



THE ARMY LAWYER

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Judge Advocate General's Corps Professional Bulletin 27-50-17-08

August 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:

A Commander and the Law in Vietnam:

Major General George L. Mabry, Jr. and “The Case of the Green Berets”

By Fred L. Borch

Regimental Historian and Archivist*

Judge advocates will be interested in Major General George L. Mabry’s Army career for at least three reasons. First, he was a Soldier who very much stood out in the million-man Army of his era, since he had been awarded every single combat valor decoration that a Soldier may receive, including the Medal of Honor. Second, his involvement as the convening authority in the infamous Green Beret murder case, a textbook example of a commander who insisted on ‘doing the right thing’ in a court-martial despite the dark shadow that the case cast upon the Army in Vietnam. Finally, our Corps has a personal connection with Major General Mabry: his daughter, Abigail “Gail” Ferrick, has been a civilian member of our Regiment at Fort Jackson, South Carolina for almost 25 years.

Born in Stateburg, South Carolina, in September 1917, George Lafayette Mabry Jr. worked as a farm manager for 14 months and played semi-professional baseball for a year before graduating from Presbyterian College in 1940. He had been a member of his school’s Reserve Officer Training Corps, and consequently was commissioned as a second lieutenant in June 1940.

With war on the horizon, Mabry began his Army career the following month with an assignment to the 4th Infantry Division, which had just been activated and was then training at Fort Benning, Georgia. Mabry joined the 8th Infantry Regiment, and remained with that unit until 1945. He deployed to England in January 1944, and waded ashore with other Soldiers of the 4th Infantry Division on Utah Beach. For his gallantry in Normandy on D-Day, then Captain Mabry was awarded the Distinguished Service Cross, second only to the Medal of Honor in the Army’s pyramid of combat decorations.¹ A short time later, Mabry also was awarded the Silver Star for heroism in combat.²

On November 20, 1944, in recognition of his conspicuous bravery during an attack through the Huertgen Forest near Schevenhutte, Germany, Major Mabry, as battalion commander, was awarded the Medal of Honor. He had singlehandedly prepared a path through a German minefield, captured three enemy bunkers, and killed three Germans, shooting two of them and bayoneting another who

was trying to kill him with a pistol. With his rifle butt, he injured another German soldier (putting him out of action), and captured nine more enemy soldiers. As if this was not enough combat heroism, Mabry then led his battalion across 300 yards of fire-swept terrain to seize high ground upon which he established a defensive position which menaced the enemy on both flanks.³

Mabry finished World War II as a lieutenant colonel in the same regiment in which he had started as a second lieutenant. It had been a remarkable five years of soldiering, as Mabry had seen 299 days of combat in Normandy, Northern France, Belgium, Luxembourg, and Germany. During that time he served as a platoon



Lieutenant Colonel George L. Mabry Jr.

leader, company commander, battalion operations officer (S-3), battalion executive officer, and battalion commander. In addition to his Medal of Honor, Distinguished Service Cross and Silver Star, Mabry was also awarded the Bronze Star Medal with V-for-valor device and the Purple Heart.

Most historians believe that the 3rd Infantry Division’s Audie Murphy, who was immortalized in the book and movie *To Hell and Back*, is the most decorated Soldier of World War II.⁴ It is highly likely, however, that Mabry is a close second, as he also was awarded every single decoration that may be awarded a Soldier for valor in combat.

At the end of World War II in 1945, then Lieutenant Colonel Mabry decided that he liked soldiering, and he decided to make the Army a career. The next year, he completed the Infantry Officers’ Advanced Course at Fort Benning, Georgia, and then remained on the staff and faculty of the Infantry School. Two years later, he was sent to

* The author thanks Ms. Gail Ferrick and Lieutenant Colonel (retired) George Mabry III for their help in preparing this article in their father.

¹ Headquarters, First U.S. Army, Gen. Order No. 32, (1944).

² Headquarters, Fourth Infantry Division, Gen. Order No. 43 (1944).

³ Headquarters, War Dep’t, Gen. Order No. 77 (1945); Medal of Honor Recipients, World War II (Recipients M-S), <http://www.history.army.mil/moh/wwII-m-s.html> (last visited July 24, 2017).

⁴ AUDIE MURPHY, *TO HELL AND BACK* (1949); *TO HELL AND BACK* (UNIVERSAL PICTURES 1955).

Command and General Staff College, Fort Leavenworth, Kansas, from which he graduated in September 1950.

The Korean War had begun a few months earlier and, like most of his classmates, Mabry wanted to go where the 'action' was. But it was not to be and instead Mabry was sent to Fort Kobbe in the Canal Zone, where he joined the 33d Infantry Regiment and served as a battalion commander and later as Regimental Executive Officer. In June 1952, LTC Mabry left command and joined the Operations Branch



John Nolan wearing the Jungle Warfare patch.

(G-3) of U.S. Army Forces Caribbean at Fort Amador, Canal Zone. During this period, he was a key player in establishing the Army's Jungle Warfare Training Center. Thousands and thousands of Soldiers earned the distinctive Jungle Warfare patch, which they proudly wore on the right pocket of their fatigues. One Soldier who successfully completed the training was John Nolan, who would later serve as the first Sergeant Major of the Corps.

Mabry returned to the United States in July, 1953, and, after graduating from the Armed Forces Staff College, served as a staff officer in Headquarters, Continental Army Command. In January 1956, Colonel Mabry was assigned to Korea, where he first served as commander of the 31st Infantry Regiment before becoming the G-3 of I Corps. Colonel Mabry returned to the American soil in 1957 where, after a brief time as the commander of the Third Training Regiment at Fort Jackson, he attended the National War College, from which he graduated in 1958.

After two assignments in the Pentagon, one with the Army and one on the Joint Chiefs of Staff, Mabry returned to the Canal Zone in 1962. He was the J-3 (Plans and Operations Officer) of the Unified Command Headquarters and, in that assignment, was in charge of developing and maintaining up-to-date plans to protect and defend the Canal.

In 1964, when the Panamanians rioted against the Canal Zone, now Brigadier General Mabry was the first U.S. military officer to arrive on scene and he directed the deployment of U.S. troops. Ultimately, the rioters were evicted from the Canal Zone and order was restored.

In August 1965, while still wearing a single star on his collar, Mabry took command of the 1st Armored Division at Fort Hood, Texas. But it was a short-lived command; in January 1966, Army Chief of Staff General Harold K. Johnson selected Mabry to head an evaluation team of 100 officers and civilians. The team's mission was to study the combat effectiveness of four types of maneuver battalions in Vietnam and its nine-volume report became known as the "ARCOV Report."⁵

After returning from Vietnam in April 1966 and resuming command of the 1st Armored Division for three months, Mabry became commanding general of the U.S. Army Combat Developments Experimentation Command at Fort Ord, California.

In April, 1969, now Major General Mabry (he had received his second star in November 1966) deployed to Vietnam, where he served as Chief of Staff and Assistant Deputy Commanding General for U.S. Army Vietnam (USARV). He also assumed command of the Support Troops, (USARV). It was during this tour of duty in Vietnam that MG Mabry faced his greatest legal challenge as the convening authority, in what *Time*, *Newsweek* and *U.S. News and World Report* would call "The Case of the Green Berets."⁶

On a moonless night in June 1969, "three men in unmarked camouflage uniforms backed a small boat out of a slip and turned down a dark slow river toward the South China Sea."⁷ The men were all Green Berets assigned to an intelligence unit in the 5th Special Forces Group. In the boat they had a fourth man. He was Thai Khac Chuyen, a 31-year old Vietnamese civilian whom they had abducted. The Americans suspected that this individual was a North Vietnamese double agent and, under the belief that they were acting on behalf of the U.S. Central Intelligence Agency (CIA), the three Green Berets shot the man in the head with a .45 caliber pistol and tossed him overboard. Since they had attached thick steel chains and two iron wheel rims to him prior to throwing him over, their victim sank immediately.

This murder was uncovered when the CIA station chief in Saigon informed General Creighton Abrams, the top uniformed officer in Vietnam, that some Green Berets probably had executed a Vietnamese agent they suspected was working for Hanoi.⁸ When Abrams questioned Colonel Robert "Bob" Rheault, the senior Green Beret in Vietnam, about the killing, Rheault lied to Abrams; although he knew otherwise, he denied that any Green Berets had been involved in killing Chuyen. Rather, said Rheault, the man was in Cambodia on a mission and would return "in a few days."⁹

After learning that Rheault had lied to him, an incensed General Abrams directed the Army's Criminal Investigation

⁵ U.S. ARMY CTR. OF MIL. HIST., PUB. 70-105-1, HISTORY OF OPERATIONS RESEARCH IN THE UNITED STATES ARMY, VOLUME II: 1961-1973 (2008). ARCOV is an acronym for Army Combat Operations in Vietnam.

⁶ JEFF STEIN, A MURDER IN WARTIME 324 (1992).

⁷ *Id.* at 3.

⁸ *Id.* at 137.

⁹ *Id.* at 143.

Division (CID) to look into the case. After CID had gathered evidence of wrongdoing, an investigation pursuant to Article 32, Uniform Code of Military Justice, concluded that the Green Berets had murdered Chuyen, and that in addition to the three Soldiers in the boat, there was sufficient evidence to charge three more men with complicity in the killing—for a total of six Soldier's being charged.

There was no doubt that the Americans had killed Chuyen, as they admitted to the murder. But, the Green Berets insisted, they had done so on the orders of the CIA. In Major General Mabry's opinion, as the general court-martial convening authority, this 'the CIA ordered us to do it' was nonsense, especially when the CIA denied having given the Green Berets any such directive. Mabry saw the event as a clear-cut case of murder—the killing of a prisoner of war in violation of the Law of Armed Conflict—and he was going to do the right thing and press on with prosecuting, even though more than a few senior leaders in the Army thought that it might be smarter to let the case quietly disappear.

Major General Mabry referred the case to trial by general court-martial, with proceedings set to begin on September 18, 1969. Colonel Wilton B. Persons, the Staff Judge Advocate at USARV, advised the defense counsel that there would be two trials. The first would be of the three lower level Soldiers, followed by a second trial of the three more senior Soldiers, including Colonel Rheault.¹⁰

But it was not to be. Congressman Peter Rodino had previously proclaimed on the floor of the House of Representatives that the Green Berets were “being sacrificed simply to protect the image of career military commanders and CIA officials.”¹¹ According to Rodino, the Army had “mishandled” the case “from the beginning,” and the Soldiers being accused were simply “scapegoats.”¹²

As public support for the Green Berets grew, Congressman Medel Rivers of South Carolina, Chairman of the House Armed Services Committee, threatened to withhold money for President Nixon's planned antiballistic missile construction program and to hold up other much needed funding for the Army.¹³

When the CIA balked at cooperating with the prosecution—by declining to provide any witnesses requested

by the defense—it was all over. On September 29, 1969, Secretary of the Army Stanley Resor announced that “the Central Intelligence Agency, though not directly involved in the incident, has determined that in the interests of national security,” it would not make any of its personnel available for trial.¹⁴ Concluding that the accused Soldiers could not receive a fair trial without CIA cooperation, Resor announced that he was directing that the charges be dismissed immediately.

Major General Mabry was “shocked” and General Abrams was equally dismayed.¹⁵ But there was nothing else to be done. In any event, there was no doubt that the Army was responsible for the death of Chuyen; his widow later received a “death gratuity” of \$6,472, which was equivalent to three years of Chuyen's salary.¹⁶

In December 1970, Major General Mabry left Vietnam and returned to the Canal Zone, where he headed the U.S.

Army Southern Command. During this assignment, he had a professional military association with the President of Panama, Omar Torrijos, under whom Manuel Noriega, served as, the chief of Panamanian military intelligence.¹⁷ Mabry's final assignment began in January 1975, when he took command of U.S. Army Readiness Region V, Fort Sheridan, Ill.



Major General George L. Mabry,

He retired in August and moved to Columbia, South Carolina., where he was active in a variety of community activities. He was an especially strong supporter of youth and veterans groups, and often spoke about his experiences in World War II and current events. Major General Mabry died on July 13, 1990.

His son, George L. Mabry III, followed his father into the Infantry, and retired in 1992 as a lieutenant colonel. Today, he continues to serve our Army as a civilian contractor as part

¹⁰ *Id.* at 350. Colonel Persons was promoted to major general in 1975, and served as The Judge Advocate General until retiring in 1979.

¹¹ *Id.* at 355.

¹² *Id.* at 350. First elected in 1948, Peter Rodino served forty years in the House of Representatives. He is perhaps best known for his time as chairman of the House impeachment hearings that “induced Richard M. Nixon to resign as president.” See generally Michael T. Kauffman, Former Rep. Peter W. Rodino Jr. Is Dead at 95; Led House Watergate Hearings, *N.Y. TIMES*, May 9, 2005, <http://www.nytimes.com/2005/05/09/nyregion/former-rep-peter-w-rodino-jr-is-dead-at-95-led-house-watergate.html?mcubz=1>.

¹³ Stein, *supra* note 6, at 350.

¹⁴ *Id.* at 374.

¹⁵ *Id.* at 373.

¹⁶ *Id.* at 386.

¹⁷ General Manuel A. Noriega subsequently became the “Maximum Leader” of Panama and, on December 15, 1989, announced that a state of war existed between the United States and Panama. This proclamation led directly to Operation *Just Cause* and the overthrow of Noriega by U.S. forces. Noriega subsequently was arrested, flown to Florida, and convicted of various drug trafficking offenses. He died in May, 2017.

of the Army National Guard's training program for brigade and battalion commanders and their staffs.¹⁸

The Corps' personal connection with Major General Mabry is through his daughter, Abigail "Gail" M. Ferrick, who is a claims examiner in the Office of the Staff Judge Advocate, Fort Jackson, South Carolina. Ms. Ferrick began her career as a Department of the Army civilian employee at Fort Jackson in June 1981, and transferred to the post's legal office nearly 25 years ago. She has "no plans to retire."

I still love working with all of these smart young active duty attorneys and our great team of civilian attorneys. They keep me on my toes. Plus I love putting money back into the U.S. Treasury and into military treatment facilities. It is the best job and it is a pleasure to come to work each morning.¹⁹

¹⁸ E-mail from George L. Mabry, to author (May 24, 2017) (on file with author).

¹⁹ E-mail from Abigail M. Ferrick, to author (May 24, 2017) (on file with author).

THE PITFALLS OF NEW STARTS DURING A CONTINUING RESOLUTION

MAJOR RONALD M. HERRMANN*

During the 25-year period covering FY1952-FY1976, when the fiscal year began on July 1, at least one regular appropriations bill was enacted after the fiscal year began. . . . Since FY1977, however, all of the regular appropriations bills were enacted before the beginning of the fiscal year in only three additional instances (FY1989, FY1995, and FY1997).¹

I. Introduction

It is near the end of September and your Deputy Staff Judge Advocate calls and states that he will need you to cover down on the Garrison Commander's weekly command and staff meeting.² At the start of the meeting, the Garrison Commander mentions that prior to leaving her office, she noticed on the news that Congress passed a continuing resolution after failing, yet again, to pass a regular appropriation for the new fiscal year. She adds that, there is uncertainty over how long it will be before a regular appropriation bill is passed for the Department of Defense (DoD).

During the command and staff meeting, the construction of a paved, three-mile running track for the garrison is discussed. The construction was slated to start the previous summer, but a bid protest delayed the project. With the protest resolved, construction is scheduled to start the second week of October. In addition, one of the dining facilities is also mentioned, as it was recently discovered that the building was in need of immediate repairs, a project which had not been previously planned. Uncertainty arises about whether these projects can be initiated during the continuing resolution. The Garrison Commander turns to you for fiscal law advice. How do you respond?

As the above scenario details, continuing resolutions cause uncertainty for government organizations. These uncertainties should be expected and mitigated before they occur, since history seems to repeat itself, especially when it comes to continuing resolutions. The United States government has only started the new fiscal year four times without the need for at least one continuing resolution.³ In

addition, between 1999 and 2013, continuing resolutions, once enacted, remained in place anywhere from "1 to 197 days."⁴ If history shows us anything, the one certainty about continuing resolutions is that some, if not all, agencies within the government will be operating under one at the start of the fiscal year.

The uncertainties that surround continuing resolutions can range from how long it will be before a regular appropriation is passed to what impacts they will have on an organization's mission. One such impact will depend on whether new starts are scheduled, and what constitutes a new start, as Congress generally prohibits "DoD from starting production on a program that was not funded in prior years."⁵ This prohibition can lead to frustrations over new start projects and activities that were planned for the new fiscal year.

Since there are general prohibitions against new starts during a continuing resolution, being able to understand what constitutes a new start makes judge advocates indispensable to their command. This understanding will enable judge advocates to advise on what new projects and activities are restricted during a continuing resolution, thus enabling practitioners to navigate through this area of Fiscal Law. This paper will provide a background on funding the government and continuing resolutions; assist judge advocates in identifying new start prohibitions, analyzing new projects and activities, finding exemptions to new start prohibitions; and identify ways to avoid delays in new projects and activities, such as the construction of the track or the repair of the dining facility.

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¹ JAMES V. SATURNO & JESSICA TOLLESTRUP, CONG. RESEARCH SERV., R42647, CONTINUING RESOLUTIONS: OVERVIEW OF COMPONENTS AND RECENT PRACTICES 1 (2016).

² Military meetings are used to "present and exchange information, solve problems, coordinate action and make decisions" within a command and are attended by those the commander deems necessary to the meeting, usually their staff and subordinate commanders. U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS para. 1-65 (5 May 2014).

³ SATURNO & TOLLESTRUP, *supra* note 1, at 1.

⁴ U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-464T, BUDGET ISSUES: EFFECTS OF BUDGET UNCERTAINTY FROM CONTINUING RESOLUTIONS ON AGENCY OPERATIONS, 3 (2013).

⁵ LYNN M. WILLIAMS & DARREN P. WEES, CONG. RESEARCH SERV., R44636, FY17 DEFENSE SPENDING UNDER AN INTERIM CONTINUING RESOLUTION: IN BRIEF, 2 (2016).

II. Basics of Funding the Government

Each year, Congress must pass several new appropriation acts to fund the agencies and activities of the Federal Government. Currently there are twelve regular appropriations that must be passed yearly, with certain agencies receiving funding from “more than one appropriation act.”⁶ Of these twelve appropriations, the DoD is primarily concerned with two: the appropriation that funds the DoD and the appropriation that covers Military Construction (MILCON).⁷

These yearly appropriations cover a fiscal year, which runs from October 1st through September 30th of the subsequent year.⁸ The fiscal year is a “yearly accounting period” and is “designated by the calendar year in which it ends.”⁹ Thus, if an annual appropriation act funds an agency or program, it must be signed into law by 1 October if agencies are to continue on with normal operations, to include paying “salaries, contracts, and grants.”¹⁰ When an appropriation act is passed by both Houses of Congress, the President then decides to sign or veto the act.¹¹

As mentioned above, it is rare that some, if any, Federal agencies will have regular appropriations by the end of the fiscal year. When an appropriations bill has not been enacted before the end of the fiscal year, one of two things will happen: either the government will be unfunded, and subsequently shutdown, or Congress will pass interim legislation that, upon the President’s signature, will keep government agencies funded temporarily.

A. Funding Gaps

If regular or interim appropriations are not enacted before the start of the fiscal year, then a lapse in appropriations

occurs. A lapse in appropriations creates a funding gap, which is a “period of time between the expiration of an appropriation and the enactment of a new [appropriation].”¹² It is possible for a funding gap to occur at any time, even after the start of the fiscal year, if a previously enacted interim appropriation has expired and either a regular appropriation or an addition interim appropriation has not been passed.¹³ Without either a regular or interim appropriation some, or possibly all, agencies will not have the money to fund operations or pay its employees’ wages.¹⁴

Agencies cannot fund operations or pay salaries due to the prohibitions of “[t]he Antideficiency Act (31 U.S.C. 1341-1342, 1511-1519), [which] generally bars the obligation or expenditure of federal funds in the absence of appropriations.”¹⁵ In 1980, Attorney General Benjamin R. Civiletti issued an opinion to the President that during a funding gap, the only funds that may be used are those needed “to bring about the orderly termination of an agency’s functions, and that the obligation or expenditure of funds for any purpose not otherwise authorized by law would be a violation of the Antideficiency Act.”¹⁶ Attorney General Civiletti, through multiple opinions, reiterated the requirement that federal agencies “begin terminating regular activities upon the occurrence of a funding gap.”¹⁷

Without an appropriation authorizing the payment of employees, they are unable to report for work, as the agencies are prohibited from obligating future monies they do not possess. This leads to essentially a cessation of government operations, minus a few excepted activities,¹⁸ and a “prompt furlough of non-excepted personnel.”¹⁹ However, the uniformed personnel of the military may be required to report for duty.²⁰ The cessation of normal operations will no doubt lead to a period of severe restrictions for the DoD unless legislation, such as a continuing resolution, is enacted to

⁶ 1 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-464SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 2-17 (4th ed. 2016) [hereinafter GAO Red Book I].

⁷ OFFICE OF THE ASSISTANT SEC’Y. OF THE ARMY (FIN. MGMT. & COMPTROLLER), CONTINUING RESOLUTION AUTHORITY GENERAL GUIDANCE, 1 (1998), <http://handle.dtic.mil/100.2/ADA351724> [hereinafter GENERAL GUIDANCE]. Funding for “military personnel, operation and maintenance, procurement, research, development, test and evaluation, and other miscellaneous appropriations” are all contained within the Department of Defense Appropriation Act. *Id.* However, the funds that cover “military construction and family housing construction” are found the Military Construction and Veterans Affairs and Related Agencies Appropriation Act. *Id.*

⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-734SP, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 55 (2005).

⁹ *Id.*

¹⁰ CLINTON T. BRASS, CONG. RESEARCH SERV., RL34700, INTERIM CONTINUING RESOLUTIONS: POTENTIAL IMPACTS ON AGENCY OPERATIONS 3 (2010).

¹¹ GAO Red Book I, *supra* note 6, at 2-18.

¹² 2 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 6-146 (3d ed. 2006) [hereinafter GAO Red Book II].

¹³ JESSICA TOLLESTRUP, CONG. RESEARCH SERV., RS20348, FEDERAL FUNDING GAPS: A BRIEF OVERVIEW 1 (2013).

¹⁴ The impact funding gaps on federal agencies will depend on the number of appropriations, if any, that have been passed. If no appropriations have been passed, then it will affect the Federal Government as a whole. On the other hand, if eleven of the twelve appropriations have been passed, it may only affect one agency. GAO Red Book II, *supra* note 12, at 6-146.

¹⁵ TOLLESTRUP, *supra* note 13, at 1.

¹⁶ The President, 43 U.S. Op. Att’y. Gen. 223, 224 (1980).

¹⁷ TOLLESTRUP, *supra* note 13, at 1.

¹⁸ The excepted activities are outside the scope of this paper. These exceptions include those that are “authorized by law” and in cases of emergencies where life or property are at stake. GAO Red Book II, *supra* note 12, at 6-149-50.

¹⁹ TOLLESTRUP, *supra* note 13, at 1-2.

²⁰ The Honorable Daniel Patrick Moynihan, B-208985, 1982 U.S. Comp. Gen. LEXIS 281, 2 (Comp. Gen. Dec. Oct. 29, 1982).

prevent the funding gap.

B. Continuing Resolutions

One way to avoid a funding gap is through the enactment of a continuing resolution, which provides funds to agencies past the end of a fiscal year.²¹ Once enacted, a continuing resolution will make available interim “authority for specific ongoing activities in the event that regular appropriations have not been enacted by the beginning of the fiscal year or the expiration of the previous [continuing resolution].”²² When a continuing resolution is enacted, it carries “the same force and effect” as if it were a regular appropriations act.²³

The purpose of the continuing resolution is to allow federal governmental agencies to continue operations when a fiscal year begins without a new appropriation. However, these continuing resolutions will have a termination date, ending the availability of their funds.²⁴ The termination date for the continuing resolution will be determined by Congress, and it will end on that date unless the continuing resolution is terminated earlier by the passage of a regular appropriation.²⁵

During a continuing resolution, funds will be provided to federal agencies, but they are not free to spend at will. Thus, it is advised that agency operations be carried out “at minimal levels” as continuing resolutions do not grant a set dollar amount, but instead provide a formula to calculate “the amounts available for continuing programs at minimal levels.”²⁶ The formula is designed so that the rate of execution will be the lowest of either “the amount contained in the President’s budget, the previous year’s rate of execution, or the amount recommended by the House and the Senate Appropriations Committees”²⁷ As various factors affect this formula, each continuing resolution is likely to provide different rates of execution.²⁸ The Office of Management and Budget (OMB) will use the formula to determine the rate of execution for agencies.²⁹ Once calculated, OMB generates detailed instructions, “typically in a bulletin,” on how agencies will spend the funds allotted to

them.³⁰

The money provided under a continuing resolution should not be considered as free money for an agency to spend. Under a continuing resolution, any funds that were expended “are not in addition to funds later provided” and they must be charged to the appropriate accounts when the regular appropriation act takes effect.³¹ For example, this provision was included in the Fiscal Year 2017 continuing resolution in section 107.³²

While continuing resolutions are generally temporary in nature, there are times when the continuing resolution will be passed for an entire year. If this occurs, then the continuing resolution will be treated as a regular appropriation, with “[o]bligation and disbursement rules” being the same for a regular appropriation, unless specific restrictions are placed within the continuing resolution.³³

The most recent year the DoD was impacted by a continuing resolution was the start of Fiscal Year 2017. On September 29, 2016, House Resolution 5325 was passed and signed into law which, among other things, continued operations for the DoD.³⁴ With the enactment of this continuing resolution, appropriations were provided for the DoD through December 9, 2016, or “until the enactment of pertinent appropriations bill,” whichever came first.³⁵ In addition, the rate of execution called for the DoD to receive appropriations “at the levels of, and under the terms and conditions of [the] FY2016 appropriations act, reduced by 0.496%.”³⁶

Agencies must closely examine any new continuing resolutions when they are signed into law. The Government Accountability Office (GAO) stated, that continuing resolutions are “intended by Congress to be temporary stop-gap measures” and their “unique nature” lend themselves to how they should be interpreted.³⁷ As continuing resolutions are temporary in nature, and offer only minimal funding,

²¹ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIR. A-11, PREPARATION, SUBMISSION AND EXECUTION OF THE BUDGET, pt. 4, sec. 123, at 1 (July 1, 2016) [hereinafter OMB CIR. A-11]. It should be noted that continuing resolutions are normally “drafted in the form of a joint resolution rather than a bill.” WILLIAMS & WEES, *supra* note 5, at 2.

²² DEF. FIN. AND ACCT. SERV.-INDIANAPOLIS, REG. 37-1, FINANCE AND ACCOUNTING para. 080401 (May 2014) [hereinafter DFAS 37-1].

²³ Oklahoma v. Weinberger, 360 F. Supp. 724, 726 (W.D. Okla. 1973).

²⁴ DFAS 37-1, *supra* note 22, at para. 080401.

²⁵ GENERAL GUIDANCE, *supra* note 7, at 3.

²⁶ OMB CIR. A-11, *supra* note 21, at pt. 4, sec. 123, 1.

²⁷ DFAS 37-1, *supra* note 22, at para. 080402A.

²⁸ OMB CIR. A-11, *supra* note 21, at pt. 4, sec. 123, 2.

²⁹ *Id.* at 1.

³⁰ WILLIAMS & WEES, *supra* note 5, at 3.

³¹ GAO Red Book II, *supra* note 12, at 8-20-21.

³² Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response Act, Pub. L. No. 114-223, 130 Stat. 857, 910 (2016).

³³ GENERAL GUIDANCE, *supra* note 7, at 3.

³⁴ Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response Act, Pub. L. No. 114-223, 130 Stat. 857, 908 (2016).

³⁵ *Id.* at 909-10. The expiration date was later amended to 28 April, 2017. Further Continuing and Security Assistance Appropriations Act, 2017, Pub. L. No. 114-254, §102, 130 Stat. 1005, 1005-06 (2016).

³⁶ H.R. 5325, 114th Cong. (2016).

³⁷ In the Matter of CETA Appropriation Under 1979 Continuing Resolution, B-194063.2, 58 Comp. Gen. 530, 2 (1979).

“their language must be interpreted accordingly.”³⁸ With this in mind, it is important to note that no two continuing resolutions are the same.³⁹ From agency to agency and year to year, they are all different. They are enacted for different periods of time, have different restrictions, and “may also establish additional terms and conditions.”⁴⁰ For example, dating back to 1999, continuing resolutions have all contained a different formula for the rate of execution.⁴¹ In addition, the continuing resolution may require “different agencies to operate under different rates.”⁴²

However, nearly all continuing resolutions prohibit new starts.⁴³ Indeed, despite the many differences in continuing resolutions, Congress has historically prohibited an agency from initiating any new starts, increasing the scope of any ongoing program, or incurring new multi-year procurements.⁴⁴ Thus, the prohibition on new starts could prevent the construction of the three-mile track or the repairs to the fining facilities during the continuing resolution.

III. New Starts

While the purpose of a continuing resolution is to keep the government functioning, Congress also uses the resolution to limit spending until a regular appropriation is passed. One way to limit spending through a continuing resolution, thereby “preserving Congressional and Presidential prerogatives prior to enactment of appropriations,” is to prohibit the initiation of new starts.⁴⁵ This prohibition prevents the initiation of new projects and activities if, during the previous fiscal year, either the funds or authority for them were not available.⁴⁶

By prohibiting new starts, Congress is able “to protect its prerogative to set full-year funding levels by” controlling the activities of agencies during a continuing resolution.⁴⁷ The continuing resolution is a type of *Band-Aid* to allow Congress to put something in place quickly in order to prevent a government shutdown. With the need to keep the government running while working on a regular appropriation, Congress

does not have the time to argue over which projects to fund, or if an agency will be funded for the exact amount requested. Thus, as there are uncertainties on what final measures will appear in a regular appropriation, it is imperative for Congress to prevent the agency from incurring any new obligations or starting new projects. In the end, without the authorization and funds for an agency to “carry out a program,” there can be no new project or activity.⁴⁸

When a continuing resolution contains prohibitions, such as against new starts, this can affect an agency in ways it would not have been impacted under a regular appropriation.⁴⁹ A new start prohibition can interrupt or postpone any “new projects or activities” government agencies planned on initiating during the new fiscal year.⁵⁰ However, the prohibitions in a continuing resolution will normally not affect any project or activity “funded by multiple year and no-year appropriations.”⁵¹ In addition, the new start prohibitions will not cause a major impact to organizations with few new starts planned for the fiscal year.

On the other hand, the new start prohibitions will have a “significant impact on operations” of those organizations that normally initiate several new projects or activities each year.⁵² For example, the Secretary of the Air Force, Deborah Lee James, estimated that approximately “60 new start or upgrade programs could be impacted” under a continuing resolution for Fiscal Year 2017.⁵³ In addition, in preparation for a Fiscal Year 2016 continuing resolution, the Pentagon listed several new starts that would be halted if a regular appropriation was not passed.⁵⁴ Among the 14 items listed was the “contract to replace Humvees for the Army and Marine Corps” as the program was not funded during the previous fiscal year.⁵⁵

Under the most recent continuing resolution, Section 102 specifically prohibits the DoD from using funds provided by the continuing resolution for “the initiation, resumption or continuation of any project, activity, [or] operation”⁵⁶ In addition, the continuing resolution also prohibits funds from

³⁸ *Id.*

³⁹ OMB CIR. A-11, *supra* note 21, at pt. 4, sec. 123, 2.

⁴⁰ *Id.*

⁴¹ U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-879, CONTINUING RESOLUTIONS: UNCERTAINTY LIMITED MANAGEMENT OPTIONS AND INCREASED WORKLOAD IN SELECTED AGENCIES, 8 (Sept. 2009) [hereinafter UNCERTAINTY LIMITED MANAGEMENT OPTIONS].

⁴² *Id.*

⁴³ OMB CIR. A-11, *supra* note 21, at pt. 4, sec. 123, 2.

⁴⁴ GENERAL GUIDANCE, *supra* note 7, at 3.

⁴⁵ *Id.*

⁴⁶ UNCERTAINTY LIMITED MANAGEMENT OPTIONS, *supra* note 41, at 8.

⁴⁷ BRASS, *supra* note 10, at 5.

⁴⁸ GAO Red Book II, *supra* note 12, at 8-31.

⁴⁹ WILLIAMS & WEES, *supra* note 5, at Summary.

⁵⁰ BRASS, *supra* note 10, at 7.

⁵¹ GAO Red Book II, *supra* note 12, at 8-23.

⁵² *Id.*

⁵³ Anthony Nelson, *60 U.S. Air Force Programs Could be Delayed by CR*, DEF. NEWS (Aug. 10, 2016), <https://www.defensenews.com/story/defense/policy-budget/budget/2016/08/10/60-programs-could-delayed-continuing-resolution/88525546>.

⁵⁴ Jacqueline Klimas, *Pentagon Lists What it Can't do Under a Continuing Resolution*, WASH. EXAMINER, (Aug. 31, 2015), <http://www.washingtonexaminer.com/pentagon-lists-what-it-cant-do-under-a-continuing-resolution/article/2571102>.

⁵⁵ *Id.*

⁵⁶ H.R. 5325, 114th Cong. (2015-2016).

being used to “initiate or resume any project for which appropriations, funds, or other authority were not available during fiscal year 2016.”⁵⁷

This blanket prohibition against new starts, or for those activities for which funds were not available during a previous fiscal year, is quite common in continuing resolutions. A 2009 GAO report examined continuing resolutions for the previous 20 years and found that they “have contained the same nine standard provisions that govern most agencies, programs, and activities,” one of which is the prohibition against new starts.⁵⁸ Routinely, the DoD new start prohibition appears in Section 102 of continuing resolutions.⁵⁹

Once a regular appropriation has been enacted, the prohibition on new starts will cease, as the continuing resolution is no longer in effect.⁶⁰ However, new starts should not be initiated until their authorization has been verified in the new appropriation act.⁶¹ Knowing there is a prohibition against new starts is only half the battle. The next step in the process is determining what constitutes a new start.

A. What Constitutes a New Start

While Congress normally provides a blanket prohibition against new starts in continuing resolutions, trying to ascertain what constitutes a new start can be difficult to determine. Instead of providing additional guidance as to what is or is not a new start, Congress offers little outside of the prohibition.

However, while continuing resolutions may offer little help in determining what constitutes a new start, other sources can be consulted to make this determination. For example, in 1998, the Army offered guidance by stating that “the initiation, resumption, or continuation of any project, subproject, activity, budget activity, program element, and subprogram within a program element for which an appropriation, fund, or other authority was not available during the previous fiscal year” would be considered a new start.⁶²

The GAO has also provided guidance on what would constitute a new start through various opinions. For example, the GAO has held that a program or activity would not fall under the prohibition of a new start if an agency previously had the authority to conduct them.⁶³ However, to fully understand this opinion, a deeper understanding of the meaning of projects and activities is needed.

B. Projects and Activities

When looking at the prohibition on new starts, it is important to know what constitutes a project or activity, as this term may have different meanings depending on the context in which the term is used.⁶⁴ If it is used in “determining which government programs are covered by the resolution, and the rate for operations limit,” which is the most common use, then the term covers “the total appropriation for the account” and not specific activities.⁶⁵ The total appropriation for the account will be determined using the formula provided in the continuing resolution.⁶⁶

To confuse matters, there are times when the term will not refer to the total appropriation, but instead refers to “specific activity.”⁶⁷ When it is used in this manner, it refers to “determining whether an activity was authorized or carried out in the preceding year.”⁶⁸ However, it should be noted that normally a continuing resolution will only address “those projects and activities for which annual funding has expired—on account of which funding is being provided.”⁶⁹

Finally, the term can be used to “prohibit the use of funds to start new programs.”⁷⁰ When this is Congress’s intent, the language normally states that “no funds made available under the resolution shall be available to initiate or resume any project or activity which was not conducted during the preceding fiscal year.”⁷¹ Similar to the second definition provided above, when used in this manner, it will not apply to the full appropriation, but rather to the specific activity.⁷² With knowledge of the various ways projects and activities can be interpreted, GAO and court guidance is still needed to fully understand what actions constitute a violation of the new start prohibitions.

⁵⁷ *Id.*

⁵⁸ UNCERTAINTY LIMITED MANAGEMENT OPTIONS, *supra* note 41, at 34.

⁵⁹ WILLIAMS & WEES, *supra* note 5, at 2.

⁶⁰ GENERAL GUIDANCE, *supra* note 7, at 22.

⁶¹ *Id.*

⁶² *Id.* at 24.

⁶³ To the Chairman, National Advisory Council on Extension and Continuing Education, B-169472, 52 Comp. Gen. 270, 6-8 (1970).

⁶⁴ GAO Red Book II, *supra* note 12, at 8-21.

⁶⁵ OMB CIR. A-11, *supra* note 21, at pt. 4, sec. 123, 1; GAO Red Book II, *supra* note 12, at 8-21-22.

⁶⁶ OMB CIR. A-11, *supra* note 21, at pt. 4, sec. 123, 1.

⁶⁷ OMB CIR. A-11, *supra* note 21, at pt. 4, sec. 123, 1; GAO Red Book II, *supra* note 12, at 8-22.

⁶⁸ *Id.*

⁶⁹ GAO Red Book II, *supra* note 12, at 8-23.

⁷⁰ *Id.* at 8-24.

⁷¹ *Id.*; See Chairman, National Advisory Council on Extension and Continuing Education., B-169472, 52 Comp. Gen. 270 (1972); Secretary of the Interior, B-125127, 35 Comp. Gen. 156 (1955).

⁷² GAO Red Book II, *supra* note 12, at 8-24.

C. GAO and Court Guidance on New Start Prohibitions

On several occasions, the GAO has provided opinions on whether certain actions violated new start prohibitions. For example, the GAO has found that when funds for the construction of buildings were previously available, it was not a violation of the new start prohibition to begin work on the plans and specifications during a continuing resolution.⁷³ This is true even though no construction had occurred in the prior fiscal year.⁷⁴ Thus, if funds were generally available to start construction in a previous fiscal year, then it was not a violation of the new start provision to prepare plans and specifications, despite no actual construction related activity taking place in the prior fiscal year.⁷⁵

In other examples, the GAO found that payments to the UN were properly payable from appropriations for International Organizations and Peacekeeping as the language was “sufficiently broad” to have supported this activity with prior year funds.⁷⁶ The GAO also determined that a yearly inspection to evaluate certain programs and projects, which ended upon the distribution of required reports, was not a new project or activity in violation of the continuing resolution.⁷⁷ The GAO determined that as discretionary funds were used, it was not a new project or activity, but rather a regularly conducted activity, even though the evaluation and reports that followed occurred newly again each year.⁷⁸ In this case, the term “new project or activity” meant an “individual program rather than the total appropriation.”⁷⁹

The courts have also had an opportunity to weigh in on new start prohibitions. For example, *In re Uncle Bud's* is a case where Congress imposed a new requirement for the “U.S. Trustee to impose and collect a new quarterly fee as part of the bankruptcy process.”⁸⁰ This took place during a continuing resolution, with a new start prohibition, and some debtors claimed the collection of the fee violated that provision.⁸¹ The court ruled against the debtors, finding that while the collection of this particular fee was a new activity,

the actual collection of fees in general by the U.S. Trustee had been one of its historical functions.⁸² In addition, the court found that the new start prohibition was “to prohibit expenditures (such as hiring personnel, replacing computers, etc.)” unless those activities had been authorized in the prior fiscal year.⁸³ Here, the collection of the new fee did not obligate money, but rather, deposited money “into the United States Trustee System Fund, pursuant to 28 U.S.C. 589a.”⁸⁴ In the end, the Court held that it was not a new activity, but rather a “continuation of activities” from the previous fiscal year.⁸⁵

Another case occurred in 1980 when “FTC staff undertook an investigation into allegations that Boise was receiving unjustified price discounts from its suppliers,” thereby violating Federal law.⁸⁶ Boise argued that the initiation of the investigation and subsequent fine violated the new start provisions of the continuing resolution.⁸⁷ Their argument hinged on the premise that the investigation constituted a new activity, which was prohibited by the continuing resolution.⁸⁸ The court found that the FTC was acting under the authority of an existing program and that it was not the intent of Congress to prevent the FTC from carrying out one of its assigned functions.⁸⁹ While the GAO and courts have offered guidance with respect to new starts, individual agencies also offer guidance.

D. Agency Guidance for New Starts Under a Continuing Resolution

Guidance for operating under a continuing resolution not only comes from the GAO, but also from individual agencies. Some agencies have provided guidance on operating under a continuing resolution which “range from highly elaborate to more ad hoc.”⁹⁰ One such agency that provides guidance is The Office of Management and Budget (OMB). This guidance is normally produced on an annual basis in *Circular No. A-11* which, in part, covers operations under a continuing resolution.⁹¹ The OMB also issues supplemental bulletins to

⁷³ To Lt. Gen. F.T Unger, B-178131, 1973 LEXIS 1989, 3 (Comp. Gen. Dec. Mar. 8, 1973); See also GAO Red Book II, *supra* note 12, at 8-24.

⁷⁴ GAO Red Book II, *supra* note 12, at 8-24.

⁷⁵ To Lt. Gen. F.T Unger, B-178131, 1973 LEXIS 1989, 3 (Comp. Gen. Dec. Mar. 8, 1973).

⁷⁶ The Honorable Harold Rogers, B-255529, 1994 LEXIS 111, 10 (Comp. Gen. Dec. Jan. 10, 1994).

⁷⁷ To the Chairman, National Advisory Council on Extension and Continuing Education, B-169472, 52 Comp. Gen. 270, 7-8 (1970).

⁷⁸ *Id.* at 6-7.

⁷⁹ CONT. & FISCAL L. DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR & SCH., U.S. ARMY, THE FISCAL LAW DESKBOOK 9-12 (2016) [hereinafter THE FISCAL LAW DESKBOOK].

⁸⁰ GAO Red Book II, *supra* note 12, at 8-25; see *In re Uncle Bud's Inc.*, 206 B.R. 889, 897 (Bankr. M.D. Tenn. 1997).

⁸¹ GAO Red Book II, *supra* note 12, at 8-25.

⁸² *In re Uncle Bud's Inc.*, 206 B.R. 889, 897 (Bankr. M.D. Tenn. 1997).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ GAO Red Book II, *supra* note 12, at 8-25.

⁸⁶ *Boise Cascade Copr. v. FTC*, 498 F. Supp. 772, 776 (D. Del. 1980).

⁸⁷ *Id.* at 780. Specifically, the provision stated: “[t]hat none of the funds made available . . . may be used for the final promulgation of trade regulation rules . . . nor to initiate any new activities. H.J. Res. 514, 96th Cong., 2d Sess., 126 Cong. Rec. H2202 (daily ed. Mar. 26, 1980).” *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ BRASS, *supra* note 10, at 9.

⁹¹ *Id.* at 8.

provide additional guidance.⁹² To alleviate any risk of violating the new start prohibitions, consult *Circular No. A-11* and OMB's occasional bulletins during a continuing resolution.⁹³

Likewise, the DoD Finance Regulation provides guidance for new starts under a continuing resolution. For example, it states that new starts cannot be initiated unless the "Office of the Secretary of Defense" provides otherwise.⁹⁴ The regulation specifies that minor construction funded by Army Operational and Maintenance (O&M)⁹⁵ funds "is not considered to be a new start."⁹⁶ Finally, the Army provides in depth guidance for new starts under a continuing resolution.⁹⁷ Although nearly two decades old, this guidance is still cited by several sources.⁹⁸

IV. Guidance for Judge Advocates Navigating Through New Starts by Fund Type

The guidance issued by the Army appears to be the most robust compared to other sources available and should be consulted by judge advocates sorting through new start issues. The Army's guidance breaks down what constitutes a new start by each category of funds. Under the Military Personnel appropriation, a new start activity would include money for bonuses or other entitlements that had not been approved in prior fiscal years.⁹⁹ Thus, if there was a new reenlistment bonus authorized for the new fiscal year in the National Defense Authorization Act, it could not begin during a continuing resolution as it would violate the new start prohibition.

For O&M funds, the Army guidance states that their normal use can continue, while confirming that minor construction funded with O&M funds would not be considered a new start as previously mentioned, and changes to O&M programs would "generally" not violate new start prohibitions.¹⁰⁰ O&M funds are usually discretionary and cover a wide array of projects and activities that are at a commander's discretion. As seen above, the GAO does not apply discretionary funds to new start prohibitions. Thus, if a

project or activity could have been funded in the previous fiscal year with O&M funds, then that same project or activity could be undertaken during a continuing resolution, even if previously not contemplated.

For Procurement and Research, Development, Test and Evaluation Appropriations (RDTE), the new start prohibitions would "apply to the execution of new investment items" not previously funded.¹⁰¹ This includes "new P-1 budget line items or new projects with existing P-1 line items" for procurements and "new R-1 budget line items" for RDTE, including those with "a program element and subprogram element."¹⁰² Thus, as seen from the above GAO cases, anything that was previously funded "or for which funding was provided in prior years and is still available for obligation," such as items funded with multi-year appropriations, would not violate the new start prohibition.¹⁰³ It should be noted that the prohibition on new starts applies "at the DoD level, not at the Service level (e.g., if the Army intends to begin procurement of a piece of equipment already being procured by another DoD Service or agency, this would not be considered a new start for the Army)."¹⁰⁴

Military Construction (MILCON)¹⁰⁵ is its own appropriation, separate from the normal appropriation for the DoD.¹⁰⁶ Thus, a continuing resolution may impact MILCON in a different way, as "Title 10 U.S.C. § 114 requires that MILCON appropriations be authorized by law."¹⁰⁷ MILCON authorizations will be "normally provided through the NDAA" for specific projects.¹⁰⁸ Under a continuing resolution, initiation of new MILCON projects can begin provided the NDAA for that fiscal year has been passed, otherwise they too would be prohibited.¹⁰⁹

In addition, the prohibition against new starts would include MILCON projects that were not previously funded in the prior fiscal year.¹¹⁰ There is a notable difference for minor construction funded with O&M funds versus minor construction funded with MILCON. As previously seen, minor construction with O&M funds would not be considered a new start, whereas any MILCON funded minor construction

⁹² *Id.*

⁹³ *Id.*

⁹⁴ DFAS 37-1, *supra* note 22, at para. 080402.

⁹⁵ Operation and Maintenance funds are authorized "[f]or expenses, not otherwise provided for, necessary for operation and maintenance of the Army . . ." Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2335 (2015).

⁹⁶ DFAS 37-1, *supra* note 22, at para. 080402.

⁹⁷ BRASS, *supra* note 10, at 9.

⁹⁸ See BRASS, *supra* note 10, at 9; THE FISCAL LAW DESKBOOK, *supra* note 79, at 9-12; DFAS 37-1; *supra* note 22, at para. 080403.

⁹⁹ GENERAL GUIDANCE, *supra* note 7, at 4.

¹⁰⁰ *Id.* at 5.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Military construction projects are any type of construction, with an approved cost that is more than \$3 million. THE FISCAL LAW DESKBOOK, *supra* note 79, at 8-46. These projects are "specifically authorized" by Congress. *Id.* at 8-26-27.

¹⁰⁶ GAO Red Book I, *supra* note 6, at 2-17-18.

¹⁰⁷ WILLIAMS & WEES, *supra* note 5, at 6.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ GENERAL GUIDANCE, *supra* note 7, at 5.

would constitute a new start and cannot be initiated until a regular appropriation is passed.¹¹¹ Also, as previously noted, it is not a violation of new start prohibitions to conduct planning and design under a continuing resolution, and funds for those tasks may be executed.¹¹² Finally, there are no new start prohibitions if a military construction project is expanded.¹¹³ While there is some leeway for undertaking new projects and activities during a continuing resolution, inevitably, many projects will be impacted. However, agencies can still take two courses of action to mitigate the effects of a new start prohibition for planned projects and activities.

V. Mitigating New Start Prohibitions

There are very few things agencies can do to limit the impact of new start prohibitions on certain planned projects or activities. The first thing agencies can do is to request an anomaly. However, for the practitioner in the field, anomalies will be of little assistance, as they are generally for large requirements.

Anomalies are provisions added to continuing resolutions to limit or remove “potential impacts” that come with them.¹¹⁴ Thus, in the absence of a regular appropriation, an anomaly could allow for certain new starts to be initiated.¹¹⁵ There are three different theories under which an agency can seek an anomaly, one of which is to allow for the initiation of select new starts.¹¹⁶ For example, the funding of a presidential transition is one obligation not normally funded in the fiscal year preceding an inauguration, that could be addressed in a continuing resolution through an anomaly.¹¹⁷ This example was specifically addressed in Section 125 of the first Fiscal Year 2017 Continuing Resolution.¹¹⁸

Thus, when agencies feel they need “authority to undertake new projects or activities” during a continuing resolution, they should seek an anomaly.¹¹⁹ The request can either be sent by the agency “directly to Congress,” or it can be routed “through the President and OMB.”¹²⁰ While anomalies seem to be the answer to avoid new start prohibitions, in reality, the granting of anomalies is rare.¹²¹ For example, in the 2017 Continuing Resolution, there was

only one anomaly granted to the DoD, which was approved and codified in Section 221.¹²²

Anomalies should not be counted on as a practical means of initiating new start projects during a continuing resolution. Thus, the second, and more reasonable approach, would be for the judge advocate to remain vigilant during the planning process for new projects and activities. The judge advocate should be attentive for new projects and activities, specifically those that are likely to occur at the start of a fiscal year. Those projects should be analyzed to determine whether they are likely to invoke new start prohibitions under a continuing resolution. The analysis should include an evaluation of what the projects are, and the source of their funding. If the new project or activity is likely to violate the new start prohibition, the judge advocate can alert the commander to the potential impacts on the project if a continuing resolution is enacted. If this warning is received during the planning stages, the start of those new projects or activities could be pushed to later in the fiscal year to avoid prohibitions contained in continuing resolutions.¹²³ While moving the start date to later in the fiscal year may not be the ideal solution, it is a better option than canceling those activities due to a lack of funding.

Knowing what projects or activities are set to begin at the start of the fiscal year, and planning ahead of time for fiscal uncertainties, will help alleviate some impacts of a continuing resolution. By looking at any new project or activity that may be planned, and analyzing the guidance that has been provided by various sources, the practitioner can advise the commander early on of the possible need to adjust the timeline of the project.

VI. Conclusion

While continuing resolutions will have an impact on agencies, not all projects and activities will be affected by the new start prohibitions. For example, the construction of the three-mile running track in the above hypothetical would not be considered a new start, as this project was originally authorized to begin during the previous fiscal year. Assuming the construction had not been planned for the prior fiscal year, it would still not violate the new start prohibition if the project

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ BRASS, *supra* note 10, at 13.

¹¹⁵ WILLIAMS & WEES, *supra* note 5, at 3.

¹¹⁶ *Id.* at 4. Additionally the agency could also request “changes in the number of certain end items to be purchased (e.g. a particular type of airplane or ship), and/or changes in the amount of budget authority provided for certain activities such as [Overseas Contingency Operations].” *Id.*

¹¹⁷ UNCERTAINTY LIMITED MANAGEMENT OPTIONS, *supra* note 41, at 10.

¹¹⁸ Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response Act, Pub. L. No. 114-223, 130 Stat. 857, 912-13 (2016).

¹¹⁹ BRASS, *supra* note 10, at 13.

¹²⁰ *Id.*

¹²¹ UNCERTAINTY LIMITED MANAGEMENT OPTIONS, *supra* note 41, at 9.

¹²² The anomaly approved stated “The Secretary of Defense may develop, replace, and sustain Federal Government security and suitability background investigation information technology system requirements of the Office of Personnel Management at a rate for operations of \$95,000,000.” H.R. 5325, 114th Cong. (2016).

¹²³ WILLIAMS & WEES, *supra* note 5, at 7 (noting that the almost yearly reoccurrence of continuing resolutions has led senior military officials to plan for operating outside the first quarter of the fiscal year).

was funded with O&M appropriations. In addition, the repair of the dining facility would also be financed through O&M funds, and thus would not constitute a new start. However, a continuing resolution would likely impact several other projects and activities within an organization.

By applying the following three principles and a little common sense, violations of the new start prohibition can be avoided. First, if the new project or activity could have been initiated during the previous fiscal year, then it can be initiated during a continuing resolution. Second, funds that are discretionary in nature, such as O&M funds, can also be used without violating the new start prohibition. Third, those projects or activities which require Congressional approval, such as a MILCON, cannot be initiated during a continuing resolution.

Continuing resolutions can offer uncertainty for any organization. However, a judge advocate, who understands the prohibition on new starts, and what new projects and activities can be initiated during a continuing resolution, can alleviate the uncertainty their commanders may face. This knowledge will help make judge advocates indispensable to commanders.

So You're Saying There's a Chance? Navigating Evaluation Appeals

Major David L. Peterson* & Major Houston John Goodell**

*Let the future tell the truth, and evaluate each one according to his work and accomplishments.
The present is theirs; the future, for which I have really worked, is mine.¹*

I. Introduction

A Relief for Cause Officer Evaluation Report (OER) sounds the death knell for any Army officer's career. The process of preparing, serving, and appealing a relief for cause OER should include the involvement of attorneys from a variety of legal backgrounds. The legal assistance attorney, brigade judge advocate (BJA), trial counsel (TC), defense counsel (DC), and administrative law attorney all play crucial roles in the evaluation reporting process. These attorneys are charged with making sure all parties understand the Evaluation Report Redress Program in order to balance due process with the commander's intent and mission requirements.²

This article will analyze the Evaluation Report Redress Program and outline the processes and procedures in order to help attorneys advocate for their clients, assist rating officials, and advise the command. The legal assistance attorney or defense counsel (DC) advises the rated officer regarding the evaluation report redress program³ and possible subsequent actions available to the command.⁴ The BJA, TC, or administrative law attorney sits in discussions with the command team in order to ensure the evaluation report is completed correctly and is properly served on the rated officer.⁵ These legal advisors help ensure subsequent actions

taken by the command are properly executed, and, if necessary, a show-cause board is initiated.⁶ Understanding the applicable law and regulation will ensure justice and fairness is achieved by all parties involved. However, before looking at the program, it is necessary to review the current state of military boards, specifically Officer Separation Boards (OSB) and Enhanced Selective Early Retirement Boards (E-SERB), which have played a prominent role in force shaping in the Army's recent past.

II. Background

For the last several years, almost every issue of the *Army Times* seemingly contained at least one article or editorial about Army downsizing.⁷ Until recently, the Army planned to shrink its ranks by almost 60,000 Soldiers over the next three years.⁸ After growing in size to 570,000 active-duty Soldiers in 2008 at the height of the war in Iraq, the Army dropped to fewer than 520,000 Soldiers in 2014 and ended fiscal year 2015 with 491,000 Soldiers.⁹ The plan to continue downsizing came to a screeching halt as the priorities of a new Congress and President changed.¹⁰ Across the force, the active component end-strength authorization will increase by 16,000 to 476,000; the Army National Guard will grow by 8,000 to 343,000, and the Army Reserve will rise by 4,000 to

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¹ Nikola Tesla on patent controversies regarding the invention of Radio and other things, as quoted in "A Visit to Nikola Tesla" by Dragislav L. Petković in *Politika* (April 1927).

² See generally, U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM ch. 4 (4 Nov. 2015) [hereinafter AR 623-3]. The Evaluation Report Redress Program consists of several elements at various levels of command. The program is both preventive and corrective, in that it is based upon principles established to prevent alleged injustices or regulatory violations and provides a remedy for correction if the injustices or violations are shown to have occurred. The program consists of two elements. The first element is based on appropriate communication fostered via the officer support form (DA Form 67-10-1A), and the second element includes various regulatory requirements, such as requiring each evaluation report to stand on its own without reference to facts and circumstances occurring prior or subsequent to the rating period and the prohibition against command influence on rating officials during the preparation of the Officer Evaluation Report (OER). *Id.*

³ See generally, U.S. DEP'T OF ARMY, PAM. 623-3, EVALUATION REPORTING SYSTEM ch. 6 (10 Nov. 2015) [hereinafter DA PAM 623-3].

⁴ See generally U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005) (RAR 6 Sept.

2011) [hereinafter AR 635-200] and U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006) (RAR 13 Sept. 2011) [hereinafter AR 600-8-24].

⁵ See generally U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005) (RAR 6 Sept. 2011) [hereinafter AR 635-200] and AR 600-8-24, *supra* note 4. An officer elimination basis may be substandard performance of duty, misconduct, or derogatory information. A relief for cause OER is considered derogatory information and may subject the officer to a board of inquiry where he or she will be required to show cause for retention. *Id.* Within the military justice and administrative law realm, the terms "board of inquiry" and "show-cause board" are used interchangeably, but mean the same thing.

⁶ *Id.*

⁷ Tom Vanden Brook, *Army Plans to cut 40,000 troops*, ARMY TIMES; July 7, 2015, <http://www.armytimes.com/story/military/pentagon/2015/07/07/army-plans-to-cut-40000-troops/29832955/> [hereinafter *Army Plans*].

⁸ Jim Tice, *Drawdown Update: More involuntary separations needed*, ARMY TIMES; Oct. 26, 2015, <http://www.armytimes.com/story/military/careers/army/2015/10/27/drawdown-update-more-involuntary-separations-needed/73374634/> [hereinafter *Drawdown Update*].

⁹ *Id.*

¹⁰ *Army is Hiring: Army Increases End Strength by 28,000 Soldiers*, U.S. ARMY (Mar. 20, 2017), https://www.army.mil/article/184431/army_is_hiring_army_increases_end_strength_by_28000_soldiers citing National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-238, 130 Stat. 2000 (2016).

199,000.¹¹ This 28,000 surge means the total Army will number 1,018,000 Soldiers.¹²

Indeed, the Army, like all the military services, fluctuates in size to meet the needs of the nation in times of war and peace.¹³ There is ample reason to suspect that trend will continue in the future. To that end, it is worth considering how this past drawdown in the force structure occurred, as prior procedures may well be used for future drawdowns. Based on the most recent drawdown, the Army appears to have little patience with Soldiers who cannot deploy or perform their operational duties.¹⁴

The Officer Separation Board (OSB) and the Enhanced Selective Early Retirement Board (E-SERB) are tools available to meet the need to cut numbers among the ranks of officers outside of natural attrition.¹⁵ The Army Deputy Chief of Staff for Personnel (Army G-1) believes that every single Soldier needs to be available for deployment and be able to do their jobs.¹⁶ Both the Army G-1 and the Army Chief of Staff consider military readiness to be the service's number one priority and feel strongly it is necessary to recruit Soldiers to meet that mission.¹⁷ The only way to recruit a deployable force is to make openings available in a shrinking force for officers who can deploy. Separating officers based on minor misconduct or poor performance is a simple way to cull the

force and create openings to recruit additional deployable officers and retain those most qualified.

Early in 2014, the Army convened the first OSBs and E-SERBs.¹⁸ These boards reviewed the records of nearly 8,000 majors for possible separation or retirement as part of the ongoing effort to drawdown the force.¹⁹ Of the 550 majors identified for involuntary separation in 2014, almost eighty percent had a negative performance evaluation or other derogatory information in their record;²⁰ however, these separation and early retirement boards provide a written rationale in each instance regarding their decisions in order to avoid the perception of arbitrary and capricious results.²¹ Also, these boards will reconsider any new evidence provided by the Soldier and may accordingly change their findings in the Soldier's favor.²²

Future downsizing requirements may require OSBs and E-SERBs in the Army Competitive Category (ACC).²³ While it has been Army policy to only look at ACC captain and major year groups once for separation or early retirement,²⁴ officers will go through promotion reviews at those grades that could also result in an involuntary separation if a separation board is initiated by the promotion board.²⁵ What this essentially means is that any officer, including a captain or major who has already survived the OSB or E-SERB, may still be selected for a show cause board.²⁶ This is because the promotion board process is still in place to eliminate those not

¹¹ *Id.*

¹² *Id.*

¹³ <http://historyinpieces.com/research/us-military-personnel-1954-2014#fn-5821-fn1>.

¹⁴ Jim Tice, *Selective early retirement boards to meet in '16*, ARMY TIMES; Dec. 20, 2015, <http://www.armytimes.com/story/military/careers/army/2015/12/20/selective-e-early-retirement-boards-meet-16/77305998/> [hereinafter *Selective Early Retirement*].

¹⁵ The Officer Separation Board (OSB) and the Enhanced Selective Early Retirement Board (E-SERB) were used to cull the force during the most recent drawdown in Soldiers and may well be used again as technique to shrink the size of the Army. *Drawdown Update*, *supra* note 8.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Military Personnel Message, 13-357, U.S. Army Human Res. Command, subject: FY14 Officer Separation Boards (OSB) and (Enhanced) Selective Early Retirement Boards (E-SERB), Major (MAJ), Army Competitive Category (ACC) (6 Dec. 2013) [hereinafter MILPER Message 13-357]. Notably, OSBs and E-SERBs are conducted at the same time for the same year group. The only difference is the officer's status at the time the board is convened. If an officer has eighteen years of active federal service on the date the board is scheduled to convene, he or she will be considered by the E-SERB. An officer who has less than eighteen years of active federal service on the scheduled board date will be considered by the OSB. Officers who appear on either list will exit the Army no later than the first day of the tenth month following the approval of the board's results. For example, if an officer is selected for separation by a board approved in January, he or she would be required to leave the Army by the first day of November. E-SERB selectees will retire, and OSB selectees will separate without retirement.

¹⁹ Brendan McGarry, *Army Officer Firings Blamed on Bad Evals, Not Race*; ARMY TIMES; Aug. 29, 2014, <http://www.military.com/daily-news/2014/08/29/army-officer-firings-blamed-on-bad-evals-not-race.html#.VkslNF2Wn0c.mailto> [hereinafter *Bad Evals*]. See also David Vergun, *Dailey: Non-deployable Soldiers No.1 problem*, DATE, http://www.army.mil/article/158897/Dailey_Non_deployable_Soldiers_No_1_problem/ [hereinafter *Non-deployable*].

²⁰ *Id.* As part of a presentation to Army Chief of Staff, General Raymond Odierno by Human Resource Command on 10 July 2014, 31 slides depicted a thorough statistical evaluation of the FY14 Major OSB and E-SERB, indicating greater weight given to derogatory information located in the officer's My Board File (MBF). *Id.*

²¹ See E-mail from the Army Review Boards Agency Office of the Legal Advisor, to author (Feb. 16, 2016) (on file with authors) [hereinafter ARBA LEGAD email].

²² *Id.*

²³ *Drawdown Update*, *supra* note 8. The Army Competitive Category consists of 34 branch and functional areas. The category consists of traditional warfighting branches such as Infantry, Artillery, Armor, Special Forces, etc., and functional areas such as Information Operations, Strategic Intelligence, Public Affairs, Force Management, etc. The Army Judge Advocate General's, Medical, and Chaplain Corps are not considered part of the Army Competitive Category. U.S. DEP'T OF ARMY, PAM 600-3, COMMISSIONED OFFICER PROFESSIONAL DEVELOPMENT AND CAREER MANAGEMENT ch. 3 (3 Dec. 2014) [hereinafter DA PAM 600-3].

²⁴ *Id.*

²⁵ *Id.* See also DA PAM 600-3.

²⁶ AR 600-8-24, *supra* at note 4.

considered upwardly mobile or able to promote through the ranks with their peers due to misconduct or derogatory information contained on an OER.²⁷

In the future, no officer seems immune to the possibility of an OSB or E-SERB, as even officers in the rank of lieutenant colonel and senior warrant officers have recently faced separation and early retirement boards.²⁸ “[These] separations are needed to provide promotion opportunity for other officers coming up through the ranks,” according to the current Deputy Chief of Staff for Army G-1, LTG James McConville.²⁹ “If lieutenant colonels are passed over twice and are allowed to stay until 28 years, the maximum tenure for O-5s, then that will not allow us to get the promotion rates for other officers where we want them to be.”³⁰ Furthermore, Chief Warrant Officer Four (CW4) and Chief Warrant Officer Five (CW5) officers will also be evaluated in order to make vacancies for others to promote to those ranks.³¹

Finally, early in 2015, the Army stopped its long-standing practice of masking³² junior OERs once an officer is promoted to captain or chief warrant officer three (CW3).³³ The new policy is in effect and applies to all recent and past OERs submitted to the Human Resources Command (HRC) for placement in an officer’s official file.³⁴ Previously masked reports have been moved from the restricted section of personnel files to the performance section, which is viewable by selection boards.³⁵ Clearly, now, more than ever, it is crucial to understand how derogatory information in an officer’s file affects his or her career and how important it is to exercise all available options to ensure accurate information is maintained in the file. Gone are the days of simply arguing a negative OER is a difference in opinion. The policies of today’s Army clearly indicate that every OER counts and an OER containing derogatory information could very well end a career.

²⁷ *Drawdown Update*, *supra* note 8.

²⁸ *Id.* Under 10 U.S.C. § 638, even Colonels and General Officers can be selected in the Army for early retirement. See <http://dopma-rpompa.rand.org/selective-early-retirement-or-discharge.html>.

²⁹ *Id.*

³⁰ *Id.* Traditionally, a Regular Army officer who holds the grade of lieutenant colonel will be allowed to serve until he or she completes 28 years of service assuming they are not recommended for promotion. The statute states, however, that the officer can be retired early and that is where the E-SERBs come into play. 10 U.S.C. § 633(a) (2015).

³¹ *Drawdown Update*, *supra* note 8.

³² Jim Tice, *New policy: Boards will see junior officer black marks*, ARMY TIMES; Feb. 2, 2015, <http://www.armytimes.com/story/military/careers/army/2015/02/02/-army-evaluations-masked-rule-change/22739073/> [hereinafter *New policy*]. Masking is a term used for moving OERs for officers in the grade of second lieutenant, first lieutenant, and warrant officer one from the permanent to the restricted portion of the Army Military Human Resource Record when selection or promotion criteria has been met. Masked reports maintained in the restricted section are normally not seen by boards. The masking process was adopted nearly 20 years ago so that officers would not be penalized late in their careers for black marks or mediocre ratings they received as lieutenants or WO1s while they were adjusting to military life. Once the officer passed through their first

III. The Relief for Cause Officer Evaluation Report Process

A. The Relief for Cause OER

While an officer can receive a negative OER for poor performance (which might also trigger a board of inquiry),³⁶ the relief for cause OER guarantees an officer is thrust into proceedings where he or she must fight for retention in the Army. When an officer is officially relieved of duties, whether due to misconduct or poor performance, a Relief for Cause OER is drafted and submitted to an officer’s file.³⁷ This type of OER requires referral to the rated officer. Referral means the officer is officially served a copy of the OER to review and, if necessary, provide comments to the rater and senior rater.³⁸ It is imperative for attorneys to begin their analysis of the OER by first examining the process of drafting the OER and serving it on the rated officer before evaluating the substantive information contained in the OER. The regulation outlines a number of steps to take in order for the OER to satisfy regulatory requirements.³⁹

1. Completing the OER

The first thing to identify in the OER redress process is who recommended the Relief for Cause OER. Did a member of the supervisory chain, i.e., the Rater or the Senior Rater, recommend the relief, or did the recommendation come from someone outside the rating chain such as the commanding general?⁴⁰ If someone other than the rater recommended the relief for cause, a mandatory review of the OER will be required by someone usually senior to the senior rater and commonly outside the standard rating chain.⁴¹ If a relief for cause OER has been directed, the completed OER will be referred to the rated Officer for further action.⁴²

centralized competitive promotion, either captain or chief warrant officer three, those reports would be placed in the restricted section of the file where they would not be seen by the highly competitive field-grade boards. *Id.* See also Military Personnel Message, 15-036, U.S. Army Human Res. Command, subject: Unmasking of Army Evaluation Reports (6 Feb. 2015) [hereinafter MILPER Message 15-036].

³³ *Drawdown Update*, *supra* at note 8.

³⁴ *Id.* See also, U.S. DEP’T OF ARMY, DIR. 2015-11, UNMASKING OF ARMY OFFICER EVALUATION REPORTS (30 JAN. 2015).

³⁵ *Drawdown Update*, *supra* at note 8.

³⁶ AR 600-8-24, *supra* at note 4.

³⁷ AR 623-3, *supra* note 2, ch.3.

³⁸ AR 623-3, *supra* note 2, ch. 2.

³⁹ AR 623-3, *supra* note 2, ch. 4.

⁴⁰ *Id.*

⁴¹ AR 623-3, *supra* note 2, ch. 2.

⁴² AR 623-3, *supra* note 2, ch. 3.

2. The Referral⁴³

The referral process ensures the rated officer knows the OER contains negative or derogatory information and affords the rated officer the opportunity to review and submit comments, if desired.⁴⁴ At this stage, the legal assistance attorney or DC may assist the rated officer. The senior rater refers a copy of the completed OER, signed and dated by the rating officials, to the rated officer for acknowledgement and comment.⁴⁵ In addition, a referral memorandum signed by the senior rater accompanies the OER.⁴⁶ The senior rater may notify the officer of the referred OER through the Evaluation Entry System (EES),⁴⁷ through email, preferably with read receipt, or via certified mail to the officer's last known mailing address.⁴⁸ It is critical for the rating chain to document the rated officer's receipt or acknowledgment of the OER.⁴⁹ If the rated officer cannot be contacted, the actions taken by the rating officials to contact the rated officer should be meticulously documented before forwarding the OER to Headquarters, Department of the Army (HQDA) without the rated officer's signature.⁵⁰

The rated officer is allowed a reasonable amount of time to provide comments.⁵¹ Remember that these comments do not represent a request for a commander's inquiry or an appeal.⁵² The legal assistance attorney or DC assists in drafting concise and factual comments, which should be limited to matters directly related to the performance and potential captured on the OER.⁵³ Ideally, the rated officer presents significant new facts about their performance that could affect the overall evaluation.⁵⁴ Once the officer has signed the OER and provided any written comments, the senior rater reviews the comments and determines if further action by the rating chain would be appropriate.⁵⁵ The senior

rater may refer the comments to the other rating officials who, in turn, may reconsider their evaluations of the rated officer.⁵⁶ Attorney-advisors to the rating chain need to make sure senior raters do not pressure or influence another rating official into making or not making corrections.⁵⁷ Any rating official may elect to improve the evaluation as a result of the comments provided by the rated officer, but the evaluation may not be reduced or worsened.⁵⁸ If the OER is changed but still requires referral to HQDA, the OER is again served on the rated officer for acknowledgement and the opportunity to provide new comments.⁵⁹ The senior rater ultimately determines if or when the OER is ready for subsequent forwarding. In the case of relief for cause OERs, the senior rater provides an original of the latest OER with acknowledgement, the rated officer's comments, and the referral memorandum to the mandatory reviewing officer.⁶⁰

3. The Mandatory Review

Army regulation states when an officer receives a relief for cause OER, additional review is required.⁶¹ This is a point of confusion within the regulation and corresponding pamphlet, as both indicate when a mandatory review and a supplementary review is required and the language regarding both is substantially similar. Accordingly, the mandatory review instructions should be followed.⁶²

Relief for Cause OERs come from primarily three sources—the rater, intermediate rater (for Judge Advocate General's Corps, Chaplain Corps, and Army Medical Department), or the senior rater.⁶³ The mandatory review is normally the inherent responsibility of the senior rater.⁶⁴ However, a review of the evaluation report is required by an officer senior to the senior rater, if the relief for cause OER

⁴³ The term "referral," as used in the regulation, is used in several different ways. Referral is used when providing a copy of the completed OER to the rated officer for review and comment. Referral is also used when the OER is to be forwarded, or referred, to other members of the rating chain or when sent to HQDA for further review and processing. Understanding the context of the paragraph in question will allow the attorney to decipher in what capacity the term is being used.

⁴⁴ AR 623-3, *supra* note 2, ch. 3.

⁴⁵ *Id.*

⁴⁶ AR 623-3, *supra* note 2, fig. 2-6.

⁴⁷ The Evaluation Entry System (EES) is a web-based system, accessed through the Human Resource Command's website, designed to create, store, and process OERs, supporting forms, and additional documentation.

⁴⁸ AR 623-3, *supra* note 2, fig. 2-7. *See also*, DA PAM 623-3, *supra* note 3, ch. 6.

⁴⁹ AR 623-3, *supra* note 2, ch. 3.

⁵⁰ *Id.*

⁵¹ *Id.* Paragraph 3-28 does not define with constitutes a reasonable suspense date.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* *See also* Human Resource Command (HRC) website for guidance on the appeals and corrections process available at <https://www.hrc.army.mil/content/Evaluation%20Appeals%20and%20Corrections>.

⁵⁵ AR 623-3, *supra* note 2, ch. 3.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ AR 623-3, *supra* note 2, ch. 2.

⁶² *Id.* at para. 2-17.

⁶³ AR 623-3, *supra* note 2, ch. 2. When a Soldier from the Judge Advocate General's Corps, Chaplain Corps, or Army Medical Department does not have representation from their branch in the form of either the rater or senior rater, they are permitted to receive feedback from an intermediate rater in their evaluation. *Id.*

⁶⁴ *Id.*

was directed by (1) the senior rater, (2) a rating official who is not a uniformed member of the rating chain, or (3) someone other than the rating official such as a commanding general.⁶⁵ As a practice note, all attorneys involved should be able to clearly identify who is directing the relief for cause because this will determine the subsequent mandatory review authority. For example, if the division commander ordered the relief for cause of a company commander, the corps commander is normally the mandatory review authority.⁶⁶

The reviewer ensures the OER specifically indicates who directed the relief of the rated officer and the specific reason for the relief in an enclosure to the OER.⁶⁷ He or she ensures the narrative portions of the OER contain factual information that both fully explain and justify the reason for the relief.⁶⁸ The reviewer verifies the accurate reflection of derogatory information and ensures the evaluation report was prepared according to the regulation and the report was referred to the rated officer for comment.⁶⁹ If comments are provided by the officer, the reviewer ensures they are included and reviews them accordingly.⁷⁰ The reviewer has two courses of action—either conclude that the OER is clear, accurate, complete, and fully in accord with the provision of the regulation and forward to HQDA; or return the OER to the appropriate rating official, indicating what is wrong in a memorandum for record.⁷¹ Assuming changes are made to the OER that still merits referral, the process of serving the rated officer with the new OER and allowing an opportunity to provide new comments is repeated. Should the rated officer disagree with the final decision of the rating and reviewing officials, the rated officer can exercise his or her rights under the Evaluation Report Redress Program.

B. Evaluation Report Redress Program

1. Commander's Inquiry

Commanders are required to investigate alleged errors, injustices, and illegalities in evaluation reports.⁷² A request

for a commander's inquiry should be submitted as soon as possible following the signing of the OER. Ideally, the OER will still be at the local unit level but safeguards are in place if the OER has already been forwarded to HQDA.⁷³

a. Initiation of Inquiry

Army regulation states a request for inquiry must occur no later than sixty days after the rated officer signs an OER.⁷⁴ The results of the inquiry will be forwarded to HQDA, if necessary, not later than 120 days after the signature date of the senior rater.⁷⁵ The 120 days must take into account the time necessary to forward the results of the inquiry to the commander and subsequent forwarding to the appropriate rating officials.

The primary purpose of the commander's inquiry is to provide a greater degree of command involvement in preventing obvious injustices to the rated officer before they become a matter of permanent record.⁷⁶ The commander's inquiry should not be used to document differences in opinion.⁷⁷ The assumption is the rater represents the organization's opinion of the rated officer.⁷⁸ However, the commander may determine through inquiry that the report has serious irregularities or errors.⁷⁹

The initiating commander in most cases will be the senior rater or a commander of comparable rank.⁸⁰ The BJA or TC should assist the command in conducting this inquiry. If derogatory information regarding the officer is discovered, the commander's inquiry should not be used to forward this information to the rated officer, nor should changes be made to an evaluation report to reflect a reduced evaluation of a rated officer following the results of a commander's inquiry.⁸¹

b. Commander's Inquiry Report

The commander's inquiry report must include the findings, conclusion, and recommendations in a one-page

⁶⁵ *Id.*

⁶⁶ AR 623-3, *supra* note 2, ch. 3.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ AR 623-3, *supra* note 2, ch. 2.

⁷² AR 623-3, *supra* note 2, ch. 4.

⁷³ *Id.* If a commander receives a request for a Commander's Inquiry after the OER has been submitted and received at HQDA for processing, but has not been filed in the officer's Army Military Human Resources Record (AMHRR), the Commander will notify the Evaluations Appeals Office via email at usarmy.knox.hrc.mbx.tagd-eval-policy@mail.mil with a request to have the evaluation placed in a temporary administrative hold status until completion of the inquiry. *Id.* para. 4-4.

⁷⁴ AR 623-3, *supra* note 2, ch. 4.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* This assumption is based on information contained in Table 4-1 which indicates the commander's responsibility to forward the evaluation to HQDA. Since this responsibility is usually the senior rater's, it is the assumption that the initiating commander should be at the same rank or comparable GS equivalent as the senior rater if not the senior rater himself. *Id.* at table 4-1.

⁸¹ AR 623-3, *supra* note 2, ch. 4.

memorandum that will be filed with the evaluation report in the rated officer's Army Military Human Resource Record (AMHRR).⁸² This memorandum is submitted with supporting documentation such as reports and statements included as attachments.⁸³

If the commander finds no fault with the evaluation, the inquiry is filed locally and a copy given to the rated officer.⁸⁴ The commander ensures the evaluation is forwarded to HQDA as expeditiously as possible.⁸⁵ If the rated officer decides to file a subsequent appeal or petition the Army Board for the Correction of Military Records (ABCMR), this investigation could be used to support a claim for relief.⁸⁶

c. Changes to the OER and Re-referral

Table 4-1 of Army Regulation 623-3 identifies the operating tasks for conducting a commander's inquiry. Under step 3, the regulation outlines the necessary steps to be taken if an error, violation of the regulation, or wrongdoing has been identified.⁸⁷ Specifically, the commander then returns the evaluation with the inquiry results to the senior rater.⁸⁸ The commander requests that the report be corrected to account for matters revealed in the inquiry.⁸⁹ Again, the commander must take care not to exert any undue influence on the rater and senior rater.⁹⁰ Ultimately, the senior rater determines if the corrected OER is satisfactory and continues to process the OER or determine the corrected OER is not satisfactory.⁹¹ If the senior rater or other rating officials disagree about the need for changes in the OER, the senior rater indicates objections to the OER by adding a memorandum as an enclosure to the OER.⁹² At this point, the OER is forwarded to HQDA and the officer must decide to exercise his or her right to appeal the OER.

⁸² *Id.* The AMHRR is also referred to as the Official Military Personnel File (OMPF). These terms are sometimes used interchangeably in military documentation.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ DA PAM 623-3, *supra* note 3, ch. 6.

⁸⁷ AR 623-3, *supra* note 2, ch. 4.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* Unfortunately, the drafters of the regulation seem to assume a commander's inquiry will address any and all basis for referral when, in actuality, the commander's inquiry may identify some but not all issues. What the table does not account for is when an OER is changed, pursuant to a commander's inquiry, but the senior rater still determines it should be referred. There is no mention of re-referring the changed OER back to the rated officer. However, it would appear, based on information contained in chapter 2 of AR 623-3 that changed relief for cause OERs are referred,

2. OER Appeals

The second element of the Evaluation Report Redress Program is the evaluation appeal. OER appeals can be based on administrative error, substantive error, or both.⁹³ The rated officer, or appellant, has the right to appeal for redress if he or she perceives an evaluation report is in some way inaccurate.⁹⁴ In most cases where derogatory information is contained in the OER, the rated officer should perform an objective analysis of the evaluation report before actually preparing an appeal.⁹⁵ The legal assistance attorney or DC may assist the rated officer with an unbiased review of his or her OER recognizing that inconsistent evaluations do not necessarily equate to an inaccurate or unjust evaluation.⁹⁶ Furthermore, careful consideration should be given before appealing an OER in which the narrative portions are positive but numerical markings or box checks are less than the maximum. In relief for cause OER situations, the decision to appeal an OER should be automatic if the rated officer believes information contained in the OER was not adequately addressed under the OER referral, review, or commander's inquiry processes.

The most important element of any successful appeal is the weight of supporting evidence, specifically third-party statements.⁹⁷ If, after careful consideration, the rated officer concludes he or she has the necessary evidentiary support, then an appeal should be prepared with help from military attorneys and battalion or brigade personnel sections.⁹⁸

a. Officer Special Review Board and Substantive Appeals

The Officer Special Review Board (OSRB) adjudicates substantive appeals based on alleged bias, prejudice, inaccurate or unjust ratings, or any matter other than

again, by the senior rater to the rated officer so that the corrected OER may be acknowledged and comments provided, if desired. *Id.* tbl. 4-1.

⁹¹ AR 623-3, *supra* note 2, ch. 2.

⁹² *Id.* The regulation states, at paragraph 2-17c(7), that senior raters, when indicating objections, are restricted to discussing only the issues listed in paragraph 2-17b. This is a typo and should reference paragraph 2-17a. Thus, the senior rater's memorandum should address his or her belief that derogatory information is not accurately reflected or that the factual information provided does not fully explain or justify the reason for the relief. *Id.* para. 2-17c(7), 2-17a. *See also*, U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM ch. 2 (3 Apr. 2014) para. 2-17c(7), para. 2-17b.

⁹³ AR 623-3, *supra* note 2, ch. 4.

⁹⁴ DA PAM 623-3, *supra* note 3, ch. 6.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

administrative error.⁹⁹ The rated officer has three years to appeal to the OSRB, but the likelihood of successfully appealing an OER usually diminishes over time.¹⁰⁰ The OSRB is comprised of senior officers with the purpose of evaluating and acting on evaluation report appeals.¹⁰¹

The board consists of at least three members and recommendations are based on a majority vote. Ideally, voting members will be senior to the appellant and, when practicable, at least one member will have a background similar to that of the appellant.¹⁰² The board proceedings are administrative and non-adversary thus neither the rated officer nor his or her representative is authorized to appear before the board.¹⁰³ The board is not bound by the rules of evidence under the Uniform Code of Military Justice (UCMJ), but “does keep within the reasonable bounds of evidence that are competent, material, and relevant.”¹⁰⁴ Furthermore, the board may obtain additional information from any and all credible sources to include the rated officer, the rating officials, chain of command, or anyone thought to have firsthand knowledge.¹⁰⁵

b. Appropriate Evidence

Third-party statements form the basis of most substantive appeals.¹⁰⁶ A reliable third party should be an individual with firsthand knowledge of the rated officer’s performance during the rating period.¹⁰⁷ Ideally, this individual will have served in positions allowing observation of the rated officer’s performance and interaction with rating officials.¹⁰⁸ Additional weight will be given to those statements authored by officials in similar vantage points to that of the rating officials.¹⁰⁹ Statements from third parties should deal in specific observations and events, and not rely on “retrospective thinking, or second thoughts.”¹¹⁰

In addition to statements, official documents may help substantiate errors contained in an OER. Specifically, award citations and letters of commendation may be of value, especially if the period and circumstances of the award or

letter closely correspond with the rating period.¹¹¹ Relevant portions of annual general and command inspections may also be helpful.¹¹²

c. Organization and Preparation

A successful appeal must be based on careful preparation, strength of evidence, and a rational line of argument.¹¹³ The best way to prepare for an effective appeal is identifying (1) specific entries or comments to challenge, (2) the inaccuracy or injustice in each statement, and (3) evaluating the availability of credible evidence.¹¹⁴ Keep in mind, the board has a wide variety of remedies available and a reasonable goal should be to correct specific inaccuracies.¹¹⁵ Correcting minor administrative errors or deleting a rating official’s comment will not invalidate the entire OER.¹¹⁶

d. Remedies and Options

Appeals to the OSRB may be approved in whole or in part or denied.¹¹⁷ The result of a partially approved appeal may not be the result requested by the rated officer, but the board rarely takes action that might put the rated officer in a worse position.¹¹⁸ If the appellant’s request is denied, he or she may submit a new appeal or may submit an application to the ABCMR.¹¹⁹

3. The Army Board for Correction of Military Records

The final prong of the Evaluation Report Redress Program is the ABCMR. This administrative body has the power to effectively change or alter personnel documentation maintained within the Department of the Army.¹²⁰

a. Purpose and Requirements

The ABCMR directs or recommends correction of military records to remedy an error or injustice in cases

⁹⁹ AR 623-3, *supra* note 2, ch. 4.

¹⁰⁰ *Id.* See also ARBA LEGAD email, *supra* note 21.

¹⁰¹ *Id.*

¹⁰² AR 623-3, *supra* note 3, ch. 4.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ DA PAM 623-3, *supra* note 3, ch. 6.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ AR 623-3, *supra* note 3, ch. 4.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See generally, U.S. DEP’T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (31 Mar. 2006) [hereinafter AR 14-185].

properly brought before it.¹²¹ The ABCMR is not an investigative body but is empowered to conduct evidentiary and administrative hearings and can request additional evidence or opinions on specific cases.¹²² The gateway to the ABCMR requires a complete and timely application to the board after all administrative remedies, to correct an alleged error or injustice, have been exhausted by the applicant.¹²³ The rated officer has the burden of proving an error or injustice by a preponderance of the evidence.¹²⁴

The rated officer is required to file an application within three years after an alleged error or injustice is discovered, though an untimely application may be accepted and considered by the Board in the interest of justice.¹²⁵ While applicants do not have a right to a formal hearing, the Board may order one in the interest of justice.¹²⁶ Applicants may appear in person at formal hearings and be represented by counsel at their own expense.¹²⁷

b. Board Composition, Duties, and Decisions

The ABCMR consists of civilians regularly employed in the executive part of the Department of the Army and are appointed by the Secretary of the Army to serve.¹²⁸ Each panel consists of three members.¹²⁹ The panel may consider a case on the merits in executive session or may authorize a hearing.¹³⁰

Decisions are based on a majority vote with written findings and recommendations.¹³¹ In the case of a denial, a written rationale must also be provided.¹³² As is the case with the appeals process, the ABCMR can grant relief in whole or in part.¹³³ Should an applicant disagree with the decision of the board, he or she may request a reconsideration assuming the request is made within one year and provides new evidentiary matter.¹³⁴ If the ABCMR receives a request for reconsideration more than one year after the original decision or after the board has already considered one request for reconsideration, the case is returned without action and the applicant advised the next remedy is appeal to the court of appropriate jurisdiction.¹³⁵

IV. Conclusion

The Army is going through a time of significant change and restructuring, which could impact the livelihood of Soldiers and officers alike. While the threat of OSBs or E-SERBs may have abated for the present time, force shaping will inevitably occur again. Moreover, HRC or any promotion board can initiate a show cause board for derogatory information contained in an OER. Therefore, it is important that each and every OER in an officer's human resource record reflects an accurate and just assessment of performance and potential. It is imperative that legal practitioners understand the necessary requirements, ramifications, and remedies available to both a rated officer and the rating chain officials in order to ensure systemic fairness.

¹²¹ *Id.* at ch. 2. ARBA has wide latitude using a preponderance of the evidence standard to determine whether a case brought before it meets the test required by Congress for ARBA to fix errors or injustices in administrative records. 10 U.S.C. § 1552 (2016). *See also* ARBA LEGAD email, *supra* note 21.

¹²² AR 14-185, *supra* note 120.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* *See also* ARBA LEGAD email, *supra* note 21.

¹²⁸ AR 14-185, *supra* note 120.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* Judicial review of ABCMR decisions is usually exercised through the US District Court or Court of Federal Claims. *See generally*, *Military Record Correction Boards and their Judicial Review*, STATE BAR OF TEXAS, MILITARY LAW SECTION PROGRAM, https://www.texasbar.com/flashdrive/materials/military_law/militarylaw_toney_militaryrecord_finalarticle.pdf (11 June 2010).

Hubris: The Tragedy of War in the Twentieth Century

REVIEWED BY MAJOR JOHN E. SWORDS*

*The ancient Greeks defined hubris as the worst sin a leader, or nation, could commit. It was the attitude of supreme arrogance in which mortals in their folly would set themselves up against the gods. Its consequences were invariably severe. The Greeks also had a word for what usually followed hubris. That was called peripeteia, meaning a dramatic reversal of fortune. In practice, it signified a falling from the grace of great height to unimaginable depth.*¹

I. Introduction

Sir Alistair Horne has written more than twenty books, largely on European history, particularly focused on 19th and 20th century France.² His book *The Price of Glory: Verdun 1916* received the Hawthornden Prize³. Subsequently, his book *A Savage War of Peace: Algeria 1954-1962* received the Wolfson Prize.⁴ His reputation as an historian makes him particularly qualified to engage in this current endeavor, though he acknowledges he has not previously written much about the Pacific and Japan.⁵

It is unsurprising Horne would reminisce on his long career, and new ideas would emerge:

Having written, over the course of fifty-odd years, numerous books and articles on warfare in its various shapes, I sat down some time ago to reflect on what might be its common features that stand out over the ages. One that emerged preeminently was hubris: wars have generally been won or lost through excessive hubris on one side or the other.⁶

Horne's reflection created the genesis for this book as he "focused on those conflicts that affected future history powerfully in ways that transcended the actual war in which

the conflict was set" and limited himself to the first half of the twentieth century.⁷ However, he deliberately left out WWI.⁸ This book examines six battles chosen based on their links to one another and to those of the combatants.⁹ Aside from the failure of the combatants to learn from their predecessors' mistakes, a common thread is the racist distortions the hubristic entities have toward their foes.¹⁰ Horne contends these actions lead to their *peripeteia*.¹¹

Hubris is not easy to avoid as it arises out of success, and a triumphant victory makes anything seem possible.¹² Horne's goal is to show this is the moment when many calamitous decisions are made.¹³ Due to its ubiquitous nature, it is critical that leaders and subordinates are able to recognize hubris because it is "one of the great renewable resources."¹⁴ Aside from the pervasiveness of hubris, we must remain cognizant of the fact that military minds have repeatedly failed to learn from their predecessors' mistakes in war.¹⁵ Since "only the dead have seen the end of war"¹⁶ it is of paramount importance we learn from these mistakes as "those who cannot remember the past are condemned to repeat it."¹⁷ Our branch is uniquely positioned to advise commanders, and learning from past mistakes makes us better stewards of our duties. While a commander "can" take some action, the analysis should not end there. We must remain vigilant students of history and astute to the intoxicating effect of

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¹ ALISTAIR HORNE, HUBRIS: THE TRAGEDY OF WAR IN THE TWENTIETH CENTURY (2015).

² PENGUIN RANDOM HOUSE, <http://www.penguinrandomhouse.com/authors/13517/alistair-horne> (last visited July 31, 2017).

³ See generally *The Hawthornden Prize*, THE GLASGOW HERALD, June 1, 1961, at 23. (The Hawthornden Prize is one of Britain's leading literary awards, and is awarded for a work of imaginative literature by an author under 41 years of age that was published in the year before the award. It is limited to British authors.)

⁴ See generally THE WOLFSON FOUNDATION, <http://www.woolfson.org.uk/history-prize/> (last visited Sept. 20, 2016). (The Wolfson History Prizes are awarded annually for works produced in the UK to promote and encourage standards of excellence in the writing of history for the general public.)

⁵ HORNE, *supra* note 1, at 4.

⁶ *Id.*

⁷ *Id.* at 1.

⁸ *Id.* at 3. Horne believes "[t]he whole war began, and was caused by, various sublime practitioners of hubris in conflict with one another. Further, it would be difficult to identify any one battle that held calamitous consequences for the future. The whole war did that."

⁹ *Id.* at 5.

¹⁰ *Id.* at 5.

¹¹ *Id.* at 1.

¹² *Id.* at 6.

¹³ *Id.* at 6.

¹⁴ P.J. O'ROURKE, www.brainyquote.com/quotes/quotes/p/pjorour447363. (last visited July 31, 2017).

¹⁵ Horne, *supra* note 1, at 5.

¹⁶ GEORGE SANTAYANA, SOLILOQUIES IN ENGLAND AND LATER SOLILOQUIES, 102 (1922).

¹⁷ GEORGE SANTAYANA, REASON IN COMMON SENSE, 284 (1905).

hubris to provide counsel on whether they “should” take an action.

Though this is a thorough and engaging text, Horne’s central premise of “hubris” remains unproven. The tragedy is that the book contains ample support for a possible premise of “intelligence” that Horne presented throughout, but unfortunately almost as an afterthought.

II. Hubris and Racial Distortions

This is a well-written book, which all DOD personnel should read. Any history fan will find it alluring. In spite of this high praise, it is not without issues. Namely, Horne failed to prove his thesis that “wars have generally been won or lost through excessive hubris . . .”¹⁸ He provides no overarching historical analysis to prove that fifty-one percent of the time his thesis is true. An attempt at such a feat would likely be impossible and result in a voluminous tome. Even when limiting his thesis to the battles in this book, Horne continually provides ample evidence highlighting outcomes resulting from intelligence, not hubris. Further, relying on hubris alone ignores geo-political¹⁹ and economic²⁰ issues that contribute to war. Once the battles begin, relying on hubris alone ignores how technological differences²¹ and the abilities of commanders affect those outcomes. It also ignores willpower, which may “count for more than foreknowledge.”²² Although Horne discusses intelligence, technology, command experience, and willpower, he does not address them in relation to his thesis. Thus, his theory would contend a military armed with sticks and longboats could defeat one with ironclads, assuming the latter was hubristic. Even individuals who lack historical perspective, but have common sense, would consider this foolish. Horne fails to

qualify his theory with an “all things being equal” statement wherein the tipping factor is hubris. This would lend credence to his claim, as it is logical. His failure to do so leaves an unverifiable, if not patently wrong, theory.

Many entities positively reviewed this book.²³ These reviews generally focused on Horne’s writing abilities or the historical takeaways. However, Max Boot’s review in the New York Times is less than favorable.²⁴ Boot praises Horne as a “skilled writer” and concedes the book “makes for good reading,” but is highly critical of the underlying theory.²⁵ Boot’s qualms have some merit. He asserts Horne’s theory is incorrect because skill or will are generally the deciding factors in war.²⁶ Ultimately, while the facts do not prove Horne’s theory, they also fail to support Boot’s contention. Specifically, the outcomes of the battles included in this book resulted from the quality of intelligence, not solely on skill or will. Further, they actually show the more “skilled” combatants regularly suffered defeat.²⁷ This correlation is what Horne asserts shows the impact of hubris on the battles. Thus, at least in these examples, skill is not the deciding factor.

Boot critiques Horne’s failure to include other historical examples outside the stated parameters of the book.²⁸ However, Horne definitively states in the first three pages “I chose to limit myself to the first half of the twentieth century” and “[d]eliberately, the First World War is left out.”²⁹ The reader is fully aware that Horne will not discuss any of the examples Boot mentions.³⁰ Though the book failed to prove its theory, it does successfully show instances of hubris. When present, hubris appears to take one of three forms. The first is hubris of the nation, which was evident with Japan and France. The second is hubris of individuals, epitomized by

¹⁸ HORNE, *supra* note 1, at 1.

¹⁹ See generally CHRISTOPHER CLARK, THE SLEEPWALKERS: HOW EUROPE WENT TO WAR IN 1914, 402-03 (2013), (discussing how the assassination of Archduke Franz Ferdinand ultimately led to WWI).

²⁰ See generally THE TREATY OF VERSAILLES, www.history.com/topics/world-war-i/treaty-of-versailles, (last visited July 31, 2017), (discussing how economic conditions in Germany following the Treaty led to Adolph Hitler’s rise and WWII).

²¹ HORNE, *supra* note 1, at 23 and 27. Japan had British-made ships in 1904, regarded as the best in the world. According to Horne: “Japan’s total fleet . . . were superior in quality and speed to their Russian counterparts.”

²² JOHN KEEGAN, INTELLIGENCE AND WAR: KNOWLEDGE OF THE ENEMY FROM NAPOLEON TO AL-QAEDA, 25 (2003).

²³ Richard Overy, *Hubris: The Tragedy of War in the Twentieth Century* by Alistair Horne, review: ‘cautionary tales’, THE TELEGRAPH (Sept. 30, 2015), <http://www.telegraph.co.uk/books/what-to-read/hubris-the-tragedy-of-war-in-the-twentieth-century-alistair-horne-review/>; Nick Romeo, ‘Hubris: The Tragedy of War in the Twentieth Century,’ by Alistair Horne, BOS. GLOBE (Dec. 8, 2015), www.bostonglobe.com/arts/books/2015/12/08/book-review-hubris-the-tragedy-war-twentieth-century-alistair-horne/JFCITLLMJ6gfpfUbGx8HgL/story.html; Leon H. Wolf, *Book Review: Hubris by Alistair Horne*, REDSTATE (Nov. 21, 2015), www.redstate.com/leon_h_wolf/2015/11/21/book-review-hubris-alistair-horne/.

²⁴ Max Boot, ‘Hubris: The Tragedy of War in the Twentieth Century’, by Alistair Horne, N.Y. TIMES (Dec. 9, 2015), www.nytimes.com/2015/12/13/books/review/hubris-the-tragedy-of-war-in-the-twentieth-century-by-alistair-horne.html.

²⁵ *Id.*

²⁶ *Id.* Boot asserts, “[a]ren’t a lot of wars won or lost simply because one side has superior skill or will – not necessarily because the other side is guilty of ‘supreme arrogance’?”

²⁷ See HORNE, *supra* note 1. Russia was universally thought to be more skilled than the Japanese prior to Port Arthur. The Germans with *blitzkrieg* warfare were believed to be more skilled than the Russians. The Japanese were regarded as superior in the sea to the United States. The United States was believed to be far superior to the North Korean army, particularly after WWII. The French were regarded as far superior to the Vietnamese.

²⁸ Boot, *supra* note 27. Boot critiques Horne for not including other examples like WWI, Napoleon invading Russia in 1812, and Robert E. Lee’s invasion of the Union culminating in the battle of Gettysburg in 1863.

²⁹ HORNE, *supra* note 1, at 1 and 3.

³⁰ *Id.* at 195. Horne does discuss Napoleon and Hitler’s failure to learn from his mistakes.

Adolph Hitler and General Douglas MacArthur. Finally, Germany was a combination of the two.

Horne contends racist distortions are a telltale sign of hubris.³¹ These assertions are a thread in his selections and are supported by fact.³² The book is full of examples of racist undertones present in the various conquests. The Russians held contempt for the Japanese.³³ The Germans, following Hitler's doctrine for a war of extermination against *Untermenschen* (subhumans), provided no quarter to Russian soldiers or civilians in their push toward Moscow.³⁴ Similarly, Horne gives many examples of war crimes committed by the Japanese against the Chinese, based on a belief that they were "lesser."³⁵ In the United States following Pearl Harbor, the language of a "lesser" Japanese was widely prevalent.³⁶ This distortion of Asiatic people continued when Koreans were called "gooks."³⁷ Finally, France discounted the Vietnamese on a belief of European racial superiority over the Asiatic at Dien Bien Phu.³⁸

There are two groups of racial distorters. The first is comprised of countries who discount their foes based on distortions; Russia, France, and the United States are in this category.³⁹ The second harbors feelings that the "lesser" nature of their opponents allows them to be massacred with no reverence to the law of armed conflict; German actions towards Russians and Japanese actions toward Chinese fall in this category.⁴⁰ Regardless of the group, Horne does an excellent job of providing historical facts to prove the view of racial distortions among them. Ultimately, it is impossible to deny the existence of this mindset in the various nations; however, the impact of the mindsets on the outcome of battle is more difficult to quantify. To that end, Horne provides many examples of how the mindset resulted in less preparation, over-reliance on sheer numbers, and a belief in one's superior technological advantage over the "lesser." While not necessarily true throughout all of history, there is sufficient evidence to support his sub-theory of racist distortion and its interplay with underperformance in combat

by the entities holding those views for the six battles in this book.

III. The Role of Intelligence in the Outcomes

Hubris is as nebulous as the sky over the Pacific during the Battle of Midway; the inability to quantify hubris makes it impossible to prove empirically. It is surprising Horne relied solely on a thesis linked entirely to hubris, while ignoring the impact of intelligence, which he repeatedly referenced. He provided ample examples of intelligence in these battles upon which he could have tied a compelling analysis. It is not a great leap to say superior intelligence led, or at least contributed, to hubristic thought. Instead, examples hang as loose threads throughout the book and, rather than strongly combining, they cause the thesis to unravel.⁴¹ His inclusion of substantial discussion on the strengths and weaknesses of intelligence leads one to theorize that intelligence is the most important factor in the outcome of these battles, not hubris. Every nation in this book that had an advantage in the area of intelligence emerged victorious. This is consistent with Sun Tzu's teachings.⁴²

During the Russo-Japanese war, Horne says Japan had a "distinct advantage" over the Russians regarding intelligence and spying.⁴³ Specifically, the Japanese had a well-placed and informed network inside Russia, which paid dividends on both the land and sea.⁴⁴ Of critical importance, the network provided intelligence on the Russian fleet's movement.⁴⁵

By the battle of Nomonhan, and continuing through WWII, the Japanese lost their intelligence advantage over the Russians. The Russians had Dr. Richard Sorge located in Tokyo, who provided them with a huge intelligence advantage.⁴⁶ Beyond an increase in the effectiveness of Russian intelligence, the Japanese had poor intelligence.⁴⁷ Sorge's expertise afforded insight on the limitations of Japan's objectives, which allowed the Russians to adjust troop

³¹ *Id.* at 344.

³² *Id.* at 5. "A thread running all the way through my selection is a kind of racist distortion whereby one power persists in writing off its foes because of the color of their skin or the slant of their eyes, or the supposed backwardness of their culture."

³³ *Id.* at 38, 14, and 12. They were called "little yellow monkeys" and the Tsar dismissed them as "little yellow men from whom Europeans have nothing to fear," likely because they were one of "Kipling's lesser breeds."

³⁴ *Id.* at 210.

³⁵ *Id.* at 144. The biggest, and most atrocious, example is the Nanking Massacre where the Japanese slaughtered an estimated 250,000-300,000 Chinese men, women, and children.

³⁶ *Id.* at 243-44. They were looked at as "subhuman and repulsive," and even the Smithsonian Institution was not immune from such racist distortions by claiming, "Japanese skulls are 2000 years less developed than ours."

³⁷ *Id.* at 283.

³⁸ *Id.* at 316.

³⁹ See HORNE, *supra* note 1. As evidenced by Russia's unwillingness to view Japan as a threat before the attack on Port Arthur in spite of the the Sino-Japanese War; the United States' inability to take the Japanese or North Korean threats seriously before Pearl Harbor and the Korean War; and the French dismissal of the Vietnamese.

⁴⁰ *Id.* at 110, 144.

⁴¹ See generally WEEZER, *Undone – The Sweater Song*, on WEEZER (Geffen Records 1994).

⁴² SUN TZU, *THE ART OF WAR* 144 (1963). "Now the reason the enlightened prince and the wise general conquer the enemy wherever they move and their achievements surpass those of ordinary men is foreknowledge."

⁴³ HORNE, *supra* note 1, at 40.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 147.

⁴⁷ *Id.* at 152.

concentrations.⁴⁸ Their advantage in intelligence extended throughout the Battle of Moscow. Based on Sorge's intelligence, Russia was able to take soldiers from the Japanese front and move them to Moscow as reinforcements.⁴⁹ This may have been the turning point. In fact, Horne credits Sorge for his leading role in Hitler's defeat at Moscow.⁵⁰

Horne also discusses intelligence's role during Midway, the Korean War, and Dien Bien Phu. During Midway, Nimitz had a huge advantage in intelligence based largely on the cracking of the Japanese naval code.⁵¹ This may be the reason for the United States' victory.⁵² However, the Korean War highlighted lapses in our intelligence. Horne says "US intelligence had been caught asleep at the wheel" when over 250,000 Chinese Soldiers crossed the Yalu River.⁵³ Their participation in combat likely turned the war. Likewise, errors by French intelligence during Dien Bien Phu appear to have contributed to their defeat. Specifically, the French estimated "Giap's primitive supply system over tortuous jungle trails would be incapable of provisioning any force . . . with more than twenty-five thousand shells for its guns."⁵⁴ They ultimately moved two hundred guns and shells without French knowledge.⁵⁵ At the ensuing artillery battle, the French were soundly defeated.

The facts establish intelligence as the deciding factor in the battles, not hubris. At a minimum, it is a contributing factor that warranted addressing within his thesis.

IV. Conclusion.

This is an incredibly well written book by a true scholar; Horne deserves praise for addressing new areas of history. Although he has not written much previously on Japan and the Pacific, he does an artful job of laying out the history of the rise of Japan from self-imposed isolation to it acquiring an empire in the shortest time in history.⁵⁶ The entire book is composed with the skill and aplomb expected of an historian of his caliber. His theory that "wars have generally been won or lost through excessive hubris on one side or the other"⁵⁷ is an intriguing concept. However, it lacks the required

evidence to prove it as fact. That said, the lessons therein can be used to provide sage counsel to commanders during the military decision making process.⁵⁸ Further, it serves as a reminder that even great military minds failed to learn from history.⁵⁹ Therefore, while it fails to support its theory, it succeeds as a must-read book for military personnel across all ranks and branches.

⁴⁸ *Id.* at 155.

⁴⁹ *Id.* at 227.

⁵⁰ *Id.* at 147.

⁵¹ *Id.* at 256.

⁵² R. EARNEST DUPUY AND TREVOR N. DUPUY, THE HARPER ENCYCLOPEDIA OF MILITARY HISTORY FROM 3500 B.C. TO THE PRESENT, 1255 – 1256 (1993). "Midway was one of the decisive battles of history. The loss of her fleet carrier force deprived Japan of the initiative; henceforward she was on the defensive. . . Two basic factors led to the result; first and foremost, the American knowledge of the Japanese secret codes, which presented Nimitz with an accurate picture of Japanese intentions and dispositions."

⁵³ HORNE, *supra* note 1, at 282 and 297. One specific example was the failure of aerial reconnaissance to see 250,000 Soldiers from the Chinese People's Volunteer Army (PVA) cross the Yalu River.

⁵⁴ *Id.* at 324.

⁵⁵ *Id.* at 326.

⁵⁶ *Id.* at 16-17, 246.

⁵⁷ *Id.* at 4.

⁵⁸ U.S. DEP'T OF ARMY, DOCTRINE PUB. 5-0, THE OPERATIONS PROCESS (May 2012).

⁵⁹ *See generally* HORNE, *supra* note 1, at 343. The United States failed to learn from the Japanese attack on Port Arthur, or from France in Vietnam. Hitler failed to learn from Napoleon's errors in trying to take Moscow. MacArthur failed to learn from Hitler's error in expecting a quick war.

Book Reviews

Tribe: On Homecoming and Belonging¹

Reviewed by Major Michael R. Tregle Jr.*

*We keep wondering how to save the vets, but the real question is how to save ourselves. If we do that, the vets will be fine. If we don't, it won't matter anyway.*²

I. Introduction

Following more than fifteen years of constant conflict for the U.S. military and more than a million of the country's men and women having served in the Global War on Terror, the issues of veterans' affairs and the treatment and support of our returning warriors have taken center stage in much of the national conversation. The Department of Veterans Affairs has come under increasing criticism and scrutiny in recent years as multiple high profile failures to care for veterans have come to light.³ More recently, a dramatic rise in the suicide rates of America's veterans has led to public outcries, congressional inquiries,⁴ and increasing awareness campaigns.⁵ In this context, Sebastian Junger's *Tribe: On Homecoming and Belonging* re-frames the conversation, shifting focus from the individual veteran's response to the experience of war to society's role in re-integrating those veterans and healing their wounds.

As the award-winning author of *War*,⁶ and director of the critically acclaimed documentaries *Restrepo*,⁷ *Korengal*,⁸ and *The Last Patrol*,⁹ few authors have focused more professional output on the social and psychological effects of trauma, conflict, and violence than Sebastian Junger. In this respect, *Tribe* stands as the next evolutionary step from his prior works, where he focused on the impacts felt while experiencing trauma and conflict, to now examining the aftermath of these events and the long term effects felt by those who experienced them. Drawing on prior attempts to explain the phenomenon of re-integrating veterans,¹⁰ *Tribe*

attempts to look beyond the more obvious and frequently studied individual psychological impacts that violence has on humans and explain the deeper social factors that influence what he perceives as failed attempts to re-integrate Soldiers returning from combat into modern American society.

In his characteristic minimalist style, Junger fuses together history, psychology, anthropology, and anecdotal storytelling in an attempt to crack the code on why modern society seems to produce more and longer-lasting post-traumatic stress disorder (PTSD) among other problems in its veterans. This is despite the fact that only a small fraction of Americans have served in the Global War on Terror, and those that have served have seen fewer casualties and less combat, on the whole, than their World War II and Vietnam era counterparts.¹¹ Yet, rates of depression, PTSD, and suicide among veterans have increased exponentially as compared to those previous generations.¹²

While Junger's analysis may lack some of the depth and intellectual rigor one might expect from a book that is so heavily reliant on social science research, his insights are nevertheless probing and thought-provoking. Indeed, Junger's style represents both a great strength and a great weakness of the work. He keeps the language approachable and digestible to avoid the density of a textbook, but this approach often leads to a degree of superficiality in his conclusions. In fairness, Junger establishes early on that his intent was not to create an academic analysis of the subject, but rather to stimulate a much needed conversation among a

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¹ SEBASTIAN JUNGER, *TRIBE: ON HOMECOMING AND BELONGING* (2016).

² Sebastian Junger, *How PTSD Became a Problem Far Beyond the Battlefield*, VANITY FAIR (May 7, 2015), <http://www.vanityfair.com/news/2015/05/ptsd-war-home-sebastian-junger>.

³ See, e.g., James Dao, *Criticism of Veterans Affairs Secretary Mounts Over Backlog Claims*, N.Y. TIMES (May 18, 2013), http://www.nytimes.com/2013/05/19/us/shinseki-faces-mounting-criticism-over-backlog-of-benefit-claims.html?_r=0; Mark Brunswick, *VA Faces Criticism Over Wait Times, Purchase Cards*, STAR TRIBUNE (June 22, 2015), <http://www.startribune.com/va-faces-criticism-over-wait-times-purchase-cards/309164641>; Tom Fox, *The Management Challenges Still Ahead for the Department of Veterans Affairs*, WASH. POST (Nov. 11, 2015), <https://www.washingtonpost.com/news/on-leadership/wp/2015/11/11/the-management-challenges-still-ahead-for-the-department-of-veterans-affairs>.

⁴ See, e.g., *Senators Seek Inquiry into Concerns About Veteran's Suicide*, WASH. TIMES (Sept. 20, 2016), <http://www.washingtontimes.com/news/2016/sep/20/senators-seek-inquiry-into-concerns-about-veterans>; Kristina Rebelo, *Long Island Congressmen Seek Inquiries into Veteran's Suicide Outside V.A. Hospital*, N.Y. TIMES (Aug. 25, 2016), <http://www.nytimes.com/2016/08/26/nyregion/long-island-congressmen-seek-inquiries-into>

[-veterans-suicide-outside-va-hospital.html?_r=0](#).

⁵ See, e.g., MISSION 22, <http://www.mission22.com> (last visited July 14, 2017); STOP SOLDIER SUICIDE, <http://www.stopsoldiersuicide.org> (last visited July 14, 2017).

⁶ SEBASTIAN JUNGER, *WAR* (2010).

⁷ *RESTREPO* (Outpost Films 2010).

⁸ *KORENGAL* (Outpost Films 2014).

⁹ *THE LAST PATROL* (Goldcrest Films NYC 2014).

¹⁰ See generally *id.* (wherein Junger and several conflict veterans journey through the American northeast on foot to reconnect with America after years of war); Junger, *supra* note 2. This article initially presented some of the observations put forth in *Tribe* and formed the core of what would later become the book.

¹¹ JUNGER, *supra* note 1, at 87.

¹² *Id.* at 85.

society that is increasingly coming face to face with the difficulties of re-integrating veterans.¹³ As such, while not always as persuasive or convincing as it could be, *Tribes* represents an important and eye-opening milestone in advancing the national conversation on how America treats its veterans.

II. The Communal Support of the Tribe

Junger's thesis, such as it is, presents the tribal societies that have dominated most of human history as the lost ideal that fulfilled the basic human needs for connection and cooperation that modern society seems incapable of fulfilling. While acknowledging the extraordinary benefits in wealth and technology that are made possible by individualistic cultures, Junger observes that these same drives for individual success have eliminated modern society's ability to provide for key components of human welfare. Most importantly, for Junger, people no longer feel the same sense of connection with others that leads to concern for the welfare of the group over that of the individual. Tribal societies, in their egalitarianism and shared sacrifice, were better suited to provide for the basic human need to feel necessary and part of something larger than oneself.

Junger first turns to American Indian¹⁴ tribes for the historical basis of the benefits he sees in tribalism. He takes particular note of the phenomenon noted by Benjamin Franklin and his contemporaries that whites captured by Indians frequently rejected opportunities to return to white society, instead choosing to live as part of their adopted tribes.¹⁵ Many who were not forced to live in the tribes elected on their own to defect from white society and join the natives.¹⁶ Junger cites the egalitarianism and social connections found in the tribes as the main reason so many whites left voluntarily or remained even after having the opportunity to leave.¹⁷

While there is undoubtedly some truth to this proposition, the phenomenon of defection only applies in some, but not all, cases of white settlers entering native societies. Junger may be guilty of cherry picking his evidence. Joanna Bourke points out that commentary on cases of whites defecting to

Indian tribes were probably more prevalent because the white Europeans who were writing the commentaries found the phenomenon so "anxiety-inducing."¹⁸ Indians leaving their native society to join white culture, on the other hand, seemed natural and understandable to whites, thus obviating the need for commentary.¹⁹

Junger then rather abruptly shifts to historical examples wherein the virtues of communal living manifested themselves following episodes of trauma and tragedy. During the London Blitz of World War II, he notes that the British government harbored great concern over the social and psychological effects German bombardment would have on its citizens.²⁰ In Junger's view, these concerns proved unfounded. The sense of community and shared sacrifice in London bomb shelters resulted in a remarkably peaceful and egalitarian environment.²¹ Hospital admissions for mental disorders actually declined during this period.²² After covering the conflict in Sarajevo in the 1990's, Junger returned after the war to find that many survivors actually yearned for "who they'd been back then."²³ Despite the dangers and catastrophic loss of life and property, people came together and provided for each other in ways that had not happened before the war. Similar situations developed in mining disasters, where leaders emerged and the greater good became more important than the individual.²⁴

These examples, too, particularly the London Blitz, reflect a romanticized view of history and trauma. The British government was pleasantly surprised by the resilience of its people during the Blitz, but to portray behavior in bomb shelters in such harmonious terms is misleading. Indeed, fights were prevalent and police involvement was often crucial in maintaining peace and order.²⁵ Furthermore, Junger's analysis and the evidence on which it is based, suffers from an Anglo-centric bias. There are countless historical examples, and several modern ones, where conflict and violence do not "inevitably lead to solidarity. Indeed, quite the opposite. Abject poverty does not necessarily make for harmonious living.... In many countries, desperate poverty leads to devastating civil wars."²⁶ Thus, the cracks in the foundation of Junger's thesis begin to emerge. The historical record may not bear out his belief in the virtue of communal tribal life, and his narrowly chosen and interpreted

¹³ *Id.* at ix.

¹⁴ Junger consciously chooses the term "American Indian" over the more politically correct "Native American" at the request of those he interviewed. "Many people prefer the term 'Native American,' although when I tried to use that with an Apache interview subject named Gregory Gomez, he pointed out that the term properly refers to people of any ethnicity born in the United States. He insisted that I use 'American Indian' instead, and so I have." *Id.* at x.

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 14.

¹⁸ Joanna Bourke, *Tribes: On Homecoming and Belonging – Review*, THE GUARDIAN (June 26, 2016), <https://www.theguardian.com/books>

/2016/jun/26/tribe-homecoming-belonging-review-sebastian-junger-joanna-bourke.

¹⁹ *Id.*

²⁰ JUNGER, *supra* note 1, at 44.

²¹ *Id.* at 45.

²² *Id.* at 46.

²³ *Id.* at 66 (emphasis in original).

²⁴ *Id.* at 63.

²⁵ Bourke, *supra* note 18.

²⁶ *Id.*

examples appear to suffer from confirmation bias. “The chief problem is that Junger is nostalgic for a world that never existed – at least not for most people.”²⁷

III. Warriors Without a Tribe

With tribal virtues established, Junger devotes the latter half of the book to his main topic of interest – the difficulty of re-integrating veterans into modern society and the problems veterans face in coping with their experiences in war. Both issues, in his view, result from the fundamental disconnections within the society that veterans are attempting to re-enter. As veterans return to dismal prospects for employment and an increasingly fractured society, both politically and economically, the sense of purpose and family that they experienced in the military seem all the more distant and lost.²⁸ As a result, veterans remain isolated and devoid of the fulfillment they experienced during wartime. This, Junger argues, leads to the paradox whereby, despite its horrors and tragedies, service members actually miss war, and many would gladly go back if given the opportunity.²⁹ Their yearning for what would seem like a terrible experience on the surface is fed by the peculiar dichotomy of war that brings together some of the worst aspects of mankind with the deeply-held human virtues of loyalty and togetherness.³⁰ Consequently, for many veterans, service in war becomes an odd mixture of the best and worst times of their lives. With nothing approaching such a sense of purpose and community to return to at home, many veterans succumb to isolation and feelings of abandonment, leading to significant cases of depression, PTSD, and suicide.³¹

The isolation of veterans is further exacerbated by the relatively small proportion of those Americans who have served during the nation’s most recent wars. As fewer and fewer Americans, in relation to the whole, bear more and more of the burdens of war on their country’s behalf, they have less in common with the society they were sent to defend. Since so few have shared in the sacrifices, society does not know how to relate to or properly support and re-integrate veterans upon their return from war. Veterans become outsiders, and in many cases, are treated as victims. Junger argues that this is exactly the wrong approach to bringing war veterans back into the fold.³² In contrast to the Indian tribes Junger alludes to in the beginning of the book, where the warriors were celebrated, and the entire society shared in the sacrifices of warfare and honored the exploits of

their warriors,³³ modern western society is unable to replicate such a shared experience. As a result, veterans are marginalized by a culture that cannot understand them and treated as victims to be cared for and medicated.³⁴ Perpetual victimhood necessarily prevents veterans from re-integrating into society and finding the sense of belonging that Junger argues is essential for their long term health and well-being.

Junger raises the essential conundrum facing the treatment of veterans in his discussion of the sources and causes of PTSD. In doing so, he commits his greatest logical fallacy and undercuts his main thesis. Psychological research indicates that pre-service trauma, abuse, and latent psychological problems are as strong an indicator of long-term PTSD as the severity of the trauma the individual has faced.³⁵ This helps explain the counterintuitive phenomenon wherein modern veterans experience significantly higher rates of debilitating PTSD than their counterparts in previous generations, who generally saw significantly more frequent and dangerous combat.³⁶ However, if latent psychological factors and pre-service experiences are equally important to the development of PTSD, as Junger asserts, then no return to communal tribalism would solve this problem. In other words, if society is not the dominant cause of PTSD and the other problems faced by veterans, as Junger argues throughout the book that it is, then his solution of changing society to better understand and incorporate its veterans cannot be effective. Junger never reconciles this apparent contradiction between the pre-service factors that predict PTSD and his thesis that society is largely to blame.

Where *Tribe* is probing and insightful on the social diagnosis for many of the problems faced by veterans, it is exceedingly light on solutions. Junger spends the vast majority of the book describing the reasons why tribal societies are better suited to support their veterans, but he offers very little in the way of recommendations for change. The sole exception is a brief portion of the book’s conclusion that advocates for town-hall meetings across the country in which veterans are invited to share their experiences with their communities.³⁷ He describes one such meeting in which Brendan O’Byrne, a Soldier who appeared in *War, Restrepo, Korengal*, and *The Last Patrol*, speaks in Massachusetts about his wartime experiences.³⁸ While laudable, such small and disconnected events are unlikely to result in the large-scale social overhaul that Junger argues is necessary to appropriately address the disconnect between veterans and society.

²⁷ *Id.*

²⁸ JUNGER, *supra* note 1, at 124.

²⁹ *Id.* at 91.

³⁰ *Id.* at 92.

³¹ *Id.* at 83. Junger acknowledges that the oft-cited statistic that twenty-two veterans per day commit suicide is misleading and notes that it was not until 2008 that veteran suicide rates equaled those of the general population.

³² *Id.* at 101.

³³ *Id.* at 119.

³⁴ Brian Stewart, *In Defense of the Tribe*, NAT’L REV. (May 23, 2016), <http://www.nationalreview.com/article/435706/sebastian-junger-tribe-book>.

³⁵ JUNGER, *supra* note 1, at 83.

³⁶ *Id.* at 85.

³⁷ *Id.* at 122.

³⁸ *Id.* at 124.

IV. Conclusion

Tribe is largely successful in highlighting the social issues at stake in America's quest to support the veterans of its longest wars. It also provides valuable insight into why modern culture is ill-suited to properly integrate veterans returning home from war. Junger's thought-provoking analysis represents an excellent starting point for addressing how society as a whole can do better in taking care of its veterans. However, it lacks the depth and intellectual rigor necessary to find solutions. While the style and tone of the book go a long way to make a difficult subject more approachable and understandable for the reader, its brevity, internal contradictions, and reliance on thinly supported conclusions cautions against taking it at face value. Junger will remain one of America's most accessible and credible commentators on modern war, but his strength lies in telling evocative and probing stories rather than diagnosing large scale social ills.

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