



# THE ARMY LAWYER

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## Lore of the Corps

### The History of the ‘Tomb of the Unknown JAG’

By Fred L. Borch

Regimental Historian & Archivist

The Hall of Heroes at The Judge Advocate General’s Legal Center and School (TJAGLCS) is a frequent site for award, promotion, reenlistment and retirement ceremonies.<sup>1</sup> Those who have been in the Hall have probably noticed the blue-and-gold JAG Corps branch insignia imbedded in the linoleum tiles of the floor. This is the story of that floor insignia, known affectionately by some as the ‘Tomb of the Unknown JAG.’

In the 1960s, when The Judge Advocate General’s School (TJAGSA) was housed in Hancock Hall on the main grounds of the University of Virginia (UVA), it had an Officers Club on the third floor of the building. In the linoleum floor of that Officers Club was



Hancock Hall housed TJAGSA from 1951-1975

the brown-and-black JAGC branch insignia depicted in the accompanying photograph. When TJAGSA moved to its current location on UVA’s North Grounds in 1975, that branch insignia was left behind in Hancock Hall. Some faculty and staff wanted to remove the imbedded insignia and move it to the new TJAGSA, but were told that the linoleum tile was “too fragile” and would be irreparably damaged if someone attempted to dig it out of the floor and move it.<sup>2</sup>

With this as background, when the members of the 29th Graduate Class were looking for a ‘class gift’ to present to

TJAGSA when they graduated, “someone on the faculty” suggested that the students fund a new floor insignia—to be imbedded in an appropriate space in the new TJAGSA.<sup>3</sup>

As then Major Richard “Dick” Black,<sup>4</sup> who was the class leader, remembers it, the 29th Graduate Class gift committee looked at the idea, liked it, and recommended to him that the class raise money for a JAGC branch insignia to be placed in the tile floor—but in that area of the building where ceremonies were conducted. After the new TJAGSA commandant, then Colonel (COL) William K. Suter,<sup>5</sup> approved the gift and its placement in the space that today is the Hall of Heroes, a blue-and-yellow JAGC insignia was designed, manufactured, and imbedded in the floor. Unlike the old insignia in Hancock Hall, which never indicated its origins, the new insignia was surrounded by the words: Gift of the 29th Graduate Class 1980-81 (top) and TJAGSA Alumni Association (bottom).

Almost immediately, the faculty, staff and students referred to the new insignia as the ‘Tomb of the Unknown JAG,’ as it reminded these men and women of the tombs that



often serve as memorials for fallen Soldiers, Sailors, Airmen and Marines. For many years, there was a rope barrier around the tile insignia, which prevented daily foot traffic from

<sup>1</sup> For more on the history of the Hall of Heroes, and those who have been honored as “fallen heroes,” see <https://www.jagcnet2.army.mil/8525736A005BE1BE/0/692C13785F682DE485257360007198CA?opendocument&noly=1> (last visited September 27, 2017).

<sup>2</sup> E-mail from Major General (retired) William K. Suter, to author (July 28, 2017, 1000 EST) (on file with author).

<sup>3</sup> Telephone Interview with Colonel (retired) Richard H. Black (September 25, 2017).

<sup>4</sup> Richard H. Black had a distinguished military career. Born in 1944, he enlisted in the U.S. Marine Corps in 1963 and, after being commissioned in 1965, qualified as a Marine aviator. The following year, Black deployed to Vietnam, where he flew 269 combat missions as a pilot in the H-34 helicopter. Mid-tour, he volunteered to serve as a ground-based Forward Air Controller with the 1st Marine Regiment. When then Captain Black left Vietnam in 1967, he had seen combat with seven different infantry companies and been awarded the Navy Marine Corps Commendation Medal with “V” device, the Purple Heart (for wounds in action in ground

combat), thirteen Air Medals, and the Combat Action Ribbon. Black left active duty in 1970 and subsequently completed his B.A. and J.D. at the University of Florida. In 1977, then Marine Reserve Major Black transferred to the Army, and entered the Judge Advocate General’s Corps as a major. As a judge advocate, Black served three tours as a staff judge advocate (Fort Leonard Wood, Fort Ord and Fort Lewis). His last tour of duty was as the Chief, Criminal Law Division, Office of The Judge Advocate General. After retiring in 1994, COL Black began a second career in Virginia politics; today he serves as a state senator for Virginia’s 13th District. BLACK VIRGINIA SENATE, <http://www.senatorblack.com/> (last visited September 28, 2017).

<sup>5</sup> Then Colonel Suter had assumed duties as Commandant on March 31, 1981. Suter would later serve as The Assistant Judge Advocate General from 1985 to 1989 and as the acting, The Judge Advocate General from 1989 to 1991. After retiring from active duty, he served as the Clerk, U.S. Supreme Court for the next 22 years. Suter retired from the court in 2013. E-mail Suter, *supra* note 2.

damaging the insignia. Some years ago, however, that rope barrier was removed, and the insignia is no worse for wear today.

But this is not the end of the history of the ‘Tomb of the Unknown JAG.’



*Judge advocates eating lunch in Hancock Hall, ca. 1969; the Corps insignia is visible in the floor*

On the contrary, no sooner was the new insignia in place than Major (MAJ) Thomas P. “Tom” DeBerry, the Chief of Non-Resident Instruction at TJAGSA,

approached COL Suter about preserving the original JAGC branch insignia still imbedded in Hancock Hall. Although a few ‘experts’ told DeBerry that the tile “was brittle and couldn’t be moved,” DeBerry found “one contractor who said that if the seal was packed with dry ice for an extended period, the tiles could be removed.”<sup>6</sup>

DeBerry got permission from the new occupants of Hancock Hall to try to remove the insignia. Since these new occupants had no idea why the Corps’ insignia was in the floor, much less what it signified, they had no reason to resist MAJ DeBerry’s attempt to remove it. The tiles were packed with dry ice and then “carefully removed” without mishap. Each piece was then cleaned, polished, then glued to a board. Originally, the old insignia was displayed outside Room 130; today, the insignia hangs on the wall adjacent to the Hall of Heroes.<sup>7</sup>



*Corps insignia removed from Hancock Hall and now on display in TJAGLCS*

<sup>6</sup> E-mail Suter, *supra* note 2.

<sup>7</sup> Id.

# AMBIGUITY ABOUNDS: A PRIMER ON THE APPROPRIATE USE OF PROCUREMENT CONTRACTS AND ASSISTANCE INSTRUMENTS

Major Jason W. Allen\*

*“The law is a profession of words.” By means of words contracts are created, statutes are enacted, and constitutions come into existence. Yet, in spite of all good intentions, the meanings of the words found in documents are not always clear and unequivocal. . . . In the eyes of the law, when this kind of situation arises, the contract or the legislative act contains “ambiguity.”<sup>1</sup>*

## I. Introduction

Trying to decide if a federal agency should use a contract or assistance instrument is a difficult task because of the ambiguity in the law.<sup>2</sup> A procurement is accomplished through a contract and is used to purchase things for the direct benefit of the government.<sup>3</sup> Assistance is accomplished through a grant or cooperative agreement and is used to transfer things of value in support or stimulation of geographic, scientific, or economic areas.<sup>4</sup> For example, if environmental protections are restricting training on a military installation, the Department of Defense (DoD) has the authority to enter into agreements for preserving habitat outside of the military installation in order to relieve the restrictions within the installation.<sup>5</sup> In this example, the decision of whether to use procurement or assistance is unclear because there could be a direct benefit to the government in the acquisition of property rights, and also the provision of support in the area of conservation.<sup>6</sup>

As will be discussed in section IV below, the ambiguity present in this example causes agencies to choose the wrong instrument, often with costly and time-consuming consequences. “[I]n 1972, the Commission on Government Procurement found that ‘failure to distinguish between procurement and assistance relationships has led to both inappropriate uses of grants to avoid the requirements of the procurement system and to unnecessary red tape and

administrative requirements in grants.’”<sup>7</sup> As section II.B will detail, this finding by the commission highlights a major advantage of using an assistance instrument, which is the inapplicability of the demanding statutory and regulatory requirements within procurement such as competition and the Federal Acquisition Regulation (FAR).<sup>8</sup> In response, Congress passed the Federal Grant and Cooperative Agreement Act of 1977 (FGCAA) to define procurement and assistance.<sup>9</sup> The FGCAA is a well-intentioned legislative attempt at defining procurement and assistance; however, ambiguity still existed following its creation.

Since the FGCAA was passed, the Office of Management and Budget (OMB) has issued administrative guidance, the Comptroller General has issued opinions, and the courts have issued decisions in attempts to better define the relationships. In spite of these attempts to reduce the ambiguity, understanding the relationship between procurement and assistance “continues to remain unsettled. Although Congress apparently demarcated the boundaries of the different legal instruments, the courts continue to find overlap between the two areas.”<sup>10</sup> Practitioners need clarity in defining procurement and assistance because of the potential costs in time and money caused by improperly utilizing the easier to use assistance instrument and avoiding the competition requirements of procurement.

This primer will provide a framework for analyzing

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<sup>1</sup> Sanford Schane, *Ambiguity and Misunderstanding in the Law*, 25 T. JEFFERSON L. REV. 167, 167 (2002) (footnote omitted) (citing DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW*, at vii (1963)).

<sup>2</sup> Grants and cooperative agreements are referred to as assistance relationships and are used to “provide domestic assistance to geographic, scientific, or economic venues of our nation,” and contracts are referred to as procurement relationships and are used for the “acquisition[] of property or services.” Kurt M. Rylander, *Scanwell Plus: Challenging the Propriety*

*of Federal Agency’s Decision to Use a Federal Grant and Cooperative Agreement*, 28 PUB. CONT. L.J. 69, 69-70 (1998).

<sup>3</sup> 31 U.S.C. § 6303 (2012).

<sup>4</sup> 31 U.S.C. §§ 6304-05 (2012).

<sup>5</sup> 10 U.S.C. § 2684a (2012).

<sup>6</sup> Fortunately for the Department of Defense (DoD), Congress allows for the use of cooperative agreements or grants even if property or services are acquired for the direct benefit or use by the United States. 10 U.S.C. § 2684a(c) (2012).

<sup>7</sup> Andreas Baltatzis, *The Changing Relationship Between Federal Grants and Federal Contracts*, 32 PUB. CONT. L.J. 611, 612 (2003) (quoting S. REP. NO. 95-449, at 6 (1977)).

<sup>8</sup> See Alissa Marque, *A New Appeals Board: Providing Consistency and Clarity in the Growing World of Grants and Cooperative Agreements*, 41 PUB. CONT. L.J. 129, 134 (2011).

<sup>9</sup> Baltatzis, *supra* note 7, at 612-13 (quoting S. REP. NO. 95-449, at 7).

<sup>10</sup> *Id.* at 614.

whether an agency should use procurement or assistance. First, section II will examine the significance between these two relationships, which is primarily the more arduous legal and administrative requirements applicable to procurement. Section II will also offer a brief history leading to the creation of the FGCAA, which provides important reasons for the act and the rationales for developing distinct relationships. Section III will evaluate how the FGCAA defines the procurement and assistance relationships and how the OMB administrative guidance provides further interpretation. Finally, section IV will conclude by explaining how the most recent court decisions in *CMS Contract Management Services v. Massachusetts Housing Finance Agency* and *Hymas v. United States*, while not entirely eliminating ambiguity, provide practitioners a useful framework for choosing between using procurement versus assistance.

## II. Significance and History

The choice between using a procurement contract versus an assistance relationship is important. First, it is important because Congress states so in the FGCAA.<sup>11</sup> Second, procurement contracts have more arduous legal and administrative requirements, leading to more robust government obligations and contractor rights.<sup>12</sup> For example, if practitioners use an assistance instrument when a procurement contract is required, they could find themselves stuck in litigation or starting over the acquisition process.<sup>13</sup>

### A. Congress States the Significance

The distinction between procurement and assistance is important because Congress, which controls federal funding,<sup>14</sup> passed the FGCAA, which establishes the purposes of the act.<sup>15</sup> In 1972, the Commission of Government Procurement found “[s]ignificant confusion over which Federal transactions should be subject to procurement procedures and which should be subject to assistance

policies.”<sup>16</sup> The commission made several recommendations, one of which was that each relationship should be clearly defined.<sup>17</sup> In response, the Senate Government Operations Committee commented on the need for legislation stating that federal grant expenses were increasing; that Congress had not been clear on when grants, as opposed to contracts, should be used; and that confusion and inconsistency led to waste and abuse.<sup>18</sup>

Thus, in 1977 Congress passed the FGCAA that establishes three purposes.<sup>19</sup> First, the FGCAA promotes a better understanding of expenditures and eliminates unnecessary administrative requirements by defining procurement and assistance.<sup>20</sup> Second, the FGCAA prescribes selection criteria in order to achieve uniformity and clarity and define responsibilities of the parties.<sup>21</sup> And lastly, the FGCAA promotes agency discipline in selecting the appropriate relationship, maximizes competition in procurement, and encourages competition in assistance.<sup>22</sup> The history and statutory purposes of the FGCAA provide important principles for practitioners when analyzing the appropriate relationship. Equally important are the different legal processes that apply to the distinct relationships.

### B. Different Legal Processes Apply

The distinction between procurement and assistance is also significant because different legal processes, which define contractor rights and government obligations, apply to each relationship.<sup>23</sup> Different processes apply because procurement and assistance have contrary goals. Within the procurement process. Congress has stated that competition is paramount to the process because the government wants to obtain the best products for the best prices.<sup>24</sup> Compare that with assistance, in which sometimes it is better to award a grant to the least efficient grantee in order to stimulate increased efficiency in the geographic, scientific, or economic venue.<sup>25</sup> Therefore, generally, the demanding statutes and

<sup>11</sup> See 31 U.S.C. § 6301 (2012) (describing the purposes of the Federal Grant and Cooperative Agreement Act of 1977 (FGCAA)).

<sup>12</sup> See generally Rylander, *supra* note 2, at 70, 73 (“[T]hese grants and cooperative agreements proceed apart from the processes mandated by the Competition in Contracting Act of 1984 (CICA) and the Federal Acquisition Regulation (FAR).”); Marque, *supra* note 8, at 134 (“[R]egulations governing procurement contracts generally do not apply to [grants and cooperative agreements].”).

<sup>13</sup> See Rylander, *supra* note 2, at 70 (“Both the Court of Appeals for the Third Circuit and the District Court for the District of Columbia have validated a small body of General Accounting Office decisions establishing that a contractor can protest a federal agency’s award of a federal grant or cooperative agreement.”).

<sup>14</sup> U.S. CONST. art. I, § 8 (giving Congress the power to lay and collect taxes, pay debts, coin money, and provide for the defense and general welfare of the United States).

<sup>15</sup> Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. §§ 6301-6305 (2012).

<sup>16</sup> Memorandum from the Office of Management and Budget to the President, subject: Enrolled Bill S. 1437-Federal Grant and Cooperative Agreement Act of 1976 Sponsor-Sen. Chiles (D) Florida and 12 Others, at 2 (Oct. 18, 1976) (on file with the Gerald R. Ford Presidential Library).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 31 U.S.C. § 6301 (2012).

<sup>20</sup> *Id.* § 6301(1).

<sup>21</sup> *Id.* § 6301(2).

<sup>22</sup> *Id.* § 6301(3).

<sup>23</sup> Rylander, *supra* note 2, at 73.

<sup>24</sup> *Id.* at 72.

<sup>25</sup> *Id.* at 73. One area in which the DoD and U.S. Army use assistance relationships is research and development administered by the U.S. Army

regulations governing the procurement process do not apply to assistance.<sup>26</sup> For example, the FAR and Competition in Contracting Act (CICA) do not apply to assistance.<sup>27</sup> Additionally, the Contract Disputes Act (CDA) is inapplicable to assistance.<sup>28</sup> Finally, Tucker Act jurisdiction only applies to procurement solicitations and contracts, and does not apply to assistance.<sup>29</sup>

However, assistance is not entirely unregulated, and is subject to OMB circulars and agency specific regulations.<sup>30</sup> The OMB circulars are A-102, governing assistance relationships with state and local governments, and A-110, governing assistance relationships with higher educational institutions, hospitals, and other nonprofit organizations.<sup>31</sup> Within the DoD, assistance relationships are regulated by the Defense Grant and Agreement Regulatory System.<sup>32</sup> Due to the more onerous procurement process, practitioners need to avoid the trap of utilizing the easier assistance instruments; otherwise, they could find themselves stuck in litigation. Because the distinction is significant, practitioners need to understand how the FGCAA defines the procurement and assistance relationships and what guidance OMB provides on the relationships.

### III. Definitions and OMB Administrative Guidance

While the legislative intent and statutory purposes of the FGCAA are insightful, the definitions contained within the FGCAA are the foundation for analyzing whether practitioners should use procurement or assistance. Additionally, the OMB administrative guidance on the FGCAA is significant in the analysis. After practitioners understand why the distinction between procurement and assistance matters, the FGCAA definitions and the OMB administrative guidance are where the analysis begins.

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Research Laboratory. *See* U.S. ARMY RESEARCH LABORATORY, <https://www.arl.army.mil/www/default.cfm> (last visited Dec. 1, 2017).

<sup>26</sup> *See* Marque, *supra* note 8, at 134.

<sup>27</sup> Rylander, *supra* note 2, at 70. *See also* FAR 1.104, 2.101 (2013) (stating the FAR applies to acquisitions and defining an acquisition as acquiring, by contract, supplies and services by and for the use of the Federal government). The Competition in Contracting Act (CICA) mandates full and open competition through the use of competitive procedures in many, but not all, purchases of property or services. 10 U.S.C. § 2304 (2012).

<sup>28</sup> Rylander, *supra* note 2, at 73. The Contract Disputes Act (CDA) provides a comprehensive system for contractors and government agencies to resolve contract performance disputes. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL, CIVIL RESOURCE MANUAL (1997) § 70 (2013).

<sup>29</sup> *Hymas v. U.S.*, 810 F.3d 1312, 1329 (Fed. Cir. 2016). *But see* *Res. Conservation Grp., L.L.C. v. U.S.*, 597 F.3d 1238, 1245-46 (Fed. Cir. 2010) (holding that § 1491(b)(1) jurisdiction is exclusion to procurement, but that implied-in-fact jurisdiction over nonprocurement solicitations still exists under § 1491(a)(1)). The Tucker Act waives sovereign immunity and grants jurisdiction to the United States Court of Federal Claims (COFC) to hear claims against the United States founded upon any express or implied contract with the United States under § 1491(a)(1), and grants the COFC the

### A. Definitions

The analysis of procurement versus assistance begins with the definitions. The FGCAA does not define these instruments, but instead defines the situations in which they are used. First, the FGCAA states that a procurement contract shall be used when “the principle purpose of the instrument is to acquire . . . property or services for the direct benefit or use of the United States Government . . . .”<sup>33</sup> Next, the FGCAA states that the two assistance instruments, grants and cooperative agreements, shall be used when “the principle purpose of the relationship is to transfer a thing of value to . . . [a] recipient to carry out a public purpose of support or stimulation authorized by a law of the United States . . . .”<sup>34</sup> The difference between grants and cooperative agreements is that substantial involvement is expected from the agency in the cooperative agreement and not expected in the grant.<sup>35</sup> As will be discussed in section IV below, the principle purpose, direct beneficiary, thing of value, and authorizing law are essential factors in the analysis of whether to use procurement or assistance. Since the FGCAA does not contain much more than the definitions, practitioners need to consult the OMB administrative guidance.

### B. OMB Administrative Guidance

After Congress defined procurement and assistance relationships in the FGCAA, the OMB issued administrative guidance. The OMB administrative guidance provides factors, such as agency mission, intent, and principal purpose of the relationship, for practitioners to consider. The OMB states that “[i]n most cases, agencies will have no trouble distinguishing between procurement and assistance. Where the distinction is hard to make, the OMB believes that the agency mission and intent must be the guide.”<sup>36</sup> The OMB goes on to provide an example:

jurisdiction to hear protests by interested parties objecting to a solicitation or award, or alleging a violation of procurement statute or regulation under § 1491(b)(1). 28 U.S.C. § 1491 (2012).

<sup>30</sup> Rylander, *supra* note 2, at 73.

<sup>31</sup> Marque, *supra* note 8, at 134 (footnote omitted).

<sup>32</sup> *See* 32 C.F.R. § 21.200 (2016) (“The Defense Grant and Agreement Regulatory System (DGARS) is the system of regulatory policies and procedures for the award and administration of DoD Components’ assistance and other nonprocurement awards.”); U.S. DEP’T OF DEF., DIR. 3210.06, DEFENSE GRANT AND AGREEMENT REGULATORY SYSTEM para. 2 (6 Feb. 2014). (“This directive applies to [DoD Components] that are authorized to award or administer grants, cooperative agreements, and other non-procurement transactions subject to the DGARS.”).

<sup>33</sup> 31 U.S.C. § 6303 (2012).

<sup>34</sup> 31 U.S.C. §§ 6304-05 (2012).

<sup>35</sup> *Id.*

<sup>36</sup> Implementation of Federal Grant and Cooperative Agreement Act of 1977, 43 Fed. Reg. 36,860, 36,860 (Aug. 18, 1978).

where an agency authorized to support or stimulate research decided to enter into a transaction where the *principal purpose* of the transaction is to stimulate or support research, it is authorized to use either a grant or a cooperative agreement. Conversely, if an agency is not authorized to stimulate or support research, or the *principal purpose* of a transaction funding research is to produce something for the government's own use, a procurement transaction must be used.<sup>37</sup>

Thus, agency mission, intent of the transaction, and principal purpose are important factors in choosing between procurement and assistance.

The OMB also provides guidance regarding substantial federal involvement to aid in distinguishing grants from cooperative agreements. Generally, substantial federal involvement includes agency collaboration, participation in the management of the project, or agency intervention.<sup>38</sup> These factors demonstrate agency involvement, but whether that involvement is substantial is still a balance depending on the circumstances.<sup>39</sup>

The OMB also provides important guidance as to agency discretion in choosing between procurement and assistance. The OMB states that “[t]he determinations of whether a program is principally one of procurement or assistance, and whether substantial Federal involvement in performance will normally occur are basic agency policy decisions. . . . Congress intended the [FGCAA] to allow agencies flexibility to select the instrument that best suits each transaction.”<sup>40</sup>

In conclusion, the FGCAA definitions will guide the agency to the correct instrument most of the time; but when the distinction is difficult to make, agency mission, intent, and principal purpose should dictate.<sup>41</sup> Additionally, while agency discretion is not unlimited, as will be discussed in the case analyses in section IV, Congress did intend the FGCAA to allow for agency flexibility.<sup>42</sup>

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<sup>37</sup> *Id.* at 36,862.

<sup>38</sup> *Id.* at 36,863. More specifically, agency involvement includes the ability to halt the project due to unmet performance specifications; stage-by-stage review and approval; sub-grant or subcontract review and approval; key personnel selection; joint participation by the assistance recipient and agency; ability to direct or redirect work based on interrelationships with other agency programs or projects; substantial involvement is anticipated to ensure statutory compliance with civil rights, environmental protection, and provisions for the handicapped; and prescriptive agency requirements regarding scope of services offered, organizational structure, staffing, operations, or management. *Id.* Substantial federal agency involvement does not include agency approval of plans before award; normal stewardship responsibilities such as site visits, performance and financial reporting, and audits; unanticipated agency involvement to make corrections; little involvement is anticipated to ensure statutory compliance with civil rights, environmental protection, and provisions for the handicapped; and general administrative guidance called for in the OMB circulars. *Id.* Finally, substantial involvement does not include providing technical assistance or guidance if the recipient requests it, the recipient is

## IV. Case Analyses

Since the publishing of the OMB guidance, the Comptroller General has issued opinions and the courts have issued decisions in attempts to better define the relationships. *CMS* and *Hymas* are the most recent U.S. Court of Appeals for the Federal Circuit (CAFC) attempts at defining procurement and assistance. While the CAFC decisions do not entirely reduce the ambiguity, they do provide practitioners a useful and recent framework because the court's analyses apply the factors and principles from the FGCAA definitions and the OMB guidance. Practitioners can use the framework in combination with the FGCAA definitions and OMB administrative guidance to choose a procurement contract or an assistance instrument. Initially, however, it is helpful to examine some of the earlier Comptroller General opinions and court decisions. This helps to explain the continuation of the ambiguity and confusion.

### A. Early Opinions and Decisions

Much of the ambiguity following the FGCAA and OMB guidance originates from the earlier Comptroller General opinions and court decisions that found overlap between procurement and assistance that created confusion among practitioners.<sup>43</sup> One of the earlier Comptroller General opinions is a letter to the Honorable Richard L. Ottinger. In that letter, the Comptroller General states that the FGCAA does not give an agency the authority to enter into grants and cooperative agreements.<sup>44</sup> The authority to enter into assistance instruments must be found in the agency's affirmative authorizing legislation.<sup>45</sup> For example, in the environmental example concerning DoD from section I above, the authorizing legislation allows the use of an assistance agreement.<sup>46</sup> While the letter to the Honorable Richard L. Ottinger is not confusing standing alone, it lays the foundation for the next opinion that complicates the principle purpose analysis by adding a party between the agency and

not required to follow it, or the guidance was provided before the relationship began and the recipient was aware of the guidance. *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 36,862.

<sup>42</sup> *Id.* at 36,863.

<sup>43</sup> See Baltatzis, *supra* note 7, at 614.

<sup>44</sup> To Honorable Richard L. Ottinger, B-210655, 1983 WL 491638, at 3 (Comp. Gen. Apr. 14, 1983).

<sup>45</sup> *Id.*

<sup>46</sup> 10 U.S.C. § 2684a(c) (2012).

assistance recipient, a third-party intermediary.<sup>47</sup>

*Civic Action Institute* deals with the complex issue of third-party intermediaries, which tweaks the principle purpose analysis. In that opinion, the General Accounting Office (GAO)<sup>48</sup> first held that it will review assistance awards if there is a showing that an assistance agreement was used to avoid competition requirements, thus providing standing at the GAO to challenge the agency choice of instrument.<sup>49</sup> The GAO then held that the direct benefit language used in the FGCAA is not necessarily the final question.<sup>50</sup> When third-party intermediaries are involved, the question becomes whether the principal purpose of the agency is to acquire that third-party intermediary's services in order to provide the assistance or whether the principal purpose is to assist the third-party intermediary in providing assistance.<sup>51</sup> This confusing twist ultimately calls into question the appropriateness of the agency's choice of instrument. The GAO relied heavily on the fact that while the agency had authority to use assistance, it had no affirmative authority in the authorizing legislation to use assistance with third-party intermediaries.<sup>52</sup>

These two opinions stand for the principle that practitioners need to critically examine the agency's authorizing legislation for the authority to use assistance and authority to use third-party intermediaries. If there is no authority to use third-party intermediaries, then selecting the proper instrument will turn on the more difficult purpose analysis as laid out in *Civic Action Institute*. Much of the confusion and ambiguity between procurement versus

assistance stems from the principal purpose analysis within a third-party intermediary relationship, which will be highlighted in subsections B and C below discussing *CMS* and *Hymas*.

The next area of Comptroller General opinions further deal with the principal purpose analysis. First, in *New York Telephone Company*, the GAO found that an award intended to fulfill the mission of the agency is a procurement, even if the award results in assistance to the public.<sup>53</sup> In another opinion, *West Coast Copy, Inc.*, the GAO similarly found that the relationship was procurement because the agency was benefiting from the award even though the services were being provided to the public.<sup>54</sup> And finally, in a letter to the Honorable Eleanor Holmes Norton, the Comptroller General stated the principal purpose test as whether the principle purpose is to serve the immediate needs of the government, or whether to provide assistance to a non-federal entity in serving a public purpose, as judged on the basis of all surrounding circumstances.<sup>55</sup> The principal purpose test focuses on whether the subject matter of the agreement falls within the duties or mission of the agency.<sup>56</sup> If so, then the principal purpose of that agreement is for the direct benefit of the agency because it assists the agency in fulfilling that duty or mission.<sup>57</sup> Accordingly, while examining the authorizing legislation and potential use of a third-party intermediary, practitioners need to focus on the principal purpose of the agreement and how it impacts the mission of the agency.<sup>58</sup>

While these GAO opinions focused on the confusion and ambiguity surrounding the concepts of authorizing

<sup>47</sup> See U.S. GEN. ACCT. OFF., GGD-81-88, AGENCIES NEED BETTER GUIDANCE FOR CHOOSING AMONG CONTRACTS, GRANTS, AND COOPERATIVE AGREEMENTS, 10 (1981) ("An intermediary situation often arises where an assistance relationship is authorized with certain parties, but the Federal agency delivers the assistance by utilizing another party."). Since the intermediary is the recipient of the award, the choice of instrument depends on the purpose of the relationship with the intermediary. *Id.*

<sup>48</sup> The General Accounting Office (GAO) became the Government Accountability Office (GAO) in 2004. GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, § 8, 118 Stat. 811, 814.

<sup>49</sup> *Civic Action Inst.*, 61 Comp. Gen. 637, 637 (1982). The GAO jurisdiction does not extend beyond this threshold question if the assistance relationship is proper. *Sprint Commc'ns Co.*, B-256586, B-256586.2, 1994 WL 190255, at 2 (Comp. Gen. May 9, 1994) ("[O]ur review is limited to protests that the award . . . of a 'contract' violates procurement laws and regulations, and thus in the context of protests of awards of cooperative agreements, our review is limited to protests that a cooperative agreement was used where a contract was required.").

<sup>50</sup> *Civic Action Inst.*, 61 Comp. Gen. 637, 639 (1982).

<sup>51</sup> *Id.* See also U.S. GEN. ACCT. OFF., GGD-81-88, AGENCIES NEED BETTER GUIDANCE FOR CHOOSING AMONG CONTRACTS, GRANTS, AND COOPERATIVE AGREEMENTS, at 10-11 (1981) (distinguishing the government's purpose).

The fact that the product or service produced by the intermediary pursuant to the Federal award may flow to and thus benefit another party is irrelevant. What is important is whether the Federal Government's purpose as defined by program legislation is to acquire the intermediary's services, which happen to

take the form of producing the product or carrying out the service that is then delivered to the assistance recipient, or if the Government's purpose is to assist the intermediary to do the same thing.

*Id.*

<sup>52</sup> *Civic Action Inst.*, 61 Comp. Gen. 637, 639 (1982).

<sup>53</sup> *N.Y. Tel. Co.*, 69 Comp. Gen. 61, 63 (1989). In this case, the General Services Administration (GSA), solicited licenses allowing companies to furnish public pay phone services on GSA controlled property. *Id.* at 62. The GSA was required under its mission to provide these services to its employees, but the pay phones were also provided for use by customers conducting business with the GSA. *Id.* at 63.

<sup>54</sup> *W. Coast Copy, Inc.*, B-254044, B-254044.2, 1993 WL 476970, at 4 (Comp. Gen. Nov. 16, 1993). In this case, the U.S. Bankruptcy Court for the Southern District of Florida solicited licenses allowing contractors space within the court to provide photocopy services to the public. *Id.* at 1. The GAO found that an award resulting in a concession or similar type contract that benefits the government, either in reduction of workload or fulfillment of mission, is a procurement relationship. *Id.* at 4.

<sup>55</sup> To Honorable Eleanor Holmes Norton, B-257430, 1994 WL 612302, at 3, 5 (Comp. Gen. Sept. 12, 1994).

<sup>56</sup> Rylander, *supra* note 2, at 82.

*Id.*

<sup>58</sup> See, e.g., *Id.* at 87 (concluding that first, courts should determine the principal purpose of an agreement and compare it to the agency's mission, and second, courts should examine the authorizing legislation).

legislation, third-party intermediaries, and principal purpose, the early court decisions focused on jurisdiction, and created ambiguity by inserting contract analysis into assistance relationships. The following court case analyses do not directly aid the practitioner in choosing between procurement and assistance, but illustrate where ambiguity and confusion exist. In *Chem Service, Inc. v. Environmental Monitoring Systems Laboratory—Cincinnati*, the Court of Appeals for the Third Circuit held that Chem Service had standing to challenge the use of an assistance agreement.<sup>59</sup> This finding follows the GAO opinions outlined above in which GAO found standing in similar circumstances.<sup>60</sup>

However, as compared to GAO's jurisdiction, which ends if an assistance relationship was properly used,<sup>61</sup> jurisdiction in the courts is unclear and confusing.<sup>62</sup> The ambiguity in jurisdiction stems from what appears to be directly conflicting case law.<sup>63</sup> For example, the United States Court of Federal Claims (COFC), in *Trauma Service Group, Ltd. v. U.S.*, held that a cooperative agreement was not a contract and could not be enforceable under the Tucker Act.<sup>64</sup> However, in affirming the decision of the COFC, the CAFC stated that "any agreement can be a contract within the meaning of the Tucker Act, provided that it meets the requirements for a contract . . . . As such, contrary to the opinion of the trial court, a [Memorandum of Agreement] can also be a contract—whether this one is, we do not decide."<sup>65</sup> Additionally, the COFC held in *Thermalon Industries, Ltd. v. U.S.*, that a grant satisfied the requirements of a contract and could be enforced under the Tucker Act.<sup>66</sup> This ambiguity and confusion stems in part from the use of the term contract

in the Tucker Act<sup>67</sup> and the term procurement contract in the FGCAA.<sup>68</sup>

More recently, the COFC held in *Ozdemir v. U.S.* that a solicitation for assistance was subject to Tucker Act jurisdiction because jurisdiction is not limited to procurement matters.<sup>69</sup> But, the CAFC, in *Resource Conservation Group, L.L.C. v. U.S.*, held that 28 U.S.C. § 1491(b)(1) of the Tucker Act "in its entirety is exclusively concerned with procurement solicitations and contracts," but that implied-in-fact non-procurement contract jurisdiction under § 1491(a)(1) still existed.<sup>70</sup> In conclusion, jurisdiction in the courts regarding assistance is puzzling, and the courts' jurisdiction analyses have led to confusion in the use of assistance. While an understanding of this area can help practitioners understand the ambiguity and confusion, they should not let the courts' jurisdiction analyses get confused with the analysis needed in choosing between using procurement versus assistance.<sup>71</sup> The final sections of this primer will focus on the most recent court decisions in *CMS* and *Hymas*, and how they provide a useful framework for choosing between using procurement versus assistance.

## B. *CMS Contract Management Services v. Massachusetts Housing Finance Agency*

*CMS*, in some ways, adds to the ambiguity and confusion in this area of the law. However, the analysis used by the court highlights what is important in deciding when to use procurement versus assistance. Based on the court's analysis

<sup>59</sup> *Chem. Serv., Inc. v. Evtl. Monitoring Sys. Lab.—Cincinnati*, 12 F.3d 1256, 1266-67 (3d Cir. 1993) ("[A]n agreement between the federal government and a non-federal party which manifests the features of a procurement contract requires the federal government to comply with the nation's procurement laws."). "To the extent that a[n agreement] is used to circumvent the statutory and regulatory requirements of the federal procurement laws, we find that Congress intended potential bidders to such a contract to be within the zone of interests." *Id.* at 1267.

<sup>60</sup> See *Civic Action Inst.*, 61 Comp. Gen. 637, 637 (1982) (finding that standing exists when agencies use grants or cooperative agreements to avoid competition requirements).

<sup>61</sup> *Sprint Commc'ns Co., B-256586, B-256586.2*, 1994 WL 190255, at 2 (Comp. Gen. May 9, 1994) ("[O]ur review is limited to protests that the award . . . of a 'contract' violates procurement laws and regulations, and thus in the context of protests of awards of cooperative agreements, our review is limited to protests that a cooperative agreement was used where a contract was required.").

<sup>62</sup> See generally Jeffrey C. Walker, *Enforcing Grants and Cooperative Agreements as Contracts Under the Tucker Act*, 26 PUB. CONT. L.J. 683, 685 (1997) ("Confusion surrounds the issue of whether assistance agreements are enforceable contracts, thereby resulting in inconsistent case law."); *Marque*, *supra* note 8, at 134 ("Court opinions and scholarly articles . . . reveal a continuing debate as to whether [grants and cooperative agreements] can be construed as procurement contracts.").

<sup>63</sup> See *Marque*, *supra* note 8, at 137 ("Although the . . . court ruled that the [Court of Federal Claims] has jurisdiction over [grants and cooperative agreements], it failed to rebut adequately a line of cases supporting a contrary outcome.").

<sup>64</sup> *Trauma Serv. Grp., Ltd. v. U.S.*, 33 Fed. Cl. 426, 429-30 (Fed. Cl. 1995).

<sup>65</sup> *Trauma Serv. Grp. v. U.S.*, 104 F.3d 1321, 1326 (Fed. Cir. 1997). A cooperative agreement could be enforceable under the Tucker Act if it meets the requirements of a contract with the government: mutual intent to contract, offer, acceptance, consideration, and a government representative with actual authority to bind the government. *Id.*

<sup>66</sup> *Thermalon Indus., Ltd. v. U.S.*, 34 Fed. Cl. 411, 413 (Fed. Cl. 1995).

<sup>67</sup> 28 U.S.C. § 1491 (2012).

<sup>68</sup> 31 U.S.C. § 6303 (2012). See generally Walker, *supra* note 62, at 700-01 ("Since 1982, the FGCAA has contrasted grants and cooperative agreements with procurement contracts and, thus, does not logically preclude grants and cooperative agreements from being contracts."). However, the FAR still uses the term contract when it should use the term procurement contract, thus, perpetuating the ambiguity and confusion. *Id.* at 685. See, e.g., FAR 2.101 (2013) (defining contract, not procurement contract, as excluding grants and cooperative agreements); FAR 35.003(a) (2013) (using the term contract instead of procurement contract).

<sup>69</sup> *Ozdemir v. U.S.*, 89 Fed. Cl. 631, 634 (Fed. Cl. 2009) (finding that the phrase "in connection with a procurement or a proposed procurement" within the Tucker Act only qualifies the seven words preceding it, leaving the earlier clauses broader and not requiring a procurement connection). 28 U.S.C. § 1491(b)(1) (2012).

<sup>70</sup> *Res. Conservation Grp., L.L.C. v. U.S.*, 597 F.3d 1238, 1245-46 (Fed. Cir. 2010) ("We conclude that the court's implied-in-fact jurisdiction over nonprocurement solicitations survived the enactment of 1491(b)(1).").

<sup>71</sup> See generally Walker, *supra* note 62, at 686 ("Although controversy surrounds the issue of whether grants and cooperative agreements are contractual in nature, it is well settled that they cannot be procurement contracts.").

in *CMS*, practitioners should focus on the principal purpose of the transaction, the direct beneficiary of the instrument, and what thing of value is being transferred to the other party to the transaction.<sup>72</sup> These terms originate from the FGCAA and the OMB guidance explained in section III.

The CAFC heard *CMS* on appeal by CMS after the COFC denied to find a Department of Housing and Urban Development (HUD) solicitation and award of contract administration services unlawful.<sup>73</sup> The CAFC held in favor of CMS stating that the proper instrument for the solicitation and award was a procurement contract.<sup>74</sup>

Under the Housing Act of 1937, the HUD was authorized to provide rental assistance benefits to low-income families, which included payments to owners of privately-owned dwellings (project owners), in order to allow for the subsidizing of rent.<sup>75</sup> After the 1974 amendments to the Housing Act, the HUD used two approaches to provide these payments.<sup>76</sup> Under the first approach, the HUD used Housing Assistance Program (HAP) contracts directly with the project owners.<sup>77</sup> Under the second approach, the HUD used annual contributions contracts (ACC) with a Public Housing Agency (PHA) that would enter into HAP contracts with the project owners.<sup>78</sup> CMS was a PHA under the second approach.<sup>79</sup>

In 1997, Congress passed the Multifamily Assisted Housing Reform and Affordability Act (MAHRA) that addressed the increasing inability of the HUD, due to budget cuts and staff reductions, to administer HAP contracts and ACCs.<sup>80</sup> The MAHRA allowed the HUD to transfer contract administration functions and responsibilities of these HAP contracts and ACCs to PHAs.<sup>81</sup> The HUD sought additional funding for this outsourcing, and stated that the benefits of this outsourcing included improved oversight of the HAP contracts and ACCs and release of agency staff for other duties.<sup>82</sup>

In 1999, the HUD began the process to award an ACC to a PHA in every state.<sup>83</sup> The ACCs provided for

administrative fees and incentive fees, and each proposal would be evaluated on best value to the agency.<sup>84</sup> The ACCs were awarded and renamed Performance Based Annual Contributions Contracts (PBACC).<sup>85</sup> In 2011, the PBACCs were re-competed and re-awarded, and several protests were filed with the GAO arguing that “the PBACCs were procurement contracts and that the HUD had not complied with federal procurement laws.”<sup>86</sup> The HUD took corrective action by withdrawing the awards and re-issuing the solicitation characterizing the PBACCs as cooperative agreements.<sup>87</sup> In the solicitation, the HUD restricted competition by giving priority to in-state PHAs over out-of-state PHAs.<sup>88</sup>

CMS filed a pre-award protest with the GAO arguing that the PBACCs were procurement contracts and that the in-state priority violated competition rules under federal procurement laws.<sup>89</sup> The GAO agreed with CMS, stating the third-party intermediary rule as: “[t]he choice of instrument for an intermediary relationship depends solely on the principal federal purpose in the relationship with the intermediary.”<sup>90</sup> The principal purpose in the PBACCs with PHAs is the administration of the HAP contracts with project owners, which is a direct benefit to the HUD because the HUD is obligated to provide that same administration under its direct HAP contracts with project owners.<sup>91</sup> The PHAs are not receiving assistance from the HUD, but are used to provide assistance to the project owners, which are the entities eligible for assistance.<sup>92</sup>

Furthermore, the payments made to PHAs to make the subsidy payments to project owners are not a thing of value under 31 U.S.C. § 6305 because the PHAs “have no rights to, or control over, the payments and that any excess funds and interest earned on those funds must be remitted to HUD or invested on its behalf.”<sup>93</sup> Additionally, the administrative fees paid to PHAs are not a thing of value because the “purpose of the fee was not to assist the PHAs in carrying out a public purpose.”<sup>94</sup> Transfer of a thing of value in order to carry out a public purpose is paramount to the definition of an

<sup>72</sup> See *CMS Contract Mgmt. Services v. Mass. Hous. Fin. Agency*, 745 F.3d 1379 (Fed. Cir. 2014).

<sup>73</sup> *Id.* at 1381.

<sup>74</sup> *Id.* at 1386.

<sup>75</sup> *Id.* at 1381.

<sup>76</sup> *CMS Contract Mgmt. Services v. Mass. Hous. Fin. Agency*, 745 F.3d 1379 (Fed. Cir. 2014).*Id.* at 1381-82.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1382.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *CMS*, 745 F.3d at 1379.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1382-83.

<sup>85</sup> *Id.* at 1383.

<sup>86</sup> *CMS*, 745 F.3d at 1379C.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1384.

<sup>90</sup> *Id.* at 1381 (quoting S. REP. NO. 97-180, at 5 (1981)).

<sup>91</sup> *CMS*, 745 F.3d at 1384.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

assistance relationship.<sup>95</sup>

The HUD disregarded the GAO recommendation and continued with the cooperative agreement solicitation, and CMS filed a pre-award protest with the COFC.<sup>96</sup> The COFC ruled in favor of the HUD, and CMS appealed to the CAFC.<sup>97</sup> The CAFC agreed with CMS and the analysis of the GAO, holding that in this third-party intermediary relationship, the proper instrument is a procurement contract.<sup>98</sup> The principal federal purpose of the PBACCs “is to procure the services of the [PHAs] to support [the] HUD’s staff and provide assistance to [the] HUD with the oversight and monitoring of Section 8 housing assistance.”<sup>99</sup> The PBACCs were used to outsource HAP management in response to budget restraints and sought to improve oversight of the Section 8 program.<sup>100</sup> Therefore, the beneficiary is the HUD because the HUD characterized the PBACCs as a solution for conducting its business during reductions in staff, intended to select awardees based on the best value to the HUD, and emphasized the support provided by the PHAs to the HUD.<sup>101</sup> Additionally, the CAFC found that nothing of value under 31 U.S.C. § 6305 was transferred to PHAs, using the same reasoning as the GAO.<sup>102</sup>

Based on the analysis in *CMS*, practitioners should focus on the principal federal purpose of the transaction, particularly any pronouncements made by the agency about the transaction. Additionally, practitioners should focus on the direct beneficiary of the instrument, particularly any benefits obtained by the agency, and whether the agency is obtaining something it has a duty or responsibility to do. Finally, practitioners should analyze what thing of value is being transferred to the other party to the transaction, particularly in third-party intermediary relationships. The next case, *Hymas*, builds upon this framework from *CMS*.

### C. *Hymas v. United States*

As with the decision in *CMS*, the decision in *Hymas* adds to the confusion and ambiguity. With a similar set of facts, the court in *Hymas* comes to a different holding than the court in *CMS*.<sup>103</sup> However, the analysis attempts to differentiate the two cases. Even though this analysis is not perfectly clear, it

does focus practitioners on the important factors in deciding between using procurement versus assistance. Building on the factors in *CMS*, those additional factors important in *Hymas* are: the language of the authorizing legislation, as mentioned in the early GAO opinions detailed in subsection A above, and agency discretion and flexibility, first detailed in the OMB administrative guidance as discussed in section III.B above.

The CAFC heard *Hymas* on appeal by the United States after the COFC held that the Fish and Wildlife Service (FWS) violated federal procurement laws when it used cooperative farming agreements (CFA) when it should have used procurement contracts.<sup>104</sup> The CAFC held in favor of the FWS, stating that the proper instruments were CFAs.<sup>105</sup> From the 1970s, the FWS entered into CFAs in which cooperators farmed parcels of public land, harvested seventy-five percent of the crop, and left twenty-five percent to feed migratory birds and wildlife.<sup>106</sup> The FWS advised cooperators on “(1) crop selection; (2) farming methods; (3) pesticide and fertilizer use; and (4) crop harvest.”<sup>107</sup>

In 2013 and 2014, the FWS considered Mr. Hymas, but did not award him a CFA.<sup>108</sup> The FWS did not use formal procurement procedures or use full and open competition; instead the FWS relied “upon its priority selection system that gave preference to previous cooperators with a successful record of farming designated areas with the [public land].”<sup>109</sup> In 2013, Mr. Hymas filed a bid protest in the COFC alleging violations of the CICA and the FGCAA.<sup>110</sup> The COFC held that the FWS violated the CICA by not obtaining full and open competition, and that the priority selection system used by the FWS violated the FGCAA.<sup>111</sup> The United States appealed.

The CAFC first held that the FWS authorizing statutes and regulations allowed it to enter into cooperative agreements.<sup>112</sup> “[T]he [Fish and Wildlife Coordination Act of 1958] provides that the [FWS] ‘is authorized to provide assistance to, and cooperate with, . . . public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife resources thereof, and their habitat.’”<sup>113</sup> The CAFC then held that the

<sup>95</sup> See 31 U.S.C. § 6304-05 (2012).

<sup>96</sup> *CMS*, 745 F.3d at 1384-85.

<sup>97</sup> *Id.* at 1385.

<sup>98</sup> *Id.* at 1386.

<sup>99</sup> *Id.* at 1385.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1385-86.

<sup>102</sup> *CMS*, 745 F.3d at 1386.

<sup>103</sup> See *Hymas v. U.S.*, 810 F.3d 1312 (Fed. Cir. 2016).

<sup>104</sup> *Id.* at 1314.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1314-15.

<sup>107</sup> *Id.*

<sup>108</sup> *Hyman*, 810 F.3d at 1315-16.

<sup>109</sup> *Id.* at 1315.

<sup>110</sup> *Id.* at 1316.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1324.

<sup>113</sup> *Hyman*, 810 F.3d at 1327-28 (quoting 16 U.S.C. § 661 (2012)).

FWS “properly construed [CFAs] as cooperative agreements.”<sup>114</sup> In coming to this second holding, the CAFC first relied upon the definitions of when an agency shall use a procurement contract and when an agency shall use a cooperative agreement as outlined in the FGCAA.<sup>115</sup> Next, the court referenced the OMB guidance on the FGCAA, namely, that determinations on whether a program is one of procurement or assistance is a policy decision, and that the FGCAA gives flexibility to agencies in transaction instrument selection.<sup>116</sup> Finally, the CAFC stated the rule as “whether an instrument reflects a ‘procurement contract’ or a ‘cooperative agreement’ turns upon the principal purpose of the relationship.”<sup>117</sup> If the principal purpose is for the agency to transfer a thing of value in order to carry out a public purpose of support or stimulation authorized by law, as opposed to acquiring property or services for the direct benefit of the agency, then the proper transaction instrument is a cooperative agreement.<sup>118</sup>

In this case, “the [FWS] principally intended the CFAs to transfer a thing of value (i.e., the right to farm specific refuge lands and retain a share of the crop yield) to carry out a public purpose authorized by law (i.e., to conserve wildlife on the refuges).”<sup>119</sup> The FWS did not intend to acquire farming services for the direct benefit of the FWS; thus, a procurement contract was not required.<sup>120</sup> As with most cooperative agreements, the CFAs indirectly benefit the FWS by advancing its mission, but the FWS does not directly benefit because “(1) it does not receive payment from the [cooperators] pursuant to the agreements, . . . and (2) ‘[r]efuge crop shares are all used by wildlife in the field’ or retained by the farmers, such that ‘[t]here are no excess crops for disposition’ by the [FWS].”<sup>121</sup> Additionally, a procurement contract would not provide the flexibility to the FWS to advise on crop rotation, crop harvest, and crop management.<sup>122</sup>

Here, the CAFC disagreed with the COFC analysis in which the COFC, relying on the analysis in *CMS*, held that the cooperators were third-party intermediaries; the migratory birds and wildlife were the beneficiaries; and the principal federal purpose of the CFAs was not to benefit the cooperators, but to obtain their services to ultimately benefit the migratory birds and wildlife.<sup>123</sup> The CAFC distinguished *CMS* by stating that the third-party intermediary relationship

in this case is different.<sup>124</sup> In *CMS*, the PHAs did not receive assistance, but they were used to provide assistance to project owners that were eligible for assistance under the authorizing legislation. In contrast, the FWS, under its authorizing legislation, negotiated with cooperators to provide assistance that furthered the goals of the authorizing legislation.<sup>125</sup>

Finally, the CAFC again touched upon agency discretion and flexibility in its analysis, stating that the congressional intent in the FGCAA was agency flexibility in transaction instrument selection.<sup>126</sup> Congress did not require the use of a particular instrument in particular situations; thus, it is an agency policy determination.<sup>127</sup> Lastly, CAFC stated that “[c]ourts should exercise caution before determining that any such decisions go beyond the policy making realm that rest within the agency’s purview.”<sup>128</sup>

Based on the analysis in *Hymas*, as in *CMS*, the principal federal purpose of the transaction is a primary focus of practitioners in deciding between procurement versus assistance. Also, the direct beneficiary and the thing of value being transferred are important factors. What *Hymas* adds is the importance of the language in the authorizing legislation, particularly in regards to third-party intermediary relationships; and the importance of agency discretion and flexibility. Therefore, practitioners should also focus on these two additional factors.

## V. Conclusion

Despite the recent decisions in *Hymas* and *CMS*, ambiguity still exists in the area of procurement versus assistance. However, *Hymas* and *CMS*, in combination with the FGCAA, OMB administrative guidance, and prior GAO opinions, provide a framework for analyzing whether to use procurement or assistance. First, the definitions in the FGCAA are the foundation of the analysis. Second, the OMB administrative guidance states that when the distinction is not clear from the definitions, the agency mission and intent in the transaction are guiding.<sup>129</sup> The OMB guidance also highlights the importance of agency discretion and flexibility.<sup>130</sup>

Next, the early GAO opinions focus on the affirmative

<sup>114</sup> *Id.* at 1324.

<sup>115</sup> *Id.* at 1325.

<sup>116</sup> *Id.* at 1325-26.

<sup>117</sup> *Id.* at 1327.

<sup>118</sup> Hyman, 810 F.3d at 1327.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1328.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Hyman, 810 F.3d at 1326.

<sup>124</sup> *Id.* at 1328.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 1329.

<sup>127</sup> *Id.*

<sup>128</sup> Hyman, 810 F.3d at 1329.

<sup>129</sup> Implementation of Federal Grant and Cooperative Agreement Act of 1977, 43 Fed. Reg. 36,860, 36,860 (Aug. 18, 1978).

<sup>130</sup> *Id.* at 36,863.

authorizing legislation and primary purpose analysis with third-party intermediaries. The court in *CMS* expanded on the principal federal purpose factor, focusing on agency pronouncements and actions regarding the transaction. The court in *CMS* also focused its analysis on the direct beneficiary of the transaction and the thing of value being transferred. Finally, the court in *Hymas* expanded the analysis in *CMS* by focusing on the importance of the language in the authorizing legislation and the importance of agency discretion and flexibility. In conclusion, in analyzing the decision between procurement versus assistance, practitioners should understand that the agency has discretion and flexibility, limited by the definitions in the FGCAA, the affirmative authorizing legislation, the principal federal purpose of the transaction, the primary beneficiary of the transaction, and the thing of value being transferred.

# Justice's Rosetta Stone: A Primer on Using Interpreters at Courts-Martial

Major Brandon R. Bergman\*

[W]e begin by observing that the . . . interpreter for the court-martial was so lacking in competence that, had there been any objection by the defense counsel at trial to his continuing as interpreter, and had such objection been overruled, we would consider such ruling, standing alone, erroneous to the point of requiring reversal.<sup>1</sup>

## I. Introduction

You are a trial counsel for a brigade with bilingual Soldiers conducting training in the country of Colombia. Your brigade commander tells you that one of his Soldiers allegedly murdered a local national and is being flown back to the United States. Host nation police initially investigated the case and uncovered a number of local nationals who witnessed various events leading up to and following the murder. Additionally, the Soldier confessed to a fellow U.S. Soldier in Spanish. A few months later, your chain of command decides to prefer charges. Following a preliminary hearing that relied primarily on translated sworn statements, the case is quickly heading to a general court-martial. In addition to the complexities that arise with any murder case, it is immediately apparent to you that court interpreters will be critical. The majority of witnesses, to include the medical examiner in the case and the victim's family, are local nationals whose English-speaking abilities are limited or non-existent.<sup>2</sup>

Attorneys receive little or no training, but the ability to properly use interpreters at courts-martial is a skill all trial advocates must possess.<sup>3</sup> Changes in the demographics of the United States have dramatically increased the number of limited or non-English speaking persons appearing in court, swelling demand for court interpreter services.<sup>4</sup> While not

to the same degree as civilian courts, the military justice system has similarly been affected by this change in demographics, and many high profile courts-martial involved extensive use of interpreters.<sup>5</sup> While the frequency of interpreter use in courts-martial varies by duty location,<sup>6</sup> military justice practitioners must understand that the need for an interpreter in a court-martial can arise at any moment.<sup>7</sup> They also must understand that court interpreters can greatly affect the outcome of a case.<sup>8</sup>

This paper will aid military justice practitioners who find themselves requiring interpreters for courts-martial. It will address the unique planning considerations, preparation, and issues that arise when witness testimony requires interpretation. The first section will provide an overview of the initial steps of obtaining an interpreter, from assessing interpreter need to officially appointing a court interpreter. The second section will discuss how to effectively use interpreters during a court-martial and will include logistical considerations, courtroom mechanics, and tips for eliciting testimony through an interpreter. The final section will explore how trial and appellate courts handle legal concerns that uniquely arise when using court interpreters so practitioners can spot and address these issue before they become a problem.

## II. The Initial Steps of Obtaining Interpreters for Courts-Martial

Prior to the preferral of charges, you conducted some initial telephone interviews with witnesses to follow up on

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<sup>1</sup> United States v. Szlosowski, 39 C.M.R. 649, 649-50 (A.B.R. 1968).

<sup>2</sup> This hypothetical scenario will be revisited throughout this paper.

<sup>3</sup> See Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 6 CLINICAL L. REV. 347, 348-49 (2000).

<sup>4</sup> ROSEANN DUENAS GONZALEZ ET AL., FUNDAMENTALS OF COURT INTERPRETATION: THEORY, POLICY, AND PRACTICE 27 (2d ed. 2012); Elena M. de Jongh, *Court Interpreting: Linguistic Presence v. Linguistic Absence*, FLA. B.J., July-Aug. 2008, at 21-22.

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<sup>5</sup> See, e.g., *All Things Considered: Sentencing Begins for Sgt. Who Killed 16 Afghan Civilians* (NPR radio broadcast Aug. 21, 2013); *Military Justice Victims Testify About Details of Afghan Massacre*, HOUS. CHRON., Nov. 11, 2012, at A17; Kirk Semple, *Private Wasn't Suited for War Zone, Soldiers Testify in Court-Martial on His Suicide*, N.Y. TIMES (Jul. 25, 2012), <http://www.nytimes.com/2012/07/26/nyregion/soldiers-testify-that-pvt-danny-chen-wasnt-suited-for-war-zone.html>; Paul Woolverton, *Court-Martial: Velez-Pagan 30 Years in Military Prison, Dishonorable Discharge, Must Forfeit Pay*, FAYETTEVILLE OBSERVER (Mar. 29, 2016), [http://www.fayobserver.com/military/court-martial-velez-pagan-given-years-in-military-prison-dishonorable/article\\_1b672cea-50ff-5846-915e-facb7b960f57.html](http://www.fayobserver.com/military/court-martial-velez-pagan-given-years-in-military-prison-dishonorable/article_1b672cea-50ff-5846-915e-facb7b960f57.html); Kate Zernike, *Detainees Describe Abuse at Iraqi Prison: Gruesome Details Emerge at GI's Trial*, INT'L HERALD TRIB., Jan. 12, 2005, at 4; David Stout, *Captain, Once a Scapegoat, Is Absolved*, N.Y. TIMES, July 14, 2001, at A9.

<sup>6</sup> See Miguel A. Mendez, *Lawyers, Linguists, Story-Tellers, and Limited English Speaking Witnesses*, 27 N.M. L. REV. 77, 78-79 (1997).

<sup>7</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 502(e)(3)(A) (2016) [hereinafter MCM].

<sup>8</sup> See MARIANNE MASON, COURTROOM INTERPRETING 9, 20-21 (2008).

the sworn statements collected and translated by Criminal Investigation Division (CID) agents. Some local nationals in the case speak and understand English with varying proficiency. However, you find yourself having to frequently repeat questions. Additionally, some of the witnesses' accents cause you difficulty in understanding their answers at times. For the non-English-speaking witnesses, you use a bilingual paralegal in your office to assist you. While the interviews seem to run smoothly, the paralegal has some back-and-forth discussions with the witnesses during your questioning. After the call, the paralegal informs you that she had to ask additional questions to clarify unfamiliar slang. Following these interviews, you identify interpreter needs and begin the process of selecting and appointing appropriate interpreters to satisfy those needs.

### A. Identifying Interpreter Need

The first step in using interpreters during a court-martial is analyzing whether interpretation services are even needed.<sup>9</sup> This includes assessing the language abilities of witnesses, identifying the type of interpretation services required, and determining the number of interpreters needed.<sup>10</sup>

#### 1. Assessing the Language Abilities of Witnesses

Interpretation services are clearly needed when a court-martial involves non-English speakers; however, the ability to speak English does not foreclose a witness – or an accused<sup>11</sup> – from possibly needing an interpreter.<sup>12</sup> English-as-a-second-language speakers or others with limited English proficiency (LEP) may have difficulty participating in court-martial proceedings without an interpreter.<sup>13</sup> When a military justice practitioner has doubt regarding a witness's ability to understand questions and articulate answers, an interpreter should be obtained.<sup>14</sup> Even if a witness is able to communicate in English for the most part, practitioners can use interpreters on an as-needed basis during a witness's

testimony.<sup>15</sup>

Practitioners may also require interpreters in situations where there are non-traditional communication barriers. Just like LEP speakers, hearing-impaired witnesses have varying degrees of hearing loss and may require interpretation services.<sup>16</sup> Additionally, other cases may arise where some form of non-standard interpretation is required. For example, witnesses may have unique speech impairments or may be children or mentally impaired who feel comfortable only talking through certain people.<sup>17</sup>

#### 2. Determining the Forms of Interpretation that May be Required

After assessing a witness's language abilities and determining interpretation is required, practitioners must next evaluate what form of interpretation will be required.<sup>18</sup> While different forms of interpretation exist, the most common forms are consecutive and simultaneous interpretation.<sup>19</sup> Consecutive interpretation is the stop-and-go interpretation used during non-English witness testimony.<sup>20</sup>

In contrast, simultaneous interpretation consists of continuous interpretation of a proceeding as the interpreter simultaneously perceives and interprets the spoken language.<sup>21</sup> Simultaneous interpretation, while commonly

<sup>9</sup> See Mark S. Shipow, *Using Interpreters in Litigation*, L.A. LAW., Apr. 2008, at 12.

<sup>10</sup> See McCaffrey, *supra* note 3, at 373; ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY AND PRACTICE 36-49 (1992); ALICIA B. EDWARDS, THE PRACTICE OF COURT INTERPRETING 73-74 (1995).

<sup>11</sup> In the military, all servicemembers must maintain English proficiency sufficient to conduct military duties. See, e.g., U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-13 (6 Nov. 2016). However, English proficiency sufficient to conduct duties may not be enough to effectively understand and participate in court-martial proceedings. See *United States v. Rosado-Marrero*, 32 C.M.R. 583, 585 (A.B.R. 1962).

<sup>12</sup> See Shipow, *supra* note 9, at 12.

<sup>13</sup> See *United States ex rel. Negron v. State of New York*, 434 F.2d 386, 389-90 (2d Cir. 1970).

<sup>14</sup> See ROSEANN DUENAS GONZALEZ ET AL., FUNDAMENTALS OF COURT INTERPRETING: THEORY, POLICY, AND PRACTICE 634 (2d ed. 2012).

<sup>15</sup> *United States v. Berger*, No. 2015000024, 2016 WL 3141753, at \*2-3 (N-M. Ct. Crim. App. May 26, 2016). Opposing counsel may object to the use of an interpreter where a witness is able to communicate in English because cross-examining a witness through an interpreter puts the examiner at a disadvantage. See *United States v. Frank*, 494 F.2d 145, 157-58 (2d Cir. 1974); EVERYTRIAL CRIMINAL DEFENSE RESOURCE BOOK § 48:3 (2015-2016 ed.).

<sup>16</sup> WILLIAM E. HEWITT, COURT INTERPRETING: MODEL GUIDES FOR POLICY AND PRACTICE IN STATE COURTS 158-63 (1995). For example, a completely deaf witness may be able to understand questions through lip-reading and answer questions verbally without difficulty or through written responses. See *id.* at 162-68. Conversely, a person who only has partial hearing loss may need a sign language interpreter. See *id.*

<sup>17</sup> See, e.g., *United States v. Bell*, 367 F.3d 452, 456, 463 (5th Cir. 2004); *United States v. Ball*, 988 F.2d 7, 9-10 (5th Cir. 1993); *Fairbanks v. Cowan*, 551 F.2d 97, 98-100 (6th Cir. 1977); *United States v. Addonizio*, 451 F.2d 49, 68 (3d Cir. 1971); *United States v. Romey*, 32 M.J. 180, 183-84 (C.M.A. 1991).

<sup>18</sup> See ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY AND PRACTICE 36-49 (1992).

<sup>19</sup> *Id.* at 37-39. Simultaneous interpretation requires an especially skilled interpreter. *Id.* at 45; John R. Bowles, *Court Interpreters in Alabama State Courts: Present Perils, Practices, and Possibilities*, 31 AM. J. TRIAL ADVOC. 619, 629 (2008).

<sup>20</sup> During consecutive interpretation, the examiner asks the witness a question. DE JONGH, *supra* note 18, at 37-39. The interpreter relays the question in the foreign language. *Id.* The witness answers the question in the foreign language, and the interpreter relays the answer in English. *Id.*

<sup>21</sup> John R. Bowles, *Court Interpreters in Alabama State Courts: Present Perils, Practices, and Possibilities*, 31 AM. J. TRIAL ADVOC. 619, 629 (2008).

seen in civilian proceedings and military commissions for non-English speaking defendants, is rarer in courts-martial where the accused traditionally possess English proficiency.<sup>22</sup>

### 3. Determining the Number of Interpreters Needed

Finally, where interpretation services are required, practitioners must also determine the number of interpreters needed.<sup>23</sup> Most courts-martial will require at least two interpreters and some may require even more.<sup>24</sup> The obvious situation requiring more than one interpreter is where multiple foreign languages will be spoken at the court-martial.

However, even where the same non-English language is used, at least two interpreters are required in many situations. When an accused and witness both require interpretation, practitioners need two interpreters.<sup>25</sup> Otherwise, using a single interpreter would deprive defense counsel of the ability to communicate with their client during interpreted witness testimony.<sup>26</sup> A case's complexity, length, or number of witnesses requiring interpretation may also trigger the need for more than one interpreter.<sup>27</sup> Finally, even in simple cases requiring limited interpretation, two interpreters may be needed when opposing counsel requests a checking interpreter. These

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<sup>22</sup> See Marilyn R. Frankenthaler, *How to Work with Court Interpreters*, N.J. LAW., Spring 1981, at 25; Therese Bellerup et al., *Using Court Interpreters: A Trial Court Perspective*, NEB. LAW., May 2010, at 26; Lieutenant Colonel David J. R. Frakt, *The Practice of Criminal Law in the Guantanamo Military Commissions*, 67 A.F. L. REV. 35, 78 (2011). However, there may be times when an accused needs an interpreter to effectively understand and participate in court-martial proceedings. See discussion *supra* Section II.A.1; MCM, *supra* note 7, R.C.M. 502(e)(3)(A). Additionally, as victim rights expand, the need for simultaneous interpretation may increase in the military. While Army regulation provides that "trial counsel . . . will ensure that victims . . . are informed of, and provided appropriate assistance to obtain . . . court-martial translators or interpreters," there is no explanation of the extent of this duty. See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 17-23 (11 May 2016). Where interpretation is required for a victim-witness, it is prudent to select an interpreter trained in both simultaneous and consecutive interpretation to effectuate a victim's right not to be excluded from court-martial proceedings. See UCMJ art. 6b(a)(3), (b), (c) (2016); MCM, *supra* note 7, MIL. R. EVID. 615(e).

<sup>23</sup> ALICIA B. EDWARDS, *THE PRACTICE OF COURT INTERPRETING* 73-74 (1995).

<sup>24</sup> See *id.*; HEWITT, *supra* note 16, at 142. Where there is more than one witness requiring interpretation, a second interpreter can also assist with managing non-English speaking witnesses waiting to testify.

<sup>25</sup> United States ex rel. Negron v. State of New York, 434 F.2d 386, 389-90 (2d Cir. 1970); HEWITT, *supra* note 16, at 142; Marilyn R. Frankenthaler, *How to Work with Court Interpreters*, N.J. LAW., Spring 1981, at 25.

<sup>26</sup> HEWITT, *supra* note 16, at 142.

<sup>27</sup> Therese Bellerup et al., *Using Court Interpreters: A Trial Court Perspective*, NEB. LAW., May 2010, at 24; see also Bowles, *supra* note 21, at 628. Practitioners must keep in mind that interpretation is fatiguing and the quality of interpretation may suffer when an interpreter is overworked. HEWITT, *supra* note 16, at 140 ("[T]wo interpreters should be assigned so they can relieve each other at periodic intervals to prevent fatigue.").

checking interpreters monitor the performance of the court interpreter to ensure accurate interpretation.<sup>28</sup> This includes translation context and emphasis.

### B. Selecting an Appropriate Interpreter

Once specific interpretation needs are determined, the practitioner should immediately start looking for appropriate interpreters.<sup>29</sup> A skilled interpreter ensures a court-martial proceeds smoothly.<sup>30</sup> An interpreter who is unskilled, biased, or fluent in a different dialect can cause court-martial delay, mistrial, dismissal, or reversal on appeal.<sup>31</sup> Unfortunately, finding interpreters appropriate for a case is not as easy as it may initially seem.<sup>32</sup>

#### 1. Interpreter Qualification and Disqualification

Interpreters come with dramatically varying skill levels. Unlike federal courts, the military does not have a program that certifies interpreters as qualified court interpreters nor is there criteria for selecting qualified interpreters.<sup>33</sup> Various states have certification programs for court interpreters, but the standards are far from universal.<sup>34</sup> Additionally, practitioners have no single private organization that certifies interpreters upon which to rely.<sup>35</sup> Rule for Courts-Martial 502(e)(1) states that the relevant service secretary may provide qualifications of interpreters, but military justice regulations contain no implementing provision concerning qualifications.<sup>36</sup> As a result, interpreters at a

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<sup>28</sup> See United States v. Smith, 33 C.M.R. 85, 93 (C.M.A. 1963); United States v. Rayas, 20 C.M.R. 195, 198 (C.M.A. 1955) ("[W]e hold that, despite the Manual's silence in this area, [accused] must in a proper case be permitted appropriately to test the correctness of a qualified court interpreter's translation by means of a reliance on the suggestions of a counter-interpreter."); Shipow, *supra* note 9, at 12.

<sup>29</sup> Nina L. Ivanichvili, *Considerations in Selecting Interpreters and Translators*, COLO. LAW., Sept. 2010, at 39.

<sup>30</sup> Additionally, an interpreter's presentation of a witness's testimony can greatly influence a witness's credibility and the ultimate outcome of the case. McCaffrey, *supra* note 3, at 382.

<sup>31</sup> See, e.g., Prince v. Beto, 426 F.2d 875, 875-77 (5th Cir. 1970); United States v. Szlosowski, 39 C.M.R. 649, 649-50 (A.B.R. 1968); Ivanichvili, *supra* note 29, at 39; Shipow, *supra* note 9, at 13. Perhaps the most important aspect of using interpreters is selecting appropriate interpreters. See McCaffrey, *supra* note 3, at 382.

<sup>32</sup> Marilyn R. Frankenthaler, *How to Work with Court Interpreters*, N.J. LAW., Spring 1981, at 26.

<sup>33</sup> 28 U.S.C. § 1827 (2012); 5 GUIDE TO JUDICIARY POLICY ch. 3 (Apr. 6, 2016). Currently, the federal judiciary has a certification program only for Spanish, Navajo, and Haitian Creole. *Interpreter Categories*, UNITED STATES COURTS, <http://www.uscourts.gov/services-forms/federal-court-interpreters/interpreter-categories#a1> (last visited Mar. 16, 2016).

<sup>34</sup> McCaffrey, *supra* note 3, at 367.

<sup>35</sup> See Julie Wilchins, *Found in Translation: How to Work with Translators and Interpreters*, NW LAW., Apr.-May 2016, at 26-27. Instead, multiple organizations apply varying standards. See *id.*

<sup>36</sup> See United States v. Eversole, No. 9600466, 1998 WL 35319629, at \*4 (A. Ct. Crim. App. June 12, 1998); MCM, *supra* note 7, R.C.M. 502(e)(1);

court-martial might be federally certified with decades of courtroom experience, a servicemember, a contracted local national,<sup>37</sup> or any other person who happens to be bilingual.

While using servicemembers may seem expedient and some service regulations require their use when possible,<sup>38</sup> servicemembers should be used only when they have experience or education in interpreting beyond that of just being bilingual.<sup>39</sup> Instead, practitioners should use interpreters specially trained for court interpretation whenever possible to prevent interpretation error and other related issues.<sup>40</sup>

Even though the military does not have rules regarding the qualifications of interpreters, there are rules regarding interpreter disqualification. The Rules for Courts-Martial state that witnesses, accusers, investigating officers, counsel, and court-martial members may not serve as an interpreter in the same case.<sup>41</sup> Interpreters are also disqualified if they

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U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (11 May 2016); U.S. DEP'T OF NAVY, JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL, JUDGE ADVOCATE GENERAL INSTRUCTION (JAGMAN) (26 June 2012). It is understandable why the military would be hesitant to layer-on qualifications for court interpreters given that it must be able to execute courts-martial in austere environments where finding the ideal interpreter may be impractical.

<sup>37</sup> One concern in using local national interpreters is their mastery of English rather than their native language. See Shipow, *supra* note 9, at 12. Even Department of Defense (DoD) contractors, said to be equivalent to federally certified court interpreters, have fallen short of basic court interpretation standards. See Peter Finn, *Lawyers Criticize Quality of Guantanamo Interpreters*, WASH. POST (Oct. 14, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/13/AR2008101302419.html>.

<sup>38</sup> The Navy and Marine Corps are required to use federal employees as interpreters whenever possible. U.S. DEP'T OF NAVY, JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL, JUDGE ADVOCATE GENERAL INSTRUCTION (JAGMAN) sec. 0130d(6) (26 June 2012). While this may seem financially prudent, the Army does not have a similar requirement, providing more flexibility in finding appropriate interpreters. See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (11 May 2016).

<sup>39</sup> See HEWITT, *supra* note 16, at 125; Wilchins, *supra* note 35, at 26. Bilingual paralegals familiar with courts-martial may be adequate when skilled interpreters are not an option. See DE JONGH, *supra* note 18, at 115-18.

<sup>40</sup> See GONZALEZ ET AL., *supra* note 14, at 612-13; HEWITT, *supra* note 16, at 127.

<sup>41</sup> See MCM, *supra* note 7, R.C.M. 502(e)(2). While not included in the list of disqualified interpreters, practitioners should be cautious of using interpreters who participated in other aspects of the case. An interpreter who translated documents related to the case or served as an interpreter during the criminal investigation is not per se disqualified from serving as an interpreter during the court-martial. *United States v. Donati*, 34 C.M.R. 15, 19 (C.M.A. 1963). However, the interpreter's previous work may color the performance of their duties. See William S. Murray, *The Use of Interpreters in Court*, 30 N.D. L. REV. 304, 304 (1954). Additionally, using interpreters who previously participated in the case, such as interpreting an earlier interview, could result in the interpreter being called as a witness. See MCM, *supra* note 7, MIL. R. EVID. 613. If called as a witness, the interpreter is disqualified from further interpreting for the court-martial, which could cause significant delay as a new interpreter is appointed. See MCM, *supra* note 7, R.C.M. 501(c), 502(e)(2).

have a personal interest in the case's outcome,<sup>42</sup> which is one of many ethical considerations to navigate.

## 2. Understanding of Professional Responsibilities

It is also important to select interpreters who are familiar with the ethical and professional conduct standards required of them in the performance of their duties since interpreters are considered officers of the court.<sup>43</sup> The federal judiciary's *Standards of Performance and Professional Responsibility for Contract Court Interpreters in Federal Courts* provides guidance that court-martial interpreters should follow.<sup>44</sup> At a minimum, interpreters should be aware of their responsibility when it comes to accuracy and completeness of interpretation, impartiality, conflicts of interest, and scope of practice.<sup>45</sup> When practitioners select bilingual servicemembers or federal employees who are not certified, trained, or experienced as court interpreters, the practitioner has the responsibility to ensure the interpreter is aware of the professional responsibilities that accompany interpretation duties.<sup>46</sup>

## 3. Language, Dialect, Cultural Understanding, and Specialized Familiarity

In addition to familiarity with professional conduct standards, the interpreter's language abilities must match the need. Selecting an interpreter fluent in the correct language may seem easy, but that is not always the case.<sup>47</sup> Whether from lack of planning, last minute interpreter changes, or interpreters overstating their skills, practitioners have been known to select incorrect interpreters.<sup>48</sup>

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<sup>42</sup> *United States v. Washington*, 46 M.J. 477, 483 (C.A.A.F. 1997).

<sup>43</sup> GONZALEZ ET AL., *supra* note 14, at 417, 1093-94.

<sup>44</sup> *Standard for Performance and Professional Responsibility*, UNITED STATES COURTS, <http://www.uscourts.gov/services-forms/federal-court-interpreters> (last visited Oct. 1, 2017).

<sup>45</sup> See *id.*; GONZALEZ ET AL., *supra* note 14, ch. 44. Interpreters providing services to accused should be especially familiar with their duty of confidentiality. See GONZALEZ ET AL., *supra* note 14, at 1120-22. When not actively interpreting, interpreters should avoid interacting with witnesses to prevent the appearance of impartiality. Bowles, *supra* note 21, at 630.

<sup>46</sup> See GONZALEZ ET AL., *supra* note 14, at 417. This is best accomplished by explaining the federal judiciary's standards to the interpreter as well as the general duties the interpreter has under the Manual for Courts-Martial. See MCM, *supra* note 7.

<sup>47</sup> Ivanichvili, *supra* note 29, at 39 (explaining how hiring an interpreter with the wrong dialect can hypothetically occur in practice). "Although, this may seem fundamental, it is critical for an attorney to confirm that the retained court interpreter speaks the client or witness's language." *Id.*

<sup>48</sup> *Id.* ("There are documented cases where all the evidence was heard and a sentence imposed before it was discovered that the appointed interpreter did not speak the defendant's language."). In 2012, for example, there was a court-martial at Fort Leonard Wood, Missouri, where the victim of an alleged sexual assault was deaf. Telephone Interview with Alyson Mortier, Former Defense Counsel, Fort Leonard Trial Defense Services (Oct. 26,

Equally important, practitioners must select interpreters familiar with the specific dialect and culture at issue. Since interpreters do not provide “word-for-word literal translations,”<sup>49</sup> accurate interpretation requires understanding the speaker’s culture, dialect, and slang.<sup>50</sup> Without this understanding, interpreters may resort to inaccurate literal interpretations.<sup>51</sup>

Finally, when a case involves the interpretation of expert or highly technical testimony, practitioners should select an interpreter familiar with the specialized area.<sup>52</sup> Before appointing an interpreter, practitioners should ensure the interpreter converses with the non-English speaking witness and, if applicable, reviews technical materials to confirm they are able to adequately interpret prospective testimony.<sup>53</sup>

### C. Appointing the Interpreter

Once interpreters are selected, they must be correctly appointed and, where applicable, employed as an expert consultant or witness.<sup>54</sup> For courts-martial, the interpreter must be detailed, but “need not be detailed by the convening authority personally.”<sup>55</sup> However, contracted interpreters may only be employed by the convening authority.<sup>56</sup>

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2016). While there were no issues with the interpreter appointed for the victim’s testimony, the checking interpreter provided to defense by the government had difficulty understanding the victim. *Id.* It turned out the victim and the court interpreter used Sign Exact English. *Id.* Unfortunately, the interpreter provided to defense used American Sign Language. *Id.*

<sup>49</sup> Frankenthaler, *supra* note 32, at 26.

<sup>50</sup> EDWARDS, *supra* note 23, at 100-04.

<sup>51</sup> For some examples of the inaccurate and sometimes absurd testimony that may arise from literal interpretation, see Haydee Claus, *Court Interpreting: Complexities and Misunderstandings*, ALASKA JUST. F., Winter 1997, at 7, and EDWARDS, *supra* note 23, at 94-99.

<sup>52</sup> Wilchins, *supra* note 35, at 27; Bowles, *supra* note 21, at 628; GONZALEZ ET AL., *supra* note 14, at 614.

<sup>53</sup> HEWITT, *supra* note 16, at 134; EDWARDS, *supra* note 23, at 46-47; GONZALEZ ET AL., *supra* note 14, at 575.

<sup>54</sup> See MCM, *supra* note 7, R.C.M. 501(c), 703(d).

<sup>55</sup> MCM, *supra* note 7, R.C.M. 501(c). For preliminary hearings under Article 32, Uniform Code of Military Justice, the commander who directed the hearing may, “as a matter of discretion, detail or request an appropriate authority to detail . . . [a]n interpreter.” MCM, *supra* note 7, R.C.M. 405(d)(4)(B).

<sup>56</sup> MCM, *supra* note 7, R.C.M. 703(d). Because interpreters are considered experts, their employment follows the same rules as all other experts. See discussion *infra* Section III.A.2. For a discussion on how to demonstrate need for expert assistance and hire experts, see Major Dan Dalrymple, *Make the Most of It: How Defense Counsel Needing Expert Assistance Can Access Existing Government Resources*, ARMY LAW., May 2013, at 38-44. Obtaining skilled interpreters prior to courts-martial, such as during pretrial preparation and investigation, a preliminary hearing, or depositions presents its own unique obstacles. Often, DoD employees will be provided for these purposes. This assertion is based on the author’s professional experience as

After appointing an interpreter or deciding one is unnecessary, practitioners must remember the ultimate decision as to whether the interpreter will be required rests within the military judge’s discretion.<sup>57</sup> Along the same line, counsel must be prepared for an objection to the use of an interpreter where the witness has a basic understanding of English.<sup>58</sup> Tactically, it is a sound defense objection in such situations.<sup>59</sup> First, direct examination of a LEP witness becomes much more difficult without an interpreter, especially for the government who has the burden of proof.<sup>60</sup> Second, the effectiveness of cross-examination is significantly undercut when conducted through an interpreter.<sup>61</sup>

Returning to the hypothetical, you determine you will need at least two federally certified interpreters in Spanish after you conducted telephonic interviews.<sup>62</sup> You choose two interpreters because of the number of witnesses requiring interpretation and the anticipated length of each witness’s examination. You select federally certified interpreters because they are experienced in both consecutive and simultaneous interpretation as well as the professional responsibilities of court interpreters. Additionally, you select interpreters familiar with the Colombian culture and dialect of Spanish, one of whom is also familiar with medical terminology, given that you will be eliciting testimony from a medical examiner. The general court-martial convening authority approved your request for and appointed the interpreters, and a contract for their services has been awarded. You now must prepare to use them in court.

### III. Effectively Using an Interpreter During Court-Martial

Obtaining appropriate interpreters is key to ensuring issue-free interpretation, but just as important is effectively using interpreters during court-martial. Practitioners can do this through detailed planning, understanding interpretation

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the Senior Trial Counsel for XVIII Airborne Corps and Fort Bragg from 27 June 2015 to 25 June 2016.

<sup>57</sup> Military judge decisions regarding the use of interpreters for witnesses are reviewed for abuse of discretion. *United States v. Berger*, No. 2015000024, 2016 WL 3141753, at \*2 (N-M. Ct. Crim. App. May 26, 2016) (citing *United States v. Brown*, 72 M.J. 359, 362 (C.A.A.F. 2013)); *United States v. Eversole*, No. 9600466, 1998 WL 35319629, at \*5 (A. Ct. Crim. App. June 12, 1998).

<sup>58</sup> See *Eversole*, 1998 WL 35319629, at \*4.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See discussion *infra* Section III.B.2.; Jonathan Kaiman, *Two Army Buddies’ Fateful Night*, L.A. TIMES, Oct. 30, 2006, at 8. (“Cross-examining . . . witnesses through an interpreter . . . can be ‘like playing a difficult piano or guitar piece with gloves on -- at best it’s clumsy, and at worst it’s ineffectual.’”)

<sup>62</sup> These interpreters are from a private company that provides interpreters to federal courts.

logistics and mechanics, and implementing strategies to elicit testimony through interpreters.

## A. Logistics and Mechanics of Using Interpreters

### 1. Logistical Considerations

In effectively planning for and using interpreters, practitioners must determine where they intend to place the interpreter and make available additional equipment that may be needed. Ideally, the interpreter sits next to the witness so counsel is able to address the witness and interpreter simultaneously.<sup>63</sup> This also facilitates the interpreter's ability to clearly hear every word the witness utters.<sup>64</sup> However, the interpreter's positioning should not interfere with the parties and panel members' line of sight to the witness.<sup>65</sup>

In addition to ensuring interpreters are positioned effectively to perform their duties, practitioners must ensure interpreters are permitted to use equipment that facilitates accurate and complete interpretation. For example, interpreters may require electronic or printed dictionaries and note-taking material while performing their duties to ensure testimony is interpreted completely and with comparable communicative context.<sup>66</sup> To facilitate this, practitioners may need to request exceptions to court rules that normally prohibit such material at the witness stand.<sup>67</sup> Finally, additional microphones may be required to ensure both the interpreter and witness are heard by those present in the courtroom and the court reporter's audio recording equipment.<sup>68</sup>

### 2. Mechanics of Calling an Interpreter

To use interpreters, practitioners must also understand the foundational mechanics for interpreting witness testimony.<sup>69</sup> For instance, practitioners must practice and prepare to establish the expertise of interpreters, administer the interpreter's oath, and follow the progression of calling a witness through an interpreter.<sup>70</sup>

Establishing an interpreter's expertise is one of the first steps in the courtroom mechanics of interpretation.<sup>71</sup> Under Military Rule of Evidence 604, interpreters are considered expert witnesses and, as such, must be qualified as an expert.<sup>72</sup> Unfortunately, counsel commonly overlook qualifying and offering an interpreter as an expert.<sup>73</sup> Practitioners must be prepared to accomplish this step as they would with any other expert, focusing on the interpreter's training and experience.<sup>74</sup>

If the military judge recognizes the interpreter as an expert, trial counsel then administers the interpreter's oath.<sup>75</sup> Interpreters must take a specific oath, separate from the witness oath, before performing duties.<sup>76</sup> Trial counsel may

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United States v. Rivera, 62 M.J. 564, 568 (C.G. Ct. Crim. App. 2005); United States v. Oliver, No. 200101259, 2005 WL 995678, at \*10 (N-M. Ct. Crim. App. Apr. 29, 2005); United States v. McElhane, 50 M.J. 819, 833 (A.F. Ct. Crim. App. 1999), *rev'd in part on other grounds*, 54 M.J. 120 (C.A.A.F. 2000).

<sup>71</sup> See GONZALEZ ET AL., *supra* note 14, at 416-18.

<sup>72</sup> See MCM, *supra* note 7, MIL. R. EVID. 604. The restyled Military Rule of Evidence 604 maintains the 2012 version's requirement that "[a]n interpreter is subject to the provisions of these rules relating to qualifications as an expert . . ." See MCM, *supra* note 7, MIL. R. EVID. 604 analysis, at A22-54; FED. R. EVID. 604 advisory committee's note to 2011 amendment; MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 604 (2012). Failure to offer and qualify an interpreter as an expert is reviewed for plain error and prejudice is hard to establish without material interpretation error. See, e.g., *McElhane*, 50 M.J. at 833; *Rivera*, 62 M.J. at 568; *Oliver*, 2005 WL 995678, at \*10. Note that bilingual fact witnesses who testify to the non-English out-of-court statements of an accused or other person may provide interpretation of those statements without counsel qualifying them as experts. Michael H. Graham, 4 HANDBOOK OF FED. EVID. § 604:1 (8th ed. 2016). For example, the U.S. Soldier in the hypothetical who heard the accused confess in Spanish may relay the confession in English without being qualified as an expert during his testimony. The Soldier's ability to accurately interpret the confession can be tested and attacked on cross-examination.

<sup>73</sup> See, e.g., *McElhane*, 50 M.J. at 833; *Rivera*, 62 M.J. at 568.

<sup>74</sup> See DAVID A. SCHLUETER ET AL., MILITARY EVIDENTIARY FOUNDATIONS § 9-3[2] (5th ed. 2013); GONZALEZ ET AL., *supra* note 14, at 422-24. Establishing expertise is done by first calling the interpreter as a witness and administering the witness oath to the interpreter. See MCM, *supra* note 7, R.C.M. 807(b)(2) discussion (F). Then, the party offering the interpreter as an expert conducts voir dire to establish the interpreter's expertise in the language at issue. For example voir dire questions to qualify an interpreter, see Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227, app. A-3 (1996). Next, the opposing party is given the opportunity to voir dire the interpreter to test their expertise. See DAVID A. SCHLUETER ET AL., MILITARY EVIDENTIARY FOUNDATIONS § 9-3 (5th ed. 2013). Finally, the interpreter is offered to the court as an expert and the opposing party makes objections if applicable. See *id.* Like any other expert, voir dire may be omitted where the parties agree to an interpreter's expertise. If interpreter voir dire is omitted, counsel also does not need to administer the witness oath to the interpreter. See MCM, *supra* note 7, R.C.M. 807(b)(2) discussion (F). Counsel should identify disagreement regarding an interpreter's qualification as an expert early so the court can resolve the matter, allowing time for the selection and appointment of a new interpreter if required.

<sup>75</sup> See MCM, *supra* note 7, R.C.M. 807(b)(1)(A), 901(c).

<sup>76</sup> *Id.*; MCM, *supra* note 7, MIL. R. EVID. 603, 604. For the specific language of the oath for interpreters, see MCM, *supra* note 7, R.C.M. 807(b)(2) discussion (E). Like failure to offer and qualify interpreters as

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<sup>63</sup> BILL COLOMBARO ET AL., LOUISIANA CIVIL TRIAL PRACTICE § 6.6 (2016).

<sup>64</sup> GONZALEZ ET AL., *supra* note 14, at 578.

<sup>65</sup> Frankenthaler, *supra* note 32, at 28. Where this cannot be accomplished, the defense and members' observation of the witness's demeanor should not be obstructed at a minimum. See United States v. Vazquez, 72 M.J. 13, 20-21 (C.A.A.F. 2013).

<sup>66</sup> GONZALEZ ET AL., *supra* note 14, at 579-80.

<sup>67</sup> See RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL, RULE 6.3 (2013).

<sup>68</sup> See GONZALEZ ET AL., *supra* note 14, at 578.

<sup>69</sup> See *id.* at 417.

<sup>70</sup> Failure to properly accomplish these steps has been the basis of numerous appeals. See, e.g., United States v. Solorio, 669 F.3d 943, 951 (9th Cir. 2012); United States v. Pluta, 176 F.3d 43, 51-52 (2d Cir. 1999);

administer the interpreter oath prior to the opening session of the court-martial or at any time thereafter before the interpreter performs duties.<sup>77</sup> If sworn prior to the opening session, trial counsel must so announce on the record.<sup>78</sup> Once the oath is administered or announced, the testifying witness is called and sworn<sup>79</sup> and the examination continues as if the interpreter was not present.<sup>80</sup>

## B. Eliciting Testimony Through an Interpreter

Even though examination continues as if the interpreter was not present, effectively presenting witness testimony requires planning, practice, and strategy.<sup>81</sup> Practitioners who fail to adjust witness examinations will not fully achieve the goals because both direct and cross-examination will be significantly impacted when conducted through an interpreter.<sup>82</sup> First, a witness examination will usually take at least twice as long.<sup>83</sup> Second, the pauses resulting from consecutive interpretation will likely interfere with speech patterns, train of thought, and rhythm.<sup>84</sup> Third, counsel may need to limit or completely abandon the looping of questions and answers<sup>85</sup> as well as the use of idioms and colloquialisms because these may be difficult or impossible to convey in the witness's language.<sup>86</sup> Fourth, counsel must also be cautious in how they ask witnesses to describe time and distance because these concepts are not universal.<sup>87</sup>

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experts, government failure to administer the oath to interpreters is reviewed for plain error. *See* United States v. Solorio, 669 F.3d 943, 951 (9th Cir. 2012).

<sup>77</sup> MCM, *supra* note 7, R.C.M. 901(c); 10 U.S.C.A. § 842(a) (West 2016). Army regulation requires trial counsel to administer the interpreter's oath at court-martial unless a written oath was previously administered. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 10-7 (11 May 2016).

<sup>78</sup> MCM, *supra* note 7, R.C.M. 901(c). Normally, the oath is administered on the record prior to the interpreter performing duties because the military does not permanently employ court-martial interpreters. *Cf.* 28 U.S.C. § 751(b) (2012); 5 GUIDE TO JUDICIARY POLICY § 310 (Apr. 6, 2016).

<sup>79</sup> Counsel in federal courts have failed to ensure the witness oath is interpreted for the witnesses otherwise requiring interpretation services during testimony. *See* Wilcoxon v. United States, 231 F.2d 384, 386-87 (10th Cir. 1956).

<sup>80</sup> Trial counsel must ensure the record clearly reflects when subsequent witnesses testify through an interpreter. MCM, *supra* note 7, R.C.M. 1103(b)(2)(B) discussion. Also, where counsel call English-speaking witnesses between non-English-speaking witnesses, counsel must recall the interpreter on the record prior to calling the subsequent non-English-speaking witnesses. *See id.*

<sup>81</sup> EDWARDS, *supra* note 23, at 141.

<sup>82</sup> *See* Lieutenant Colonel David J. R. Frakt, *The Practice of Criminal Law in the Guantanamo Military Commissions*, 67 A.F. L. REV. 35, 79-80 (2011).

<sup>83</sup> Ivanichvili, *supra* note 29, at 44; Shipow, *supra* note 9, at 13.

<sup>84</sup> Frankenthaler, *supra* note 32, at 26; EDWARDS, *supra* note 23, at 85.

<sup>85</sup> Frankenthaler, *supra* note 32, at 29.

<sup>86</sup> *Id.*

<sup>87</sup> Haydee Claus, *Court Interpreting: Complexities and Misunderstandings*, ALASKA JUST. F., Winter 1997, at 8.

Fifth, counsel should use names rather than pronouns and avoid negative constructions to reduce the chance of a question being misinterpreted.<sup>88</sup> Sixth, bilingual counsel must refrain from speaking to a witness in a foreign language and must use English at all times.<sup>89</sup> Finally and perhaps most importantly, counsel must talk directly to the witness and not the interpreter to prevent interpretation error and ambiguity.<sup>90</sup>

Likewise, interpreters must provide the English interpretation in the first person and verbatim as if they are the witness talking.<sup>91</sup> Failing to do so creates significant ambiguity for fact-finders as well as appellate courts reviewing the record.<sup>92</sup> For example, the Navy-Marine Corps Court of Appeals provided the following observation:

[W]e note our difficulties in determining the facts from the record. The primary witnesses were Japanese nationals who testified in Japanese through interpreters. Rather than translate a witness' testimony verbatim in the first person, e.g., "I saw Mr. Jones hit Mr. Smith," the interpreters often related the testimony as a third party, e.g., "He [the witness] said that he saw Mr. Jones hit Mr. Smith." . . . [T]he risk exists that ambiguities or subtle variations would be introduced and, indeed, some of the translation was ambiguous. . . . The military judge must . . . be vigilant to ensure an accurate translation is created for the record, because the very basis of our adversarial system is dependent upon such accuracy.<sup>93</sup>

Trained court interpreters will rarely make this mistake, but interpreters who are not formally trained as court interpreters very well may.<sup>94</sup> In addition to interpreting in the verbatim first person, counsel should expect interpreters, to the extent possible, convey the register, "pace, pitch, and other communicative context" of the witness's testimony.<sup>95</sup>

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<sup>88</sup> EDWARDS, *supra* note 23, at 93-94.

<sup>89</sup> HEWITT, *supra* note 16, at 140-41.

<sup>90</sup> Ivanichvili, *supra* note 29, at 40.

<sup>91</sup> *See* United States v. Zweifel, No. 9900865, 2001 WL 1159681, at \*2 (N.M. Ct. Crim. App. Sept. 28, 2001).

<sup>92</sup> *See id.*

<sup>93</sup> *Id.*

<sup>94</sup> GONZALEZ ET AL., *supra* note 14, at 165.

<sup>95</sup> Bowles, *supra* note 21, at 630; Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227, 283 (1996). Note taking by interpreters during testimony can aid in conveying this information. *See* MASON, *supra* note 8, at 61-74.

Finally, counsel must be aware that interpreters might ask questions or make statements during a witness's examination. Trained interpreters will always do so in a way that ensures the record identifies that the interpreter and not the witness is speaking, usually by referring to him or herself in the third person as "the interpreter."<sup>96</sup>

### 1. Direct Examination Through an Interpreter

In addition to the points noted above, direct examination requires some other considerations. First, counsel should ensure their questions do not appear to lessen the examiner's regard for the witness's intelligence.<sup>97</sup> This can occur when counsel talk very loudly or extremely slowly.<sup>98</sup>

Second, counsel should thoroughly brief witnesses on all aspects of the courtroom and interpreter.<sup>99</sup> They should be briefed on pausing every couple of sentences to allow interpretation, asking counsel and not the interpreter to clarify confusing questions, and, if they comprehend some English, refraining from answering a question until it is interpreted.<sup>100</sup>

Third, while providing an interpreter case-specific materials ahead of time may be beneficial,<sup>101</sup> counsel should be cautious because the materials may potentially color the interpreter's performance of duties.<sup>102</sup> Opposing counsel should attempt to reach an agreement on what material may be provided to the interpreter because both direct and cross-examination can benefit.<sup>103</sup> However, generally speaking, interpreters should be provided as much information as possible.<sup>104</sup>

Fourth, refreshing recollection with prior written statements requires significant preplanning.<sup>105</sup> If the witness provided a written statement in their native language, counsel should ensure to have a translated copy, both for referencing where material is discussed in the non-English

version and marking as an exhibit.<sup>106</sup> If the statement was memorialized in English, counsel should consider whether to translate the document to the witness's native language ahead of time or have the interpreter read the document to the witness.<sup>107</sup> Similar planning is required when using other documentary exhibits during testimony.<sup>108</sup>

Finally, counsel may want to consider whether it would be beneficial to use leading questions during the direct examination of a witness. While normally prohibited, the judge may allow leading questions during direct examinations conducted through an interpreter.<sup>109</sup>

### 2. Cross-Examination Through an Interpreter

Compared to direct examination, cross-examining a witness through an interpreter is incredibly difficult. Above all, a witness's need for interpretation often completely undercuts the control and effectiveness of leading questions.<sup>110</sup> Additionally, "[t]he witness, if he is evasive or untruthful, has the language barrier and intermediary third person, to help shield him. The psychological effect of many common forms of cornering cross-examination is often completely unattainable."<sup>111</sup> Furthermore, the use of inflection in questioning to control the witness may be unachievable, even with interpreters skilled at conveying register, because inflection on certain words may not have the same effect in different languages.<sup>112</sup> Likewise, interpreters may convey a leading question as open-ended

<sup>96</sup> Ivanichvili, *supra* note 29, at 40; HEWITT, *supra* note 16, at 133 ("Interpreters should never use the pronoun "I" to refer to themselves when speaking.").

<sup>97</sup> Bowles, *supra* note 21, at 631.

<sup>98</sup> *Id.* at 630.

<sup>99</sup> See HEWITT, *supra* note 16, at 130-31.

<sup>100</sup> See *id.*; Ivanichvili, *supra* note 29, at 44.

<sup>101</sup> Wilchins, *supra* note 35, at 27. This is especially true in cases of expert witnesses requiring interpretation. See *id.*; Shipow, *supra* note 9, at 14; GONZALEZ ET AL., *supra* note 14, at 614, 949.

<sup>102</sup> See Murray, *supra* note 61, at 304.

<sup>103</sup> Shipow, *supra* note 9, at 14.

<sup>104</sup> GONZALEZ ET AL., *supra* note 14, at 949.

<sup>105</sup> See *United States v. Jenkins*, 40 C.M.R. 916, 921-22 (N.B.R. 1969) (describing where counsel only had the English version of a document where he needed to refresh the recollection of a non-English speaking witness).

<sup>106</sup> See *id.*; RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL, RULE 15 (2013).

<sup>107</sup> Where bilingual panel members are present, counsel must ensure they do not hear the interpreter as the document is read for refreshing recollection purposes. See 5 JONES ON EVIDENCE § 32:36 n.1 (7th ed. 2016).

<sup>108</sup> EDWARDS, *supra* note 23, at 85.

<sup>109</sup> MCM, *supra* note 7, MIL. R. EVID. 611(c) analysis, at A22-57.

<sup>110</sup> See CRIM. LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, CRIMINAL LAW DESKBOOK: PRACTICING MILITARY JUSTICE, 29-6 to -10 (2015) ("The questions may come in more 'rapid-fire' fashion, giving the witness less time to think through the answer before making it and thus increasing the likelihood of a mistake (or honesty) in answering."). While the use of interpreters generally hinders cross-examination, witnesses may also have difficulty recognizing attempts to discredit their testimony, avoiding confirmation of contradictory fact interpretations, and defending their position. HEWITT, *supra* note 16, at 125.

<sup>111</sup> Murray, *supra* note 61, at 306. "[T]he mere presence of the interpreter acts as a buffer, so that reactions are delayed, the witness is protected from fast verbal assault, and the jury cannot perceive the true essence of the witness." EDWARDS, *supra* note 23, at 85. This is also true for impeaching a witness with prior inconsistent statements because the examiner must often rely on a statement, which itself was translated. See *United States v. Orm Hieng*, 679 F.3d 1131, 1137 (9th Cir. 2012); *Dia v. Ashcroft*, 353 F.3d 228, 263 n.2 (3d Cir. 2003). Many inconsistencies can be explained away as incorrect translations of the prior statement, preventing any effective impeachment. See *Orm Hieng*, 679 F.3d at 1137; *Dia*, 353 F.3d at 263 n.2.

<sup>112</sup> See LARRY S. POZNER & ROGER J. DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES 211 (2009).

because some languages do not lend themselves to leading questions.<sup>113</sup>

For these reasons, setting the conditions of the cross-examination is critical. Counsel must ensure the witness understands that answers should be limited to the specific question asked. Counsel cannot rely on the interpreter to accomplish this task.<sup>114</sup> Moreover, interpreters have an obligation to interpret what is being said even if it is a rambling or non-responsive answer.<sup>115</sup> One common mistake of cross-examiners is to object to a witness's answer prior to its initial interpretation.<sup>116</sup> If counsel asks a yes or no question and the witness begins speaking beyond which would be expected for a simple yes or no, counsel's objection is not ripe until the interpreter begins interpretation.<sup>117</sup> However, as soon as the English interpretation begins to warrant an objection, counsel may object even if the interpreter does not finish the complete interpretation of the answer.<sup>118</sup>

Returning to your court-martial, you effectively elicited testimony from witnesses requiring interpretation after implementing the strategies discussed above. These witnesses appeared credible and convincing despite the language barrier. You further earned credibility with the panel as you flawlessly navigated the mechanics of using an interpreter as the opposing party stumbled with basics such as how to ask questions through an interpreter. However, you did encounter a number of objections during the court-martial for which you were initially unprepared. These included objections that your interpreter was biased and misinterpreting as well as challenges during voir dire to the inclusion of bilingual panel members. After receiving the verdict and sentence you believe just, you begin pondering the appellate implications of these various issues.

#### IV. Legal Issues Unique to Using Interpreters in Courts-Martial

Recognizing the impact interpretation has on court-martial examinations, practitioners must also be aware of and guard against legal issues that arise when interpreters are used. Member bias against persons requiring interpreters, concerns with bilingual panel members, interpreter bias, and

interpretation error are among the common issues that surround courtroom interpretation.

##### A. Member Bias and Fluency

When counsel use interpreters, certain traditional panel member concerns are more pronounced. This is especially true for members who may be biased against non-English speakers or those fluent in the language being interpreted.<sup>119</sup> Members may be biased against witnesses or accused who do not speak English,<sup>120</sup> especially where it is a servicemember who has limited English proficiency.<sup>121</sup> Practitioners must attempt to address this possible member bias during panel voir dire.<sup>122</sup>

Like member bias, practitioners should explore member fluency on voir dire as well. Members should not be challenged purely upon their fluency in the language being interpreted.<sup>123</sup> As long as the member agrees that they must accept and only consider the court-provided interpretation, a challenge based on a member's bilingual abilities is inappropriate.<sup>124</sup> Though, there are risks a member may ignore the court interpretation or augment it with information directly from the witness.<sup>125</sup> To prevent this, counsel should be on the lookout for indicators of this occurring, such as the member asking for the witness to speak up or taking notes on or reacting to testimony not yet interpreted.<sup>126</sup>

Furthermore, prior to or after voir dire, counsel should consider asking the military judge to provide the panel an instruction related to interpreters.<sup>127</sup> The instruction should address the issues discussed above, such as bias towards a non-English speaking witness or accused as well as concerns surrounding member fluency.<sup>128</sup>

<sup>113</sup> GONZALEZ ET AL., *supra* note 14, at 770.

<sup>114</sup> Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227, 293 (1996).

<sup>115</sup> *Id.*

<sup>116</sup> *See* Shipow, *supra* note 9, at 13-14.

<sup>117</sup> *See id.*

<sup>118</sup> *See id.* Where a bilingual panel member is present and an objection prevents an interpreter from completing a witness's answer in English, the court should remind the bilingual panel member to disregard the answer. *See id.* This may seem redundant, but it is necessary because only the witness, interpreter, and bilingual panel member are aware of the complete answer. *See id.*

<sup>119</sup> *See* Bowles, *supra* note 21, at 642-43; GONZALEZ ET AL., *supra* note 14, at 574-75, 630.

<sup>120</sup> Bowles, *supra* note 21, at 642-43.

<sup>121</sup> *See* GONZALEZ ET AL., *supra* note 14, at 630.

<sup>122</sup> *See* United States v. Sarkisian, 197 F.3d 966, 979 (9th Cir. 1999). For suggested voir dire questions, see GONZALEZ ET AL., *supra* note 14, at 630. This can be supplemented with asking whether potential panel members believe servicemembers or persons living in the United States need to be proficient in English. *See id.*

<sup>123</sup> GONZALEZ ET AL., *supra* note 14, at 630. In fact, a military appellate court has said member fluency may actually aid in bringing an unqualified interpreter to the court's attention. United States v. Ladell, 30 M.J. 672, 675 (A.F.C.M.R. 1990); *see also* Grabau & Gibbons, *supra* note 114, at 304-07.

<sup>124</sup> GONZALEZ ET AL., *supra* note 14, at 574-75, 630; *see* Hernandez v. New York, 500 U.S. 352, 360 (1991); Batson v. Kentucky, 476 U.S. 79 (1986).

<sup>125</sup> Shipow, *supra* note 9, at 14-15; Ladell, 30 M.J. at 675.

<sup>126</sup> *See* Shipow, *supra* note 9, at 14-15; Ladell, 30 M.J. at 675.

<sup>127</sup> HEWITT, *supra* note 16, at 131-32.

<sup>128</sup> *Id.* Unfortunately, the *Military Judges' Benchbook* contains no example

## B. Interpreter Bias

Practitioners must also be on the lookout for interpreter bias. Interpreter bias, whether conscious or unconscious, may cause an interpreter to add, omit, embellish, or ignore parts of the testimony.<sup>129</sup> The alleged bias of interpreters is one of the most litigated issues that arise with interpreters.<sup>130</sup> However, it is often difficult to establish interpreter bias<sup>131</sup> because actual bias must be shown.<sup>132</sup> Also, a voir dire of the interpreter establishing their ability to interpret accurately and impartially will usually suffice to overcome an objection.<sup>133</sup> Regardless, practitioners should ensure interpreters are not only free of actual bias, but that no apparent bias is present.<sup>134</sup>

Appellants often face difficulty obtaining relief for interpreter bias. First, failure to raise known issues of potential bias at trial constitutes forfeiture of the issue.<sup>135</sup> Second, even where interpreter bias is raised and demonstrated, appellate courts will deny relief unless the appellant is able to show the bias was sufficient to render the trial fundamentally unfair.<sup>136</sup> For a trial to be fundamentally unfair, appellants must show the bias prejudiced them by causing material interpretation error, which, as seen below, is rarely established.<sup>137</sup>

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instruction in this area. See U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHMARK (10 Sept. 2014). However, for an example of such an instruction, see Grabau & Gibbons, *supra* note 114, app. A-4.

<sup>129</sup> GONZALEZ ET AL., *supra* note 14, at 165.

<sup>130</sup> See generally Charles C. Marvel, *Disqualification, for Bias, of One Offered as an Interpreter of Testimony*, 6 A.L.R.4th 158 (1981) (providing a survey of cases that involved alleged interpreter bias).

<sup>131</sup> See *United States v. Romey*, 32 M.J. 180, 183-84 (C.M.A. 1991).

<sup>132</sup> See *United States v. Lozano*, 511 F.2d 1, 6 (7th Cir. 1975); Marvel, *supra* note 130, §§ 5, 6 (discussing cases where family, friends, and other interested parties were permitted to serve as interpreters).

<sup>133</sup> See *Romey*, 32 M.J. at 183-84.

<sup>134</sup> See U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS pmbl. (1 May 1992). Practitioners should monitor interpreter performance for bias by ensuring the interpreter and witnesses have no private discussions and observing whether the interpreter employs any "body language that might suggest answers to witnesses, such as nods, shoulder shrugs, or eye expressions." GONZALEZ ET AL., *supra* note 14, at 580-81.

<sup>135</sup> *United States v. Oliver*, No. 200101259, 2005 WL 995678, at \*10 (N-M Ct. Crim. App. Apr. 29, 2005); *United States v. Smith*, 33 C.M.R. 85, 93 (C.M.A. 1963).

<sup>136</sup> *Siripongs v. Calderon*, 35 F.3d 1308, 1318 (9th Cir. 1994); *United States v. Ball*, 988 F.2d 7, 9-10 (5th Cir. 1993).

<sup>137</sup> See *Siripongs*, 35 F.3d at 1318 *United States v. Wampler*, 38 C.M.R. 801, 803 (A.F.B.R. 1967). While rare, courts have found the bias so significant they hold a trial fundamental unfair even without a showing of material interpretation error or other prejudice. See *Prince v. Beto*, 426 F.2d 875, 876-77 (5th Cir. 1970).

## C. Interpretation Error

In addition to bias influencing an interpreter's performance of their duties, interpretation error can occur for a number of reasons.<sup>138</sup> It can result from the interpreter misunderstanding context, misunderstanding the witness's speech, failing to interpret the testimony in its entirety, and being imprecise with regards to meaning, register, or formality.<sup>139</sup> Interpretation error takes many forms and may include omitting or distorting testimony, inserting comments, and incorrectly conveying other linguistic features.<sup>140</sup>

Fortunately, counsel can help minimize the occurrence of misinterpretation. First, counsel must ensure to select appropriate interpreters.<sup>141</sup> Second, counsel should implement some sort of check on interpretation, which can be in the form of a second interpreter or counsel paying attention to signs of inaccurate interpretation.<sup>142</sup> Such signs include the interpreter frequently providing a short English interpretation of long non-English testimony, use of legal terms that would not be expected to originate from the witness, and interpreter failure to mimic the speaker's pauses, hesitations, and other linguistic features.<sup>143</sup> Third, counsel must encourage interpreters to inform them or the court when they are unable to accurately convey the meaning of a word or phrase.<sup>144</sup>

If a party objects based on interpreter error, the judge conducts a hearing outside the presence of the members and determines whether the alleged error is material.<sup>145</sup> If material, the judge should request the objecting counsel provide what they believe is the correct interpretation, at which point the judge should ask the interpreter if the alternative proposed is acceptable.<sup>146</sup> If an agreement cannot be reached, the judge decides which interpretation is proper using a rebuttable presumption that the original interpretation is correct.<sup>147</sup>

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<sup>138</sup> EDWARDS, *supra* note 23, at 91-94.

<sup>139</sup> *Id.* at 91-93; see also *United States v. Copeland*, 21 C.M.R. 838, 866 (A.F.B.R. 1956) (addressing arguments that the accused was prejudiced where the interpreter used classic English when interpreting for a witness who had no formal education).

<sup>140</sup> GONZALEZ ET AL., *supra* note 14, at 200.

<sup>141</sup> See discussion *supra* Part II.

<sup>142</sup> See *id.*; GONZALEZ ET AL., *supra* note 14, at 580.

<sup>143</sup> GONZALEZ ET AL., *supra* note 14, at 580.

<sup>144</sup> Frankenthaler, *supra* note 32, at 27. This often occurs when jargon or specialized language is used. *Id.* Other times, the language being interpreted does not have a comparable term. Wilchins, *supra* note 35, at 27.

<sup>145</sup> See UCMJ art. 39(a) (2016); GONZALEZ ET AL., *supra* note 14, at 581.

<sup>146</sup> GONZALEZ ET AL., *supra* note 14, at 581.

<sup>147</sup> *Id.*

If the judge sustains the objection, interpretation error may be addressed in a number of ways.<sup>148</sup> If the witness and interpreter are still on the stand, the interpreter could simply announce the correction.<sup>149</sup> Alternatively, the judge could permit reexamination on the subject to provide clarification on what the witness intended to convey in their testimony.<sup>150</sup> The parties could also create a stipulation of fact or testimony as to the correct interpretation.<sup>151</sup> Finally, in cases where the interpretation error is so prejudicial that the effectiveness of the above curative measures is doubtful, a mistrial may be appropriate.<sup>152</sup>

If the issue is not raised during the court-martial or is raised but not corrected, convicted persons may seek relief in appellate courts. If raised during the court-martial, the trial court's ruling is reviewed for an abuse of discretion.<sup>153</sup> If not raised, the interpretation error is reviewed under a plain error standard and must be so egregious that it renders the trial fundamentally unfair.<sup>154</sup> After all, accused have no right to flawless interpretations and occasional errors do not render a trial fundamentally unfair.<sup>155</sup>

Additionally, interpretations are presumed correct and the burden is on the appellant to show a specific interpretation error with proof.<sup>156</sup> Proof is often difficult because courts-martial are conducted only in English and the source language does not become part of the record. When the interpreter is the only bilingual person in the courtroom, interpretation errors may never be discovered, preventing appeals.<sup>157</sup> However, where defense was denied a checking

interpreter, defense counsel should request a copy of the court reporter's audio recording as it may be the only proof of the error.<sup>158</sup>

## V. Conclusion

While appellate relief for interpreter issues is rare, practitioners have an obligation to ensure the fair and efficient administration of justice.<sup>159</sup> Further, all military justice practitioners must be vigilant to ensure an accurate interpretation "because the very basis of our adversarial system is dependent upon such accuracy."<sup>160</sup> Vigilance begins by taking the steps discussed throughout this paper. It begins by taking time to truly assess interpreter need and select appropriate interpreters when a need is identified. It includes considering and incorporating measures to effectively use court interpreters and elicit testimony from witnesses. And, as every attorney learned in law school, it consists of spotting and addressing legal issues that may arise. Only then will practitioners be ready for the ever-increasing appearance of non-English speakers in courts-martial.

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<sup>148</sup> See *United States v. Smith*, 33 C.M.R. 85, 92-94 (C.M.A. 1963); HEWITT, *supra* note 16, at 137.

<sup>149</sup> GONZALEZ ET AL., *supra* note 14, at 581. This is also frequently done when the interpreter recognizes the error while the witness is still on the stand, in which case the interpreter notifies the court and simply states the error and provides the substitute interpretation for the record. *Id.*

<sup>150</sup> See *United States v. Gonzalez*, 319 F.3d 291, 296 (7th Cir. 2003).

<sup>151</sup> See MCM, *supra* note 7, R.C.M. 811.

<sup>152</sup> See *United States v. Huang*, 960 F.2d 1128, 1133, 1136 (2d Cir. 1992) ("If the translation were materially flawed and there were no reasonable alternative cure, the court could reasonably conclude that a mistrial was required in the interests of justice."); MCM, *supra* note 7, R.C.M. 915(a) discussion. Even where a mistrial is not granted, significant or recurrent interpretation error may warrant replacing the interpreter. In such cases, with the exception of the identified errors, the previously interpreted testimony is still presumed valid. See *United States v. Delancey*, 34 C.M.R. 845, 847 (A.F.B.R. 1964); *United States v. Smith*, 33 C.M.R. 85, 93 (C.M.A. 1963).

<sup>153</sup> See *United States v. Santos*, 397 F. App'x 583, 588 (11th Cir. 2010); GONZALEZ ET AL., *supra* note 14, at 206-07.

<sup>154</sup> *United States v. Camejo*, 333 F.3d 669, 672 (6th Cir. 2003); GONZALEZ ET AL., *supra* note 14, at 206..

<sup>155</sup> See, e.g., *Camejo*, 333 F.3d at 672; *United States v. Gomez*, 908 F.2d 809, 811 (11th Cir. 1990).

<sup>156</sup> *United States v. Smith*, 33 C.M.R. 85, 93 (C.M.A. 1963).

<sup>157</sup> See Frankenthaler, *supra* note 32, at 25. "[P]rofessional interpreters are trained to understand and act on their obligation to correct any errors that

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they might make . . . ." HEWITT, *supra* note 16, at 136.

<sup>158</sup> GONZALEZ ET AL., *supra* note 14, at 582; see also U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-43 (11 May 2016) (discussing the retention of court-martial recordings). When sign language or another form of visual communication requiring interpretation is used, counsel should request that testimony be video recorded if a checking interpreter is not provided. See MCM, *supra* note 7, R.C.M. 1103(j).

<sup>159</sup> U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS pmb1. (1 May 1992).

<sup>160</sup> See *United States v. Zweifel*, No. 9900865, 2001 WL 1159681, at \*2 (N-M. Ct. Crim. App. Sept. 28, 2001).

## With The Old Breed<sup>1</sup>

Reviewed by Major Andrea M. Hunwick\*

*Replete with violence, shock, blood, gore and suffering, this was the type of incident that should be witnessed by anyone who has any delusions about the glory of war.*<sup>2</sup>

### I. Introduction

War is a waste. So concludes E.B. Sledge in his memoir detailing the Pacific battles of Peleliu and Okinawa during World War II.<sup>3</sup> *With The Old Breed* is an uncensored window into the stink and horror endured by those on the front lines. Sledge's book is not political or blatantly anti-war, it is simply honest. As he tells his readers, his story is "personal" – an account of his experience fighting in the Pacific which he wrote to cope with the nightmares he suffered as a result.<sup>4</sup>

Known as "Sledgehammer" amongst his comrades, Sledge was an enlisted mortarman with the Third Battalion, Fifth Marines, First Marine Division.<sup>5</sup> He purposefully failed officer candidate school because, as he says, "I did not join the Marine Corps to sit out the war in college."<sup>6</sup> Like many young men, he had a glamorized notion of combat, and he was eager to get on the front lines. But Sledge learned in the jungles of Peleliu and Okinawa that, instead of glamour, war yields death, tragedy, camaraderie, and nightmares.

*The Old Breed* is regarded as the first story of its kind told from an enlisted man's point of view.<sup>7</sup> Though it was published in 1981, it is certainly not outdated. Especially in this age of endless conflict, Sledge forces the reader to face some uncomfortable truths. Namely, that war kills the very naiveté it feeds on, and on the front lines the true value of human life is questionable.

### II. Where Youth and Laughter Go<sup>8</sup>

The book's title serves two meanings. Traditionally, "The Old Breed" refers to the First Marine Division – the oldest and most decorated division in the Marine Corps.<sup>9</sup> Through Sledge's narrative, the moniker also comes to represent the point at which naïve combat rookies become hardened veterans. This dichotomy is illustrated by Sledge's description of the new enlistees heading to training and the battle-weary instructors awaiting their arrival. Of the enlistees, Sledge noted, "[e]veryone was in high spirits, as though we were headed for a picnic instead of boot camp – and war."<sup>10</sup> Meanwhile, the seasoned instructors "seemed a million miles away" and had "an intangible air of subdued, quiet detachment."<sup>11</sup> They carried the mark of "The Old Breed."

Sledge of course undergoes this transformation. There is not a definitive moment when he declares himself a hard-nosed veteran, but the transition is clear in the changing way he perceives the battlefield.

In his first foray into battle at Peleliu, Sledge describes the shock and gore of combat with agonizing detail. He recalls the paralyzing fear he experienced the first time he came under enemy fire.<sup>12</sup> He remembers the goose bumps crawling down his spine the first night he stood guard in his meager fox hole awaiting a near-certain enemy attack.<sup>13</sup> The reader can almost feel him hold his breath at the sound of artillery shells overhead – and hear his whispered prayers begging God that those shells pass him by. Sledge recalls the

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<sup>1</sup> E.B. SLEDGE, WITH THE OLD BREED (1981).

<sup>2</sup> SLEDGE, *supra* note 1, at 307.

<sup>3</sup> *Id.* at 315.

<sup>4</sup> *Id.* at 315.

<sup>5</sup> *Id.* at xi. ("More properly listed as Pfc. E.B. Sledge.")

<sup>6</sup> *Id.* at 6.

<sup>7</sup> *Sledgehammer: Old Breed Marine* (The History Channel 2010).

<sup>8</sup> SIEGFRIED SASSON, SUICIDE IN TRENCHES (1949). "You smug-faced crowds with the kindling eye [who cheer when soldier lads march by, [s]neak home and pray you'll never know [t]he hell where youth and laughter go."

<sup>9</sup> OFFICIAL WEBSITE OF THE UNITED STATES MARINES, <http://www.1stmardiv.marines.mil> (last visited Sep. 21, 2016).

<sup>10</sup> SLEDGE, *supra* note 1, at 7.

<sup>11</sup> *Id.* at 16.

<sup>12</sup> *Id.* at 56.

<sup>13</sup> *Id.* at 73.

image of the first enemy deceased he encountered so vividly he notes the coral dust “glistening” on its displaced entrails.<sup>14</sup> He grieves for the enemy dead and is disgusted by fellow Marines who ravage the corpses for “souvenirs.”<sup>15</sup> The fact he goes to such effort to describe these events shows how deeply they resonated with this raw psyche.

But by the time Sledge reaches Okinawa he is so accustomed to these scenes they are hardly worth mentioning. Sledge acknowledges the enemy dead, but no longer out of shock or pity.<sup>16</sup> He is so bitter towards the enemy and numb to death that the Japanese corpses are mostly a nuisance infesting the battlefield with maggots.<sup>17</sup> Even the sight of Marines ripping gold teeth from the mouths of enemy soldiers does not faze him.<sup>18</sup> What he once described down to the detail of the “glistening coral dust” becomes simply a passing narrative. For the man on the front lines, tragedy is normal.

The loss of innocence due to war is certainly not a novel idea. But what is special about Sledge is he does not just surmise this principle, he embodies it. He takes the reader on this dreadful journey where death and destruction turn from shocking to ordinary, and the fire of an excited young man burns to ash. At the end of Okinawa, Sledge reflects on the war and accepts he is forever branded “with the indelible mark” of combat.<sup>19</sup> He begins to see that his buddies have the same vacant look he first noticed on the veteran Marines at boot camp. He can tell by the way people look at him, he must have it too.<sup>20</sup>

### III. Cannon Fodder

*With The Old Breed* similarly confronts the reader with the troubling reality that man is plentiful, and therefore, expendable. For all the rhetoric surrounding U.S. servicemembers as “the most precious resource,” Sledge

forces the reader to consider: What is the actual value of human life amidst a war?

Sledge and his comrades enlisted with “faith that the battles we were destined to fight would be necessary to win the war.”<sup>21</sup> He accepted the possibility of death because he believed his life would contribute to a greater purpose. However, he began to doubt this “purpose” after he saw men treated like disposable commodities worth less than a machine.

Tanks, amtracs, trucks, aircraft, and ships were considered valuable and difficult to replace way out in the Pacific. They were maintained carefully and not exposed needlessly to war or destruction. Men, infantrymen in particular, were simply expected to go beyond the limits of human endurance until they got killed or wounded or dropped from exhaustion.<sup>22</sup>

In one chilling exchange, the First Marine Division is casually warned to expect eighty to eighty-five percent casualties on day one of what was expected to be a sixty-day battle in Okinawa.<sup>23</sup> Sledge eventually comes to refer to himself and his fellow enlistees as “cannon fodder”<sup>24</sup> – their sole purpose being to absorb enemy bullets with their flesh.

#### A. Peleliu: A Neglected Battle<sup>25</sup>

Sledge’s frustration is most strongly echoed in the controversial battle of Peleliu. Historically, Peleliu is regarded as a “relatively minor engagement” whose “contribution to the total victory was dubious.”<sup>26</sup> It came at the cost of 1,794 American lives.<sup>27</sup> The purpose behind the attack was to seize the Peleliu airfield in order to prevent Japanese assaults on U.S. forces heading to the Philippines.<sup>28</sup>

<sup>14</sup> *Id.* at 64.

<sup>15</sup> *Id.*

<sup>16</sup> Over 100,000 Japanese troops were killed in action at Okinawa. *Id.* at 312.

<sup>17</sup> *Id.* at 260.

<sup>18</sup> *Id.* at 123. In this scene, which actually occurred at the end of Peleliu, Sledge himself considered harvesting gold teeth from an enemy soldier as a souvenir. A comrade was only able to talk him out of it after suggesting Sledge might become infected with germs. This is in stark contrast to the first time he sees a Marine stripping an enemy for souvenirs and Sledge wonders, “[w]ould I become this casual and calloused about enemy dead?” *Id.* at 64.

<sup>19</sup> *Id.* at 315. Before Post Traumatic Stress Disorder, the mental trauma caused by combat was referred to as “combat fatigue” as if a simple nap could fix the problem. According to Sledge, “[s]ome of those who didn’t return probably never recovered but were doomed to remain in mental limbo and spend their futures...as living dead.” *Id.* at 264.

<sup>20</sup> *Id.* at 125. Sledge observed, “None of us would ever be the same after what we had endured. To some degree that is true, of course, of all human experience. But something in me died at Peleliu. Perhaps it was a childish

innocence that accepted as faith the claim that man is basically good.” *Id.* at 156.

<sup>21</sup> *Id.* at 19.

<sup>22</sup> *Id.* at 137. There are multiple accounts of similar modern day complaints by Soldiers who feel they are forced to unnecessarily put their lives at risk to save expensive equipment – the implication being that the machine is worth more than the Soldier. A common example concerns broken-down Humvee vehicles. Soldiers are generally not permitted to destroy them in place because the parts are valuable and the potential security hazard in leaving equipment behind. So instead, Soldiers may have to tow the vehicles at great risk to themselves. *See:* DAVID FINKEL, *THE GOOD SOLDIERS* (2010); JON KRAKAUER, *WHERE MEN WIN GLORY: THE ODYSSEY OF PAT TILLMAN* (2010).

<sup>23</sup> SLEDGE, *supra* note 1, at 185.

<sup>24</sup> *Id.* at 100.

<sup>25</sup> SLEDGE, *supra* note 1.

<sup>26</sup> *Id.* at 3. As indicated by LtCol John A. Crown, USMC.

<sup>27</sup> *Id.* at 155. Also, 10,900 Japanese soldiers were killed in action. *Id.*

<sup>28</sup> *Id.* at 53; JEREMY GYPTON, *BLOODY PELELIU: UNAVOIDABLE YET UNNECESSARY* (2004); BILL SLOAN, *BROTHERHOOD OF HEROES: THE*

However, days prior to the attack it was discovered that the Japanese did not have the long-range capabilities to pose a threat from Peleliu.<sup>29</sup> Admiral Chester W. Nimitz, the head of Naval operations in the Pacific, received this information but chose to go forward nonetheless, reportedly because the forces were already underway and turning them around would be “wasteful.”<sup>30</sup>

Even if the decision to invade Peleliu was warranted, once on the island Sledge paints a picture in which Marines were sacrificed simply because there was enough of them to go around. For example, in one scene four infantry battalions are ordered to storm the Peleliu airfield which was completely exposed and surrounded by enemy high ground. As the men ran across the open field praying for their lives, they come under a barrage of artillery and small arms fire. Sledge called the attack “suicidal.”<sup>31</sup> The need to storm the airfield was questionable considering it had been previously destroyed in a U.S. airstrike.<sup>32</sup> One wonders if the operation commenced simply because there were enough men to support it. This notion is arguably supported by the reports of Marine officers who accused senior leaders in Peleliu of “cross[ing] the line that separates courage and wasteful expenditure of lives.”<sup>33</sup>

#### B. *The Rear Echelon*

Sledge has a surprisingly high tolerance for the difficult conditions he encountered in combat. But intertwined with his disgust that men could be reduced to fodder is a repulsion for those at the “rear echelon.” That is how he refers to the Marines with their clean pants and warm coffee. Those who make decisions from the security of a command post without fully appreciating the risks and sacrifices on the front lines. He uses the phrase as almost a slur and extends it to politicians whom he criticizes for “sending others to endure...war’s savagery” without enduring it themselves.<sup>34</sup>

One need only look to his association of “cannon fodder” and “rear echelon” to understand that Sledge’s memoir is plea for leaders to tread carefully with the lives of their troops. Certainly war comes with calculated decisions and the unfortunate reality that men will die. But there is a stark difference between taking casualties because they are

necessary and taking casualties simply because there are men to spare. The mere suggestion that anyone would exercise the latter may sound callous, but Sledge makes it clear that, from the infantryman’s perspective, it happens. He shows the reader that an infantryman unequivocally puts his life into his leader’s hands. In return, he should be secure in a promise that his life will be sacrificed only for something truly significant. Three days into Peleliu, Sledge came to terms with his value:

Slowly the reality of it all formed in my mind: we were expendable! It was difficult to accept. We come from a nation and a culture that values life and the individual. To find oneself in a situation where your life seems of little value is the ultimate loneliness.<sup>35</sup>

#### IV. Recommendation

*With The Old Breed* is an enlisted man’s story, but the lessons are for those who lead men and women into combat. It is a poignant reminder of the human price paid by war. “So many bright futures consigned to the ashes of the past. So many dreams lost in the madness....”<sup>36</sup> Anyone who has the power to influence or direct servicemembers into combat owes it to them to read this book – to understand just what a person sacrifices when they volunteer to fight. Sledge wrote *With The Old Breed* out of a sense of duty for the 9407 comrades who gave their lives in Peleliu and Okinawa. Today, one can honor Sledge and his brothers by heeding their lessons to ensure no man or woman’s sacrifice is laid to waste.

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MARINES AT PELELIU 1944 – THE BLOODIEST BATTLE OF THE PACIFIC WAR 6 (2005) (“Many post-World War II military historians have described the battle as strategically pointless – one they maintain should have never happened. Even while Marines were dying there, it became clear that Peleliu posed no offensive threat to [General Douglas] MacArthur’s Philippine invasion and could have been easily bypassed by U.S. forces.”).

<sup>29</sup> SLEDGE, *supra* note 1, at 53; BLOODY PELELIU, *supra* note 28, at p.2.

<sup>30</sup> SLEDGE, *supra* note 1, at 53; BLOODY PELELIU, *supra* note 28, at p.3. It is ironic to see the term “waste” used here by a senior leader to describe the expenditure of resources in contrast to Sledge’s frequent use of the same term in reference to battlefield casualties.

<sup>31</sup> SLEDGE, *supra* note 1, at 80.

<sup>32</sup> BILL SLOAN, BROTHERHOOD OF HEROES: THE MARINES AT PELELIU 1944 –THE BLOODIEST BATTLE OF THE PACIFIC WAR 340 (2005).

<sup>33</sup> *Id.* at 341. Specifically, Colonel Lewis “Chesty” Puller was criticized for being unreasonably aggressive with Marines of the Third Brigade. Additionally, “[t]hroughout the battles [Major General William] Rupertus, seemingly oblivious to the casualties his division was taking, insisted that an end was in sight, and that outside help was unnecessary.... Apparently, it was a far better decision to sacrifice his own troops rather than take a chance on the Army.” JEREMY GYPTON, BLOODY PELELIU: UNAVOIDABLE YET UNNECESSARY 3 (2004).

<sup>34</sup> Although he clearly resented the ignorance of rear echelon officers to the blight of the front lines, he showed all deference and respect to his superior officers and non-commissioned officers. Sledge’s frustration should not be confused with a contempt for leadership or the chain of command. Sledge was a proud Marine and held the distinction of rank at very high regard.

<sup>35</sup> SLEDGE, *supra* note 1, at 100.

<sup>36</sup> *Id.* at 315.

# ALLEGIANCE<sup>1</sup>

Reviewed by Major Dylan S. Mack\*

*You worry that the government will do wrong in the future. . . . But I worry that some judge will stop the government from doing what's needed. . . . We don't know what will happen. But we lose more if the judges get it wrong than if the government does. Do you want to gamble the country on five votes?*<sup>2</sup>

## I. Introduction

President Franklin D. Roosevelt's Executive Order 9066, signed mere months after the bombing of Pearl Harbor, ordered all Japanese Americans to evacuate the West Coast.<sup>3</sup> This order resulted in the relocation of 120,000 people to 10 internment camps across the United States.<sup>4</sup> In *Allegiance*, Caswell "Cash" Harrison, a young member of Philadelphia's elite, finds himself in the middle of government machinations leading up to the seminal Supreme Court decisions regarding Japanese internment, *Hirabayashi v. United States*,<sup>5</sup> *Ex Parte Endo*<sup>6</sup> and *Korematsu v. United States*.<sup>7</sup>

Author Kermit Roosevelt, himself a professor of constitutional law at the University of Pennsylvania Law School,<sup>8</sup> uses his experience to believably take Cash through the Supreme Court and the Department of Justice, interacting with such historical figures as Justice Hugo Black, Justice Felix Frankfurter, Attorney General Francis Biddle, Solicitor General Charles Fahy, and FBI Director J. Edgar Hoover. Along the way, Cash not only confronts the serious legal and moral dilemmas presented by the cases he encounters in his job, but also is swept along in a tide of intrigue and questioned loyalties when one of his fellow clerks dies under mysterious circumstances. While the majority of cases and issues Cash confronts are based on real events, the conspiracy subplot beginning with the clerk's murder are woven from whole cloth.<sup>9</sup> Ultimately, the author has wordsmithed a compelling narrative, though at times the pacing is hurt by Cash's wordy internal reflections. The novel's conclusion may also leave some readers unsatisfied, as the fictional subplot offers no

counterpoint to the existential questions raised by the real-world events depicted in the story.

## II. The Philadelphian Elite

Cash Harrison is in his final year of law school when the Japanese attack Pearl Harbor. He feels a compulsion to defend his country, yet is devastated when he fails his pre-induction physical. He is still determined to volunteer in some capacity, but receives a call from his former law professor informing him that has been selected to serve as a clerk to Supreme Court Justice Hugo Black. Cash turns to his girlfriend's father, Judge Skinner, whom Cash simply refers to as "the Judge," for advice. Judge Skinner's response introduces the recurring theme of the novel. Cash will struggle with his allegiance to his rich, white upbringing while simultaneously being pulled in an opposing direction by allegiance to new friends, mentors, and his evolving sense of justice. When the Judge recognizes that Cash wanted to join the military and has lost his sense of purpose because he cannot serve, the Judge tells Cash,

You were made for more than that, and more is what is now offered you. . . . Society left the governing to the little men, and that was fine as long as government left society alone. But it hasn't for the past decade, and it won't again. If we don't govern, we will be governed. . . . Oh,

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<sup>3</sup> KERMIT ROOSEVELT, *ALLEGIANCE* (2015).

<sup>2</sup> *Id.* at 375.

<sup>3</sup> *Japanese-American Relocation*, HISTORY.COM, <http://www.history.com/topics/world-war-ii/japanese-american-relocation>. (last visited Sept. 27, 2017).

<sup>4</sup> *Id.*

<sup>5</sup> *Hirabayashi v. United States*, 320 U.S. 81 (1943). The Court ruled, *inter alia*, that Executive Order 9066 was constitutional. *Id.*

<sup>6</sup> *Ex parte Endo*, 323 U.S. 283 (1944). The Court ruled the U.S. government could not continue to detain Mitsuye Endo in an internment camp, but did not address the constitutionality of Executive Order 9066. *Id.*

<sup>7</sup> *Korematsu v. United States*, 323 U.S. 214 (1944). In an opinion issued the same day as *Ex parte Endo*, the Supreme Court, citing *Hirabayashi*, sustained Mr. Korematsu's convictions. *Id.* at 223.

<sup>8</sup> *Penn Law Faculty: Kermit Roosevelt, expert on Constitutional Law, Conflict of Laws, Federal Jurisdiction*, PENN LAW, <https://www.law.upenn.edu/cf/faculty/krooseve/> (last visited Sept. 20, 2016).

<sup>9</sup> ROOSEVELT, *supra* note 1, at 389 (Author's Note).

there is a war at the court if you care to look for it.<sup>10</sup>

This theme of separateness and otherness pervades the novel. Later, Cash remembers his father once told him that “one’s class and one’s kind” is what keeps a person safe in the world.<sup>11</sup> Another Philadelphian,<sup>12</sup> Attorney General Francis Biddle, makes a similar, though seemingly less elitist comment, telling Cash, “I decided as a young man that I would be one of the governing class, not just a gentleman of cultivated taste. And that’s who I want with me. Not society, but those who want to serve.<sup>13</sup>” Cash himself falls victim to this type of thinking; when he is about to meet J. Edgar Hoover, and is ruminating on how the meeting could go wrong, Cash thinks, “[s]omewhere in this building is Attorney General Biddle, and he is Hoover’s superior. I imagine calling out his name . . . but there is no need. I know I have nothing to fear from the government.”<sup>14</sup>

### III. The Outsiders

Roosevelt presents two main foils to Cash’s “society” upbringing in Philadelphia, one a real historical figure and another invented for the novel. The first, Justice Hugo Black, serves as an example of a man who appears to have rejected the society in which he was raised.<sup>15</sup> Justice Black practiced law in Birmingham, Alabama, and served in the U.S. Senate, where he supported much of President Franklin D. Roosevelt’s New Deal initiatives.<sup>16</sup> Though he was a defender of civil rights and civil liberties on the Court,<sup>17</sup> it is undisputed he was a member of the Ku Klux Klan for two years, eventually resigning before entering the Senate elections.<sup>18</sup> Doubts about the veracity of his resignation, however, would continue throughout his life and tenure on the Court.<sup>19</sup> Still, Roosevelt treats his version of Justice Black as the good man who renounced his past prejudices, or who

perhaps never had them in the first place. As Justice Black says to Cash,

I’ve seen some bad cases. I prosecuted four years in Jefferson County. The Bessemer cops had a perfect arrest record. Any crime there was, they’d bring me some colored boy who’d confessed. I could have got [sic] convictions, of course, but I told them I wouldn’t try a case on a confession alone. And then I got a grand jury together, and we investigated that police department and cleaned ’em [sic] out.<sup>20</sup>

The second foil character, Clara Watson, is an invention of the author.<sup>21</sup> Towards the end of the book, when she and Cash are reflecting on the manner in which the Japanese Americans were treated, with a not-so-subtle nod to the atrocities the Nazis committed against the Jewish people, she reminds Cash, “It will never happen to you. And you should be happy about that. It means you can afford to look for the best in people.”<sup>22</sup> Roosevelt uses a character from humble beginnings to make Cash aware of the white privilege<sup>23</sup> he inherited from his elite Philadelphian upbringing.

### IV. Shifting Loyalties

Roosevelt wisely takes Cash through a slow development, bringing the reader on an emotional ride with the protagonist. When Cash first works on the *Hirabayashi* case, he is merely a clerk at the Supreme Court. He feels sympathy for the defendant, and works with his closest friend among the clerks, Gene Gressman,<sup>24</sup> in an attempt to influence the Court to rule against the curfew applicable to all persons of Japanese descent on the West Coast.<sup>25</sup> The case is contentious, resulting in intense arguments among both the Justices and the clerks, but ultimately results in a

<sup>10</sup> *Id.* at 17.

<sup>11</sup> *Id.* at 272.

<sup>12</sup> See *Francis B. Biddle (1941-1945)*, MILLER CTR. OF PUB. AFFAIRS, UNIV. OF VA., <http://millercenter.org/president/essays/biddle-1941-francis-attorney-general> (last visited Sept. 21, 2016).

<sup>13</sup> ROOSEVELT, *supra* note 1, at 162.

<sup>14</sup> *Id.* at 131.

<sup>15</sup> See Virginia Van Der Veer, *Hugo Black and the K.K.K.*, Am. Heritage (Apr. 1968), <http://www.americanheritage.com/content/hugo-black-and-kkk>. Van Der Veer states, “Black came from yeoman stock in rural Alabama, and his birthrights were little more than a keen mind and prodigious energy.” *Id.*

<sup>16</sup> John Fox, *Supreme Court History. Expanding Civil Rights. Biographies of the Robes. Hugo La Fayette Black*, PBS (Dec. 2006), [http://www.pbs.org/wnet/supremecourt/rights/robes\\_black.html](http://www.pbs.org/wnet/supremecourt/rights/robes_black.html).

<sup>17</sup> *Id.* Justice Black also joined the unanimous Supreme Court decision that desegregated public schools, though this case is beyond the timeline of *Allegiance*. *Brown v. Board of Education of Topeka*, 373 U.S. 483 (1954).

<sup>18</sup> *Hugo Black Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/hugo-black-37030> (last updated Apr. 2, 2014).

<sup>19</sup> See generally Van Der Veer, *supra* note 15.

<sup>20</sup> ROOSEVELT, *supra* note 1, at 58.

<sup>21</sup> ROOSEVELT, *supra* note 1, at 389 (Author’s Note). As she is wholly an invention of the author, and as her character arc is essential to the plot, I will say little more about her to avoid revealing a plot device.

<sup>22</sup> *Id.* at 371.

<sup>23</sup> This is neither an endorsement nor condemnation of the academic concept of white privilege in this review; The author merely points out that, since this novel was published in 2015, Roosevelt is clearly making reference to the concept through characters and situations in the novel.

<sup>24</sup> Gene Gressman is also an invented character. ROOSEVELT, *supra* note 1, at 389 (Author’s Note).

<sup>25</sup> One of the main issues in the *Hirabayashi* case was the legality of a curfew order imposed by the military commander under the authority of Executive Orders 9066 and 9102. *Hirabayashi*, 320 U.S. at 87.

disappointing result for Cash and Gene, as the Court would uphold the curfew order.<sup>26</sup>

As the Court term and Cash's tenure as a clerk comes to an end, Cash is determined to return to Philadelphia and the world he knows. However, Gene Gressman is found dead under mysterious circumstances.<sup>27</sup> His death forces Cash's first true shift of loyalty in the novel. Against the pleadings of Judge Skinner and Suzanne, he returns to Washington in a quest to find the people responsible for Gene's death.<sup>28</sup> He turns to an unlikely ally, Justice Frankfurter, who recommends Cash take a job in the Department of Justice (DOJ).<sup>29</sup>

From Cash's job at the DOJ's Alien Enemy Control Unit, Roosevelt shows the reader, through Cash's eyes, a personal relationship with the people affected by the *Endo* and *Korematsu* cases. Edward Ennis,<sup>30</sup> Cash's supervisor, sends Cash to the Tule Lake War Relocation Center in Northern California, mainly to investigate why nearly five thousand Japanese Americans "failed" a "loyalty questionnaire" which gave them a Hobson's choice of either accepting induction into the Army or renouncing their American citizenship and agreeing to be expatriated to Japan at the conclusion of the war.<sup>31</sup>

It is here that the novel becomes its most poignant. Cash personally meets with some of the interned Japanese, and both he and the reader are finally able to see the Japanese internment not as an academic problem to be solved, as it was first viewed from the marble halls of the Supreme Court, but rather as a deeply troubling, human, and moral quandary. While Cash's superiors in Washington cannot fathom how so many American citizens could possibly be so "disloyal," Cash's 19-year-old driver at Tule Lake, Private First Class Andrew Rosen, frames the issue perfectly.

I got this uniform through the draft. I didn't like it. I had a job. I had a girl. I didn't like being told to put them aside and pick up a rifle. But I did it. Your boss is right; when your country calls, you go. But let me tell you. If old Uncle Sam had taken away that job, taken away that girl because he didn't like my looks, put me in a camp and then said, "Well, son, pick up that rifle, I guess you're good enough to die"—I'd spit in his

face is what I'd do. A man that would go along with that kind of treatment, he's not a man at all.<sup>32</sup>

Here again, someone not of Cash's upbringing is the person who is able to analyze the situation in a manner the "elites" are unable to do.

## V. Overall Impressions

As most of the novel is based on the true events, the reader knows from the beginning how the *Endo* and *Korematsu* cases are resolved. The knowledge that Cash will ultimately fail in his efforts to bring true justice to the interned Japanese makes his fervent resolve and extraordinary efforts so much more tragic for the reader. Roosevelt is at his best when showing Cash's one-on-one interactions with other characters in the novel. The dialog, interspersed with Cash's internal monologue, highlights the internal struggles and the multiple influences pulling at the protagonist from varying directions. In keeping with the title of the book, Roosevelt does a masterful job keeping the reader in suspense regarding the loyalties of most of the supporting cast, which encourages the reader to devour the prose as fast as possible.

Impeding the book, however, are two minor flaws. From time to time, Cash will fall into a reverie, and these lengthy internal reflections fall flat and encumber the pacing of the novel. Whether poorly written or meant to be further commentary on Cash's growth and journey, these introspections mainly leave the reader impatient for the next meeting with one of the Justices or the well-written supporting characters. Most disappointing, however, is the resolution of the subplot involving Gene Gressman's murder and a conspiracy to influence the Supreme Court. As noted above, because it is grounded in reality, the main plot involving the Japanese internment cannot have a satisfying conclusion. It is curious, then, why Roosevelt would also choose to have the subplot over which the author has complete control also come to a conclusion that, while just, fails to provide a sense of finality. Cash's final confrontation with the mastermind of the conspiracy plot leaves the reader unfulfilled, and, while the narrative implies that the mastermind will get his just deserts, the novel ends having only mentioned that an investigation into the conspiracy has begun.

<sup>26</sup> See ROOSEVELT, *supra* note 1, at 120. See also *Hirabayashi*, 320 U.S. at 105.

<sup>27</sup> ROOSEVELT, *supra* note 1, at 125.

<sup>28</sup> *Id.* at 157.

<sup>29</sup> *Id.* at 158.

<sup>30</sup> Edward Ennis was in charge of the Japanese internment program, though he was opposed to it; he would leave the Department of Justice and join the American Civil Liberties Union in 1946, eventually becoming its president in 1967. Alfonzo A. Naravez, *Edward Ennis, 82, Ex-Prosecutor and Head of Civil Liberties Union*, N.Y. TIMES, Jan. 9, 1990,

<http://www.nytimes.com/1990/01/09/obituaries/edward-ennis-82-ex-prosecutor-and-head-of-civil-liberties-union.html>.

<sup>31</sup> This plot device is based in historical fact. See, e.g., LESLIE HATAMIYA, *RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988* (1993). Knowing they would be drafted if they affirmed their American citizenship, many Japanese chose to renounce to keep their families together, while others feared to return to their homes on the West Coast, even after the war, due to anti-Japanese sentiment stirred up by the Pearl Harbor attacks. See *id.*

<sup>32</sup> ROOSEVELT, *supra* note 1, at 211.

Roosevelt may have chosen to end the subplot in the manner he did to indicate a parallel with the main historical plot. Just as the Japanese internment was ended and many Americans were allowed to return to their lives, few of the real issues were settled. Indeed, it would take until 2011 for the Acting Solicitor General of the United States, Neal Katyal, to confess that his predecessor, Charles Fahy, withheld evidence from the Supreme Court that could have been disastrous to the *Hirabayashi* and *Korematsu* cases.<sup>33</sup> The novel raises this issue and leaves it unresolved, just as the conspiracy subplot is left unresolved. What Roosevelt leaves the reader with, therefore, is an impression that all of Cash's efforts were on some level futile, but there is hope that some good will eventually come.

Minor flaws aside, I highly recommend this book. Its pacing errors are eminently redeemable and the novel is quite an enjoyable read that makes the reader want to devour it as quickly as possible. The novel's themes, too, are incredibly relevant today as we face the constant question of striking the proper balance between the freedoms guaranteed by America and the need for national security in the face of an enemy.

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<sup>33</sup> David G. Savage, *U.S. Official cites misconduct in Japanese American internment cases*, L.A. TIMES, May 24, 2011, <http://articles.latimes.com/2011/may/24/nation/la-na-japanese-americans-20110525>. Solicitor General Fahy apparently had knowledge of a report from the Office of Naval Intelligence indicating that Naval Intelligence found no evidence that

Japanese Americans on the West Coast were a threat, or had signaled to Japanese submarines or otherwise served as spies, as the government alleged in the Supreme Court cases on Japanese internment. *Id.*

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