



THE ARMY LAWYER

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Judge Advocate General's Corps Professional Bulletin 27-50-17-06

June 2017

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The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities.

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Lore of the Corps

Ranger Cleary and the Law

Fred L. Borch*

Regimental Historian & Archivist

On May 23, 1962, First Lieutenant (1LT) John Joseph Cleary, Judge Advocate General's Corps, U.S. Army, made history as the first Army lawyer in history to graduate from Ranger training at Fort Benning, Georgia, and earn the black and yellow "Ranger Tab."¹

The following year, then Captain (CPT) Cleary became the first Judge Advocate to be assigned to the U.S. Army Special Warfare Center (SWC) at Fort Bragg, North Carolina, where he served as its Staff Judge Advocate.² In early 1964, Cleary made history a third time when he became the first Army lawyer graduate of SWC's High-Altitude-Low-Opening or "HALO" Parachute course. This is his story.



Captain John Cleary during High Altitude, Low Opening (HALO) parachute jump, 1964

After graduating from high school, Cleary entered Loyola University in Chicago, where he joined the Army Reserve Officer Training Corps. He was commissioned as a Second Lieutenant (2LT) in the MP Corps in June 1958.

At the time of his commissioning, Cleary had finished his first year of law school at Loyola (he had completed the course work for his undergraduate degree in 1957). He now joined the Army Reserve's 302d Special Forces Group in Cicero, Illinois, and in July 1958, 2LT Cleary completed basic parachutist school at Fort Benning, Georgia. His first jump was his second time in an airplane.⁵

Born in Illinois in 1936, John Cleary was very much a child of the World War II era. In January 1952, while he was in his second year of high school, then fifteen-year-old Cleary lied about his age (he claimed that he was eighteen years old) and enlisted in the Illinois National Guard. Cleary did so at the urging of his police officer father, who had been told by a colleague that with the Korean War now in full swing, the Army National Guard needed motivated young men as never before. Cleary subsequently qualified as an assistant gunner on a quad .50 Browning machine gun.³ After a summer camp with his unit at Camp Ripley, Minnesota; however, then Specialist Cleary decided that he preferred another military occupation and so he became a military policeman (MP).⁴

After graduating from law school and passing the District of Columbia and Illinois bar examinations in 1960, 2LT Cleary began a tour of active duty as a MP. In late 1960, deciding that he preferred to serve the Army as a lawyer, Cleary applied for a commission in the Judge Advocate General's (JAG) Corps. On the last day of 1960, he took his oath as a 1LT and Judge Advocate. While waiting for the Judge Advocate Officer Basic Course to begin in Charlottesville, 1LT Cleary was temporarily assigned to the 82d Airborne Division, Fort Bragg, North Carolina. His mentor was then Major Reid Kennedy, who would later achieve a measure of fame as the trial judge in *United States v. Calley*.⁶ Kennedy, who had been the first Judge Advocate to qualify as a Jumpmaster, arranged for 1LT Cleary to attend

* The author thanks Mr. John Cleary for his help in preparing this Lore of the Corps.

¹ The cloth ranger tab was introduced for wear on the upper left sleeve in January 1953. This was the only authorized insignia for those who had successfully completed Ranger training until November 1984, when the Army Chief of Staff approved a small metal and enamel version for wear on the pocket flaps of the blue and white uniforms. WILLIAM K. EMERSON, UNITED STATES ARMY BADGES, 1921-2006, at 82 (2006).

² The U.S. Army Special Warfare Center (SWC) started at Fort Riley, Kansas, as the U.S. Army Psychological Warfare Center and School. It moved to Fort Bragg in 1952 and was renamed the U.S. Army Center for Special Warfare in 1956. After President John F. Kennedy's assassination, SWC became the U.S. Army John F. Kennedy Special Warfare Center and School (USAJFKSWCS). Today, USAJFKSWCS or SWC is part of U.S. Army Special Operations Command. U.S. ARMY SPECIAL OPERATIONS CTR. FOR EXCELLENCE, <http://www.soc.mil/swcs/about.html> (last visited June 20, 2017).

³ The "quad .50 caliber" (nicknamed the "meat chopper") was a weapon mounting on the back of a half track. The word "quad" comes from "M45 quadmount"—which consisted of four heavy barrel .50 caliber Browning machine guns mounted on sides of an electrically-powered turret. It was used throughout World War II and Korea. See M45 "Quadmount," ROBERTS ARMORY, <http://www.robertsarmory.com/quad.htm> (last visited June 26, 2017).

⁴ E-mail from John Cleary to author, subject: Your history (June 2, 2017, 2:52 PM) (on file with author).

⁵ E-mail from John Cleary to author, subject: National Guard question (June 14, 2017, 10:53 AM) (on file with author).

⁶ The trial of First Lieutenant (1LT) William L. "Rusty" Calley was the most high-profile court-martial of the Vietnam War. Calley and his men were accused of murdering more than 350 Vietnamese civilians at the hamlet of My Lai. Calley was prosecuted for premeditated murder at Fort Benning in 1971; then Colonel Reid Kennedy was the trial judge at the general court-martial. A panel found Calley guilty as charged and sentenced him to confinement at hard labor for life. For more on the Calley

the division's one-week-long course, from which Cleary graduated in early 1961.⁷

While at Fort Bragg, 1LT Cleary also had his first experience with military justice. An officer, who was married but had several girlfriends, wanted a vasectomy so that there would be no possibility of any unwanted pregnancy. He asked a sergeant medic to perform the vasectomy on him; apparently the officer was convinced that this was a simple medical procedure and that the medic was capable of doing it safely. The chain-of-command, however, was unhappy when it learned of this unauthorized medical event and the sergeant who had performed the vasectomy was prosecuted at a court-martial. At trial, the accused remained silent, and the officer refused to answer any questions. When the only other witness to the event—another medic—claimed to have seen nothing, the court acquitted the accused. Now very unhappy with the entire episode, the command preferred a charge of perjury against the medic who had testified previously that he had seen nothing. First Lieutenant Cleary was the prosecutor. The court convicted the accused of perjury. Looking back, John Cleary felt the entire proceeding had been unfair. The sergeant who had performed the operation had been found not guilty, and the officer involved had been administratively discharged. The by-stander medic, however, who had foolishly lied under oath, now paid a heavy price with a court-martial conviction.⁸

After completing the 34th Judge Advocate Officer Basic Course (then called the Special Course) in May 1961, 1LT Cleary reported for duty at Fort Campbell, Kentucky. During this period, the 101st (along with the 82d), was on airborne status. Consequently, Cleary continued to jump and qualified as a senior parachutist in January 1962.

While at the 101st, 1LT Cleary wrote a letter to The Judge Advocate General, Major General Charles E. "Ted" Decker,⁹ requesting that Decker permit him to attend the Army's Ranger School. Cleary believed that he would be a better officer—and a better judge advocate—if he took part in this rigorous combat arms training. A short time later, Cleary got a notification that he had a slot for the school. As he remembers it:

Ranger School was and is a real personal challenge. With [my] active duty experience, I was better prepared, but still underestimated the rigorous demands. Sleep deprivation made

you punchy and cranky and tested your endurance.

The motto of the class was 'cooperate and graduate,' for you had to work well with others. Once on an all-night patrol in a swamp during the Florida phase, I fell asleep standing up resting on a BAR [Browning Automatic Rifle]. I did not know I slept, for I thought I only blinked. In that instant in the darkness of the early morning, I noticed a sharp increase in the beginning of daylight. I checked my watch. An hour had elapsed, and the 24-man patrol was gone. If you got lost in Ranger School, you were out. I ran as fast as I could and caught up with the patrol. My buddy told the instructor I was somewhere on the flank when he noticed I was missing.

The instructor immediately made me the patrol leader, and I did not have a clue of where we were going or what the plan of assault was for our objective. The two student squad leaders covered for me by making it appear that the instructions they gave in the instructor's presence came from me. They must have liked me.¹⁰

On May 24, 1962, 1LT Cleary pinned the yellow and black Ranger tab on the sleeve of his shirt. About forty-five students finished with him in Ranger Class No. 7; he was the first Army lawyer in history to become Ranger-qualified. Many of this fellow graduates would later serve in Vietnam; more than a few were killed or wounded in action.¹¹

Cleary returned to Fort Campbell and the 101st Airborne Division. In the days before the Vietnam War, there were few overseas deployments, but 1LT Cleary did serve overseas as a Judge Advocate in brigade exercises in Okinawa and the Philippines. During training in the Philippines, a nineteen-year-old Soldier was shot by another Soldier. Apparently, the victim was on duty as the charge of quarters when he learned that the shooter had brought a privately-owned .22 caliber pistol with him. As Soldiers had been told that privately-owned weapons could not be brought on the deployment, the charge of quarters demanded that the Soldier turn over the pistol to him. What happened next was very much in dispute. The shooter claimed that, when he pulled the pistol out of his uniform pocket, it had accidentally fired. The victim, however, insisted that the shooter had taken "it out of his pocket, aimed

trial, see *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973), *aff'd* 48 C.M.R. 19 (C.M.A. 1973). See also *Calley v. Calloway*, 382 F. Supp. 650 (1974); *Calley v. Hoffman*, 510 F. 2d 814 (1975), *cert. denied*, 425 U.S. 911 (1976). For a good narrative of the event, see RICHARD HAMMER, *THE COURT MARTIAL OF LT. CALLEY* (1971).

⁷ E-mail, John Cleary to author, *supra* note 4.

⁸ E-mail, John Cleary to author, subject: Revision of article (June 15, 2017, 10:38 AM) (on file with author).

⁹ Charles E. Decker served as The Judge Advocate General (TJAG) from 1961 to 1963. He had previously been a key player in the decision to establish The Judge Advocate General's School in Charlottesville in 1951. For more on General Decker, see *THE JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER* 233-35 (1975).

¹⁰ E-mail, John Cleary to author, subject: Ranger School (May 18, 2017, 3:21 PM) (on file with author).

¹¹ *Id.*



Captain John Cleary, 101st Airborne Division, on maneuvers with his division in South Carolina, summer 1962

it, and deliberately fired it at him.” The bullet had struck the charge of quarters in the spleen and, while 1LT Cleary thought that the man might die from this serious wound, Cleary was assured by the treating physician that “it was a clean wound” and that the victim would recover.¹²

Cleary was not so sure. Consequently, he interviewed the wounded Soldier and took a statement from him. At the time, 1LT Cleary realized that this interview might qualify as a “dying declaration” and an exception to the hearsay rule if the victim acknowledged that he was making his statement in the belief that he might die of his wound. But Cleary was uncomfortable about asking the victim if he would acknowledge that he might die of the gunshot wound, chiefly because he felt that if he “advised him, even in a subtle way of the chance of death, I might be taking away from him his will to live.” Cleary never asked the nineteen-year-old Soldier if he thought he might die and, as a result, the statement was not used at a later time—when the victim died of his wound. As Cleary remembers, the shooter “got off” with a very light punishment.¹³

In 1963, CPT Cleary became the first Staff Judge Advocate at the SWC at Fort Bragg, North Carolina (it would not be known as the John F. Kennedy SWC until after President Kennedy’s death). Then Brigadier General William P. Yarborough, the unit’s commander, assigned him to the 6th Special Forces Group so that he could remain on jump status. In early 1964, CPT Cleary made history yet again when he graduated from SWC’s High Altitude, Low Opening or HALO course of instruction. As the accompanying certificate

shows, he completed “14 free fall jumps, reaching a maximum of 95 seconds.” His highest jump was from 20,000 feet.



High Altitude, Low Opening (HALO) Parachute Certificate awarded to CPT John Cleary, 1964

After leaving active duty for the Army Reserve in 1964, Cleary remained active in sport parachuting clubs. He also made over 600 descents by parachute, of which more than 550 were free-fall jumps. In March 1966, he managed to spend two weeks active duty for training with the U.S. Army Sport Parachute Team, the “Golden Knights” at Fort Bragg.¹⁴

¹² E-mail, John Cleary to author, *supra* note 4.

¹³ *Id.* For the current rule on statements made under belief of impending death, see MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 804(b)(2).

¹⁴ E-mail, John Cleary to author, *supra* note 4.

After taking off his Army uniform, John Cleary first worked as the deputy director of the National Defender Project. The goal of the project, which was underwritten by the Ford Foundation, was to implement the Supreme Court's 1963 decision in *Gideon v. Wainwright*. General Decker, who had recently retired as The Judge Advocate General (TJAG), was the director of the National Defender Project, and he hired Cleary as his deputy. Cleary later went into private practice as a defense attorney in San Diego. Today, at eighty-one years of age, he works at San Diego State University (SDSU) organizing trips to China for SDSU students and bringing Chinese students to SDSU for training in basic trial advocacy.

John Cleary's story is worth telling for several reasons. First, it shows that even before the Corps' institutional development of operational law in the 1980s and 1990s—our *raison d'être* today—there were individual Judge Advocates who were looking for ways to better serve commanders. Cleary's successful completion of Ranger and HALO training opened the door for him to join the special warfare community as a lawyer, thereby ensuring that these operators had the services of a judge advocate. Second, John Cleary's life experiences after the Army demonstrate that his historical "firsts" as a judge advocate were not a fluke, as his continued to lead a full and rewarding life as a civilian.

A final note. Shortly after Cleary completed Ranger training, a second judge advocate, CPT Hunter Clarke, who had served with Cleary at the 101st Airborne Division, also completed the Ranger course and earned the Ranger tab.¹⁵ Over the years, other Army lawyers have also completed Ranger training. In the early 1980s, Captain Philip Lindley and Martin Healy, both assigned to the Office of the Staff Judge Advocate, Fort Benning, Georgia, earned the Ranger tab. Other Judge Advocates who have successfully completed Ranger training while members of the Corps include Colonel George Smawley and Major John Doyle.

More historical information can be found at

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

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

¹⁵ E-mail, John Cleary to author, *supra* note 10.

Disability and Readiness: The Integrated Disability Evaluation System Needs to Get Healthy

Major Michael J. Scaletty*

How frustrating it is when a Soldier is pending [a Medical Evaluation Board] and at the same time pending a [Chapter] 14 that we would need to take all the way up to the [Commanding General] for approval, and the Soldier continues to use drugs, doesn't show up to work, gets in trouble all the time, etc. . . . If you are dealing with these kinds of cases, our [Deputy Staff Judge Advocate] recommends that you seriously consider preferring charges and offering [Chapter] 10s to get the Soldiers out quickly.¹

I. Introduction

The Colorado Springs Gazette published the above email from the Chief of Justice (COJ) at 4th Infantry Division (4ID) and Fort Carson, Colorado.² The email was sent to the 4ID trial counsel (TCs) in response to a high number of Soldiers committing misconduct who were also enrolled in the medical evaluation board (MEB) phase of the integrated disability evaluation system (IDES).³ At the time, it took the average Soldier 140 days to be seen at an initial evaluation appointment during the MEB phase of the IDES.⁴ Soldiers waiting in the IDES remain on the unit books and occupy slots for their military occupational specialties (MOSs), but the Soldiers are non-deployable.⁵ This meant that units were fully manned on paper, but were, in reality, undermanned because of the large numbers of Soldiers unable to work or deploy.

Many 4ID commanders were frustrated that a percentage of their force was not able to perform the deployed mission for which they were preparing and there was little they could do to improve readiness.⁶ Commanders also wanted the

Soldiers in the IDES to receive all the care and attention they needed to have an accurate and fair disability rating.⁷ At the time the email was sent, the units at Fort Carson were deploying on regular twelve month rotations to Iraq and Afghanistan, making readiness a top issue.⁸

Generally, commanders want to fill the unit's authorized MOS billets with deployable Soldiers to accomplish their missions. However, the command's desires for deployability often meant an acceleration of the IDES resulting in an incomplete disability evaluation.⁹ Some Soldiers turned to the media to express their frustrations. The Colorado Springs Gazette said the Army was casting aside wounded Soldiers for convenience.¹⁰ Similar articles periodically appear in news outlets across the country.¹¹

Commanders are likely to look to brigade judge advocates (BJAs), chiefs of justice (COJs), and TCs to work with the brigade personnel section (S1) and the staff surgeon to find creative ways to reduce non-deployable numbers and increase readiness.¹² Soldiers may be non-deployable for a number of reasons, but commanders are particularly

* Judge Advocate, United States Army. LL.M., 2017, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; J.D., 2007, Washburn University; B.A., 2004, Washburn University. Assignments include Special Victim Prosecutor, United States Army Legal Services Agency, United States Army Alaska, Fort Wainwright and Joint Base Elmendorf-Richardson, Alaska, 2014-2016; Administrative Law Attorney, 1st Infantry Division, Fort Riley, Kansas, 2013-2014; Brigade Judge Advocate, Task Force Durable, Bagram Airfield, Afghanistan, 2012-2013; Brigade Judge Advocate, 1st Sustainment Brigade, Fort Riley, Kansas, 2011-2012; Senior Trial Counsel, 4th Infantry Division, Fort Carson, Colorado, February 2011-July 2011; Trial Counsel/Operational Law Attorney, 3d Brigade Combat Team, 4th Infantry Division, COB Adder, Iraq, 2010-2011; Trial Counsel/Operational Law Attorney, 3d Brigade Combat Team, 4th Infantry Division, 2009-2010; Officer In Charge, Fort Carson Tax Center, Fort Carson Colorado, 2008-2009; Legal Assistance Attorney, Fort Carson, Colorado, 2008. Member of the bar of Kansas. This paper was submitted in partial completion of the Master of Laws requirements of the 65th Judge Advocate Officer Graduate Course.

¹ Dave Phillips, *Disposable: Surge in Discharges Includes Wounded Soldiers*, THE GAZETTE (May 19, 2013), <http://cdn.csgazette.biz/soldiers/day1.html>.

² *Id.*

³ This assertion is based on the author's professional experiences as the Trial Counsel/Operational Law Attorney for 3d Brigade Combat Team, 4th Infantry Division, Fort Carson, Colorado from 2009 to 2011 [hereinafter Fort Carson Professional Experience].

⁴ U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-191T, MILITARY AND VETERANS DISABILITY SYSTEM: PRELIMINARY OBSERVATIONS ON EVALUATION AND PLANNED EXPANSION OF DOD/VA PILOT (2010).

⁵ Nick Wills, Army News Serv., *IDES & Medical Readiness: For the Health of the Force*, June 26, 2015, https://www.army.mil/article/151295/IDES___Medical_Readiness__For_the_Health_of_the_Force. See also U.S. DEP'T OF DEF., INSTR. 6490.07, DEPLOYMENT-LIMITING MEDICAL CONDITIONS FOR SERVICE MEMBERS AND DOD CIVILIAN EMPLOYEES encl. 3 (5 Feb. 2010).

⁶ Fort Carson Professional Experience, *supra* note 3.

⁷ *Id.*

⁸ *Id.*

⁹ Phillips, *supra* note 1.

¹⁰ *Id.*

¹¹ *Id.* The article by Dave Phillips sparked interest from National Public Radio which led to an inquiry by Secretary of the Army Eric Fanning and more national attention. See *id.* See also Daniel Zwerdling, *Missed Treatment: Soldiers with Mental Health Issues Dismissed for 'Misconduct'*, NAT'L PUB. RADIO (Oct. 28, 2015), <http://www.npr.org/2015/10/28/451146230/missed-treatment-soldiers-with-mental-health-issues-dismissed-for-misconduct>; Denver Nicks, *U.S. Army Kicked Out Thousands of Mentally Injured Vets for 'Misconduct,' Report Says*, TIME (Oct. 28, 2015), <http://time.com/4091809/u-s-army-mentally-ill-misconduct-kicked-out/>; Kellan Howell, *U.S. Army Dismissed Thousands of Soldiers with Mental Health Problems for 'Misconduct': report*, THE WASH. TIMES (Oct. 29, 2015), <http://www.washingtontimes.com/news/2015/oct/29/us-army-dismissed-thousands-soldiers-mental-health/>.

¹² The S1 is the principal staff officer for all matters concerning human resources, which include personnel readiness, personnel services, and

concerned about those Soldiers who are not deployable because of enrollment in the time consuming IDES.¹³ The ideal MEB phase takes 100 and the total IDES goal is 295 days.¹⁴ The Army, in fiscal year (FY) 2014, reported that seventeen percent of IDES cases were not meeting that timeline.¹⁵

The problem is not only the lengthy timeline, but the fact that Soldiers in the IDES are counted when calculating unit and Army end strength.¹⁶ Increasing readiness by reducing the approximately 80,000 medically non-deployable (approximately 12% of total Army end strength) Soldiers is the number one priority for the Army today.¹⁷ Congress should not count Soldiers enrolled in the IDES against authorized end strength, and the Army should require a greater degree of personal accountability for Soldiers enrolled in the IDES. Doing so will free commanders to both prepare for war and care for their wounded Soldiers.

This paper briefly discusses the historical development of the IDES. The paper then defines the readiness problem created by the IDES and discusses some of the ways commanders navigate this problem under the current rules. Finally, the paper proposes corrections to the regulatory and

headquarters management. U.S. DEP'T OF ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS (31 May 1997).

¹³ David Vergun, Army News Serv., *Dailey: Non-deployable Soldiers No.1 Problem*, U.S. ARMY, Nov. 19, 2015, https://www.army.mil/article/158897/Dailey__Non_deployable_Soldiers_No_1_problem.

The biggest problem in the Army today is Soldiers who are non-deployable, and that's having a direct impact on readiness, Sgt. Maj. of the Army Daniel A. Dailey said. . . . "If you will not or cannot fight and win, then there's no place for you in the Army," Dailey said, "We have to become unemotional about this. We have a job to do."

Id. See also Scott Maucione, *Only a Fraction of Non-deployable Soldiers are Capable of Regaining Deployable Status*, FED. NEWS RADIO (June 13, 2016), <http://federalnewsradio.com/army/2016/06/fraction-non-deployable-soldiers-capable-regaining-deployable-status/>.

[T]he Army has about 100,000 troops that are 'non-deployable,' [Vice Chief of Staff of the Army Gen. Daniel B. Allyn] said, adding that about 80 percent of those Soldiers are unable to deploy due to medical issues. Personnel readiness is the Army's No. 1 priority, he emphasized. One fix is to get as many Soldiers healthy as possible: 'Suffice to say that we're probably talking about 10,000 that we can expect to get back in by those means,' Allyn said. Another solution is to work with Veterans Affairs to speed up the process of determining disability claims and medical retirements. These 'Soldiers for Life' deserve a quicker resolution so that they can get the help they need, he said.

Gary Sheftik, Army News Serv., *Allyn Outlines Keys to Readiness Under Pressure*, U.S. ARMY, June 16, 2016, <https://www.army.mil/article/169797>.

¹⁴ *Integrated Disability Evaluation System*, U.S. ARMY CARE & TRANSITION, <http://www.wtc.army.mil/modules/soldier/s6-ides.html> (last visited Nov. 22, 2016).

statutory framework to relieve judge advocates and commanders from having to choose between the proper care of Soldiers in the IDES and mission readiness.

II. Background

A. Advent of the IDES

Prior to the creation of the IDES, the Department of Defense (DOD) and the Department of Veteran's Affairs (VA) managed their medical evaluations for the purposes of disability retirement separately.¹⁸ However, when Congress faced the problem of long waits and substandard care for veterans at Walter Reed Army Medical Center (WRAMC),¹⁹ it saw an opportunity to streamline the disability evaluations of both departments and passed legislation to create the IDES.²⁰

The problems at WRAMC that led to the radical changes for disability evaluation were large. The problems included

Soldiers suffering from traumatic brain injuries or stress disorders, others with amputated limbs, hav[ing] [to] languish for

¹⁵ U.S. DEP'T OF DEF., REPORT TO CONGRESS—REVIEW OF INTEGRATED DISABILITY EVALUATION SYSTEM 26 (2014) [hereinafter DOD REPORT TO CONGRESS].

¹⁶ Scott Arnold et al., *Non-Deployable Soldiers: Understanding the Army's Challenge* (May 11, 2011) (unpublished Master of Strategic Studies research project, U.S. Army War College) (on file with author). See also National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 402, 130 Stat. 2000 (2016). Throughout this paper several citations are made to unpublished war college research projects. These research projects are not formally published, but are kept in a repository online at the defense technical information center (DTIC). While the unpublished materials are kept on file with the author, they may also be found at DEF. TECHNICAL INFO. CTR., <http://www.dtic.mil/dtic/> (last visited Mar. 15, 2017).

¹⁷ The Sergeant Major of the Army and the Vice Chief of Staff of the Army have both expressed serious concern about non-deployable Soldiers and the effect on readiness. Gary Sheftik, *supra* note 13; Michelle Tan, *Sergeant Major of the Army Dan Dailey's 6 Priorities for 2016*, ARMY TIMES (Feb. 17, 2016), <https://www.armytimes.com/story/military/careers/army/2016/02/17/sergeant-major-army-dan-daileys-6-priorities-2016/80015482/>.

¹⁸ James R. Andrews, *Transformation of the Army's Physical Disability Evaluation System* (Jan. 6, 2011) (unpublished Master of Strategic Studies research project, U.S. Army War College) (on file with author). "The [Department of Defense (DOD)] disability evaluation is focused on the effect of any disabling condition on the performance of the service member's duties in the military, while the [Department of Veterans Affairs (VA)] evaluate[s] an individual's prospects for gainful employment in the civilian economy." *Id.* at 2. See also U.S. DEP'T OF ARMY, REG. 635-40, DISABILITY EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION para. 4-1 (19 Jan. 2017) [hereinafter AR 635-40].

¹⁹ Dana Priest & Anne Hull, *Soldiers Face Neglect, Frustration at Army's Top Medical Facility*, WASH. POST (Feb. 18, 2007), http://www.washingtonpost.com/wpdyn/content/article/2007/02/17/AR2007021701172_pf.html.

²⁰ Dignified Treatment of Wounded Warriors Act, H.R. 1538, 110th Cong. (2008) [hereinafter Wounded Warriors Act]. See also Andrews, *supra* note 18.

weeks and months on end in vermin-infested quarters waiting for a decision on their military status and a ruling on the level of benefits they will receive if they are discharged and transferred to the civilian-run [VA].²¹

The September 2007 shift to a combined evaluation system for both the DOD and the VA, but run by the DOD, solved those problems.²² Now, the Soldiers waiting on a disability rating from the VA receive a paycheck, have Army officers to look over them, and have full medical care.²³

B. Overview of the IDES

There are three main phases to the IDES each with several stages and steps with a total goal timeline of 295 calendar days.²⁴ After enrollment into the IDES, the Soldier enters the MEB phase, followed by the physical evaluation board (PEB) phase, then the transition phase.²⁵ Each phase has several stages, and each stage several steps. The IDES phases and their steps are briefly discussed below.

²¹ Dana Priest & Anne Hull, *supra* note 19.

²² U.S. DEP'T OF DEF., ANNUAL PERFORMANCE REPORT FY 2015, at 6 (2015).

²³ U.S. DEP'T OF DEF., INSTR. 1332.18, DISABILITY EVALUATION SYSTEM (5 Aug. 2014) [hereinafter DODI 1332.18]. Soldiers in the Integrated Disability Evaluation System (IDES) do not separate for a medical condition until completion of both the DOD and VA disability ratings. *Id.* encl. 3, para. 4d.

²⁴ U.S. DEP'T OF ARMY, PAM. 635-40, PROCEDURES FOR DISABILITY EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION para. 3-2 (12 Jan. 2017) [hereinafter DA PAM 635-40]. *See generally* U.S. ARMY MEDICAL COMMAND, IDES GUIDEBOOK: AN OVERVIEW OF THE INTEGRATED DISABILITY EVALUATION SYSTEM para. 1-3 (Oct. 2012) [hereinafter IDES GUIDEBOOK]. The IDES Guidebook is an informal publication maintained by the United States Army Medical Command (MEDDAC) to unify efforts. *Id.* The IDES Guidebook states,

To ensure that Soldiers, Commands, and Army Staff each have a clear understanding of their critical contributions to smooth case processing, the core IDES process must be standardized. Accountability measures must be put in place at all levels across the Army. This guidebook defines the processes, roles and responsibilities, and the standards that will be measured at all levels of the enterprise.

Id. The Department of the Army published Pamphlet 635-40 (DA PAM 635-40) in January of 2017, codifying a significant portion of the IDES Guidebook. However, DA PAM 635-40 does not have the same level of detail as the IDES Guidebook. *See generally* IDES GUIDEBOOK, *supra*; DA PAM 635-40, *supra*. There are no noticeable contradictions between the new DA PAM 635-40 and the IDES Guidebook. *See generally* IDES GUIDEBOOK, *supra*; DA PAM 635-40, *supra*. As such, this paper still considers IDES Guidebook a reliable source of procedural requirements for the administration of IDES cases within the Army.

1. The Initial Medical Evaluation

The IDES begins with an initial medical evaluation by a physician, often referred to as phase zero.²⁶ That exam determines that the Soldier has an ailment or injury that interferes with their ability to perform duties.²⁷ If a temporary profile²⁸ remains in place for one year or if the condition of the Soldier makes it clear that he or she is not fit for duty, then the Soldier reaches the medical retention determination point (MRDP).²⁹ The MRDP is the point at which the Soldier is officially enrolled in IDES.³⁰

2. The MEB Phase, 100 Days

After the initial medical evaluation, the Soldier enters the MEB phase of the IDES.³¹ The ultimate purpose of the MEB phase is to determine if the Soldier meets medical retention requirements.³² The MEB process consists of several stages and the processing time goal is 100 days.³³ The stages include the referral stage, the claim development stage, the medical exam stage, and the MEB stage.³⁴

In the referral stage, the Soldier receives informational briefs and provides the board with a copy of their medical records.³⁵ The Soldier's immediate commander is required to assess and document the Soldier's duty limitations from a

²⁵ DA PAM 635-40, *supra* note 24, para. 3-2. *See generally* IDES GUIDEBOOK, *supra* note 24.

²⁶ IDES GUIDEBOOK, *supra* note 24, para. 1-3.

²⁷ *Id.* para. 1-2.

²⁸ A medical profile limits what duties a Soldier can perform. U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS para. 7-4 (22 Dec. 2016) [hereinafter AR 40-501]. Temporary profiles are intended to allow time for recovery and have expiration dates, whereas permanent profiles do not expire and limit a Soldier's duties indefinitely. *Id.*

²⁹ IDES GUIDEBOOK, *supra* note 24, para. 1-5.

³⁰ *Id.* para. 1-4.

³¹ DA PAM 635-40, *supra* note 24, para. 3-2a(2). *See also* IDES GUIDEBOOK, *supra* note 24, para. 1-3. It appears the drafters of DA PAM 635-40 made an oversight in their math when calculating the target timeline. In paragraph 3-2a(1), DA PAM 635-40 states that the overall target timeline is 295 days; however, each phase's target timeline adds to 310 days. DA PAM 635-40, *supra* note 24, para. 3-2a(2). The MEB phase target is 100, the physical evaluation board (PEB) phase target is 120 days, and the transition phase target is 90 days for a total of 310 days. *See id.* This paper recognizes the target goal of 295 days, but also relies on each individual phase's target acknowledging the mathematical anomaly.

³² DODI 1332.18, *supra* note 23, encl. 3, para. 2a. *See generally* AR 40-501, *supra* note 28.

³³ DA PAM 635-40, *supra* note 24, para. 3-2a(2). *See also* IDES GUIDEBOOK, *supra* note 24, para. 1-7.

³⁴ DA PAM 635-40, *supra* note 24, para. 3-2. *See also* IDES GUIDEBOOK, *supra* note 24.

³⁵ DA PAM 635-40, *supra* note 24, para. 3-2a(2)(a). *See also* IDES GUIDEBOOK, *supra* note 24, para. 1-7.

non-medical perspective and to provide it to the Soldier's physical evaluation board liaison officer (PEBLO).³⁶ This is also the stage at which a line of duty investigation is completed, if required.³⁷

The next stage is claim development.³⁸ In this stage, the Soldier is counseled on the role of the VA to compensate the Soldier "for chronic illnesses, injuries and diseases that were incurred in or aggravated by service."³⁹ The Soldier also receives appointments for VA compensation and pension (C&P) medical examinations and given an opportunity to add conditions not included at the MRDP.⁴⁰

The Soldier then enters the VA disability examination stage.⁴¹ This is the longest stage of the MEB phase of the IDES.⁴² In this stage the Soldier attends the C&P appointments and the providers complete various administrative and documentation requirements.⁴³ The exams cover all potential conditions, claimed or otherwise.⁴⁴ When Soldiers have conditions that cannot be fully addressed in the C&P exams, the provider provides a notation in their administrative reports and the process continues.⁴⁵ Soldier "no-shows" are a common cause of delay in this stage, and, if a Soldier misses an appointment, the Soldier's command is

responsible for allocating resources to ensure the Soldier attends all appointments as scheduled.⁴⁶

The final stage in the MEB phase is the MEB stage.⁴⁷ This stage takes approximately thirty-five days.⁴⁸ The PEBLO forwards the C&P exam results to the MEB provider.⁴⁹ Then the MEB provider writes a Narrative Summary (NARSUM) using the C&P exam and the Soldier's entire medical record to describe all of the Soldier's medical conditions.⁵⁰ Then an informal MEB, consisting of two credentialed providers and an approval authority, review the NARSUM and the MEB case file to determine if the Soldier meets medical retention standards.⁵¹ If the Soldier meets medical retention standards they are returned to duty.⁵² If the Soldier does not meet medical retention standards, the case is forwarded to the PEB phase.⁵³

There are several options available to the Soldier prior to entering the PEB phase.⁵⁴ The Soldier may request an impartial medical review (IMR) and may also provide a rebuttal to the medical retention determination of the MEB.⁵⁵ However, these options are not factored into the projected processing timeline.⁵⁶ Also, potential adverse administrative

³⁶ DA PAM 635-40, *supra* note 24, para. 3-4; IDES GUIDEBOOK, *supra* note 24, para. 1-9. This allows an immediate commander to have input early in the process and greatly assists the process by allowing non-medical personnel to evaluate the Soldier's ability to perform. DA PAM 635-40, *supra* note 24, para. 3-4; IDES GUIDEBOOK, *supra* note 24, para. 1-9.

³⁷ DA PAM 635-40, *supra* note 24, para. 3-4; IDES GUIDEBOOK, *supra* note 24, para. 1-9.

³⁸ DA PAM 635-40, *supra* note 24, para. 3-2a(2)(b); IDES GUIDEBOOK, *supra* note 24, para. 1-11.

³⁹ IDES GUIDEBOOK, *supra* note 24, para. 1-11. *See also* DA PAM 635-40, *supra* note 24, para. 3-2a(2)(b). *See generally* Schedule for Rating Disabilities, 38 C.F.R. pt. 4 (2017).

⁴⁰ The compensation and pension (C&P) exam is conducted by Department of Veteran's Affairs (VA) physicians and is the first step in the IDES process exclusively for the purposes of VA disability evaluation. IDES GUIDEBOOK, *supra* note 24, para. 1-11. *See also* DA PAM 635-40, *supra* note 24, para. 3-5.

⁴¹ DA PAM 635-40, *supra* note 24, para. 3-2a(2)(c); IDES GUIDEBOOK, *supra* note 24, para. 1-12. The IDES Guidebook refers to this stage as the medical exam stage, the DA PAM 635-40 labels this stage the VA disability examination stage. DA PAM 635-40, *supra* note 24, para. 3-2a(2)(c); IDES GUIDEBOOK, *supra* note 24, para. 1-12.

⁴² IDES GUIDEBOOK, *supra* note 24, para. 1-12.

⁴³ IDES GUIDEBOOK, *supra* note 24, para. 1-11 to 1-18.

⁴⁴ IDES GUIDEBOOK, *supra* note 24, para. 1-13. "The designated exam provider(s) will provide a general medical examination which will address not only those conditions claimed by the Soldier and referred by the [medical evaluation board (MEB)] provider, but also include a comprehensive screening examination of all body systems." *Id.*

⁴⁵ IDES GUIDEBOOK, *supra* note 24, para. 1-14.

⁴⁶ DA PAM 635-40, *supra* note 24, para. 3-4d; IDES GUIDEBOOK, *supra* note 24, para. 1-10. *See also* Kirk Frady, Army News Serv., *Missed Medical Appointments Impact Readiness*, U.S. ARMY (Aug. 25, 2016), https://www.army.mil/article/173976/missed_medical_appointments_impac

t_readiness; David White, Army News Serv., 'No-Show' Appointments Cost EAMC \$3M Last Year, U.S. ARMY (Feb. 28, 2017), https://www.army.mil/article/183361/no_show_appointments_cost_eamc_3m_last_year.

⁴⁷ DA PAM 635-40, *supra* note 24, para. 3-2a(2)(d); IDES GUIDEBOOK, *supra* note 24, para. 1-22.

⁴⁸ DA PAM 635-40, *supra* note 24, para. 3-2a(2)(d); IDES GUIDEBOOK, *supra* note 24, para. 1-17.

⁴⁹ IDES GUIDEBOOK, *supra* note 24, para. 1-16.

⁵⁰ IDES GUIDEBOOK, *supra* note 24, para. 1-18; DA PAM 635-40, *supra* note 24, para. 3-5a.

⁵¹ *See generally* IDES GUIDEBOOK, *supra* note 24; U.S. DEP'T OF ARMY, REG. 635-40, DISABILITY EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION para. 4-1 (19 Jan. 2017) [hereinafter AR 635-40]; *See generally* DA PAM 635-40, *supra* note 24.

⁵² *See supra* note 51. Very few Soldiers are returned to duty and providers are encouraged by Congress from returning Soldiers to duty because it shows a lack of efficiency. *See generally* *Review of the VA and DOD Integrated Disability Evaluation System: Hearing Before the S. Comm. On Veterans' Affairs*, 111th Cong. 913 (2010) [hereinafter Congressional Testimony of John R. Campbell] (statement of John R. Campbell, Deputy Under Secretary of Defense, Office of Wounded Warrior Care and Transition Policy).

⁵³ DA PAM 635-40, *supra* note 24, para. 3-2a(3); IDES GUIDEBOOK, *supra* note 24, para. 1-20.

⁵⁴ DOD REPORT TO CONGRESS, *supra* note 15.

⁵⁵ DODI 1332.18, *supra* note 23. An Impartial Medical Review (IMR) serve as an independent means of review of the MEB findings and advise the Soldier on whether the MEB findings are complete. *Id.* encl. 3, para. 2e(4).

⁵⁶ DOD REPORT TO CONGRESS, *supra* note 15. The new DA PAM 635-40 sets the target for the MEB phase at one hundred days, but does not include the rebuttal in that timeline. DA PAM 635-40, *supra* note 24, para. 3-2a(2). The stages within the MEB phase and their timelines are the referral stage at

or legal actions often lead to delays in the processing of cases through the MEB phase.⁵⁷

3. The PEB Phase, 120 Days

The purpose of the PEB phase is to determine whether the Soldier is fit for duty, and, if not, their eligibility for benefits.⁵⁸ The fit for duty determination is different from the MEB's meets retention standards determination in that the PEB evaluates the impact of the Soldier's medical conditions on their ability to perform their military occupational specialty while the MEB simply determines if the Soldier meets general objective retention standards.⁵⁹

The PEB phase is also comprised of several stages.⁶⁰ The first stage is the informal PEB stage.⁶¹ This stage renders the fit or unfit for continued service determination.⁶² If the Soldier is found fit for continued military service he or she is returned to duty.⁶³ If the Soldier is found unfit for continued military service, the PEB sends all conditions rendering the Soldier unfit to the VA's disability rating activity site (DRAS) to obtain a disability rating.⁶⁴

The Soldier is then presented with the findings of the PEB and the DRAS.⁶⁵ At this point, the Soldier may non-concur with the fitness determination and request a formal PEB.⁶⁶ If the Soldier disagrees with the VA disability rating, the Soldier may present additional medical information and request reconsideration for each unfitting condition.⁶⁷ The

Soldier is entitled to a formal PEB and, if requested, the IDES enters that stage of the PEB phase.⁶⁸

A formal PEB consists of a panel of medical and non-medical members and the Soldier may appear in person before the formal PEB.⁶⁹ The Soldier may also be represented by legal counsel at the formal PEB at government expense.⁷⁰ After a finding is made by the formal PEB, they are sent to the United States Army Physical Disability Agency (USAPDA) for review.⁷¹ The USAPDA may return the findings to the formal PEB for reconsideration or approve them.⁷² Once the findings are certified by the USAPDA they are forwarded to the PEBLO to inform the Soldier.⁷³

4. The Transition Phase, 90 Days

After completion of the PEB phase, the Soldier enters the final phase of the IDES, the transition phase.⁷⁴ The purpose of the transition phase is to guide the Soldier through retirement or separation from the Army.⁷⁵ This phase is governed mostly by the Soldier's installation transition office and ends when the Soldier is no longer on active duty or has completed their return to duty.⁷⁶ With an understanding of the IDES and its lengthy timeline it is now time to outline the readiness problem.

ten days, claim development stage at ten days, the VA disability examination stage at forty-five days, the MEB stage at thirty-five days for a total of 100 days. *Id.* The DA PAM 635-40 then mentions a MEB rebuttal stage estimated at twenty days, bringing the total to one hundred twenty days, but the regulation does not discuss the time added by rebuttals in their target processing timelines. *Id.*

⁵⁷ DOD REPORT TO CONGRESS, *supra* note 15. *See also* AR 635-40, *supra* note 18, para. 4-3.

⁵⁸ DODI 1332.18, *supra* note 23, encl. 3, para. 3a. *See Integrated Disability Evaluation System*, U.S. ARMY CARE & TRANSITION, <http://www.wtc.army.mil/modules/soldier/s6-ides.html> (last visited Nov. 22, 2016).

⁵⁹ DODI 1332.18, *supra* note 23, encl. 3, para. 3a.

⁶⁰ DA PAM 635-40, *supra* note 24, para. 3-2a(3).

⁶¹ DA PAM 635-40, *supra* note 24, para. 3-2a(3)(a); IDES GUIDEBOOK, *supra* note 24, para. 1-23.

⁶² IDES GUIDEBOOK, *supra* note 24, para. 1-23.

⁶³ IDES GUIDEBOOK, *supra* note 24, para. 1-23. Providers are pressured to refrain from returning Soldiers to duty. *See generally* Congressional Testimony of John R. Campbell, *supra* note 52.

⁶⁴ IDES GUIDEBOOK, *supra* note 24, para. 1-23. Disability ratings are calculated on a percentage basis and used to calculate monetary compensation for the DOD and the VA. *Id.*; *See* 38 C.F.R. pt. 4 (2017). The VA rates all conditions using the VA schedule for rating disabilities (VASRD), and the DOD copies those ratings for conditions unfitting for military service. *See* 38 C.F.R. pt. 4 (2017).

⁶⁵ IDES GUIDEBOOK, *supra* note 24, para. 1-26.

⁶⁶ DA PAM 635-40, *supra* note 24, para. 3-2a(3)(b); IDES GUIDEBOOK, *supra* note 24, para. 1-27. The Soldier is not required to request a formal PEB, and if the Soldier does not request the formal PEB, the case simply skips that step. *Id.*

⁶⁷ DA PAM 635-40, *supra* note 24, para. 3-10; IDES GUIDEBOOK, *supra* note 24, para. 1-27.

⁶⁸ DA PAM 635-40, *supra* note 24, para. 3-11; IDES GUIDEBOOK, *supra* note 24, para. 1-28.

⁶⁹ AR 635-40, *supra* note 18, para. 4-21; DODI 1332.18, *supra* note 23, encl. 3, para. 3d.

⁷⁰ AR 635-40, *supra* note 18, para. 4-5; DODI 1332.18, *supra* note 23, encl. 3, para. 3h.

⁷¹ DA PAM 635-40, *supra* note 24, para. 3-11. *See also* DODI 1332.18, *supra* note 23, encl. 3, para. 3h; IDES GUIDEBOOK, *supra* note 24, para. 1-30.

⁷² IDES GUIDEBOOK, para. 1-30. *See also* DA PAM 635-40, *supra* note 24, para. 3-13.

⁷³ IDES GUIDEBOOK, *supra* note 24, para. 1-30.

⁷⁴ DA PAM 635-40, *supra* note 24, para. 3-2a(4); IDES GUIDEBOOK, *supra* note 24, para. 1-32.

⁷⁵ *Id.*

⁷⁶ DA PAM 635-40, *supra* note 24, para. 3-2a(4); IDES GUIDEBOOK, *supra* note 24, paras. 1-32, 1-35.

III. What is the Readiness Problem, and How Do Commanders Cope

While the IDES solved serious problems with access to care and eliminated duplicate disability evaluations in the DOD and the VA, the current regulatory makeup of the IDES creates a problem with readiness. This section of the paper discusses the problems with readiness as created by the IDES and then discusses the ways in which commanders are currently dealing with the readiness problems.

A. Defining the Readiness Problem

The Army aims to downsize toward 476,000 active end strength in FY 2017,⁷⁷ and the percentage of non-deployable Soldiers continues to grow.⁷⁸ For example, from 2007 to 2010 the percentage of Soldiers within brigade combat teams (BCTs) that were non-deployable increased from 11% to 16%.⁷⁹ In November of 2015, the active Army had approximately 50,000 Soldiers who could not deploy, 37,000 (7.5% of active Army end strength) of which were due to medical issues.⁸⁰ That number is up from 3.4% in FY 2007, 4.6% in FY 2010, and 5.78% in FY 2011.⁸¹

The ever increasing rate of non-deployable Soldiers, particularly medically non-deployable Soldiers, causes great concern among the Army's leaders.⁸² Sergeant Major of the Army (SMA) Dan Dailey made reducing non-deployable Soldiers number one on his list of six priorities for 2016.⁸³ When announcing this priority, SMA Dailey said, "I want every Soldier deployable in the Army. It's about building readiness in the United States Army, doing what's right, taking care of Soldiers and getting them healthy—but cracking down on it, too."⁸⁴ Placing the problem in perspective, SMA Dailey said the number of non-deployable Soldiers, 50,000, is roughly equivalent to having three of the Army's ten divisions unavailable for deployment.⁸⁵ The bottom line, from a strategic perspective, is medical non-deployable Soldiers reduce the number of Soldiers available to accomplish the Army's overall mission.

However, the problem is more palpable when viewed from an individually deployable unit level. When a Soldier

cannot deploy, but remains assigned to a deployable unit, that unit is left with a vacancy when they do deploy.⁸⁶ For example, if a battalion has one paralegal, and that paralegal is not deployable but remains assigned to the battalion, then the battalion is forced take a Soldier away from another unit or simply go without. As such, it is understandable that commanders at all levels of the Army are concerned about this issue. A 2011 Army War College study summarized the non-deployable problem well when it concluded,

Army personnel who are non-deployable detract from readiness and encumber their units by failing to perform the required tasks as outlined by regulations, orders, and directives. Unit level commanders are often forced to seek other resources or individuals to fill vacancies left by non-deployable Soldiers, while also expending time and effort to supervise and process non-deployable Soldiers until they become deployable or are separated. At senior Army levels, non-deployable Soldiers are viewed as a total non-deployable percentage compared to a unit's overall strength. Within a unit, however, the non-deployable percentage is not just an aggregate number but individual Soldiers with particular Military Occupational Specialties, who are needed to perform specific roles and tasks for the unit.⁸⁷

Soldiers who are non-deployable for a non-temporary medical reason are likely to become enrolled in the IDES.⁸⁸ All Soldiers who are enrolled in the IDES fall into the category of medically non-deployable.⁸⁹ Therefore, reducing the 37,000 medically non-deployable Soldiers, and increasing Army readiness, is directly tied to the IDES.⁹⁰ However, despite reducing the overall wait times for Soldiers to receive their disability ratings, the IDES has also resulted in Soldiers remaining on active duty, and in their current unit, for far longer than they did under the previously separate DOD and VA disability evaluation systems.⁹¹

⁷⁷ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 402, 130 Stat. 2000 (2016).

⁷⁸ Maucione, *supra* note 13.

⁷⁹ U.S. ARMY PUB. AFF., THE PENTAGON, FORT HOOD FACT SHEET NO. 0715 (3 Mar. 2010), <http://www.hood.army.mil/facts/FS%200715%20-%20Non-Deployables.pdf>. This factsheet distributes statistics from the entire Army to the Fort Hood community. *Id.*

⁸⁰ Matthew Cox, *Army Has 50,000 Active Soldiers Who Can't Deploy, Top NCO Says*, MILITARY.COM (Nov. 25, 2015), <http://www.military.com/daily-news/2015/11/25/army-has-50000-active-soldiers-who-cant-deploy-top-nco-says.html>.

⁸¹ Arnold et al., *supra* note 16; Cox, *supra* note 80.

⁸² Tan, *supra* note 17.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Cox, *supra* note 80.

⁸⁶ Arnold et al., *supra* note 16.

⁸⁷ *Id.*

⁸⁸ IDES GUIDEBOOK, *supra* note 24, para. 1-2.

⁸⁹ See AR 40-501, *supra* note 28, ch. 7.

⁹⁰ Arnold et al., *supra* note 16.

⁹¹ *Id.*

The November 24, 2010, IDES report data revealed 16,000 Service members participating in the program

The IDES requirement that Soldiers remain on active duty throughout the entire process (MEB, PEB, and Transition) means commanders are holding onto medically non-deployable Soldiers for a minimum of 295 days.⁹² However, significant numbers of the DOD's IDES cases exceed target processing timelines.⁹³ Congress and the DOD recognize that reducing the processing time of IDES cases will result in increased readiness and are actively engaged in reducing the percentage of cases that exceed the target timeline.⁹⁴ Despite their efforts, and major improvements, 13% of FY 2015 DOD IDES cases exceeded timelines.⁹⁵

The readiness problem for commanders is aggravated by the fact that they are responsible for ensuring Soldiers in the IDES process keep to the scheduled timeline and make it to their appointments.⁹⁶ Then, when there are delays caused by Soldiers missing appointments or not cooperating with medical professionals during the IDES, commanders are required to allocate resources, such as noncommissioned officer escorts, to ensure the Soldier no longer misses appointments.⁹⁷ Utilizing those resources on medically non-deployable Soldiers in the IDES necessarily results in not utilizing those resources to increase readiness or to prepare for an upcoming deployment.

and 3,800 Service members who had completed the program. Active component personnel averaged 318 days from enrollment to completion. This exceeds the IDES goal of 295 days, however, it is 41% faster than the legacy DES and subsequent VA claims process, which together total 540 days to complete. This is beneficial for the Soldier in that he or she receives their first VA disability payment faster, though the Soldier remains on active duty slightly longer.

Id.

⁹² DA PAM 635-40, *supra* note 24, para. 3-2a. *See generally* IDES GUIDEBOOK, *supra* note 24.

⁹³ DOD REPORT TO CONGRESS, *supra* note 15. The percentage of cases meeting processing timeline goals were 24% in Fiscal Year 2012 (FY12), 32% in FY13, 79% in FY14, and 87% in FY15. U.S. DEP'T OF DEF., ANNUAL PERFORMANCE REPORT FY 2015, at 26 (2015) [hereinafter PERFORMANCE REPORT].

⁹⁴ PERFORMANCE REPORT, *supra* note 93, at 26. The DOD performance report to Congress indicated that the number one Agency Priority Goal (APG) included "accelerating the transition of recovering Service Members into Veteran status by reducing disability evaluation processing time." *Id.*

⁹⁵ *Id.*

⁹⁶ DA PAM 635-40, *supra* note 24, para. 3-4d; IDES GUIDEBOOK, *supra* note 24, para. 1-10.

⁹⁷ IDES GUIDEBOOK, *supra* note 24, para. 1-10.

The unit command is responsible for coordinating transportation so the Soldier reports to scheduled appointments and examinations on time. If a Soldier misses ("no-shows") any appointment without any prior notification to the unit command and [physical evaluation board liaison officer (PEBLO)], the unit

In a similar vein, many commanders, from the division commander down to the company commander, deal with processing a Soldier through the IDES when they are also committing misconduct resulting in a desired or mandatory administrative separation.⁹⁸ These cases are commonly referred to as dual-processing, referencing the administrative separation process and the IDES.⁹⁹ Army regulations require Soldiers to complete the MEB phase of the IDES prior to a separation authority taking final action on an administrative separation for misconduct.¹⁰⁰ The same 2011 War College study quoted earlier addressed commander's frustrations with this process, ". . . Soldiers with a history of indiscipline and misconduct are remaining in the Army pending disposition of their [IDES] cases. These [IDES] processing timelines are challenging for commanders who expect to separate Soldiers for misconduct but learn these Soldiers will remain in the Army for up to another year."¹⁰¹

B. What are Commanders Doing to Cope?

The readiness problem associated with the IDES is not new. As discussed, the Army's leadership, and the DOD, has continually prioritized reducing non-deployable Soldiers and reducing IDES processing timelines since the IDES was piloted in 2007.¹⁰² As such, commanders have been creative in navigating the readiness problem created by the IDES.¹⁰³

must allocate resources and assign an escort to accompany the Soldier to all future IDES appointments. Missed appointments create unnecessary delays in the IDES process.

Id.

⁹⁸ Arnold et al., *supra* note 16; *See also* AR 635-40, *supra* note 28, para. 4-3. Several types of misconduct require initiation of administrative separation under Army regulations, for example, drug use and two alcohol related offenses in one year require processing an administrative separation. U.S. DEP'T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM para. 1-7(c)(7) (28 Dec. 2012).

⁹⁹ Arnold et al., *supra* note 16.

¹⁰⁰ U.S. DEP'T OF ARMY, REG. 635-200, ENLISTED ADMINISTRATIVE SEPARATIONS para. 1-33 (19 Dec. 2016) [hereinafter AR 635-200].

When the medical treatment facility (MTF) commander or attending medical officer determines that a Soldier being processed for administrative separation under . . . chapter . . . 14 [misconduct], does not meet the medical fitness standards for retention (see AR 40-501, chap 3), he/she will refer the Soldier to a MEB in accordance with AR 40-400. The administrative separation proceedings will continue, but final action by the separation authority will not be taken, pending the results of MEB.

Id.

¹⁰¹ Arnold et al., *supra* note 16.

¹⁰² Sheftik, *supra* note 13; Tan, *supra* note 17; Arnold et al., *supra* note 16.

¹⁰³ Arnold et al., *supra* note 16; John E. Sena, Non-Deployables: An Increasing Challenge for the Army (Dec. 04, 2010) (unpublished Master of Strategic Studies research project, U.S. Army War College) (on file with author).

Below are a few of the methods commanders have utilized to reduce the number of medically non-deployable Soldiers in their formations. These methods often result in commanders having to choose readiness over the individual Soldier's needs.

First, commanders have tried to send medically non-deployable Soldiers to warrior transition units (WTUs).¹⁰⁴ This can be effective to remove Soldiers enrolled in the IDES from the books of the deployable unit, however, the WTUs have specific requirements for Soldiers to be assigned to them and they are riddled with issues.¹⁰⁵ The issues include "harassment, mistreatment and a lack of care from their supervisors."¹⁰⁶ The WTUs have a reputation as a dumping ground for problem Soldiers who no longer contribute to the Army.¹⁰⁷ This information indicates that the WTUs are not an effective solution to the readiness problem when commanders also want the best care for their Soldiers in the IDES.

Next, commanders have simply moved non-deployable Soldiers from units preparing to deploy to units that just returned and will not deploy in the near future.¹⁰⁸ This prevents the Soldiers in the IDES from having continuity of command and creates an additional roadblock for PEBLOs who work with the command to quicken the IDES processing timeline. The 4ID attempted this process in 2009 and quickly recognized the issue with continuity.¹⁰⁹

In an effort to solve the continuity problem, Fort Carson created a provisional holding unit for Soldiers who are not in the WTU but remain non-deployable for medical reasons.¹¹⁰ Fort Riley created a similar provisional unit to process

administrative separations and hold dual processing Soldiers for the duration of the MEB phase to free deployable units from carrying the Soldiers.¹¹¹ Strategically, these units deepen the non-deployable population instead of reduce it because they require officers and enlisted members to manage them.¹¹² When considering Congress's reduction of authorized Army end strength, this solution will not increase long term readiness.

A final example pertains specifically to dual process Soldiers and explains the email quoted at the outset of this paper. When Soldiers in the IDES committed relatively minor misconduct usually disposed of through non-judicial punishment, judge advocates at Fort Carson recommended the command prefer charges and then accept a request for discharge in lieu of court-martial if requested.¹¹³ This is a quick way around the requirement to keep the Soldier through the MEB phase because Army regulations do not prioritize medical processing over discharges in lieu of court-martial.¹¹⁴

However, a request for a discharge in lieu of court-martial is voluntary and must come from the accused Soldier.¹¹⁵ If the Soldier does not submit the request, the prefferal of charges pauses the IDES between the MEB and PEB phase.¹¹⁶ If the Soldier's court-martial ends without a punitive discharge, then the IDES case may proceed to the PEB phase.¹¹⁷ This practice creates temptation to treat minor misconduct committed by Soldiers enrolled in the IDES differently than minor misconduct committed by Soldiers those who are not enrolled in the IDES.¹¹⁸ Commanders will receive scrutiny when minor misconduct results in an administrative discharge for Soldiers who are not in the IDES and court-martial charges for those who are.¹¹⁹ All of these

¹⁰⁴ Sena, *supra* note 103.

In 2007, the Army created 35 warrior transition units (WTUs) at Army installations to fill a gap in support personnel for wounded Soldiers. The WTUs provide critical support to wounded Soldiers who are expected to require six months of rehabilitative care and the need for complex medical management. The units have physicians, nurses, squad leaders, platoon sergeants, and mental health professionals. These leaders are responsible for making sure wounded Soldiers' needs are met, their care is coordinated, and their families are taken care of.

Id. See generally U.S. DEP'T OF ARMY, REG. 40-58, WARRIOR CARE AND TRANSITION PROGRAM (23 Mar. 2015).

¹⁰⁵ Thomas E. Ricks, *Here's How Screwed Up the Army's Warrior Transition Units Are: Genuinely Sick Soldiers Try to Get Out of Using Them*, FOREIGN POL'Y MAG. (June 17, 2010), <http://foreignpolicy.com/2010/06/17/heres-how-screwed-up-the-armys-warrior-transition-units-are-genuinely-sick-soldiers-try-to-get-out-of-using-them/>.

¹⁰⁶ David Tarrant & Scott Friedman, *Badly Wounded Veterans Need Better Care From Special Army Units, Report Says*, DALLAS NEWS (Nov. 2011), <http://www.dallasnews.com/news/investigations/2016/11/11/federal-probe-army-needs-improve-care-wounded-warriors>.

¹⁰⁷ Ricks, *supra* note 105.

¹⁰⁸ Fort Carson Professional Experience, *supra* note 3.

¹⁰⁹ *Id.*

¹¹⁰ Fourth Infantry Division and Fort Carson established a provisional unit called Task Force Ivy to hold non-deployable Soldiers and free space in deploying units to fill various military occupational specialties and increase the deploying units deployable percentage. Fort Carson Professional Experience, *supra* note 3.

¹¹¹ Arnold et al., *supra* note 16.

¹¹² *Id.*

¹¹³ Phillips, *supra* note 1.

¹¹⁴ AR 635-200, *supra* note 100, para. 1-33. In an effort to combat this shortcut, Congress now requires mental health examinations for all Soldiers deployed within a twenty-four month period prior to their separation. 10 U.S.C. § 1177 (2017).

¹¹⁵ AR 635-200, *supra* note 100, paras. 10-1, 10-2.

¹¹⁶ AR 635-40, *supra* note 18, para. 4-5.

¹¹⁷ *Id.*

¹¹⁸ Colonel Jonathan Kent, Med. Command Staff Judge Advocate, Impact of Misconduct during Army Physical Disability Evaluation System Process (2 Jan. 2012) (unpublished information paper) (on file with author).

¹¹⁹ *Id.*

problems put commanders in a tough position when they want to both care for Soldiers and fully prepare for deployment.

IV. Relieving the Pressure

This paper proposes two actions to address the readiness problem of the IDES without forcing commanders to compromise Soldier care for readiness, or vice versa. First, Congress should pass legislation that excludes Soldiers enrolled in the IDES from calculations of total Army end strength. Second, the Army should require Soldiers to be personally accountable for their IDES case, and if they fail to be accountable, the Soldier should no longer be eligible for the IDES. Each proposal is analyzed below.

A. Congress Should Exclude Soldiers Enrolled in the IDES from End Strength

As discussed above, the FY 2017 National Defense Authorization Act (NDAA) set the Army's end strength at 476,000 active duty Soldiers.¹²⁰ Soldiers who are enrolled in the IDES are included in that 476,000.¹²¹ The DOD wishes to reduce the number of Soldiers who are returned to duty out of the IDES, making nearly all of the 37,000 medically non-deployable Soldiers simply waiting to exit the Army.¹²² Despite these Soldiers inability to ever fully participate in the mission of the Army, Congress still includes them in the 476,000 authorized for mission accomplishment.

If these Soldiers are removed from end strength calculations, commanders will be able to fully staff their units with Soldiers who are able to deploy and accomplish the Army's primary missions. Additionally, commanders will be free from the constant pressure to reduce non-deployable numbers and will no longer feel compelled to seek solutions that compromise Soldier care.

It appears that Congress did not account for the readiness problems associated with the implementation of the IDES. The combining of the DOD and VA systems and placing the entire disability evaluation process on the DOD created a type of unfunded mandate. This unfunded mandate requires the Army to hold Soldiers on active duty for the entirety of the IDES without an increase in the authorized number of Soldiers.¹²³ Eliminating those servicemembers who are

waiting for a disability rating and separation corrects this issue.

To accomplish this end, Congress only needs to place a qualifier in the next NDAA that excludes Soldiers enrolled in the IDES from the authorized end strength.¹²⁴ Then the executive can implement the measure through the service secretaries. The Army is already accounting for Soldiers non-deployable because of permanent medical conditions and the Army G1 can easily exclude them from end strength calculations while still providing accounting information to Congress regarding the number of Soldiers enrolled in the IDES.

The most notable impediment to this change is cost. Removing these Soldiers from authorized end strength essentially results in an increase of the force. However, in doing so, Congress is armed with more information so that they may better assess the actual size of the DOD and set end strength accordingly. Further, the apparent cost of fielding new Soldiers to replace those enrolled in the IDES is inflated. As discussed, the vast majority of Soldiers enrolled in the IDES are simply waiting to exit the Army and it is only a matter of time before they create the vacancy.¹²⁵ Excluding these Soldiers from end strength calculations allows the Army to get ahead of those vacancies by filling them now instead of waiting until the IDES Soldiers transition out.

Further, the cost of the additional Soldiers is offset by a requirement for personal accountability in the IDES. Soldiers who miss appointments cost the military health system billions of dollars each year in wasted time.¹²⁶ The missed appointments add cost by slowing the IDES.¹²⁷ A requirement for personal accountability in the IDES will reduce no shows and the high costs associated with them.

B. The Army Should Require Personal Accountability for Soldiers in the IDES

Through the IDES, the Army intends to compensate Soldiers for injuries and illnesses incurred during service, and the Soldier stands to gain through disability separation pay or retirement.¹²⁸ At every other point during service, Soldiers are expected to conduct themselves in accordance with the

¹²⁰ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 402, 130 Stat. 2000 (2016).

¹²¹ *Id.*

¹²² In Congressional testimony, John R. Campbell, Deputy Under Secretary of Defense, Office of Wounded Warrior Care and Transition Policy, stated that one of his objectives was to "to reduce superfluous referrals in which servicemembers were returned to duty . . ." Congressional Testimony of John R. Campbell, *supra* note 52.

¹²³ See generally DODI 1332.18, *supra* note 23.

¹²⁴ See *infra* Appendix A.

¹²⁵ Congressional Testimony of John R. Campbell, *supra* note 52.

¹²⁶ Katherine Rosario, Army News Serv., *Appointment No-Shows are Costly in Dollars*, *Time*, U.S. ARMY (Dec. 5, 2013), https://www.army.mil/article/116502/Appointment_no_shows_are_costly_in_dollars__time. See also Frady, *supra* note 46; White, *supra* note 46.

¹²⁷ See IDES GUIDEBOOK, *supra* note 24, para. 1-10.

¹²⁸ See generally DODI 1332.18, *supra* note 23. Soldiers discharged without completing the IDES may still be able to obtain VA disability pay under certain circumstances. In other words, a discharge does not necessarily remove all opportunity to recoup for injury or illness sustained on active duty. See 38 U.S.C. § 5303 (2016).

uniform code of military justice.¹²⁹ The Army's current regulatory framework creates a loophole in those obligations for Soldiers in the IDES.¹³⁰

Soldiers who do not participate in the IDES, who are unruly or regularly fail to attend medical appointments, should forfeit their ability to gain from the IDES. That said, Soldiers enrolled in the IDES are due a fair shot to complete the process. Therefore, this paper recommends the Army allow Soldiers who commit misconduct that disrupts their participation in the IDES to be separated without completion of the MEB phase.¹³¹ The separation should account for medical issues by capping the characterization of service at general (under honorable conditions), elevating the separation authority to the general court-martial convening authority, and requiring concurrence of a senior medical provider.

To accomplish this change, the Army must adjust Army Regulation 635-200 and Army Regulation 635-40.¹³² There should be an exception to the requirement to complete the MEB phase prior to separation for misconduct reflecting the qualifications discussed above. Requiring a reasonable level of personal accountability will reduce costs, increase readiness, and speed the processing of IDES cases.

V. Conclusion

There is a real problem with readiness when it comes to disability evaluation in the Army. To best address Soldier care and the need to have an Army that is ready to do America's bidding, Congress should not count Soldiers enrolled in the IDES against authorized end strength. The Army should also require Soldiers enrolled in the IDES to be accountable in the process.

Making the recommended statutory and regulatory changes in this paper will result in increased readiness and an improvement in Soldier care throughout the IDES. Commanders will be free to fully care for their wounded Soldiers while maintaining focus on their upcoming missions. Bottom line, the Army will be better prepared.

¹²⁹ Generally, the uniform code of military justice (UCMJ) applies to Soldiers at all times. See 10 U.S.C. §§ 801–946 (2016). Commanders have an obligation to enforce good order and discipline within their units, and Soldiers have an obligation to conduct themselves within good order and discipline. See generally U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (6 Nov. 2014).

¹³⁰ Soldiers who commit minor misconduct while enrolled in the IDES are protected from administrative separation until completion of the medical evaluation board phase of the IDES (unless the administrative separation is in lieu of court-martial). U.S. DEP'T OF ARMY, REG. 635-200, STANDARDS OF MEDICAL FITNESS para. 1-33 (19 Dec. 2016). Therefore, many Soldiers

and commanders believe the IDES is used as a shield. See generally Arnold et al., *supra* note 16.

¹³¹ Examples of misconduct that interferes with IDES processing includes repeatedly failing to report for medical appointments, disrespect or disruptive behavior toward providers, lengthy civilian confinement, etc. It does not include misconduct independent of the IDES process such as drug use without a dependence diagnosis or disrespect to a senior non-commissioned officer or officer.

¹³² See *infra* Appendix B.

Appendix A. Changes to Authorized End Strength Calculations

1. The § 401 of the NDAA for FY 2017 reads as follows:

The Armed Forces are authorized strengths for active duty personnel as of September 30, 2017, as follows:

- (1) The Army, 476,000.
- (2) The Navy, 323,900.
- (3) The Marine Corps, 185,000.
- (4) The Air Force, 321,000.¹³³

2. To exclude servicemembers enrolled in IDES, the NDAA should be amended to read:

The Armed Forces are authorized strengths for active duty personnel, excluding personnel enrolled in the Integrated Disability Evaluation System, as of DATE, are as follows:

- (1) The Army, NUMBER.
- (2) The Navy, NUMBER.
- (3) The Marine Corps, NUMBER.
- (4) The Air Force, NUMBER.

¹³³ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 401, 130 Stat. 2000, 2016 (2016).

Appendix B. Regulatory Changes for Personal Accountability

1. Paragraph 1-33 of Army Regulation 635-200 reads as follows:

1-33. Disposition through medical channels

a. Except in separation actions under chapter 10 and as provided in para 1-33b, disposition through medical channels takes precedence over administrative separation processing.

b. When the medical treatment facility (MTF) commander or attending medical officer determines that a Soldier being processed for administrative separation under chapters 7 (see sec IV), or 14, does not meet the medical fitness standards for retention (see AR 40-501, chap 3), he/she will refer the Soldier to a Medical Evaluation Board (MEB) in accordance with AR 40-400. The administrative separation proceedings will continue, but final action by the separation authority will not be taken, pending the results of MEB.

(1) If the MEB findings indicate that referral of the case to a physical evaluation board (PEB) is warranted for disability processing under the provisions of AR 635-40, the MTF commander will furnish copies of the approved MEB proceedings to the Soldier's GCMCA and unit commander. The GCMCA may direct, in writing, that the Soldier be processed through the physical disability system when action under the UCMJ has not been initiated, and one of the following has been determined:

(a) The Soldier's medical condition is the direct or substantial contributing cause of the conduct that led to the recommendation for administrative elimination.

(b) Other circumstances of the individual case warrant disability processing instead of further processing for administrative separation.

(2) The authority of the GCMCA to determine whether a case is to be processed through medical disability channels or under administrative separation provisions will not be delegated.

(3) The GCMCA's signed decision to process a Soldier through the physical disability system will be transmitted to the MTF commander as authority for referral of the case to a PEB.

(a) Copies of the GCMCA's decision will be furnished to the unit commander and included in the administrative separation proceedings.

(b) The unit commander will suspend processing of the administrative separation action pending the PEB.

1. If the Soldier is found physically fit, the administrative separation action will be resumed.

2. If the Soldier is found physically unfit, the administrative separation action will be abated.

c. Disability processing is inappropriate if the conditions in b(1)(a) and (b) do not apply, if UCMJ action has been initiated, or if the Soldier has been medically diagnosed as drug dependent. (See para 14-12c.) Accordingly, disability processing is inappropriate in separation actions under chapter 10.¹³⁴

2. To impose personal responsibility in the IDES, paragraph 1-33a and c should be amended and a new section d should be added,

a. Except in separation actions under chapter 10, as provided in para 1-33b, and in situations where a separation is initiated under chapter 14 and an administrative separation board determines the Soldier has committed misconduct that interferes with the processing of the Integrated Disability Evaluation System, disposition through medical channels takes precedence over administrative separation processing.

¹³⁴ U.S. DEP'T OF ARMY, REG. 635-200, STANDARDS OF MEDICAL FITNESS para. 1-33 (19 Dec. 2016).

c. Disability processing is inappropriate if the conditions in b(1)(a) and (b) do not apply, if UCMJ action has been initiated, if the Soldier commits misconduct that interferes with the processing of IDES, or if the Soldier has been medically diagnosed as drug dependent. (See para 14–12c.) Accordingly, disability processing is inappropriate in separation actions under chapter 10.

d. In cases where the Soldier commits misconduct that interferes with the processing of the IDES the board procedure must be followed, a medical provider in the grade of O-5 or higher must serve as the president of the administrative separation board, the Soldier may not receive an under other than honorable characterization of service, and the separation authority is the GCMCA.

3. Paragraph 4-3f of Army Regulation 635-40 reads as follows,

f. Enlisted Soldiers pending administrative separation.

(1) Enlisted Soldiers who are approved for discharge in lieu of trial by court-martial are ineligible for referral to the MEB and PEB phases of the DES (see AR 635–200). If the Soldier is in the DES process, their DES case will be terminated, and the Soldier is discharged in lieu of trial by court-martial.

(2) Soldiers under processing for an administrative separation for fraudulent enlistment or misconduct remain eligible to be referred to the MEB. The Soldier's commander must notify the Soldier's PEBLO in writing that administrative separation action has been initiated. The Soldier's completed MEB must be referred to the Soldier's General Court-martial Convening Authority (GCMCA) in accordance with AR 635–200 to determine whether the Soldier will be referred to the PEB. Approval and suspension of an AR 635–200 separation action is not authorized when the Soldier is pending both an AR 635–200 and AR 635–40 action. The GCMCA must decide which action to pursue (as described in AR 635–200). Soldiers continue to be eligible for these administrative separation actions up until the day of their separation or retirement for disability even though their PEB findings have been previously completed and approved by USAPDA for the SECARMY. In no case will a Soldier, being processed for an administrative separation for fraudulent enlistment or misconduct be discharged through the DES process without the approval of the GCMCA.

(3) For administrative separation actions other than those addressed in paragraphs 4–3f(1) and 4–3f(2), referral and disposition under the DES takes precedence over the administrative separation action.

4. Paragraph 4-3f(2) of Army Regulation 635-40 should be amended to read:

f(2) Except in separation actions under AR 635-200 chapter 10, and in situations where a separation is initiated under chapter 14 and an administrative separation board determines the Soldier has committed misconduct that interferes with the processing of the Integrated Disability Evaluation System (see paragraph 1-33, AR 635-200), Soldiers under processing for an administrative separation for fraudulent enlistment or misconduct remain eligible to be referred to the MEB. The Soldier's commander must notify the Soldier's PEBLO in writing that administrative separation action has been initiated. The Soldier's completed MEB must be referred to the Soldier's General Court-martial Convening Authority (GCMCA) in accordance with AR 635–200 to determine whether the Soldier will be referred to the PEB. Approval and suspension of an AR 635–200 separation action is not authorized when the Soldier is pending both an AR 635–200 and AR 635–40 action. The GCMCA must decide which action to pursue (as described in AR 635–200). Soldiers continue to be eligible for these administrative separation actions up until the day of their separation or retirement for disability even though their PEB findings have been previously completed and approved by USAPDA for the SECARMY. In no case will a Soldier, being processed for an administrative separation for fraudulent enlistment or misconduct be discharged through the DES process without the approval of the GCMCA.

Going Beyond Article 60—A Defense Counsel Primer on Alternative Sources of Sentence Relief

Major T. Campbell Warner*

I. Introduction

The overwhelming majority of courts-martial (89.2% in fiscal year 2015) end in convictions.¹ Among a client's chief concerns are how much time he will serve if convicted, whether he will be punitively discharged, and what avenues exist to reduce his sentence. Since Congress has curtailed the convening authority's clemency power under Article 60(c), Uniform Code of Military Justice (UCMJ),² defense counsel and clients can no longer rely on obtaining sentence relief at initial action. Therefore, defense counsel must understand and advise their clients on alternative sources of sentence relief and how to have the best chance at obtaining it.

This article will educate defense counsel on the history of Article 60(c) and how recent changes to it have effectively eliminated an accused's chance to receive early clemency with respect to confinement and punitive discharges. It will then describe opportunities for sentence reduction and clemency outside of Article 60(c). These sources include sentence abatements at the confinement facility and the potential relief available at the Army Clemency and Review Board, the Army Discharge Review Board, and the Army Board of Correction for Military Records. Defense counsel must be able to set clients up for later success by providing advice on all available avenues of sentence relief before terminating representation.

II. Background of Article 60(c)

Article 60(c)³ used to be the most immediate option for an accused to receive sentence relief. It granted the convening authority unchecked plenary power to grant relief for any or no reason at all. Article 60(c)(3) permitted the convening authority to "dismiss any charge or specification by setting aside a finding of guilty thereto" or to "change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification."⁴ With respect to the sentence, Article 60(c)(2) permitted the convening authority to "disapprove, commute, or suspend the sentence in whole or in part."⁵ The convening authority's ability to grant clemency was so powerful that it was considered to be "the accused's best hope for sentence relief."⁶

However, the 2014 National Defense Authorization Act (NDAA) curtailed that unfettered power.⁷ With respect to findings, the convening authority may now only disapprove a finding if the conviction is for a "qualifying offense."⁸ A qualifying offense is an offense for which the maximum sentence to confinement does not exceed two years, in which the adjudged sentence does not include a punitive discharge or confinement exceeding six months, and which does not fall under Articles 120(a), 120(b), 120b, or 125.⁹ If an accused is convicted of a non-qualifying offense, the convening authority may not disapprove the finding of guilty for that offense.

The 2014 NDAA also limited a convening authority's ability to grant sentence relief. Now, absent a pretrial

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¹ THE JUDGE ADVOCATE GEN., U.S. ARMY, ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES OF THE UNITED STATES SENATE AND THE HOUSE OF REPRESENTATIVES AND TO THE SECRETARY OF DEFENSE, SECRETARY OF HOMELAND SECURITY, AND THE SECRETARIES OF THE ARMY, NAVY, AND AIR FORCE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD OCTOBER 1, 2014 TO SEPTEMBER 30, 2015, at 48 (2015) [hereinafter 2015 ANNUAL REPORT]. In fiscal year 2015, 88.99% of general courts-martial and 89.78% of special courts-martial empowered to adjudge a bad-conduct discharge resulted in conviction. *Id.*

² National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66, § 1702, 127 Stat. 672, 955-56 (2013) [hereinafter National Defense Authorization Act 2014].

³ UCMJ art. 60(c) (2012).

⁴ UCMJ art. 60(c)(3) (2012).

⁵ UCMJ art. 60(c)(2) (2012).

⁶ *United States v. Lee*, 50 M.J. 296, 297 (C.A.A.F. 1999) (quoting *United States v. Bono*, 26 M.J. 240, 243 n.3 (C.M.A. 1988)).

⁷ National Defense Authorization Act 2014 § 1702.

⁸ UCMJ art. 60(c)(3)(A) (2014).

⁹ UCMJ art. 60(c)(3)(D) (2014). Examples of qualifying offenses include many "military-only" crimes like absence without leave, disrespect to a superior commissioned officer, and all crimes under Article 92. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶¶ 10.e, 14.e, 15.e (2016) [hereinafter MCM] (setting forth maximum sentences to confinement for these offenses as two years or less). Qualifying offenses can also include crimes not unique to the military, like drunken operation of a vehicle, assault consummated by a battery, and even sexual offenses such as indecent viewing and indecent exposure. *Id.* pt. IV, ¶¶ 35.e, 54.e(2), 45.e(1), 45.e(5) (setting forth the maximum sentences to confinement for those offenses as less than two years).

agreement or “recommendation from the trial counsel in recognition of the substantial assistance by the accused in the investigation or prosecution of another person,” a convening authority “may not disapprove, commute, or suspend in whole or in part an adjudged sentence of confinement for more than six months or a [punitive discharge].”¹⁰ Although a convening authority may still “disapprove, commute, or suspend” other portions of a court-martial sentence, including reduction in grade and forfeiture of pay and allowances¹¹ (and a defense counsel should not disregard the convening authority’s ability to do so), that may be little comfort to the client facing years of confinement.

In plain English, these changes mean that with respect to long sentences to confinement and punitive discharges, the convening authority is no longer an “accused’s best chance for sentence relief.”¹² Although defense counsel should never assume that sentence relief will be forthcoming and therefore strive to get the lowest reasonable sentence possible at trial, it is now more important than ever for defense counsel to understand the various alternate avenues for clemency and educate their clients about those various avenues and the odds of success at each before terminating representation.

III. Submitting Post-trial Matters

Before addressing alternate sources of sentence relief, the subject of submitting post-trial matters under Rule for Courts-Martial (RCM) 1105¹³ should be discussed. Defense counsel may wonder if there is any merit to submitting post-trial matters in light of the changes to Article 60(c). It may be tempting to avoid one more post-trial headache and advise the client not to submit matters. Before advising a client not to submit post-trial matters, though, consider whether other clemency may be granted and whether the case has legal errors affecting the findings or sentence.

First, the convening authority can still grant clemency on portions of the sentence not extending to a punitive discharge or confinement exceeding six months.¹⁴ Therefore, submission of RCM 1105 matters is an appropriate vehicle to request such clemency. The convening authority may deny

such a request, but nothing is lost by asking.

Second, a defense counsel may raise “[a]llegations of errors affecting the legality of the findings or sentence.”¹⁵ Although a convening authority may not disapprove or reduce a punitive discharge or confinement exceeding six months even to remedy legal error, the Army Court of Criminal Appeals (ACCA) may do so under Article 66(c).¹⁶ By raising allegations of legal error in the post-trial matters, a defense counsel can alert his client’s appellate counsel and the ACCA to issues warranting appellate scrutiny and possible relief.

IV. Understanding and Calculating Sentences to Confinement

To understand how sentence relief works, defense counsel must understand how sentences to confinement are calculated and the various release dates that apply to them. Assume a thirty-year-old staff sergeant with no prior convictions or nonjudicial punishments, was convicted of unpremeditated murder and sentenced to, *inter alia*, twenty-five years’ confinement. The sentence was adjudged on January 1, 2017. He was in pretrial confinement for 200 days and received an additional 100 days of credit under Article 13. You know that the military justice system allows for parole and that prisoners can receive credit for good behavior in confinement, but your client wants to know when he can expect to be released. Is your client eligible for parole? If so, when? If he does not receive parole, are there other ways he can reduce his sentence? How much of those twenty-five years will he actually spend behind bars?

Department of Defense Manual 1325.7-M (DoD 1325.7-M) is the governing authority for calculating sentences to confinement.¹⁷ Under that authority, prisoners receive a maximum release date, an adjusted maximum release date, and a minimum release date. The maximum release date is “[t]he sentence or sentences to confinement without reductions, but less 1 day for the day of confinement/release.”¹⁸

The adjusted maximum release date “is computed by taking the [maximum release date] and adjusting it for

¹⁰ UCMJ art. 60(c)(4) (2014). The Military Justice Act of 2016 slightly alters a convening authority’s ability to grant clemency on the findings and sentence. National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, § 5322 (2016) [hereinafter National Defense Authorization Act 2017]. However, the general rule is the same—the convening authority will be unable to disapprove findings in a case where the sentence includes more than six months’ consecutive (as opposed to concurrent) confinement or a punitive discharge, will be unable to disapprove a punitive discharge or confinement exceeding six months consecutively, and will always be able to disapprove, commute, or suspend parts of a sentence not extending to a punitive discharge and confinement exceeding six months consecutively. National Defense Authorization Act 2017 § 5322-23.

¹¹ UCMJ art. 60(c)(2)(B) (2014).

¹² United States v. Lee, 50 M.J. 296, 297 (C.A.A.F. 1999) (quoting United States v. Bono, 26 M.J. 240, 243 n.3 (C.M.A. 1988)).

¹³ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1105 (2016).

¹⁴ UCMJ art. 60(c)(2)(B) (2014); National Defense Authorization Act 2017 § 5322.

¹⁵ MCM, *supra* note 9, R.C.M. 1105(b)(2)(A).

¹⁶ UCMJ art. 66(c) (2014) (requiring a service Court of Criminal Appeals to affirm “only so much findings of guilty and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved”).

¹⁷ U.S. DEPT. OF DEF., 1325.7-M, DoD SENTENCE COMPUTATION MANUAL (27 July 2004) (C2, 9 Mar. 2007) [hereinafter DoD 1325.7-M].

¹⁸ *Id.* app. 1, para. AP1.1.13.

administrative credit, judicial credit, inoperative time,” and other rare adjustments outside the scope of this article, such as crossing the international date line.¹⁹ Administrative credit is “[d]ay-for-day credit provided on the Report of Results of Trial for pre-trial confinement and conditions tantamount to confinement.”²⁰ Judicial credit is “[c]redit ordered by judicial authority to be applied to a sentence to confinement,” such as credit for illegal pretrial punishment in violation of Article 13.²¹ The minimum release date is a prisoner’s “[adjusted maximum release date] adjusted for credit or forfeiture of [sentence] abatements.”²² Abatements are deductions of days from a sentence.²³

In your client’s case, his maximum release date would be December 31, 2041 – twenty-five years from the date the sentence was adjudged minus one day. He received 200 days of administrative credit for pretrial confinement and 100 days of judicial credit under Article 13, so his adjusted maximum release date would be 300 days earlier, or March 6, 2041. There remains, though, the matter of the minimum release date. What abatements is your client eligible to receive? When will your client be advised of his minimum release date? Finally, how realistic is it that your client can receive any abatements and obtain further sentence relief?

V. Sentence Abatements and Mandatory Supervised Release

Abatements are relatively easy to obtain and are the most reliable way for clients to obtain sentence relief. A client can begin earning abatements from the minute he arrives at the confinement facility. Any abatements your client receives adjust his minimum release date to an earlier date, thereby potentially reducing the amount of time he spends confined. However, defense counsel and their clients must understand that abatements do not guarantee early release, as certain requirements, including an acceptable release plan, must be met before early release is possible.²⁴ Further, defense counsel and clients must recognize that early release does not always mean the prisoner is free from governmental supervision.

¹⁹ *Id.* app. 1, para. AP 1.1.1.

²⁰ *Id.* app. 1, para. AP1.1.2.

²¹ *Id.* app. 1, para. AP1.1.11.

²² *Id.* app. 1, para. AP 1.1.14. Sentence abatements are discussed in detail in Section IV.

²³ U.S. DEP’T OF DEF., INSTR. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY encl. 1, para. 18.j (11 Mar. 2013) [hereinafter DoDI 1325.07].

²⁴ *Id.* encl. 2, app. 2.

²⁵ *Id.* encl. 2, app. 3. Although Army Regulation (AR) 190-47 also contains information regarding abatements, eligibility therefor, and rate of earning, it has not been updated since June 15, 2006. U.S. DEP’T OF ARMY, REG. 190-47, MILITARY POLICE—THE ARMY CORRECTIONS SYSTEM (15 June 2006) [hereinafter AR 190-47]. Accordingly, AR 190-47 does not

A. Types of Abatements and Rates of Earning

Department of Defense Instruction (DoDI) 1325.07 describes the abatements available to an accused and the methods by which they are earned.²⁵ A prisoner is eligible to receive three types of abatement: good conduct time, earned time, and special acts abatement.²⁶ A prisoner may receive different abatements in the same month, but “[t]he total of [good conduct time], [earned time], and [special acts abatement] awarded for any 1 month shall not exceed 15 days.”²⁷ These abatements can reduce a prisoner’s sentence to confinement on a day-for-day basis.²⁸ In order to be credited with earned time, the prisoner must submit and cooperate with an acceptable mandatory supervision plan.²⁹ Awards of good conduct time and special acts abatements “shall be conditioned on the prisoner submitting an acceptable supervision plan and fully cooperating in all other respects with the mandatory supervision policy herein, if directed to do so.”³⁰

1. Good Conduct Time

Good conduct time “is a deduction from a prisoner’s release date for good conduct and faithful observance of all facility rules and regulations.”³¹ In other words, a prisoner receives good conduct time as long as he behaves well. A prisoner who is convicted of offenses occurring after December 31, 2004 may earn up to five days of good conduct time per month of confinement regardless of sentence length.³² Therefore, a client who is sentenced to twelve months of confinement can earn up to sixty days of good conduct time, reducing his sentence by two months. Pretrial confinees are eligible for good conduct time, but any such time earned will not be awarded until a sentence is adjudged.³³

Unlike other abatements, potential good conduct time may be calculated upon a prisoner’s entry into confinement,

incorporate the provisions of the later-published DoDI 1325.07, and counsel are advised to disregard the abatement calculations contained in AR 190-47.

²⁶ DoDI 1325.07, *supra* note 23, encl. 2, app. 3, para. 1.

²⁷ *Id.* encl. 2, app. 3, para. 5.

²⁸ *Id.* encl. 2, app. 3, paras. 2.c.(1), 4.c.

²⁹ *Id.* encl. 2, app. 3, para. 3.a.(2).

³⁰ *Id.* encl. 2, app. 3, paras. 2.a.(2), 4.a.(2).

³¹ *Id.* encl. 2, app. 3, para. 2.

³² *Id.* encl. 2, app. 3, para. 2.b.(2). See *infra* Appendix C for rates of earning for portions of a month.

³³ *Id.* encl. 2, app. 3, para. 2.a.(3).

thereby reducing his minimum release date.³⁴ This is accomplished by determining the total number of months of the prisoner's sentence and multiplying it by the good conduct time rate.³⁵ Credit for portions of a month, if applicable, are added onto that result.³⁶ The resulting number of good conduct time days is subtracted from the adjusted maximum release date, thereby providing the prisoner with a minimum release date.

Recall that your hypothetical client was sentenced to twenty-five years' confinement. That sentence equates to 300 months' confinement. Since up to five days per month of good conduct time may be earned, your client may receive up to 1,500 days of good conduct time. When those 1,500 days are subtracted from the adjusted maximum release date of March 6, 2041, your client will receive a minimum release date of January 26, 2027. Simply by behaving himself in confinement, including pretrial confinement, your client has the potential to reduce his sentence by almost five years.

2. Earned Time

Earned time "is a deduction of days from a prisoner's release date earned for participation and graded effort in the areas of work, offense-related or other rehabilitation programs, education, self-improvement and personal growth, and support activities."³⁷ For example, a prisoner who is assigned to a work detail and displays "good performance and good attendance" may receive earned time.³⁸ A prisoner who "participat[es] in community service programs, over and above which is normally scheduled" or in "special projects supportive of institutional goals or missions" may likewise receive earned time.³⁹

A prisoner may earn up to eight days per month of earned time.⁴⁰ Unlike good conduct time, pretrial confinees are not eligible for earned time.⁴¹ Further, "[w]hen calculating a prisoner's anticipated release date at the beginning of a prisoner's sentence to confinement, the Military Services shall not consider [earned time] that could be earned during a sentence."⁴²

³⁴ *Id.* encl. 2, app. 3, para. 2.c. ("The Military Services may elect to calculate an anticipated release date at the beginning of a prisoner's sentence to confinement based on the [good conduct time] that could be earned for the entire period of the sentence or sentences.").

³⁵ DoD 1325.7-M, *supra* note 17, para. C2.9.1.

³⁶ *Id.*

³⁷ DoDI 1325.07, *supra* note 23, encl. 2, app. 3, para. 3.

³⁸ U.S. DISCIPLINARY BARRACKS, REG. 600-1, MANUAL FOR THE GUIDANCE OF INMATES para. 7-2a(1) (14 Nov. 2013) [hereinafter USDB REG. 600-1].

³⁹ *Id.* para. 7-2c.

⁴⁰ DoDI 1325.07, *supra* note 23, encl. 2, app. 3, para. 3.b.(1).

3. Special Acts Abatement

Special acts abatement "is a deduction of days from a prisoner's release date earned for a specific act of heroism, humanitarianism, or extraordinary institutional or community support deemed appropriate by the [military confinement facility] commander."⁴³ A prisoner may earn up to two days per month of special acts abatement for up to twelve months.⁴⁴ For example, if a prisoner were to protect a corrections specialist from harm during a riot, that prisoner could receive special acts abatement for up to a twelve-month period at a maximum of two days per month.

B. The Supervision Plan and Types of Release

Abatements do not guarantee that a prisoner will be released from confinement early, nor does early release mean that a prisoner is no longer subject to supervision by appropriate authorities. First, early release depends upon submission of an acceptable post-release plan that is approved by the Army Clemency and Parole Board (ACPB).⁴⁵ Second, a prisoner who receives early release must often still be supervised by a United States Probation Officer (USPO) until his adjusted maximum release date unless he receives clemency.⁴⁶

1. The Supervision Plan

Prisoners must submit an acceptable supervision plan to be credited with earned time and may be ordered to do so to receive good conduct time and special acts abatements.⁴⁷ An acceptable supervision plan must include, at a minimum, residence and employment information.⁴⁸ Specifically, the prisoner must identify "where and with whom [he] will live" and must also, unless medically disabled, show he has "either guaranteed employment, an offer of effective assistance to obtain employment, or acceptance in a valid educational or vocational program."⁴⁹ Army Regulation (AR) 15-130 provides that such a plan may include other "conditions of parole deemed reasonable and appropriate," including "a requirement to begin or continue treatment for alcohol and drug abuse, the payment of restitution, or the payment of a

⁴¹ *Id.* encl. 2, app. 3, para. 3.c.(2).

⁴² *Id.* encl. 2, app. 3, para. 4.

⁴³ *Id.* encl. 2, app. 3, para. 4.b.

⁴⁴ *Id.*

⁴⁵ Steven Andraschko & David Haasenritter, *The Army Clemency and Parole Board*, CORRECTIONS TODAY, May-June 2013, at 55.

⁴⁶ *Id.*

⁴⁷ DoDI 1325.07, *supra* note 23, encl. 2, app. 3, paras. 2.a.(2), 3.a.(2), 4.a.(2).

⁴⁸ *Id.* encl. 2, app. 2.

⁴⁹ *Id.*

fine ordered executed as part of the prisoner's court-martial sentence."⁵⁰ The supervision plan is subject to approval by the ACPB.⁵¹ The importance of submitting an acceptable release plan cannot be understated. Failure to submit an acceptable release plan—for example, a prisoner required to register as a sex offender submitting a plan where he will live next door to a school—is typically the reason why early release may be denied to an otherwise eligible prisoner.⁵²

2. Unsupervised Release vs. Mandatory Supervised Release

Whether a prisoner receives mandatory supervised release or unsupervised release often depends on the length of his sentence. Per DoDI 1325.07, the ACPB is not required to review for mandatory supervised release prisoners with sentences of fewer than three years of confinement.⁵³ Such prisoners may be reviewed for mandatory supervised release by the ACPB upon recommendation of the prisoner's military confinement facility commander.⁵⁴ Practically speaking, though, such a prisoner is released at his minimum release date without supervision.⁵⁵

Prisoners sentenced to three years or more of confinement are eligible for mandatory supervised release upon reaching their minimum release date.⁵⁶ Mandatory supervised release is similar to parole and is defined as “[a] form of conditional release granted to a qualifying individual who has served that portion of his or her sentence to confinement up to their [minimum release date]. This form of release is served until the adjusted maximum release date unless otherwise revoked or remitted by the [ACPB].”⁵⁷ Prisoners under mandatory supervised release are “subject to supervision by a [USPO] up to the full-term of the sentence imposed.”⁵⁸ A prisoner who violates a condition of supervision is subject to having his supervision revoked and being returned to confinement.⁵⁹ In layman's terms, mandatory supervised release is like parole, but eligibility for it occurs much later than parole eligibility.

The odds of receiving mandatory supervised release are

high compared to the odds of receiving parole or clemency. In recent years, fewer than two percent of clemency requests have been granted, and parole has been granted on average in less than fifteen percent of cases.⁶⁰ In contrast, mandatory supervised release is approved at significantly higher rates, increasing from approximately 46% in fiscal year 2012 to approximately 73% in fiscal year 2016.⁶¹

C. Best Practices for Defense Counsel

Because abatements are the easiest, most reliable way for clients to earn sentence reductions, defense counsel are in a position to set their clients up for success from the outset. First, assume that your client will be required to submit a supervision plan before being credited with any abatements. To that end, advise your client to begin preparing for life after confinement, including determining where and with whom he will live and how he will support himself financially. Such matters are inevitably easier to resolve before sentence is imposed and the client's ability to communicate with the outside world is restricted (and monitored by the confinement facility). The sooner your client can determine where he will live and work, the better the chance that he will submit an acceptable supervision plan.

Second, inform your client about how much he can reduce his sentence simply by behaving himself. Five days per month may not seem like much, but like a deployment, the sooner a prisoner can return home, the happier he will be. If your client is in pretrial confinement, advise him that he can receive good conduct time for it. A client who is dismayed at remaining in pretrial confinement is more likely to behave (and easier to manage) once he understands that his pretrial confinement time can earn him more than day-for-day credit. With respect to earned time, advise clients of the benefits of taking advantage of every possible vocational, educational, and rehabilitative opportunity and volunteering for extra work if possible. Again, every day counts.

Third, advise your client that he will be subject to supervision by a USPO if he receives mandatory supervised

⁵⁰ U.S. DEP'T OF ARMY, REG. 15-130, BOARDS, COMMISSIONS, AND COMMITTEES—ARMY CLEMENCY AND PAROLE BOARD para. 3-2a(5)(d) (23 Oct. 1998) [hereinafter AR 15-130]. The regulation uses the term “parole plan,” but a comparison of the plans described in AR 15-130 and DoDI 1325.07 shows that the residence and employment requirements are the same. Therefore, prudence suggests that defense counsel advise their clients that the more extensive terms of AR 15-130 will likely apply to their post-release supervision plans.

⁵¹ DoDI 1325.07, *supra* note 23, encl. 2, para. 19.c.(4).

⁵² Interview with Mary McCord, Legal Advisor, Army Rev. Bds. Agency, in Charlottesville, Va. (Feb. 22, 2017) [hereinafter McCord Interview].

⁵³ DoDI 1325.07, *supra* note 23, encl. 1, para. 19.c.(1).

⁵⁴ *Id.*

⁵⁵ Andraschko & Haasenritter, *supra* note 45, at 55; McCord Interview, *supra* note 52.

⁵⁶ DoDI 1325.07, *supra* note 23, encl. 2, para. 19.a. This authority also requires that a prisoner be eligible for parole in order to be eligible for mandatory supervised release. Given that a prisoner's minimum release date (and therefore eligibility for mandatory supervised release) will always be later than his parole eligibility date, it is unclear why DoDI 1325.07 imposes this requirement.

⁵⁷ *Id.* glossary, pt. II.

⁵⁸ *Id.* encl. 2, app. 2.

⁵⁹ *Id.* encl. 2, para. 22.a.

⁶⁰ E-mail from Gerald Patterson, Operations Officer, Army Clemency & Parole Bd., to Mary McCord, Legal Advisor, Army Rev. Bds. Agency (Jan. 31, 2017, 15:17 EST) (on file with author) [hereinafter Patterson E-mail 1].

⁶¹ *Id.*

release. Therefore, even though your client may be out of confinement, his liberty may still be significantly restricted and he may be returned to confinement if he violates the conditions of his supervision. Although prisoners are briefed regarding supervised release during reception and in-processing at the confinement facility,⁶² defense counsel should advise their clients of the same during the course of representation.

VI. The Army Clemency and Parole Board

While sentence abatements represent a prisoner's best opportunity for sentence reduction, defense counsel should be aware of and advise clients about alternate sources of clemency. The next best opportunity for sentence relief is found through the clemency and parole authority of the ACPB.⁶³ The statutory authority for the ACPB is 10 U.S.C. §§ 951-954. Further regulatory guidance is in DoDI 1325.07 and AR 15-130.

A. Types of Relief and Eligibility Therefor

1. Parole

Parole is a "conditional release from confinement, under the guidance and supervision of a USPO."⁶⁴ As with mandatory supervised release, prisoners who wish to be considered for parole must submit a supervision plan and agree in writing to abide by it.⁶⁵

Parole eligibility also depends upon a prisoner's sentence. A prisoner sentenced to confinement for fewer than twelve months, life without eligibility for parole, or death is not eligible for parole.⁶⁶ A prisoner serving at least twelve months' but fewer than thirty years' confinement is eligible for parole after serving six months or one-third of his sentence, whichever is longer.⁶⁷ Accordingly, a prisoner serving thirty years or more of confinement is eligible for parole after serving ten years of confinement.⁶⁸ Prisoners sentenced to confinement for life are eligible for parole after serving ten or twenty years of confinement, depending on

when the offense was committed.⁶⁹

Finally, "[p]rojected [good conduct time] and other abatement of confinement shall be excluded in computing eligibility for parole."⁷⁰ In other words, good conduct time and earned time do not count towards parole eligibility (however, administrative and judicial credit are not similarly excluded, so that time does count towards parole eligibility).

Recall that your hypothetical client was sentenced to twenty-five years' confinement. Because he was sentenced to at least twelve months' but fewer than thirty years' confinement, he is required to serve one-third of his sentence or ten years, whichever is less, before he is eligible for parole. One third of a twenty-five year sentence is eight years and four months; because that is less than ten years, your client must serve that much confinement before he may be considered for parole. While the good conduct time your client earned in pretrial confinement may not be considered towards his parole eligibility, his 200 days of pretrial confinement credit and 100 days of Article 13 credit do. Those 300 days of credit mean that your client has to serve roughly seven years and six months' of post-trial confinement before he is eligible for parole.

2. Clemency

Clemency is not expressly defined in DoDI 1325.07, but AR 15-130 defines it as "[a]n action taken to remit or suspend the unexecuted part of a court-martial sentence, to include upgrading a discharge and the restoration or reenlistment of an individual convicted by a court-martial."⁷¹ Additional forms of clemency include substituting an administrative discharge for a punitive discharge and reducing or remitting a fine or forfeitures.⁷²

Prisoners serving sentences shorter than twelve months' confinement are generally ineligible for clemency.⁷³ Prisoners serving at least twelve months but fewer than ten years of confinement are considered for clemency no later than nine months after confinement begins and at least annually thereafter.⁷⁴ Prisoners serving ten years or more of

⁶² DoDI 1325.07, *supra* note 23, encl. 2, para. 19.b.(1).

⁶³ The Army Clemency and Parole Board (ACPB) maintains clemency authority over all prisoners serving court-martial sentences. DoDI 1325.07, *supra* note 23, encl. 2, app. 2; U.S. PAROLE COMM'N, RULES AND PROCEDURES MANUAL § 2.43 (June 30, 2010) [hereinafter USPC MANUAL]. However, military prisoners who are transferred to the custody of the Federal Bureau of Prisons are under the jurisdiction of the U.S. Parole Commission for parole and mandatory supervised release purposes. DoDI 1325.07, *supra* note 23, encl. 2, app. 2; 10 U.S.C. § 858 (2012).

⁶⁴ DoDI 1325.07, *supra* note 23, glossary, pt. II.

⁶⁵ *Id.* encl. 2, para. 18.i.

⁶⁶ *Id.* encl. 2, paras. 18.a.(2), 18.b.

⁶⁷ *Id.* encl. 2, para. 18.a.(2)(a).

⁶⁸ *Id.* encl. 2, para. 18.a.(2)(b).

⁶⁹ *Id.* encl. 2, para. 18.a.(2)(b-c). Prisoners sentenced to life for "an offense committed after February 15, 2000" must serve twenty years' confinement before becoming eligible for parole. *Id.* encl. 2, para. 18.a.(2)(c). Prisoners sentenced to life for offenses committed prior to that date must serve ten years. *Id.* encl. 2, para. 18.a.(2)(b).

⁷⁰ *Id.* encl. 2, para. 18.e.

⁷¹ AR 15-130, *supra* note 50, glossary.

⁷² Steven L. Andraschko, U.S. Army Clemency & Parole Board, at slide 3 (Feb. 11, 2014) (unpublished PowerPoint Presentation) (on file with author).

⁷³ DoDI 1325.07, *supra* note 23, encl. 2, para. 17.a.

⁷⁴ *Id.* encl. 2, para. 17.c.(1).

confinement are considered for clemency at the point they become eligible for parole and at least annually thereafter.⁷⁵ Prisoners serving sentences of life without eligibility for parole are considered for clemency after serving twenty years of confinement and at least once every three years thereafter.⁷⁶

Practically, prisoners must not only meet the temporal requirements of DoDI 1325.07, but their appeals must be complete before the ACPB will grant clemency. According to Mr. Steven Andraschko, the former chairman of the ACPB, the ACPB will not grant clemency while the appeals process is ongoing “99 percent of the time.”^{77,78}

B. Criteria for Parole and Clemency

1. Criteria Applicable to Clemency and Parole

The ACPB must “consider each case [for clemency or parole] on its own merits.”⁷⁹ To meet that end, the ACPB “may consider the criteria listed” in AR 15-130, para. 3-2a(1-6).⁸⁰ “Determination of the relevance and weight to be accorded any factor is within the broad discretion of the ACPB.”⁸¹

Those criteria include “the nature and circumstances of the offense to determine whether clemency or parole would depreciate the seriousness of the offense or promote disrespect for the law,”⁸² “the individual’s civilian history and the quality of [his] prior military service,”⁸³ “the conduct and disciplinary records of the prisoner’s confinement to determine whether the prisoner has achieved the degree of rehabilitation necessary to warrant clemency or parole,”⁸⁴ certain “personal characteristics of the prisoner,”⁸⁵ “the prisoner’s parole plan” if parole is being considered,⁸⁶ and

“the views of any victim of the prisoner’s offense.”⁸⁷ Each factor except the last one contains multiple subfactors that are reproduced in Appendix D.

2. Parole-specific Considerations: Salient Factors

In addition to the above-listed criteria, AR 15-130 requires the ACPB to “use a salient factor score and evaluation guidelines when considering prisoners for parole suitability.”⁸⁸ These guidelines “provide a customary range of time to be served in confinement before release on parole,” but they are advisory only and do not bind the ACPB.⁸⁹ The guidelines are based upon the offender’s salient factor score and the severity of his offense. The ACPB uses a chart promulgated by the U.S. Parole Commission (USPC) to determine these guidelines for time served.

The salient factor score assigns point values to certain aspects of a prisoner’s criminal history and is “[a] system designed to aid in determining parole prognosis [and] potential risk of parole violation.”⁹⁰ Salient factors include (1) the prisoner’s prior convictions and nonjudicial punishments, if any; (2) any prior commitments to confinement of thirty days or more; (3) the prisoner’s age at the time of the current offense; (4) whether the prisoner has been committed to confinement for thirty days or more in the past three years; (5) whether the prisoner was in a particular status, such as being under a suspended sentence, in confinement, or under a parole violator, escape, or unauthorized absentee status when he committed the current offense; and (6) whether the prisoner has a history of dependence on or significant abuse of drugs or alcohol.⁹¹ The prisoner is scored on each factor, and the scores for all six factors are combined to form the salient factor score.⁹² A more developed list of the factors and how to score them is at

⁷⁵ *Id.* encl. 2, para. 17.c.(2).

⁷⁶ *Id.* encl. 2, para. 17.c.(3).

⁷⁷ *Sentencing Guidelines: Hearing before the Comp. Sys. Subcomm. of the Response Sys. to Adult Sexual Assault Crimes Panel, United States Dep’t of Def.*, 115 (2014) (testimony of Mr. Steven Andraschko, Chairman, U.S. Army Clemency and Parole Board) [hereinafter Andraschko Testimony].

⁷⁸ Although Private (PVT) Chelsea (formerly Bradley) Manning received clemency before her direct appeals were complete, that clemency was granted by President Obama rather than the Army, an agency thereof, or the convening authority. Charlie Savage, *Chelsea Manning to Be Released Early as Obama Commutes Sentence*, N.Y. TIMES (Jan. 17, 2017), https://www.nytimes.com/2017/01/17/us/politics/obama-commutes-bulk-of-chelsea-mannings-sentence.html?_r=0. President Obama’s grant of clemency was pursuant to the President’s constitutional power “to grant Reprieves and Pardons for Offences against the United States.” U.S. CONST. art. II, § 2, cl. 1. While presidential clemency is an additional source of potential sentence relief, it is outside the scope of this article.

⁷⁹ AR 15-130, *supra* note 50, para. 3-2a.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* para. 3-2a(1).

⁸³ *Id.* para. 3-2a(2).

⁸⁴ *Id.* para. 3-2a(3).

⁸⁵ *Id.* para. 3-2a(4).

⁸⁶ *Id.* para. 3-2a(5). Again, the requirements of the parole plan referenced in AR 15-130, paragraph 3-2a(5) mirror those of the supervision plan referenced in DoDI 1325.07, *supra* note 23, encl. 2, app. 2.

⁸⁷ AR 15-130, *supra* note 50, para. 3-2a(6).

⁸⁸ *Id.* para. 3-2a.

⁸⁹ *Id.* para. 3-2.

⁹⁰ *Id.* glossary (definition of “salient factors”).

⁹¹ E-mail from Gerald Patterson, Operations Officer, Army Clemency & Parole Bd., to Mary McCord, Legal Advisor, Army Rev. Bd. Agency (Feb. 8, 2017, 07:19 EST) (on file with author) [hereinafter Patterson E-mail 2]. Note that AR 15-130 requires the ACPB to consider a prisoner’s salient factor score and parole guidelines, AR 15-130, *supra* note 50, para. 3-2a, but does not expressly identify those factors. Also note that the salient factors the ACPB uses are, with slight modifications, the same as those used by the U.S. Parole Commission. USPC MANUAL, *supra* note 63, § 2.20.

⁹² Patterson E-mail 2, *supra* note 91.

After the prisoner's salient factor score is determined, the severity level of his offense must be determined. Like the USPC,⁹³ the ACPB places offenses into one of eight severity categories, with severity level 1 being the least severe offenses and severity level 8 being the most severe.⁹⁴ Neglectful dereliction of duty, for example, is a severity level 1 offense, while all forms of murder are severity level 8 offenses.⁹⁵

Once the salient factor score and offense severity level are determined, the ACPB uses a guidelines chart to determine how much time a prisoner should serve before he is considered a good candidate for parole.⁹⁶ The ACPB uses the same guidelines chart as the USPC.⁹⁷ A copy of the USPC's parole guidelines chart is contained at Appendix F. As the chart shows, clients with lower salient factor scores or convicted of more severe offenses must serve longer before being considered good candidates for parole.⁹⁸

Recall that your hypothetical client has no prior convictions or nonjudicial punishments, was thirty years old at the time of the offense, and has no history of drug or alcohol abuse or dependence. Because he has no other convictions and no nonjudicial punishments, he would receive the highest possible score of 3 for the first factor. He has no prior commitments, so he would receive the highest possible scores of 2 for the second factor, 1 for the fourth factor, and 1 for the fifth factor. Because he is older than 26, he would receive the highest possible score of 2 for the third factor. Finally, because your client has no history of drug or alcohol abuse or dependence, he would receive the highest possible score of 1 for the sixth factor. The client's total salient factor score would be 10, which is the highest possible score.

Your client was convicted of unpremeditated murder, which has a severity level of 8.⁹⁹ According to the guidelines chart, a prisoners with a salient factor score of 10 and an offense severity level of 8 should serve at least one hundred months, or eight years and four months, before being a good candidate for parole.¹⁰⁰ Therefore, your client would meet the eligibility requirement for parole with respect to time served, and that time served would also meet the minimum guideline

for time to be served.

C. Practical Considerations Regarding Parole

It may be tempting to rely solely on the salient factor score and parole guidelines in assessing a client's chances for parole. Resist that temptation. Given military entrance standards, few servicemembers will have prior convictions and commitments to confinement, so most servicemembers should have high salient factor scores. Typically, though, fewer than fifteen percent of eligible prisoners are granted parole.¹⁰¹ Therefore, defense counsel should advise clients that while parole is more than a remote possibility, it is also not likely to be granted given recent trends. Remember that the guidelines do not bind the ACPB—they are merely advisory and are considered in conjunction with the factors expressly stated in AR 15-130.¹⁰²

Because the guidelines are not binding, the ACPB is free to give them as much or as little weight as it wants.¹⁰³ Some board members may find the guidelines compelling.¹⁰⁴ However, other board members may grant more weight to other considerations, including a prisoner's acceptance of responsibility.¹⁰⁵ A prisoner who demonstrates rehabilitation by showing true remorse and accepting genuine responsibility for his crimes is more likely to receive parole than one who does not.¹⁰⁶ Therefore, defense counsel should advise clients that if they desire parole, they need to be prepared to accept complete responsibility for their offenses. Blaming the victim, the defense counsel, any co-accuseds, or the system in general is not advisable.¹⁰⁷ Colloquially speaking, the client needs to be ready to throw himself on the proverbial sword.

Defense counsel should also advise their clients that the parole guidelines may suggest a sentence longer than the actual term of confinement. For example, assume a prisoner was convicted of rape, a category seven offense,¹⁰⁸ sentenced to three years' confinement, and has a salient factor score of 10. Under the parole guidelines, such a prisoner should serve between fifty-two and eighty months – well over your client's maximum term of three years – before he is released on parole.¹⁰⁹ In such cases, mandatory supervised release is likely your client's only reasonable opportunity at sentence

⁹³ USPC MANUAL, *supra* note 63, § 2.20; Patterson E-mail 2, *supra* note 91.

⁹⁴ DoDI 1325.07, *supra* note 23, encl. 2, app. 1.

⁹⁵ *Id.*

⁹⁶ USPC MANUAL, *supra* note 63, § 2.20.

⁹⁷ E-mail from Gerald Patterson, Operations Officer, Army Clemency & Parole Bd., to author (Mar. 1, 2017, 15:35 EST) (on file with author) [hereinafter Patterson E-mail 3]; USPC MANUAL, *supra* note 63, § 2.20.

⁹⁸ USPC MANUAL, *supra* note 63, § 2.20.

⁹⁹ DoDI 1325.07, *supra* note 23, encl. 2, app. 1.

¹⁰⁰ USPC MANUAL, *supra* note 63, § 2.20.

¹⁰¹ Patterson E-mail 1, *supra* note 60.

¹⁰² AR 15-130, *supra* note 50, para. 3-2.

¹⁰³ McCord Interview, *supra* note 52.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ DoDI 1325.07, *supra* note 23, encl. 2, app. 1.

¹⁰⁹ USPC MANUAL, *supra* note 63, § 2.20.

relief.

D. Practical Considerations Regarding Clemency

Unfortunately, a prisoner's chances of receiving clemency are slim, and such relief is not likely to be meaningful with respect to confinement. The ACPB "presume[s] that court-martial panels and military judges' decisions on sentences are appropriate"¹¹⁰ and is "very reluctant to make changes to" a sentence to confinement.¹¹¹ The ACPB's reluctance is due to "the facts in each case [being] different" and the ACPB not "hav[ing] the value of everything that that military judge or that panel heard in the case."¹¹² In four of the last five fiscal years, clemency was granted in under two percent of cases.¹¹³ In the past two fiscal years, clemency was granted in less than one percent of cases.¹¹⁴

If a prisoner does receive clemency, it will not be quickly. Because the ACPB will rarely grant clemency while the appeals process is ongoing, prisoners need to be prepared to wait two years or more to be practically eligible for clemency.¹¹⁵ For clients who are sentenced to under twelve months' confinement, this means clemency from the ACPB is impossible. Most likely, prisoners receiving clemency will likely already have been released on parole. According to Mr. Andraschko:

[m]ost clemency occurs many years after [the prisoner has] served time in prison [and] has been on parole for a number of years out in the community under a U.S. Probation Officer. They're getting old. They've done a lot of time and so they get a miniscule amount of time chopped off their sentence to acknowledge their good behavior and try to keep them going that

¹¹⁰ Andraschko & Haasenritter, *supra* note 45, at 55.

¹¹¹ Andraschko Testimony, *supra* note 77, at 120.

¹¹² *Id.* at 120.

¹¹³ Patterson E-mail 1, *supra* note 60.

¹¹⁴ *Id.*

¹¹⁵ This timeline is based on speedy post-trial processing standards set forth in *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). The convening authority is supposed to take initial action on the findings and sentence no later than 120 days after the sentence is adjudged. *Id.* at 142. The record of trial is supposed to be docketed with the service Court of Criminal Appeals no later than thirty days after initial action. *Id.* The service Court of Criminal Appeals is supposed to render a decision no later than eighteen months after docketing. *Id.* Assuming these processing deadlines are met, review by the Army Court of Criminal Appeals can take up to twenty-three months from the date the sentence is adjudged. Should an accused desire to petition the United States Court of Appeals for the Armed Forces (CAAF) for a grant of review, he has up to sixty days after he is notified of or served with the Court of Criminal Appeals decision to do so. C.A.A.F. R. PRAC. & PROC. 19(a). A petition for a grant of review to the CAAF therefore can extend the appellate timeline beyond two years.

way until they finish their sentence.¹¹⁶

In short, clemency from the ACPB is unlikely to be awarded, and when it is, it will likely be granted to a prisoner who was sentenced to a lengthy term of confinement and has already been released on parole or mandatory supervised release. Therefore, defense counsel should advise clients that while clemency is technically possible, the recent trend shows that it is rarely granted. As such, clients are best served by focusing on gaining release through mandatory supervised release or parole.

VII. The Army Discharge Review Board and the Army Board for Correction of Military Records

Mandatory supervised release and parole represent a client's best opportunities for sentence relief. However, relief may also be granted by the Army Discharge Review Board (ADRB) and the Army Board for Correction of Military Records (ABCMR). However, given the slim likelihood of relief from either board, defense counsel are advised simply to advise clients that these avenues for relief exist rather than devoting precious time to substantive work in these areas.

A. The Army Discharge Review Board

The ADRB is established pursuant to 10 U.S.C §1553,¹¹⁷ and DoDD 1332.41,¹¹⁸ DoDI 1332.28,¹¹⁹ and AR 15-180¹²⁰ provide regulatory guidance. The ADRB's ability to grant relief from a court-martial sentence is limited. The ADRB is not permitted to review punitive discharges adjudged at a general court-martial,¹²¹ and nothing in the enabling statute or the applicable regulations permits the ADRB to review the findings of a court-martial or any part of a court-martial sentence aside from a bad-conduct discharge. Accordingly, the only part of a court-martial sentence that the ADRB may review is a bad-conduct discharge adjudged at a special court-

¹¹⁶ Andraschko Testimony, *supra* note 77, at 116-17.

¹¹⁷ 10 U.S.C. §1553 (2012).

¹¹⁸ U.S. DEP'T OF DEFENSE, DIR. 1332.41, BOARDS FOR CORRECTION OF MILITARY RECORDS (BCMRS) AND DISCHARGE REVIEW BOARDS (DRBs) (8 Mar. 2004) [hereinafter DoDD 1332.41].

¹¹⁹ U.S. DEP'T OF DEFENSE, INSTR. 1332.28, DISCHARGE REVIEW BOARD (DRB) PROCEDURES AND STANDARDS (4 Apr. 2004) [hereinafter DoDI 1332.28].

¹²⁰ U.S. DEP'T OF ARMY, REG. 15-180, BOARDS, COMMISSIONS, AND COMMITTEES—ARMY DISCHARGE REVIEW BOARD para. 3-2a(5)(d) (20 Mar. 1998) [hereinafter AR 15-180]. This regulation contains as an appendix an outdated version of the applicable DoDD. Therefore, counsel are advised to consult DoDD 1332.41, *supra* note 118, and DoDI 1332.28, *supra* note 119, rather than relying solely on AR 15-180.

¹²¹ 10 U.S.C. § 1553(a) (2012) (The ADRB may "review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial)."); DoDI 1332.28, *supra* note 119, encl. 2, para. E2.1.1.

martial empowered to adjudge a bad-conduct discharge.¹²² A bad-conduct discharge may be changed, but only as a matter of clemency.¹²³

Further, the ADRB may not review a case until a discharge is issued.¹²⁴ Therefore, a client must wait until his direct appellate review is complete (or, if he has waived or withdrawn appellate review, when review of his case by a judge advocate is completed) before he may apply for relief from the ADRB.¹²⁵ Applications for relief must be made within fifteen years after the discharge date.¹²⁶

B. The Army Board for Correction of Military Records

The ABCMR is established under 10 U.S.C. § 1552,¹²⁷ and DoDD 1332.41¹²⁸ and AR 15-185¹²⁹ provide further regulatory guidance. The ABCMR's ability to grant relief is broader than the ADRB's, as the ABCMR may grant relief by taking "action on the sentence of a court-martial for purposes of clemency."¹³⁰ Unlike the ADRB, the enabling legislation for the ABCMR places no restrictions on the types of sentences the board may consider, so all portions of a sentence, including a punitive discharge adjudged at a general court-martial, are eligible for review. However, relief will only be granted "when adequate evidence submitted warrants such a consideration."¹³¹ The person seeking relief must have "exhausted all administrative remedies to correct the error or alleged injustice" before applying for relief from the ABCMR¹³² and bears "the burden of proving an error or injustice by a preponderance of the evidence."¹³³ While the ABCMR requires applications for relief to be filed "within [three] years after an alleged error or injustice is discovered

or reasonably should have been discovered," the board "may excuse untimely filing in the interest of justice."¹³⁴

C. Practical Considerations Regarding the ADRB and ABCMR

First, a defense counsel should simply advise the client that these avenues exist but that the likelihood of relief is rare. Although the U.S. Army Trial Defense Service Standard Operating Procedure permits (but does not require) defense counsel to "assist former clients in applications to the [ADRB] and [ABCMR],"¹³⁵ the odds of defense counsel providing such assistance are slim at best, given the other demands on their time.¹³⁶ Efforts are better spent educating the client about mandatory supervised release and parole and assisting the client with preparing a supervision plan, as those avenues provide likelier odds for relief.

Second, the likelihood of relief from the ADRB or ABCMR is small. After all, a client seeking relief from either board will have gone through the court-martial process, including putting on a (hopefully) robust sentencing case, and have completed direct appellate review,¹³⁷ including review of sentence appropriateness by the Court of Criminal Appeals under Article 66(c).¹³⁸ Therefore, any matters in extenuation and mitigation will have been considered by multiple parties with respect to the sentence before the ADRB or ABCMR hears the case. If, in light of such evidence, the court-martial adjudges a particular sentence and the Court of Criminal Appeals affirms it under Article 66(c), it is unlikely that the ADRB or ABCMR will grant sentence relief based on the

¹²² MCM, *supra* note 13, R.C.M. 201(f)(2)(B)(i) (a special court-martial lacks jurisdiction to impose a dismissal or dishonorable discharge).

¹²³ 10 U.S.C. § 1553(a).

¹²⁴ DoDI 1332.28, *supra* note 119, encl. 2, para. E2.1.4 ("Discharge" is "[t]he complete severance from all military status gained by the enlistment or induction concerned, including the assignment of a reason for such discharge and characterization of service."). Generally speaking, a punitive discharge may not be executed (and therefore is not final) until direct appellate review is complete. 10 U.S.C. § 871(c)(1) (2012).

¹²⁵ 10 U.S.C. § 871(c).

¹²⁶ 10 U.S.C. § 1553(a).

¹²⁷ 10 U.S.C. § 1552 (2012).

¹²⁸ DoDD 1332.41, *supra* note 118.

¹²⁹ U.S. DEP'T OF ARMY, REG. 15-185, BOARDS, COMMISSIONS, AND COMMITTEES—ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (31 Mar. 2006) [hereinafter AR 15-185].

¹³⁰ 10 U.S.C. § 1552(f)(2) (2012). Although the statute references a board of military corrections "setting aside a conviction by court-martial," 10 U.S.C. § 1552(c)(4) (2012), the board's ability to set aside a finding only extends to "correction of a record to reflect actions taken by reviewing authorities under [the UCMJ]." 10 U.S.C. § 1552(f)(1) (2012). Such reviewing authorities include the U.S. Court of Appeals for the Armed Forces acting under Article 65 and Rule for Courts-Martial (RCM) 1204; the U.S. Army Court of Criminal Appeals acting under Article 66 and RCM

1203; the Office of the Judge Advocate General acting under RCM 1201(b), and a judge advocate acting under RCM 1112(a)(2). UCMJ art. 65, 66 (2012); MCM, *supra* note 9, R.C.M. 1112(a)(2), 1201(b), 1203, 1204.

¹³¹ U.S. ARMY REV. BDS. AGENCY, APPLICANT'S GUIDE TO APPLYING TO THE ARMY BOARD FOR CORRECTION OF MILITARY RECORDS para. 5.c (3 Dec. 2014) [hereinafter ABCMR Guide].

¹³² AR 15-185, *supra* note 129, para. 2-5.

¹³³ *Id.* para. 2-9.

¹³⁴ *Id.* para. 2-9.

¹³⁵ U.S. ARMY TRIAL DEFENSE SERVICE, STANDARD OPERATING PROCEDURES para. 1-5D.1.c (5 Aug. 2013) [hereinafter TDS SOP].

¹³⁶ *Id.* para. 1-5D.1.A-B (prescribing priorities of duties for defense counsel).

¹³⁷ Again, completion of direct appellate review is required before a punitive discharge may be issued, UCMJ art. 71(c) (2012), and issuance of a discharge is a prerequisite to review by the ADRB. DoDI 1332.28, *supra* note 119, encl. 3, para. E2.1.4. While nothing in the applicable statute, DoDD, or regulation prevents a client from petitioning the ABCMR for relief before completion of direct appeals, review by the ABCMR before completion of such appeals would almost always be premature since appellate relief can consist of the findings, sentence, or both being set aside.

¹³⁸ UCMJ art. 66(c) (2014).

same evidence.¹³⁹

VIII. Conclusion

Although the means of sentence relief discussed here are not available until after trial, defense counsel can assist their clients with obtaining such relief by providing thorough advice and assistance about these means. With respect to mandatory supervised release and parole, defense counsel can advise clients on the likelihood of relief and assist them in preparing supervision plans before confinement. While relief through clemency from the ACPB, ADRB, or ABCMR is much less likely, clients have everything to gain and nothing to lose by seeking relief through them. Therefore, defense counsel should advise clients of those avenues for sentence relief during the course of representation.

Although convening authorities no longer possess unfettered clemency power, hope is not lost for sentence relief. In light of the restrictions on the convening authority's clemency power with respect to punitive discharges and especially confinement, defense counsel need to be aware of and advise their clients of alternative avenues for sentence relief. With the proper advice and preparation, clients can be well-prepared to take advantage of these avenues and hopefully obtain sentence relief in spite of the recent amendments to Article 60(c).

¹³⁹ McCord Interview, *supra* note 52.

Appendix A. Comparison of Grants of Mandatory Supervised Release, Parole, and Clemency by the Army Clemency and Parole Board, Fiscal Years 2012-2016*

Fiscal Year 2012

	Cases granted/considered	Percentage of cases granted
Mandatory Supervised Release	27/59	45.76%
Parole	20/156	12.82%
Clemency	13/657	1.98%

Fiscal Year 2013

	Cases granted/considered	Percentage of cases granted
Mandatory Supervised Release	41/51	80.39%
Parole	27/163	16.56%
Clemency	15/671	2.24%

Fiscal Year 2014

	Cases granted/considered	Percentage of cases granted
Mandatory Supervised Release	52/68	76.47%
Parole	20/171	11.70%
Clemency	8/645	1.24%

Fiscal Year 2015

	Cases granted/considered	Percentage of cases granted
Mandatory Supervised Release	59/82	71.95%
Parole	22/176	12.50%
Clemency	4/593	0.67%

Fiscal Year 2016

	Cases granted/considered	Percentage of cases granted
Mandatory Supervised Release	58/79	73.42%
Parole	23/242	9.50%
Clemency	4/746	0.54%

* E-mail from Gerald Patterson, Operations Officer, Army Clemency & Parole Bd., to Mary McCord, Legal Advisor, Army Rev. Bds. Agency (Jan. 31, 2017, 15:17 EST) (on file with author).

Appendix B. Timeline of Eligibility for Mandatory Supervised Release, Parole, and Clemency

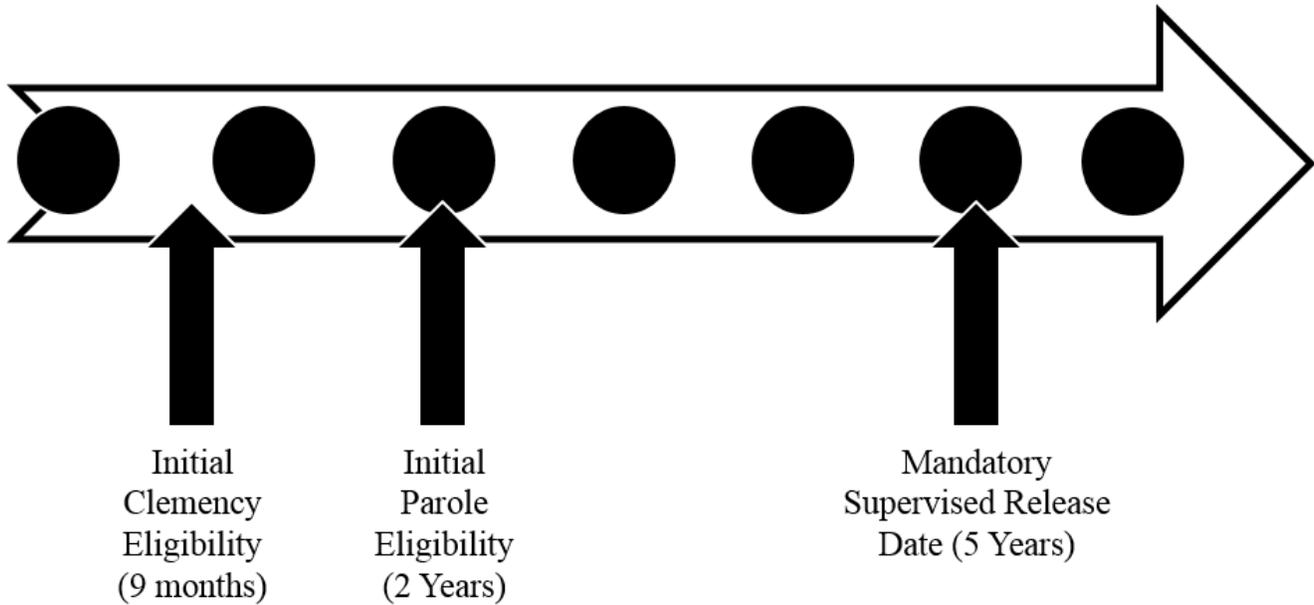
The following charts show the different points at which a prisoner becomes eligible for parole, clemency, and mandatory supervised release. The mandatory supervised release calculation only assumes good conduct time since that is the only abatement that is taken into account at the start of a prisoner's sentence.*

A prisoner who received earned time or special acts abatements would be eligible for mandatory supervised release at dates earlier than those indicated in the following charts. The charts depict eligibility points for sentences to confinement of six, twelve, and forty years respectively.

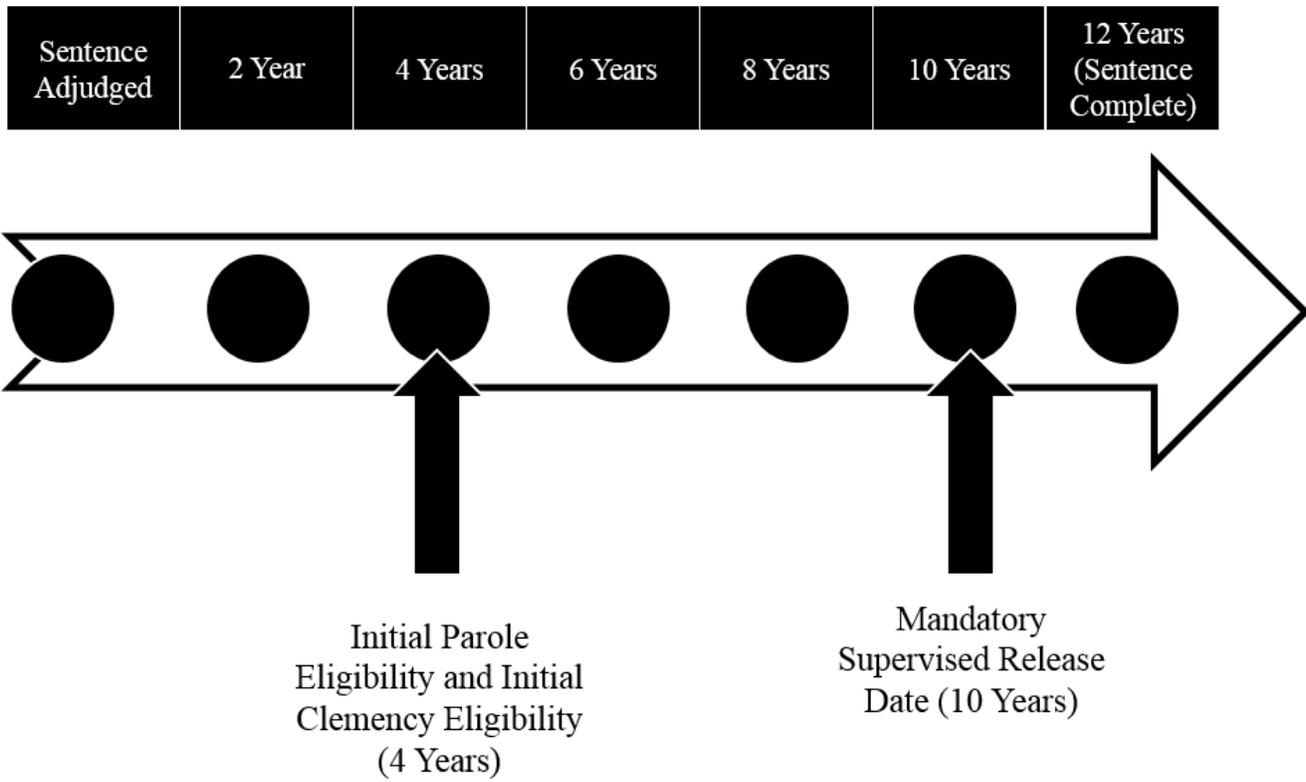
* U.S. DEP'T OF DEF., INSTR. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY encl. 2, app. 3, para. 18.j (11 Mar. 2013) (“[t]he Military Services may elect to calculate an anticipated release date at the beginning of a prisoner's sentence to confinement based on the [good conduct time] that could be earned for the entire period of the sentence or sentences.”).

Parole, Clemency, and Mandatory Supervised Release Eligibility Dates – Six-Year Sentence

Sentence Adjudged	1 Year	2 Years	3 Years	4 Years	5 Years	6 Years (Sentence Complete)
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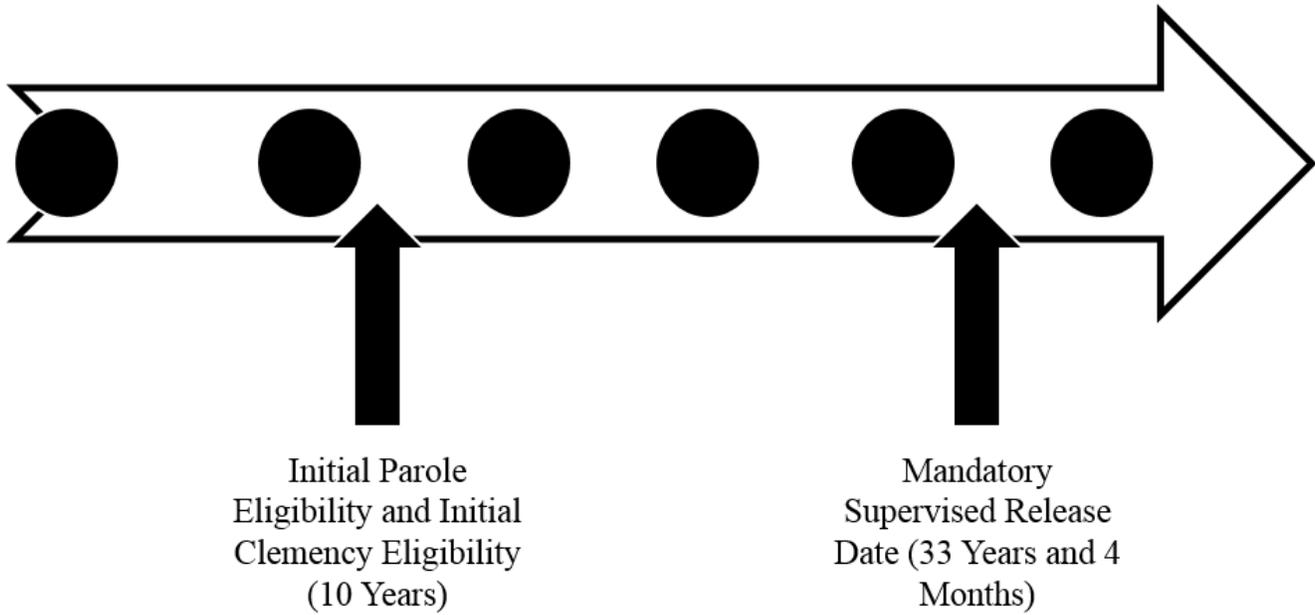


Parole, Clemency, and Mandatory Supervised Release Eligibility Dates – Twelve-Year Sentence



Parole, Clemency, and Mandatory Supervised Release Eligibility Dates – Forty-Year Sentence

Sentence Adjudged	8 Years	16 Years	24 Years	32 Years	40 Years (Sentence Complete)
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Appendix C. Rates of Earning Good Conduct Time for Portions of a Month.*

NUMBER OF DAYS	GOOD CONDUCT TIME	NUMBER OF DAYS	GOOD CONDUCT TIME
1	0	16	2
2	0	17	2
3	0	18	3
4	0	19	3
5	0	20	3
6	1	21	3
7	1	22	3
8	1	23	3
9	1	24	4
10	1	25	4
11	1	26	4
12	2	27	4
13	2	28	4
14	2	29	4
15	2	30	5

* U.S. DEP'T OF DEFENSE, INSTR. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY encl. 2, app. 3, para. 2.b.(2) (11 Mar. 2013).

Appendix D. Further Description of Clemency and Parole Factors Contained in Army Regulation 15-

130.*

(1) The ACPB may consider the nature and circumstances of the offense to determine whether clemency or parole would depreciate the seriousness of the offense or promote disrespect for the law. In that regard, the ACPB may consider any of the following:

- (a) The effect its decision may have on the deterrence of the offender and others from committing other or similar crimes.
- (b) The protection and welfare of society.
- (c) The need for good order and discipline within the Army.
- (d) The rehabilitation of the offender.
- € The extent and nature of any violence or the potential for violence associated with the offense.
- (f) If a weapon was involved, the type of weapon and how it was used.
- (g) The physical, financial, social, psychological, and emotional harm done to or loss suffered by any victim of the offense.
- (h) The motive of the offender.
- (i) Whether the offender received any gain from the offense.
- (j) The extent of the offender's participation in the offense.
- (k) The criminal or administrative disposition of any co-accused and the degree of that co-accused's complicity in the offense.
- (l) Whether the offender committed other or similar offenses.

(2) The ACPB may consider the individual's civilian history and the quality of the prisoner's prior military service when considering a case for clemency or parole. The ACPB may give whatever weight it deems appropriate to any of the following:

- (a) Prior honorable discharges.
- (b) Combat service.
- (c) Awards and decorations.
- (d) Favorable personnel actions.

€ Prior criminal activity or evidence of misconduct. In determining the probative value of prior criminal activity or evidence of misconduct, the ACPB may consider the nature and circumstances of the prior act and the lapse of time between the act and the current offense.

(3) The ACPB may review the conduct and disciplinary records of the prisoner's confinement to determine whether the prisoner has achieved the degree of rehabilitation necessary to warrant clemency or parole. Prisoners are expected to comply with all institutional rules and to participate meaningfully in available correctional treatment programs. Relevant to this review are the following:

* U.S. DEP'T OF ARMY, REG. 15-130, BOARDS, COMMISSIONS, AND COMMITTEES—ARMY CLEMENCY AND PAROLE BOARD para. 3-2a (23 Oct. 1998)

- (a) Comments by institution counselors.
 - (b) Reports of institution boards.
 - (c) Evaluations by institution cadre.
 - (d) Evidence of enrollment in or completion of available education, vocational, and correctional treatment programs.
- (4) The ACPB may consider any of the following personal characteristics of the prisoner:
- (a) The prisoner's age, education, experience, psychological profile, medical condition, and marital and family status.
 - (b) The prisoner's need for specialized treatment.
 - (c) Whether the prisoner has recognized the wrongfulness of his or her confining offense, shown genuine remorse, achieved a sense of purpose, demonstrated a desire for self-improvement, or exhibited self-discipline.
- (5) The ACPB will consider the prisoner's parole plan before granting parole. Prisoners eligible for parole must agree to abide by the parole plan before their parole release. A parole plan should be tailored to motivate the prisoner for continued socialization. The parole plan will include, at a minimum, the following:
- (a) A residence requirement stating where and with whom a parolee will live.
 - (b) Except in the case of a medically disabled prisoner, a requirement that the prisoner have an offer of guaranteed employment, an offer of effective assistance to obtain employment, or acceptance in a bona fide educational or vocational program.
 - (c) A signed agreement by the prisoner that the prisoner will abide by the parole plan and the conditions of parole.
 - (d) Any conditions of parole deemed reasonable and appropriate. These may include a requirement to begin or continue treatment for alcohol or drug abuse, the payment of restitution, or the payment of a fine ordered executed as part of the prisoner's court-martial sentence.
- (6) The ACPB may obtain the views of any victim of the prisoner's offense. The victim, the victim's family members[,] or the victim's representatives may submit matters in writing or by audio tape or video tape or by a combination of all methods for consideration by the ACPB.

Appendix E. List of Salient Factors (Parole Consideration Only).*

Item A: Prior convictions or adjudications (civilian, adult and juvenile; and military courts-martial and nonjudicial punishment).

- None = 3 points
- One = 2 points
- Two or three = 1 point
- Four or more = 0 points.

Item B: Prior commitment(s) of thirty days or more (civilian or military).

- None = 2 points
- One or two = 1 point
- Three or more = 0 points.

Item C: Age at commencement of current offense.

- 26 years of age or more = 2 points
- 20-25 years of age = 1 point
- 19 years of age or less = 0 points

Item D: Recent commitment-free period (three years).

- No prior commitment of thirty days or more (civilian or military) or released from last such commitment at least three years prior to the commencement of the current offense = 1 point
- Otherwise = 0 points

Item E: Confinement/escape/suspended sentence/parole violator or unauthorized absentee status

- Neither on suspended sentence, confinement, escape, parole violator or unauthorized absentee status at the time of the current offense; nor committed as a suspended sentence, confinement, or escaped status violator this time = 1 point
- Otherwise = 0 points

Item F: Alcohol/drug dependence/significant abuse

- No history of alcohol/drug dependence or significant abuse = 1 point
- Otherwise = 0 points

* E-mail from Gerald Patterson, Operations Officer, Army Clemency & Parole Bd., to Mary McCord, Legal Advisor, Army Rev. Bds. Agency (Jan. 31, 2017, 15:17 EST) (on file with author).

Appendix F. Salient Factor Guidelines Chart*

GUIDELINES FOR DECISION-MAKING [Guidelines for Decision-Making, Customary Total Time to be Served before Release (including jail time)]				
OFFENSE CHARACTERISTICS:	OFFENDER CHARACTERISTICS: Parole Prognosis (Salient Factor Score 1998)			
Severity of Offense Behavior	Very Good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
Category One	≤4 months	Guideline Range ≤8 months	8-12 months	12-16 months
Category Two	≤6 months	Guideline Range ≤10 months	12-16 months	16-22 months
Category Three	≤10 months	Guideline Range 12-16 months	18-24 months	24-32 months
Category Four	12-18 months	Guideline Range 20-26 months	26-34 months	34-44 months
Category Five	24-36 months	Guideline Range 36-48 months	48-60 months	60-72 months
Category Six	40-52 months	Guideline Range 52-64 months	64-78 months	78-100 months
Category Seven	52-80 months	Guideline Range 64-92 months	78-110 months	100-148 months
Category Eight*	100+ months	Guideline Range 120+ months	150+ months	180+ months

*Note: For Category Eight, no upper limits are specified due to the extreme variability of the cases within this category. For decisions exceeding the lower limit of the applicable guideline category by more than 48 months, the Commission will specify the pertinent case factors upon which it relied

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* U.S. PAROLE COMM'N, RULES AND PROCEDURES MANUAL 36 (June 30, 2010).

Intergovernmental Support Agreements: A Primer for the Field

Major Erik J. Zoll*

I. Introduction

The Airborne and Special Operations Museum, located in downtown Fayetteville, North Carolina, was set to become a casualty of a reduction in military funding.¹ Fort Bragg faced a difficult situation when they could no longer afford the custodial service contract for the museum due to a budget reduction in 2013.² Daily custodial services are required by the state in order to maintain the museum's regularly scheduled hours of operation.³ This left Fort Bragg with the prospect of closing the museum several days a week, despite the importance to the City of Fayetteville of maintaining the museum's current daily schedule, due to an investment in advertising money aimed at attracting more tourism to the downtown area.⁴

As luck would have it, that same year the Fiscal Year (FY) 2013 National Defense Authorization Act (NDAA) authorized Army commands to partner with local governments in order to receive installation support services through intergovernmental support agreements, or IGSA's.⁵ Using the new authorization, Fort Bragg and the City of Fayetteville came to an agreement.⁶ The city would provide the required custodial services and the museum would maintain their normal operations schedule.⁷ This arrangement saved the Army fifty thousand dollars annually as compared to the previous contract and kept the tourists

flocking to downtown Fayetteville.⁸

Most installations are dealing with the same budgetary shortfalls when funding facility maintenance or installation services.⁹ This is a result of the Budget Control Act's¹⁰ cuts to Department of Defense (DoD) funding levels.¹¹ The DoD plan for achieving the Budget Control Act operations and maintenance (O&M) savings through FY 2019 is to cut four percent from the installation services and fourteen percent of the facilities budget.¹² In 2015, the Army already faced a \$3 billion dollar maintenance and infrastructure backlog due to funding constraints.¹³ In the future, the Army will continue to take risks on installation sustainment due to existing combatant command requirements around the globe.¹⁴

Commands must search for ways to save money to deal with the funding shortfalls. The IGSA is a new method to help ease the burden and reduce the costs for installation support services. Intergovernmental support agreements authorize the DoD to partner with State or local governments in providing installation support services without regard for any other federal contracting law.¹⁵ This allows commands to save time and money procuring support services. Installations already involved in public-to-public agreements have saved millions.¹⁶ Presidio of Monterey (POM), for example, receives nearly all installation support services from

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¹ The Airborne & Special Operations Museum is a part of the U.S. Army Museum System and is Army owned and operated. AIRBORNE & SPECIAL OPERATIONS MUSEUM FOUND., <http://www.asomf.org/museum-information/about-the-organization/> (last visited Dec. 9, 2016).

² Mr. Doug Earle, Public-Public Partnership: Fort Bragg and City of Fayetteville Custodial Support for Airborne Special Operations Museum Fort Bragg, N.C., at slide 2 (Dec. 12, 2013) (unpublished PowerPoint presentation) (on file with author) [hereinafter Fort Bragg CBA].

³ *Id.* at 3.

⁴ *Id.*

⁵ National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, § 331, 125 Stat. 1632, 1696 (2013).

⁶ Fort Bragg CBA, *supra* note 2, at 2, 4.

⁷ *Id.*

⁸ Contract between Fort Bragg and City of Fayetteville for Custodial Services (Apr. 24, 2014) (on file with author).

⁹ See Karen Jowers, *Base Facilities Deteriorating Under Budget Squeeze*, MILITARYTIMES (Mar. 18, 2015), <http://www.militarytimes.com/story/military/capitol-hill/2015/03/18/budget-constraints-affecting-base-facilities/24966655/>.

¹⁰ See Budget Control Act, 2 U.S.C. § 901 (2012).

¹¹ AMY BELASCO, CONG. RESEARCH SERV., R44039, DEFENSE SPENDING AND THE BUDGET CONTROL ACT LIMITS 1-2 (2015); OFFICE OF THE UNDER SEC'Y OF DEF., DEFENSE BUDGET OVERVIEW: UNITED STATES DEPARTMENT OF DEFENSE FISCAL YEAR 2017 BUDGET REQUEST 1-1 (2016) [hereinafter *FY17 Budget Request*].

¹² *Id.* at 44-45.

¹³ See Jared Serbu, *2016 Budget Aims to 'Arrest' Deterioration in Military Facilities*, FED. NEWS RADIO (Mar. 4, 2015), <http://federalnewsradio.com/sequestration/2015/03/2016-budget-aims-to-arrest-deterioration-in-military-facilities/>.

¹⁴ *FY17 Budget Request*, *supra* note 11, at 3-4. The Navy and Marines noted taking similar risks in installation funding. *Id.* at 3-6, 3-9.

¹⁵ 10 U.S.C. § 2679(a)(1) (2014).

¹⁶ BETH E. LACHMAN ET AL., RAND CORP., MILITARY INSTALLATION PUBLIC-TO-PUBLIC AGREEMENTS: LESSONS FROM PAST AND CURRENT EXPERIENCES 162, 165 (2016).

the surrounding municipalities and saves over \$2 million annually.¹⁷

This paper will analyze the IGSA statute and detail the Army guidance and procedures for approval. Part II of the primer will look at the history of public-to-public partnerships and how these partnerships led to the development of the IGSA statute. Part III will examine the IGSA statute as amended in the FY 2015 NDAA. Part IV will look at Executive Order (EXORD) 200-16 issued by the Army in response to the FY 2015 amendments and details the Army procedure for an IGSA's approval. Judge advocates are heavily involved in the formation of an IGSA at the command level and this primer will assist those attorneys, with or without contract and fiscal law experience, in understanding the IGSA guidelines and the Army's requirements for approval.

II. The Road to Intergovernmental Support Agreements

Even though the law was introduced in the FY 2013 NDAA, the road to IGSA's began over twenty years ago. A pilot program in the FY 1995 NDAA authorizing DoD installations in Monterey, California to purchase municipal services from local government agencies lays the foundation for the current statute.¹⁸ Due to the success in Monterey, the Army launched a second pilot program at two more installations that again proved successful.¹⁹ As a result, the FY 2013 NDAA granted all DoD commands the authorization to procure support services from local governments.²⁰ Reviewing the history of IGSA's provides examples of successful partnerships along with the advantages and limitations.

A. Presidio of Monterey

The public partnership between POM and the City of Monterey (Monterey) started with an elevator maintenance contract.²¹ From that initial contract, the affiliation grew to what is now considered the *gold standard* for public-to-public partnerships.²² For almost twenty years POM procured a majority of its installation support services from Monterey, which provided millions of dollars in cost savings to the federal government.²³

The partnership began in the early 1990's during the base closure and realignment process.²⁴ With the potential closure of POM, Monterey met with the Base Realignment Commission (BRAC) and proposed a "Community Installation Partnership."²⁵ The proposed partnership would decrease installation costs and keep POM out of the base realignment process.²⁶ The commission supported the proposal and legislation passed authorizing the suggested partnership.²⁷

The FY 1995 NDAA codified the partnership and authorized POM to receive municipal services from government agencies in the county of Monterey.²⁸ Early projects under this authority included operation and maintenance of parks, a nature reserve, and a child development center.²⁹ Monterey also continued to provide fire protection services to POM as it has since 1954.³⁰ In 1998, POM signed the first contract to procure municipal services that included facility maintenance, stormwater system maintenance, and various capital improvement projects.³¹

An Army Audit Agency review conducted in 2000 revealed that from 1998 to 2000 POM realized an estimated

¹⁷ *Id.*

¹⁸ National Defense Authorization Act for Fiscal Year 1995, Pub. L. 103-337, § 816, 108 Stat. 2663, 158 (1994).

¹⁹ National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, § 325, 118 Stat. 1811, 1847 (2004); *see* Sec'y of Army, Implementation Report to Congress on the Pilot Program for Purchase of Certain Municipal Services for Army Installations (undated) (on file with author) [hereinafter Report to Congress].

²⁰ *See* National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, § 331, 125 Stat. 1632, 1696 (2013); *see also* 10 U.S.C. § 2336 (2013).

²¹ *See* Catherine Caruso, *Texas Airmen Admire Monterey Model*, U.S. ARMY (Feb. 26, 2016) https://www.army.mil/article/163124/texas_airmen_admire_monterey_model.

²² Ivan Bolden & Donna Wilhoit, Office of the Assistant Chief of Staff for Installation Mgmt., Intergovernmental Support Agreements, at slide 2 (undated) (unpublished PowerPoint presentation) (on file with author).

²³ LACHMAN, *supra* note 16, at 161-62. Fort Ord previously provided municipal service to Presidio of Monterey (POM) until the installation closed in 1994 due to Base Realignment and Commission (BRAC). *Id.* From 1994 to 1997, POM received municipal services from the Navy Post Graduate School through an interservice support agreement. *Id.*

²⁴ *Id.* at 162.

²⁵ *Id.* The initial "Community Installation Partnership" proposal was for the Naval Post Graduate School to close its fire station and contract for fire protection services with the City of Monterey. *Id.* At the time, the Navy was spending \$1.7 million for its two fire stations and has since reduced the cost to \$900,000 annually, however no contract was ever agreed upon. *Id.* Presidio of Monterey currently receives fire protection services from the City of Monterey for \$340,000 annually. *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ National Defense Authorization Act for Fiscal Year 1995, Pub. L. 103-337, § 816, 108 Stat. 2663, 158 (1994). The statute authorizes POM to purchase fire-fighting, security-guard, police, public works, utility, or other municipal service from government agencies within the County of Monterey. *Id.*

²⁹ LACHMEN, *supra* note 16, at 162.

³⁰ *Id.* at 165.

³¹ *Id.* at 162-63. POM signed the contract with the Presidio Municipal Services Agency (PMSA), a nonprofit organization established by the cities of Monterey and Seaside. *Id.* at 162. The PMSA had no employees and used resources from the cities to coordinate and manage the contracts with POM. *Id.* at 163.

savings of forty-one percent, almost \$2.5 million, on the operating costs of municipal services by contracting with the Presidio Municipal Services Agency.³² As a result, the FY 2004 NDAA provided permanent authorization for DoD assets in Monterey County, California to purchase municipal services necessary for installation operation.³³ A second audit conducted in 2010 by the Department of Public Works estimated POM saved twenty-two percent on municipal services as compared to previous federal and commercial contracts.³⁴ The estimate did not include the hundreds of thousands of dollars in capital improvements and cost savings POM received by Monterey upgrading and maintaining parks, the nature preserve, and the child care facility on the installation.³⁵

B. Additional Installation Pilot Programs

After the success in Monterey, the Army initiated a second pilot program. The FY 2005 NDAA authorized the Secretary of the Army to choose two installations to procure specific municipal services from their respective local governments.³⁶ The two installations chosen for this pilot program were Fort Gordon, Georgia, and Fort Huachuca, Arizona.³⁷

Fort Gordon used the authorization to contract with the City of Augusta for water and wastewater treatment services.³⁸ They utilized Augusta's excess capacity which lowered the city's cost by expanding the customer base.³⁹ In return, Fort Gordon obtained services at a lower rate than operating their existing water system.⁴⁰ Fort Gordon estimates the installation saved \$7,393,385 in capital upgrade costs along with \$47,500 in yearly commodity savings.⁴¹ In September 2007, Fort Gordon extended the partnership by

signing a fifty-year contract with Augusta valued at over \$200 million.⁴²

Fort Huachuca used the pilot program to acquire traffic signal maintenance and traffic measurement services from the City of Sierra Vista.⁴³ In addition, the installation closed the on-post library and all general library services are now provided by the city.⁴⁴ The library closure saves the installation over \$300,000 annually.⁴⁵

The FY 2005 NDAA directed the Secretary of the Army to submit a report to Congress and the Comptroller General that described the obstacles of the pilot program, evaluated the efficiencies, and made recommendations for expansion or alteration.⁴⁶ The Secretary's report detailed how the program provided cost benefits to the Army and the local governments.⁴⁷ In addition to cost savings, the partnerships produce the intangible benefit of fostering better relationships between the community and the installations.⁴⁸

However, there were some obstacles to implementing the program. The geographic location of Fort Gordon, which is ten miles west of Augusta, limited the city's ability to provide many of the services in an efficient manner.⁴⁹ Additionally, even though Sierra Vista is contiguous to Fort Huachuca, the city's population is smaller and the staff was too lean to provide services to the installation.⁵⁰ Even with these limitations the report ultimately recommended expanding the municipal services authorized for procurement and making the legislation permanent.⁵¹ Congress followed the recommendations and six short years later the FY 2013 NDAA provided for intergovernmental support agreements DoD-wide.⁵²

³² *Id.* at 165 (as compared to the interservice support agreement signed with the Navy Post Graduate School from 1994 to 1997).

³³ *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, § 343, 117 Stat. 1392, 1448 (2003).

³⁴ LACHMEN, *supra* note 16, at 165.

³⁵ *Id.* Presidio of Monterey received almost \$1.3 million in capital improvements and \$102,000 in operations and maintenance (O&M) cost avoidance. *Id.*

³⁶ *See* National Defense Authorization Act Fiscal Year 2005, Pub. L. 108-375, § 325, 118 Stat. 1811, 1448 (2004); 10 U.S.C. § 2461 note (2004) (Pilot Program for Purchase of Certain Municipal Services for Military Installations). The authorized services were refuse collection and disposal, library and recreational services, facility maintenance and repair, and utilities. *Id.*

³⁷ Report to Congress, *supra* note 19, at 2.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 3.

⁴¹ *Id.*

⁴² *See Augusta Wins Water-Sewer Contract for Fort Gordon*, AUGUSTA CHRONICLE, (Oct. 4, 2012), <http://chronicle.augusta.com/news-metro-latest-news/2012-10-04/augusta-wins-water-sewer-contract-fort-gordon>. Fort Gordon used a military utility conveyance authority to sign the 50 year contract. 10 U.S.C. § 2688 (2012). Under the authority the Secretary of Defense is authorized to contract for utility services for a term not to exceed fifty years after determining the transfer is cost effective. *Id.* § 2688(d)(2).

⁴³ Report to Congress, *supra* note 19, at 2.

⁴⁴ *Id.* at 3-4.

⁴⁵ *Id.* at 2.

⁴⁶ *See* 10 U.S.C. § 2461 note (2004) (Pilot Program for Purchase of Certain Municipal Services for Military Installations).

⁴⁷ Report to Congress, *supra* note 19, at 4-5.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See* National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, § 331, 125 Stat. 1632, 1696 (2013); 10 U.S.C. § 2336 (2013).

C. National Defense Authorization Act of 2013

The FY 2013 NDAA provided all DoD agencies with the authorization to enter into agreements with local governments to procure installation support services.⁵³ However, the law's placement in the procurement section of Title 10 left some confusion as to the appropriate contracting method.⁵⁴ The Office of the Secretary of Defense (OSD) believed the Federal Acquisition Regulation (FAR) still applied to IGSA's due to the location of the statute.⁵⁵ Because most communities do not employ personnel with FAR expertise, the requirement added time and money to the initial efforts by commands and local governments to reach agreements.⁵⁶ Local governments were forced to hire consultants in order to wind through the FAR contracting process.⁵⁷

To meet the true intent of an IGSA, the FY 2015 NDAA amended the statute. The NDAA issued clarifications to the statutory language governing a command's authority to enter into an agreement and defined an IGSA as a legal instrument.⁵⁸ Furthermore, the amendment reassigned IGSA's from the procurement chapter to the real property chapter.⁵⁹ As a result, lawmakers clarified their intent that IGSA's were no longer subjected to any other federal contracting law, such as the FAR.⁶⁰

III. Intergovernmental Support Agreements

The FY 2015 NDAA amendments leave us with the current IGSA statute. The law, now codified at 10 U.S.C. § 2679, contains five subsections that provide general guidelines for drafting an agreement. The guidelines outline seven basic principles: (1) to provide, receive, or share, installation-support services, (2) the ability to sole-source, (3) may use wage-grades normally paid by the state/local

government, (4) must enhance mission effectiveness or create efficiencies or economies of scale including reduced costs, (5) the service must be pre-existing, (6) excludes security guard or fire-fighting functions, and (7) the term cannot exceed 5 years.⁶¹ This section will discuss the IGSA principles to provide practitioners with an understanding of the law. Army judge advocates are active in the IGSA formation process and must attend partnership meetings with local governments, therefore, having a knowledge of the law is essential.⁶² Furthermore, this section will briefly discuss Office of Management and Budget (OMB) Circular A-76 and its inclusion into the language of the statute.

A. Provide, Receive, and Share Services

Military commands are authorized to provide, share, and receive installation support services from local governments.⁶³ The goal of partnering is to create efficiencies or economies of scale in order to maximize cost reduction.⁶⁴ Efficiencies are improvements to the production and performance of services while saving time, labor, and most importantly, money.⁶⁵ A good example is Fort Huachuca's receipt of library services from Sierra Vista. The installation receives the same services and saves \$300,000 annually.⁶⁶

Economies of scale, on the other hand, decrease the unit cost of a product or service as a result of a larger scale operation.⁶⁷ Partnerships to reduce cost through an economy of scale are encouraged as many of the same support services are necessary for local governments to operate on a daily basis.⁶⁸ These agreements can reduce costs for both entities as demonstrated by the Fort Gordon water services contract with the City of Augusta.⁶⁹

⁵³ National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, § 331, 125 Stat. 1632, 1696 (2013); 10 U.S.C. § 2336 (2013).

⁵⁴ LACHMEN, *supra* note 16, at 2.

⁵⁵ Telephone Interview with Mark J. Connor, Assoc. Deputy Gen. Counsel, Army Gen. Counsel (Sept. 27, 2016); Ivan Bolden & Donna Wilhoit, Intergovernmental Support Agreements, at slide 3 (undated) (unpublished PowerPoint presentation) (on file with author).

⁵⁶ LACHMEN, *supra* note 16, at xviii, 138.

⁵⁷ *Id.* at 138.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 2.

⁶¹ See 10 U.S.C. § 2679 (2014); See also Headquarters, U.S. Dep't of Army, Execute Order No. 200-16 (6 Jun 16) [hereinafter EXORD 200-16].

⁶² EXORD 200-16, *supra* note 61, para. 3.D.3., annex B, pt. 1, para. a.

⁶³ 10 U.S.C. § 2679(a)(1) (2014). The term "local government" includes a county, parish, municipality, city, town, township, local public authority, school district, special district, and any agency or instrumentality of a local government. 10 U.S.C. § 2679(e)(2) (2014). Installation support services

are defined as "those services, supplies, resources, and support typically provided by a local government for its own needs and without regard to whether such services, supplies, resources, and support are provided to its residents generally, except that the term does not include security guard or fire-fighting functions." 10 U.S.C. § 2679(e)(1) (2014). The Department of Defense (DoD) prohibition on contracting for the performance of firefighting or security-guard function has been in place since 1986. 10 U.S.C. § 2465 (2012). There are exceptions for contracts in performance before September 24, 1983. *Id.* § 2465(b)(1)-(b)(4). This exception allowed POM to continue receipt of firefighting services from the City of Monterey. LACHMEN, *supra* note 16, at 163 n.7.

⁶⁴ 10 U.S.C. § 2679(a)(1) (2014).

⁶⁵ *Efficiency*, BUS. DICTIONARY, <http://www.businessdictionary.com/definition/efficiency.html> (last visited Jan. 3, 2016).

⁶⁶ Report to Congress, *supra* note 19, at 3-4.

⁶⁷ *Economy of Scale*, THE FREE DICTIONARY, <http://www.thefreedictionary.com/economy+of+scale> (last visited Nov. 20, 2016).

⁶⁸ 10 U.S.C. § 2679(a)(1) (2014).

⁶⁹ Report to Congress, *supra* note 19, at 4 n.2.

When procuring services with an IGSA, commands must use O&M funds.⁷⁰ This is also typical of service contracts procured using the FAR.⁷¹ However, the statute allows commands to provide and share services with local governments as well.⁷² For instances when O&M funds are expended to provide or share services, the “funds received . . . as reimbursement . . . shall be credited to the appropriation or account charged with providing the installation support services.”⁷³ This ensures commands do not lose precious O&M funds by working with local governments.⁷⁴

B. Sole Source Agreements

When using an IGSA the statute gives direct authority for commands to enter into sole source agreements with local governments.⁷⁵ This is contrary to FAR contracting procedures that require the head of an agency achieve full and open competition by using the competitive procedures unless otherwise authorized by the statute.⁷⁶ The competitive contracting procedures are in place to reduce costs, improve performance by contractors, and decrease fraud.⁷⁷

The IGSA statute, however, still has measures in place to promote competition, limit fraud, and keep the spirit of the FAR alive. First, if a contract is used as the basis for an agreement it must be awarded competitively.⁷⁸ This applies if the command is receiving, sharing, or providing services to the local government.⁷⁹ Second, the service must be pre-existing.⁸⁰ The contract serving as the basis for the IGSA “may only be used when the Secretary concerned or the State or local government . . . already provides such services for its own use.”⁸¹ If the service meets these requirements, a command can sign a sole source agreement for a term not to exceed five years.⁸² After five years the appropriate service

Secretary can renew the IGSA.⁸³

C. Wage Grades Normally Paid by the State.

Federal contracting administered by the FAR requires the government adhere to the Service Contract Act and the Davis-Bacon Act.⁸⁴ Both federal statutes set a wage scale requirement contractors must pay employees on government contracts. The Service Contract Act and Davis-Bacon Act require contractors to pay prevailing wages based on the locality of the contract or pay no less than the federal minimum wage.⁸⁵ In 2014, the President signed an executive order raising the minimum wage for federal contractors and subcontractors to over ten dollars an hour.⁸⁶

In some locations, the prevailing or minimum wages under the federal laws are higher than the rates paid the local government. The FY 2005 report to Congress listed both laws as obstacles to further implementation of services at both Sierra Vista and Augusta.⁸⁷ Both cities noted the wage rates of employees that would be assigned to the partnership were substantially lower than required by the Service Contract Act.⁸⁸ In contrast, the City of Monterey pays wages higher than the prevailing wage rates required by the Service Contract Act and Davis-Bacon Act.⁸⁹ This allowed POM to utilize more municipal services offered by the city.⁹⁰

Intergovernmental support agreements authorize commands to use wage grades normally paid by that local government.⁹¹ Using these wage grades enables commands in regions of the United States with lower hourly incomes to fully utilize available installation support services in the community.⁹² However, there is some risk. The Department of Labor (DoL) has not provided an advisory opinion on whether IGSA's are subject to the executive order's minimum

⁷⁰ 10 U.S.C. § 2679(c) (2014).

⁷¹ See U.S. DEP'T OF ARMY, 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 2A, para. 010201 (Apr. 2016).

⁷² 10 U.S.C. § 2679(a)(1) (2014).

⁷³ *Id.* § 2679(c).

⁷⁴ This is an exception to the general rule that funds received by the agency are sent to the Treasury without deduction for any charge or claim. Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b) (2012).

⁷⁵ 10 U.S.C. § 2679(a)(1) (2014).

⁷⁶ Competition in Contracting Act, 10 U.S.C. § 2304(a)(1) (2012).

⁷⁷ See Memorandum from Office of Mgmt. & Budget to Chief Acquisition Officers, subject: Enhancing Competition in Federal Acquisition (May 31, 2007).

⁷⁸ 10 U.S.C. § 2679(a)(4) (2014).

⁷⁹ *Id.*

⁸⁰ *Id.* § 2679(a)(3).

⁸¹ *Id.*

⁸² *Id.* § 2679(a)(2)(A).

⁸³ EXORD 200-16, *supra* note 61, para. 1.B.7.

⁸⁴ FAR subpt. 22.10, 22.403-1 (2016). The Service Contracts Act applies to contracts that furnish services inside the United States valued over \$2,500. Service Contract Act of 1965, 41 U.S.C. § 351(a) (2012). The Davis-Bacon Act relates to construction contracts on public buildings and public works valued over \$2,000. Davis-Bacon Act, 40 U.S.C. § 3142 (2012).

⁸⁵ Service Contract Act of 1965, 41 U.S.C. § 351(a)-(b)(1) (2012).

⁸⁶ Exec. Order No. 13658, 79 Fed. Reg. 9851 (Feb. 12, 2014).

⁸⁷ Report to Congress, *supra* note 19, at 4.

⁸⁸ *Id.* To account for the wage rate difference the cities would have to set up two separate pay scales, one for employees working at the city and one for employees working on federal contracts. *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 4 n.2.

⁹¹ 10 U.S.C. § 2679(a)(2)(B) (2014).

⁹² Report to Congress, *supra* note 19, at 5.

wage standard.⁹³ The Army recently replied to a DoL inquiry requesting additional materials to help understand the Congressional intent behind IGSA, however, no response has been provided to date.⁹⁴

D. Effects on OMB Circular A-76⁹⁵

The OMB Circular A-76 is a federal policy affecting executive agencies to include the DoD.⁹⁶ It requires agencies to categorize government employee job-related activities as either inherently governmental or commercial.⁹⁷ All inherently governmental activities will only be performed by government personnel.⁹⁸ Conversely, all activities deemed commercial in nature must undergo a public-private competition by the command to determine if government personnel or the private sector can perform the work more efficiently.⁹⁹ The circular's supplemental handbook provides detailed guidance on preparing cost estimates for government performance, contractor performance, and interservice support agreements.¹⁰⁰

Service Secretaries are required to "ensure that intergovernmental support agreements authorized by this section are not used to circumvent the requirements of Office of Management and Budget Circular A-76 regarding public-private competitions."¹⁰¹ Therefore, commands cannot reduce their civilian workforce by entering into an IGSA.¹⁰² Public-private competitions are still required to determine the most cost efficient way to perform commercial activities,¹⁰³ though now an IGSA should play a part in that equation. However, since 2008, various legislation has placed a moratorium on the public-private competitions required by

the circular.¹⁰⁴ The moratorium prohibits commanders from converting civilian positions even if the work assigned to civilian personnel has no established billet or the billet is vacant.¹⁰⁵

A commander's restriction on converting civilian billets over to contract positions is particularly relevant with the hiring freeze put in place by the President on January 23, 2017.¹⁰⁶ No vacant positions may be filled unless the billet is "necessary to meet national security or public safety responsibilities."¹⁰⁷ Hiring contractors outside the Government to circumvent the hiring freeze is prohibited by the president's memorandum.¹⁰⁸ Intergovernmental service agreements provide no relief as the A-76 moratorium and the hiring freeze prevents commanders from converting civilian positions.

IV. Implementation¹⁰⁹

The statute defines the principles to the formation of an IGSA, however, the language does not direct DoD agencies on how they must implement the law. The individual Service Secretaries are free to determine the appropriate way to execute an IGSA within their department.¹¹⁰ So far the Army and Air Force have taken the lead in the implementation and management of IGSA.¹¹¹

The Air Force (AF) issued Policy Directive 90-22 in July 2014, and a rewrite in August 2016, outlining the program's roles and responsibilities of all relevant offices.¹¹² The policy tasks the "Air Force Community Partnership Program" (AFCP) with developing and managing the IGSA and to

⁹³ EXORD 200-16, *supra* note 61, annex B pt. 4.

⁹⁴ Email from Roger Wilkinson, Headquarters Dep't of the Army, Office of the Judge Advocate General, to author (Jan. 26, 2017, 14:08 EST) (on file with author).

⁹⁵ This section is only intended to provide a general understanding of Office of Management Circular A-76 and not complete analysis.

⁹⁶ OFFICE OF MGMT. & BUDGET, CIRCULAR NUMBER A-76 (REVISED), at 5(a) (2003) [hereinafter *Circular A-76*]. The DoD is statutorily required to perform a public-private competition before conversion of civilian personnel to contractor performance. 10 U.S.C. § 2461 (1988).

⁹⁷ *Id.* at 4(a).

⁹⁸ *Id.* at 4(b).

⁹⁹ *Id.* at 4(a)-(e).

¹⁰⁰ See OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76 REVISED SUPPLEMENTAL HANDBOOK (1996).

¹⁰¹ 10 U.S.C. § 2679(d) (2014).

¹⁰² EXORD 200-16, *supra* note 61, para. 1.C.

¹⁰³ 10 U.S.C. § 2679(d) (2014).

¹⁰⁴ VALERIE ANN BAILEY GRASSO, CONG. RESEARCH SERV., R40854, CIRCULAR A-76 AND THE MORATORIUM ON DoD COMPETITIONS: BACKGROUND AND ISSUES FOR CONGRESS 5-8 (2013).

¹⁰⁵ See Memorandum from Assistant Sec'y of Def. to Principal Officials of Military Departments et al, subject: Update on OMB Circular A-76 Public-Private Competition Prohibitions – FY 2016 (21 Apr. 2016).

¹⁰⁶ See Memorandum from President of the U.S. to Heads of Exec. Dep't & Agencies, subject: Hiring Freeze (23 Jan. 2017) [hereinafter *Hiring Freeze*].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ This section covers the each agencies strategic IGSA guidance, however, the primer will focus on the Army's process for IGSA execution and approval.

¹¹⁰ 10 U.S.C. § 2679(a) (2013).

¹¹¹ The Army has thirteen completed or in progress IGSA. Email from Joshua T. Randolph, Attorney Advisor, Installation Mgmt. Command, to author (Sept. 29, 2016, 11:27 EST) (on file with author). The Air Force, Marines, and Navy have eleven, four, and zero completed or in progress IGSA respectively. Email from Brad Collier, Pub. Private Venture Program Manager, Navy Facilities Headquarters, to author (Feb. 2, 2017, 11:52 EST) (on file with author); Email from Carolyn White, Ass't Deputy Gen. Counsel, Air Force Installations, Energy & Env't, to author (Jan. 18, 2017, 4:07 EST).

¹¹² U.S. DEP'T OF AIR FORCE, DIR. 90-22, AIR FORCE COMMUNITY PARTNERSHIP PROGRAM 1 (24 July 2014); U.S. DEP'T OF AIR FORCE, DIR. 90-22, AIR FORCE COMMUNITY PARTNERSHIP PROGRAM 1 (25 Aug. 2016) [hereinafter *AFPD 90-22*].

provide the necessary guidance to forming community partnerships.¹¹³ The AFCP Program Office established a SharePoint site as an information repository to provide helpful information for commands and potential partners in the community.¹¹⁴

When partnering opportunities are identified, the AFCP Program Office facilitates the process.¹¹⁵ The program office sends a “brokering team” to assist in meetings and outline opportunities that will mutually benefit the AF and local government through a series of six to seven meetings.¹¹⁶ Subject matter experts ensure the necessary resources are identified and the agreements or contracts are established using the proper authorities.¹¹⁷ IGSAs are exempt from laws governing the award of government contracts, however, AF policy requires acquisitions using this authority implement a contract that complies with the FAR.¹¹⁸

The Navy and Marines utilize IGSAs with the Marines following the Navy’s implementation guidance.¹¹⁹ Similar to the Air Force, the Navy and Marines employ community partnership programs to develop relationships with local governments.¹²⁰ Pursuant to the Navy’s policy, IGSAs awarded by the agencies remain subject to the FAR.¹²¹ Proposed IGSAs by the Navy and Marines must be forwarded to the Deputy Assistant Secretary of the Navy (Energy, Installations, and Environment) for review and approval.¹²²

Within the Army, the Office of the Assistant Chief of Staff for Installation Command (OACSIM) has primary responsibility for IGSA implementation and oversight.¹²³ The office is responsible for publishing Army IGSA policy and on June 6, 2016, the Army issued EXORD 200-16 in

response to the FY 2015 amendments.¹²⁴ The EXORD’s mission is to immediately seek opportunities for cost savings and to strengthen relationships with local governments through a range of public-to-public arrangements, including IGSAs.¹²⁵ Commands are directed to review soon-to-expire installation support service contracts in coordination with the appropriate contracting officer for a possible transition to an IGSA.¹²⁶ The EXORD reinforces the IGSA statute’s guidelines, details the paperwork and coordination necessary for approval, and provides templates to assist commands.¹²⁷ The following sections will review the Army’s EXORD requirements and highlight information for judge advocates involved in the IGSA implementation process.

A. The Army Process

The Army process is laid out in the main body of the EXORD and in Annex B Part 1.¹²⁸ Army commands must develop a broad selection of potential partners and meet with all cities and counties that reside within a reasonable distance, not just locations contiguous to the installation.¹²⁹ For example, Fort Benning reached outside of its contiguous cities to partner with Auburn University for the installation’s ecological forest monitoring.¹³⁰ Auburn University is a State-supported institution located forty miles west of Fort Benning.¹³¹ The IGSA signed with the university saved Fort Benning sixty-six thousand dollars annually as compared to their previous contract.¹³²

After developing partnerships that require the use of an IGSA, commands must draft a partnership proposal for the idea.¹³³ The EXORD provides a template for the proposal in

¹¹³ *Id.*

¹¹⁴ See *Air Force Community Partnership Program*, U.S. DEP’T OF AIR FORCE (last visited Jan. 4, 2016), <https://community.af.mil/wg/airforcepartnerships/p/member>.

¹¹⁵ AFD 90-22, *supra* note 112, at 1.

¹¹⁶ U.S. Air Force, *Air Force Community Partnership Program*, DCO Connect Training, at slide 6-7 (Feb. 12, 2015) (unpublished PowerPoint presentation) (on file with author) [hereinafter *AFCP Presentation*].

¹¹⁷ *Id.* at slide 6. Attorneys are considered subject matter experts and must engage in the meetings. *Id.*

¹¹⁸ See Memorandum from Assistant Sec’y of Air Force to Major Commands et al., subject: Air Force Community Partnership (AFCP) Program; 10 U.S.C. § 2679 “Installation Support Services: Intergovernmental Support Agreements (IGSA)” (24 Aug. 2015).

¹¹⁹ See Memorandum from Assistant Sec’y of the Navy to Chief of Naval Operations and Commandant of the Marine Corps, subject: Intergovernmental Support Agreements with State and Local Governments (23 Nov. 2015) [hereinafter *Navy Policy*].

¹²⁰ See U.S. Marine Corps, *Marine Corps Community Partnership Program* (undated) (on file with author); Email from Brad Collier, Pub. Private Venture Program Manager, Navy Facilities Headquarters, to author (Feb. 2, 2017, 11:52 EST) (on file with author).

¹²¹ See *Navy Policy*, *supra* note 119.

¹²² *See id.*

¹²³ EXORD 200-16, *supra* note 61, para. 3.C.1.A.

¹²⁴ *See id.*

¹²⁵ *Id.* para. 2.

¹²⁶ *Id.* para. 3.A.

¹²⁷ *Id.* paras. 1.B.-1.E., 3.A.1.-3.A.2., 3.D.8.

¹²⁸ *Id.* para. 3-3.A.2., annex B, pt. 1.

¹²⁹ *Id.* annex B, pt. 1, para. a. Some partnerships may be executed under a separate authority so judge advocates must be present to assist in determining the appropriate one.

¹³⁰ Intergovernmental Support Agreement between United States and Auburn University for Ecological Forest Monitoring Services on Fort Benning (Sept. 26, 2016) (on file with author) [hereinafter *Fort Benning IGSA*].

¹³¹ Mr. James Parker, Cost Benefit Analysis, Ecological Monitoring Fort Benning, at slide 3 (Apr. 14, 2016) (unpublished PowerPoint presentation) (on file with author) [hereinafter *Fort Benning CBA*].

¹³² Fort Benning IGSA, *supra* note 130, at 2; Fort Benning CBA, *supra* note 131, at slide 6.

¹³³ EXORD 200-16, *supra* note 61, annex B, pt. 1, para. b.

Annex B Part 2.¹³⁴ In addition to the Proposal Template, commands are required to fill out a Business Case Analysis (BCA) to show the IGSA is in the best interest of the Army.¹³⁵ The partnership proposal and BCA are discussed further in section IV.B.

During development of the proposal, commands must coordinate with their supporting Office of the Staff Judge Advocate and Resource Manager at a minimum.¹³⁶ If the service under consideration affects an existing or follow-on small business contract commands must also coordinate with the Small Business Administration (SBA). Existing small business or Abilityone contracts will not be terminated to form an IGSA. For expiring small business contracts the command will coordinate with the SBA.¹³⁷ If not, the proposals will be returned to the command.¹³⁸ Fort Bragg's IGSA for the museum custodial services, for example, was originally a small business contract.¹³⁹ After coordinating with the SBA and explaining the funding restraints, the SBA released Fort Bragg from the small business requirement and the command signed an IGSA with the City of Fayetteville.¹⁴⁰

After the proposal package is complete it must be submitted through the chain of command for approval and concurrently submitted to OACSIM.¹⁴¹ This allows OACSIM to provide guidance early in the proposal's inception and review for completeness to avoid delays later in the process.¹⁴² Once the proposal is endorsed by the command headquarters OACSIM will forward to the Assistant Secretary of the Army for Installations, Energy & Environment (ASA (IE&E)) for approval.¹⁴³

After approval by the ASA (IE&E), an approval memorandum will be sent to the installation and the originating command.¹⁴⁴ The agreement must be signed by the command within ninety days of approval by an IGSA certifying official.¹⁴⁵ Once executed a signed copy must be

sent to OACSIM within ninety days.¹⁴⁶ If the Army is receiving services under the IGSA, the command will designate a technical representative to provide oversight similar to a FAR contract ensuring the Army is receiving the expected benefits.¹⁴⁷

B. The Proposal Package

The package required by OACSIM consists of a partnership proposal and a BCA.¹⁴⁸ The proposal is a template document designed to elicit information in order to determine if an IGSA is the appropriate contracting method and the agreement is fully developed. The template begins by examining the Army's OMB Circular A-76 and small business concerns.¹⁴⁹ Commands are required to answer a series of questions to determine if both of these policies are affected.¹⁵⁰ If so, a further explanation must be provided to show adherence to federal law and Army policy.¹⁵¹

Next, the command must provide the details surrounding the proposal. A brief concept summary of the IGSA is required along with the background, objectives, and description.¹⁵² The description outlines duration, payment plan, and any planning assumptions.¹⁵³ This section must also detail how the IGSA will reduce costs by creating efficiencies or economies of scale as compared to the existing arrangement.¹⁵⁴ For IGSA's valued over \$200 thousand per year, the proposal must also describe how the agreement will be administered by the command.¹⁵⁵

Finally, the command must answer the IGSA's "requirements for success."¹⁵⁶ The checklist determines if all requirements have been satisfied by the proposal.¹⁵⁷ For example, one requirement includes staffing a dedicated team that includes a contracting representative and a legal

¹³⁴ *Id.* annex B, pt. 1, para. b, annex B, pt. 2.

¹³⁵ *Id.* annex B, pt. 1 para. b, annex B, pt. 3.

¹³⁶ *Id.* para. 3.D.3.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Fort Bragg CBA, *supra* note 2, at slide 2.

¹⁴⁰ Telephone Interview with Mark J. Connor, Assoc. Deputy Gen. Counsel, Army Gen. Counsel (Sept. 27, 2016).

¹⁴¹ EXORD 200-16, *supra* note 61, para. 3.D.5., annex B, pt. 1. If an agreement or work statement is already drafted commands should submit those documents as well. *Id.*

¹⁴² *Id.* annex B, pt. 1, paras. c, d.

¹⁴³ *Id.* para. 3.A.2., annex B, pt. 1, para. f.

¹⁴⁴ *Id.* annex B, pt. 1, para. g.

¹⁴⁵ *Id.* para. 3.A.2., annex B, pt. 1, para. h. The approval letter from the Assistant Secretary of the Army will specify who is authorized to sign the agreement. *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* annex B, pt. 1, para. i.

¹⁴⁸ *See id.* annex B, pt. 2, annex B, pt. 3.

¹⁴⁹ *Id.* annex B, pt. 2, at 1.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* para. 3.D.9.

¹⁵⁶ *Id.* annex B, pt. 2, at 2.

¹⁵⁷ *Id.*

counsel.¹⁵⁸ These requirements do not require a written explanation, just a checkmark showing the command has explored the issue.¹⁵⁹ When complete the proposal document should be a maximum of four pages.¹⁶⁰

The second part of the proposal package is the BCA. Aside from restating the summary and description, the BCA includes the various courses of action (COA) the command is analyzing.¹⁶¹ The BCA must analyze the status quo and proposed IGSA along with any other logical COA.¹⁶² For example, Fort Benning's BCA for ecological foresting monitoring analyzed hiring civilians or using traditional contracting methods as alternatives to the status quo and proposed IGSA.¹⁶³ Once all COAs are determined, the cost factors such as labor, materials, and overhead must be estimated.¹⁶⁴ Any facts used in the analysis should be listed to show how the costs were reached.¹⁶⁵ The Fort Benning's BCA listed its use of OMB Circular A-76 to develop the costs associated with hiring civilians and contract labor.¹⁶⁶ After analysis, the proposed IGSA should prove to be the lowest priced COA to be a viable option. The level of effort expended preparing the CBA should be commensurate with the funding involved in the agreement.¹⁶⁷

C. The Agreement Format

The command has options when preparing the final agreement with a local government. A traditional FAR-based contract may still be used even though it is no longer required by law.¹⁶⁸ For commands that desire to use a non-FAR based IGSA agreement, the EXORD provides two pilot templates from which to choose.¹⁶⁹ Each template contains the minimum requirements for an IGSA, however, commands can make additional conditions or requirements if needed.¹⁷⁰

One template was developed by the U.S. Army Mission and Installation Contracting Command (MICC) and the other by the U.S. Army Corps of Engineers (USACE).¹⁷¹ Both templates serve as a plug-and-play document. They both

contain bracketed areas where the appropriate information about the IGSA must be inserted along with additional guidance to assist the drafter.¹⁷² Selecting the appropriate template will come down to personal preference. However, the USACE template notes that it should only be used when the Army is receiving services under the agreement.¹⁷³ Regardless of the template used, once the agreement is signed the command is responsible for the monitoring and administering the IGSA, not the contracting community.¹⁷⁴

V. Conclusion

Intergovernmental service agreements are an intriguing new method for commands to save funds on installation support services. In a time when installation budgets are decreasing, these agreements provide one more tool in the toolbox for judge advocates to assist their commanders. Not every command will be as lucky as POM and receive almost all municipal services from the local government through an IGSA, but there may be some opportunities for cost savings by working with the community right outside the front gate.¹⁷⁵

One thing is for certain with IGSAs, the Army's guidance will change. This type of agreement is fairly new and as OACSIM collects and reviews data, FRAGOs will be issued to the field.¹⁷⁶ Judge advocates should expect additional Army guidance by the end of 2017, so keep your eyes open for the exciting new chapter in the world of IGSAs.¹⁷⁷

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* annex B, pt. 2, at 1.

¹⁶¹ *Id.* annex B, pt. 3, at slide 2-5.

¹⁶² *Id.* annex B, pt. 3, at slide 5.

¹⁶³ Fort Benning CBA, *supra* note 131, at slide 6-7.

¹⁶⁴ EXORD 200-16, *supra* note 61, Annex B Pt. 3 at slide 6.

¹⁶⁵ *Id.* annex B, pt. 3, at slide 4.

¹⁶⁶ Fort Benning CBA, *supra* note 131, at slide 4.

¹⁶⁷ EXORD 200-16, *supra* note 61, para. 3.D.5.

¹⁶⁸ *Id.* para. 3.D.8.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *See id.* annex C, pt. 1-5, annex D.

¹⁷³ *See id.* annex C, pt. 1-5.

¹⁷⁴ *Id.* para. 3.D.8.

¹⁷⁵ On October 16, 2016, Presidio of Monterey and the cities of Monterey and Seaside signed an IGSA for facility and infrastructure operations and maintenance valued at nearly \$10 million. Brian Lepley, *Historic Service Agreement Struck by Presidio, Cities*, U.S. ARMY (Dec. 16, 2016), https://www.army.mil/article/179856/historic_service_agreement_struck_by_presidio_cities.

¹⁷⁶ EXORD 200-16, *supra* note 61, para. 3.B.3.

¹⁷⁷ Email from Donna Wilhoit, Office of the Assistant Chief for Installation Mgmt., Privatization and Partnership Division, to author (Jan. 17, 2017, 16:42 EST) (on file with author).

Book Review

The (Honest) Truth About Dishonesty, How We Lie to Everyone—Especially Ourselves¹

Reviewed by Major Julie L. Borchers*

*Let me come right out and say it. They cheat. You cheat. And yes, I also cheat from time to time.*²

I. Everyone is Dishonest

Everyone at some point does something dishonest, from telling a white lie to stealing money. While it may be tempting to think about the notorious few who cheat a lot or who are dishonest in a big way, Dan Ariely's assertion in *The (Honest) Truth About Dishonesty* is that cumulatively the bigger problem is the more minor cheating of a substantially larger group. As a somewhat common sense conclusion, the author asserts that people cheat in order to get things, most commonly a financial benefit. However, this desire conflicts with a desire to want to see one's self as good or ethical. "[A]s long as we cheat by only a little bit, we can benefit from cheating and still see ourselves as marvelous human beings. This balancing act is the process of rationalization, and it is the basis for what we'll call the 'fudge factor theory.'"³ Thus, everyone cheats, but only to the point that they can still feel good about themselves.

Once the reader grasps the Ariely's premise, it is tempting to quickly apply it to the reader's own life or profession. However, while application can be fun and while there are lessons to be learned from this book, the author's presentation of the material makes it difficult to determine whether his premise is academically sound. Specifically, the author discusses the field of behavioral economics, but fails to explain exactly what that is. He oversimplifies much of the research, presumably in an attempt to appeal to a larger audience.

However, this oversimplification creates an impression that the research may be flawed, thus making it difficult to determine how broadly the results can be applied. Ariely also assumes that all unethical behavior is essentially the same, whether that is lying, cheating, stealing, or purchasing a counterfeit item. Finally, he leaves the reader to draw his or her own conclusions about application of the results of this research rather than suggesting a way forward. Despite these issues, the test results reported by the author are thought

provoking, contain insightful explanations of human behavior, and have application in both the military and legal context.

II. What is Behavioral Economics?

This book is based on an emerging body of research called behavioral economics. Dan Ariely is a professor of psychology and behavioral economics at Duke University.⁴ He holds PhDs in both cognitive psychology and business administration.⁵ On his website, he asserts, "I do research in behavioral economics and try to describe it in plain language."⁶ He also states that the body of his work, which includes four books, the website, a documentary, a research laboratory at Duke, and more, are an "attempt to take . . . research findings and describe them in non-academic terms so that more people will learn about this type of research, discover the excitement of behavioral economics, and possibly use some of the insights to enrich their own lives."⁷

However, while the author references behavioral economics early in the book, perhaps as part of his effort to avoid a non-academic writing style, he fails to explain what exactly behavioral economics is or how his theory of dishonesty works within the behavioral economics field. Instead, Ariely unhelpfully explains his theory of dishonesty by defining a competing theory. That competing theory is the Simple Model of Rational Crime (SMORC). According to the SMORC, "we all seek our own advantage as we make our way through the world."⁸ "If we lived in a purely SMORC-based world, we would run a cost-benefit analysis on all of our decisions and do what seems to be the most rational thing."⁹ The SMORC does not take into account the less tangible concepts of ethics, morality, trust, altruism, judgement, or group dynamics that behavioral economics tries to consider when analyzing human behavior.¹⁰

Behavioral economics offers a counterpoint to traditional economic theories, such as the SMORC, that view the human

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¹ DAN ARIELY, THE (HONEST) TRUTH ABOUT DISHONESTY, HOW WE LIE TO EVERYONE—ESPECIALLY OURSELVES (2012).

² *Id.* at 11.

³ *Id.* at 27.

⁴ *Id.* at 313.

⁵ *Id.*

⁶ *All about Dan*, DAN ARIELY, <http://danariely.com/all-about-dan/> (last visited June 20, 2017) [hereinafter *All about Dan*].

⁷ *Id.*

⁸ ARIELY, *supra* note 1, at 4.

⁹ *Id.* at 5.

¹⁰ *Id.*

decision maker as a rational actor. Recent works in this field have tried to address such questions as, “the biases that systematically cloud judgement and perception; . . . [and] how people predictably fail to make consistent ethical appraisals and almost invariably overestimate their own ethical qualities.”¹¹ Thus, this book focuses on explaining human behavior, specifically dishonesty and other associated behaviors, when those behaviors cannot be explained through a cost-benefit analysis.

III. Overly Simplistic Social Science Research Methodology

To test his theory about dishonesty, the author designed an experiment involving twenty math problems. He recruited college students from the Massachusetts Institute of Technology (MIT), told them that they would be paid according to the number of problems they solved correctly, and then gave them an insufficient amount of time to solve all the problems. At the end, the test subjects were told the correct answers, to shred their answer sheets, and to then self-report the number of correct answers. The answers from a second control group were not shredded, but were graded to determine the test subject group typically inflated the number of self-reported correct answers. Surprisingly though, while test subjects could have reported they answered all the questions correctly because they destroyed any evidence to the contrary, they only inflated their answers by an average of two questions when compared to the control group.¹²

The author repeated this same experiment with seemingly endless variations such as: increasing the amount of money provided as an incentive for correct answers to determine whether a greater financial reward increases cheating; using an actor engaging in obvious dishonesty to determine whether observing dishonest behavior increases cheating; asking students to read and sign an honor code either before or after completing their answers to determine whether reminding students of the importance of ethical behavior would decrease cheating; varying the levels of test proctor supervision to determine the impact on cheating; and others. From these further tests the author concludes that neither increasing the amount of financial gain nor increasing the probability of being caught have a significant impact on the amount of cheating.¹³ Observing others behaving dishonestly, creating an opportunity to rationalize cheating, and seeing others benefit from dishonesty all increased cheating.

Alternatively, increasing supervision and utilizing moral reminders such as religion, ethics, or signatures decreased

dishonesty in the author’s experiments.¹⁴

While the author’s attempt to test his hypothesis by examining the behavior of university students completing math problems is interesting, it is an intellectual leap from these experiments to more practical application. The author does not provide any information about the test subjects other than that they are MIT students. This makes it difficult to determine the reliability of the results. As another reviewer noted when discussing the testing methods described by Ariely in the book:

[I]ts claims about the psychology of lying and cheating rely often enough and quite unabashedly on single studies with small sample sizes conducted by the author himself. Given Ariely’s authority in the area of judgement and decision-making this playing fast and loose with psychological research is all the more difficult to make sense of.¹⁵

Questions not only about the size of the sample population, but also about whether the sample population is representative of the university student population, whether that university’s student population is representative of students in the United States, and whether university students are representative of the populations to which the author would like the reader to apply his conclusions—Wall Street bankers, members of Congress, doctors, judges, or any other population the reader chooses—all remain unanswered.

Through his website, the author attempts to partially address the question of whether students are representative of broader populations. However, his answer is a short video segment that only says he has not found results involving students to be “that different” from results involving other people.¹⁶ Again, there is no discussion of how many subjects were involved in these tests, what other people he tested, how the tests were conducted, or what “that different” means regarding the comparison to the student tests. Thus, while the author would like the reader to take the results of his experiments and apply them to more diverse situations, without further information about the testing the reader cannot be sure of the results or whether their broader application is intellectually sound.

IV. Is All Unethical Behavior Really the Same?

The author supplements his university student tests with several qualitative experiments involving one or two subjects and varying conditions. Many of these experiments use both real and counterfeit items such as handbags or sunglasses.

¹¹ Bruce Maxwell, *Review Article*, 43:1 J. MORAL EDUC. 136, 136 (2014).

¹² See generally ARIELY, *supra* note 1, at 14-19 (discussing the basic test used by the author to examine whether students would behave as expected by the simple model of rational crime (SMORC)).

¹³ *Id.* at 245.

¹⁴ *Id.*

¹⁵ Maxwell, *supra* note 11, at 138.

¹⁶ *Frequently Asked Questions: How can you generalize results from university students to real people?*, DAN ARIELY, <http://danariely.com/all-about-dan/faq/> (last visited June 20, 2017).

From these tests the author concludes that, “wearing a genuine product does not increase our honesty (or at least not by much). But once we knowingly put on a counterfeit product, moral constraints loosen to some degree, making it easier for us to take further steps down the path of dishonesty.”¹⁷

Throughout the book the author primarily uses the terms cheating and dishonesty, but occasionally also describes lying, unethical behavior, and, as just described, counterfeiting. This raises a question for the reader about whether all of these behaviors really are the same, whether the terms are interchangeable, or more simply whether carrying a fake purse is the same as stealing money. In addition, the author overlooks other factors that may motivate an individual’s behavior. As another reviewer stated, “It is slightly dissatisfying that Ariely does not consider the potential benefits of dishonesty beyond those of white lies, perhaps overlooking other reasons why we fudge the truth.”¹⁸ Someone who is engaging in marital infidelity is certainly cheating, but their motivation is likely different from someone who buys a counterfeit item or steals a small amount of money. In this regard, the author seems to treat all dishonest behavior as a single cohort and misses an opportunity to address the myriad of emotional, psychological, or social factors that may motivate unethical behavior.

While not a source of motivation for behavior, the author does address the ways rationalization can influence behavior. He specifically discusses why someone may engage in the wrong actions for the right reasons based on a belief that the ends justify the means.

This tendency to care about others can also make it possible to be more dishonest in situations where acting unethically will benefit others. From this perspective, we can think about cheating when others are involved as altruistic—where, like Robin Hood, we cheat because we are good people who care about the welfare of those around us.¹⁹

As an example of this book’s applicability to the legal profession, at least one attorney has cited Ariely’s work regarding rationalization in the context of attorney willingness to engage in unethical practices when representing a client. “[A] particular client may benefit from a lawyer’s dishonesty, whether rationalized by the lawyer as demanded by the norms of zealous advocacy and the duty of

loyalty, or by the lawyer’s genuine altruistic concern for the client’s welfare.”²⁰

V. What to Do with this Research.

“Given the appropriate circumstances almost everyone will cheat. This is the message for which the recent book by Dan Ariely[,] *The (Honest) Truth about Dishonesty* (2012)[,] provides experimentally supported chapter and verse. This is not news. The question is what is to be done about it?”²¹ In fairness to the author, his stated purpose is only to describe the counterintuitive situations in which people behave dishonestly and then to test factors that either increase or decrease dishonest behaviors. He never purports to tell the reader what to do with his conclusions about dishonesty. He does provide some examples of application of the conclusions of his research to certain groups of people—Wall Street bankers, members of Congress, doctors, judges—but they are anecdotal at best. As indicated on his website, this could be his attempt to avoid an overly scientific approach and communicate in a way the average reader can understand.²² Maybe he wants the reader to feel free to draw their own conclusions about applicability. Perhaps this was simply outside the scope of this book.

Whatever the reason, the omission leaves the reader wanting more but nevertheless free to draw his or her own conclusions.

In the military context there are numerous examples of application of the factors the author asserts decrease dishonesty, specifically signatures, supervision, and moral reminders. These take the form of the Army Values card that all Soldiers are asked to wear on their identification tags, the reminder of the penalties for filing a false travel claim that appears prior to signing a travel voucher in the Defense Travel System, and the warning banner concerning misuse that appears in conjunction with logging onto a government computer system.

The harder challenge for the military leader is to stay in front of the factors that increase dishonesty. As Ariely points out, depletion, which occurs when someone is tired, hungry, or stressed, increases dishonest behavior because it typically takes less energy to make a poor decision than it does to make a good decision.²³ It may seem paternalistic to tell military leaders that they should not overwork their Soldiers. However, it probably is not intuitive that leaders could likely reduce disciplinary problems, maintenance errors, or other

¹⁷ ARIELY, *supra* note 1, at 126.

¹⁸ Jordan Lite, *MIND Reviews: The (Honest) Truth about Dishonesty*, SCI. AM. (Sept. 1, 2012), <http://www.scientificamerican.com/article/-mind-reviews-the-honest-truth-about-dishonesty/>.

¹⁹ ARIELY, *supra* note 1, at 223.

²⁰ Michael S. McGinnis, *Breaking Faith: Machiavelli and Moral Risks in Lawyer Negotiation*, 91:247 N. D. L. REV. 248, 284 (2015) (citing ARIELY, *supra* note 1, at 222).

²¹ Raymond E. Spier, *On Cheating*, 19 SCI. & ENGINEERING ETHICS 309, 309 (2013).

²² *All about Dan*, *supra* note 6.

²³ See generally ARIELY, *supra* note 1, at 97-107 (discussing why judges are more likely to grant parole first thing in the morning or immediately after lunch, why people make poor food choices when tired, and why student reports of a death in the family increase immediately prior to college midterm and final examinations).

costly mistakes by monitoring Soldier well-being, not allowing them to become tired, hungry, or stressed. Similarly applicable are lessons about the impact of observing dishonest behavior or belonging to an organization with a culture that tolerates dishonesty. A seeming epidemic of sexual assault; fraud, infidelity, and other forms of misconduct by senior officers; or entire units engaged in a criminal enterprise, such as detainee abuse, are just a few examples of issues that Ariely might attribute to either observing dishonest behaviors or a culture of dishonesty.

The lessons for the legal professional are not as straight forward. While the author addresses conflicts of interest in the context of seven other professions, he devotes only a small portion of the book to addressing conflicts of interest in the legal profession, and only specifically addresses expert witness testimony. Overbilling clients for hours worked by an attorney seems like an area perfectly suited for the author's "fudge factor," yet it is not addressed. As previously noted, an attorney's willingness to engage in unethical practices when representing a client is an interesting application of Ariely's findings regarding altruistic dishonesty. From a criminal law perspective some study of the people on the margins of the author's experiments, namely those who cheat the most, may provide insight and explanation of these behaviors. Perhaps there is something to learn about how to prevent criminal activity from those who are less ethical than most.

VI. Conclusion

While the author may have failed to clearly define the field of behavioral economics, oversimplified the research he designed and conducted to test dishonesty, and failed to tell the reader what to do with the results of his research, the undeniable conclusion of this work is that everyone cheats. There are infinite applications of the author's conclusions to any field, but such application requires the reader to overlook the flaws in the ways the author tested his hypothesis about cheating and blindly accept the author's conclusions about dishonesty. Ultimately, placing such faith in the author's conclusions seems itself to be a little dishonest.

Book Review

The Boys in the Boat: Nine Americans and Their Epic Quest for Gold at the 1936 Berlin Olympics¹

Reviewed by Major Sara M. Tracy-Ruazol*

*Joe, when you really start trusting those other boys, you will feel a power at work within you that is far beyond anything you've ever imagined. Sometimes, you will feel as if you have rowed right off the planet and are rowing among the stars.*²

I. Introduction

For many Americans, the 1936 Olympic Games conjure up achievements cemented in American sports history. Most recall Jesse Owens breaking three world records, medaling four times,³ and undermining Adolf Hitler's goal of using the Games to showcase his theory of Aryan racial superiority.⁴ Laura Hillenbrand's book, *Unbroken: A World War II Story of Survival, Resilience, and Redemption*,⁵ put Louis Zamperini's record breaking final lap of the 5000 meter run in modern American consciousness.⁶ Now, thanks to Daniel James Brown's book, *The Boys in the Boat: Nine Americans and Their Epic Quest for Gold at the 1936 Berlin Olympics*, the University of Washington rowing team's first place finish and victory over Germany⁷ can rightfully be added to that list.

The Boys in the Boat is a narrative non-fiction⁸ portraying the team's journey from ragtag working-class boys to Olympic champions.⁹ Brown centers the story on Joe Rantz, a young man who suffered incredible deprivation in childhood but eventually found his home and peace through rowing and its brotherhood.¹⁰ While Rantz is the primary subject, Brown expertly weaves the personal stories of Rantz's teammates, coaches, and mentors along with contemporaneous accounts of the political and economic challenges facing the Depression-era United States and the pre-World War II international landscape.¹¹

At 404 pages, *The Boys in the Boat* is a substantial yet quick read owing to Brown's captivating storytelling; readers will have a hard time putting the book down. Those without

a rowing background should not be discouraged. Brown has a magical way of educating laymen on the basics of rowing while keeping the material engaging. Judge advocates looking for an inspirational story will find this an extremely worthwhile book to supplement their professional reading list. *The Boys in the Boat* is filled with invaluable leadership and teamwork lessons set against the historical backdrop of the United States and Europe during the 1930s.

II. Summary of Unifying Themes

In telling the team's story, Brown hits on key unifying themes throughout the book. One of those themes concerns the underdog persevering with a "never quit" attitude. In the 1930s, rowing was an exclusive sport typically reserved for the well-heeled and Ivy League-educated.¹² Yet, like Rantz, nearly all the members of the University of Washington's Olympic team came from working-class backgrounds.¹³ On top of this, they had a societal disadvantage; most elite rowing teams typically hailed from the East Coast while the American West, especially Seattle, was still viewed as backwaters.¹⁴ These boys were the unlikeliest of rowing champions, yet as underdogs they defied traditional expectations.

Another key theme is the importance of subordinating the needs of the individual to the needs of the group. Rowing is considered by some to be the ultimate team sport.¹⁵ To successfully row, all eight oarsmen, with the coxswain directing,¹⁶ must perfectly synchronize their stroke and

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¹ DANIEL JAMES BROWN, *THE BOYS IN THE BOAT: NINE AMERICANS AND THEIR EPIC QUEST FOR GOLD AT THE 1936 BERLIN OLYMPICS* (2013).

² *Id.* at 235.

³ Jesse Owens, *THE INTERNATIONAL OLYMPIC COMMITTEE*, <https://www.olympic.org/jesse-owens> (last visited Sept. 22, 2016).

⁴ *Berlin, 1936: Jesse Owens and the Aryan Race*, DW (July 30, 2008), <http://www.dw.com/en/berlin-1936-jesse-owens-and-the-aryan-race/a-3524138>.

⁵ LAURA HILLENBRAND, *UNBROKEN: A WORLD WAR II STORY OF SURVIVAL, RESILIENCE, AND REDEMPTION* (2010).

⁶ *See War Hero, Olympian Louis Zamperini Dies at 97*, ESPN (July 3, 2014), http://www.espn.com/olympics/story/_id/11171984/war-hero-olympian-louis-zamperini-dies-97.

⁷ BROWN, *supra* note 1, at 351.

⁸ *About Daniel*, DANIEL JAMES BROWN, <http://www.danieljamesbrown.com/about/#.V-TzLv7r3mQ> (last visited Sept. 22, 2016).

⁹ BROWN, *supra* note 1.

¹⁰ *See id.* at 25-37, 343-70, 375.

¹¹ *See id.*

¹² *See id.* at 18, 110-11.

¹³ *Id.* at 1.

¹⁴ *Id.* at 173; *see id.* at 18-19, 111-13.

¹⁵ James Cracknell, *10 Things No One Tells You When You Take up Rowing*, THE TELEGRAPH (July 11, 2014), <http://www.telegraph.co.uk/men/active/10953438/10-things-no-one-tells-you-before-you-take-up-rowing.html>.

¹⁶ BROWN, *supra* note 1, at 231.

muscle movement.¹⁷ For Al Ulbrickson, the head coach of the University of Washington's rowing program,¹⁸ the most important characteristic for a rower is "the ability to disregard his own ambitions, to throw his ego over the gunwales, to leave it swirling in the wake of his shell, and to pull, not just for himself, not just for glory, but for the other boys in the boat."¹⁹ This theme is pervasive not only in the team's rowing exploits, but also in the personal stories of the boys.²⁰

III. Notable Lessons for Leaders

Simply put, Brown's storytelling is masterful. He adroitly keeps the reader engaged in a compellingly-told personal story brimming with leadership and teamwork lessons. Some of the best leadership books are ones that are not marketed or intended as such,²¹ yet have practical examples of leadership in action. *The Boys in the Boat* is one of these books, and judge advocates should add this to their professional reading list for the leadership lessons they can glean in a well-told story set against the backdrop of critical moments in our national and world history. Of note, the most notable lessons involve the value of "grit" in achieving success and the importance of a teamwork concept the rowing world calls "swing."

A. Grit

Angela Duckworth, author of *Grit: The Power of Passion and Perseverance*,²² defines grit as "perseverance and passion for long-term goals" and argues that gritty people work "strenuously toward challenges" while "maintaining effort and interest over years despite failure, adversity, and plateaus in progression."²³ Alternatively, George Pocock, a legendary designer and builder of racing shells and an informal mentor to the University of Washington rowing program, summarizes grit and its effect more poetically:

"Men as fit as you, when your everyday strength is gone, can draw on a mysterious reservoir of power far greater. Then it is that you can reach for the stars. That is the way champions are made."²⁴ Brown also uses a Pocock quote about the rings in a tree to keenly express the importance of grit in survival and how it shapes a person:

These giants of the forest are something to behold. Some have been growing for a thousand years, and each tree contains its own story of the centuries' long struggle for survival. Looking at the annular rings of the wood, you can tell what seasons they have been through. In some drought years they almost perished, as growth is barely perceptible. In others, the growth was far greater.²⁵

The importance of grit in success could not be more evident in *The Boys in the Boat*. Brown's main vehicle for this lesson is through Rantz.²⁶ As a poor, motherless child growing up in a working-class home during the Great Depression,²⁷ Rantz had much stacked up against him. His circumstances worsened when his father, stepmother, and half-siblings eventually abandoned him.²⁸ As a school-aged boy he had to find a way to support himself.²⁹ Objectively, Rantz was setup for failure and if he did fail, few would likely blame him. But instead of failing, Rantz persevered, put himself through the University of Washington,³⁰ and won a gold medal in the Olympics³¹—all while barely scraping up enough money employed as a janitor.³²

Another pivotal example of grit at play is the suspenseful and gripping picture Brown paints of the Olympic championship race.³³ The U.S. team had the worst lane assignment against a strong wind,³⁴ didn't hear or see the signal for the start,³⁵ and their teammate in the critical stroke position was suffering from pneumonia.³⁶ At one point, the

¹⁷ *Id.* at 161.

¹⁸ *Id.* at 15.

¹⁹ *Id.* at 23.

²⁰ *Id.* For instance, in recounting the pain he experienced from his family leaving him, Joe Rantz tells his girlfriend, Joyce Simdars, "They didn't have any choice. There were just too many mouths to feed." *Id.* at 134. Rantz continued to provide to care to his half-siblings despite his own extremely meager financial means. *See id.* at 73, 218.

²¹ *See* Dane Stangler, *The Best Management Books*, INC. MAGAZINE, (Mar. 2014), <http://www.inc.com/magazine/201403/dane-stangler/best-management-books.html>; Craig Chappelow, *A Leadership Book Author on Why You're Better Off Reading Fiction for Lasting Lessons*, FAST COMPANY (Jun. 17, 2013), <https://www.fastcompany.com/3013003/dialed/a-leadership-book-author-on-why-youre-better-off-reading-fiction-for-lasting-lessons>.

²² ANGELA DUCKWORTH, *GRIT: THE POWER OF PASSION AND PERSEVERANCE* (2016).

²³ Angela Duckworth et al., *Grit: Perseverance and Passion for Long-Term Goals*, 92 J. PERSONALITY & SOC. PSYCHOLOGY 6, at 1087-88 (2007).

²⁴ BROWN, *supra* note 1, at 343.

²⁵ *Id.* at 25.

²⁶ *See id.*

²⁷ *Id.* at 28-37.

²⁸ *Id.* at 58.

²⁹ *Id.* at 36.

³⁰ *Id.* at 361.

³¹ *Id.* at 350.

³² *Id.* at 73.

³³ *Id.* at 340-51.

³⁴ *Id.* at 334.

³⁵ *Id.* at 341.

³⁶ *Id.* at 332.

U.S. team was dead last with teams far ahead of them.³⁷ But through sheer grit, the nine of them made a miraculous comeback in the final minutes of the race to beat the Germans by one sixth of a second and finish in first place.³⁸

B. Swing

Another key lesson—and probably the most important lesson of all—is that grit, while important, will only take one so far. What is required is trust between team members to achieve what is known in the rowing world as “swing.”³⁹ Pocock calls swing the “fourth dimension of rowing.”⁴⁰ Brown explains that swing is “hard to achieve and hard to define” but it is something that “only happens when all eight oarsmen are rowing in such perfect unison that no single action by any one is out of synch with those of the others.”⁴¹ Brown goes on to say that this synchronization requires not only the oar hitting the water at just the right time, but each oarsman’s muscle movement being in synch.⁴²

Achieving swing does not necessarily make the team go as fast as they can; however, when a crew finds its swing, it allows them to stroke so efficiently that they can conserve the power they may need for that “gut-wrenching, muscle-screaming sprint at the end of a race.”⁴³ Such perfect synchronization is so elusive that Pocock recalled hearing “men shriek out with delight when that swing came in an eight; it’s a thing they’ll never forget as long as they live.”⁴⁴ Throughout the book Ulbrickson is on a quest to find the best combination of freshman, junior varsity, and varsity boys that is most likely to achieve swing, and he eventually finds it in the nine who make up the Olympic team.⁴⁵ The team owed their success to both their individual grit and the swing they found with each other both on and off the water.⁴⁶

Leaders can use this rowing concept and apply it to everyday team building. Every project and group endeavor likely has an equivalent moment where something akin to swing can be achieved. Although the concept is abstract and therefore difficult to define, judge advocates can put this rowing lesson in their leadership kitbags to provide a

framework of how to achieve goals in a team environment. The very concept of swing is universal to team efforts and emphasizes the importance of every person pulling his or her own weight. However, brute strength isn’t enough to achieve swing; each team member’s energy must be expended in a way that perfectly harmonizes and complements one another to achieve their goals in the most efficient manner.

C. Other Leadership Lessons

Other particularly notable leadership lessons are displayed in Al Ulbrickson’s use of George Pocock.⁴⁷ While Pocock was not a member of the coaching staff, Ulbrickson recognized Pocock’s value for his expertise in rowing, and Ulbrickson started to use Pocock more as the Olympics approached.⁴⁸ At one point he asks Pocock to “figure out” Joe Rantz.⁴⁹ Ulbrickson recognized Rantz’s enormous talent and potential, but Rantz was oftentimes inconsistent in his performance.⁵⁰ Pocock approached Rantz as a mentor and got to know him well enough to break through the barriers that kept Rantz from fully meshing with the team and realizing his true potential.⁵¹

In this story alone, judge advocates can glean two critical leadership lessons: (1) recognize and use the resources all around you,⁵² and (2) leaders must know their people to unlock their subordinates’ and teammates’ full potential.

IV. Conclusion

With its well-paced and engaging storyline filled with real world examples of valuable leadership and teamwork attributes, *The Boys in the Boat* should be on any judge advocate’s short list of professional development books. While books written specifically on leadership are sometimes dry or too theoretical, as a narrative nonfiction *The Boys in the Boat* is neither. Additionally, the book’s historical context increases its professional development value. As Army professionals, continuing self-education in history is critical

³⁷ *Id.* at 344.

³⁸ *Id.* at 351.

³⁹ *See id.* at 235.

⁴⁰ *Id.* at 275.

⁴¹ *Id.* at 161.

⁴² *Id.*

⁴³ *Id.* at 162.

⁴⁴ *Id.* at 229.

⁴⁵ *See, e.g., id.* at 84, 212-13, 229-40.

⁴⁶ *See id.* at 343-51.

⁴⁷ *See id.* at 212.

⁴⁸ *Id.*

⁴⁹ *Id.* at 213.

⁵⁰ *Id.*

⁵¹ *See id.* at 213-15, 219, 234-35.

⁵² This lesson is also exemplified in a revelation Rantz had as a school-aged boy on a natural history field trip when his schoolteacher introduced them to an edible fungus on a tree stump. At this point Rantz was abandoned by his family and fending for himself. Rantz realized that

[i]f you simply kept your eyes open, it seemed, you just might find something valuable in the most unlikely of places. The trick was to recognize a good thing when you saw it, no matter how odd or worthless it might at first appear, no matter who else might just walk away and leave it behind. *Id.* at 37.

because it builds our knowledge on the legacies of the past to better understand the world we operate in today.⁵³

⁵³ See William H. McNeill, *Why Study History?*, THE AM. HIST. ASS'N (last visited July 12, 2017), [https://www.historians.org/about-aha-and-membership/aha-history-and-archives/archives/why-study-history-\(1985\)](https://www.historians.org/about-aha-and-membership/aha-history-and-archives/archives/why-study-history-(1985)) (advocating the study of recent and ancient history because “[o]nly an

acquaintance with the entire human adventure on earth allows us to understand these dimensions of contemporary reality.”).

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