide other types of investigation, including AR 15-6 inquiries, Inspector General investigations, Flight Evaluation Boards, and similar administrative investigations premised upon the application and enforcement of Army regulations rather than laws. In such contexts, the “authorized by law” exception would not apply, and pretext phone calls or other surreptitious contacts would not be permissible.⁶⁵

Defense Counsel Can More Fully Advise Their Client

Every defense counsel knows to remind their clients that their statements—to anyone—can be used against them. Client counseling geared toward that issue might sound like this:

Listen, Watson, don't talk to anyone about this investigation. Not your roommate, girlfriend, gym buddy, platoon sergeant, or your favorite bartender. You only get to talk to one person about what's happening here. Me. You might think all those other people are on your side, but they might report anything you say back

CID's investigation gets too far along, defense counsel can discuss with him the possibility of becoming an investigative source in the work to uncover the scope of SGT Marshall's misconduct.

This is more than just "flipping" on SGT Marshall and talking to CID about what PFC Watson already knows about her drug dealing. Private First Class Watson has the opportunity to affirmatively elicit admissions or confessions from SGT Marshall, by wearing a wire, engaging in consensually recorded phone calls, or engaging with SGT Marshall digitally—by text or social media messages. This makes PFC Watson a far more valuable asset in the drug dealing investigation and is likely to create negotiating value or goodwill that can be leveraged to secure a more favorable plea agreement.

Again, this might look like a small difference in what defense counsel is able to bring to the table in plea negotiations, but the impact on trial counsel's other investigations might be significant. It might mean the difference between drug possession with circumstantial evidence of distribution and recorded admissions that put SGT Marshall at the center of an installation-wide drug distribution network. To get at the latter possibility, trial counsel may be willing to argue to the convening authority that a 25 percent (or more) reduction in confinement is appropriate for PFC Watson.

Open Questions in the Application of the "Authorized By Law" Exception to Military Practice

Having explored the scope and application of the "authorized by law" exception to the "no-contact" rule, two questions unique to military practice present themselves. First, when should "the commencement of criminal...enforcement proceedings" be understood to begin? To the point, should initiation of non-judicial punishment signal the expiration of the "authorized by law" exception? Second, how should the "authorized by law" exception be understood and applied in the context of special victim counsel representation? Is a victim always to be a fair object of ex parte communications—assuming charges related to the underlying conduct are never preferred

against them—or should the "authorized by law" exception expire upon preferral of charges against the accused?

Is Article 15 a "Criminal Enforcement Proceeding" for Purposes of Rule 4.2?

The military court-martial system is a tool with two purposes: to offer the commander a mechanism for enforcing good order and

eschews convening orders, records of trial, and review by an appellate court—likewise fails to create a proceeding which triggers a right to representation by counsel. One of the unique features of the Article 15 process, however, is the right to *demand* trial by court-martial. This right creates a bridge between the administrative process of non-judicial punishment and the formal

The military court-martial system is a tool with two purposes: to offer the commander a mechanism for enforcing good order and discipline and as a process for enforcing the law

discipline and as a process for enforcing the law.⁶⁷ Non-judicial punishment through Article 15, Uniform Code of Military Justice (UCMJ) is part of the commander's "discipline toolkit." As described by AR 27-10, non-judicial punishment is appropriately used to "[c]orrect, educate, and reform offenders"; limit the professional stigma which might otherwise attach to a Soldier subject to court-martial; and constitute a swift, efficient means of disposing of "minor offenses."⁶⁸ This function is, indeed, different from that for which a court-martial is employed—to address serious breaches of discipline and conduct that, in the eye of the commander, warrant significant punishment.⁶⁹ In essence, enforcing good order and discipline and enforcing the law are simultaneously pursued by processes that are related by degree. Read together, they fall on a spectrum of rights, obligations, and parallel mechanisms which form the military justice system.

In *Middendorf v. Henry*,⁷⁰ the Supreme Court evaluated whether the Sixth Amendment right to counsel attached for trial by summary court-martial. The Court concluded that, because summary court-martial was "quite different from a criminal trial" and was not a criminal prosecution for purposes of the Sixth Amendment, it did not.⁷¹ If summary court-martial does not trigger a constitutional right to counsel, clearly the lesser process of non-judicial punishment—which

system of trial by court-martial. But is that bridge enough that initiation of Article 15 proceedings constitutes "criminal enforcement proceedings" under Rule 4.2?

Soldiers facing Article 15 proceedings have a right to consult with counsel,⁷² but no right to representation by counsel at an Article 15 hearing.⁷³ Nonetheless, many—most—Soldiers will have at least met with trial defense counsel prior to their hearing. Army Regulation 27-10, para 3-18(g)(3) makes clear that Rule 4.2 applies to government counsel if they attend the hearing.

One reason initiation of Article 15 proceedings terminates the availability of "authorized by law" contacts is that these proceedings do not constitute the government's requisite fixing of its criminal enforcement intent. The respondent Soldier is not yet "faced with the prosecutorial forces of an organized society, and immersed in the intricacies of substantive and procedural law."⁷⁴ The commander has assessed the alleged misconduct involved and determined it does not warrant all the trappings of court-martial. It is only the respondent Soldier's *demand* that brings the possibility of trial; but, even then, this demand cannot force the government to initiate criminal enforcement proceedings. The government, having made a choice not to prefer charges, leaves open the possibility of further investigation, and this must include the sort of legitimate investigative

techniques that the “authorized by law” exception permits.

The fact that Rule 4.2 applies is no surprise. It applies any time a lawyer might communicate with someone who is known to be represented. However, as is clear from the text of Rule 4.2 and the relevant case law, the “authorized by law” exception permits trial counsel to communicate with the respondent Soldier for investigative purposes—perhaps with an eye toward court-martial. Permitting such communications, which are clearly supported by the law, would render meaningless the admonition in AR 27-10 that Rule 4.2 applies. The clear intent of the Article 15 hearing laid out in AR 27-10 is that a Soldier should not be subject to examination by a JA at the hearing.

The Article 15 hearing is not a criminal proceeding, and such ex parte communications would be permissible prior to the Article 15 hearing, and they would be permissible afterward. Thus, one might argue that the admonition in AR 27-10, para 3-18(g)(3), that Rule 4.2 applies must serve the unwritten purpose of temporarily suspending the “authorized by law” exception. However, this reasoning is inconsistent with principles of regulatory drafting.

Instead, we should look to the case law above; it describes when the “authorized by law” exception to the “no contact” rule expires: at arrest or preferral of court-martial charges. The Article 15 hearing is neither of those things, but it is clear that a JA should not engage with a Soldier who is represented by counsel. Why not?

The Soldier-commander relationship is unlike anything in civilian law. Principles with a genesis in civilian practice cannot be imported to military practice without considering the balance of authority and responsibility in the military justice system and its inherently coercive nature. The entire military justice system is the commander’s tool, but nothing more so than non-judicial punishment. The best answer to why trial counsel should be precluded from engaging in direct ex parte examination of the Article 15 respondent is that the presence and inherent authority of the commander creates a form of duress for the Soldier, a compulsion and obligation to obey. The situation becomes a form of constructive arrest.⁷⁵ As discussed above,

arrest terminates the “authorized by law” exception. But does this constructive arrest *actually* terminate the investigative permissibility built in to Rule 4.2, such that the respondent Soldier could no longer be the target of ex parte communications after the Article 15 hearing, such as further pretextual communications?

No. Applying the principle of constructive arrest in this way merely acknowledges the unique society within which the military justice system operates. A right to remain silent at Article 15—clearly not a constitutional right because such a proceeding is administrative in nature—would be meaningless if JAs were permitted to engage the respondent Soldier in ex parte investigative communications. The idea of constructive arrest—and its effect of temporarily suspending the “authorized by law” exception—is necessary to keeping the balance between Soldiers’ rights and efficient enforcement of good order and discipline.⁷⁶

Application of the “Authorized by Law” Exception to Communications with Victims Represented by Special Victim Counsel

The modern military justice system goes beyond most civilian jurisdictions to give certain rights to sexual assault victims, including rights to be heard at motions hearings and standing to challenge certain trial court decisions through interlocutory appeal.⁷⁷ Do—or should—those rights, change the way trial counsel applies the “authorized by law” exception when contemplating seeking ex parte communications with a victim represented by special victim counsel? While it may be unusual that a victim will not cooperate with the government’s investigation of their assault, three possible scenarios where a lack of cooperation is not driven by a victim’s self-interest spring readily to mind:

1. Victim did not commit misconduct;
2. Victim committed misconduct but is a civilian and not amenable to military authority;
3. Victim committed misconduct and fears discipline, even though senior commander (who has withheld jurisdiction over victim misconduct) has determined not to seek adverse action in this case.

Importantly, each of these scenarios suggest that trial counsel has no expectation of preferring charges against the victim for any conduct related to the assault which precipitated the investigation. Comment (2) to Rule 4.2 makes clear that the Rule should apply, even in interactions with a victim: “this Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.”⁷⁸

In any of the three scenarios suggested, does arrest of the accused foreclose ex parte communications with the victim? The short answer is no. Trial counsel may still seek to engage in investigative ex parte communications with the victim. While military courts have not reviewed such conduct or applied Rule 4.2 to this sort of situation, civilian appellate courts have made clear that the “authorized by law” exception is available to government counsel prior to arrest or indictment—also known as preferral of charges—against the person who is the target of the communication. It is also available to the investigators they direct.

United States v. Kenny⁷⁹

In *Kenny*, the “dramatic” recordings, which led in significant part to Kenny’s conviction, were made by an indicted co-conspirator.⁸⁰ While the court was not explicit in its reasoning that the permissibility of investigative ex parte contacts should be evaluated from the perspective of whether the target of those communications has been indicted, that is how the “no contact” rule was applied. Had the court interpreted the “authorized by law” exception to expire when any person involved in the matter had been charged, it would have found the ex parte contacts by the co-conspirator to be improper.

Although the *Kenny* court considered the application of the “no-contact” rule in the context of a co-conspirator’s government-direct communications with an accused, extrapolation of the reasoning behind its permissibility makes plain the same should be true of government-directed, ex parte contact with victims. Recall that the purpose of the “no-contact” rule is to “protect[] a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who

are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.⁷⁸¹ The implication is that the person on the receiving end of ex parte communications will suffer some injury if the communications were permitted. Yet, the Rule permits some potential injury where pre-preferral investigation contributes to law enforcement. This is so even where the potential injury to an accused—in addition to the injury to the lawyer-client relationship—is deprivation of life, liberty, or property, as long as that contact occurs pre-preferral.

The lesser intrusion upon a victim-witness who might be the subject of investigative, pre-preferral, ex parte communications must, similarly, be contemplated by the Rule. While potential injury to the lawyer-client relationship is the same, the additional injury in the context of ex parte victim contacts is principally to a victim's privacy interest. This is not insignificant, but it is a lesser interest than the accused's potential costs of liberty. Moreover, to suggest the victim—or any other witness—should not be equally subject to pre-preferral investigative contacts would afford them greater protections than the accused himself. Such a conclusion would challenge the central balance of accused's rights versus discipline and justice around which the court-martial system is built.

Comment Regarding Use of the "Authorized by Law" Exception by Defense Counsel or Special Victim Counsel

The question may arise whether defense counsel or special victim counsel can avail themselves of the "authorized by law" exception in order to engage in investigative ex parte communications. This is especially so for defense counsel in light of the introduction of defense investigators and the backdrop of Article 46, UCMJ, which—in relevant part—provides the following: "In a case referred for trial by court-martial, the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."⁷⁸²

Defense counsel and special victim counsel remain officers and members of the Judge Advocate General's Corps and have enduring duties to the United States and to the Army. But they are in a position—particularly with respect to circumstances like these—where they represent an individual client. They do not represent "governmental entities," so the "authorized by law" exception is foreclosed to them

It may be that they want to "get to the bottom" of whatever situation brought their client to them. They may think that trial counsel's method or pace of investigation is ill-suited to finding justice for their client. They may remember using these investigative methods when they were trial counsel. Defense counsel and special victim counsel should not, however, believe or act as if this exception to the "no-contact" rule is for them. Comment (6) to AR 27-26, Rule 4.2, is explicit: "Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings."⁷⁸³

Defense counsel and special victim counsel remain officers and members of the Judge Advocate General's Corps and have enduring duties to the United States and to the Army. But they are in a position—particularly with respect to circumstances like these—where they represent an individual client. They do not represent "governmental entities," so the "authorized by law" exception is foreclosed to them. Nor can they direct others to engage in conduct which they cannot pursue themselves.⁸⁴

Resolving what seems a contradiction in Article 46, UCMJ, merely requires taking note of *when* this equal access to witnesses and evidence is available to defense counsel: only *after* referral, and, therefore, well after prefferal of charges. It is only after the "authorized by law" exception for investigative ex parte contacts is foreclosed to trial counsel that defense counsel gains equal

footing. To the extent AR 27-26 constitutes an implementing regulation for purposes of Article 46, it is clearly not contemplated that any lawyer other than one for the United States should have this investigative permissibility. If AR 27-26 is not such an implementing regulation and, rather, establishes baseline standards of conduct—regardless of where, when, or how the UCMJ applies—Comment (6) to Rule 4.2 provides a reminder of a JA's *concurrent*—and potentially competing—obligations: "The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule."⁷⁸⁵

In other words, just because a course of conduct is legally permissible does not make it ethical. Article 46, permits equal access between prosecution and defense for the purposes of preparing for trial. The "authorized by law" exception, however, is different and recognizes a distinct *obligation* that trial counsel has for the investigation of alleged violations of law. During the investigative phase of a case, the government has more tools—investigative ex parte contacts; more information—no discovery or disclosure obligations; and more control over the process—timing of prefferal. These are all measures of imbalance that are inherent in the dynamic between the government and accused.

Conclusion and Caution Against Reading Rules in Isolation

As described above, a JA's obligations under AR 27-26 to refrain from communications with a person who is known to be

represented in a matter is not an absolute bar to ex parte communications. When the contact amounts to lawful investigative activities in furtherance of law enforcement investigations, prosecutors may engage in or direct ex parte communications with such persons. While the “authorized by law” exception is not absolute, it is an available avenue of investigation that trial counsel should be willing to explore. Defense counsel should, likewise, develop a greater understanding and appreciation of the “authorized by law” exception. Doing so will ensure their clients will be aware of the possibility of such continued covert—or overt—communications. Defense counsel may also offer the government the cooperation of their client—thereby, securing their client some additional concrete benefits in an offer to plead guilty.

Like other aspects of the Rules of Professional Conduct, however, Rule 4.2 and the “authorized by law” exception should not be read or applied in isolation. The Rules must be read together and concurrently applied. This means that permissibility of contact is not the end of the analysis. Counsel should always evaluate *all* relevant facts in a situation. Trial counsel’s use of permissible communications to invade the attorney-client relationship would violate Rule 4.4(a).⁸⁶ Nor should trial counsel use “authorized by law” ex parte contacts where local policy prohibits such conduct.⁸⁷ Used appropriately, however, the no-contact Rule both protects the rights of represented Soldiers and enables the robust investigation of criminal misconduct. **TAL**

Mr. Grimes currently serves as the Deputy Director of the United States Department of Justice’s Professional Responsibility Advisory Office.

The views expressed are those of the author alone and do not represent those of the Department of Justice or the United States.

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Notes

1. U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS r. 4.2, comment (1) (28 June 2018) [hereinafter AR 27-26].
2. Obviously, this is a dramatization of the relationship between trial and defense counsel. A more courteous relationship should be expected, and a more appropriate response from trial counsel would be, “Thanks for confirming your representation of SPC Snuffy, and I appreciate your position. We’ll continue to investigate, consistent with all applicable law, policy, and regulation.”
3. This hypothetical is purely fictional and is not intended to represent any real person or scenario.
4. See, e.g., *In Re Oliver*, 2 Adm. & Eccl. 620, 622, 111 Eng. Rep. 239, 240 (26 Jan. 1835) (“When it appeared that Mrs. Oliver had an attorney, to whom she referred, it was improper to obtain her signature, with no attorney present on her part. If this were permitted, a very impure, and often a fraudulent, practice would prevail.”) (Lord Denman, C.J.).
5. A.B.A. Comm’n on Ethics & Pro. Responsibility, Formal Op. 95-396, at 4 (1995) (citing Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 325 (1992)).
6. AR 27-26, *supra* note 1, r. 4.2 (emphasis added).
7. *Id.* cmt. (6) (emphasis added).
8. The rules of professional conduct of Florida (Rules Regulating the Florida Bar, Rule 4-4.2) and Puerto Rico (Canons of Professional Ethics, Canon 28) do not contain the exception for contacts which are “authorized by law.”
9. See discussion *infra* Comparing Service Rules to ABA Model Rule 4.2.
10. AR 27-26, *supra* note 1, r. 4.2.
11. AR 27-26, *supra* note 1, at cmt. (6).
12. An important question this article will not address is how Article 31(b), UCMJ, should be applied in the context of “authorized by law” contacts. The Court of Appeals for the Armed Forces noted in *United States v. Gilbreath*, 74 M.J. 11 (2014), that Article 31(b) should not be interpreted to reach “literal but absurd results.” *Id.* at 16. Presumably, this means it should not frustrate otherwise lawful covert investigations which do not implicate the “subtle and not so subtle pressures that apply to military life.” *Id.* Trial counsel should consult with supervisors whenever considering ex parte contact with an accused.
13. See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (“We conclude that a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.”).
14. *United States v. Lemonakis*, 485 F.2d 941 (D.C. Cir. 1973); *United States v. Bindow*, 804 F.3d 558 (2d Cir. 2015); *United States v. Brown*, 595 F.3d 498 (3d Cir. 2010); *United States v. Worthington*, 911 F.2d 726 (4th Cir. 1990); *United States v. Johnson*, 68 F.3d

899 (5th Cir. 1995); *United States v. Cope*, 312 F.3d 757 (6th Cir. 2002); *United States v. Plumley*, 207 F.3d 1086 (8th Cir. 2000); *United States v. Carona*, 660 F.3d 360 (9th Cir. 2011); *United States v. Ryans*, 903 F.2d 731 (10th Cir. 1990).

15. See AR 27-26, *supra* note 1, r. 5.3(c) (“a lawyer shall be responsible for conduct of [a non-lawyer acting under the authority, supervision, or direction of the lawyer] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) [Modified] the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”); AR 27-26, *supra* note 1, r. 8.4(a) (“It is professional misconduct for a lawyer to...violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”).

16. *United States v. Kenny*, 645 F.2d 1323 (9th Cir. 1981).

17. *Id.*

18. *Id.*

19. *Id.*

20. The American Bar Association (ABA) Model Code of Professional Responsibility was the precursor to the Model Code of Professional Conduct. Disciplinary Rule 7-104(A)(1) provided:

During the course of his representation of a client a lawyer shall not: Communicate or cause another to communicate on the subject of the representation with a party he know to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

MODEL CODE OF PRO. RESP. r. 7-104(A)(1) (AM. BAR ASS’N 1980) [hereinafter ABA MODEL CODE].

21. *Kenny*, 645 F.2d at 1339.

22. *United States v. Carona*, 660 F.3d 360, 366 (9th Cir. 2011).

23. *United States v. Ryans*, 903 F.2d 731 (10th Cir. 1990).

24. The then-applicable “no contact” rule, Code of Professional Responsibility, Disciplinary Rule 7-104(A)(1), prohibited ex parte contact with “a party [the lawyer] knows to be represented by a lawyer in that matter.” ABA MODEL CODE, *supra* note 20, r. 7-104(A)(1). Note that AR 27-26, Rule 4.2—and virtually all licensing jurisdictions’ versions of this rule—prohibit ex parte communications with represented “persons,” rather than being limited to “parties.” AR 27-26, *supra* note 1, r. 4.2.

25. *Id.* *United States v. Ryans*, 903 F.2d 732 (10th Cir. 1990).

26. *Ryans*, 903 F.2d at 734.

27. *Id.* at 739.

28. *Id.* at 740 (citing *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

29. *Id.*

30. *United States v. Cope*, 312 F.3d 757 (6th Cir. 2002).

31. *Id.*

32. *Id.*

33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Cope*, 312 F.3d at 773.
40. *United States v. Heinz*, 983 F.2d 609 (5th Cir. 1993).
41. *Id.* at 618.
42. Notably, no common set of rules has been adopted to govern courts convened at the DoD level (such as ongoing military commissions or potential future tribunals), although CAAF has adopted the ABA Model Rules to govern attorneys who practice before it. *United States v. Brunson*, 59 MJ 41, 43 (C.A.A.F. 2003) (“this Court has adopted the ABA’s Model Rules of Professional Conduct as the rules of conduct for members of the Bar of this Court”).
43. U.S. DEP’T OF AIR FORCE, INSTR. 151-110, PROFESSIONAL RESPONSIBILITY PROGRAM Attachment 2 (Air Force Rules of Professional Conduct), r. 4.2 (11 Dec. 2018) [hereinafter AFI 151-110]; U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 5800.1, COAST GUARD LEGAL PROFESSIONAL RESPONSIBILITY PROGRAM encl. 2 (Coast Guard Rules of Professional Conduct), r. 4.2 (1 June 2005) [hereinafter COMDTINST M5800.01].
44. U.S. DEP’T OF NAVY, JAGINST 5803.1E, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL, Rules of Professional Conduct, r. 4.2 (20 Jan. 2015) [hereinafter JAGINST 5803.1E].
45. Comment 6 to AR 27-26, Rule 4.2 substitutes “an Army lawyer” for “a government lawyer.” AR 27-26, *supra* note 1, r. 4.2, cmt. 6.
46. COMDTINST M5800.01, *supra* note 43.
47. JAGINST 5803.1E, *supra* note 44, r. 4.2, cmt. (2).
48. AFI 151-110, *supra* note 43, cmt. ¶2.
49. *Compare id.* (“Communications authorized by law may also include investigative activities advised upon by government lawyers, which are done by investigative agents...”) with AR 27-26, *supra* note 1, r. 4.2, cmt. (6) (“Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents...”).
50. *United States v. Lewis*, 38 M.J. 501 (A.C.M.R. 1993), *aff’d*, 42 M.J. 1 (C.A.A.F. 1995).
51. *Id.*
52. *Id.* In *Lewis*, the Army Court of Military Review noted in a footnote that such conduct constituted a violation of AR 27-26, Rule 4.2. *Id.* at *521 n.12.
53. *United States v. Evans*, 39 M.J. 614, 614–15 (A.C.M.R. 1994).
54. *Id.*
55. *Id.*
56. *Id.* at 615.
57. *United States v. Meek*, 44 M.J. 2 (C.A.A.F. 1996)
58. *Meek*, 44 M.J. at 2 (citing the Court of Military Review, 40 M.J. 675, at 676 (1994)).
59. *Id.* at 8 n. 7.
60. “Indeed, the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him.” *See United States v. Ellis*, 57 M.J. 375, 381 (C.A.A.F. 2002) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991)) (internal quotation marks omitted).
61. As used here, “pretext” communications are those arranged and monitored by law enforcement officers (LEOs), but carried out by non-LEO personnel. Pretext phone calls are a common—and useful—tool in the investigation of sexual assaults or other crimes in which the victim and perpetrator may have a pre-existing relationship.
62. “Authorized by law” permissibility of ex parte communications is not boundless. It must be limited to legally permissible conduct which otherwise complies with law and regulation. *See, e.g., United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988); *United States v. Ward*, 895 F. Supp. 1000 (N.D. Ill. 1995); *United States v. Tapp*, No. CR107-108, 2008 WL 2371422 (S.D. Ga. June 4, 2008).
63. Use of social media by judge advocates may raise other issues of professional responsibility, such as issues of confidentiality (Rule 1.6) and truthfulness (Rule 8.4(c)). *See AR 27-26, supra* note 1, r. 1.6, 8.4(c).
64. AR 27-26, *supra* note 1, r. 4.2, cmt. (6).
65. This article makes no attempt to determine whether the “authorized by law” exception should apply in every investigative scenario. Counsel should be mindful of the limitations of this exception and consult with supervisors in determining whether it may be relied upon to engage in ex parte communications in any given situation.
66. Judge advocates in all roles should be mindful of their responsibility to “stay current” on the use and implications of technology, including social media. *See AR 27-26, supra* note 1, 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, including the benefits and risks associated with relevant technology”); *see, e.g., Social Media Ethics Guidelines*, N.Y. STATE BAR ASS’N (June 20, 2019), <https://nysba.org/app/uploads/2020/02/NYSBA-Social-Media-Ethics-Guidelines-Final-6-20-19.pdf>.
67. *See David Schleuter, The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1 (2013). Schleuter offers a thorough examination of these dual roles. *Id.*
68. U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 3-2 (11 May 2016) [hereinafter AR 27-10] (“Use of nonjudicial punishment is proper in all cases involving minor offenses in which nonpunitive measures are considered inadequate or inappropriate.”).
69. *See MANUAL FOR COURTS-MARTIAL, UNITED STATES*, R.C.M. 306(b) discussion (2019).
70. *Middendorf v. Henry*, 425 U.S. 25 (1976).
71. *Id.* at 37–39.
72. AR 27-10, *supra* note 69, para 3-18(c).
73. *Id.* para. 3-18(g)(1).
74. *United States v. Ryans*, 903 F.2d 732 (10th Cir. 1990).
75. *See California v. Hodari*, 499 U.S. 621, 626 (1991) (“An arrest requires either physical force...or, where that is absent, submission to the assertion of authority.” (emphasis in original)).
76. *See Middendorf*, 425 U.S. at 48 (citing *McMann v. Richardson*, 397 U.S. 759, 769 (1970)) (“The criminal process, like the rest of the legal system, is replete with situations requiring ‘the making of difficult judgments’ as to which course to follow.”).
77. *LRM v. Kastenburg*, 72 M.J. 364 (C.A.A.F. 2013).
78. AR 27-26, *supra* note 1, r. 4.2, cmt. (2).
79. *United States v. Kenny*, 645 F.2d 1323 (9th Cir. 1981).
80. *Id.* at 1337.
81. AR 27-26, *supra* note 1.
82. UCMJ art. 46(a) (2019).
83. AR 27-26, *supra* note 1, r. 4.2, cmt. (6) (emphasis added).
84. AR 27-26, *supra* note 1, r. 8.4(a) (“It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”); *Id.* r. 5.3(c) (“a lawyer shall be responsible for conduct of [a non-lawyer over whom they have supervisory authority] that would be a violation of the Rules of Professional Conduct in engaged in by a lawyer if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial measures.”).
85. AR 27-26, *supra* note 1, r. 4.2, cmt. (6).
86. AR 27-26, *supra* note 1, r. 4.4(a). “In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.” *Id.*
87. *See AR 27-26, supra* note 1, r. 1.2(a) (“Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”). Judge advocates have an obligation to abide by their clients’ wishes regarding the goals of the representation. For trial counsel, such client guidance regarding the means by which a representation is carried out might be argued to include Department of Defense or Army policies and regulations, or local office standard operating procedures.



(Credit: istockphoto.com/Iryna Chubarova)

No. 4

Jack of All Trades, Master of One

Why Military Justice Experts Need Experience in Other Areas of Military Law

*By Lieutenant Colonel Jeffrey A. Gilberg, Major Michelle E. Borgnino,
Major Robert E. Murdough, and Major Angel M. Overgaard*

Expertise and Versatility Can Be Mutually Supporting

In 2017, Lieutenant General (LTG) Charles N. Pede, The Judge Advocate General (TJAG) of the Army, announced a shift in the Army Judge Advocate General's Corps (JAG Corps) career model to deliberately develop expertise in one or two particular areas.¹ At the same time, the JAG Corps officially eliminated the concept of the “broadly skilled” judge advocate (JA) as the ideal career path, replacing it with a career model that places a premium on balancing expertise and versatility.² While the “expert and versatile” model applies to all the JAG Corps legal functions, the renewed emphasis on expertise has particular significance for the practice of military justice. The military justice system's recent evolution demanded this shift away from the generalist “broadly skilled” model to address concerns pertaining to litigation inexperience, career progression, and victim care throughout the court-martial process.

The shift away from “broadly skilled” to “expert and versatile” provides an excellent opportunity for the JAG Corps to build military justice expertise, as well as reinforce within the

JAG Corps culture that expertise and versatility are not mutually exclusive. Military justice experts should certainly spend the majority of their careers in military justice assignments, yet competence in other areas deepens their expertise by refining legal knowledge, enhancing advocacy, and developing the leadership abilities necessary to develop the next generation of military justice experts. Experience in other assignments and legal functions ultimately makes judge advocates (JAs) better military justice practitioners—both in the courtroom and in the office. The JAG Corps should deliberately and progressively cultivate military justice expertise without fragmenting the Corps by creating a cohort of officers who focus exclusively on military justice. To meet these goals, JAG Corps personnel policies—as well as informal mentorship and messaging—should facilitate both expertise and versatility by encouraging military justice practitioners to occasionally serve in positions outside of military justice. Individual JAs striving to build military justice expertise should not be reticent about accepting positions in other legal disciplines. The past

six years have seen incredible changes in military justice.³ Throughout this period of change, many expressed concern that JAG Corps military justice practitioners⁴ and their supervisors do not have sufficient experience to litigate felony-level trials.⁵ Congress shared this concern and, in 2016,

actual, to specializing in a preferred practice area.⁶ By explicitly encouraging expertise, the JAG Corps addressed part of that frustration. But those who saw vindication of their criticisms of the “broadly skilled” model in TJAG’s current guidance would do well to notice the second part of his expecta-

Corps have formalized iterative systems, the Army provides a more flexible framework centered around a progressive system of proficiency codes. The Navy and, to a lesser extent, the Marine Corps, explicitly emphasize the need for versatility. Despite the dual emphasis on both versatility and expertise, the Army model does not link the two.

The Navy and Marine Corps systems provide a useful basis for comparison; like the Army, they emphasize both expertise and versatility. While the Navy and Marine Corps have formalized iterative systems, the Army provides a more flexible framework centered around a progressive system of proficiency codes

directed each military service to “carry out a pilot program to assess the feasibility and advisability” of establishing a military justice specialization track.⁶

In the authors’ experience, many junior JAs who seek a career “specializing” in military justice see the ideal career path as one that stays within the field. For example, one justice career path might include serving as a trial counsel, then defense counsel or appellate counsel, then a special victim prosecutor, and—following promotion to major—assignments as senior defense counsel, professor of criminal law, service in the criminal law policy division, or the U.S. Army Legal Service Agency litigation division, before culminating with assignment as a military judge. While this is certainly a path toward building military justice expertise, it is not necessarily the optimal one.

Historically, JAG Corps senior leadership emphasized the benefits of generalization and fungible skills to the Army and the JAG Corps as a whole, as opposed to the individual JA. The result was a cautionary inference that “broadly skilled” was the ideal way to remain competitive for career advancement.⁷ Accordingly, the “broadly skilled” model was controversial within the Corps; while some saw it as a positive feature of a JAG Corps career, others expressed frustration with the barriers, perceived or

tions—that JAs, while experts in a particular field, must maintain competence in all areas.⁹ The JAG Corps continues—appropriately—to promote versatility. Therefore, the JAG Corps should emphasize the mutually supporting relationship between the two concepts, especially in its core statutory mission of military justice.

The Services’ Approach to Specialization

Each of the services has its own system to identify and manage JAs assigned to practice military justice. The Air Force takes a generalist approach, much like that of the Army’s prior model of the “broadly skilled judge advocate.”¹⁰ The Coast Guard has fewer than 200 active duty attorneys, at least fifty of whom serve in non-attorney roles. The structure of the Coast Guard does not allow for specializations. Due to the small number of practicing attorneys, the Coast Guard policy assigns only a handful of officers as defense counsel at a centralized location; it relies on its Memorandum of Understanding with the Navy to provide additional support.¹¹ The Navy and Marine Corps have established formal military justice specialization tracks.

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The Navy and Marine Corps Programs

The Navy and Marine Corps build their military justice communities differently. The Navy has created the Military Justice Litigation Qualification (MJLQ) designation which feeds the Military Justice Litigation Career Track.¹² The MJLQ allows JAs to hold qualifications as Specialist I, Specialist II, and Expert.¹³ At each level, JAs who have the requisite experience and time in service may apply to the MJLQ Board—which is held on a yearly basis.¹⁴ Ordinarily, JAs become eligible for each level after four (Specialist I), ten (Specialist II), and sixteen (Expert) years of active duty, provided they meet additional requirements.¹⁵ If the Board grants an officer a designation, they must meet the qualifications for the next level within seven years, or they will be considered “inactive” and must reapply for the previously held designation.¹⁶

In line with these qualifications, the Navy has designated MJLQ-required billets.¹⁷ These billets necessitate a certain level of military justice experience, and MJLQ JAs will primarily be detailed to such billets.¹⁸ However, despite the military justice experience required to fill the designated billets, the Navy recognizes that all JAs must have a “familiarity with the broader mission of the Navy.”¹⁹ These MJLQ JAs are explicitly “encouraged to experience the wide variety of naval experiences that contribute to the broad understanding of the duties of JAs, and to seek out detailing to non-litigation billets even after receiving an MJLQ designation.”²⁰ Experience in other legal functions is beneficial for the Navy and individual JAs; Navy policy recognizes this.

The Marine Corps’s approach differs slightly from that of the Navy. In the Marine Corps, JAs are considered line officers—they can fill billets requiring a JA or any free billet.²¹ They also compete with all officers for promotion, schools, and command.²² This framework makes it

more difficult to carve out a military justice track with the same specificity as the Navy. However, the Marine Corps acknowledges the need to grow experts in military justice; certain jobs require them.²³

To assure those specialists are available to fill certain assignments, the Marine Corps sends JAs to The Army's Judge Advocate General's Legal Center and School (TJAGLCS) to obtain an LL.M. in Military Law with a specialization in Military Justice.²⁴ A competitive board process selects senior captain JAs who have already served in several legal functions during their time as a captain.²⁵ Once a Marine JA receives an LL.M. in Military Law with a specialization in Military Justice, they receive a new Primary Military Occupational Specialty (MOS) code and may be assigned to the properly coded billets.²⁶ This creates a de facto military justice track; however, those individuals are expected to remain versatile Marine officers.²⁷

The Army Approach: Skill Identifiers and Redesigned Organization for Prosecutors

The Army approach has never been as rigidly structured as the Navy or Marine Corps. But over the last decade, the Army has embraced—to varying degrees—the concept of specialization. Since 2008, the Army has used a system of Military Justice Additional Skill Identifiers (ASIs), which provide helpful context for assignment managers.²⁸ In 2019, the Army replaced the ASI system with a system of Professional Development Proficiency Codes (PDPCs).²⁹ However, the JAG Corps has never required any particular level ASI or PDPC as a prerequisite for any position—it is theoretically possible, for example, for a division chief of military justice to have never tried a case.

In January 2018, the JAG Corps implemented its Military Justice Redesign Pilot Program (MJRPP) to ensure the best use of its resources and compliance with Congressional mandates.³⁰ In July 2019, following a period of evaluation, the pilot program became the JAG Corps standard as the Military Justice Redesign Program (MJRP).³¹ The duties formerly performed by trial counsel are now diffused between full-time prosecutors and command military justice advisors.³² The preferred model

further divides prosecutors between special victim cases and general crimes cases.³³

The MJRP gives installation staff judge advocates flexibility to implement the program's tenets.³⁴ However, from its initiation, the basic division of labor has remained the same. Military justice advisors bear primary responsibility for providing advice to commanders and brigade staff on administrative actions, separations, policies, and investigations.³⁵ The general crimes and special victim trial counsel, on the other hand, exclusively prosecute courts-martial.³⁶ They are not assigned specific jurisdictions and take over cases from the relevant military justice advisor.³⁷

Dividing attorney responsibilities in this way, at the lowest echelon, is only a first step toward building proficiency, and it does not significantly mitigate the risk of assigning new counsel to litigation billets. The JAG Corps assumes risk each time it

prosecutors—the JAG Corps should not continue to assume the level of risk that it has in the past. It should not be “luck of the draw as to whether experienced litigators occup[y] those positions.”³⁹

The Army JAG Corps's current posture of “no single assignment is a prerequisite for...future assignments”⁴⁰ is counterproductive toward building expertise. By creating an entirely new MOS for military justice and restricting certain key positions to those with such an MOS, the Marine Corps goes further than any other service.⁴¹ The Army need not adopt such a rigid model. Between the MJRP and the PDPC system, the Army has the tools in place to identify and cultivate military justice experience; but superior performance as a litigator should be formalized as a presumptive requirement for litigation leadership.⁴² The Judge Advocate General recently announced that “possession of skill

The Judge Advocate General recently announced that “possession of skill identifiers...will now be a significant factor and part of our assignment discussions.”⁴³ A more formal step to ensure effective litigation experience may be coding certain military justice positions, particularly leadership and instructor positions, with a certain level of skill identifier or proficiency code to ensure sufficient experience for these positions

assigns a new captain to a trial counsel billet. The JAG Corps assumes even more risk by assigning a captain—or first lieutenant—with no military justice experience to Trial Defense Service (TDS).³⁸ Even if the JAG Corps does away with the expectation that nearly every JA will get a “turn” to be a trial counsel, there will always be some level of residual risk. But this risk is minimal and greatly mitigated with the right people *leading* those captains. When it comes to the mid-level leaders of military justice—the chiefs of justice, senior trial counsel, senior defense counsel, and special victim

identifiers...will now be a significant factor and part of our assignment discussions.”⁴³ A more formal step to ensure effective litigation experience may be coding certain military justice positions, particularly leadership and instructor positions, with a certain level of skill identifier or proficiency code to ensure sufficient experience for these positions.⁴⁴

Even with these measures to generate experience, the collective MJRP and PDPC system still has no mechanism to promote versatility in other legal functions. Meanwhile, while encouraging expertise,

current guidance continues to promote versatility—primarily for its benefit to the JAG Corps as a whole.

We need judge advocates who are expert in one or two practice areas and competent in all others. Make no mistake, you need to be ready to practice justice one day and sprint to a targeting cell in country Y the next day. There is simply no room for a single purpose tool for a modern Army.⁴⁵

This perpetuates the cultural gap that existed with the “broadly skilled” paradigm. The JAG Corps has struggled to explain how broad legal competence contributes to individual military justice expertise, both to political leadership and to its own members. A military justice practitioner

To give just a few examples: the Army’s policy concerning family support is punitive and regularly enforced through the Uniform Code of Military Justice (UCMJ).⁴⁶ Few attorneys—indeed few people in the Army—understand the Army’s policy concerning family support better than legal assistance attorneys; this experience aids the trial counsel who drafts the charge alleging a family support violation and the defense counsel who defends his client against it. A JA who is fully integrated with a combat unit and has spent months practicing national security law will be able to speak and think like the clients, witnesses, panel members, and convening authorities that they will encounter in the military justice process. A chief of justice who understands contract law comprehends the process and reasons for an expert witness to register through the System for

essential for the lawyers who advise the individual under investigation and the lawyers advising the command administering those processes—none of which can be found in the *Manual for Courts-Martial*. With increasing regularity, medical issues intersect with the timing of adverse administrative actions. To assess the best course of action, counsel must understand the Integrated Disability Evaluation System.⁵⁵ A proficient attorney in a military justice billet can, of course, research these issues and produce a satisfactory result; after all, learning through immersive administrative law experience enhances the ability to thoroughly and efficiently spot issues, synthesize multiple concepts, and provide a comprehensive solution.

To provide another example, consider senior leader misconduct. Criminal investigators rarely investigate allegations of misconduct by senior leaders. Typically, these are either local command administrative investigations or investigations by the Inspector General (IG).⁵⁶ Allegations of senior leader misconduct frequently touch on a variety of issues, including the standards of conduct for federal employees and the Department of Defense Joint Ethics Regulation (JER).⁵⁷ Depending on the jurisdiction, allegations of senior leader misconduct and JER violations are relatively uncommon, and a military justice practitioner is unlikely to build familiarity with the myriad of unique and detailed aspects of these standards in a tour as a trial or defense counsel. Because there are so many different, yet overlapping, regulations applicable to these investigations, it is important to have a sufficient foundation in all of them to spot issues and determine whether an ethical violation has actually occurred. When a senior officer walks into a TDS office under IG investigation, the senior defense counsel or regional defense counsel is infinitely more prepared to advise this client if they have served as an ethics counselor.

It is not physically possible, nor optimal, for a military justice expert to serve in *every* type of assignment available in the JAG Corps. But neither is it healthy to balkanize the JAG Corps, creating a cabal of officers who solely practice military justice. Duties as ethics counselors, national

Duties as ethics counselors, national security law attorneys, administrative law attorneys, or contract and fiscal law attorneys help leaven the JAG Corps’s pool of military justice expertise with necessary breadth and diversity

who eschews the other legal functions (i.e., administrative and civil law, contract and fiscal law, Soldier and Family legal services, national security law) and assignments to generalist leadership positions will ultimately be less effective not only as a JA in general, but specifically as a litigator and litigation leader.

Exposure to Other Areas of Military Law Makes Better Military Justice Practitioners

The JAG Corps’s military justice experts benefit from full, tour-length assignments in non-litigation billets. These assignments can be as diverse as a national security law attorney at a division or corps, an attorney in the administrative law policy division of the Office of The Judge Advocate General, an observer-controller-trainer, an advisor in a contracting brigade, or countless others.

Awards Management, why a sole-source contract is acceptable,⁴⁷ and why giving the expert a “read ahead” before the contract is awarded violates fiscal policy.⁴⁸ Although courts-martial have jurisdiction to try violations of the law of war,⁴⁹ the United States prefers to use the punitive articles of the UCMJ to prosecute law of war violations.⁵⁰ Therefore, command legal advisors and prosecutors must understand where and how the law of war, rules of engagement, and punitive articles of the UCMJ intersect.

Particularly for military justice leaders—chiefs of justice, special victim prosecutors, senior defense counsel, senior trial counsel, and even military judges—understanding of complex administrative law is vital. In-depth understanding of the interplay between the regulations governing unfavorable information,⁵¹ suspension of favorable personnel action,⁵² personnel evaluations,⁵³ and officer eliminations⁵⁴ is

security law attorneys, administrative law attorneys, or contract and fiscal law attorneys help leaven the JAG Corps's pool of military justice expertise with necessary breadth and diversity. This knowledge is essential for when those military justice experts serve as command legal advisors at the brigade, division, corps, and installation levels. Furthermore, service in those command advisory positions in turn builds that diversity of experience as well as the leadership skills necessary to excel when they return to military justice leadership and litigation billets.

Service in Command Advisory and Leadership Positions Makes Better Military Justice Practitioners

Assignment as a command advisor is absolutely critical to the professional development of any military justice practitioner—particularly those who entered the JAG Corps without any prior military experience. Although these assignments typically do not involve court appearances or litigation, they are nonetheless instrumental in developing JAs who will later become chiefs of military justice, senior defense counsel, senior trial counsel, special victim prosecutors, and military judges. The lessons learned while serving as a command advisor directly translate into those positions, thereby resulting in a higher quality of JAG Corps litigation. In fact, absent that command advisor time, JAs will never learn many of those valuable lessons. The MJRP exacerbates this deficiency because it deliberately removes military justice practitioners from individual brigades and, in the case of prosecutors, drastically reduces their interactions with Army commanders and units.⁵⁸ As the JAG Corps implements the MJRP, it will become even more critical for military justice experts to gain this experience through service in command advisory billets.

For example, brigade judge advocates (BJAs) are fully integrated into the brigade staff and the unit's daily battle rhythm.⁵⁹ They regularly attend—and often brief during—command and staff briefings, battle updates, and other meetings with brigade leadership. Further, they frequently work with other staff sections on various brigade projects and initiatives, thereby exposing

them to the many other functional areas of the Army.⁶⁰ Through these interactions, JAs gain a deeper understanding of how the Army works, how decisions are made through the Military Decision Making Process,⁶¹ and how different areas of expertise are utilized in order to accomplish the mission.

The personnel with whom a BJA must work are representative of the personnel who participate in a court-martial. Bailiffs, escorts, many witnesses, and—most importantly—panel members all come from Army units. Understanding who these people are, what they do, and how they process

advocate experience helps litigators speak the same language as their audience when presenting and arguing a case at trial.

Third, the substantive legal tasks that BJAs complete provide further benefit to a military justice practitioner. Indeed, for mid-level justice leaders—principally chiefs of justice and senior defense counsel—there is no position better for quickly and thoroughly building competence in most of the JAG Corps's other legal functions.⁶³ Specifically, BJAs spend a considerable amount of their time advising or reviewing Army Regulation 15-6 investigations, commander's inquiries, and financial liability

Those who have already served as a BJA and subsequently returned to the courtroom should later seek an additional non-litigation assignment; this could serve as a refresher in the overarching issues confronting the institutional Army

information to make decisions helps JAs prepare a more effective and persuasive presentation of their case. A focused and precise prosecution presented in a manner the panel can accept and understand is much more likely to produce the targeted result. Being immersed in a brigade also equips JAs with the knowledge to better relate to court-martial witnesses, know what questions to ask, and more clearly present their testimony at trial.

Second, BJAs typically have a weekly meeting with their brigade commander. This one-on-one interaction is not only useful to discuss current investigations, legal trends, pending courts-martial, disposition decisions, and other legal issues facing the unit, but it also offers JAs the opportunity to learn how senior commanders think and process information. Brigade judge advocates are exposed to several battalion and company-level commanders as well. Senior leaders typically compose court-martial panels⁶² to include past and present commanders; this added insight helps JAs better understand their audience at courts-martial, thereby enabling them to be more persuasive in presenting and arguing their case at trial. Brigade judge

investigations of property loss. While these fact-finding measures are administrative in nature, they often lead to an adverse administrative action against a service member. Military justice practitioners advise whether a particular case should proceed to court-martial or whether an alternative disposition is appropriate. Case analysis is a crucial part of a litigator's job; knowing all of the options available to the commander and the second- and third-order effects of their decision is therefore critical in advising court-martial convening authorities on how to dispose of a particular case.⁶⁴

Fourth, BJAs function as the officer-in-charge of the brigade legal section.⁶⁵ As a supervisor to multiple individuals of various ranks and expertise, the BJA must lead effectively to keep cases moving and ensure timely completion of all legal tasks and responsibilities, all while bolstering the morale, enthusiasm, and professional development of all those assigned to the legal section. This provides an invaluable opportunity for JAs to develop, implement, and execute their own leadership philosophy.⁶⁶ Not only does this experience help JAs become better leaders and supervisors, but it also provides them a small glimpse into

common issues that arise in courts-martial. For example, the failure of leadership is a frequently presented theory by both prosecutors—when the accused has been charged with such—and defense counsel—in order to explain why the accused acted in a particular way. The BJA experience enables JAs to better understand the challenges of leadership and articulate and present these themes at courts-martial.

While serving as a BJA is perhaps the most important non-litigation assignment for a military justice practitioner to complete at some point in their career, it is by no means the only one. In fact, those who have already served as a BJA and subse-

must still consciously—and deliberately—ensure its military justice experts do not become so myopically focused on criminal litigation that they lose the cross-functional competence necessary both to practice criminal law and to develop the next generation of military justice experts. The JAG Corps needs to address three concerns: (1) identifying the right JAs to become military justice experts, (2) continually developing military justice expertise, and (3) adjusting the JAG Corps’s culture.

Identifying Military Justice Experts

Based on longstanding practice in the Army (at least unofficially) every JA cap-

senior defense counsel who will train, supervise, and mentor those junior litigators from among whom future justice specialists will be drawn. The JAG Corps acknowledges there is a subjective component to this decision and has implemented a talent-management system of “bench builders”—the functional proponents in the Office of The Judge Advocate General—and “talent scouts”—leaders throughout the JAG Corps—to identify and develop JAs with both interest and demonstrated expertise in a particular legal function.⁷⁰ That identification process must recognize that litigation experience, while necessary, is not alone sufficient for military justice leaders and managers.⁷¹

Continually Developing Military Justice Experience While Adjusting the JAG Corps Culture

The first proposal to legislate a career litigation track contained a prohibition against “more than a total of four years total duty or assignments” outside of military justice.⁷² This reflects a begrudging nod to the reality of a military career in which diversity of assignments is unavoidable, but primarily exhibits a misinformed view that the only way to build military justice experts is to keep them solely in military justice positions.

As argued throughout this article, exceptional performance in military justice positions does not alone make the best career military justice specialists and leaders; this is primarily where even the new JAG Corps policies fall short. Policies that formalize requirements for experience in military justice only address part of the necessary conditions for expertise. The Navy career litigator track deliberately allows and encourages its participants to branch out.⁷³ The current Army model, both the PDPC system and the MJRP, does not account for the benefits of versatility. This needs to change.

Despite shedding the moniker “broadly skilled,” the JAG Corps nonetheless reminds its officers that “[f]unctional expertise is not sole-discipline specialization, and as such developing expertise in a particular legal discipline does not guarantee exclusive utilization within that core competency.”⁷⁴ On its face, it would seem that the guidance

The military justice expert career path should focus on developing the senior trial counsel, special victim prosecutors, chiefs of justice, and senior defense counsel who will train, supervise, and mentor those junior litigators from among whom future justice specialists will be drawn

quently returned to the courtroom should later seek an additional non-litigation assignment; this could serve as a refresher in the overarching issues confronting the institutional Army. Irrespective of rank or time in service, a career criminal law practitioner should seek positions and opportunities outside of military justice; such experiences are critical to the development of court-martial knowledge, skill, and expertise.

“Specialization” Should Be Deliberate, Progressive, and Versatile

Within the constraints of the Army’s assignment management, evaluation, and promotion systems, the Army JAG Corps must find a way to continuously identify, develop, and maintain military justice talent. If properly implemented, the recent changes to JAG Corps policies—including the MJRP—can provide a way to build a “bench” of military justice experts. In the drive to shed the negative perceptions of the “broadly skilled” model, the JAG Corps

tain, regardless of interest or capability, is expected to spend some time as a trial or defense counsel—most often as a trial counsel. Yet, the “broadly-skilled” model promoted the belief that too much time in those positions would be detrimental to career advancement. There was an unstated, Goldilocks-style, “just right” amount of military justice experience for every JA’s ideal career progression. The Army’s MJRP is at least a step toward acknowledging that not every JA can or should be a litigator. If the JAG Corps continues down this path, culture and expectations must change so that those JAs who have neither the aptitude nor the affinity for criminal litigation can still have successful careers if they excel in other aspects of military law.⁶⁷ Positively, rotating fewer captains through litigation billets will allow each more time to gain a foundation of experience.⁶⁸

Relatively junior captains will continue to try courts-martial.⁶⁹ The military justice expert career path should focus on developing the senior trial counsel, special victim prosecutors, chiefs of justice, and

could not be any clearer, yet the JAG Corps continues to use cautionary language to promote versatility: “Officers with functional expertise must continue to seek diverse assignments of increasing responsibility, inside and outside of their area of expertise, to remain the most competitive for promotion, schooling, and assignments.”⁷⁵ The JAG Corps policies and messaging still omit

positions as a prerequisite for successive PDPCs. This would reinforce the expectation of versatility and reassure criminal justice practitioners that serving in a command advisory position will not harm their prospects for future military justice assignments. Lastly, the JAG Corps should amend the current cautionary message⁸⁰ and acknowledge the benefits of cross-func-

LTC Gilberg is assigned as a Special Victim Prosecutor in Fort Campbell, Kentucky.

MAJ Murdough is assigned as a Complex Litigation Attorney with the Trial Counsel Assistance Program in Fort Belvoir, Virginia.

MAJ Overgaard is assigned as the Chief of Military Justice for the 101st Airborne Division (Air Assault) in Fort Campbell, Kentucky.

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Exceptional performance in military justice positions does not alone make the best career military justice specialists and leaders; this is primarily where even the new JAG Corps policies fall short

the fact that doing so also makes officers more competent within their area of functional expertise.⁷⁶

Expertise certainly requires experience acquired through repetition. An officer who wants to become a better runner should follow a training program focused predominantly on running. But they should also seek to improve their overall strength and endurance, because doing so will ultimately make them a better runner. Similarly, the JAG Corps’s military justice experts should spend most, but not all, of their careers in military justice assignments. As the JAG Corps refines the PDPC system and implements the MJRP across the Army, JAG Corps leaders—particularly military justice leaders—must change the culture and views of those who see service in other legal functions as somewhere between distraction and detriment.⁷⁷

The JAG Corps leadership can informally propagate this message through the Personnel, Plans, and Training Office, the Criminal Law Division, and the Criminal Law Department at TJAGLCS. Formally, the JAG Corps military justice career model must deliberately facilitate versatility through diverse assignments at both the captain and field grade levels.⁷⁸ One simple solution would be adding “Brigade Judge Advocate” to the “Military Justice Opportunities” career model.⁷⁹ Another may be requiring a modest amount of time spent in non-justice or command advisory

tional versatility for all legal practitioners, including military justice experts.

Conclusion

It is possible to meet the intent of Congress and to develop more expertise in the area of military justice without formalizing a rigid construct that pigeon holes JAs into a specific legal function. Instead, for the Corps to remain flexible and versatile and build the next generation of JAs, JAs must occasionally step out of their comfort zones and out of the courtroom. This will allow them to see the greater Army function. “Our diversity makes us stronger, smarter, and more innovative, helping us better service the needs of our clients, our people, and our communities.”⁸¹ This sentiment rings as true for the Army as it does for any large corporation.

Versatility must not be subsumed by the quest for expertise. The JAG Corps will create the best military justice experts through a combination of deliberate progression in the military justice legal function and diverse experience elsewhere. The JAG Corps will avoid the pitfalls of the “broadly-skilled” paradigm when its career military justice practitioners see versatility as an asset, not an impediment. **TAL**

MAJ Borgnino is assigned as the Chief of Ethics for U.S. Army Reserve Command in Fort Bragg, North Carolina.

Notes

1. TJAG AND DJAG SPECIAL ANNOUNCEMENT 40-04: ANNOUNCEMENT OF DECISIONS ON STRATEGIC INITIATIVES 2 (20 Apr. 2018) [hereinafter SPECIAL ANNOUNCEMENT 40-04].
2. *Id.* (“We will eliminate ‘broadly skilled.’”).
3. In addition to changing multiple procedural and evidentiary rules, every annual National Defense Authorization Act from 2013 through 2016 amended the statutory text of the Uniform Code of Military Justice (UCMJ). *See, e.g.*, National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1701-1705, 127 Stat. 672, 952-59 (2013) (codified at UCMJ arts. 6b, 32, 60(c), 43, 46(b), 56(b), 18(c)); Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 532, 128 Stat. 3292, 3366 (2014) (amending UCMJ art. 49); National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 531, 129 Stat. 726, 814 (2015) (amending UCMJ art. 6b); National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, Division E, 130 Stat. 2000, 2894-2968 (2016) (containing the Military Justice Act of 2016, which made major structural and substantive changes to the entire UCMJ).
4. For the purposes of this article, “military justice practitioners” refer to those who are directly and primarily involved in the litigation of courts-martial at the trial and appellate level, specifically trial counsel, trial defense counsel, special victim prosecutors, senior defense counsel, regional defense counsel, chiefs of military justice, appellate counsel, military judges, and appellate judges. However, a “military justice assignment” for career experts in military justice would also include professors of criminal law, the trial counsel assistance program, defense counsel assistance program, among others.
5. *See, e.g.*, United States v. Mack, 2013 CCA LEXIS 1016, at *5 (A. Ct. Crim. App. 2013) (Pede, C.J., concurring) (expressing concern about a “blocking and tackling” weakness among our [military justice] practitioners”); Cully Stimson, *Latest Case of JAG Malpractice Shows Pressing Need for Reform*, DAILY SIGNAL (Feb. 21, 2017), <https://www.dailysignal.com/2017/02/21/latest-case-of-jag-malpractice-shows-pressing-need-for-reform/> (citing United States v. Sewell, 76 M.J. 14 (C.A.A.F. 2017) and United States v. Stellato, 74 M.J. 473 (C.A.A.F. 2015) as examples of “cases coming through the military justice system [that] strongly suggest[]” the Army needs a career litigation track”); SUBCOMM. OF THE JUD. PROC. PANEL,

REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES 10 (2016) (expressing concern that, “in the Army, about 20% of attorneys assigned to a defense counsel position have no prior [criminal litigation] experience”), https://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_DefResources_Final_20161208.pdf; Rebecca Kheel, *Bipartisan Senators Seek to Boost Experience in Military Justice System*, HILL (June 22, 2017, 11:03 AM), <https://thehill.com/policy/defense/338949-bipartisan-senators-look-to-improve-expertise-in-military-justice-system> (quoting Sen. Kirsten Gillibrand) (“JAGs [sic] are encouraged to have a broad range of experience, which means that a JAG who has very little experience trying cases may be assigned to a complex sexual assault case. Our service members deserve better.”).

6. In 2017, Congress gave more specific direction, requiring each pilot program to include:

(A) A military justice career track for judge advocates that leads to judge advocates with military justice expertise in the grade of colonel, or in the grade of captain in the case of judge advocates of the Navy.

(B) The use of skill identifiers to identify judge advocates for participation in the pilot program from among judge advocates having appropriate skill and experience in military justice matters.

(C) Guidance for promotion boards considering the selection for promotion of officers participating in the pilot program in order to ensure that judge advocates who are participating in the pilot program have the same opportunity for promotion as all other judge advocate officers being considered for promotion by such boards.

(D) Such other matters as the Secretary concerned considers appropriate.

National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 532(c)(4), 131 Stat. 1283, 1388-89 (2017). This was not the first attempt to legislate a “military justice career track.” See *infra* note 77 and accompanying text.

7. Congress specifically directed the service secretaries to guide promotion boards to ensure that military justice specialization does not disadvantage officers pursuing this track, which shows some validity to these perceptions. See *supra* text accompanying note 6. See also *infra* note 81 and accompanying text (discussing the current policy, encouraging versatility to remain competitive for career advancement).

8. In early 2017, Lieutenant General (LTG) Flora Darpino, the 39th Judge Advocate General of the Army, directed a comprehensive retention survey of the Judge Advocate General’s Corps (JAG Corps) titled “Why You Stay.” Early results of the survey indicated that some JAs saw “broadly skilled JA” as one of many reasons to continue with a JAG Corps career; but, among other concerns, a perceived “lack of ability to specialize” led other JAs to consider leaving the service. LTG Flora Darpino, 39th Judge Advocate General of the Army, Office of The Judge Advocate General, *Why You Stay Results* (June 2017) (unpublished PowerPoint presentation) (on file with author-Major Murdough).

9. SPECIAL ANNOUNCEMENT 40-04, *supra* note 1, at 2.

10. U.S. DEP’T OF AIR FORCE, CAREER FIELD EDUCATION AND TRAINING PLAN 51J para. 4.2 (9 May 2017) (“Judge

advocates must know and fully understand all legal capabilities and limitations. They must be able to advise in any environment, perform a variety of legal jobs, and understand all aspects of legal support to operations.”).

11. See Memorandum of Understanding Between the Deputy Judge Advocate General, United States Coast Guard and the Commander, Naval Legal Service Command, subject: Mutual Support in Military Justice Matters (31 Aug. 2016).

12. U.S. DEP’T OF NAVY, JAGINST 1150.2D, MILITARY JUSTICE LITIGATION CAREER TRACK 1 (15 Feb. 2017).

13. *Id.* at 2.

14. *Id.* encl. 1, encl. 2.

15. *Id.* at 3.

16. *Id.* at 3–4.

17. *Id.* encl. 1.

18. *Id.*

19. *Id.* at 2–3.

20. *Id.* at 3.

21. See generally U.S. MARINE CORPS, ORDER 1200.17E, MILITARY OCCUPATION SPECIALTIES MANUAL (8 Aug. 2013).

22. U.S. MARINE CORPS, LEGAL SERVICES STRATEGIC ACTION PLAN 2010–2015 at 4, https://www.hqmc.marines.mil/Portals/135/Docs/Unit%20Home/Strategic_Action_Plan_2010-2015.pdf [hereinafter USMC Action Plan].

23. *Id.* app. A, at 6 (“These [37 specific billets in military justice] are supervisory and must be filled by military justice experts with an LL.M. in criminal law or a proven history of military justice experience and expertise.”).

24. *Id.* app. A, at 7.

25. *Id.*

26. U.S. MARINE CORPS, BULLETIN 5800, MILITARY JUSTICE REQUIREMENTS AND IMPLEMENTATION GUIDANCE (25 May 2017).

27. See USMC Action Plan, *supra* note 22, at 4 (“Without a [Marine Air-Ground Task Force] officer background, our judge advocates would be less effective in their primary roles as command legal advisors, military justice practitioners, and operational law advisors.”).

28. See Policy 08-2, Office of the Judge Advocate General, subject: Military Justice Additional Skill Identifiers (21 July 2008), *superseded* by Policy 11-7, Office of the Judge Advocate General, U.S. Army, subject: Military Justice Skill Identifiers (9 June 2011), *superseded* by U.S. DEP’T OF ARMY, OFFICE OF THE JUDGE ADVOCATE GENERAL, JUDGE ADVOCATE LEGAL SERVICES PUB. 1-1, PERSONNEL POLICIES para. 7-14.b (20 May 2019), *superseded* by U.S. DEP’T OF ARMY, OFFICE OF THE JUDGE ADVOCATE GENERAL, JUDGE ADVOCATE LEGAL SERVICES PUB. 1-1, PERSONNEL POLICIES para. 7-14.b (June 2020) [hereinafter JALS PUB. 1-1]. Congress specifically requires each service “pilot program” to include a system of skill identifiers. See *supra* text accompanying note 6.

29. JALS PUB. 1-1, *supra* note 28.

30. Memorandum from The Judge Advocate General for Staff Judge Advocates at Military Justice Redesign Pilot Program Sites, subject: Military Justice Redesign Pilot Program (24 Jan. 2019) (enclosed as Enclosure

3 to SPECIAL ANNOUNCEMENT 40-04, *supra* note 1). The Military Justice Redesign Pilot Program (MJRPP) began at Fort Riley, Fort Leonard Wood, and Joint Base Lewis-McChord. After gaining permission from the Assistant Judge Advocate General for Military Law and Operations, Fort Carson implemented the MJRPP in January 2019. See Memorandum from Chief, Military Justice, 4th Infantry Division and Fort Carson to Criminal Law Division, Office of the Judge Advocate General, subject: Establishment of Military Justice Redesign Pilot Program Standard Operating Procedures (14 Dec. 2018) (on file with author-Major Overgaard) [hereinafter 4ID SOP]. Two of the authors of this article serve as senior defense counsel at two of the initial MJRPP locations.

31. Policy 19-01, Office of the Judge Advocate General, subject: Military Justice Redesign (18 July 2019) [hereinafter Policy 19-01].

32. *Id.*; see also 4ID SOP, *supra* note 30.

33. Policy 19-01, *supra* note 31; see also TJAG AND DJAG SPECIAL ANNOUNCEMENT 40-08: DECISIONS ON STRATEGIC INITIATIVES 2 (30 Apr. 2019) [hereinafter SPECIAL ANNOUNCEMENT 40-08].

34. See Policy 19-01, *supra* note 31 (giving individual staff judge advocates (SJAs) an option between two general models, and discretion to divide responsibilities for individual tasks, e.g., administrative boards, referral of charges, providing legal opinions, et al. within certain parameters).

35. See, e.g., *id.*; SPECIAL ANNOUNCEMENT 40-08, *supra* note 33; 4ID SOP, *supra* note 30; Gail Parsons, *Pilot Program at Fort Riley Creating Expertise Among Attorneys*, ARMY.MIL (Nov. 21, 2018), https://www.army.mil/article/214114/pilot_program_at_fort_riley_creating_expertise_among_attorneys.

36. Policy 19-01, *supra* note 31.

37. See *id.* (leaving the “precise delineation” between the trial counsel and military justice advisor up to individual SJAs).

38. See *id.* para. 5-10c (“As a general rule, judge advocates graduating from the [Judge Advocate Officer Basic Course] will not be assigned to TDS as their initial assignment... any assignment of JAOBC graduates to TDS will be carefully monitored.”). All the authors of this article have served as senior defense counsel. At least one-third of the defense counsel assigned to each of our offices had no prior military justice experience.

39. Major Jeffrey Gilberg, *The Secret to Military Justice Success: Maximizing Experience*, 220 MIL. L. REV. 65 (2014).

40. JALS PUB. 1-1, *supra* note 28, para. 5-1i. The notable exception is the position of military judge, which for active duty officers requires a minimum of either three years of trial litigation experience, two years of litigation experience combined with a year as chief of criminal law, regional defense counsel, or criminal law instructor, or three years as a SJA in an active criminal law jurisdiction. *Id.* para 8-1a(1).

41. See *supra* notes 22–26 and accompanying text. The Army JAG Corps uses a secondary MOS for military judges, but not for any other positions.

42. A formalized presumption, rather than a formal requirement, would reinforce the JAG Corps’s emphasis on expertise, yet also allow flexibility to grant an exception.

43. TJAG AND DJAG SENDS 40-11: BUILDING EXPERT AND VERSATILE JUDGE ADVOCATES-THE REVISED SKILL

IDENTIFIER PROGRAM para. 1.a (7 Jun. 2019) [hereinafter TJAG AND DJAG SENDS 40-11]; accord JALS PUB. 1-1, *supra* note 28, para. 7-14a (“PDPCs are a significant factor in the assignment process, and possession of the appropriate level of PDPC...will be strongly considered during the assignment process”).

44. See generally U.S. DEP’T OF ARMY, PAM. 611-21, MILITARY OCCUPATION CLASSIFICATION AND STRUCTURE (19 July 2018); U.S. DEP’T OF ARMY, REG. 611-1, MILITARY OCCUPATIONAL CLASSIFICATION STRUCTURE DEVELOPMENT AND IMPLEMENTATION para. 4-2 (15 July 2019) (discussing use of skill identifiers in matching officers’ skills to the requirements of particular duty positions).

45. TJAG AND DJAG SENDS 40-11, *supra* note 43, para. 1.a.

46. See U.S. DEP’T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY para. 2-5 (29 Oct. 2003).

47. See FAR 6-302-3(a)(2)(iii) (2019).

48. Cf. FAR 1.602-3 (2019) (discussing unauthorized commitments of funds); 32 C.F.R. §

719.138(k) (1985) (discussing payment of expert witnesses).

49. UCMJ art. 18(a) (2016).

50. U.S. DEP’T OF ARMY, FIELD MANUAL 6-27, THE COMMANDER’S HANDBOOK ON THE LAW OF LAND WARFARE para. 8-39 (7 Aug. 2019).

51. U.S. DEP’T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION (10 Apr. 2018). This regulation discusses adverse administrative actions, such as reprimands, but also the potential impact of unfavorable information on security clearances, an often overlooked collateral consequence of adverse actions. *Id.* ch. 3-4.

52. U.S. DEP’T OF ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS) (11 May 2016).

53. U.S. DEP’T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM (4 Nov. 2015).

54. U.S. DEP’T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006).

55. See generally U.S. DEP’T OF ARMY, REG. 635-40, DISABILITY EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION (19 Jan. 2017); U.S. DEP’T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS (19 Dec. 2016); Information Paper from Colonel F. Dean Raab, U.S. Army Medical Command Staff Judge Advocate, subject: Impact of Misconduct during Army Physical Disability Evaluation System Process, (8 June 2015) (on file with author).

56. See generally U.S. DEP’T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES (29 Nov. 2010).

57. See generally Supplemental Standards of Conduct for Employees of the Department of Defense, 5 C.F.R. § 3601, (1993); U.S. DEP’T OF DEF., 5500.7-R, JOINT ETHICS REGULATION (JER) para. 3.1 (30 Aug. 1993) (C7, 17 Nov. 2011).

58. Prosecutors were formerly assigned to specific brigade headquarters as members of the staff, though they performed duties in the division, corps, or installation military justice office. Under the MJRP, all prosecutors are now centrally assigned to the OSJA, in the headquarters of the General Court-Martial Convening Authority. See Policy 19-01, *supra* note 31.

59. U.S. DEP’T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 3-6 (12 Jan. 2017) (describing the duties of brigade judge advocates (BJAs), to include physical duty location at the brigade headquarters) [hereinafter AR 27-1].

60. See generally U.S. DEP’T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS 2-28 (5 May 2014) (describing the role and function of the staff judge advocate as a member of the commander’s personal and special staff).

61. See U.S. DEP’T OF ARMY, DOCTRINE PUB. 5-0, THE OPERATIONS PROCESS paras. 32–34 (May 2012). Without this experience, most JAs are not exposed to Military Decision Making Process until they are senior majors attending their Intermediate Level Education course. *Id.*

62. See generally MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 502(a)(1) (2019) (requiring selection of members based on their “age, education, training, experience, length of service, and judicial temperament”) [hereinafter MCM].

63. See generally *supra* section Exposure to Other Areas of Military Law Makes Better Military Justice Practitioners.

64. See generally MCM, *supra* note 62, R.C.M. 306 (discussing disposition options available to commanders for allegations of misconduct); see also DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 5-8 (6 Nov. 2014).

65. AR 27-1, *supra* note 59, para. 3-6d(1).

66. Particularly compared to other Army branches, the JAG Corps provides a dearth of opportunities for junior officers to lead within the organization.

67. Additionally, the “competent in all legal disciplines” requirement includes military justice competence for the JAG Corps’s specialists in other legal functions, such as national security law. Assignment to positions as military justice advisors or special victims counsel may be a way for the JAG Corps to build competence in its non-justice specialists while mitigating the risk of sending unqualified litigators into the courtroom.

68. With fixed (or declining) numbers of courts-martial, more JAs trying cases means fewer opportunities for individual JAs to gain experience through trying cases. Two relatively recent studies quantify this issue. See Gilberg, *supra* note 39, at 1, 10–11 (finding, *inter alia*, in a 2014 study that over 70% of the Army’s trial counsel and about 60% of its chiefs of justice had tried fewer than 10 cases); Major Derrick W. Grace, *Sharpening the Quill and Sword: Maximizing Experience in Military Justice*, ARMY LAW., Dec. 2010, at 24.

69. Otherwise they will never gain the base experience on which expertise can be built.

70. JALS PUB. 1-1, *supra* note 28, para. 5-3.

71. See Colonel Jerrett W. Dunlap Jr., *Measuring the Effectiveness of the Military Justice System*, ARMY LAW., Jan. 2018, at 9, 15 (“Experience alone, as measured by the number and type of cases tried, is not sufficient to ensure effectiveness. There are countless examples of experienced counsel who are not effective.”).

72. Justice for Victims of Military Sexual Assault Act, H.R. 5257, 114th Cong. § 2(b)(3) (2016).

73. See *supra* notes 19–20 and accompanying text.

74. JALS PUB. 1-1, *supra* note 28, para. 5-1j.

75. *Id.* (emphasis added).

76. The JAG Corps career management policy acknowledges that “Versatile JAs, by understanding the interrelationship of the various legal disciplines, are better practitioners and better able to serve their clients, even in areas requiring the development of functional expertise.” *Id.* But this single sentence, without formal and informal reinforcement, will do little to overcome the skepticism produced in the era of “broadly-skilled.”

77. A recent review of the Navy JAG Corps made a similar observation, noting that “Increased understanding of and appreciation for Navy operations and Service culture would improve judge advocates’ court-martial practice” and recommending the Navy “Effectively communicate the need for, and value of, [national security law, command advice, administrative law, legal assistance and claims] missions to the entire JAG Corps organization.” U.S. DEP’T OF NAVY, EXECUTIVE REVIEW PANEL, COMPREHENSIVE REVIEW OF THE DEPARTMENT OF THE NAVY’S UNIFORMED LEGAL COMMUNITIES 115–16 (2019), <https://www.navy.mil/strategic/Comprehensive%20Review%20DON%20Uniformed%20Legal%20Communities.pdf>.

78. The JAG Corps’s published “Military Justice Opportunities,” superimposed on the standard officers’ career model, acknowledges military justice experts “remain versatile and capable of performing successfully in any core legal function,” but does not explain the benefits of cross-functional versatility to the practice of justice. JALS PUB. 1-1, *supra* note 28, fig. 7-1.

79. By comparison, even though national security law issues do not typically dominate a BJA’s workload, the “National Security Law Opportunities” model still includes BJA of a Brigade Combat Team and Group or Regimental JA of units within U.S. Army Special Operations Command. *Id.* fig. 7-3.

80. See *supra* note 79 and accompanying text.

81. Press Release, Accenture, Accenture Further Strengthens Commitment to Inclusion & Diversity in the U.S. (Feb. 8, 2016), <https://newsroom.accenture.com/news/accenture-further-strengthens-commitment-to-inclusion-and-diversity-in-the-us.htm> (quoting Julie Sweet, Accenture Chief Executive-North America).



(Credit: U.S. Army photo by SSG Laura Buchta)

No. 5

How 9/11 Changed the JAG Corps Forever

By Colonel (Retired) Lorianne M. Campanella

As the Regiment looks back, it is remarkable to think about how the Judge Advocate General's (JAG) Corps was catapulted into the deep, complex, and intense legal environment that ensued as a result of the events that took place on 9/11—and why it matters. Overnight, the U.S. Army went from a peacetime to a wartime footing, and the nature of life in America changed. The JAG Corps changed. In addition to the firsthand experiences of judge advocates (JAs) that day, the JAG Corps faced an immediate challenge of advising senior officials on the legal basis for a military response; this highlighted the disparity between the existing rules and those needed in the months and years that followed. United States Army JAs played a critical role in shaping the legal framework after 9/11, much of which is still in place today, nearly twenty years later.

This article, however, is not about the mountain of legal issues and changes that followed as a result of the events of that day. Instead, it is intended to honor those members of the JAG Corps who bore direct witness to history—as it unfolded before them on 9/11—and recount their stories. This short article provides only a sampling of judge advocate accounts because, for obvious reasons, many do not wish to speak of the events of that day. History, however, is grateful to those who chose to share their memories so that their stories are not lost forever to time and space. This article is dedicated to the legacy of the women and men of the JAG Corps

who sacrificed their blood, tears, and lives on that day, and every day since.

Everybody who is old enough to remember 9/11 has a story. They remember where they were. They remember the confusion, the disbelief, the unfathomable waste of life, the helplessness, and the anger. The effect of 9/11 on the JAG Corps could have been different, if not for the seemingly immaterial leadership decisions made a few short years and months before that day. For the Corps, and some of its individual members, providence interceded; the JAG Corps became more interwoven than ever into the decision-making fabric of the nation's military—both on and off the battlefield.

Before 11 September 2001

In 1998, the Pentagon was due for a renovation.¹ With five wedges and a three-year estimate to overhaul each wedge, it would take over a decade to renovate the entire building. To keep the Pentagon operational during renovation, one-fifth of the building's occupants needed to relocate to temporary office space in and around the Pentagon. The vacated "wedge" of the Pentagon would then be sealed off for renovation and abatement. Each wedge would take three years to renovate. The Office of The Judge Advocate General (OTJAG) occupied a section of the first "wedge" set for renovation. That section was in the E

ring, second floor, fourth corridor, facing westward and overlooking what was then the Marine Corps Headquarters and the Navy Annex.² To the right, looking out the OTJAG windows, not far in the distance, was a clear view of Arlington National

Altenburg was TAJAG.⁵ With the notification of the intended modernization effort, MG Huffman was directed to move OTJAG operations to a commercial office space nearby the Pentagon. Chief Warrant Officer 5 (CW5) Sharon Swartworth

The building manager told MG Huffman the decision had been made not to move the OTJAG operating divisions back into the Pentagon due to “efficiency and economy”

Cemetery. The Judge Advocate General (TJAG) and The Assistant Judge Advocate General’s (TAJAG)³ offices were in front of the Pentagon’s helicopter pad. From this suite, those assigned to OTJAG would watch helicopters land and take off. It was prime Pentagon property. In those days, the barriers around the Pentagon were hardly formidable. The stand-off was a great distance from the sidewalk and street, but only a six-foot iron fence stopped passersby from walking right up to the building and touching it on the west side, and no fence existed on the opposite side. The helicopter pad could also be seen from the sidewalk and roads toward the west.

In 1998, in addition to TJAG and TAJAG, the same Pentagon wedge also housed The Assistant Judge Advocate General for Military Law and Operations (MLO), the Regimental Sergeant Major (SGM), the Chief Warrant Officer of the Corps, and the majority of OTJAG operating divisions. They included the divisions of Administrative Law; Criminal Law; International and Operational Law; Standards of Conduct; Personnel, Plans, and Training Office; Contract Law; Labor Law; Technology; and Legal Assistance Policy. All totaled, approximately one hundred lawyers, paralegals, and staff occupied the offices located in OTJAG’s Pentagon space.⁴ The OTJAG Pentagon personnel were often referred to as the “brain trust” of the JAG Corps—many were hand-selected to leverage their talents and skills, as well as prepare them for future responsibilities and assignments.

Major General (MG) Walter B. Huffman was TJAG and MG John D.

and the OTJAG administrative staff were charged with the mission to move OTJAG to Rosslyn, Virginia.⁶ After significant planning, JAG Corps leadership chose a building to temporarily house OTJAG. The move occurred swiftly and efficiently in May 1998.

Since MG Huffman’s primary clients—the Secretary and Chief of Staff of the Army—remained in the Pentagon, office space for him, his executive officer, and his clerical staff remained at the Pentagon. The operating divisions of OTJAG moved to the tenth and eleventh floors of an office complex located at 1777 North Kent Street, Rosslyn, Virginia, where they had a stunning bird’s eye view of Washington, D.C. At the Pentagon, MG Huffman settled into a dated interior basement office suite at 1E739, across the hall from the Army Inspector General’s office.⁷ While MG Huffman spent most of his time at the Pentagon, and MG Altenburg spent most of his time in Rosslyn, each General had offices at both locations. While the situation was not ideal, it was manageable, and the OTJAG team made it work.

Three years later, in July 2001, the Pentagon Building Manager notified MG Huffman that the renovations of the TJAG and TAJAG executive suites—which previously occupied “wedge 1” spaces—were complete and the OTJAG executive office could move into the space.⁸ The building manager told MG Huffman the decision had been made not to move the OTJAG operating divisions back into the Pentagon due to “efficiency and economy.” Instead, other functions already in the Pentagon would shift from a non-renovated wedge

into a renovated wedge and this would happen continuously, until the whole building refurbishment was complete. This meant OTJAG would be the last group to move back into the Pentagon after the entire Pentagon renovation, perhaps a decade or more down the road. There was no certain timeline, other than no time soon.

Given the short remaining time he would serve as TJAG, MG Huffman turned down the opportunity to move the OTJAG executive offices back into the renovated Pentagon spaces without his operating divisions. He remained in the basement space and left future moving decisions to the incoming TJAG, MG Thomas J. Romig. On 11 September 2001, due to Congressional delay, MG Romig was still awaiting Senate confirmation to become TJAG and TJAG’s Pentagon office was still in the basement. Wedge 1, previously occupied by OTJAG, was ground zero on 9/11.⁹

11 September 2001

The World Trade Center

On 9/11, Army Reserve Lieutenant Colonel (LTC) William H. Pohlmann—an Army Reservist assigned to the 4th Legal Support Organization—was working on the seventy-ninth floor of the South Tower of the World Trade Center. Shortly after 0846, LTC Pohlmann called his wife—Linda—to reassure her he was fine after the first plane hit the North Tower. He then spoke to his son, who called him from Wall Street to check on his father. As he hung up the phone with his son and called his wife back, terrorists flew United Airlines Flight 175 into the South Tower at 0903, killing him. Lieutenant Colonel Pohlmann was the first judge advocate killed during the War on Terrorism.

Pentagon City, Arlington, Virginia

As Americans gathered around televisions to watch the events of 9/11 unfold, Associate General Counsel, Drug Enforcement Agency (DEA), and former Army JAG officer, Colonel (COL) (Ret.) Charlie Trant, was on the twelfth floor of the DEA building across the street from the Pentagon on Army-Navy Drive.

As the first plane hit the North Tower, he and his colleagues gathered to watch

the television coverage in an exterior office facing the west side of the Pentagon. Colonel Trant, who was facing the interior, turned around when someone yelled, "Oh, my God." His memory of the event is vivid, colorful, and horrific. He described the moment as taking place in slow motion. Due to the location of Ronald Reagan National Airport, it was common to see low flying aircraft near the Pentagon—but not in this area of the sky. He saw a large commercial airplane flying low in the sky with a flat trajectory and with no wheels down. He was standing on the twelfth floor. The plane seemed to be around the eighth-floor level. He saw the tail numbers. He read "American Airlines" clearly. Alongside his colleagues, he watched in disbelief as the plane glided in front of him, gently banked, hit a light post, and headed directly for the office space he once occupied as a staff officer in OTJAG. He watched the plane disappear into the building and create an explosion that shot hundreds of feet into the air above the Pentagon.

The Office of the Judge Advocate General

On 11 September 2001, at 0937, the only person inside the Pentagon OTJAG basement executive office spaces was the administrative assistant to TJAG, Ms. Lisa Hudson.¹⁰ That morning MG Altenburg—acting TJAG—began his day in Rosslyn by traveling to attend a meeting in the Pentagon with Lieutenant General (LTG) Thomas J. Plewes—Chief of the Army Reserve—in an office across from the OTJAG office space.¹¹ Major General Altenburg had planned to fly from National Airport to Bogota, Columbia, for a conference after his meeting at the Pentagon. He left Rosslyn to go to the Pentagon after learning the first plane hit the World Trade Center, without thinking of the potential impact on his travel or world events. He had intended on returning to OTJAG in Rosslyn before departing for Columbia. After dropping him off, Staff Sergeant (SSG) Christopher M. Swires, MG Altenburg's driver, waited in a government van outside the Pentagon for MG Altenburg to finish his meeting. At the time, there was a "VIP" parking lot at the edge of Corridor 6. From where SSG Swires sat in the parking lot, he could see down the

length of the outside of the Pentagon to the helicopter pad.

As he waited, SSG Swires listened to President Bush on the radio saying terrorists had attacked the United States. He was looking down at the radio when he felt the van lurch forward. He looked up to see a portion of the Pentagon explode hundreds of feet in the air. Unsure of what caused the explosion and concerned about what to do next, SSG Swires immediately called OTJAG in Rosslyn seeking guidance as to whether he should return to Rosslyn. He spoke with CW5 Swartworth, the Chief Warrant Officer of the Corps. Because his phone call was near contemporaneous with the plane's impact with the Pentagon, CW5 Swartworth did not understand why SSG Swires was calling to say he was still waiting for MG Altenburg. Staff Sergeant Swires explained the "top of the Pentagon exploded" and "it's on fire." Chief Swartworth informed the Assistant Executive Officer (AXO), LTC Charles "Chuck" Pede.¹² Lieutenant Colonel Pede directed SSG Swires to wait for MG Altenburg. Outside

passed that bombs had exploded at the State Department building and the U.S. Capitol.

Inside the Pentagon, engrossed in his meeting, MG Altenburg did not hear or feel the impact of the airplane. Though he heard a commotion in the hallway, he assumed it was something innocuous, like the annual Army-Navy game cheerleader ruckus that makes its way around the Pentagon, or perhaps a birthday celebration. As the noise became more disruptive, LTG Plewe's Executive Officer (XO) came in the room and informed them a bomb may have gone off in the building. Major General Altenburg trusted the XO had a handle on the situation and would keep them informed if they needed to do anything. They continued with their meeting. They finally ended their meeting when the noise in the hallway became too loud and distracting.

Major General Altenburg, still unaware a plane had flown into the building, returned to the nearby Pentagon OTJAG executive office space to find the unlocked door wide open and no one there. He noticed dozens of unattended burn bags

SSG Swires listened to President Bush on the radio saying terrorists had attacked the United States. He was looking down at the radio when he felt the van lurch forward. He looked up to see a portion of the Pentagon explode hundreds of feet in the air

the van, SSG Swires noticed a window from the airplane on the ground.

From their office building in Rosslyn, OTJAG personnel could see smoke rising from the Pentagon.¹³ There was an enormous sense of confusion and uncertainty as to what was happening and what to do next. There was a desire to get accountability of the JAs in and around the Pentagon, including MG Altenburg, but there was no way to communicate with the Pentagon.¹⁴ Cell phones were jammed, and landlines would not work because the operator switchboard, which was in the Pentagon, disabled the phones. There was no way to drive to the Pentagon because roads were closed. There were also rumors being

filled with sensitive information behind Ms. Hudson's desk. He waited a few minutes for the Administrative Assistant to return to talk to her about leaving burn bags unattended. After a period of time, he wandered to the D ring to look for her and found every office empty. While he was in the D ring office area, a man came by and asked to use the office phone. Major General Altenburg acquiesced and overheard the man explaining to someone that a bomb went off inside the Pentagon and that he was leaving the building. After the man left, MG Altenburg locked the door and returned to the OTJAG office space where he waited a few more minutes, still unaware of the precise nature of events taking

place around him in the Pentagon. When Ms. Hudson did not return, he locked the door and headed toward the exit to meet his driver, still thinking he was headed to Bogata later that day.

As MG Altenburg attempted to exit the Pentagon the same way that he'd entered, a security guard activated a metal curtain, thus locking off the exit. MG Altenburg asked him to open it, but the guard told him it could not be opened after it was activated due to security measures, as the security system required two separate compartmentalized keys to unlock the curtain. Unable to exit there, and armed with a resolve to get

immediately after the attack, SSG Swires drove on the shoulder of the road; it took forty-five minutes to drive the two miles back to OTJAG in Rosslyn.

Joint Legal Assistance Office

Many Army JAs were in the Pentagon on 9/11. In the D ring, the Joint Legal Assistance Office (JLAO) adjoined OTJAG space. The JLAO Officer in Charge (OIC), Major (MAJ) Elizabeth Gossart, was seeing a client when she heard a loud sound and felt a massive change in air pressure in her office; she and her client ducked. This was the moment the plane struck the Pentagon.

Elizabeth Gossart was seeing a client when she heard a loud sound and felt a massive change in air pressure in her office; she and her client ducked. This was the moment the plane struck the Pentagon

outside, MG Altenburg headed back inside the Pentagon to find another exit. Coming down the staircase in front of him, he saw the Chief of Naval Operations (CNO), the Vice CNO, two or three other admirals, and the remainder of the CNO's entourage hurrying in the direction of another exit. He followed behind them and exited the Pentagon at the River Entrance, where he found thousands of people standing outside.

Determined to make his flight to Colombia that day, he made his way back around the building, clambering over barriers to get to where SSG Swires waited. From where SSG Swires sat in the vehicle, he had a direct view of the impact area. In a rush, MG Altenburg entered the vehicle and ordered SSG Swires to drive to Rosslyn. As they drove across the parking lot, they were stopped by the Secretary of Defense's security force who attempted to commandeer the van to get to the Secretary of Defense. Major General Altenburg instead provided them a ride. Staff Sergeant Swires drove to the other side of the parking lot, dropped them off, and headed back to Rosslyn, driving over and around plane parts on their way. Since the expressways had become literal parking lots almost

Army paralegal Ms. Alva Foster opened the door and told MAJ Gossart and her client they needed to leave the building. The client quickly left, and MAJ Gossart swept the area for remaining personnel. She found MG Huffman's secretary, Lisa Hudson, on the phone telling her mother a fire drill was underway in the Pentagon. Upon MAJ Gossart's entrance, Ms. Hudson realized this was not a drill. The JLAO personnel left the building and met at a designated (pre 9/11) outdoor emergency location they called "the tree of life."

Staff Sergeant Nathan Jones, the non-commissioned officer in charge (NCOIC) for both OTJAG and JLAO, was at a meeting in the Pentagon with SGM Larry Strickland, the Deputy Chief of Staff for Personnel (DCSPER) SGM, when the first plane hit the North Tower of the World Trade Center. When word spread to those at the meeting that a second plane hit the South Tower of the World Trade Center, SGM Larry Strickland left the meeting and returned to his office in the Pentagon. The meeting ended when the plane hit the Pentagon. People dispersed, but SSG Jones rushed back to OTJAG to account for his people. When he arrived in the basement

space, everyone was gone. He headed to the "tree of life" and found the JLAO personnel and Ms. Hudson. Later, SSG Jones would learn SGM Strickland was killed after leaving the meeting and returning to his DCSPER office.

There was mass confusion outside the Pentagon. Panicked uniformed personnel were retrieving their children from the Pentagon's daycare center—some in strollers, some in cribs. Others were carried by daycare workers. Someone in uniform said, "This isn't over; another plane is coming." The legal assistance crew decided it would be best to walk the two-mile walking trail to OTJAG in Rosslyn to figure out what was happening. Information was scarce, and Rosslyn was a place to reassemble to figure out who needed to advise and assist Army officials and what to do next. Personnel at the Rosslyn office were uncertain as to what actually occurred at the Pentagon and were getting news from the television.

As they walked, the legal assistance personnel picked up stragglers and invited others to join them—some were JAs, some were not. Many left their keys, cars, money, and phones inside the Pentagon. Cell phone communication was near impossible because the networks were overwhelmed. Near Arlington Cemetery, a reporter tried to interview the group. They declined, and the reporter shouted "America loves and supports you."

The Army General Counsel's Office

On 9/11, MAJ Karen Fair was assigned as an Assistant Counsel to the Army General Counsel. Assigned there since June 2001, her portfolio included issues concerning military personnel and U.S. Army Reserve Affairs. That morning, she was preparing to attend a meeting at the DCSPER's Office concerning the development of a computer program to aid Soldiers in being able to view their military benefits online. The night before, she had received an index card on her desk, personally from the DCSPER, specifically requesting her presence at the meeting.

At around 0835, she gathered her materials and headed out to attend the meeting. Major Fair did not want to arrive late to the meeting and knew she was

expected to be there. Adding to her angst, SGM Lacey B. Ivory—her former platoon leader and colleague from her Army service prior to becoming a JA—was attending the meeting. Now serving as the Senior Enlisted Executive Assistant to the Deputy Assistant Secretary for Army Manpower and Reserve Affairs, SGM Ivory would surely give her grief should she be late.

The Senior Deputy General Counsel and the then-Acting General Counsel, Mr. Thomas W. Taylor, stopped her as she headed for the door. She explained she was expected to be at the DCSPER meeting and had been personally requested to attend, but Mr. Taylor pointedly and tersely said, “I have my own meeting and you don’t need to go to that meeting. My meeting is more important.” Major Fair found this abnormal in that Mr. Taylor rarely, if ever, convened meetings, but she followed him across the hall into the Office of the General Counsel (OGC) conference room. Mr. Taylor began to explain to the group the dour message that it was anticipated there were going to be staff reductions across the Services at the Secretariat level and specifically in the Army Secretariat. As Mr. Taylor described the situation, someone knocked on the door and told Mr. Taylor he had a phone call. He said, “Tell them to call later, I am having a meeting.” A moment later, they knocked again saying it was important. This time, Mr. Taylor sent Assistant General Counsel Stephanie Barna to take the call in his stead. She quickly returned to report “planes hit the World Trade Center” and he needed to “come now.” The meeting adjourned.

Upset that the morning had been “wasted” and she had missed the DCSPER’s meeting, after being personally summoned to attend, Major Fair returned to her office. She was preparing for her next meeting when she heard a “deep thud” sound. She had a fleeting thought that perhaps a plane had hit the Pentagon, but then she associated the noise with the ongoing construction in the Pentagon.

Moments later, the OGC XO came into her office and urgently told her to “get the hell out of here.” She left the office, and in the hallway she saw people with ash on their heads. She wasn’t sure where to run, but she found an exit and—somehow—met the rest of her office outside the

Pentagon on a grassy knoll near Interstate 495, overlooking the scene. She recalled the organized confusion that took place outside the Pentagon. Mr. Taylor and Ms. Barna ended up on that grassy knoll as well. Mr. Taylor got accountability of his personnel and kept them together.

An Air Force officer came by the crowd and directed them to run to another location because of another incoming plane. They took heed and headed into Pentagon City. Mr. Taylor found a way to make sure everyone got home that day. Eventually MAJ Fair, along with OGC administrative assistant Ms. Carrie Stacha,

Colonel Lassus was so close to the explosion that the heat from the burning jet fuel melted his polyester class B uniform shirt to the skin of his back

took the Springfield metro toward their homes on the last train in operation that day. Everyone in attendance at the DCSPER meeting MAJ Fair had missed earlier that day was killed in the Pentagon attack, including her mentor and friend, SGM Lacey.

Army Office of the Chief of Legislative Liaison

In another part of the Pentagon, Army judge advocates COL Calvin “Cal” Lederer and LTC Everett Maynard were meeting in the Office of the Army Chief of Legislative Liaison (OCLL) when they felt a thud and a change in air pressure. Unaware of the World Trade Center attack, they heard voices in the D ring urging people to leave the building. They heeded the instruction and walked outside through the fifth corridor exit. As they stepped outside, they saw fire and smoke. At first, COL Lederer thought there had been an accident involving the Pentagon renovation; but, as he stepped outside and saw aircraft debris and heard witness comments, he realized there was an aircraft strike. Lieutenant Colonel William “Bill” Hudson, another judge advocate assigned to OCLL and present in the OCLL Pentagon office space, escorted two distraught female civilian employees away from the Pentagon after the attack.¹⁵

After exiting the building, COL Lederer joined dozens of others who fell into ad hoc rescue teams.¹⁶ Over the course of the afternoon, he watched the west facade of the Pentagon collapse and the fire spread.

The day after 9/11, COL Lederer returned to the Pentagon dressed in his battle dress uniform (BDU) instead of the normal suit a JA assigned to OCLL would be authorized to wear. The OCLL office space was destroyed by a combination of smoke and water damage. Throughout the day, the air smelled of smoke and burning debris as attempts were made to put out the remaining fire. The Chief of Legislative Liaison found

OCLL personnel temporary cubicle space at the Ballistic Missile Defense Organization. In the weeks following the attack, OCLL lawyers worked on emergency legislation and staffed the first Capitol Hill hearings on Military Commissions.¹⁷

Joint Chiefs of Staff—J5

Colonel Kenneth “Kenny” Lassus was assigned as an action officer in the Strategy, Plans, and Policy (J-5) Division of the Joint Chiefs of Staff. At the moment of impact, COL Lassus was in a meeting in the C ring of the Pentagon, at the corner of corridors four and five. He was preparing with an Air Force employee and a Central Intelligence Agency agent for a trip to Pakistan the next day.¹⁸

When the plane hit the middle of corridor four, the explosion rocked the conference room, and the lights went out. Colonel Lassus and two civilians at the meeting, unaware of the cause of the explosion, felt their way through the darkness and smoke in the room into the corridor and, then, to the open-air five-acre center courtyard of the Pentagon. Colonel Lassus was so close to the explosion that the heat from the burning jet fuel melted his polyester class B uniform shirt to the skin of his back. After receiving medical care in the

A female voice from the 1940s repeated over and over, “Please exit the building.” Three strange, high-pitched, long beeps followed the instructions; it was a holdover mechanism for emergencies from when the Pentagon was built

center courtyard, he was told to leave the area. With no keys or wallet, COL Lassus walked to OTJAG in Rosslyn, unaware that a second plane had hit the South Tower of the World Trade Center, and that the Towers had collapsed. He still had no idea what caused the explosion at the Pentagon.

Office of Legal Counsel, Chairman of the Joint Chiefs of Staff

At the moment of impact, COL Waldo “Chip” Brooks and I, then a Major, were in tiny back-corner cubicles in the Office of Legal Counsel to the Chairman of the Joint Chiefs of Staff (OLC/CJCS).¹⁹ Minutes before impact, Navy Captain (CAPT) Jane Dalton, the Chairman’s Legal Advisor, called the CJCS legal team into her office to tell them a plane had flown into the North Tower of the World Trade Center and the Joint Staff was on high alert. While she spoke, her staff watched the second airplane disappear into the South Tower and explode. Shocked by the immediate realization this was not an accident, CAPT Dalton headed to the National Military Command Center (NMCC) to consult with the Vice CJCS, Air Force General Richard Myers.²⁰

I returned to my desk and called a fellow judge advocate, Captain (CPT) Wendy Daknis, at Fort Campbell, Kentucky. Captain Daknis was not aware of the World Trade Center strikes, but—as she spoke to me—she turned on the office television in her legal assistance office and listened. At 0937, as we talked, there was an explosion outside the OLC/CJCS office, which was followed by the building quaking. I told CPT Daknis, “The Pentagon has been hit,” and I had to hang up.

The OLC/CJCS personnel met in the legal front office. There was a strange loud alarm sounding in the Pentagon hallway. A female voice from the 1940s repeated over and over, “Please exit the building.”

Three strange, high-pitched, long beeps followed the instructions; it was a holdover mechanism for emergencies from when the Pentagon was built.

Unclear as to where the danger was, the legal team decided to exit the Pentagon through an exit onto the large grassy field outside.²¹ We walked with a sea of people to the water’s edge of the tidal basin. Watching the smoke rise, Navy Commander Ralph Cory, who worked current operations in Chairman’s Legal Office said, “They pulled it off.”²² Commander Cory understood the cunning nature of the attacks and the specific danger that the Country’s enemy posed.

After a few minutes of standing outside, the group observed several military transport helicopters land on the field. We watched predesignated people exit the Pentagon, pile into the helicopters, and fly to faraway, presumably safer, locations to carry on the defense of the nation.²³

Those remaining outside the Pentagon were confused about what to do next. As smoke rose from the opposite side of the building into the bluest of skies, someone yelled, “Another plane is incoming.” A Marine scurried along the water’s edge and directed people to lie on the ground and spread out “to make less of a target.” Most were compliant. Dressed in my Class B uniform, I sat on the ground. My back was against the concrete base of a flag pole located at the tidal basin’s edge, at the top of a stepped terrace leading down to the lagoon. This was the area that had been used as a landing dock until the late 1960s to ferry personnel between Bolling Air Force Base and the Pentagon. Several minutes later, someone announced that the second plane was not coming. Suddenly, a U.S. fighter jet screamed across the sky breaking the sound barrier. With that, the ground suddenly seemed safe.

As we stood outside trying to figure out what to do next, the NCOIC of the Chairman’s Legal Office, Sergeant First Class (SFC) Kevin Holmes appeared. He had been sent outside by CAPT Dalton to relay the message that CAPT Dalton wanted us inside the NMCC. He handed us face masks, as the building was on fire and filling with smoke. I did not have NMCC clearance, but I put on the mask and followed SFC Holmes.

SFC Holmes led the way into the Pentagon, through the smoke-filled corridors, and into the NMCC—past the guards who did not care to check clearances. They waived everyone in and closed the double-lock hatch doors that one might find on a Navy ship. The NMCC, a secret compartmentalized information facility, had its own internal air supply and was able to operate independently of the rest of the Pentagon. Not long after arriving, a worker entered the area and placed small carbon monoxide gauges around the work spaces.

The building was still burning, and there was a question as to whether the command and control of the U.S. military would shift to another location if the fire was not contained. For the next two years, to plan for and execute the response to the attack—as well as the follow-up operations in Iraq, the OLC/CJCS legal team staffed the NMCC in twelve-hour shifts, twenty-four hours a day.

Office of the Chief of Army Reserve

On the morning of 9/11, MAJ Michael J. Coughlin, the Deputy Legal Counsel for the Office of the Chief of Army Reserve (OCAR), was in Crystal City, a short distance from the Pentagon.²⁴ After the attack, he walked to the Pentagon and spent the day helping firefighters and supporting evacuation efforts. Around 1930, as events slowed, MAJ Coughlin went home; but, he returned around 2300 when he heard on the news that as many as eight hundred people may have been killed inside the Pentagon. When he arrived, a SGM from the Old Guard approached him as the “senior officer” on the ground and told him two Marines needed his help.

The two Marines, Sergeant Nathaniel Penn and SSG Ronald Mix, had driven from Quantico at their commander’s orders with

an American flag. They were tasked to hang the flag at the crash site. With the assistance of MAJ Coughlin, they hung the flag on the fire-crash rescue vehicle ordinarily stationed at the helicopter pad as part of aviation operations. The fire-crash rescue vehicle was inoperable after catching fire when Flight 77 crashed into the Pentagon. They fashioned a makeshift flag pole with a metal pole that was part of the truck, some duct tape, and zip ties, and raised the small flag over the fire truck. This was the first U.S. flag to fly over the scene after the Pentagon attack.

Later that evening, MAJ Coughlin had the flag moved from the fire-crash truck to the top of the Pentagon at the crash site. Shortly after that, MAJ Coughlin suggested to staff on the ground that a large garrison flag should replace the small flag hanging from the Pentagon. The next day, the U.S. Army band sent over the largest flag in the Army inventory from Fort Myer. During President Bush's visit on 12 September 2001, the Old Guard and firefighters unfurled the flag and hung it over the side of the Pentagon, replacing the smaller one. The hanging of the flag resulted in the iconic photograph often seen displayed in government offices.²⁵

The Days That Followed

While the Department of Defense had a plan to carry on its military operations at an alternate location, if necessary, the Secretary of Defense—Donald H. Rumsfeld—made the decision to continue operations at the Pentagon as long as it was operationally feasible.²⁶ The day after the attacks, employees reported for work at the Pentagon. On 12 September 2001, while the building was still burning, President George W. Bush and Secretary Rumsfeld toured the Pentagon, met with employees, and surveyed the damage. People lined the hallways to shake the President's hand. The message was clear. The United States would come together and persevere. Indeed, the U.S. Government and its military operations continued forward.

On 12 September 2001, the international community joined forces in an act of solidarity with the United States. World leaders, political and religious representatives, and the international media joined

The JAG Corps became involved at all levels of command and control, in every phase of the war effort, and across the full spectrum of legal issues. Judge advocates interpreted laws that had not been construed outside academic settings since the Korean Conflict and World War II. There was a necessary shift in legal practice focus from criminal law to international and operational law

together to condemn the attacks. The United Nations (UN) Security Council issued Resolution 1368 condemning the terrorists' attacks and classifying the acts "like any act of international terrorism, as a threat to international peace and security."²⁷ That same day, the North Atlantic Treaty Organization (NATO) invoked Article V of the treaty for the first time in history.²⁸ They recognized the individual and collective right of self-defense, contained in Article 51 of the UN Charter, to aid the United States through armed force to restore and maintain the security of the North Atlantic Area and reaffirmed the need to combat, by all means, in accordance with the UN Charter, threats to international peace and security caused by terrorist acts.²⁹ This invocation allowed other countries to come to the collective aid of the United States with armed force if necessary.³⁰

International law shaped how commanders planned and conducted military operations. The United States asserted a legal basis for the use of force derived from both international law norms and the provisions in the UN Charter. The United States and its coalition partners also conducted operations in accordance with the international law of armed conflict. For the Army, international law included the application to military operations of international agreements, international customary practices, and the general principles of law recognized by civilized nations.³¹

Conclusion

The events of 9/11 sparked a collective war effort and produced global consciousness that changed the world, an impact that continues today. The international community

quickly rallied to the aid of the United States, and the Global War on Terrorism began.

The growing involvement of JAs in all aspects of military operations since 9/11 has shaped countless policy and procedural developments in the Army. The JAG Corps became involved at all levels of command and control, in every phase of the war effort, and across the full spectrum of legal issues. Judge advocates interpreted laws that had not been construed outside academic settings since the Korean Conflict and World War II. There was a necessary shift in legal practice focus from criminal law to international and operational law.

The structure of the JAG Corps then changed to mirror the changes in the structure of the Army. Due to the nature of the conflict, the Army moved to a more decentralized, modular structure. The brigade combat team (BCT) became the focus, and JAs deployed with their BCTs. The educational model across the Army and JAG Corps changed to refocus Soldiers to fight an unconventional enemy. There was a change in the Army's approach to conducting investigations (e.g., combat casualties, senior leader misconduct, sexual misconduct, and collateral deaths in combat).

Commanders utilized their lawyers increasingly for more than legal advice; JAs found themselves immersed in activities not traditionally considered "legal." Commanders leveraged their JAs' critical, objective, and analytical thought process to advise and assist them in undertakings ranging from public affairs to targeting. Technological changes affected the way and speed with which judge advocates provided legal advice. Based on legal issues

surrounding the Global War on Terrorism, even the rank of The Judge Advocate General was eventually upgraded from two-star general to three-star general.

Since 9/11, this Nation has been immersed in conflicts around the world and at home; the fight to maintain freedom is continuous. The attacks, and our Nation's response, have transformed our way of life and our day-to-day thinking. While new strength was forged at an immeasurable price over the last two decades, life as an Army JA has been irreversibly altered. One must anticipate and provide advice regarding the unimaginable. As we look to the future as a Corps, the events of 9/11 continue to remind us that countless threats to freedom still exist, and those threats can touch any of us at any time—at home and abroad. To honor the memory of those lost in this fight, we must continue to have the courage and resolve to preserve this great Nation as we face the unpredictable threats of the future. **TAL**

After thirty-six years of Army service, COL (Ret.) Campanella retired in April 2020. During active duty, she served as a judge advocate in a variety of duty positions.

Notes

1. The Pentagon is a five-sided office building and each side is known as a "wedge." It is located in Arlington County, Virginia, across the Potomac River from Washington, D.C., and serves as the headquarters of the United States Department of Defense. The concentric rings are designated from the center out as "A" through "E," with additional "F" and "G" rings in the basement. The Pentagon contains 6,500,000 square feet of space, of which 3,700,000 square feet are offices. Approximately 26,000 military, civilian, and support personnel, work in the Pentagon. It has five sides, five floors above ground, two basement levels, and five ring corridors per floor with a total of 17.5 mi of corridors. The central pentagonal plaza is five-acres large.
2. Completed in February 2006, now the location of the U.S. Air Force memorial.
3. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 543, 122 Stat. 3, 114 (2008) [hereinafter NDAA 2008]. The designation "TAJAG" was changed to Deputy Judge Advocate General in 2008. NDAA 2008 amended sections 3037(a), 5148(b), and 8037(a) of Title 10 of the U.S. Code. The amendment to section 3037 changed the title of The Assistant Judge Advocate General (TAJAG) to Deputy Judge Advocate General (DJAG). Accordingly, there is no "The" in front of Deputy Judge Advocate General like there was when the term The Assistant Judge Advocate General (TJAG) was used. "The" was never officially used in front of "Assistant

Judge Advocate General" in the previous version of 10 U.S.C. 3037. The Army Judge Advocate General's (JAG) Corps used "The" to differentiate the senior Assistant Judge Advocate General (Major General (MG) rank) from the other Assistant Judge Advocates General (Brigadier General (BG) rank). This practice became a matter of custom and tradition through the years. The first DJAG, MG Daniel Wright, chose not to use "The" in front of his title, thus setting the new custom and starting the new tradition. Before this amendment, the three services had different names for their number two JAG. Calling them the same title, "Deputy," solved the confusion. Further, the Army, Navy, and Air Force headquarters staffs did not understand the difference between TJAG and TAJAG, particularly when each wore the same two-star rank. Resultantly, there was confusion as to who was TJAG or TAJAG. This issue was resolved once TJAG became a Lieutenant General (LTG) in 2008. *Id.*

4. Corridor 4 on the second floor from the C to the E rings.
5. Major General Huffman served as the 35th TJAG from 5 August 1997 until 30 September 2001. He is a veteran of the Vietnam and Gulf Wars. Major General Altenburg, also a veteran of the Gulf Wars, served as the TAJAG 1997 to 2001.
6. In June 1999, Chief Warrant Officer 5 (CW5) Sharon Swartworth was selected as the Chief Warrant Officer of the Judge Advocate General's Corps, serving as the primary adviser to TJAG on all matters concerning legal administrators in the Army. On 7 November 2003, CW5 Swartworth and Sergeant Major (SGM) Cornell Gilmore, the Sergeant Major of the JAG Corps, were both killed in action in Iraq in a surface to air missile attack on a helicopter in which they were flying during an Article 6 visit with TJAG, MG Thomas Romig and Colonel Michelle "Mickey" Miller.
7. The Joint Legal Assistance Policy Division also remained in the Pentagon because it was joint service and it served the entire military Pentagon population. It was situated directly behind the TJAG suites in the basement.
8. Telephone interview with MG (Ret.) Huffman, U.S. Army (17 August 2018).
9. Lieutenant General (LTG) Timothy J. Maude, the Army's Deputy Chief of Staff for Personnel (DCSPER), and his personnel, moved from the neighboring Pentagon space into the renovated space. On 11 September 2001, exactly sixty years after construction began on the building, LTG Maude was at a meeting in his new office area when hijacked American Airlines Flight 77 flew into the western side of the building, killing 189 people, including LTG Maude. The DCSPER had moved with his staff only days before the attack. The 189 people included fifty-nine victims on the airplane, 125 victims in the building and the five terrorists on board the airplane.
10. On 9/11, OTJAG personnel assigned to the Pentagon included: Acting TJAG—MG John Altenburg; Executive Officer (XO)—Colonel (COL) Daniel F. McCallum; Pentagon Legal Assistance Office—Major (MAJ) Elizabeth A. Gossart and Staff Sergeant (SSG) Nathan Jones. Other Judge Advocates assigned to the Pentagon on 9/11 were: Department of Defense (DoD) Office of General Counsel—COL Carl M. Wagner; DoD Acquisition and Logistics—COL John L. Long; Office of the Assistant Secretary of Defense (OASD) Legislative Affairs, COL Fred T. Pribble; Office of the Under Secretary of Defense (OUOSD), Personnel and Readiness—COL Steven

T. Strong; OSD Legislative Reference Service—Lieutenant Colonel (LTC) Michael J. Fucci; Armed Forces Tax Council—LTC Thomas K. Emswiler; DoD Inspector General—MAJ Brenda J. Jardin; Office of Legal Counsel, Chairman of the Joint Chiefs of Staff—COL Waldo W. Brooks, LTC Kelly D. Wheaton, and MAJ Lorianne M. Campanella; Office of the Joint Chiefs of Staff (OCJCS), J-5, Weapons Technology Controls Division—COL Kenneth J. Lassus; Ballistic Missile Defense Organization, Office of General Counsel (OGC)—LTC Lara J. Rafael and LTC Karen L. Judkins; Defense Intelligence Agency, OGC—LTC Orin R. Hilmo Jr.; Army Office of General Counsel—COL Frank B. Ecker Jr., COL Sandra B. Stockel, LTC Mark J. Connor, LTC Lisa Anderson-Lloyd, LTC Richard J. Sprunck, LTC Paul D. Hancq, LTC Stephanie A. Barna, and MAJ Karen V. Fair; Office of Congressional Liaison—COL Calvin M. Lederer, LTC William A. Hudson Jr., and LTC Everett J. Maynard; Secretary of the Army Technology Management Office—LTC Michael J. McElligott; Army Inspector General—COL Ronald J. Buchholz and LTC Craig A. Meredith; Office of the Chief Attorney Headquarters Services—COL Brent P. Green, CPT Cheryl A. Patterson-Emery, Ms. Lynette R. Miserez, Mr. David Ridgely, and Mr. Robert Duecaster.

11. Major General Huffman retired in the summer of 2001 and MG Altenburg stayed in place as the acting TJAG, while MG Romig and MG Marchand awaited Senate confirmation. Office of The Judge Advocate General Personnel assigned to Rosslyn were Special Assistant to TJAG—BG Thomas S. Walker (Army National Guard (ARNG)); Assistant Executive Officer (AXO)—LTC Charles N. Pede; Administrative Office—Mr. Jose Robertson; Chief Warrant Officer of the Corps—CW5 Sharon T. Swartworth; WO1 Marybeth E. Fangman; SGM of the Corps—SGM Howard Metcalf; Sergeant First Class (SFC) Richard S. Walker; Personnel, Plans, and Training Office (PP&TO)—COL Clyde "Butch" J. Tate II, LTC Donald C. Lynde-Active Guard Reserve (AGR), LTC David N. Diner, MAJ Mike Mulligan, LTC Mark Cremin, LTC Sharon E. Riley, MAJ Tania M. Antone, MAJ George R. Smawley, Mr. Roger Buckner, and Mr. Bruce Fresh; Legal Technology Resources Office—LTC Joseph K. Lee Jr., CW3 John A. Lawson, Warrant Officer 1 (WO1) Philip G. Kraemer III, and Sergeant (SGT) Christopher M. Swires; Standards of Conduct Office—COL Garth K. Chandler, SSG Traci Johnson, LTC Diane Moore, Mr. Dean S. Eveland, Mr. Alfred H. Novotne, and Mr. Charles H. Criss; Special Assistants to TJAG for Guard and Reserve Affairs—COL Keith H. Hamack; Special Assistants to TJAG—COL John B. Hoffman and COL Paul Holden; Assistant Judge Advocate General for Military Law and Operations (MLO)—BG Thomas Romig, COL (P) Scott Black, Assistant Judge AJAG Installation Management Agency (IMA) MLO—BG Jeffery Arnold-United States Army Reserve (USAR); Contract Law Division—COL Roger D. Washington, Mr. Alfred E. Moreau, and Ms. Margaret K. Patterson; Administrative Law Division—COL Paul B. Anderson Jr., and LTC Jan W. Charvat; General Law Branch—LTC Robin N. Swope, MAJ Mike J. Henry, MAJ Robb W. Jefferson, MAJ Mike G. Seidel, MAJ Carrie F. Ricci-Smith, and CPT Antoinette Wright-McRae; Personnel Law Branch—LTC Shaun S. Shumake, MAJ Dale N. Johnson, MAJ Noel L. Woodward, MAJ Bradley E. Vanderau, MAJ Shannon M. Morningstar, and MAJ Thomas R. Serrano; Investigations Branch—LTC Sarah S. Green, MAJ John M. Bickers, MAJ Douglas M. Depeppe, MAJ Steven M. Mohlenrich, CPT Charlie C. Choi,

Mr. Eric C. Stamets, and MAJ Eugene J. Martin, Jr.; Criminal Law Division—COL Lawrence J. Morris, LTC William T. Barto, LTC Michael J. Klausner, MAJ Mark L. Johnson, and CPT Olivia N. Graham; International and Operational Law Division—COL David E. Graham, LTC Ronald W. Miller Jr., LTC Gregory T. Baldwin, MAJ Steven M. Walters, LTC Bradley P. Stai, LTC Michael E. Smith, and Mr. Hay W. Parks; Labor and Employment Law Division—Ms. Diane M. Nugent, LTC Charles B. HERNICZ, CPT Leslie C. Smith II, CPT Christopher W. Haines, Mr. James N. Szymalak, Ms. Susan C. Henry, Mr. Robert M. Fano, Ms. Louise A. Schmidt, and Mr. Steven E. Engle; Legal Assistance Policy Division—COL George L. Hancock Jr., LTC Linda K. Webster, MAJ Janet H. Fenton, and Mr. Mike T. Meixell. Other members of the Judge Advocate General's Corps stationed in the Military District of Washington, not listed herein and included within the U.S. Army Legal Services Agency (USALSA) and Litigation Center were: the USALSA Commander and Chief Judge, the U.S. Army Court of Criminal Appeals, the Office of the Clerk of Court, the Chief Trial Judge, Government Appellate Division, Defense Appellate Division, the U.S. Army Trial Defense Service, Contract Appeals Division, Litigation Division, Procurement Fraud Division, Environmental Law Division, and the Regulatory Law and Intellectual Property Divisions, all located at 901 North Stuart Street in Arlington, Virginia. 9/11 was also the first day of the 2001 LTC judge advocate (JA) selection board. The USALSA commander, BG Daniel Wright, was sitting as the President of the selection board at the Hoffman building when word of the attacks on the World Trade Center towers was passed to them. The board was cancelled that day, and reconvened and completed on Wednesday, 12 September 2001.

12. Lieutenant Colonel Pede would eventually go on to serve as the 40th Judge Advocate General of the Army.

13. Major George Smawley, the PP&TO Boards officer was in a vehicle headed back to OTJAG in Rosslyn after leaving the Pentagon when the first plane hit the World Trade Center. Major Smawley made it back to Rosslyn in time to join the PP&TO team in LTC "Butch" Tate's office as the second plane struck the other tower. Lieutenant Colonel Pede, also present in the room, made the prescient comment "it would be really easy to hit the Capitol or the Pentagon."

14. Mrs. Ginger Chada, the legal secretary for the International Law Division, was immediately worried for her husband who worked for the Navy in the Pentagon. She would later find out SFC (Ret.) John J. Chada, her husband, was killed in the attack. He was a two-time Vietnam veteran and, after a long military career, he served both the Navy and the Army as an administrative assistant for the Department of Defense Information Management Support Center.

15. Mr. Bernie Ingold, a retired JA working in Army Office of the Chief of Legislative Liaison (OCLL), was on his way to the U.S. Capitol when the plane hit. He was at the Pentagon Mall Entrance getting into a shuttle when the driver said, "Look, a helicopter just crashed on Pentagon heliport." With Assistant Secretary of the Army for Civil Works nominee, Mr. Mike Parker in tow, Bernie Ingold continued to head to the Capitol for their courtesy call. Frustrated by the gridlock on the streets, they got out of the vehicle and walked to Capitol Hill, but they found the Capitol had been evacuated when they arrived. They spent the morning outside the Capitol with Members of Congress and staff waiting for the possibility of a fourth plane. They eventually walked back to the

Pentagon. See E-mail from COL (Ret.) Bernie Ingold to author (13 May 2019) (on file with author).

16. Major Jeanette K. Stone, a JA who worked for the Army Environmental Law Division at USALSA, was attending a Base Realignment and Closure (BRAC) meeting in the Pentagon on 9/11. She did not normally work at the Pentagon and only went there for an hour-long weekly BRAC meeting from 0900-1000 every other Tuesday. Making her presence more unlikely, she shared this duty with a co-worker. After feeling the impact of the airplane, she evacuated the building with her colleagues through the Mall entrance. While watching the Pentagon burn from about 200 yards away, she joined other military personnel edging back toward the building, where she found an Army O-6 forming four-person litter teams. The litter teams, however, were never allowed to enter the building. Firefighters were battling the fire and smoke, and it was too dangerous. About an hour after impact, MAJ Stone watched the facade of the building collapse. Looking back she recounted, "Rationally, I took their point—the building was structurally unsound, the fire was unmanageable, the smoke itself could be lethal, and we had no equipment—but emotionally...it was difficult to stand there and do nothing while people were dying. The experience was both surreal and numbing." After this, she assisted other agencies with manual labor needs, such as off-loading tents, moving pallets of food and water, and setting up medical triage areas. When the Old Guard arrived, LTG John A. Van Alstyne released the ad hoc military helpers and thanked them not for what they did—but for what they were willing to do. Interview with MAJ Jeanette Stone with Center for Military History (10 October 2001).

17. A week after the attack, COL Lederer was in the Hart Senate Office Building when letters containing anthrax spores arrived. He was among the people tested and treated prophylactically for exposure to anthrax.

18. The trip was to deliver a message of sanctions for providing material to Libya and Iran that would advance their missile technology in violation of International laws.

19. Lieutenant Colonel Kelly Wheaton was also assigned to the Office of Legal Council/Chairman of the Joint Chief of Staff (OLC/CJCS) on 9/11 but was not in the Pentagon. He flew from Dulles International Airport (IAD) to Dallas, Texas, that morning. Lieutenant Colonel Wheaton was at IAD at the same time the terrorists boarded American flight 77 to Los Angeles, the plane that left IAD at 0820 and crashed into the Pentagon at 0938. Lieutenant Colonel Wheaton was flying aboard another flight heading to Texas when planes in the air over the U.S. were grounded after the World Trade Center attacks occurred.

20. The Chairman, General Henry Hugh Shelton, was on a plane heading to a NATO meeting in Europe at the time.

21. In the aftermath of 9/11, renovations were made to change the landscape of the River entrance grounds, and create a setback which would lessen the effects of possible future attacks. It is no longer possible to walk this path without walking across an expressway.

22. At the time, two current operations lawyers in CJCS/LC worked inside a sensitive compartmented information facility inside the legal office. This was known as "The Bridge."

23. Among those on the helicopters flown to an alternate command site were retired judge advocates, COL Daniel Del'Orto and COL James Smiser from the Office of the Secretary of Defense General Counsel's Office. Colonel Waldo Brooks, representing OLC/CJCS, instead drove to the alternate command site.

24. Interview with COL (Ret.) Michael J. Coughlin (Sept. 17, 2018).

25. *Id.*

26. Interview with COL (Ret.) Dan Del'Orto (Sept. 12, 2018).

27. S.C. Res. 1368 (Sept. 12, 2001).

28. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 [hereinafter NATO Treaty]. Article V of the NATO Treaty states:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith,

individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken necessary measures to restore and maintain international peace and security.

Id.

29. U.N. Charter art. 51 [hereinafter U.N. Charter]. The U.N. Charter states:

Nothing in the present Charter shall impair the right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in anyway affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id.

30. See 1 CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001—1 MAY 2003) ch. 2 (1 Aug. 2004).

31. U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 3-6 (1 Mar. 2000). Within the Army, the practice of international law includes foreign law, comparative law, martial law, and domestic law affecting overseas intelligence, security assistance, counterdrug, and civil assistance activities. *Id.*



(Credit: istockphoto.com/Arsen Volkov)

Closing Argument

The Calm in the Storm

Judge Advocates Must Have the Courage That Principled Counsel Requires

By Major General (Retired) Thomas J. Romig

The concept of judge advocates providing principled counsel has long been part of the culture of our Judge Advocate General's (JAG) Corps, even

though we did not term it as such. Often, we may have taken it for granted, but it was always there. We recognized it in practice and admired those who rose to

those challenges. We may have studied it, but probably not in a deliberate or developmental way. Now, through Lieutenant General (LTG) Pede's leadership and vision, we can see the advantages of a focus on the practical aspects of principled counsel. This focus prompts questions such as: What does it look like? How does it apply in different contextual situations? What are the different approaches to exercising it? How do you know when you need to take a principled stand?

Principled counsel entails many things, including: integrity, competence, the courage to choose the harder right over the easier and safer wrong, and speaking truth to power. It starts with rock-solid values and the strength of personal courage, and then it grows and builds with experience. We gain expertise from observing and learning from others and from thoughtfully

reflecting on our own first-hand personal experiences. Personal experience is often the most powerful way to learn. It certainly can be the most challenging form of learning, but it also can be the most brutal of teachers. A program that captures the experiences of others in meeting the challenges of principled counsel, and then shares them as part of the leadership development process, is incredibly valuable. It softens some of the potentially hard blows of the learning process, deepens the knowledge and experience base for leaders, and broadens that throughout the Corps.

This is an exciting time to be a judge advocate in the Army JAG Corps. Everyone has their own stories about their experiences, those they served with, and the challenges they were called to meet. Like LTG Pede's anecdote in this edition's Court Is Assembled, these stories illustrate examples of principled counsel. Because we often take these for granted, they usually were not shared beyond our circle of friends and fellow judge advocates. What a wealth of experiences that could have been shared with the new generation of judge advocates and paralegals.

Now there is a program that allows those experiences to be highlighted. As judge advocates, if you haven't already had to take a principled stand in your career, just wait, because you will if you are doing your job. That doesn't mean that you have to be facing issues of great national consequence. That means trying to do the right thing in everything you do. You are not always going to get everything exactly right, but if you set that as a goal, you are going to achieve it much more often. Each time you take a principled stand, you will find the next time a little easier. The effect of successively doing the right thing—even when no one is looking—will make each succeeding time easier.

I remember my first experience with this as a judge advocate. It was my first JAG Corps assignment, and, after six months in legal assistance, I was made a trial counsel with my own special court-martial (SPCM) jurisdiction. I inherited about fourteen or fifteen cases from the previous trial counsel, who had quickly prepared all the charges immediately before his reassignment. As I worked through the cases in preparation

for referral with the SPCM convening authority, I became concerned that one of the cases did not have the necessary probable cause to establish guilt. After wrestling with this for a day or two, I decided that I needed to raise this with the convening authority. At my meeting, I explained my concerns and said that I could not ethically prosecute the case. If he still wanted to go forward, I would see if someone else would take the case. I was convinced this was going to end my stint as trial counsel before it had really started. The colonel, who had served in combat in both Korea and Vietnam, looked at me for what seemed like an eternity and then he smiled and said, "Well, I'll be. That's never happened to me before. If you feel that strongly, I'll dismiss the charges." In retrospect, that clearly wasn't a big deal in the grand scheme of things; but it was at the time, and it helped me begin to develop the confidence that I would need later in my career.

In my first job as a staff judge advocate, I worked for a commander in Europe who had the reputation as one the toughest commanders in the theater. It was a reputation that he embraced and promoted. The other members of the staff said he liked to initiate new staff members with an ordeal of trial by fire. During my first several months, I was sure I was going to be fired at any moment for telling him things that he didn't want to hear. One day, after I had been in the job for about three months, there was a briefing by one of the staff chiefs that was not going very well. The commanding general thought the briefer was telling him what they thought he wanted to hear and not what he needed to hear. His eyes narrowed. "Stop," he shouted. He stared at the briefer and then around the room. He jumped up from his chair and started out of the room. Then he stopped and spun around. "Some of you have a lot to learn and you are running out of time. I have only two staff officers who tell me what I need to hear, not what they think I want to hear: the Chaplain and the JAG." I knew from then on that he appreciated my legal advice, even if he didn't always show it.

Some advice about when you decide to make a principled stand: make sure you are right about the law and that you have looked at all of the options before rendering

your advice. Being wrong can have a devastating effect on your credibility with your client, not to mention your own confidence. If your advice is not based on law or regulation, tell your client, but then explain the basis of your advice. Your client will appreciate your candor, and it will strengthen your hand when you do later rely on law or regulation.

As you move through your career in the JAG Corps, you will find that those whom you lead will expect you and the other leaders above them to exercise principled counsel. In some of the most challenging times I experienced as TJAG, I was always guided by the thought that the Corps would expect no less from me.

Who could have predicted the challenges our military and our nation are facing today? It's times like these that make principled legal counsel to the Army even more important and challenging. Through their principled counsel judge advocates are and always have been the calm eye in the middle of the storm. When there is an accounting after it is all said and done, you want to be sure you are on the right side of the law, and the right side of history. **TAL**

MG (Ret.) Romig served as the U.S. Army's 36th Judge Advocate General. After his military retirement, he served as Washburn University School of Law Dean until stepping down after eleven years in July 2018. MG (Ret.) Romig continues to serve as a professor on phased retirement.



AROUND THE CORPS

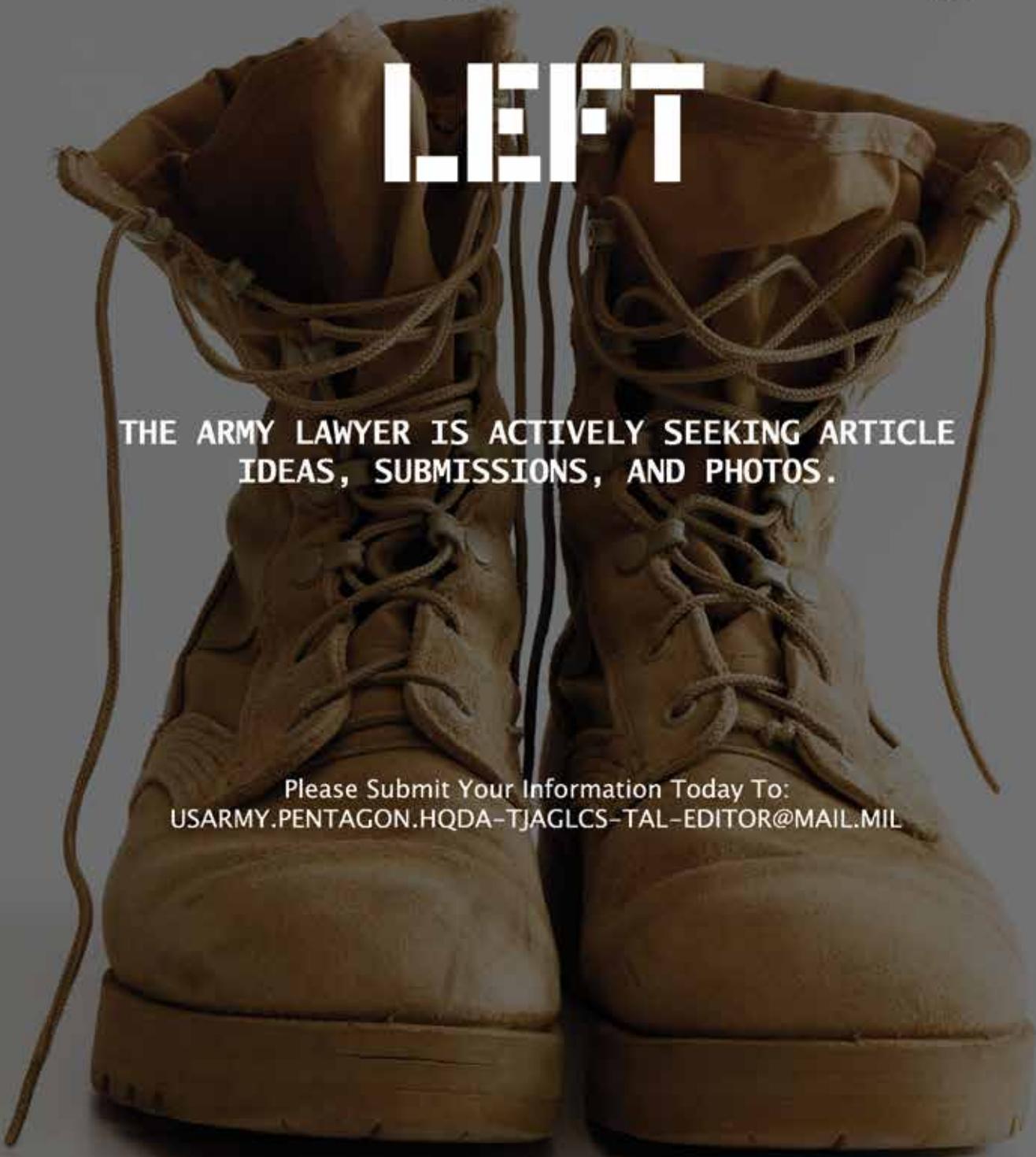
Judge advocate CPT Hamzah Khan runs up the middle during the 103rd Expeditionary Sustainment Command's "Superbowl" flag football game at Camp Arifjan, Kuwait last February. (Credit: SSG Godot Galgano)



AROUND THE CORPS

TJAGLCS faculty and staff members CPT Andrew Warmington, left, MAJ Jamie Gurtov, center, and LtCol Toby Hamnett, right, of the British Army, near the finish line of the run celebrating the 245th birthday of the JAG Corps (Credit: Jason Wilkerson/TJAGLCS).

LEFT, WRITE, LEFT



THE ARMY LAWYER IS ACTIVELY SEEKING ARTICLE
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