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Lore of the Corps

Hangings and Death by Musketry in the Pacific: Death Penalty Courts-Martial in Australia, Hawaii, and India (1942-1947)

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Regimental Historian & Archivist

In April 2001, the *Honolulu Advertiser* published an article titled, “Mysterious Schofield Plot Filled with Untold Stories.”¹ Those who took the time to read the piece learned that the six-acre Schofield Barracks Post Cemetery in Hawaii has a special plot containing the remains of seven Soldiers who were tried, convicted, and executed either by hanging or by firing squad. What follows is the story of five of those seven courts-martial, which occurred either in Australia, Hawaii, or India. They are examined in chronological order.²

United States v. Private Edward J. Leonski *Australia 1942*

Twenty-four year old Leonski “paid with his life for three brutal murders which chilled the blood.”³ The victims, all Australian females residing in Melbourne, were killed by the accused on three different days in May 1942. The accused, a private (PVT) assigned to the 52d Signal Battalion, Camp Pell, Melbourne, Australia, was apprehended and confessed to the murders. He was charged with premeditated murder of all three victims in that Leonski “willfully, deliberately, feloniously, [and] unlawfully” strangled each woman “with his hands.”⁴ Tried by general court-martial in July, he was found guilty of the triple homicide and sentenced to death.

Given that Leonski had confessed to the killings when questioned by an Australian police detective, the panel members did not have trouble finding him guilty. But the accused was a heavy drinker, and evidence was presented at trial that he had consumed prodigious

amounts of alcohol prior to each murder. Prior to the last homicide on 18 May, for example, PVT Leonski drank “25-30 glasses of beer, followed by five one-ounce whiskeys.”⁵ The defense suggested that the accused’s drinking was evidence of “mental derangement,” but the panel rejected this theory, as did Lieutenant Colonel John A. Stagg in his Staff Judge Advocate’s Review of the case.⁶ Leonski in fact “had acquired a reputation for his drinking ability,” and the members necessarily concluded that he was able to form the requisite intent to support their findings.⁷



On October 26, 1942, the Board of Review, Branch Office of The Judge Advocate General, then sitting in Melbourne, Australia, concluded in a thirty-page opinion that the record was “legally sufficient to support the findings of guilty . . . and the sentence.”⁸ Events moved quickly after the board’s work was completed. General Douglas MacArthur, as Commander-in-Chief, Southwest

¹ Will Hoover, *Mysterious Schofield Plot Filled with Untold Stories*, HONOLULU ADVERTISER, Apr. 22, 2001.

² The author thanks Colonel William D. Smoot, Staff Judge Advocate, 25th Infantry Division, for alerting him to the existence of this piece of military legal history. He also thanks Chief Warrant Officer Four Jennifer D. Young, Senior Legal Administrator, Fort Shafter, Hawaii, for photographing the gravestones of the executed Soldiers buried in the Schofield Barracks Post Cemetery.

³ *Leonski in Life and Death: Full Story*, THE SUN NEWS (Melbourne, Australia), no date. This article was published shortly after Leoniski’s execution on 4 November 1942.

⁴ Gen. Court-Martial Order No. 1, Gen. Headquarters, Southwest Pacific Area (4 Nov. 1942).

⁵ *United States v. Private Edward J. Leonski*, CM 267174, 16 (Board of Review, Oct. 26, 1942) (record is located at the National Archives and Records Administration, National Archives at St. Louis, Record Group 153).

⁶ Review of the Staff Judge Advocate, Branch Office of The Judge Advocate General 30 (29 Sept. 1942) (*United States v. Edward J. Leonski*, CM 267174, 16 (Board of Review, Oct. 26, 1942)).

⁷ *Id.*

⁸ *Leonski*, CM 267174 at 30.

Pacific Area, ordered the death sentence to be carried out on November 4, 1942, and Leonski went to the gallows five days later. Leonski initially was interred in Ipswich, Australia, but his remains were subsequently transported to the Schofield Barracks Post Cemetery, probably shortly after World War II ended.

United States v. Herman Perry
India 1944–45

On March 15, 1945, Private Herman Perry, 849th Engineer Aviation Battalion, was hanged in New Delhi, India. He had been convicted of murder, desertion, and willful disobedience of a lawful command of a superior officer.⁹

On March 4, 1944, the accused failed to report for duty and, when told that he consequently was under arrest and “was going to the guard house,” killed a lieutenant who was attempting to apprehend him.¹⁰ Private Perry then fled into the surrounding jungle. When apprehended by a “raiding party” sent to search for him on July 20, 1944—more than four months later—he was discovered to be married to a local Indian woman and was operating a small farm with her. At first the accused denied that he was Herman Perry, but “later admitted his identity.”¹¹

At trial, the accused admitted that he had disobeyed orders and deserted. But he claimed that he had been justified in shooting the lieutenant because the officer had “jumped at” him. The panel members, however, saw it otherwise. After the Acting Staff Judge Advocate, Major Charles Richardson Jr., wrote that “this is a case of cold-blooded, deliberate, and brutal murder of a brave young officer of the United States Army,” and that the death penalty was “the only fitting punishment for this offender,” there was little doubt that the Commanding General, U.S. Army Forces, China, Burma, and India Theater, would order the execution to be carried out.¹²

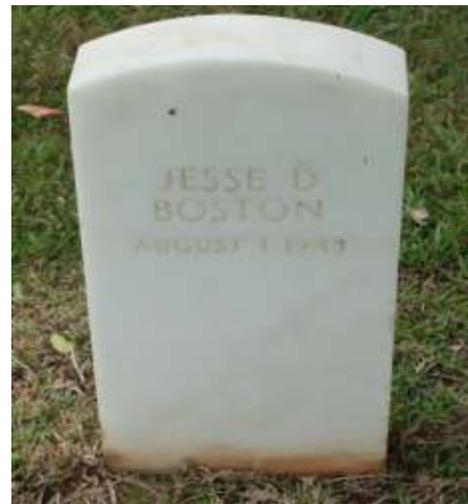
United States v. Jesse D. Boston
Hawaii 1945

Thirty-five year old Private First Class (PFC) Boston killed a woman by striking her in the head with a “cement weight.” He was executed by firing squad on August 1,

1945—the only Soldier to be “executed by musketry” in Hawaii in World War II.¹³

Why a firing squad? This was the actual punishment adjudged by the panel deciding Boston’s case. Under the Articles of War then in effect, the members had the option of selecting hanging as a punishment, but did not.¹⁴ Presumably, the convening authority could have altered the means of execution, but he did not. Boston was shot by musketry shortly before the hanging of Cornelius Thomas, discussed below, which meant Boston was part of the only double execution to occur in Hawaiian history.

Boston’s trial by general court-martial was held in Hawaii from April 20–24, 1945. Evidence showed that the accused was stationed on the island of Maui at the time of the crime, and on February 15, he entered the home of Shizue Saito, a civilian, with the intent to “take her money if she had any.” Private Boston walked up behind Saito and he hit her in the head with a “rock or brick or something of the sort.” He likely hoped that the victim would be rendered unconscious, but when she began yelling for help, his plan went awry. When Boston left the victim’s home, she was alive. Unfortunately for the accused, her skull had been fractured and she died before midnight that same night. After being advised of his rights, Boston admitted to having killed Mrs. Saito while attempting to rob her.¹⁵



⁹ *United States v. Private Herman Perry*, CM 307871 (Board of Review, 4 Sept. 1944) (record is located at National Archives and Records Administration, National Archives at St. Louis, Record Group 153).

¹⁰ Review of the Staff Judge Advocate 2 (21 Sept. 1944) (*United States v. Perry*, CM 307871 (Board of Review, 4 Sept. 1944) (Allied Papers)).

¹¹ *Id.* at 3.

¹² *Id.*

¹³ Gen. Court-Martial Orders No. 19, Headquarters, U.S. Army Forces Pacific Ocean Areas (19 June 1945); *United States v. Jesse D. Boston*, CM 307533 (Board of Review, 24 Apr. 1945).

¹⁴ Under the Manual for Courts-Martial then in effect, the panel members were required to “prescribe” the method of execution, “whether by hanging or shooting.” While the Manual stated that shooting usually was prescribed for military offenses, this was not required. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 103c (1928).

¹⁵ *Boston*, CM 307533 at 8 (Allied Papers).

After being convicted of premeditated murder and sentenced to be dishonorably discharged, to forfeit all pay and allowances, and to be shot by musketry, the Board of Review, U.S. Army Forces Pacific Ocean Areas, affirmed both the findings and sentence. The Commanding General, U.S. Army Forces Pacific Ocean Areas, then ordered the execution to be carried out.

United States v. Cornelius Thomas
Hawaii 1945

Twenty-two year old Thomas killed a man by shooting him with a .45 caliber pistol. He was hanged on August 1, 1945, shortly after Jesse D. Boston was shot by firing squad.¹⁶



On June 11, 1944, PVT Thomas, a member of the 3297th Quartermaster Service Company, then located on the island of Maui, absented himself without leave from his camp. He walked to the home of Francis T. Silva, where Silva, his wife, and nine-month-old child were sleeping. The accused cut a rear screen door and went into the Silva's bedroom. Although PVT Thomas did not know the Silvas, his intent was to awaken Mrs. Silva and "compel her to come outside for the purpose of having sexual relations with him." But when Thomas touched her leg to awaken her, she screamed. Perhaps the accused panicked, but he had a .45 caliber pistol with him that he raised and fired. The bullet hit the third finger of Mrs. Silva's right hand and then passed into the chest of her husband, killing him. According to the evidence presented at trial, PVT Thomas left the Silva home and,

¹⁶ United States v. Thomas, CM 267174 (Board of Review, 9 Aug. 1944) (record is located at National Archives and Records Administration, National Archives at St. Louis, Record Group 153).

"after wandering about for some two hours and breaking into several other houses with a view to committing rape, returned to his camp."¹⁷

The members had no difficulty in finding Thomas guilty as charged. He had given a "voluntary written statement" in which he admitted entering the Silva home "with the intent to commit rape." Private Thomas also admitted to "firing a shot at the deceased." The defense objected to the admissibility of this statement on the grounds that it was involuntary, but the objection was overruled, and the defense counsel offered no additional evidence at trial.¹⁸

Major General Myron C. Cramer, then serving as The Judge Advocate General, recommended to President Franklin D. Roosevelt that the "sentence of death be confirmed and ordered executed." As Cramer put it, PVT Thomas was "a confirmed criminal and a menace to society."¹⁹ On March 20, 1945, Roosevelt agreed and ordered the execution to be carried out. The record of trial is not clear why it took nearly four months for the War Department to publish General Court-Martial Orders ordering the hanging of PVT Thomas to occur, but they were published on July 11, 1945.²⁰ Slightly more than two weeks later, Thomas met the hangman's noose.

United States v. Private Garlon Mickles
Hawaii 1946-1947

Mickles was the last Soldier hanged in Hawaii: the "trap was strung" on April 22, 1947, at 7:01 a.m., and Mickles was "pronounced dead" twenty minutes later.²¹

On April 3, 1946, nineteen-year old Private Garlon Mickles was assigned to the 2280th Quartermaster Truck Company, then located on Guam, Marianas Islands. According to the evidence presented at his general court-martial, Mickles entered the barracks room of a sleeping female civilian at about 10:30 p.m. on April 3, 1946. He was carrying "a coral rock about the size of a grapefruit,"

¹⁷ Boston, CM 307533.

¹⁸ Review of the Staff Judge Advocate, Headquarters, Central Pacific Base Command 2 (14 Sept. 1944) (United States v. Thomas, CM 267174 (Board of Review, 9 Aug. 1944).

¹⁹ Memorandum from Myron C. Cramer, The Judge Advocate General to Major General Edwin M. Watson, subject: Private Cornelius Thomas, 3297th Quartermaster Service Company (25 Jan. 1945).

²⁰ Gen. Court-Martial Order No. 333, War Department (11 July 1945).

²¹ War Department, Message from Commanding General Army Forces Pacific to War Department 4 (22 Apr. 1947) (United States v. Mickles, CM 31502 (Board of Review, 11 June 1946) (Allied Papers)).

which he used to strike the woman in the head. When she did not “make any sound . . . he proceeded to have intercourse with her for about fifteen minutes.” Just before leaving her room, Mickles noticed that his victim was wearing an expensive wristwatch on her right arm. He took it from her arm, put it in his pocket, and left.²²

When the victim awoke, she knew she had been raped but was unable to provide any information about her assailant. Consequently, the crime remained unsolved until early May, when Mickles attempted to sell the wristwatch to some local civilians. The accused was apprehended, and the rape victim identified the watch as hers. Private Mickles subsequently gave a statement in which he “admitted all the essential elements of proof required” for rape and larceny.²³

The question of Mickles’s sanity was hotly contested at trial, but after an Army psychiatrist testified that the accused was sane at the time he committed the offenses, the panel did not have much trouble finding him guilty. At the time, rape was a capital offense under the Articles of War, and the panel certainly had little sympathy for the accused. The twenty-seven year-old victim testified that she woke up “to find herself in great pain about the face and head, and unable to open her eyes.”²⁴ She was fortunate not to have been killed when struck in the head with the coral rock. Additionally, although he was only nineteen years old, the accused had two prior convictions by courts-martial. The accused was African-American, and the victim was white. While race may have been a factor at trial given that black Soldiers were segregated from white Soldiers and faced discrimination on a daily basis, the extent to which race played a role will never be known.

On June 11, 1946, Private Mickles was found guilty of rape and larceny and sentenced to be dishonorably discharged, to forfeit all pay and allowances, and to be hanged by the neck until dead. After the convening authority took action, the case went to The Judge Advocate General, Major General Thomas Green, for his recommendation, and then via the Undersecretary of War to President Harry S. Truman for a final decision on the death sentence. The National Association for the Advancement of Colored People, and other interested parties, lobbied the Army and the White House for clemency for Mickles, but their efforts were to no avail.

Truman ordered the hanging to proceed. While Mickles had been tried in Guam, he would be executed in Hawaii on April 22, 1947. He was the last Soldier hanged in Hawaii.



A final note on Mickles. The War Department Adjutant General’s Office Form 52-1, Report of Death, states that his “cause of death” was “due to Judiciary strangulation.”²⁵ Your Regimental historian has not previously seen this legal term in use.

A final note about the burials of these executed men. The graves are “hidden behind a hedge [and] separated from the main cemetery.”²⁶ This is because it was considered wrong to bury them alongside men and women who served honorably and faithfully. Additionally, as the executed men had dishonored the Army and the Nation, they were buried “with their heads toward their individual tombstones, thus facing away from the post cemetery flag.” This is significant as, of roughly 1800 people buried in the Schofield Barracks Post Cemetery, only these men are so interred; every other buried person faces toward the flag.²⁷

There were, of course, other Soldiers tried by courts-martial and sentenced to death in Asia and the Pacific during World War II; their stories must wait until another day. But at least the history of five men executed and interred at the Schofield Barracks Post Cemetery is now better known to readers of *The Army Lawyer*.

²² Review of the Staff Judge Advocate, Headquarters, Twentieth Air Force 1 (28 June 1946) (United States v. Mickles, CM 31502 (Board of Review, 11 June 1946)).

²³ *Id.* at 2.

²⁴ Statement of Captain (Dr.) Leonard W. Charvet, 204th General Hospital, Guam, Marianas Islands 1 (14 May 1946) (United States v. Mickles, CM 31502 (Board of Review, 11 June 1946) (Allied Papers)).

²⁵ War Department Adjutant General’s Office Form 52-1, Report of Death, Garlon Mickles (United States v. Mickles, CM 31502 (Board of Review, 11 June 1946) (Allied Papers)).

²⁶ Post Cemetery, Schofield Barracks, n.d. (visitor’s brochure) (on file with Regimental Historian).

²⁷ Hoover, *supra* note 1.

**Achieving Simplicity in Charging Larcenies by Credit, Debit, and Electronic Transactions by
Recognizing the President’s Limitation in the *Manual for Courts-Martial***

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I. Introduction

The Army Court of Criminal Appeals (ACCA) recently struggled to reconcile decisions by the Court of Appeals for the Armed Forces (CAAF) on larcenies by credit, debit, and electronic transactions in *United States v. Endsley*.¹ Even though, in the usual case, the merchant from whom the goods were obtained would be the victim,² the ACCA held that a debit card holder was a proper victim in *Endsley*, where the accused used the card number, without permission, to purchase food from restaurants and comic books from Amazon.com.³ *Endsley* is a usual case, and with it the CAAF had the opportunity to clarify how prosecutors should distinguish “usual” cases from “unusual” cases. This distinction is important to the identification of the correct victim⁴ of a larceny by credit, debit, or electronic transaction. The CAAF reversed the ACCA’s ruling in *Endsley* because the prosecutor alleged the cardholder as the victim in a case where the merchants should have been identified as the victims.⁵ Unfortunately, the CAAF reversed the ACCA in a summary disposition without explaining its rationale. The CAAF missed an opportunity to give clear guidance on identifying the victim of a debit, credit, or electronic transaction larceny.

The simplest way, and perhaps the only way, to reconcile the CAAF’s credit and debit card transaction larceny cases from the last fifteen years is to hypothesize the CAAF is enforcing the presidential limitation

contained in the *Manual for Courts-Martial (MCM)*.⁶ In 2002, the President amended the *MCM*, specifying that the victim of a larceny by credit, debit, or electronic transaction is *usually* the merchant that provides the goods to the thief. Although the CAAF has issued opinions explaining its rationale in credit and debit card transaction larcenies with unusual facts, the court has not explained its rationale when setting aside convictions in garden-variety cases where the wrong victim was alleged. The President has limited prosecutorial discretion in the usual cases, and the CAAF should explicitly recognize this presidential limitation requiring prosecutors to allege the merchant as the victim in usual debit card larcenies. When trial practitioners understand that the CAAF is correctly enforcing the President’s directive, they will be able to reconcile the CAAF’s opinions and identify the correct victim. The CAAF should use its opinions to establish more clearly the parameters for what constitutes an “unusual” case. Though the CAAF has not yet taken the opportunity to provide clear guidance, a review of the case law in this area is instructive.

II. Background for *Endsley*

Private Endsley secretly copied the debit card number of a friend in his squad and used that number to purchase food from Domino’s and Chinese Chef and comic books from Amazon.com. The accused pled guilty to stealing money from the cardholder. The stipulation of fact stated that when the accused used the friend’s debit card number, he was using, spending, and stealing money from the friend’s bank account. During the providence inquiry, the accused told the military judge that on multiple occasions he took money from his friend’s bank account using the debit card number. The military judge accepted the accused’s guilty plea to the larceny.⁷

¹ 73 M.J. 909 (A. Ct. Crim. App. 2014) *rev’d*, No. 15-0202/AR (C.A.A.F. Jan. 14, 2015) (sum. disp.).

² MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 46c(1)(i)(vi) (2012) [hereinafter *MCM*].

³ *Endsley*, 73 M.J. at 910–12.

⁴ This article uses the word “victim” to mean the owner of the stolen property.

⁵ *United States v. Endsley*, No. 15-0202/AR (C.A.A.F. Jan. 14, 2015) (sum. disp.).

⁶ *MCM*, *supra* note 2, pt. IV, ¶ 46c(1)(i)(vi) (2012).

⁷ *Endsley*, 73 M.J. at 910.

On appeal, Endsley argued that the proper victims were the merchants rather than the cardholder.⁸ After analyzing the rulings of its superior court in *United States v. Lubasky*,⁹ *United States v. Gaskill*,¹⁰ and *United States v. Cimball Sharpton*,¹¹ the ACCA held that the military judge did not abuse his discretion in accepting the guilty plea to larceny of money from the cardholder.¹² A discussion of the President's 2002 amendment to ¶46 of Part IV of the *MCM*, as well as *Lubasky*, *Gaskill*, and *Cimball Sharpton*, will assist in understanding the law that the ACCA had to decipher.

III. The President Selected the Theory of Larceny and Narrowed the Category of Proper Victim

The *MCM* is a valuable legal reference. In some respects, the *MCM* is a source of law. For example, Part II of the *MCM* (Rules for Courts-Martial) and Part III of the *MCM* (Military Rules of Evidence) are examples of law created by the President using his authority under Article 36, Uniform Code of Military Justice (UCMJ).¹³ Although Part IV (Punitive Articles) is not governed by Article 36, the President may narrow the interpretation of the UCMJ's provisions. If the narrowing construction is consistent with the statute and the Constitution, and the President provides additional rights for the accused, military appellate courts give effect to the President's interpretation.¹⁴

*United States v. Davis*¹⁵ is a good example. Corporal Davis and about ten other Marines participated in a blanket party to encourage a substandard Marine to improve. The Marines grabbed the victim, threw him to

the floor, bound his hands and feet together with tape, and assaulted him with their hands and feet.¹⁶ Davis escalated the assault when he put an unloaded gun to Simon's head and said, "You're nothing but a pussy. I ought to cap you now."¹⁷ Corporal Davis was convicted by a court-martial of conspiracy to commit assault and battery, violation of a lawful general order, assault with a dangerous weapon, and communicating a threat. The Navy-Marine Corps Court of Criminal Appeals (NMCCA), sitting *en banc*, affirmed the findings and sentence.¹⁸

The CAAF reversed the decision of the NMCCA, applying the hierarchy of rights. The edition of the *MCM* in effect at the time of Davis's trial, like every edition of the *MCM* before and since, provided, "an unloaded pistol, when presented as a firearm and not as a bludgeon, is not a dangerous weapon or a means of force likely to produce grievous bodily harm, whether or not the assailant knew it was unloaded."¹⁹ The CAAF gave deference to the President's interpretation of Article 128, UCMJ, limiting the conduct subject to prosecution as an aggravated assault, because it did not contradict the Constitution or the UCMJ. "[W]here the President unambiguously gives an accused greater rights than those conveyed by higher sources, this Court should abide by that decision unless it clearly contradicts the express language of the Code."²⁰

*United States v. Contreras*²¹ is a more recent example. Article 130, UCMJ, prohibits unlawful entry into another's building or structure with the intent to commit a criminal offense therein.²² The President narrowed the universe of criminal offenses that could be the intended crime for a housebreaking offense. "Any act or omission which is punishable by courts-martial, except an act or omission constituting a purely military offense, is a 'criminal offense.'"²³ The intended offense underlying Contreras's housebreaking conviction was indecent acts with another.²⁴ The CAAF determined that indecent acts with another was not a purely military offense. It followed the hierarchy of rights analysis and did not

⁸ *Id.*

⁹ 68 M.J. 260 (C.A.A.F. 2010).

¹⁰ 73 M.J. 207 (C.A.A.F. 2014) (sum. disp.).

¹¹ 73 M.J. 299 (C.A.A.F. 2014).

¹² *Endsley*, 73 M.J. at 910.

¹³ UCMJ, art. 36 (President may prescribe rules).

¹⁴ *United States v. Lopez*, 35 M.J. 35, 39 (C.M.A. 1992).

"[The] military, like the Federal and state systems, has hierarchical sources of rights. These sources are the Constitution of the United States; Federal Statutes, including the Uniform Code of Military Justice; Executive Orders containing the Military Rules of Evidence; Department of Defense Directives; service directives; and Federal common law Normal rules of statutory construction provide that the highest source authority will be paramount, unless a lower source creates rules that are constitutional and provide greater rights for the individual."

Id.

¹⁵ 47 M.J. 484 (C.A.A.F. 1998).

¹⁶ *Id.* at 487.

¹⁷ *Id.*

¹⁸ *Id.* at 484.

¹⁹ *Id.* at 486.

²⁰ *Id.*

²¹ 69 M.J. 120 (C.A.A.F. 2010).

²² UCMJ, art. 130.

²³ *MCM*, *supra* note 2, pt. IV, ¶ 56c(3).

²⁴ This offense was punishable under Article 134, UCMJ, because the offense occurred before 1 October 2007.

“disturb the President’s narrowing construction . . . on the conduct subject to prosecution.”²⁵

With respect to larcenies accomplished by credit, debit, or electronic transaction, the President has prescribed a narrowing of Article 121 that constrains the way military prosecutors can charge and prove these offenses. Article 121 codifies three common law offenses. “A wrongful taking with intent permanently to deprive includes the common law offense of larceny; a wrongful obtaining with intent permanently to defraud includes the offense formerly known as obtaining by false pretenses; and a wrongful withholding with intent permanently to appropriate includes the offense formerly known as embezzlement.”²⁶ Understanding the theories of larceny before drafting charges is important because a correct understanding of the theory of larceny will ensure the prosecutor correctly identifies the victim of the larceny and the stolen property. Larcenies accomplished with credit, debit, or electronic transactions are complicated crimes that can be viewed as fitting more than one theory of larceny. A recent article, “*Where’s the Money Lebowski?*”—*Charging Credit and Debit Card Larcenies Under Article 121, UCMJ*, contains a comprehensive discussion of the different views on possible theories of larceny for credit and debit card transactions,²⁷ and the article does a good job demonstrating the uncertainty in this area of the law.

While the theft of the credit or debit card itself is a wrongful taking, the unauthorized use of the stolen card to buy a television at the Post Exchange (PX) could be viewed as a wrongful obtaining from the PX, a wrongful obtaining (of money) from the bank where the cardholder has his account, or a wrongful obtaining (of money) from the cardholder.²⁸ The gravamen of the wrongful obtaining is the material misrepresentation that causes the owner of the property to transfer it to the thief. A determined prosecutor might view this larceny as a wrongful taking of money from the cardholder, and some debit card transactions may be viewed as wrongful

²⁵ United States v. Guess, 48 M.J. 69, 71 (C.A.A.F. 1998) (quoting *Davis*, 47 M.J. at 486-87); see United States v. Conliffe, 67 M.J.127

(C.A.A.F. 2009) (holding conduct unbecoming an officer and a gentleman is a purely military offense).

²⁶ MCM, *supra* note 2, pt. IV, ¶ 46c(1)(a).

²⁷ Major Benjamin M. Owens-Filice, “*Where’s the Money Lebowski?*”—*Charging Credit and Debit Card Larcenies Under Article 121, UCMJ*, ARMY LAW., Nov. 2014, at 3.

²⁸ The thief makes a material misrepresentation to the merchant when he represents he is an authorized user of the card making a bona fide purchase. The merchant, in turn, then innocently makes the same misrepresentation to the bank and card-holder. The thief is criminally liable for the merchant’s innocent misrepresentation under Article 77(2), UCMJ. See also *id.* at 6.

withholdings where the thief owes a fiduciary duty to the card-holder.²⁹ The wrongful-obtaining-from-the-merchant model, however, is the easiest model to understand and the easiest to prove.³⁰

This myriad of charging possibilities has been narrowed by the President in the Credit, Debit, and Electronic Transactions provision of Article 121, in which he directed that “[w]rongfully engaging in a credit, debit, or electronic transaction to obtain goods or money is an obtaining-type larceny by false pretense.”³¹ This provision limits trial counsel to charging and prosecuting these crimes as wrongful obtainings without exception. In addition to fixing the theory of larceny, the President used this provision to identify the victim in the usual case. “Such use to obtain goods is *usually* a larceny of those goods from the merchant offering them. Such use to obtain money or a negotiable instrument . . . is *usually* a larceny of money from the entity presenting the money or negotiable instrument.”³² The President’s narrowing construction of the larceny statute, if followed, will result in trial counsel using the simplest and easiest criminal model. Trial counsel who proceed on a theory other than wrongful obtaining violate the President’s directive.³³

²⁹ “A ‘withholding’ may arise as a result of devoting property to a use not authorized by its owner.” MCM, *supra* note 2, pt. IV, ¶ 46.c (1)(b); see, e.g., United States v. Cimball Sharpton, 73 M.J. 299 (C.A.A.F. 2014) (detailing that the thief, a government purchase card-holder, had a duty to the Air Force only to use the card for authorized purposes); United States v. Lubasky, 68 M.J. 260 (C.A.A.F. 2010) (explaining that the thief had a fiduciary duty only to use the debit card to purchase things for the benefit of the co-owner of the debit account); see also Owens-Filice, *supra* note 27, at 7.

³⁰ One author disagrees. “[I]t may prove difficult to use eye-witness testimony from the merchant to establish which goods were obtained by the thief, as the merchant may not remember the details of a mundane credit or debit card transaction that took place months or years ago.” Owens-Filice, *supra* note 27, at 3. However, careful merchants will keep invoices and sales receipts listing the property for two years to avoid chargebacks. BEN DWYER, CHARGEBACKS: A SURVIVAL GUIDE, available at <http://www.cardfellow.com/blog/chargebacks/> (last visited May 28, 2015). If the merchant has a receipt or invoice, the merchant’s memory of an old, mundane transaction can be refreshed. Moreover, the receipt or invoice may qualify for admission as a business record. MCM, *supra* note 2, MIL. R. EVID. 803(6).

³¹ MCM, *supra* note 2, pt. IV, ¶ 46c(i)(vi) (Miscellaneous considerations).

³² *Id.* (emphasis added).

³³ Trial counsel should be leery about the language in the analysis of Article 121 that suggests alternative charging theories remain available. MCM, *supra* note 2, at A23-17. The information published in the analysis of the punitive articles is not official or binding. See MCM, *supra* note 2, pt. I, ¶4 discussion; see also United States v. Fosler, 70 M.J. 225, 231 (C.A.A.F. 2011) (describing the drafters’ analysis as explanatory, hortatory, and non-binding). Also, the analysis merely explains that, if the facts of a case raise an issue as to whether the merchant was a victim, such as where the accused might have had authority to use the card, and the transaction might not be fraudulent vis à vis the merchant, then alternative charging theories can be used.

Trial counsel who identify a victim other than the merchant (for purchases) or the bank (for ATM withdrawals) must have a valid reason for selecting an “unusual” victim.³⁴

The Credit, Debit, and Electronic Transactions provision is every bit as directive as the Presidential limitations created for Articles 128 and 130, as previously discussed. In all three cases, the President has shielded accused Soldiers from prosecution based on enumerated, specific theories of criminality. Any doubt the President intended to limit prosecutorial choices is eliminated because the President provides a definition that lists the payment devices to which the limitation applies.³⁵ The CAAF should enforce all three of these limitations equally.

IV. CAAF Discusses the Proper Victim of Larcenies by Credit and Debit Card Transactions in *Lubasky*

The first time the CAAF discussed the proper victims of larcenies by credit, debit, and electronic transactions after the 2002 amendment to the *MCM* was in *Lubasky*. The court acknowledged that the amendment post-dated Lubasky’s criminal conduct and court-martial, but the court still found the amendment instructive.³⁶ Chief Warrant Officer Four Lubasky was appointed as a Casualty Assistance Officer to help the widow of a retired officer manage her financial affairs and obtain a new military identification card.³⁷ Although his duties should have ended after she received her identification card, he offered to continue to assist her with her financial affairs. Between December 1998 and June 2000, the widow gave the accused limited authority to use three credit cards and a debit card for her benefit. During that period, the accused also used those cards for

his personal needs without her knowledge or permission.³⁸

The accused was charged with stealing from the widow by making unauthorized use of her credit and debit cards to obtain cash and goods.³⁹ The court quickly disposed of the specifications involving the credit cards. “In using the credit cards in this case, Appellant did not obtain anything from [the widow]. Rather, he obtained those things from other entities. For these reasons, the proper subject of the credit-card-transaction larcenies was not [the widow].”⁴⁰ The court set aside the convictions involving the credit cards and dismissed seven larceny specifications.⁴¹

The court, however, affirmed the convictions for seven specifications involving debit transactions.⁴² The court stated that, although the 2002 amendment to the *MCM* stated that debit card transactions are usually a larceny of goods or money from the merchant or bank presenting them, alternative theories remain available if warranted by the facts.⁴³ The court found that the evidence in *Lubasky* supported a larceny of money from the widow. The unique facts in the case were that the accused obtained access to the money as a joint owner of the bank account by falsely representing to the widow that he would only use the funds in an authorized manner and he would use those funds to make purchases only for the benefit of the widow.⁴⁴ These facts are indeed unusual and support a finding that the accused obtained some property from the widow; therefore, the widow was a proper victim.

V. The Usual Debit Card Larceny in *Gaskill*

The first time the CAAF applied the 2002 *MCM* amendment to credit card larcenies was in *Gaskill*. In its summary disposition, the CAAF did not discuss the facts or its rationale in detail; however, the facts of the case are articulated in the Army court’s summary disposition.⁴⁵ Three of the larceny specifications alleged stealing funds from three different Soldiers in the unit. The accused had stolen their bank debit cards and used them to

³⁴ See *United States v. Gaskill*, 73 M.J. 207 (C.A.A.F. 2014) (setting aside three larceny specifications because the trial counsel proceeded with the wrong victim) (sum. disp.); *United States v. Gaskill*, ARMY 20110028, 2013 CCA LEXIS 605 (A. Ct. Crim. App. 2014) (reciting facts that show this was a garden-variety debit card larceny and the merchant from whom the accused received the merchandise should have been the victim in the specifications).

³⁵ *MCM*, *supra* note 2, ¶46c.(1)(i)(vi).

For purposes of this section, the term “credit, debit, or electronic transaction” includes the use of an instrument or device, whether known as a credit card, debit card, automated teller machine (ATM) card or by any other name, including access devices such as code, account number, electronic serial number or personal identification number, issued for the use in obtaining money, goods, or anything else of value.

Id.

³⁶ *Lubasky*, 68 M.J. at 263.

³⁷ *Id.* at 262.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 265.

⁴² *Id.*

⁴³ *Id.* at 263–64.

⁴⁴ *Id.* at 264.

⁴⁵ *United States v. Gaskill*, No. 20110028, 2013 CCA LEXIS 605 (A. Ct. Crim. App. Aug. 12, 2013) (sum. disp.).

purchase goods.⁴⁶ The three Soldiers were listed as the alleged victims rather than the merchants or the issuers of the bank debit cards. The accused pled guilty to these three specifications, and the accused admitted during the providence inquiry that he used the stolen cards, without authorization, to purchase pizza, Xbox games, and Xbox videos.⁴⁷

With this “usual” fact pattern, CAAF did not hesitate. In a summary disposition, CAAF was quick and decisive.

On consideration of the petition for grant of review of the decision of the United States Army Court of Criminal Appeals, and in light of *United States v. Lubasky*, 68 M.J. 260 (C.A.A.F. 2010), we note that the proper victim in Specifications 2, 3, and 4 of Charge V was the merchant who provided the goods and services upon false pretenses, not the debit cardholder/Soldier. However, the charge sheet, stipulation of fact, and providence inquiry focused on the three Soldiers as victims, and there was no discussion on the record of whether the merchants were victimized.⁴⁸

The court set aside the convictions for those three specifications without further explanation of its rationale.⁴⁹ However, the specifications so clearly violated the President's limitation that no further explanation was required. The prosecution must charge the larceny as an obtaining of the goods from the merchant, unless the particular facts of the case warrant a different theory of criminality. The possibility of cases where the facts do not permit charging larceny of the goods from the merchant is why the President used the word “usually.” The facts of *Gaskill* clearly did not warrant an exception to the rule. With this run-of-the-mill fact pattern, the CAAF saw no reason to discuss the possibility of anyone except the usual victim, the merchant, being the victim of the larceny.

VI. The Unusual Credit Card Larceny in *Cimball Sharpton*

After *Gaskill*, the CAAF encountered an unusual fact pattern, with a victim other than the merchant, and

explained why it was an unusual case. Senior Airman Cimball Sharpton was issued a General Purchase Card (GPC) by U.S. Bank so she could purchase medical supplies for an Air Force hospital in Mississippi. The GPC could only be used by authorized cardholders for legitimate government purchases. After reviewing GPC purchases, the Air Force would cause the Defense Finance Accounting Service (DFAS) to pay for the GPC purchases using Air Force appropriated funds.⁵⁰ The GPC functioned like a debit card with a level of review between the time of purchase and payment.⁵¹

Cimball Sharpton used the GPC to make over \$20,000 worth of personal purchases at AAFES, Walgreens, and Walmart. She was eventually caught and charged with larceny of Air Force money. Cimball Sharpton was convicted of larceny and other charges,⁵² after pleading not guilty. At trial, Cimball Sharpton did not dispute the facts or elements; in fact, the defense actually stipulated to many facts that helped the CAAF later find the specification legally and factually sufficient. The defense's strategy at trial appears to have been to exploit a perceived charging error by the trial counsel; the trial counsel did not charge the merchants as the victims and the merchandise received as the property stolen. The strategy did not work at trial, and it did not work before the Air Force Court of Criminal Appeals (AFCCA). Not only did the AFCCA find the larceny specification legally and factually sufficient, they noted the merchants could not be the named victims because they were compensated and did not lose anything of value. According to the AFCCA, the Air Force was the only victim in the case.⁵³ Cimball Sharpton appealed to the CAAF.

The CAAF began its analysis with the President's directive: “Wrongfully engaging in a credit, debit or electronic transaction to obtain goods or money is an obtaining-type larceny by false pretenses. Such use to obtain goods is usually a larceny of those goods from the merchant offering them.”⁵⁴ The court treated this larceny

⁵⁰ *Sharpton*, 73 M.J. at 299–300.

⁵¹ The government purchase card (GPC) functions like a debit card in that there is guaranteed payment. The GPC functions like a credit card in that there is a delay in payment. *Cf. Owens-Filice, supra* note 27, at 5.

⁵² Senior Airman Cimball Sharpton was convicted of one specification of larceny, one specification of wrongful use of oxycodone, one specification of wrongfully using cocaine, and one specification of fraudulent enlistment. She was sentenced to a Bad Conduct Discharge, twelve months of confinement, reduction to E1, and a \$20,000 fine. *Sharpton*, 73 M.J. at 300.

⁵³ *Id.* at 300.

⁵⁴ *Id.* at 301.

⁴⁶ *Id.* at *2.

⁴⁷ *Id.* at *2–3.

⁴⁸ *Gaskill*, 73 M.J. at 207.

⁴⁹ *Id.*

as a wrongful obtaining,⁵⁵ but approved of the deviation from the general rule of using the merchant from whom the goods are obtained as the victim of the larceny.⁵⁶ Unfortunately, the CAAF did not explain the difference between the “usual” case, where the victim is the merchant, and an “unusual” case where the victim is someone other than the merchant. The CAAF did, however, strongly suggest that this is an unusual case because the Air Force alone suffered the financial loss,⁵⁷ but the court stopped short of saying that the Air Force was the only possible victim in this case.

The CAAF’s analysis and comment that *Cimball Sharpton* is consistent with *Lubasky*⁵⁸ has created an unfortunate impression that a situation where the merchant is not the person who suffers the financial loss is an “unusual” circumstance permitting deviation from the President’s directive. A merchant is always a victim of larceny when he transfers property to a thief because of a fraudulent debit or credit card transaction, and the fact that the merchant may not suffer a financial loss does not change this. The crime of larceny is complete when all of the elements coalesce. Moreover, determining who suffered the financial loss from a fraudulent transaction can be difficult.⁵⁹

VII. The Usual Debit Card Larceny in *Endsley*

With the CAAF going to great lengths to explain why the unusual facts of *Lubasky* and *Cimball Sharpton* warrant alleging someone other than the merchant or bank as the victim of credit or debit card transaction larcenies, and with them summarily setting aside a conviction in a case with usual facts not warranting a victim other than the merchant, one would think that the ACCA would enforce the President’s directive in a routine case like *United States v. Endsley*. However, it did not. In *Endsley*, after acknowledging that the opinions in *Lubasky*, *Gaskill*, and *Cimball Sharpton* were controlling,⁶⁰ the ACCA held that the cardholder could be the victim in a case with facts indistinguishable from those in *Gaskill*, despite the CAAF’s crystal-clear language in *Gaskill*: “we note that the proper victim in Specifications 2, 3, and 4 of Charge V was the merchant

who provided the goods and services upon false pretenses, not the debit cardholder/Soldier.”⁶¹

Key to the ACCA’s holding is its assertion that “one who purchases goods with a debit card obtains those goods in exchange for money which results in an immediate deduction from the cardholder’s account. In debit card transactions, an item is obtained via an immediate expenditure from and debit against the cardholder’s account, hence the label ‘debit card.’”⁶² This blanket statement is not accurate for all debit card transactions. As discussed below, in some debit card transactions, there is not an immediate debit from the cardholder’s account. In such cases, without more, the mere usage of a debit card does not permit the inference that money was actually removed from the cardholder’s account.

The ACCA’s blanket statement is an oversimplification; the statement only describes *some* debit card transactions. Currently, there are at least three types of debit cards: the electronic fund transfer point of sale (EFTPOS) debit card,⁶³ the offline debit card,⁶⁴ and the stored value card.⁶⁵ One card can be a part of more than one processing system.

The ACCA’s blanket statement describes the EFTPOS or online debit card system. The hallmark of the EFTPOS system is that the cardholder must use a personal identification number (PIN) at the time of the sale. Online debit cards require electronic authorization, usually a PIN, for every transaction, and the debits are posted to the cardholder’s account almost immediately. Offline debit cards look like online debit cards and are used at the point of sale like a credit card. The merchant authenticates the transaction by obtaining the cardholder’s signature. Like credit cards, offline debit card transactions can take several days to be posted to the

⁵⁵ “In view of the elements of Article 121, UCMJ, Appellant (a) wrongfully obtained property” *Id.*

⁵⁶ “We view this as a case where such an alternative charging theory should apply[.]” *Id.*

⁵⁷ “No other party suffered financially as a result of Appellant’s action.” *Id.* at 302.

⁵⁸ “*Lubasky* is fully consistent with our decision today.” *Id.*

⁵⁹ Owens-Filice, *supra* note 27, at 6.

⁶⁰ *Endsley*, 73 M.J. at 910.

⁶¹ *Gaskill*, 73 M.J. at 207.

⁶² *Endsley*, 73 M.J. at 911.

⁶³ “Online debit cards use a [personal identification number (PIN)] for customer authentication and online access to account balance information Debit card transactions are authorized in real time at the [point of sale] using the same electronic funds transfer (EFT) networks that handle ATM transactions and typically settled at the end of the day using the ACH network.” FED. FIN. INSTS. EXAMINATION COUNCIL, RETAIL PAYMENT SYSTEMS: IT EXAMINATION HANDBOOK 21 (2010), available at <http://ithandbook.ffiec.gov/it-booklets/retail-payment-systems.aspx> [hereinafter RETAIL PAYMENT HANDBOOK].

⁶⁴ “Off-line debit card systems authenticate consumers through a written signature or other authenticating action. The transactions are processed in batch mode through the same bankcard networks as credit card transactions and typically settle at the end of the business day.” *Id.* at 21.

⁶⁵ “Stored-value cards do not typically involve a deposit of funds as the value is prepaid and stored directly on the cards. Because its business model requires cardholders to pay in advance, it substantially eliminates the nonpayment risk for the issuing financial institution.” *Id.* at 25.

cardholder's account and fraudulent transactions can be stopped before the debit is posted. A stored value debit card stores value on a chip that is part of the card. The card does not require an internet connection, because the funds do not come from an external account. Generalizing about the operation of a debit card and focusing on who suffers the loss in a credit or debit card larceny is dangerous and unnecessary.

There were sound reasons why the President limited the victim of larceny by credit, debit, and electronic transactions to the merchant in usual cases. If the accused obtained the goods from the merchant by false pretenses, that would constitute a larceny of the goods from that merchant. Although funds might be removed from the cardholder's account at the time of the larceny, or soon thereafter, which could be a larceny of those funds from the cardholder or issuing bank as an additional theory of larceny, the President had the authority to make the prosecution of usual cases much simpler and more rapid by limiting the theory available to the prosecution in routine cases to the wrongful obtaining of the goods from the merchant. It is up to the appellate courts to define the parameters for what constitutes an unusual case to which this limitation does not apply. The CAAF has begun to do so. From *Lubasky* and *Cimball Sharpton*, it is clear that, when the cardholder gives the accused authority to make credit, debit, or electronic transactions for a limited purpose, such as for the benefit of the cardholder, a transaction for the accused's personal benefit could be charged and prosecuted as a larceny from the cardholder. On the other hand, it is clear from *Gaskill* and now *Endsley* that using a debit card without any authority to obtain merchandise cannot be charged and prosecuted as a larceny from the cardholder.

Whether one agrees with the President's interpretation in the *MCM* or not, the President's directive limits the theory of larceny available to the prosecution and the identity of the victim, except in the yet-to-be-fully-defined category of unusual cases. There is no doubt that *Endsley*, with its routine fact pattern, is not an unusual case.

The ACCA raised another point in *Endsley* that is worthy of discussion. The ACCA correctly stated that "whether a victim is made whole, stolen property is returned, or reimbursement is paid are matters in mitigation, but these factors are not wholly determinative of whether or not a larceny occurred in the first place and who was the initial victim of that larceny."⁶⁶ Also, as the *MCM* states, "[o]nce a larceny is committed, a return of the property or payment for it is no defense."⁶⁷ *Cimball*

Sharpton did not change these basic principles. "[A]n obtaining of property from the possession of another is wrongful if the obtaining is by false pretense."⁶⁸ If the accused obtains goods from a merchant by a false representation that causes the merchant to part with the property, then there is a larceny of those goods from that merchant, even if the merchant gets reimbursed for the cost of the goods. The CAAF's focus on who suffered the financial loss in *Cimball Sharpton* seems to have misled the ACCA about whether suffering the ultimate financial loss is dispositive on who could be a proper victim.⁶⁹ In the absence of the President's directive on how to prosecute larcenies by credit, debit, and electronic transactions, the person who suffered the financial loss could be a proper victim, but determining who suffers the ultimate loss can be hard to determine and adds a layer of complexity to the proof required at trial.

When a credit card is fraudulently used, the cardholder can dispute the transaction, and the dispute may lead the card's issuing bank to recoup the amount of the transaction using a process called "chargeback."⁷⁰ A chargeback is a form of customer protection provided by the issuing banks that allows cardholders to file a complaint regarding fraudulent transactions. Once the cardholder files a dispute, the issuing bank investigates. If the transaction is fraudulent, the bank will refund the amount of the transaction to the cardholder. If the merchant does not prove the transaction to be legitimate, the issuing bank will take back the entire value of the transaction along with a fee.⁷¹ If the loss is small, the issuing bank may not investigate or recoup the amount of the transaction because the cost of the investigation

⁶⁸ *MCM*, *supra* note 2, pt. IV, ¶ 46c(1)(d).

⁶⁹ Another recent example is the Army Court of Criminal Appeal's (ACCA's) summary disposition in *United States v. Conway*, No. 20120708, 2014 CCA LEXIS 855 (A. Ct. Crim. App. Nov. 21, 2014) (sum. disp.). Specialist Conway wrongfully appropriated another Soldier's debit card and used it to purchase merchandise on divers occasions at the Army and Air Force Exchange Service (AAFES) at Fort Bragg. Because he did not know the PIN, Conway chose to use the credit function by signing the cardholder's name on an electronic pad. The cardholder's account at TCF Bank, which issued the card, showed a loss of over \$14,000. Pursuant to his pleas, the accused was convicted of larceny of U.S. currency from TCF Bank. On appeal, Conway argued that the larcenies were obtaining-type larcenies of the retail goods from the merchant by false pretenses, but the ACCA found that "the government proceeded upon a valid alternative charging theory because TCF Bank suffered a financial loss." *Id.* at *3.

⁷⁰ RETAIL PAYMENT HANDBOOK, *supra* note 63, at B-2 (defining "chargeback" as "a transaction generated when a cardholder disputes a transaction or when the merchant does not follow bankcard company procedures. The issuer and [acquiring bank] research the facts to determine which party is responsible for the transaction.").

⁷¹ "The merchant is required by the card companies to cover fraudulent transactions through the chargeback process if it does not follow the minimum procedures." *Id.* at 51.

⁶⁶ *Endsley*, 73 M.J. at 912.

⁶⁷ *MCM*, *supra* note 2, pt. IV, ¶ 46c(1)(f)(iii)(C).

would exceed the value of the loss. In the case of a fraudulent credit card transaction, the cardholder may be liable for up to \$50 of the loss. In some cases, the cardholder will not suffer a loss.⁷² The bottom line is that the cardholder, merchant, or issuing bank could suffer all or part of the financial loss from a fraudulent credit card transaction. Determining who suffered the financial loss is an unnecessary and, potentially, time-consuming task. Once the person or entity that suffered the financial loss is determined, presenting proof that this person or entity is a victim of the larceny will require additional witnesses and cause delay to an otherwise routine case. On the other hand, the merchant from whom the goods were obtained by false pretenses is always a victim of the larceny, and proving this element is straight-forward and easy to understand. The merchant is always a necessary witness, in a usual debit or credit card larceny, to prove the material misrepresentation made by the thief.

Determining who suffered the financial loss of fraudulent debit card transactions is even more complicated. The potential loss to the cardholder is limited by federal law.⁷³ If the cardholder reports a card lost or stolen before it is used, the cardholder has no financial liability if the card is used later. If the cardholder reports an unauthorized transaction within two business days after learning about the loss, the cardholder's maximum loss is \$50.00. If the cardholder reports an unauthorized transaction more than two business days after a loss but less than sixty calendar days after the statement is sent to the cardholder, the cardholder's maximum loss is \$500.00. If the cardholder does not report unauthorized use within sixty calendar days of the statement being sent to him, the cardholder can be liable for the full loss.⁷⁴ Like with credit cards, the person or entity that suffered the financial loss from a fraudulent debit card transaction will vary from case to case. However, the merchant from whom the goods were stolen is always a victim of the larceny. Charging anyone other than the merchant as the victim in routine debit card cases is inefficient and unwise, and, most importantly, it is not permitted under the President's narrowing construction in the *MCM*.

⁷² "Under the [Fair Credit Billing Act (FCBA)], your liability for unauthorized use of your credit card tops out at \$50.00. However, if you report the loss before your credit card is used, the FCBA says you are not responsible for any charges you didn't authorize. If your credit card number is stolen, but not the card, you are not liable for unauthorized use." FEDERAL TRADE COMMISSION, LOST OR STOLEN CREDIT, ATM, AND DEBIT CARDS, 2-3 (Aug. 2012), available at <http://www.consumer.ftc.gov/articles/0213-lost-or-stolen-credit-atm-and-debit-cards>.

⁷³ *Id.*

⁷⁴ *Id.*

In *Endsley*, the CAAF was just as quick and decisive in its summary disposition as it was in *Gaskill*, using almost identical language.

On consideration of the petition for grant of review of the decision of the United States Army Court of Criminal Appeals, and in light of *United States v. Lubasky*, 68 M.J. 260 (C.A.A.F. 2010), we note that the proper victims in the Specification of the Charge were the merchants who provided the goods upon false pretenses, not the debit cardholder/Soldier. However, the charge sheet, stipulation of fact, and providence inquiry focused on the Soldier as the victim, and there was no discussion on the record of whether the merchants were victimized.⁷⁵

The court set aside the conviction, again without explaining its rationale any further.⁷⁶ However, the CAAF stated that the proper victims were the merchants. It explicitly stated that the debit cardholder was not a proper victim, and it implied that the issuing bank was not a proper victim. In a run-of-the-mill case like this, the only proper victim is the merchant. The prosecution must follow the President's limitation in the *MCM*, unless the particular facts of the case warrant a different theory of liability. Otherwise, routine cases like *Gaskill* and *Endsley* will meet the same fate. Hopefully, when the next case involving this issue arises, the CAAF will issue an opinion that clearly explains its rationale, in order to avoid confusion by trial practitioners in the future.

VIII. Conclusion

Following the money in credit, debit, and electronic transactions can be a challenge. Although more than one person or entity theoretically could be a proper victim in larcenies by such transactions, the President simplified the prosecution of these cases by limiting the theory and victim upon which the prosecution could proceed in routine cases. Debating who could be a proper victim of larceny is academic in the routine cases, because the President has exercised his authority to direct how prosecutors will charge and prosecute the routine cases. Prosecutors should follow the President's directive to avoid having convictions set aside for routine debit card transaction larcenies. Prosecutors will also avoid a

⁷⁵ *United States v. Endsley*, No. 15-0202/AR (C.A.A.F. Jan. 14, 2015) (sum. disp.).

⁷⁶ *Id.*

granted motion for a finding of not guilty⁷⁷ by following the President's directive. With the CAAF treating the larceny specifications in *Endsley* like the larceny specification in *Gaskill*, military trial judges will likely grant motions for a finding of not guilty under RCM 917.

The CAAF missed an opportunity in *Endsley* to articulate explicitly its reliance on the President's narrowing construction and the "hierarchy of rights" and to establish clearer parameters for identifying unusual cases. The CAAF will have another chance to clarify its analysis for practitioners, reveal whether their analysis relies on the President's narrowing construction, and provide guidance on how to distinguish a "usual" case from an "unusual" case in *United States v. Williams*.⁷⁸

⁷⁷ MCM, *supra* note 2, R.C.M. 917 (providing that the military judge shall enter a finding of not guilty if the evidence is insufficient to sustain a conviction).

⁷⁸ *United States v. Williams*, No. 20130284 (A. Ct. Crim. App. Aug. 28, 2014) *review granted* No. 15-0140/AR (C.A.A.F. Apr. 30, 2015).

A Few Minutes of Your Time Can Save Your Client's Dime: Obtaining Pro Bono Assistance for Legal Assistance Clients

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If the motto “and justice for all” becomes “and justice for those who can afford it,” we threaten the very underpinnings of our social contract.¹

I. Introduction

Any attorney who works in a military legal assistance office experiences the moment when she realizes she can no longer help her client and another attorney needs to step in. Whether the case involves going to court, filing court documents, or is more complex than what regulations allow legal assistance attorneys to support, the end result is the same: the client rolls his eyes and asks a question such as, “So I need to go and get a ‘real’ attorney now?” The legal assistance attorney grits her teeth, glances at the bar license hanging on the wall, spends a moment remembering how brutal the bar exam was, and then regrettably states, “Yes, you need to get *another* attorney to help you with this case.”

Unfortunately, the average legal assistance client is an active duty servicemember or family member who simply cannot afford private attorneys’ fees. As a result, when a client’s needs exceed the support a legal assistance attorney can provide, the legal assistance attorney often finds herself handing off the local bar referral number² and wishing the client luck. However, given the various resources available to many service and family members, this practice should become a thing of the past.

In recent years, numerous programs to assist eligible servicemembers and eligible family members with legal matters on a no-fee or reduced-fee basis have sprung up

across the nation. These programs range from attorney-to-attorney based assistance to the American Immigration Lawyers Association (AILA) Military Assistance Program. This article discusses the variety of attorney-to-attorney-based assistance programs and pro bono services available for military legal assistance clients. Further, this article discusses the eligibility requirements for these services and explains how legal assistance attorneys can properly refer clients to these programs.

II. Background

A. Origins of Pro Bono Assistance

Pro bono publico literally means “for the public good.”³ The American Bar Association (ABA) believes that “[p]ro [b]ono [p]ublico is fundamental to the practice of law and has been viewed as an ethical responsibility of lawyers—both informally and formally—since the beginning of the profession.”⁴ In the last several decades, pro bono has transformed from informal action to a more complex professional institution.⁵

In 1983, in an effort to promote pro bono service, the ABA House of Delegates adopted Model Rule 6.1 of the ABA Model Rules of Professional Conduct, encouraging lawyers to provide public interest legal service.⁶ The rule was then amended in 1993 to put further emphasis on free legal services to low income individuals.⁷ Since the rule’s adoption, many state bar associations have adopted the exact

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¹ *Supporting Justice: A Report on the Pro Bono Work of America’s Lawyers*, 2005 ABA STANDING COMM. ON PRO BONO & PUB. SERV. 4 (quoting Chief Justice Ronald George, California Supreme Court), <http://apps.americanbar.org/legalservices/probono/report.pdf> [hereinafter *Supporting Justice*].

² Most state bar associations have a dedicated number to assist individuals with finding an attorney within the state to handle their case. It is commonly referred to as the “referral line.”

³ Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POL’Y REV. 83, 87 (2013).

⁴ *Supporting Justice*, *supra* note 1, at 5.

⁵ Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 6 (2004).

⁶ *Supporting Justice*, *supra* note 1, at 6. Rule 6.1 states,

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities to improve the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Id. at 22 n.1.

⁷ *Id.* at 6.

language of the rule or implemented similar pro bono language into their model rules.⁸ Additionally, the scope of free services for civil legal issues has grown with the expansion of pro bono programs in state bar associations, law schools, and private law firms.⁹

B. Pro Bono as it Relates to the Army

Pro bono services are essential to servicemembers and family members because Army legal assistance attorneys are limited in the services they can provide to their clients. Army Regulation (AR) 27-3 regulates the Army's Legal Assistance Program and defines a legal assistance attorney's scope of representation. The regulation states that legal assistance attorneys "will not assist clients on matters outside the scope of the legal assistance program."¹⁰ Further, the regulation limits the scope of representation in both the types of cases and types of services legal assistance attorneys may provide to clients.¹¹

Although AR 27-3 limits the scope of representation, the regulation gives legal assistance attorneys a useful framework to determine who is eligible for legal assistance services and how far the representation may go. The regulation requires legal assistance attorneys to handle cases without referral to an outside attorney whenever possible to avoid delaying a solution to the client's legal issue.¹² However, if the client's needs exceed the expertise of the legal assistance attorney, the regulation allows for referral of the client to another attorney.¹³ When referring the client to an attorney outside the legal assistance office, AR 27-3 encourages legal assistance attorneys to find no-fee or reduced-fee assistance for their clients.¹⁴

III. Forms of Pro Bono Assistance

⁸ *Id.* These states include Alaska, Arizona, Colorado, Florida, Georgia, Hawaii, Kentucky, Louisiana, Massachusetts, Maryland, Minnesota, Mississippi, Montana, New Mexico, Nevada, Virginia and Utah. *Id.* at 22 n.2.

⁹ *Id.*

¹⁰ U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 3-5a (13 Sept. 2011) [hereinafter AR 27-3].

¹¹ *Id.* The types of cases within the scope of the legal assistance program are family law, estates, real property, personal property, economic, civilian and military administrative, torts, taxes, and civilian criminal matters. *Id.* at para. 3-6. The types of services within the scope of the legal assistance program include ministerial services, legal counseling, legal correspondence, legal negotiation, and legal document preparation and filing, among others. *Id.* at para. 3-7.

¹² *Id.* at para. 3-7h(2).

¹³ *Id.* at para. 4-7b.

¹⁴ *Id.* at para. 3-7h(7).

Fortunately, there are various forms of no-fee and reduced-fee assistance available to eligible legal assistance clients who are in need of a referral outside of a legal assistance office. These programs include attorney-to-attorney based assistance, such as Operation Stand-By, and pro bono and reduced-fee programs, including the ABA Military Pro Bono Project, state bar programs, law school clinics, the Military Spouse Juris Doctor (JD) Network, and the AILA Military Assistance Program.

A. Attorney-to-Attorney Resources

Many legal issues can be resolved by a legal assistance attorney without referring the client to a private attorney. While a legal issue may fall outside of expertise of the legal assistance attorney, a quick phone call to another attorney or an information paper from a local bar association on a particular issue may lead to a quick resolution for the client. As such, the first valuable resource available to legal assistance attorneys to assist clients is attorney-to-attorney assistance. Attorney-to-attorney assistance connects civilian attorneys with legal assistance attorneys through one-on-one phone calls or e-mails answering case-specific questions. Attorney-to-attorney assistance is available both through the ABA and local bar associations.¹⁵

1. Operation Stand-By

Operation Stand-By, a program sponsored by the ABA Military Pro Bono Project, is the most comprehensive and extensive network of attorney-to-attorney based resources available to legal assistance attorneys.¹⁶ This program consists of a state-by-state directory of civilian attorneys who have volunteered to answer e-mails and phone call inquiries from legal assistance attorneys concerning various practice areas.¹⁷

Through Operation Stand-By, legal assistance attorneys can reach out to civilian attorneys to ask case-specific legal questions, determine the proper jurisdiction to resolve the legal issue, and discuss legal remedies.¹⁸ Additionally, the attorneys can discuss ways to resolve the case at the legal assistance attorney's level and the possibility of referral to

¹⁵ See generally *Operation Stand-By: Seek Attorney-to-Attorney Advice from a Civilian Attorney*, ABA MILITARY PRO BONO PROJECT, http://www.militaryprobono.org/about/item.2727-Operation_StandBy_Information_for_Military_Attorneys (last visited May 27, 2015) [hereinafter *Operation Standby*]; *Military Personnel Legal Assistance*, NORTH CAROLINA LEGAL ASSISTANCE FOR MILITARY PERSONNEL, <http://www.nclamp.gov/> (last visited May 27, 2015) [hereinafter NC LAMP].

¹⁶ *Operation Stand-By*, *supra* note 15.

¹⁷ *Id.*

¹⁸ *Id.*

the ABA Military Pro Bono Project.¹⁹ Operation Stand-By attorneys can provide assistance in various areas of law to include bankruptcy, criminal, consumer, disability, domestic relations, education, employment, guardianship, health care, housing, immigration, personal injury, public benefits, tax, and trusts and estates.²⁰

2. Local Bar Associations

A second, often untapped, resource for legal assistance attorneys is consultation with local attorneys near the military installation or within the state. Many state bar associations have active Legal Assistance for Military Personnel (LAMP) committees that are willing to offer attorney-to-attorney advice on case-specific issues. Additionally, some LAMP committees offer extensive online resources to assist legal assistance attorneys with a variety of civil law issues.

The North Carolina LAMP (NC LAMP) committee is a prime example of the type of attorney-to-attorney assistance LAMP committees can offer. The NC LAMP committee's mission is to offer legal assistance attorneys assigned within North Carolina increased access to North Carolina law as it relates to a specific area of law and allow legal assistance attorneys to obtain advice from experienced North Carolina practitioners.²¹ One of the methods provided to accomplish this mission is the NC LAMP committee's robust preventative law program.²² The preventative law program provides extensive online information papers targeted towards legal assistance clients, attorney-to-attorney assistance called "Co-Counsel Bulletins" and "Silent Partners," and an annual Continuing Legal Education (CLE) course on North Carolina law for legal assistance attorneys.²³ The NC LAMP's website, available to the public, provides a wealth of knowledge both on North Carolina law and general legal assistance issues that can benefit any legal assistance attorney.²⁴

B. ABA Military Pro Bono Project

If attorney-to-attorney assistance cannot resolve a client's legal issue, legal assistance attorneys should consider the wide range of reduced-fee and pro bono

¹⁹ *Id.* Legal assistance attorneys may not seek out pro bono representation for their clients through Operation Stand-By. *Id.*

²⁰ *Id.* A legal assistance attorney can utilize Operation Stand-By by visiting its website. To access the directory, a legal assistance attorney must register with the ABA Military Pro Bono Project and login to the site. The directory organizes the attorneys by state and by practice areas.

²¹ NC LAMP, *supra* note 15.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

assistance available. One of the most comprehensive pro bono assistance networks is the ABA's Military Pro Bono Project. After 9/11, the ABA's Standing Committee on LAMP began to see an increased need for legal assistance for servicemembers, particularly for legal assistance to servicemembers who were deployed and unable to represent themselves in civil court cases.²⁵

In response to this need, the ABA Standing Committee on LAMP formally established the ABA Military Pro Bono Project (ABA Project) in September 2008.²⁶ The mission of the program is to take "case referrals from military legal assistance attorneys (JAGs) anywhere in the world on behalf of junior-enlisted servicemembers with civil legal issues requiring services beyond what JAGs can provide."²⁷ The legal assistance attorney completes the referral process online.²⁸ The ABA Project then places eligible cases with civilian attorneys across the country to assist legal assistance clients on a pro bono basis.²⁹

1. Eligibility Requirements for the ABA Project

The ABA Project has specific criteria to determine the individual's eligibility for the program and the cases the ABA Project will handle.³⁰ In terms of personal eligibility, the targeted clientele for the ABA Project are

²⁵ Telephone Interview with Mary Meixner, ABA Military Pro Bono Project Director (Oct. 22, 2014).

²⁶ E-mail from Mary Meixner, ABA Military Pro Bono Project Director, to author (Oct. 15, 2014) (on file with author); *see also* Telephone Interview with Mary Meixner, *supra* note 25.

²⁷ ABA MILITARY PRO BONO PROJECT, PROVIDING MILITARY FAMILIES WITH ACCESS TO JUSTICE 1. This document was obtained from Mary Meixner, ABA Military Pro Bono Project Director and is on file with the author. The document is handed out at events by the ABA Military Pro Bono Project.

²⁸ *Id.*

²⁹ *Id.* As of 1 October 2014, 2,202 cases have been submitted to the ABA Project and, of that number, the ABA Project successfully secured placement for 1,077 cases in 49 states. Of the cases not successfully placed, 46% of those were rejected and closed during the screening process because "they did not meet the ABA Project's guidelines or lacked merit." The additional 54% not successfully placed was because the ABA Project was "unable to locate volunteer attorneys or the referring military attorneys informed the ABA Project that the pro bono assistance was no longer needed." Of the cases referred to the ABA Project so far, over 70% are family law related, approximately 10% are consumer law and creditor based cases, and the remaining 20% involve other legal issues such as guardianship, landlord-tenant disputes, and trusts and estate matters. *See* E-mail from Mary Meixner, *supra* note 26.

³⁰ AMERICAN BAR ASSOCIATION, ABA MILITARY PRO BONO PROJECT GUIDELINES FOR MILITARY LEGAL ASSISTANCE ATTORNEYS 1, *available at* http://www.militaryprobono.org/about/item.3216/Project_Guidelines_and_Information [hereinafter PROJECT GUIDELINES]. To access the document you must register with the ABA Military Pro Bono Project and login to the website. *See infra* note 44 and accompanying text (listing website link and explaining referral procedures).

servicemembers who cannot afford private attorney fees.³¹ Servicemembers in the rank of E6 or below are presumed eligible.³² Servicemembers above the rank of E6 are presumed ineligible for referral unless special circumstances warrant acceptance into the program.³³ Overall, the referring legal assistance attorney is responsible for verifying the pay grade of the servicemember and attesting to the servicemember's eligibility when making a referral.³⁴

Active-duty servicemembers, to include National Guard and Reserve members on federal active-duty status under Title 10 of the United States Code, are generally eligible for referral to the ABA Project.³⁵ A National Guard or Reserve member serving under Title 32 of the United States Code, even those not currently on active-duty orders, are eligible if referral is for a legal matter connecting to or arising from mobilization, de-mobilization, or the servicemember's military status.³⁶

A non-servicemember spouse is eligible for referral to the ABA Project if the servicemember meets the financial eligibility requirements discussed previously and if the following three criteria are met:³⁷

1. The legal issue must directly affect the well-being of the servicemember, his or her family as a whole, or his or her military readiness.
2. The legal interests of the spouse and servicemember must be aligned in the matter—in other words, a non-

³¹ *Id.*

³² *Id.*

³³ *Id.* at 1–2. To refer a client above the rank of E6, a referring attorney must “thoroughly document compelling circumstances justifying the referral and should make it clear to the client that acceptance of the referral by the ABA Project will be discretionary.” *Id.* at 2.

³⁴ *Id.* at 1. The legal assistance attorney should ask to see the client's Leave and Earning Statement and tax return paperwork to determine a client's financial assets. *Id.*

³⁵ *Id.* at 2. Title 10 status refers to federal mobilization to active-duty under Title 10 of the United States Code. Mobilized servicemembers are serving full-time, are federally funded, and are under federal command and control while on Title 10 orders. See NATIONAL GUARD ASSOCIATION OF THE UNITED STATES, NGAUS FACT SHEET: UNDERSTANDING THE GUARD'S DUTY STATUS, available at <http://www.ngaus.org/sites/default/files/Guard%20Status.pdf> (last visited May 28, 2015) [hereinafter NGAUS FACT SHEET].

³⁶ PROJECT GUIDELINES, *supra* note 30, at 2. Title 32 is the section of the United States Code under which National Guard servicemembers operate when they are conducting missions that are funded with federal dollars but are under the command and control of the State. Servicemembers are on full-time state active duty while on Title 32 orders. See NGAUS FACT SHEET, *supra* note 35; see also T. Scott Randall, *Application of Article 2(c) of the UCMJ to Title 32 Soldiers*, ARMY LAW., Nov. 2013, at 29.

³⁷ PROJECT GUIDELINES, *supra* note 30, at 2.

servicemember spouse will not receive a referral through the ABA Project for representation adverse to the servicemember.

3. The legal issue must be such that the servicemember would have pursued the matter were he or she present to do so. That is, the spouse is acting as a surrogate to protect the non-present servicemember's interests. For example, a referral may be made for a deployed servicemember's spouse involved in a dispute with a landlord or creditor where the servicemember is a party to the agreement or contract, but not for a case where the servicemember's spouse is involved in a family law dispute with his or her former spouse.³⁸

An unmarried servicemember's parents may also be referred to the program using the same analysis used for a non-servicemember spouse.³⁹ Such referrals are appropriate if the issue involves payment of survivor benefits or guardianship establishment for an incapacitated servicemember.⁴⁰ In cases involving the referral of a non-servicemember spouse or the parent of an unmarried servicemember, the referring attorney must detail the reasons for referring the family member rather than the servicemember to the ABA Project.⁴¹

In addition to client specific eligibility requirements, the ABA Project has case specific requirements. Specifically, the ABA Project will only accept cases within the specific defined categories of consumer law (to include certain bankruptcy cases), employment law, expungements, family law, guardianship, landlord-tenant, probate, tax law, and trusts and estates.⁴²

2. Referral Procedures

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 3–4. One of five elements must be met for the ABA Project to accept a family law case. These elements are (1) servicemember is deployed outside of the country and needs a lawyer in the United States to handle his legal matter; (2) opposing party is represented by counsel; (3) Servicemembers Civil Relief Act is implicated; (4) servicemember's physical custody of his children is at issue; and/or (5) servicemember has established, to the satisfaction of the referring military attorney, that he has experienced domestic violence perpetrated by the adverse party and is seeking legal assistance for a divorce, order of protection, child custody and/or visitation. If none of these elements exist, there is a presumption against acceptance of the referral. However, a referral is possible if the case is uniquely urgent or compelling. *Id.* at 3.

Referral to the ABA Project is an online process.⁴³ The referring legal assistance attorney must first register with the ABA Project and submit all case and client information through the ABA Project's web portal.⁴⁴ At a minimum, the referring attorney must provide enough information for the pro bono attorney to conduct a conflict check and understand the legal issues at hand.⁴⁵ A referring attorney must also keep in mind that the civilian attorneys may be unfamiliar with issues such as the Servicemembers Civil Relief Act (SCRA) or Uniformed Services Employment and Reemployment Rights Act (USERRA), so the referral should include a detailed explanation of these areas of the law.⁴⁶ Additionally, the referring attorney is required to affirm that the referral is being made for "good cause."⁴⁷ Most importantly, keep in mind when referring a case to the ABA Project, "If I were a civilian attorney, would I want to offer pro bono assistance to this client, and what information would I need to decide whether or not I want to offer my assistance for the case?"⁴⁸

Once the referral is submitted by a legal assistance attorney, the referral is sent via e-mail to a military attorney designated to review all referrals.⁴⁹ Approved referrals then go to the ABA Project Director who makes every available effort to find a volunteering pro bono attorney to take the case.⁵⁰ The referring attorney should be confident that the case is in good hands and the referring attorney is notified when the case is successfully placed with a civilian attorney or if the case is rejected.⁵¹

C. State Bar Pro Bono Programs

⁴³ *Id.* at 1.

⁴⁴ *Id.* MILITARY PRO BONO PROJECT, <http://www.militaryprobono.org> (last visited May 28, 2015) (look for "register" link).

⁴⁵ PROJECT GUIDELINES, *supra* note 30, at 2.

⁴⁶ *Id.* at 4.

⁴⁷ *Id.* at 1. The "good cause" affirmation will require the attorney to answer a list of questions including: "(i) What are the operative facts regarding the legal issue?; (ii) What is the client's desired outcome?; (iii) What is the specific legal theory under which the client may achieve his or her objective?; and (iv) How has the client attempted to resolve this issue?" *Id.* at 4-5.

⁴⁸ E-mail from Mary Meixner, *supra* note 26.

⁴⁹ PROJECT GUIDELINES, *supra* note 30, at 1. For the Army, the approval authority varies. Check with The Office of the Judge Advocate General Legal Assistance Policy Division to see who the reviewing official is for your office. E-mail from Jason Vail, ABA Chief Counsel for Legal Services, to author (Dec. 3, 2014) (on file with author).

⁵⁰ PROJECT GUIDELINES, *supra* note 30, at 1.

⁵¹ *Id.* Generally, cases are placed within sixty days of approval of the referral. Once sixty days have passed, the referral may be returned as "unplaced" based on the discretion of the Project Director. *Id.* at 6.

In addition to the ABA Project, many state bar associations have likewise seen a great need to assist servicemembers with legal issues and have created programs to provide pro bono and reduced-fee assistance for legal assistance clients. State programs vary widely state-to-state and some even vary county-to-county within a state as to who is eligible for services and what type of pro bono services are offered.⁵² There are several ways to find state resources and determine which programs meet a legal assistance client's needs.

1. State Directory of Programs

State bar-run pro bono programs are constantly growing and are a valuable resource to consider when advising legal assistant clients on the benefits of these programs versus hiring a civilian attorney on a for-fee basis. Given the constantly changing landscape of state-run services, the most accurate list of state-by-state resources can be found through ABA's Home Front website.⁵³ The website features a variety of publications and resources on various legal issues military families may encounter, as well as a directory of resources available by state.⁵⁴

2. The State Bar of Georgia Military Legal Assistance Program

The State Bar of Georgia Military Legal Assistance Program (MLAP) is a front-runner in providing quality pro bono assistance to servicemembers and family members.⁵⁵ The goal of MLAP is to link servicemembers and veterans to state bar members who are willing to provide no-fee or reduced-fee legal services.⁵⁶ The program was created after a Georgia attorney, and Navy veteran, Jay Elmore, attended a Department of Defense (DoD) trip to speak with servicemembers deployed across the Middle East and the Horn of Africa in 2007 to determine what issues the servicemembers faced while away from home.⁵⁷

⁵² Telephone Interview with Mary Meixner, *supra* note 25; Telephone Interview with Norman E. Zoller, Military Legal Assistance Program of the State Bar of Georgia (Nov. 13, 2014). A comprehensive internet search of various state-run programs also revealed a wide range of eligibility requirements.

⁵³ *ABA Homefront*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/portals/public_resources/aba_home_front.html (last visited May 29, 2015).

⁵⁴ *Id.*

⁵⁵ Extensive research concerning state-run programs revealed that the Georgia Military Legal Assistance Program (MLAP) is one of the best pro bono programs in the nation.

⁵⁶ *The State Bar of Georgia Military and Veterans Legal Assistance Program*, STATE BAR OF GEORGIA, <http://www.gabar.org/publicservice/militarylegalassistance.cfm> (last visited May 6, 2015).

⁵⁷ Norman E. Zoller, *Military Legal Assistance Aid Tops 500 in Two Years*, GEO. BAR J. 32 (Feb. 2012).

The trip inspired Mr. Elmore, and he shared his experience with his law partner and soon-to-be president of the State Bar of Georgia, Jeff Bramlett.⁵⁸ A committee convened to explore the need for legal services for servicemembers and veterans in Georgia and found that not only was there a great need for legal services, but that “enthusiasm for the concept among Georgia lawyers was infectious.”⁵⁹ As a result, the State Bar Board of Governors formally created the MLAP in June 2009.⁶⁰ Since its creation, 850 attorneys have volunteered their services, and the MLAP has assisted over 1,300 servicemembers and veterans with legal issues.⁶¹

a. Eligibility Requirements

The MLAP has specific client and case eligibility requirements. Active-duty servicemembers, Reservists, National Guardsmen, retirees, or veterans with a service-connected disability in the pay grade of E5 or below are presumptively eligible for the MLAP on a pro bono basis.⁶²

The MLAP also assists those in the grade above E5, but such assistance may be on a reduced-fee basis.⁶³ Servicemember spouses may also be eligible for the MLAP if the interests of the servicemember are in alignment with the spouse and there is no contention between the two, but such assistance may likewise be on a reduced-fee basis.⁶⁴ For clients who are above the pay grade of E5 or are a servicemember’s spouse, the attorney assigned to the case will talk with the client and determine whether the representation will be on a no-fee or for-fee basis.⁶⁵

In addition to client eligibility requirements, the MLAP also has case eligibility requirements. Specifically, the MLAP will only assist in civil legal matters.⁶⁶ Such cases include family law matters, consumer law, employment issues, bankruptcy, insurance claims, Veterans Administration claims, foreclosures, and estate planning.⁶⁷

⁵⁸ *Id.* at 33.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Telephone Interview with Norman E. Zoller, *supra* note 52.

⁶² State Bar of Georgia, *State Bar of Georgia Military Legal Assistance Program 1*, <http://www.gabar.org/publicservice/upload/MLAP-Application-for-Assistance.pdf> (last visited May 6, 2015).

⁶³ Telephone Interview with Norman E. Zoller, *supra* note 52.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Norman E. Zoller, *A Thousand Military Cases for Georgia Lawyers*, GEO. BAR J. 24 (June 2013).

⁶⁷ Telephone Interview with Norman E. Zoller, *supra* note 52.

b. Referral Procedures

To apply for the program, the client must complete an agreement form, have it notarized, and submit it to the address listed on the form.⁶⁸ Once received, the director of the program completes a summary of the legal issue and forwards the information to Georgia Legal Services, Inc.⁶⁹ In turn, Georgia Legal Services, Inc. provides the MLAP with the names of two attorneys who have volunteered for the program and specialize in the area of law requested.⁷⁰ The MLAP then notifies the first attorney on the referral list to confirm availability, and the MLAP asks the selected attorney for permission to give the client the attorney’s contact information.⁷¹ Once the attorney confirms availability, the client is given the attorney’s information and the attorney and client contact begins.⁷²

Again, the MLAP is just one of the many valuable state programs available to assist eligible legal assistance clients. Legal assistance attorneys should regularly check the ABA’s Home Front directory of available state programs for the most accurate list of resources available.

D. Law School Clinics

Another valuable pro bono resource available to legal assistance clients is law school clinics.⁷³ Law schools across the country have seen a need to assist servicemembers with legal issues and have taken action to offer pro bono legal services. As a result, numerous law schools have created military-specific clinics to address servicemembers’ growing need for legal services. Much like the state bar programs, the law school clinics vary in services offered and eligibility requirements.

1. Directory of Law School Clinics

Like state bar programs, the number of law school clinics providing pro bono legal assistance to servicemembers is on the rise. The most comprehensive list of the current law school clinics offering pro bono services to servicemembers

⁶⁸ *State Bar of Georgia Military Legal Assistance Program*, *supra* note 62, at 2.

⁶⁹ Telephone Interview with Norman E. Zoller, *supra* note 52.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Law school clinics consist of law students assisting eligible clients with various legal issues. The law students are supervised by licensed attorneys and the clinics are run through law schools. Client eligibility is determined by the law school.

can be found on the ABA Home Front website.⁷⁴ One example of an extremely successful clinic that offers a variety of legal services to servicemembers is the Mason Veterans and Servicemembers Legal Clinic (MVETS) sponsored by George Mason University School of Law (GMUSL).⁷⁵

2. Mason Veterans and Servicemembers Legal Clinic

In the aftermath of 9/11, George Mason University and the GMUSL saw numerous legal issues arise with students in the military reserve component who had been mobilized to active duty service.⁷⁶ Most of the legal issues concerned landlord-tenant and consumer issues.⁷⁷ Seeing a need for services, the GMUSL stepped in and began assisting students with their legal problems.⁷⁸ Given the volume of assistance given, the GMUSL created the MVETS.⁷⁹ The MVETS now provides a wide range of assistance in civil cases to servicemembers and veterans.⁸⁰

a. Eligibility Requirements

The MVETS has case and client specific eligibility requirements. The MVETS provides assistance to all ranks and demographics.⁸¹ The key factor in determining eligibility is whether the potential client is facing an injustice or cannot afford private attorney legal fees.⁸² Additionally, the MVETS will look at the clinic's ability to effectively handle the case, which includes the availability of clinic resources, the costs involved, and the complexity of the issue

⁷⁴ *Pro Bono Resources for Veterans*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/committees/veterans_benefits/pro_bono_resources_for_veterans.html (last visited May 28, 2015).

⁷⁵ George Mason University School of Law is located in Arlington, Virginia. GEORGE MASON UNIVERSITY SCHOOL OF LAW, <http://www.law.gmu.edu> (last visited May 25, 2015).

⁷⁶ E-mail from Laurie Neff, Mason Veterans and Servicemembers Legal Clinic Director and Managing Attorney to author (Nov. 12, 2014, 1055 EST) (on file with author).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Mason Veterans and Servicemembers Legal Clinic*, GEORGE MASON UNIVERSITY SCHOOL OF LAW, <http://mvets.law.gmu.edu/> (last visited May 6, 2015). Cases taken on by the MVETS consist of 50% family law issues, 25% Veterans Administration (VA) benefits, 20% military administrative matters (to include discharge upgrades, Physical Evaluation Boards, and military pay issues), 10% consumer law issues, and 5% other (minor traffic offenses, name changes, FTCA). See E-mail from Laurie Neff, *supra* note 76.

⁸¹ E-mail from Laurie Neff, *supra* note 76.

⁸² *Id.*

presented.⁸³ The MVETS will not take on cases consisting of contested family law cases (where the parties cannot come to mutual agreement on a division of property or child custody/visitation), criminal cases (other than traffic offenses), bankruptcy, or immigration cases.⁸⁴

b. Referral Procedure

There are two ways to apply for services with the MVETS. First, a potential client can apply for the MVETS services directly on the clinic's website.⁸⁵ The application is web-based and takes the potential client through a series of questions about his legal issue.⁸⁶ The case is given a full factual and legal review by the clinic staff and the staff contacts the client to further discuss the case before determining if the case will be accepted by the clinic.⁸⁷

In addition to a client directly applying for the MVETS services, a military legal assistance attorney may contact the clinic directly.⁸⁸ The MVETS prefers referrals directly through a military legal assistance attorney because the legal assistance attorney can assist the clinic in background information on the case and in gathering further information as the case progresses.⁸⁹ Furthermore, having the legal assistance attorney contact the clinic, versus the client applying alone, can assist the clinic in making a faster determination on the validity of the claim.⁹⁰

As with the state bar-run programs, the MVETS is just one example of the numerous law school-run programs available to assist legal assistance clients. Legal assistance attorneys should regularly check the ABA's Home Front website for the most recent listing of law school clinics.

E. Justice for Military Families

An additional avenue for pro bono services is the newly founded Justice for Military Families (JMF) program. The JMF is a national program run by the Military Spouses JD

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Clinic for Legal Assistance to Servicemembers and Veterans Applicant Intake Form*, GEORGE MASON UNIVERSITY SCHOOL OF LAW, <http://mvets.law.gmu.edu/apply/> (last visited May 6, 2015).

⁸⁶ *Id.*

⁸⁷ *Id.*; see also E-mail from Laurie Neff, *supra* note 76.

⁸⁸ E-mail from Laurie Neff, *supra* note 76.

⁸⁹ *Id.*

⁹⁰ *Id.*

Network (MSJDN).⁹¹ The MSJDN is an international network made up of military spouses who are legal professionals.⁹²

When looking for resources to assist military families, the MSJDN found that most free legal services only focused on the servicemember and not the family member.⁹³ Wanting to fill the gap, the MSJDN formed the JMF in partnership with the Tragedy Assistance Program for Survivors (TAPS).⁹⁴ The TAPS is an organization that provides compassionate care for individuals grieving the death of a loved one who died serving in the Armed Forces.⁹⁵ Currently, the JMF is funded by a grant from Newman's Own Foundation.⁹⁶ Newman's Own Foundation is a private, independent organization created by Paul Newman in 2005, which donates profits from Newman's Own products to nonprofit organizations around the world.⁹⁷ The JMF connects family members in need of pro bono legal services with military spouse attorneys to help resolve the family member's legal issue.⁹⁸ The Director of the JMF, Josie Beets, describes the JMF as "a pro bono program for military families by military families."⁹⁹

1. Eligibility Requirements

The JMF currently assists clients referred to their program through the TAPS.¹⁰⁰ The TAPS refers surviving spouses, parents, and children of deceased servicemembers who have civil legal issues to the JMF.¹⁰¹ Clients are considered eligible for services by virtue of the TAPS referral and are not further screened for income level.¹⁰²

⁹¹ *Justice for Military Families*, MILITARY SPOUSE JD NETWORK, <http://www.msjdn.org/about/jmf/> (last visited June 3, 2014). The Military Spouse JD Network was founded in 2011. *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *About Taps*, TRAGEDY ASSISTANCE PROGRAM FOR SURVIVORS, <http://www.taps.org/about/> (last visited May 6, 2015).

⁹⁶ *Justice for Military Families*, *supra* note 91.

⁹⁷ *About Us*, NEWMAN'S OWN FOUNDATION, <http://newmansownfoundation.org/about-us/> (last visited May 6, 2015).

⁹⁸ *Justice for Military Families*, *supra* note 91.

⁹⁹ *Id.*

¹⁰⁰ Telephone Interview with Josie Beets, Pro Bono Director, Justice for Military Families (Dec. 8, 2014).

¹⁰¹ *Id.*

¹⁰² *Id.*

2. Referral Procedures

Currently, referrals to the JMF come directly through TAPS.¹⁰³ However, if a legal assistance attorney has a case involving a surviving spouse, parent, or child they believe could be eligible for the JMF, the legal assistance attorney can contact the JMF directly to inquire as to whether the client is eligible for pro bono services.¹⁰⁴ Additionally, legal assistance attorneys can visit the MSJDN website for more information on the services the JMF provides.¹⁰⁵ The JMF is a valuable resource servicing a specific type of legal assistance client that may not be eligible for other pro bono programs. Legal assistance attorneys should be aware of the important assistance the JMF can provide and regularly check the JMF website for updates.¹⁰⁶

F. American Immigration Lawyers Association (AILA) Military Assistance Program

There are also pro bono programs available targeting specific legal issues such as immigration. The AILA's Military Assistance Program (MAP) addresses this specific need through its pro bono program. The MAP is a joint effort between the AILA and legal assistance attorneys across the military services to provide assistance on immigration cases when the client's needs exceed what a legal assistance attorney can handle.¹⁰⁷ The MAP was created in 2008 with the priorities of providing immigration specific resources to legal assistance attorneys and pro bono counsel to eligible clients.¹⁰⁸

1. Eligibility Requirements

The MAP will provide pro bono services on immigration cases to active duty servicemembers and their immediate family members.¹⁰⁹ Given the high demand for pro bono services through this program, clients may only use the MAP one time to resolve their legal issue through pro bono

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*; MILITARY SPOUSE J.D. NETWORK, <http://www.msjdn.org/about/jmf/> (last visited May 28, 2015).

¹⁰⁶ *See supra* note 91 (website link).

¹⁰⁷ *AILA Military Assistance Program (MAP)*, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, <http://www.aila.org/content/default.aspx?bc=11836157671867624108> (Dec. 19, 2007) [hereinafter AILA MAP].

¹⁰⁸ *Id.* Client intake has more than doubled in the last two years and in 2014 MAP will have provided pro bono assistance for close to 300 cases. Telephone Interview with Michelle Singleton, AILA MAP Coordinator (Dec. 4, 2014).

¹⁰⁹ Telephone Interview with Michelle Singleton, *supra* note 108. Active duty servicemembers include Reserve and National Guard members. Immediate family members include spouses, children, and parents. *Id.*

representation.¹¹⁰ Clients seeking additional assistance on another immigration case will only be placed with a pro bono attorney if resources are available.¹¹¹

issue through these programs without the burden of private attorneys fees.

2. Referral Procedures

Clients can either self-refer to the MAP or a legal assistance attorney may refer the client.¹¹² Self-referral is accomplished by completing an online application on the MAP website.¹¹³ Legal assistance attorneys can assist clients with the self-referral application form available on the MAP website.¹¹⁴ The client can submit the form themselves, or the legal assistance attorney can provide the application form directly to the MAP.¹¹⁵ Cases are generally matched with a volunteer attorney within thirty to forty-five days of the application submission.¹¹⁶ The MAP is an excellent resource for legal assistance attorneys to consider when faced with a client needing immigration assistance.

IV. Conclusion

The resources discussed in this article present just a few of the many valuable pro bono programs available to servicemembers and their families. By understanding the legal issue at hand, the financial resources of their client, and by researching the relevant pro bono programs, legal assistance attorneys can save their client's time and money by properly referring them to pro bono services or by resolving the issue through attorney-to-attorney consultations. Legal assistance attorneys need to take the time to know these resources and properly use them to help their clients take advantage of the generous gifts these volunteer attorneys and law students offer.

Once a legal assistance attorney understands how to properly use these resources and can help clients utilize them, the legal assistance attorney can feel less helpless when realizing they cannot completely resolve their client's legal issue. Thus, instead of sending the client away with the local state bar referral number, a legal assistance attorney can take the client one step closer to resolution of his legal

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Application for Assistance*, AILA MILITARY ASSISTANCE PROGRAM, <https://adobeformscentral.com/?f=CcQhW8EnaUAdWfo-LTcQkw#> (last visited May 6, 2015).

¹¹⁴ Telephone Interview with Michelle Singleton, *supra* note 108.

¹¹⁵ *Id.*

¹¹⁶ *Id.* The timelines may vary depending on the complexity of the case and volunteer availability. *Id.*

Use of Admissions of Guilt under Afghan Law

Major T. Scott Randall*

The criminal justice system in Afghanistan is modeled on the Italian inquisitorial system of justice.¹ In this type of system, the judge is the main player who seeks to arrive at a just result through an investigation of all of the evidence.² In an inquisitorial system, the accused has the right to silence; however, this right is rarely exercised because the main aim of an inquisitorial system is to find the truth through rigorous investigation from all components of the criminal justice system, including the accused.³ Therefore, the accused is expected to fully cooperate with the investigation in order for the truth to be uncovered.⁴ Hence, statements by the accused both pre-trial and during the criminal proceedings are integral to this type of criminal justice system.⁵

Understandably, there are several provisions under Afghan law that deal with admissions by the accused. Pursuant to Article 30 of the Afghan Constitution of 2004, “a statement, confession or testimony obtained from an accused or of another individual by means of compulsion shall be invalid. Confession to a crime is a voluntary admission *before an authorized court* by an accused in a sound state of mind.”⁶ Similarly, under the Afghan Criminal Procedure Code of 2014 (CPC), Article 4, a confession is defined as “admitting responsibility for committing the crime voluntarily and in a sound state of mind without duress *before an authorized court*.”⁷ Further, pursuant to Article 19 of the CPC, incriminating evidence includes a confession by the accused.⁸ Finally, under Article 150 of the CPC, the accused may remain silent in response to any question asked.⁹ Silence of the accused is not considered a statement, and a statement, confession, or testimony taken

from an accused person or a witness by lure, threat, dismay or coercion is not valid.¹⁰

Based on the foregoing, the question arises regarding whether out of court admissions by the accused can be used against him in Afghan courts. The answer is yes. Under Article 156 of the CPC, the prosecutor is obligated to ask the suspect in the beginning of the pre-trial investigation to state his role in the crime.¹¹ If he confesses to the material element of the crime or to a part of it, or provides information with respect to the issue, the prosecutor shall request him to provide further details on how the criminal action was committed.¹² Further, during this pre-trial questioning, the accused is given the opportunity to state his reasons for elimination of suspicion and to express the facts that are in his favor.¹³ Most importantly, pursuant to Article 221 of the CPC, “if the accused person refuses to answer the question [during trial] or his statements made during the session contradict those already made during the stages of evidence collection and investigation, the court may order that his first statement be read.”¹⁴ Therefore, the CPC recognizes that the court may be able to bring up the accused’s out of court admissions at trial provided the accused chooses to remain silent during his court appearance, or if his testimony contradicts his out of court statements.¹⁵ This provision, in essence, allows the court to use out of court admissions in almost every case.¹⁶ The reliance on such admissions is one of the primary attributes of the Afghan legal system.

A unique aspect of the Afghan legal system is its dependence on fingerprints to verify documents.¹⁷ Under Article 37 of the CPC:

witness statements and testimony shall be put in the report without changes, additions, distortions, correction, cleaning, and scratching. The statement and/or testimony will not be valid until confirmed by the witness, prosecutor’s office or

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¹ John Jupp, *Legal Transplants as Tools for Post-Conflict Criminal Law Reform: Justification and Evaluation*, 3 (1) Cambridge J. of Int’l and Comp. Law 381 (2014).

² *Inquisitorial and accusation systems of trial*, Law Teacher (2009), <http://www.lawteacher.net/free-law-essays/common-law/inquisitorial-and-accusation-systems-of-trial.php>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Afghan Const. January 26, 2004, art. 30.

⁷ Crim. Pro. Code, art. 4 (2014) (Afg.).

⁸ *See id.*, art. 19.

⁹ *Id.*, art. 150

¹⁰ *Id.*, art. 150.

¹¹ *Id.*, art. 156. *See also* Crim. Pro. Code, art. 45 (*stating* the primary investigator for all misdemeanor and felony crimes is the prosecutor, who may then ask for assistance from the police or National Directorate of Security to perform this duty).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*, art. 221.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*, art. 37.

the court. The witness shall sign or put his/her fingerprint on the statements when the entire statement is read to him/her and is confirmed. If the witness refuses or is not available to sign or put his/her fingerprint in the registry a reason shall be entered in the registry.¹⁸

Further, under Article 85, “the statements of suspect, accused person, victim, plaintiff, witnesses and present people and informer of the crime scene should contain their signatures; if the person is unable to sign he/she should fingerprint the statement.”¹⁹ This reliance upon fingerprinted statements brings a modicum of validity to the statement of the accused, but also creates an issue when the accused is illiterate and does not understand the contents of “his” statement.²⁰ Therefore, corroborating evidence in the case file, even in this inquisitorial system, is crucial to a transparent prosecution.

Because courts rely on written confessions so heavily in the Afghan criminal justice system, rule of law judge advocates must be cognizant of their proper uses. Confessions derived from coercion are specifically forbidden in the Afghan Constitution.²¹ Further, the contents of any written admissions must be read back to the accused prior to signing or placing his finger print on the document.²² Although these safeguards are meant to protect the rights of the accused, the rule of law judge advocate must remain wary of any case that relies solely on out of court admissions for its validity.

¹⁸ *Id.*

¹⁹ *Id.*, art. 85.

²⁰ *Id.*

²¹ Afghan Const. January 26, 2004, art. 30.

²² Crim. Pro. Code, art. 37 (2014) (Afg.).

Defense Support of Civil Authorities: A Primer On Intelligence Collection During Civil Disturbance and Disaster Relief Operations

Major Travis J. Covey*

*The U.S. Armed Forces have a historic precedent and enduring role in supporting civil authorities during times of emergency, and this role is codified in national defense strategy as a primary mission of the Department of Defense.*¹

I. Introduction

You have just recently taken over as the Deputy Staff Judge Advocate in the 2d Marine Division Office of the Staff Judge Advocate (OSJA). You are trying to wade through the mountain of administrative separation boards and investigations on your desk that never seems to get smaller, hoping that today will be the day you actually get home before your family goes to bed. As you flip open the next file, the Staff Judge Advocate walks in and asks if you have heard about the hurricane that is heading toward the coast. You confirm that you heard about it on the news during your morning commute and someone from the G-2 mentioned it during his brief earlier in the week at a meeting you were covering. He explains that the 24th Marine Expeditionary Unit (MEU) is going to deploy after the hurricane makes landfall to assist civil authorities in disaster relief and quell any civil disturbances that pop up. He further explains that the MEU Staff Judge Advocate (SJA) is on leave and unable to get back in time and you are being tapped to fill the gap. He tells you, "Congratulations, embark is in twenty-four hours. You need to be checked-in and ready to go in twelve." After thanking him, he says, "Oh yeah, I expect the MEU Commander will have some questions on what authority he will have and why. I also think he will be interested in the use of intelligence collection assets and things like that, so make sure you're good to go on that stuff."

After calling home to explain the "situation," you make sure your gear is ready and start reading everything you can find on domestic operations. You find that there is plenty of information on the subject. You find handbooks, instructions, and other publications.² You just wish there

was one document that you could read in the small amount of time that is available that will answer the basic questions you know your new commander will have and help you get off on the right foot.

This article provides judge advocates with a background in domestic operations, gives an overview and summary of a commander's authority and limitations when conducting Defense Support of Civil Authorities (DSCA) operations, and focuses on the authority to use intelligence collection assets domestically. Centering on federal (Title 10) response to domestic Disaster Relief and Civil Disturbance Operations, this article provides practitioners with a tool in planning and conducting these types of missions. Areas of discussion include a brief history of domestic operations—including the authorizations and limitations of the Stafford Act—the Posse Comitatus Act, the Insurrection Act, and the commander's use of intelligence collection assets in DSCA operations, along with some examples.³

II. History

The U.S. Military has a long history of assisting civil authorities at all levels during times of national emergency and civil disturbance. When western Pennsylvania farmers refused to pay their liquor taxes and were attacking the federal tax collectors during the Whisky Rebellion, President George Washington ordered 15,000 troops to assist in

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¹ JOINT CHIEFS OF STAFF, JOINT PUB. 3-28, DEFENSE SUPPORT OF CIVIL AUTHORITIES, at vii (31 Jul. 2013) [hereinafter JP 3-28].

² CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, DOMESTIC OPERATIONAL LAW HANDBOOK FOR JUDGE ADVOCATES (2013) [hereinafter DOPLAW HANDBOOK]; INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK (2014).

³ A review of contract and fiscal law and the use of force in Defense Support of Civil Authorities (DSCA) operations is beyond the scope of this article, although such reviews are available through other sources. See Major Christopher B. Walters, *Responding to Natural Disasters and Emergencies: A Contract and Fiscal Law Primer*, ARMY LAW., Jan. 2007, at 35. A patch work of "U.S. domestic law, Presidential Decision Directives (PDDs), National Security Presidential Directives (NSPDs), and Homeland Security Presidential Directives (HSPDs), Presidential Policy Directives (PPDs), Executive Orders (EOs), and DoD regulations provide the framework for, and set limits on, the use of military forces to assist civil authorities." DOPLAW HANDBOOK, *supra* note 2, at 3-4. While these directives, orders, and regulations are integral to how the federal government responds to domestic incidents, most are outside the scope of this article. Only documents that will assist the judge advocate and that are directly applicable to the commander's authority are reviewed.

quelling the disturbance.⁴ Presidents Eisenhower and Kennedy ordered Federal troops during the 1950s and 1960s to quell riots and enforce federal desegregation laws.⁵ In 1992, President George H. W. Bush ordered Marines and Soldiers to assist local law enforcement in restoring order during the Los Angeles Riots.⁶ Servicemembers from all branches have been ordered to assist civilian firefighting efforts when forest and wildfires have destroyed thousands of acres across the country.⁷ In recent years, responding to the aftermath left in the wake of Hurricanes like Katrina, Irene, and Sandy are just a few of the contingency operations that Federal troops have been ordered to assist civil authorities.⁸

These examples provide judge advocates and commanders with a good deal of historical context regarding the scope of DSCA missions and lessons learned when conducting training for future incidents. However, the law regarding DSCA has not remained stagnant. Understanding each mission and how it fits within the current structure will inform the judge advocate as to how a commander's authority is derived and how it may be limited.

III. Background

A. Federal Response Structure

Federal and State Civil authorities have the primary responsibility in domestic operations.⁹ As the term "Defense Support of Civil Authorities" suggests, the role of the Department of Defense (DoD), and ultimately of the commander of the unit on the ground during domestic operations, is one of support.¹⁰ The primary authority for all DoD personnel in DSCA operations is DoD Directive 3025.18.¹¹ Directive 3025.18 defines DSCA as

[s]upport provided by U.S. Federal military forces, DoD civilians, DoD contract personnel, DoD Component assets, and National Guard forces (when the Secretary of Defense, in coordination with the Governors of the affected States, elects and requests to use those forces in title 32, U.S.C., status) in response to requests for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities, or from qualifying entities for special events. [Defense Support of Civil Authorities is] also known as civil support.¹²

Under DoDD 3025.18, in all but a few limited exceptions, civil authorities must request DSCA in writing or it must be independently "authorized by the President or Secretary of Defense."¹³ This directive provides the following criteria that should be considered when evaluating the request: cost, appropriateness, risk, readiness, legality, and lethality.¹⁴ These are often referred to as CARRLL factors.¹⁵ As a practical matter, when a unit such as the MEU has been ordered to a DSCA operation, the request and approval will have already occurred. The judge advocate should request copies of any existing requests and ensure the commander is familiar with their content. The commander needs to understand what went into the request and be prepared to forward recommendations up the chain of command if further requests are received.¹⁶

Department of Defense Directive 3025.18 is part of the overall structure within the National Response Framework (NRF).¹⁷ "The NRF is a guide to how the Nation responds to all types of disasters and emergencies" and "sets the doctrine for how the Nation builds, sustains, and delivers the response. . . ."¹⁸ While the NRF is the product of the Department of Homeland Security (DHS), which is the lead federal agency in such operations, the commander must understand that the NRF applies to all federal departments and agencies that have jurisdiction for, or responsibility to

⁴ William C. Banks, *Providing "Supplemental Security": The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 J. NAT'L SECURITY L. & POL'Y 39, 58 (2009).

⁵ Dan DeRight, *Lawful Military Support to Civil Authorities in Times of Crisis*, JURIST (May 2, 2013, 12:30 PM), <http://jurist.org/forum/2013/05/kevin-govern-posses-comitatus.php>.

⁶ *Id.*

⁷ See Captain Francis A. Delzompo, *Warriors on the Fire Line: The Deployment of Service Members to Fight Fires in the United States*, ARMY LAW., Apr. 1995, at 51–52. (Discussing military assistance to civilian firefighters, the statutory authority for such assistance, and the regulatory framework that allows servicemembers to assist in suppressing forest fires.)

⁸ DeRight, *supra* note 5; see also DOPLAW HANDBOOK, *supra* note 2, at 1.

⁹ See U.S. DEP'T OF DEFENSE, STRATEGY FOR HOMELAND DEFENSE AND DEFENSE SUPPORT OF CIVIL AUTHORITIES at 14–15, (Feb. 2013) [hereinafter STRATEGY FOR HOMELAND DEFENSE AND DSCA].

¹⁰ U.S. DEP'T OF DEFENSE, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES, at 16 (21 Sept. 2012) [hereinafter DoDD 3025.18].

¹¹ See *id.*

¹² *Id.* at 16.

¹³ *Id.* para.4.c.

¹⁴ *Id.* para. 4.e.

¹⁵ *Id.*

¹⁶ DOPLAW HANDBOOK, *supra* note 2, at 4.

¹⁷ DoDD 3025.18, *supra* note 10, para. 4.f; see also Exec. Order No. 12,656, 3 C.F.R. 585 (1988). In 1988, President George H. W. Bush signed Executive Order 12656, which provided the foundation for what is now the National Response Framework (NRF) under the National Preparedness System (NPS). *Id.*

¹⁸ U.S. DEP'T OF HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK 19 (2nd ed. 2013) [hereinafter NRF].

support, any response or recovery effort.”¹⁹ Within the NRF, roles and responsibilities are delegated and a hierarchy of command and control is created. The most important takeaway for the commander is that regardless of this structure and his mission to support, “[w]hen DoD resources are authorized to support civil authorities, command of those forces remains with the Secretary of Defense.”²⁰ The most common avenue through which the DoD provides support is the Stafford Act.

B. The Stafford Act

The primary statutory authority used in DSCA operations is the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act).²¹ The president, in his capacity as Commander-in-Chief, has certain constitutional and inherent authorities that allow him to order federal forces to act domestically for certain purposes.²² Examples would include expelling foreign invaders or responding to incidents that threaten federal property or personnel. However, statutory authority is the principal way the president acts to provide federal support to the state or local authorities during domestic emergencies.

The Stafford Act originally came into law in 1988, renaming and amending the Disaster Relief Act of 1974.²³ The declared intent of Congress in passing the Stafford Act was “to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters.”²⁴ The Stafford Act gives the president authority

to declare that a particular disaster is a “major disaster” or “emergency,” authorizing federal assistance.²⁵

The major practical difference between emergency and major disaster is that “[e]mergency assistance is more limited in scope and in time.”²⁶ Prior to a declaration of emergency or major disaster under the Stafford Act, either the governor must request assistance or the situation must be “beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary.”²⁷ The important take away for the judge advocate is that the commander’s authority to provide assistance in most circumstances is derived from a declaration of emergency or major disaster.²⁸ Such a declaration may exist even before a “hurricane that is heading toward the coast” makes its landfall.²⁹ It is more likely, however, that the declaration will be made once the damage has actually occurred.³⁰ In either case it will not be until a declaration is made that the authority will vest and the commander can assist.³¹

There is also a statutory authorization that allows commanders to act on their own in urgent situations called the Immediate Response Authority (IRA).³² The IRA permits commanders to authorize assistance if civil

¹⁹ DOPLAW HANDBOOK, *supra* note 2, at 106; *see also* NRF, *supra* note 19.

²⁰ NRF, *supra* note 18, at 19.

Military forces always remain under the control of the military chain of command and are subject to redirection or recall at any time. Military forces do not operate under the command of the incident commander or under the unified command structure, but they do coordinate with response partners and work toward a unity of effort while maintaining their internal chain of command.

Id. at 6.

²¹ The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5206 (1974) (as amended by the Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, 120 Stat. 1355 (2007) and the Sandy Recovery Improvement Act of 2013, Pub. L. No. 113-2, 127 Stat. 4 (2013)) [hereinafter Stafford Act].

²² DOPLAW HANDBOOK, *supra* note 2, at 115; *see also* U.S. CONST. art II, § 2.

²³ Stafford Act §§ 5121-5206.

²⁴ *Id.* § 5121(b).

²⁵ *Id.* § 5191. “Emergency” is defined as “any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.” *Id.* § 5122(1). “Major Disaster” is defined as “any natural catastrophe (including any hurricane, tornado, storm, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.” *Id.* § 5122(2).

²⁶ DOPLAW HANDBOOK, *supra* note 2, at 33.

²⁷ Stafford Act § 5191(a).

²⁸ *See id.*

²⁹ *See* FEMA, HURRICANE SANDY: A TIMELINE (Apr. 24, 2013), *available at* http://www.fema.gov/media-library-data/20130726-1912-25045-8743/hurricane_sandy_timeline.pdf.

³⁰ *See The Storm, 14 Days: A Timeline*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/storm/etc/cron.html> (last visited May 19, 2015).

³¹ Stafford Act § 5191. For a description and graphic depiction of the Stafford Act process, *see infra* Appendix A (Overview of Stafford Act Support to States).

³² DoDD 3025.18, *supra* note 10, para. 4.g. (“The Immediate Response Authority exception to the Stafford Act authorized the use of the medevac aircraft, ambulances, bomb detection dog teams, and various military personnel” in response to the 19 April 1995 bombing that destroyed the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma. Commander Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, ARMY LAW., Jul. 1997, at 4.)

authorities have requested for “imminently serious conditions . . . to save lives, prevent human suffering, or mitigate great property damage” and time does not permit getting approval from a higher authority.³³ Notification of the assistance must immediately be sent to the National Joint Operations and Intelligence Center and the duration of the assistance provided cannot exceed seventy-two hours without another form of authorization.³⁴ Finally, the assistance provided under the IRA, and the Stafford Act in general, must be consistent with the Posse Comitatus Act.³⁵

C. The Posse Comitatus Act

The Posse Comitatus Act (PCA) is “the primary statute restricting military support to civilian law enforcement.”³⁶ Originally enacted in 1878, the current PCA states:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.³⁷

In addition to the Army and Air Force, the PCA also applies to the Navy and Marine Corps under 10 U.S.C. § 375: “activity . . . under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.”³⁸ While a thorough analysis of every application and exception of the PCA is beyond the scope of this article, a rudimentary explanation is warranted.

The U.S. Code and DoD instruction “outline the restrictions of the PCA as they apply to participation by the military in civilian law enforcement activities. Under these statutes, regulation of military activity is divided into three

major categories: (1) use of information, (2) use of military equipment and facilities, and (3) use of military personnel.”³⁹ Regarding the “use of information” category, DoDI 3025.21 states that “DoD Components are encouraged to provide to Federal, State, or local civilian law enforcement officials any information collected during the normal course of military operations that may be relevant to a violation of State or Federal law”⁴⁰ Likewise, the portion of DoDI 3025.21 regarding the “use of military equipment and facilities” states, “DoD Components may make equipment, base facilities, or research facilities available to Federal, State, or local civilian law enforcement officials for law enforcement purposes in accordance with the guidance in this enclosure.”⁴¹

The third category, pertaining to the “use of military personnel” is the most in-depth and generally onerous category.⁴² The category is divided into sub-categories: direct assistance, personnel to operate and maintain DoD equipment, training, expert advice, and other permissible assistance.⁴³ The sub-category of direct assistance is further divided into prohibited and permissible direct assistance.⁴⁴

The prohibition in the PCA, and as implemented through DoDI 3025.21, limits the military in supporting law enforcement agencies and performing civilian law enforcement functions only.⁴⁵ If the DSCA mission does not entail either of those aspects, the PCA is not a factor. For example, if the hurricane is declared a major disaster under the Stafford Act and the mission is strictly to help clean up debris and provide aid, the PCA should not be an issue.

However, it is important for the judge advocate operating in a DSCA environment to be aware of the PCA and its limitations on the commander because he may say, “Judge! The local sheriff told me there are riots downtown. He is short handed and asked if we could help with some security and maybe question the punks once we catch them. I’m pulling a squad off debris clean-up to go assist. No problem. Right?” This scenario, absent a constitutional or statutory exception, would go straight to the heart of the PCA and the type of direct assistance that is prohibited.⁴⁶ One long

³³ DoDD 3025.18, *supra* note 10, para. 4.g.

³⁴ *Id.* para. 4.g.2.

³⁵ *Id.* para. 4.g.

³⁶ DOPLAW HANDBOOK, *supra* note 2, at 69.

³⁷ The Posse Comitatus Act, 18 U.S.C. § 1385 (2011) (The PCA was originally passed to end military occupation of the former Confederate states during Reconstruction following the end of the Civil War.).

³⁸ 10 U.S.C. § 375 (2012) (promulgated by Department of Defense Instruction 3025.21); U.S. DEP’T OF DEF., INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES (27 Feb. 2013) [hereinafter DoDI 3025.21]. The Posse Comitatus Act (PCA) also applies to the National Guard when in a Title 10 status and the U.S. Coast Guard when under the DoD..

³⁹ DOPLAW HANDBOOK, *supra* note 1, at 72; *see also* the Posse Comitatus Act § 1385; DoDI 3025.21, *supra* note 38.

⁴⁰ DoDI 3025.21, *supra* note 38, enclosure 7, para. 1.

⁴¹ *Id.* encl. 8, para. 1.

⁴² *See id.* encl. 3.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See id.* encl. 3, para. c. To further assist the judge advocate in PCA analysis, Figure 4.1, which “summarizes PCA restrictions in 10 U.S.C. §§ 371–375 and major areas of guidance from DoDI 3025.21,” has been provided in Appendix B (Posse Comitatus Act Chart).

standing statutory exception to the PCA's limitation on the armed forces conducting law enforcement activities is the Insurrection Act.

D. Insurrection Act

The Insurrection Act is a civil disturbance statute and an example of permissible direct assistance outlined in section C above.⁴⁷ The Insurrection Act is a statutory exception to the PCA and is "rooted in the constitution" based on the authorities vested in the president.⁴⁸ The Insurrection Act allows the president to order the military to enforce or ensure the enforcement of the laws of a state or the federal government and to suppress rebellion.⁴⁹

One way the Insurrection Act can be employed is when a state requests federal assistance.⁵⁰ Federal forces responding to state requests to restore law and order during the Los Angeles Riots is an example of an invocation of the Insurrection Act.⁵¹ In addition to a state or territorial request for assistance, the president may also use the Insurrection Act to enforce federal authority or to protect constitutional rights.⁵² However, prior to committing federal forces under this act, the president must issue a proclamation to those causing the disturbance to "disperse and retire peaceably to their abodes within a limited time."⁵³

In light of this knowledge, a judge advocate responding to the commander wanting to assist the sheriff, as described above, must know if the president invoked the Insurrection Act. If not, he should look to see if there is a permissible way for the commander to assist that is consistent with the PCA. Likewise, the judge advocate may need to determine if there is a permissible use of the commander's organic intelligence capabilities in a DSCA environment.

IV. Use of Intelligence Collection Assets

You are starting to feel confident in your understanding of what DSCA is and what authorities the commander will have when the hurricane hits. Then you remember the Staff

Judge Advocate saying the MEU Commander would be "interested in the use of intelligence collection assets," and you know you still have your work cut out for you.

Collecting and using intelligence is a critical function of war fighting. Organic intelligence assets are found at every echelon of command.⁵⁴ These assets include, but are not limited to, human intelligence (HUMINT) collectors, Defense Criminal Investigative Organizations (DCIOs), Ground-Based Operational Surveillance Systems (G-BOSSs), and unmanned aircraft systems (UASs).⁵⁵ Commanders have grown accustomed to relying on these assets to improve their situational awareness and it should be expected that they will desire to use them in DSCA operations. They will look at "domestic missions . . . no different than overseas missions in that a key requirement for mission success is situational awareness" Commanders believe that "they must be aware of the situation on the ground and have a complete picture of the 'battle space' within which the unit is operating."⁵⁶

From the mission accomplishment prospective, this seems reasonable enough. However, domestic intelligence collection usually "entails collecting information on U.S. persons."⁵⁷ The constitutional rights of U.S. persons that prohibit unlawful search and seizure is a consideration that most commanders have not had to deal with outside of a military justice context. The judge advocate must be prepared to balance the commander's need for information with the protections provided to U.S. persons.

Americans have always been uneasy with domestic information collection regardless of the justification.⁵⁸ As

⁴⁷ The Insurrection Act, 10 U.S.C. §§ 331-335 (2012) [hereinafter Insurrection Act].

⁴⁸ DOPLAW HANDBOOK, *supra* note 2, at 90; *see also* U.S. CONST. art. I, § 8, para. 15, art. II, § 2, and art. IV, § 4.

⁴⁹ Insurrection Act §§ 331-335.

⁵⁰ *Id.* § 331.

⁵¹ DeRight, *supra* note 5; DOPLAW HANDBOOK, *supra* note 2, at 91-92.

⁵² Insurrection Act §§ 331-335.

⁵³ *Id.* § 334.

⁵⁴ *See* U.S. MARINE CORPS, MCWP 2-1, INTELLIGENCE OPERATIONS, ch. 4, at 4-2 (10 Sept. 2003) [hereinafter MCWP 2-1].

⁵⁵ *See* U.S. MARINE CORPS, MCWP 2-2, MAGTF INTELLIGENCE COLLECTION, at 1-6 (30 July 2004) [hereinafter MCWP 2-2]; *see also infra* Part IV.A (discussing human intelligence (HUMINT) collectors, Defense Criminal Investigative Organizations (DCIOs), Ground-Based Operational Surveillance Systems (G-BOSSs), and unmanned aircraft systems (UASs) in more detail).

⁵⁶ DOPLAW HANDBOOK, *supra* note 2, at 164; MCWP 2-1, *supra* note 58, ch. 1, at 1-1.

⁵⁷ DOPLAW HANDBOOK, *supra* note 2, at 164. "United States person" means a United States citizen, an alien known by the intelligence agency concerned to be a permanent resident alien, an unincorporated association substantially composed of United States citizens or permanent resident aliens, or a corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments. E.O. 12333, *supra* note). Exec. Order No. 12,333, U.S. Intelligence Activities, 3 C.F.R. 200, para. 3.4(i) (1981), *amended by* Executive Orders 13,284 (2003), 13,355 (2004) and 13,470 (2008).

⁵⁸ *See* Mark Jaycox & Trevor Timm, *Multiple New Polls Show Americans Reject Wholesale NSA Domestic Spying*, ELECTRONIC FRONTIER FOUNDATION (Aug. 13, 2013), *available at* <https://www.eff.org/deeplinks/2013/06/multiple-new-polls-show-americans-reject-wholesale-nsa-domestic-spying>.

the U.S. Supreme Court noted, “[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.”⁵⁹ The sensitivities that Americans have toward the Fourth Amendment to the U.S. Constitution and the belief that the government must be limited in its ability to reach too far have led to the promulgation of rules regarding when and how information can be collected and used.⁶⁰

The commander says, “Ok Judge, I got it! There are all of these rules, and we can’t violate anyone’s civil liberties. But we have a mission and people need our help. What can I do?” The judge advocate trying to answer that question needs to look at each intelligence collection activity separately. When a proposal is made to perform some sort of collection function, the first question that a judge advocate should ask is, “Who is doing the collecting—intelligence assets or non-intelligence assets?”⁶¹ The answer to that question will determine which set of restrictions and authorities apply and how to analyze the use.

The landscape is generally split into two categories of collection assets that are available to commanders.⁶² The first category includes members of the intelligence community.⁶³ Generally, “[t]he only authorized mission sets for DoD intelligence components are defense-related foreign intelligence [FI] and counterintelligence [CI].”⁶⁴ Executive Order 12333, United States Intelligence Activities, is the primary source establishing who is included as a DoD intelligence component and defines the scope of their authority, including “[t]he intelligence and counterintelligence elements of the Army, Navy, Air Force, and Marine Corps.”⁶⁵ This order also states, in regard to the “[c]ollection of information,” that “[e]lements of the intelligence community are authorized to collect, retain, or disseminate information concerning United States persons only in accordance with procedures established by the head

of the Intelligence Community element concerned or by the head of a department containing such element and approved by the Attorney General.”⁶⁶

Pursuant to Executive Order 12333, the DoD has implemented how these intelligence components can conduct “intelligence activities.”⁶⁷ Additionally, Executive Order 12333 outlines an exception for assistance to law enforcement and other civil authorities that are not otherwise prohibited.⁶⁸ From this exception, the DoD has promulgated procedures and instructions for these types of intelligence components when providing assistance to law enforcement.⁶⁹ Additionally, each service has implemented its own regulations based on these references.⁷⁰

The second group is made up of those who are not members of the intelligence community, which basically includes everyone else in the DoD. The rules governing this group are promulgated in DoD Directive 5200.27.⁷¹ Collection by non-intelligence personnel of information on U.S. persons is limited. “DoD policy prohibits collecting, reporting, processing, or storing information on individuals or organizations not affiliated with the [DoD], except in those limited circumstances where such information is essential”⁷² For DSCA missions, the most relevant exceptions are in relation to protecting “DoD [f]unctions and [p]roperty” and “[o]perations [r]elated to [c]ivil [d]isturbance.”⁷³

After determining which category of collection assets applies, the judge advocate must ascertain the type of information the commander wants collected, which will further influence whether the desired collection is permissible. If the commander has HUMINT, DCIO, G-BOSS, and UAS at his disposal and would like to use them, each activity/system requires its own analysis.

⁵⁹ *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961).

⁶⁰ Exec. Order No. 12,333, U.S. Intelligence Activities, 3 C.F.R. 200 (1981), amended by Executive Orders 13,284 (2003), 13,355 (2004) and 13,470 (2008) [hereinafter E.O. 12,333].

⁶¹ DOPLAW HANDBOOK, *supra* note 2, at 136.

⁶² See U.S. DEP’T OF DEFENSE, DIR. 5240.01, DOD INTELLIGENCE ACTIVITIES (27 Aug. 2007) [hereinafter DoDD 5240.01]; see U.S. DEP’T OF DEFENSE, DIR. 5200.27, ACQUISITION OF INFORMATION CONCERNING PERSONS AND ORGANIZATIONS NOT AFFILIATED WITH THE DEPARTMENT OF DEFENSE (7 Jan. 1980) [hereinafter DoDD 5200.27].

⁶³ See DoDD 5240.01, *supra* note 62. “In simple terms these are the Title 10 intelligence specialists—J2s, G2s, A2s, etc. These groups of people—and the assets they use—are subject to one set of rules referred to as intelligence oversight.” DOPLAW HANDBOOK, *supra* note 2, at 164.

⁶⁴ JP 3-28, *supra* note 1, at vii.

⁶⁵ E.O. 12,333, *supra* note 60, para. 1.7 (f).

⁶⁶ *Id.* para. 2.3.

⁶⁷ See DoDD 5240.01, *supra* note 62; U.S. DEP’T OF DEFENSE, REG. 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS (1 Dec. 1982) [hereinafter DoD 5240.1-R]. As of May 2015, DoD 5240.1-R is undergoing revision. Consequently, practitioners citing this reference should first ensure DoD 5240.1-R is still in effect.

⁶⁸ E.O. 12,333, *supra* note 60, para. 2.6.

⁶⁹ See DoDI 3025.21, *supra* note 38.

⁷⁰ See U.S. MARINE CORPS, ORDER 3800.2B, OVERSIGHT OF INTELLIGENCE ACTIVITIES (30 Apr. 2004) [hereinafter MCO 3800.2B]; U.S. DEP’T OF ARMY, REG. 381-10 ARMY INTELLIGENCE ACTIVITIES (3 May 2007) [hereinafter AR 381-10].

⁷¹ See DoDD 5200.27, *supra* note 62.

⁷² *Id.* para. 3.1.

⁷³ *Id.* paras. 4.1-4.3.

A. Human Intelligence

Human Intelligence is a “category of intelligence derived from information collected and provided by human sources.”⁷⁴ In a combat environment, HUMINT operators “cover a wide range of activities encompassing reconnaissance patrols, aircrew reports and debriefs, debriefing of refugees, interrogations of prisoners of war, and the conduct of counterintelligence force protection source operations.”⁷⁵ In DSCA operations, the commander may want to use HUMINT operators to collect information from locals regarding potential threats to government personnel or property.

The HUMINT collectors would certainly fall into the intelligence community category. Based on that knowledge, the construct of DoD 5240.01, as discussed above, applies. If the collectors have an approved intelligence mission that fits the activities the commander wants conducted, as well as any required approvals, then they could conduct that mission.⁷⁶ However, “intelligence activities” are defined as “[t]he collection, analysis, production, and dissemination of foreign intelligence and [counterintelligence]. . . .”⁷⁷ “Domestic activities” are defined as “activities that take place within the United States that do not involve a significant connection with a foreign power, organization, or person.”⁷⁸ Depending on the need, a request and authorization using the “Assistance to Law Enforcement and other Civil Authorities” exception discussed above may be a viable solution.⁷⁹ Keep in mind that even if a DSCA mission did involve a proper intelligence mission, any collection of U.S. persons information within the United States would need to be done in accordance with Attorney General approved procedures.⁸⁰ If available, a better alternative for the commander in a DSCA environment may be to use DCIO personnel.

⁷⁴ JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, at 110 (8 Nov. 2010) (amended through 15 Jan 2015) [hereinafter JP 1-02].

⁷⁵ MCWP 2-1, *supra* note 54, ch. 4, at 4.2.

⁷⁶ See DoDD 5240.01, *supra* note 62.

⁷⁷ *Id.* para. E.2.7. “Foreign intelligence” is defined as “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, foreign persons, or international terrorists.” E.O. 12,333, *supra* note 62, paras. 3.5(e). “Counterintelligence” is defined as “information gathered and activities conducted to identify, deceive, exploit, disrupt, or protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations, or persons, or their agents, or international terrorist organizations or activities.” E.O. 12,333, *supra* note 60, para. 3.5(a).

⁷⁸ DoD 5240.1-R, *supra* note 67, para. C2.2.3.

⁷⁹ E.O. 12,333, *supra* note 60, para. 2.6; see also DoDI 3025.21, *supra* note 38.

⁸⁰ E.O. 12,333, *supra* note 60, para. 2.3.

B. Defense Criminal Investigative Organizations

If a commander has DCIO assets, they will “have primary responsibility for gathering and disseminating information about the domestic activities of U.S. persons that threaten DoD personnel or property.”⁸¹ Defense Criminal Investigative Organizations are military law enforcement agencies and include “U.S. Army Criminal Investigation Command, Naval Criminal Investigative Service, and Air Force Office of Special Investigations.”⁸² For the purposes of this article and the relevant DSCA analysis, DCIO also includes any Military Police assets at the commander’s disposal.

These assets clearly fall into the second group of non-intelligence components, and are subject to the limitations of DoDD 5200.27, as outlined above.⁸³ They may only be used to acquire “information essential to accomplish the following DOD missions: protection of DoD functions and property, personnel security, and operations related to civil disturbances.”⁸⁴

The commander’s use of DCIO assets will likely be for “force protection in domestic support operations.”⁸⁵ In a DSCA environment, DCIO “are responsible for tracking and analyzing criminal threats to DoD and domestic threats to DoD.”⁸⁶ They can “liaise with other law enforcement agencies to develop the criminal threat situational picture.”⁸⁷ This can provide the commander with a picture of the criminal element in the area that may compromise success in the DSCA mission and allow him to respond accordingly.

As long as the commander and the DCIO personnel understand the limitations imposed under DoDD 5200.27 and the particular agency regulations, using trained law enforcement personnel in DSCA operations could provide the commander with a valuable force protection asset.⁸⁸ Similarly, the commander may want to use a Ground-Based Operational Surveillance System to monitor his surroundings for threats.

⁸¹ DOPLAW HANDBOOK, *supra* note 2, at 168.

⁸² U.S. DEP’T OF DEF., INSTR. 5505.03, INITIATION OF INVESTIGATIONS BY DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS (24 Mar. 2011) [hereinafter DoDI 5505.03].

⁸³ DoDD 5200.27, *supra* note 62.

⁸⁴ JP 3-28, *supra* note 1, at V-5.

⁸⁵ DOPLAW HANDBOOK, *supra* note 2, at 168.

⁸⁶ *Id.* at 170.

⁸⁷ *Id.*

⁸⁸ DoDD 5200.27, *supra* note 62.

C. Ground-Based Operational Surveillance Systems

The G-BOSS, or rapid aerostat initial deployment (RAID) systems as used by the U.S. Army, have become one of the commander's favorite tools for collecting information in combat.⁸⁹ Heavily used in Iraq and Afghanistan at bases of all sizes, they have become standard equipment for many units.⁹⁰ These systems "consist of a 107-foot-high tower, electro-optical/ infrared (EO/IR) sensor, map overlay software, battle command software connectivity, data link, generator and command shelter."⁹¹ It is a very large tower with a camera or two that can be emplaced very quickly and allow the operators to observe very long distances.⁹²

In a combat environment, G-BOSS are used to monitor activities around a base, including attacks and improvised explosive device (IED) emplacement. In DSCA operations, the commander may want to use G-BOSS to observe the activities around a relief center, command and control center, or survey a surrounding disaster area.

As before, the first question to ask is who is doing the collecting? If it is an intelligence community asset, the analysis would be the same as above for the HUMINT assets. However, the G-BOSS would likely be considered non-intelligence assets if controlled and operated by non-intelligence personnel. If not used for an intelligence purpose, the commander's use of these assets in DSCA, as described above, does not fit into the various categories that would trigger DoD 5240.1-R.⁹³ The G-BOSS type assets are further distinguished from intelligence collection assets by looking to the guidance on how various types of collection are defined.⁹⁴

⁸⁹ Scott R. Gourley, *RAID Tower Sensor Helps Force Protection Equation*, ARMY MAG., Feb. 2009, at 61. (Explaining the capabilities and application of the G-BOSS and RAID systems in a combat environment.)

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² For photographs of various examples of G-BOSS units, see *infra* Appendix C (Ground-Based Operational Surveillance Systems).

⁹³ See DoD 5240.1-R, *supra* note 67.

⁹⁴ "Electronic surveillance" is defined as "[a]cquisition of a nonpublic communication by electronic means without the consent of a person who is a party to an electronic communication or, in the case of a non-electronic communication, without the consent of a person who is visibly present at the place of communication" *Id.* para. DL1.1.9. "Concealed monitoring" is defined as "targeting by electronic, optical, or mechanical devices a particular person or a group of persons without their consent in a surreptitious and continuous manner. Monitoring is surreptitious when it is targeted in a manner designed to keep the subject of the monitoring unaware of it. Monitoring is continuous if it is conducted without interruption for a substantial period of time." *Id.* para. C6.2.1. "Physical surveillance" is defined as "a systematic and deliberate observation of a person by any means on a continuing basis, or the acquisition of a nonpublic communication by a person not a party thereto or visibly present thereat through any means not involving electronic surveillance." *Id.* para. C9.2.

The typical use of G-BOSS does not target a particular person or group, nor is its purpose to access communication. The commander's use of this type of asset in a DSCA environment is more accurately defined as a force protection tool. Force Protection includes "preventive measures taken to mitigate hostile actions against DoD personnel (to include DoD family members), resources, facilities, and critical information in an all hazards environment."⁹⁵

If used in this manner, DoDD 5200.27 would apply with the "[p]rotection of DoD functions and property" exception as described above.⁹⁶ The limitations that are set out under that directive would also apply, including the requirement that any information that is collected must be "destroyed within 90 days unless its retention is required by law or unless its retention is specifically authorized"⁹⁷ As long as these procedures are followed, the G-BOSS could serve a commander well in a DSCA environment and not violate the rights of U.S. Persons.

D. Unmanned Aircraft System

Unmanned Aircraft Systems include "an aircraft that does not carry a human operator and is capable of flight with or without human remote control."⁹⁸ In a combat environment, these aircraft perform intelligence, surveillance, and reconnaissance (ISR), search and rescue, and target strike missions.⁹⁹ Sometimes referred to as drones, the aircraft "range in size from the Wasp and the Raven, at 38 inches long, both of which are 'launched' by being thrown in the air by hand, to the twenty-seven foot long Predator and the forty-foot long Global Hawk."¹⁰⁰ The UAS available for the MEU commander's use in DSCA will include smaller aircraft dedicated to surveillance, rather than the larger models capable of carrying weapons.¹⁰¹

On its face, the analysis for UAS appears to be very similar to G-BOSS. However, unlike G-BOSS type assets, the DoD has specifically directed that "[n]o DoD unmanned

⁹⁵ JP 3-28, *supra* note 1, at II-15.

⁹⁶ DoDD 5200.27, *supra* note 62, paras. 4.1-4.3.

⁹⁷ *Id.* para 6.4.

⁹⁸ JP 1-02, *supra* note 74, at 258.

⁹⁹ *MQ-1B Predator Factsheet*, U.S. AIR FORCE, <http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104469/mq-1b-predator.aspx> (last visited May 19, 2015).

¹⁰⁰ Chris Jenks, *Law From Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict*, 85 N.D. L. REV. 649, 653 (2010). For images of drones, see *infra* Appendix D (Unmanned Aircraft Systems).

¹⁰¹ Gidget Fuentes, *Lightweight Drone Set for First MEU Deployment*, MARINE CORPS TIMES (Mar. 8, 2011), <http://archive.marinecorpstimes.com/article/20110308/NEWS/103080323/Lightweight-drone-set-first-MEU-deployment>.

aircraft systems (UAS) will be used for DSCA operations, including support to Federal, State, local, and tribal government organizations, unless expressly approved by the Secretary of Defense [SecDef].”¹⁰² However, the SecDef has pre-approved missions for DSCA operations that use UAS.¹⁰³ These are known as “incident awareness and assessment (IAA)” missions.¹⁰⁴ As such, UAS are considered an intelligence asset, but these missions are considered a “non-intelligence activity” because they do “not involve FI or CI.”¹⁰⁵

These pre-approved IAA missions “are actions taken by the commander to collect information about and analyze the impact of events and conditions involved in DSCA operations.”¹⁰⁶ An example is “the collection, retention, production, and dissemination of maps, terrain analysis, and damage assessments”¹⁰⁷ Specifically, seven IAA missions that are pre-approved exist “to support first responders and decision makers” They include “situational awareness, damage assessment, evacuation monitoring, [Search and Rescue], [Chemical, Biological, Radiological, Nuclear and high-yield Explosives] assessment, hydrographic survey, and dynamic ground coordination.”¹⁰⁸ “[S]pecific SecDef review and approval on a case-by-case basis” is required for any other purpose.¹⁰⁹

Even when a mission is authorized, “the use of IAA assets should integrate with capabilities from other government and commercial capabilities.”¹¹⁰ Further, “IAA must be conducted [in accordance with] all intelligence oversight requirements,” and as such, “[a]ssets tasked to perform IAA should be efficient, effective, and utilize the least intrusive, least costly means to accomplish the support mission within necessary timelines.”¹¹¹

The functions, unique nature, and public attention in UAS have led the DoD to promulgate guidance that may require further analysis.¹¹² A judge advocate looking to provide the commander with guidance on a particular platform must learn the capabilities and methods of that platform, to include “how . . . the data [is] collected, transmitted, and processed”¹¹³ The answer to those questions will dictate what can be disseminated and who may receive it.¹¹⁴ The National Geospatial-Intelligence Agency (NGA) and the Defense Intelligence Agency have instructions and regulations on the classification and use of “geospatial data and imagery” and how it can be used.¹¹⁵ Most of these sources, however, are classified and must be obtained through official government channels.¹¹⁶

The commander could use certain UAS in DSCA missions, provided the intended use is sufficiently narrow enough to fit within the SecDef pre-approved IAA missions, restrictions, and follows the oversight rules. The judge advocate advising the commander on the use of UAS in support of DSCA would also be well served to understand and be prepared to explain the potential political risks associated with an otherwise permissible use.

V. Conclusion

This article has provided a background in domestic operations and an overview and summary of a commander’s authority and limitations when conducting DSCA operations. Additionally, it emphasized the specific rules and limitations of intelligence collection during those operations. The examples provided above should assist the judge advocate in providing timely and accurate advice to the commander during a DSCA mission. In addition to this article, the NRF, the Stafford Act, JP 3-28, and the *DOPLAW Handbook* are important resources to gain an understanding of domestic operations. Defense Support of Civil Authorities presents unique challenges to commanders and judge advocates because of our history, laws, and structure of government. By understanding the authorities and limitations a federal military unit has during DSCA operations, judge advocates and commanders are better equipped to assist when disaster strikes and the need occurs.

¹⁰² DoDD 3025.18, *supra* note 10, para. 4.o.

¹⁰³ Headquarters, Chairman of the Joint Chiefs of Staff Office, Defense Support of Civil Authorities, para. 3.C.4.J.1. (7 June 2013) [hereinafter DSCA EXORD].

¹⁰⁴ “Incident Awareness and Assessment” missions are defined as “Secretary of Defense approved use of Department of Defense intelligence, surveillance, reconnaissance, and other intelligence capabilities for domestic non-intelligence support for defense support of civil authorities.” JP 3-28, *supra* note 1, at GL-7.

¹⁰⁵ *Id.*; DOPLAW HANDBOOK, *supra* note 2, at 167.

¹⁰⁶ JP 3-28, *supra* note 1, at IV-2.

¹⁰⁷ DOPLAW HANDBOOK, *supra* note 2, at 167.

¹⁰⁸ DSCA EXORD, *supra* note 103, para. 3.C.4.J.1.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*; JP 3-28, *supra* note 1, at IV-2.

¹¹² DOPLAW HANDBOOK, *supra* note 2, at 167.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See U.S. DEP’T OF DEF., DEF. INTELLIGENCE AGENCY REG. (DIAR) 50-30, SECURITY CLASSIFICATION OF AIRBORNE SENSOR IMAGERY (25 June 1997).

Overview of Stafford Act Support to States

Overview of Stafford Act Support to States

This overview illustrates actions Federal agencies are likely to take to assist State, tribal, and local governments that are affected by a major disaster or emergency. Key operational components that may be activated include the National Response Coordination Center (NRCC), Regional Response Coordination Center (RRCC), Joint Field Office (JFO), and Disaster Recovery Centers (DRCs).

1. The Department of Homeland Security (DHS) National Operations Center continually monitors potential major disasters and emergencies. When advance warning is received, DHS may deploy—and may request that other Federal agencies deploy—liaison officers and personnel to a State emergency operations center to assess the emerging situation. An RRCC may be fully or partially activated. Facilities, such as mobilization centers, may be established to accommodate Federal personnel, equipment, and supplies.
2. Immediately after a major incident, tribal and/or local emergency personnel respond and assess the situation. If necessary, those officials seek additional resources through mutual aid and assistance agreements and the State. State officials also review the situation, mobilize State resources, use interstate mutual aid and assistance processes such as the Emergency Management Assistance Compact to augment State resources, and provide situation assessments to the DHS/Federal Emergency Management Agency (FEMA) regional office. The Governor activates the State emergency operations plan, declares a state of emergency, and may request a State/DHS joint Preliminary Damage Assessment (PDA). The State and Federal officials conduct the PDA in coordination with tribal/local officials as required and determine whether the impact of the event warrants a request for a Presidential declaration of a major disaster or emergency. Based on the results of the PDA, the Governor may request a Presidential declaration specifying the kind of Federal assistance needed.
3. After a major disaster or emergency declaration, an RRCC coordinates initial regional and field activities until a JFO is established. Regional teams assess the impact of the event, gauge immediate State needs, and make preliminary arrangements to set up field facilities. (If regional resources are or may be overwhelmed or if it appears that the event may result in particularly significant consequences, DHS may deploy a national-level Incident Management Assistance Team (IMAT).)
4. Depending on the scope and impact of the event, the NRCC carries out initial activations and mission assignments and supports the RRCC.
5. The Governor appoints a State Coordinating Officer (SCO) to oversee State response and recovery efforts. A Federal Coordinating Officer (FCO), appointed by the President in a Stafford Act declaration, coordinates Federal activities in support of the State.
6. A JFO may be established locally to provide a central point for Federal, State, tribal, and local executives to coordinate their support to the incident. The Unified Coordination Group leads the JFO. The Unified Coordination Group typically consists of the FCO, SCO, and senior officials from other entities with primary statutory or jurisdictional responsibility and significant operational responsibility for an aspect of an incident. This group may meet initially via conference calls to develop a common set of objectives and a coordinated initial JFO action plan.
7. The Unified Coordination Group coordinates field operations from a JFO. In coordination with State, tribal, and/or local agencies, Emergency Support Functions assess the situation and identify requirements. Federal agencies provide resources under DHS/FEMA mission assignments or their own authorities.

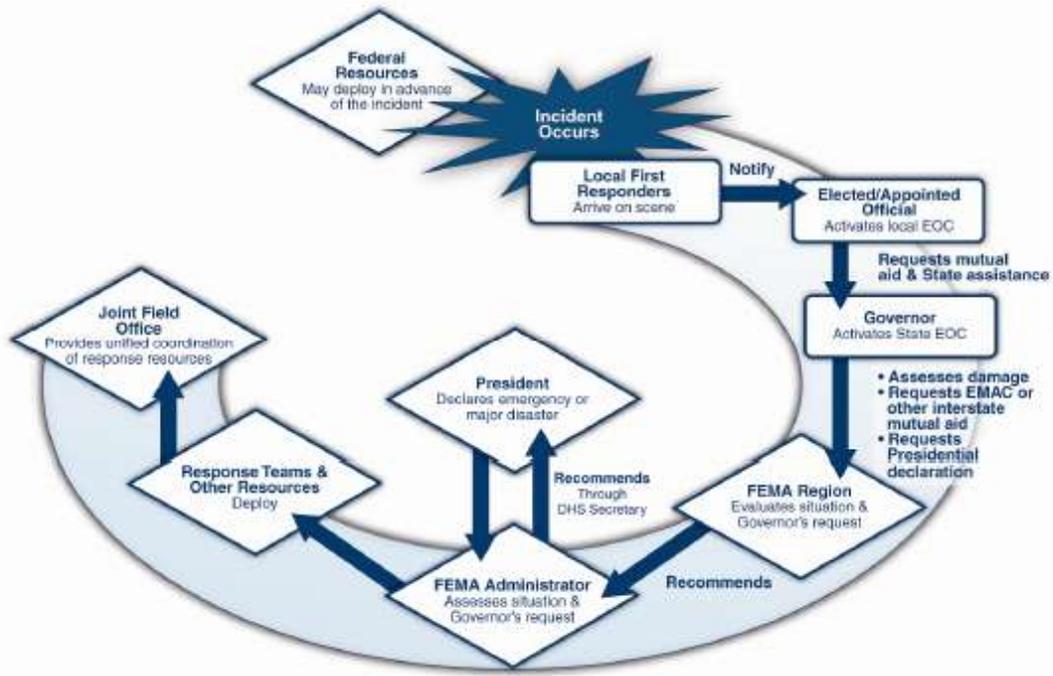
National Response Framework: Stafford Act Support to States

1 of 2

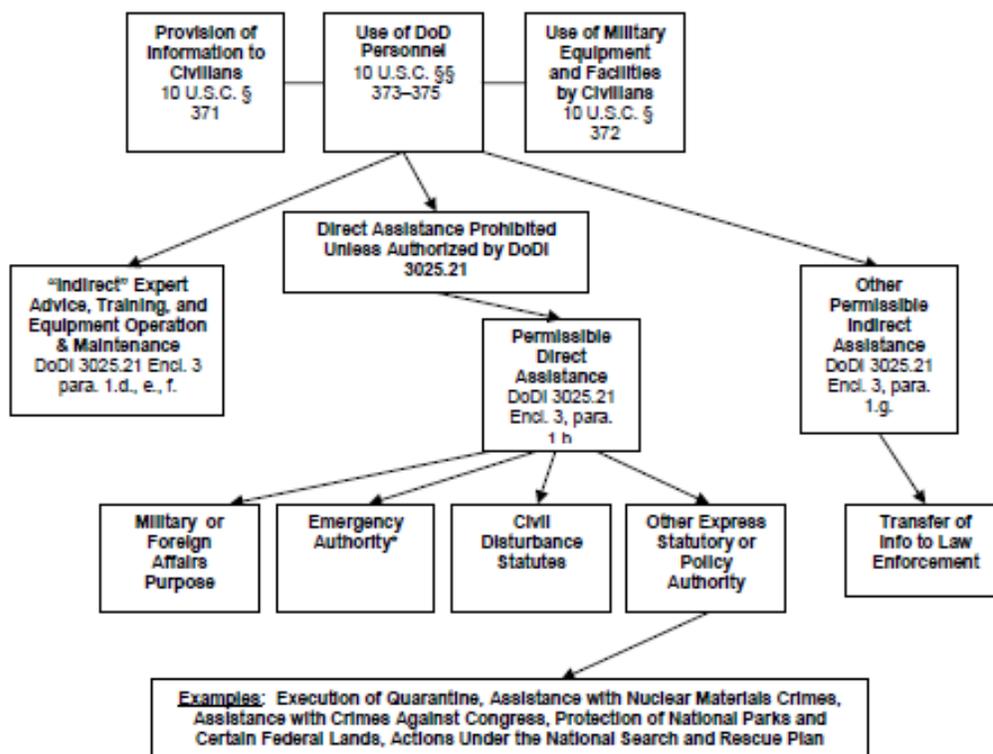
¹¹⁷ *Overview of Stafford Act Support to States*, FEMA.GOV, available at <http://www.fema.gov/pdf/emergency/nrf/nrf-stafford.pdf> (last visited June 4, 2015).

8. As immediate response priorities are met, recovery activities begin. Federal and State agencies assisting with recovery and mitigation activities convene to discuss needs.
9. The Stafford Act Public Assistance program provides disaster assistance to States, tribes, local governments, and certain private nonprofit organizations. FEMA, in conjunction with the State, conducts briefings to inform potential applicants of the assistance that is available and how to apply.
10. Throughout response and recovery operations, DHS/FEMA Hazard Mitigation program staff at the JFO look for opportunities to maximize mitigation efforts in accordance with State hazard mitigation plans.
11. As the need for full-time interagency coordination at the JFO decreases, the Unified Coordination Group plans for selective release of Federal resources, demobilization, and closeout. Federal agencies work directly with disaster assistance grantees (i.e., State or tribal governments) from their regional or headquarters offices to administer and monitor individual recovery programs, support, and technical services.

The following chart summarizes Stafford Act support to States.



Posse Comitatus Act Chart



*See DoDD 3025.18 (U.S. DEP'T OF DEFENSE, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (21 Sept. 2012) to distinguish Emergency Authority from Immediate Response Authority.

Figure 4-1

¹¹⁸ THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, DOMESTIC OPERATIONAL LAW HANDBOOK FOR JUDGE ADVOCATES 73 (2013).

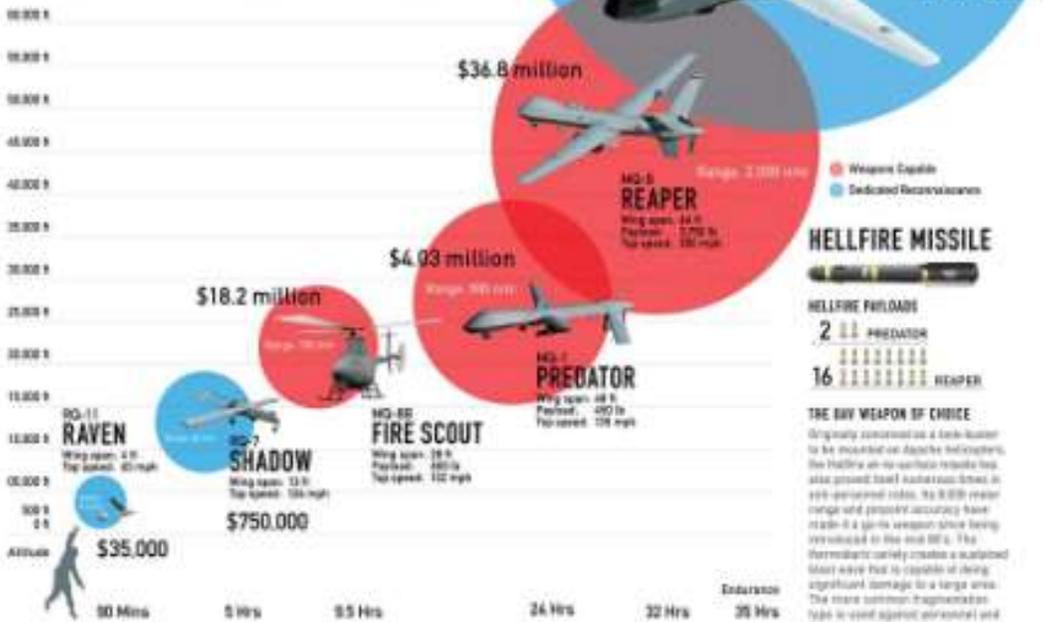
Ground-Based Operational Surveillance Systems



¹¹⁹ *Ground Based Operational Surveillance System, Marine Corps Base Camp Pendleton, MARINES*, <http://www.pendleton.marines.mil/StaffAgencies/AssistantChiefofStaffG35/TrainingSupportDivision/TrainingDevices/GroundBasedOperationalSurveillanceSystem.aspx> (last visited June 4, 2015).

US DRONE CAPABILITIES

Unmanned Aerial Vehicles and systems have existed since at least 1914, but it is only through recent advancements in technology that they have become such a formidable force. These six aircraft represent the diverse spectrum of the US drone program. From the all-seeing Global Hawk, to the deadly Predator, and ultra-portable Raven, there's a system for every mission.



MQ-42 GLOBAL HAWK
Wing span: 102 ft
Payload: 2,000 lb
Top speed: 402 mph

Range: 5,400 nautical miles

\$140.9 million

\$36.8 million

MQ-9 REAPER
Wing span: 44 ft
Payload: 2,700 lb
Top speed: 330 mph

Range: 2,000 miles

\$4.03 million

MQ-1B PREDATOR
Wing span: 48 ft
Payload: 400 lb
Top speed: 310 mph

Range: 2,000 miles

\$18.2 million

MQ-7 SHADOW
Wing span: 33 ft
Top speed: 100 mph

MQ-1A1 RAVEN
Wing span: 4 ft
Top speed: 25 mph

\$35,000

HELLFIRE MISSILE

HELLFIRE PAYLOADS



THE BAY WEAPON OF CHOICE

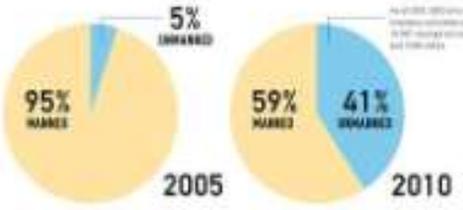
Originally conceived as a tank-killer to be mounted on Apache helicopters, the Hellfire air-to-surface missile has also proved itself a versatile weapon in air-to-ground roles. Its 8,000 meter range and pinpoint accuracy have made it a go-to weapon since being introduced in the mid 80's. The thermobaric warhead creates a scalded blast wave that is capable of doing significant damage to a large area. The more common fragmentation type is used against personnel and light targets, while a shaped-charge warhead variant is used against armor plating and highly reliable. It is the weapon of choice for both the Predator and Reaper drones.

OPTICS THE EYE IN THE SKY

A thousand miles of UAVs is their powerful optics. Even the tiny Raven has a wide-angle, high-magnification camera that can see well during inclement conditions. Though the Global Hawk's optical suite is the most powerful, the powerful cameras, including an electro-optical infrared imaging system, and Synthetic Aperture Radar, make a single UAV capable of surveying an area the size of Illinois.

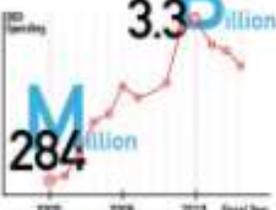
MANNED VS. UNMANNED

Due to the recent explosion in UAV production and shipments in earnest efforts, manned aircraft inventory have gone from 80% of all 2010 aircraft to 28% by 2015.



UAV SPENDING

2010 spending on UAVs has increased from \$260 million in 2007 to \$2.2 billion in 2010.



*All figures reflect publicly available information. Different sources and interpretations of the same aircraft will have different capabilities and costs. Source: US House of Congress, U.S. Unmanned Aerial Systems, January 2010, as well as various websites. www.flytheboom.com

¹²⁰ Tech: The 6 Drones You Need to Know About, HEAVY (Feb. 11, 2013), <http://heavy.com/tech/2013/02/the-6-drones-you-need-to-know-about/>.

Kill Anything That Moves¹

Reviewed by Major Jeniffer G. H. Cox*

There are more civilians killed here per day than [Viet Cong (VC)] either by accident or on purpose and that's just plain murder. I'm not surprised that there are more VC. We make more VC than we kill by the way these people are treated. I won't go into detail but some of the things that take place would make you ashamed of good old America.²

I. Introduction

Kill Everything That Moves: The Real American War in Vietnam is a compelling and discomfiting account of American atrocities against Vietnamese civilians during the Vietnam War.³ The author, Nick Turse, convincingly argues that the mass carnage against civilians was not the result of many poor or immoral small unit and individual choices, but rather the consequence of deliberate decision making at the strategic level by America's leadership. Supported by graphic stories of murder, rape, and pillage, Turse portrays a disturbing systematic dehumanization of the Vietnamese people and a portrait of American political and military leaders who either refused to take the necessary action to stop war crimes or actively encouraged their commission.⁴ Turse further attempts to re-humanize and memorialize those who suffered from American atrocities, including Soldiers who tried and failed to raise concerns over the conduct of their fellow Soldiers.⁵

Combining first person accounts with primary source materials, Turse uses a journalistic background to present a sobering account of America's decisions in Washington, actions in Vietnam, and the disturbing results. The stories in this book provide judge advocates historical context for advising commanders engaged in combat operations, and

highlight how focusing on specific mission metrics at the expense of ethical considerations could lead to war crimes. Judge advocates have an opportunity to use the stories in this book to provide context for commanders, to recognize situations where metric focus could lead to war crimes, and to give advice to prevent the same.⁶

II. Means and Methods

Turse initially came upon inspiration for this book by accident: an archivist at the National Archives handed Turse the records of the Vietnam War Crimes Working Group while he was researching another topic for his graduate program.⁷ Turse instantly recognized that the files "[d]ocumented a nightmare war that is essentially missing from our understanding of the Vietnam conflict."⁸ He spent the next twelve years performing further research and wrote this book to fill the gap.

Turse weaves together his exhaustive research to form a comprehensive and well integrated analysis of American atrocities.⁹ Personal accounts from survivors and Soldiers on both sides of the conflict, criminal investigations, government records, and news media accounts are knit together to support his argument that decision-making at the highest levels devolved into merciless killing in rural villages. Turse particularly explores the United States' use of statistical methodologies for war-time decision making.¹⁰

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¹ NICK TURSE, *KILL ANYTHING THAT MOVES* (2013).

² Turse, *supra* note 1, at 120 (footnote omitted).

³ *Id.*

⁴ For example, the author names Major General Julian Ewell and Colonel John Donaldson, among others, as leaders who encouraged brutality to raise body counts, who were never punished for their actions. *Id.* at 200–04 and 207–12. Major General Ewell was awarded and promoted to Lieutenant General at the end of his tour. *Id.* at 214.

⁵ See *id.* at 214–20, where a "Concerned Veteran"—a whistleblower—contacted American military leadership with specific allegations of war crimes describing a "My Lay [sic] each month for over a year," and naming specific leaders who encouraged the crimes. He sent several follow-up letters, which were forwarded to the Army General Counsel, who instituted a special investigation, which was summarily scuttled by General Westmoreland on the advice of an Army undersecretary because the complaints were anonymous. *Id.*

⁶ Focus on the specific role of judge advocates in Vietnam is beyond the scope of this book. For more information on that topic, see FREDERIC L. BORCH III, *JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTH EAST ASIA 1959–1975* (1989).

⁷ Turse, *supra* note 1, at 14.

⁸ *Id.* at 14. "Today, histories of the Vietnam War regularly discuss war crimes in the context of a single incident: the My Lai massacre . . . all the other atrocities perpetrated by U.S. soldiers have essentially vanished from popular memory." *Id.* at 2.

⁹ Turse's approach lends credibility to his arguments and earned him numerous reporting awards and honors, including a Ridenhour Prize for Reportorial Distinction, a Guggenheim Fellowship, and a fellowship at Harvard University's Radcliffe Institute for Advanced Study. *Id.* (author's biography, unpaginated).

¹⁰ For example, the author tellingly notes that "[w]hile the U.S. military attempted to quantify almost every other aspect of the conflict—from the number of helicopter sorties flown to the number of propaganda leaflets dispersed, it quite deliberately never conducted a comprehensive study of

The means and method used to evaluate American actions in Vietnam starkly contrast with the statistical “indicator of success” that he believes led to the atrocities.¹¹ Turse places the blame for the Department of Defense’s statistics-driven culture squarely on the shoulders of Secretary of Defense Robert McNamara: “He relied on numbers to convey reality and like a machine, processed whatever information he was given with exceptional speed, making instant choices and not worrying that such rapid fire decision-making might lead to grave mistakes. There was to be no ‘fog of war’ for his Pentagon.”¹² Pentagon officials espoused and operated under a philosophy that if Americans reached a point where they were killing more enemy troops than there were troops to replace them, then the enemy would surrender and the conflict would be concluded.¹³ This philosophy focused on America’s superior firepower and the rationality of the enemy.¹⁴

Turse succinctly describes the Pentagon’s clear misunderstanding of the enemy¹⁵ and how as a result, “body count” became the only “measure of success” in battle.¹⁶ Turse is mainly concerned with the sheer number of civilians slaughtered as a consequence of the Pentagon’s failure to adjust course in the face of an enemy that failed to comply with rational principles, and not the mere existence of the body count as a statistical measure.¹⁷ He describes the entire strategy as absurd: “[d]ay after day, patrol after patrol, U.S.

Vietnamese noncombatant casualties.” *Id.* at 12 (footnote omitted). There is no official count of the number of noncombatant casualties, but recent statistical analysis places the number of deaths close to 2 million and the number of injuries at 5.3 million. *Id.* at 13. The author identifies multiple studies attempting to quantify the total number of casualties, civilian casualties, wounded, and dead. He uses the studies as a baseline for the overarching thesis recognizing that even the “most sophisticated” analysis likely underestimates the number of casualties. *Id.* at 12–13.

¹¹ *Id.* at 42 (footnote omitted).

¹² *Id.* (footnote omitted).

¹³ *Id.* (“The statistically minded war managers focused, above all, on the notion of achieving a ‘crossover point’: the moment when American soldiers would be killing more enemies than their Vietnamese opponents could replace.”).

¹⁴ *Id.* at 42 (footnote omitted); 78 (“Pentagon’s war managers never gave up their conviction that American technological prowess would ensure victory.”).

¹⁵ *Id.* at 42 (footnote omitted) (“What McNamara and the Pentagon Brass failed to grasp was that Vietnamese nationalists . . . might not view warfare as a straightforward exercise in benefit maximization to be pursued in a ‘rational manner’ and abandoned when the ledger sheet showed more debits than credits.”).

¹⁶ *Id.* at 43 (footnote omitted); see also Donald Fisher Harrison, *Computers, Electronic Data, and the Vietnam War*, 26 ARCHIVARIA 18, 22 (Summer 1988) (discussing statistical reporting systems and how units were judged using body count and kill ratios).

¹⁷ Turse, *supra* note 1, at 42–43 (“The war managers, of course, gave little thought to what this strategy—basing the entire American military effort on such an indicator as Vietnamese corpses—might mean for Vietnamese civilians.”). As an illustration, for the 9th Infantry Division during a particularly brutal campaign, the kill ratio increased to 134:1, but the number of enemy troops did not decline. *Id.* at 209 (footnote omitted).

troops wandered around the countryside spoiling for a fight—trying to goad a lightly armed enemy to abandon all sense and stand toe-to-toe in open battle with the best armed military in the world.”¹⁸

The Commander of American forces in Vietnam, General Westmoreland, embraced the strategy despite some commanders and career officers balking at a strategy determined largely by statistics.¹⁹ General Westmoreland’s enthusiastic support of this new method of warfare translated into “killing quotas,” “incentivizing of death,” and purposeful inclusion of civilian casualties to increase the body count.²⁰ In the end, “[t]he practice of counting all dead Vietnamese as enemy kills became so pervasive that one of the most common phrases of the war was: ‘If it’s dead and Vietnamese, it’s VC.’”²¹

Turse lays out how the means to achieve the body count blatantly ignored the principles of the law of war in place to protect civilians.²²

A sound from the tree line? Hose it down with machine-gun fire. A sniper shot from the ville? Hit the hamlet with napalm. A hunch that an area might have enemy fighters in it? Plaster it with artillery fire. A Saigon-appointed Vietnamese official identifies a village as an enemy stronghold? Bomb it back to the stone age.²³

It was not unusual for commanders to order Soldiers to “kill anything that moves,” including non-combatants, live stock, and crops.²⁴

Turse spends the majority of the book presenting, in gruesome detail, American atrocities committed by individual Soldiers, patrols, platoons, and on to brigade size

¹⁸ *Id.* at 51 (footnote omitted).

¹⁹ Harrison, *supra* note 14, at 22–23 (describing the close personal relationship between McNamara and Westmoreland and the integration of statistical analysis into the war planning effort).

²⁰ Turse, *supra* note 1, at 44–48 (footnotes omitted).

²¹ *Id.* at 47 (footnote omitted).

²² Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 27–34, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (providing for the respect and humane treatment for all civilians in an international armed conflict and specifically protecting against acts of violence including rape, murder, torture, corporal punishment, punishment from offenses committed by others, and pillage).

²³ Turse, *supra* note 1, at 78–79.

²⁴ *Id.* at 53 (describing search and destroy as code for shoot anything that moves), 89 (footnote omitted) (“anything that moves dies”), 94–96 (detailing use of herbicides to destroy crops and fire to burn entire hamlets), 111–12 (referring to orders to level entire villages if receiving any fire). These examples are representative of a theme presented throughout the book. See also, BORCH *supra* note 6, at 28 (citation omitted) (categorizing all U.S. operations in Vietnam as search and destroy missions, clearing operations, or securing operations).

elements. In fact, an entire chapter, entitled “A Litany of Atrocities,” recounts numerous horrors committed in two geographically separated provinces.²⁵ Turse argues that atrocities were widespread and undertaken with tacit, if not overt, support of the higher chain of command, following a common, established metric.²⁶ Descriptions of similar events, throughout the book, separated by time and geography and conducted by different units, under different command personalities, support Turse’s argument.²⁷ Turse recounts stories of troops murdering prisoners on order of their commander in 1968, and murdering children and reporting them as enemy troops by order of the commander in 1969. He describes General Westmoreland’s declaration, in 1967, that intensification of U.S. operations would “make it impossible” for a civilian to “stay put and follow his natural instinct to stay close to the land, living beside the grave of his ancestors.”²⁸

III. Dehumanization and Dissociation

Turse manages to present these stories without demonizing individual Soldiers. He depicts how the systematic dehumanization of the Vietnamese people, and concurrent dissociation of American Soldiers from their actions, began in basic training, continued when called to the battlefield, and ultimately led to the atrocities committed by U.S. Forces.²⁹

“Recruits were indoctrinated into a culture of violence and brutality, which emphasized above all a readiness to kill without compunction.”³⁰ This was a readiness to achieve the body count immediately upon arrival in Vietnam, no

questions asked.³¹ Racism was rampant, pervasive, and specifically targeted to prevent Soldiers from visualizing the enemy as human beings.³² Leaders and Soldiers alike described Vietnam and its people as “a piddling piss ant country,” a “backward nation,” and “the garbage dump of civilization.”³³

Commanders ordered “search and destroy” missions and used the “amorphous” Rules of Engagement (ROE) to justify attacks on unarmed villagers.³⁴ Turse elaborates on how commanders often sought approval from South Vietnamese counterparts before strafing villages, and he describes commanders who gave copies of the ROE without providing any training on the contents.³⁵ These types of actions were designed to achieve “plausible deniability” for their actions, while still increasing the overall body count.³⁶

Soldiers received brief training on the Law of War and Rules of Engagement from the chaplain upon arriving in country,³⁷ but it “was soon apparent to many young officers that few at headquarters knew or cared much about the details in the field—beyond the stats, that is.”³⁸ Murder, rape, pillage, torture, and destruction without remorse were the norm. Technological advances allowed Soldiers to fire from a distance without necessarily observing the carnage and to do so just for the “thrill of it.”³⁹

Turse reports that atrocities were an everyday occurrence, but little resulted from reporting the incidents.⁴⁰

²⁵ Turse, *supra* note 1, at 108–43.

²⁶ *Id.* at 97 (performance of raids with “full knowledge, consent and participation” of Troop Commander); 142–43.

While we have only fragmentary evidence about the full extent of civilian suffering in South Vietnam, enough similar accounts exist so that roughly the same story could have been told in a chapter about Binh Dinh Province in the mid-1960s, Kien Hoa Province in the late 1960s, or Quang Tri Province in the early 1970s, among others. The incidents in this chapter were unbearably commonplace throughout the conflict and are unusual only in that they were reported in some form or recounted by witnesses instead of vanishing entirely from the historical record.

Id. (footnote omitted).

²⁷ *Id.*

²⁸ *Id.* at 46, 49, 65 (footnotes omitted).

²⁹ *Id.* at 26–27 (describing how boot camp created a tabula rasa of recruits allowing the military to indoctrinate recruits with racist ideas and manipulate their psyches to reduce reluctance to kill).

³⁰ *Id.* at 27 (footnote omitted).

³¹ *Id.* at 30 (explaining the lack of detailed instruction about the law of war).

³² *Id.* at 50. “The notion that Vietnam’s inhabitants were something less than human was often spoken of as the ‘mere gook rule’ This held that all Vietnamese—northern and southern, adults and children, armed enemy and innocent civilians—were little more than animals, who could be abused at will.” *Id.*

³³ *Id.* at 49 (footnotes omitted).

³⁴ *Id.* at 56–58.

³⁵ *Id.* at 54–55.

³⁶ *Id.*

³⁷ *Id.* at 30. Responsibility for promulgating law of war training has shifted to The Judge Advocate General. Soldiers must receive training on the law of war annually and before deployment by a judge advocate or paralegal noncommissioned officer. U.S. DEP’T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT para. 2-16, app. G-21 (4 Aug. 2011).

³⁸ Turse, *supra* note 1, at 57.

³⁹ *Id.* at 158–59 (firing for the thrill of it), 160 (treating the Vietnamese as subhuman), 166–167 (linking male sexuality to violence resulting in sexual assault as a standard operating procedure to obtain information about the enemy).

Some individuals who spoke out against these actions were ostracized and threatened by their fellow Soldiers; many of the allegations were never investigated, or, if they were, the investigations were buried.⁴¹ Turse argues that the lack of consequences for their actions only increased Soldiers' dissociation from the carnage: all that mattered was the appearance of "battlefield success"—the body count.⁴² Ultimately, Turse navigates past the body count to provide the reader with an insight into the daily horrors of the Vietnam War and the systems that perpetuated the cycle of humanitarian abuses.

IV. Memorials and Conclusions

The dedication of the book is "[f]or all those who shared their stories—and for those with stories yet to be told."⁴³ Nick Turse's motivation to give faces and names back to the individual victims of American atrocities is evident throughout the book. He names the victims, describes small local memorials, and includes photographs.⁴⁴ There is no Vietnam Veterans Memorial (VVM) for the millions of Vietnamese civilians who lost their lives, livelihoods, and

families.⁴⁵ Just as family members leave sentimental items at the VVM, Turse has been inundated by letters, calls, and other tangible tokens from survivors, family members, and veterans.⁴⁶ Turse recognizes that even his comprehensive review could not possibly cover every person or story and concludes, "[i]n the end, these blank spots in the history books will tell the story. They will be the final testament, the lasting legacy of the real American war in Vietnam."⁴⁷

Judge advocates have an opportunity to use the stories and legacy presented in this book to advise commanders and teach Soldiers to recognize how laser focus on particular metrics can lead to erroneous decisions. Current Army leadership recognizes that all Soldiers, not just judge advocates, must incorporate "ethical reasoning" into operational decision-making.⁴⁸ As judge advocates, we have the opportunity and responsibility to recognize the second and third order effects that political pressures or outside influences may have on the decision-making process, and must articulate concerns in a constructive manner to help commanders achieve mission success. We must also recognize when the metrics of mission success may become a forcing function that leads to war crimes, and we should provide commanders with alternative, practical courses of action.

Judge advocates should integrate themselves into the military decision-making process and operational planning by building trust with other staff members. As General Odierno said, "The foundation of our profession is centered on trust. . . . [I]t will take every measure of competence and commitment to forge ahead and above all it will take character."⁴⁹ Turse successfully presents a critique of the overall U.S. policy in Vietnam and manages to craft a compelling recognition of the cost—measured in human suffering, not body count. This book should be required cautionary reading for judge advocates endeavoring to become trusted legal advisors, at every level of command, in the age of asymmetric warfare.

⁴⁰ *Id.* at 184–87 (describing Commanders' reluctance to prosecute and Army practice not to prosecute Soldiers once they left Active Duty), 192 ("culture of defensiveness"); *see also* BORCH, *supra* note 6, at 35.

At the same time, American soldiers also committed war crimes, and from 1965–1973 there were 241 cases (besides My Lai) alleging war crimes committed by Americans. After investigation, 160 of these were found to be unsubstantiated. Thirty-six war crimes incidents, however, resulted in trials by courts-martial on charges ranging from premeditated murder, rape, and assault with intent to commit murder or rape to involuntary manslaughter, negligent homicide, and the mutilation of enemy dead. Sixteen trials involving thirty men resulted in findings of not guilty or dismissal after arraignment. Twenty cases involving thirty-one soldiers resulted in conviction. Punishments varied. . . . In at least one court case, a soldier convicted of manslaughter received only an admonishment.

Id.

⁴¹ Turse, *supra* note 1, at 41 (command level failure to take action), 193 (dubbing whistleblowers as malcontents), 196 (successful use of good Soldier defense), 199–200 (detailing the results of several courts-martial and describing witness tampering), 218 (whistleblower complaint forwarded to general counsel, no investigation launched), 219–21 (whistleblower complaints ignored), 241 (strategically drawing out investigations and tampering with witnesses to impede courts-martial).

⁴² *Id.* at 229–30. After the My Lai incident came to light, the Pentagon instituted a deliberate strategy of suppression and withholding of information and developed the War Crimes working group to warn of and deal with allegations of war crimes as individual incidents causing an image problem. *Id.* at 229–33.

⁴³ *Id.* (dedication).

⁴⁴ *Id.* at 20 (describing multiple local memorials to the victims of massacres).

⁴⁵ The Vietnam Veterans Memorial currently contains 58,272 names of Americans who served in Vietnam. It does not include "[c]ancer victims of Agent Orange, and post traumatic suicides" because they do "not fit the criteria for inclusion," and "some have calculated that it would take another two or more entire Walls to include all the names in those two categories alone." *The Wall-USA, VIETNAM VETERANS MEMORIAL*, <http://thewall-usa.com/information.asp> (last visited May 28, 2015). Unfortunately, coverage of these tragic deaths was also outside the scope of this book.

⁴⁶ Turse, *supra* note 1, at 263.

⁴⁷ *Id.* at 268.

⁴⁸ CENTER FOR THE ARMY PROFESSION AND ETHIC, *THE ARMY ETHIC WHITE PAPER 7* (2011).

⁴⁹ General Ray Odierno, Chief of Staff of the Army, Address at the U.S. Military Academy Graduation Banquet (May 27, 2014).

American Spartan: The Promise, The Mission, and the Betrayal of Special Forces Major Jim Gant¹

Reviewed by *Lieutenant Commander Naa Ayeley Akwei-Aryee**

*Remember: Whoever does me in will be wearing a U.S. Army uniform, with a Special Forces tab.*²

I. Introduction

A Spartan is a person of great courage and self-discipline, undaunted by pain or danger.³ This definition is apt to show how the reviewer views the principal character in *American Spartan*, Army Special Forces Major Jim Gant.⁴ Written by Ann Scott Tyson, the wife of Major Gant, it is a riveting true story of love, war, organizational failures, and human relationships.

Major Gant enlisted in the Army in 1986,⁵ straight out of high school. He passed the Special Forces selection in 1988,⁶ and, despite the injuries he sustained during his training, he pressed on until he attained the Green Beret.⁷ Gant later served as a communications sergeant in the 1990-91 Persian Gulf War, and he received training as an intelligence analyst.⁸ In 1996, he commissioned as a second

lieutenant in the Infantry.⁹ He deployed to Afghanistan in 2003 and 2004, and he deployed to Iraq in 2006 and 2007.¹⁰

During his tours in Iraq, Gant became legendary among the Iraqi population for his love of the local people, and they returned his affection with fierce loyalty. Later, he earned the prestigious Silver Star for heroism in Iraq for leading his Special Forces team. Returning from Iraq, he distilled his theories on counterinsurgency into a monograph, titled *One Tribe At a Time: A Strategy For Success In Afghanistan*, which was read by important leaders like General David Petraeus¹¹ and Admiral Eric Olson.¹² High-level military officers like General Petraeus said “Gant was the perfect counterinsurgent,” and Admiral Olson believed that Gant held the key to winning the war in Afghanistan through Village Stability Operations.¹³ Gant’s paper served as a strategic catalyst and helped lay the groundwork for formulating a plan for raising local forces nationwide.

Although greatly admired, Gant’s unconventional tactics and flouting of the rules during his deployment in Iraq eventually proved too much. For example, Gant refused to delay a mission in order to allow military teams to clear the Improvised Explosive Devices (IEDs) he spotted on a route.¹⁴ He also consumed liquor in the mission area,¹⁵ and he was addicted to painkillers.¹⁶ On one occasion despite a lockdown imposed on U.S. troops because of anti-American protests, Gant left base.¹⁷ Ultimately, Gant was fired and

¹ ANN SCOTT TYSON, *AMERICAN SPARTAN: THE PROMISE, THE MISSION, AND THE BETRAYAL OF SPECIAL FORCES MAJOR JIM GANT* (2014).

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² *Id.* at 230, 301 (quoting Jim Gant).

³ MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/spartan> (last visited Sept. 3, 2014).

⁴ The author effectively piques the reader’s interest early on in the prologue when she describes the “ritual ceremony” performed by Gant by slitting long, deep gashes between the thumb and index finger of his left hand. TYSON, *supra* note 1, at 3. This instantly makes readers visualize his heroic exploits and the fact that he is willing to die for what he believes in.

⁵ TYSON, *supra* note 1 at 8.

⁶ *Id.* at 9.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ General Petraeus was in charge of U.S. military forces in the Middle East and Central Asia and head of U.S. Central Command (CENTCOM). *Id.* at 12. Petraeus was largely responsible for the Army’s new counterinsurgency (COIN) doctrine, Field Manual 3-24, published in December 2006. *Id.* at 24.

¹² *Id.* at 8. Admiral Olson was the Commander of U. S. Special Operations Command at the time Gant’s monograph was published.

¹³ Military operations at the village level to raise local defense forces, to bring in development opportunities, and create ties to district governments in Afghanistan. A grassroots initiative, it became the focus of the U.S. Special Forces, Navy SEAL, and Marine Special Operations Forces (Green Berets), Rangers, and Civil Affairs Soldiers. *Id.* at 374.

¹⁴ *Id.* at 51.

¹⁵ *Id.* at 52.

¹⁶ *Id.* at 80.

¹⁷ *Id.* at 283. He also hired mercenaries without approval from Higher Command and at times wrote his own Standard Operating Procedures.

stripped of his prized Special Forces tab after First Lieutenant (1LT) Thomas Roberts submitted a statement alleging that Gant had refused to report his own injuries after an IED explosion, used alcohol in the operational theatre, along with other acts of misconduct. Robert's claim prompted a formal investigation and eventually led to Gant's humiliating retirement.¹⁸

Instead of simply launching into the war in Afghanistan, the author begins by describing how she became a journalist. Tyson is an investigative journalist,¹⁹ and had been involved with significant work in China where freedom of speech is not guaranteed. She had also covered the war in Afghanistan since 2001 and the invasion of Iraq in 2003.²⁰ She was present in the war zone with Gant in 2003. Tyson uses this experience and competence as a veteran war correspondent and her experience in combat situations to write *American Spartan*. She is therefore able to catapult the reader into the combat zone with her impressive detail and she can express the sights and sounds of combat from her perspective. Tyson's writing enables the reader to visualize the scenes by creating a graphic presentation of gruesome fights with the Taliban and of the atmosphere that permeated the local Afghan community both for the Americans and the Afghans. This is worth commending as it gives facts which other sources unfamiliar with the region cannot chronicle.²¹ Tyson was also a correspondent for the *Washington Post*, and was present at important military briefings. She also had the additional opportunity to interview important figures such as General David Petraeus, Admiral Eric Olson, and Senator John McCain, among others prior to and during the writing of *American Spartan*.²² The reader admires her

resilience and perceives her as prepared to surmount any obstacle in order to carry her message.²³

II. Lessons Learned

The book describes, in real time, the harsh effects of combat on Soldiers. Gant has been in such intense combat that images keep flashing through his head.²⁴ He hears the voice of Hecate, the Greek goddess of war,²⁵ rummages through garbage, and sleeps fitfully.²⁶ He also imagines himself a reincarnated Spartan.²⁷ Tyson is able to portray how war wounds the minds of Soldiers and the vulnerability of even those who appear strong and unshakable like "Spartan Gant." "It is tempting to agree that this is one of the most troubling things that happen to elite troops after their country has kept them in combat for more than a decade."²⁸ This book is an important read for servicemembers; it brings home the point of combat stress and demonstrates that protracted stays in combat zones invariably have negative effects on the Soldier.

American Spartan is filled with instances of strong cords of friendship, trust, and displays of loyalty. For example, Gant and his men were practically adopted by Afghan families in the village in their area of operations.²⁹ The Mohmand tribal leader, Noor Afzhal, promised to protect Major Gant as he would his own son, and he was true to his word.³⁰ He was happy to admit that Gant made decisions for him.³¹ The tribal intelligence network routinely tipped off Gant and his men to danger, and gave them critical information which led to the capture of a target.³² The Americans and Afghans ate the same food.³³ This connection to the people struck General Petraeus, when he

¹⁸ 1LT Roberts submitted his statement in March of 2012. By the end of the year Gant had been reprimanded, stripped of his rank and his Special Forces tab and forced to retire. *Fall of Green Beret Officer Jim Gant: Drugs and Booze in Deadly Lands*, ABC NEWS (Jun. 25, 2014, 3:25 PM), <http://abcnews.go.com/Blotter/fall-green-beret-officer-jim-gant-drugs-booze/story?id=24301847>.

¹⁹ *Id.* at 6.

²⁰ *Id.* at 63.

²¹ Tyson includes some simple but useful maps at the beginning of the book before the prologue of the Konar and Mangwel village area where the Tribe lived, enabling the reader to visualize the setting for the book. *Id.* at 184-85. (pictures found between these pages). She also includes numerous photographs in the center of the book. These pictures tell their own story. They depict the close relationship that existed between Gant and his "father" Noor Afzhal, the other members of the Tribe, the Afghan locals, Afghan culture, and support the author's assertions. The picture of First Lieutenant Thomas Roberts is of particular significance as it enables the reader to put a face to the character that is so demonized by the author for submitting a statement to the military top brass accusing Jim of misconduct, prompting the formal investigation. *Id.* The author provides a powerful description and analysis of Pashtun culture. The reviewer indeed learned more about the Tribal culture in Afghanistan than had been learned years of listening to the news since the war began.

²² *Id.* at 25, 262.

²³ *Id.* She did some investigative journalism, covered Congress during the Clinton impeachment, and also wrote articles for the *Christian Science Monitor* after the September 11 terrorist attacks. *Id.* at 3. She uses these instances to staunchly establish her capability to write this book.

²⁴ *Id.* at 10. In November 2006 for example, the vehicle in which MAJ Gant was riding was hit by a massive IED and caught fire trapping him inside. His head and body were smashed against the windshield.

²⁵ *Id.* at 52.

²⁶ *Id.* at 251.

²⁷ *Id.* at 139, 140.

²⁸ *Id.* at back cover (quoting Gunner Sepp, a former Green Beret and co-author of *Weapon of Choice: U.S. Army Special Operations in Afghanistan*).

²⁹ *Id.* at 104.

³⁰ *Id.* at 107.

³¹ *Id.* at 193.

³² *Id.*

³³ *Id.* at 149.

visited the tribe, as extraordinary.³⁴ When Gant was suddenly removed from the operational theater, the local population made repeated attempts to make contact with him and maintain the relationship they had built even after Gant lost his command.³⁵

Throughout the book, Gant exhibits his love for his men.³⁶ It echoes Sun Tzu, in his book *The Art of War*,³⁷ when he notes, “Regard your soldiers as your children, and they will follow you into the deepest valleys; look on them as your own beloved sons, and they will stand by you even unto death.” Gant’s men were prepared to stand by him because he had protected them like his own children.³⁸ Unfortunately, the men he led failed woefully to guide him or tell him where to stop, contributing to his fall in the military.

Although Gant was fired by the Army he so cherished and lost his coveted Special Forces tab,³⁹ the problems with Special Forces Operations are still very much alive. This is a book that would especially resonate with people who are interested in Special Forces. However, the lessons are timeless and applicable to all in uniform. Tyson has contributed immensely to the unearthing of red flags that exist in operations, such as failures of organizational leadership.

Unfortunately, why Gant was allowed to stay in combat is a question left unanswered. Commanders who seized on his fresh ideas, skills, and reputation did not look out for his welfare. Perhaps it goes to show how selfish those in the higher echelons can be. Some leaders may care about their own rising star at the expense of those who work under them. Though Gant spoke openly about his Post Traumatic Stress Disorder (PTSD) to his chain of command, it was blatantly ignored.⁴⁰ Even after he was involved in an IED explosion, he was not taken out of the combat zone.

The military bureaucracy had their opening to criticize Gant after the investigation into his alleged misconduct began and when Gant’s “godfathers”⁴¹ exited the scene. There were those who had clearly resented him when he was singled out and praised for his heroic exploits and the success of his operations. Special Forces Colonel Mark Schwartz, who had previously recommended Gant for promotion to the rank of Lieutenant Colonel,⁴² changed his tone to one of shock and disgust after the investigations into the alleged misconduct of Gant began, calling his actions “inexcusable” and “despicable.”⁴³ Lieutenant General John Mulholland, who previously offered to give his full support to Gant and his team,⁴⁴ openly lambasted Gant and called him a disgrace to the Special Forces. Lieutenant General Mulholland feared that reports in the tabloids would be similar to those that covered Vietnam after the war,⁴⁵ and he underscores the fact that political use of the military still occurs. Gant’s superiors were so bent on protecting the image of the Special Forces from the reputation of a rogue outfit that they sacrificed one of their own.⁴⁶ They considered it better for Gant to be sent away than to tarnish the image of the force.

During his final tour in Afghanistan, his command failed to advance Gant additional funds for operations to train the *Arbakai*.⁴⁷ Gant therefore had to resort to borrowing heavily from the very people that he was tasked to help. Requests for basic needs to keep his unit alive were routinely denied.⁴⁸ Gant and his unit had asked for air support on several occasions during attacks and received no support, yet two separate helicopters were sent to pick up Captain Dan McKone, who was Gant’s Second-in-Command, and Gant after the investigation.⁴⁹

³⁴ *Id.* at 208.

³⁵ The distortion on their faces when he was picked up, the quest of the large group of elders to ask for Gant’s return, the support given to Tyson to sneak her out of the camp, and her protection are all instances that support the strong theme of friendship. *Id.* at 308, 325. Gant’s second-in-command, Dan McKone, was also prepared to go to jail with Gant. *Id.* at 308.

³⁶ *Id.* at 308, 311 (“I will go to prison for you I will die for you.”). *Id.*

³⁷ SUN TZU, *THE ART OF WAR* (1913) (ancient Chinese military general and tactician).

³⁸ The author of this review finds this particularly intriguing as it brings to light the fact that even in war, when friendships must be sacrificed at the altar of battle, friendships are instead built and stand the test of time.

³⁹ TYSON, *supra* note 1, at 350 (“The proudest day of my life.”). *Id.* at 130.

⁴⁰ *Id.* at 92.

⁴¹ The reviewer used the word “godfathers” to note that Gant found support and inspiration from others like he had found in General Petraeus and Admiral Olson.

⁴² *Id.* at 337.

⁴³ *Id.*

⁴⁴ *Id.* at 59.

⁴⁵ *Id.* at 344. Mulholland says, “The politics of this are an absolute nightmare.” *Id.*

⁴⁶ Joseph Collins, *War on the Rocks*, available at <http://warontherocks.com/author/joseph-collins/> (last visited Sept. 5, 2014).

⁴⁷ A traditional Afghan tribal police force, especially prevalent in eastern Afghanistan, that protects tribal territory and upholds the decisions of tribal leaders. Tyson, *supra* note 1, at 369.

⁴⁸ TYSON, *supra* note 1, at 292. For example, Gant was not given resources to build observation posts, money to hire donkeys to help ferry supplies, tents, blankets, ammunition, and heavy weapons. *Id.*

⁴⁹ *Id.* at 316. There was an investigation into the allegations of the conduct of MAJ Gant. The allegations included alcohol consumption in theatre, misuse of pain medication, misappropriation of government funds, misuse of fuel, falsifying documents and a potential inappropriate relationship with Ms. Ann Tyson. *Id.* at 299.

Points of special interest to the judge advocate (JA) are not so nicely packaged in the book; however, their impact is felt. For example, the unit JA read Major Gant his rights and told him what he was to do and not to do.⁵⁰ Furthermore, the JA was consulted before punishment was meted out to Major Gant.⁵¹ Judge advocates will continue to deploy to Afghanistan and Iraq and other parts of the world. It is important that they understand some of the discipline problems that rear their ugly heads in the operational theater.⁵²

III. Negative Aspects of *American Spartan*

“When one is in love, a cliff becomes a meadow.”⁵³ This is exactly how Tyson portrays her unflinching support for Gant. Her admiration for him is cast in stone.⁵⁴ She unapologetically loses her journalistic objectivity,⁵⁵ and her bias is evident due to her relationship with him. Any attack on him affects her and hence her inability to hide her emotions. Tyson lived clandestinely with Gant while in the operational theater. Living with Gant in a war zone was unethical in military circles and ran contrary to the rules and regulations of the mission. Furthermore, Tyson was secretly engaging in combat operations.⁵⁶ At times it is difficult to decipher if the writer is a reporter, an author, a lover, or a soldier.⁵⁷

Tyson praises Gant and rationalizes his addictions. For example, she still believes that Gant was not a danger to himself or to others, even after he put the barrel of his AK-

47 rifle in his mouth and pulled the trigger.⁵⁸ Furthermore, she desperately tries to rationalize the presence of pornographic pictures in the room she shared with Gant by indicating that it was a common occurrence in the operational setting,⁵⁹ and that the possession of alcohol was a norm rather than the exception.⁶⁰ Though Gant recognized his own shortcomings and lack of discipline, the writer does not. She argues that Gant’s misdeeds were ultimately unsubstantial and particularly irrelevant when weighed against the service he rendered to his country.⁶¹ She portrays that whether Gant is a victim or a hero is in the eyes of the beholder, and for her the latter holds sway.

She uses the epilogue as an important literary tool to add insight to interesting developments in the war, and to try to convince the reader that her hero should be everyone’s hero too, especially since Osama bin Laden had read Gant’s article, *One Tribe At A Time*, mentioned him by name in propaganda, and considered him an impediment to Al Qaeda’s operational objectives.⁶² Proclaiming Gant a hero at all costs and laying blame at the doorsteps of everyone who dissented considerably diminishes her objectivity.

The author professes her admiration for the military,⁶³ but this must be measured against her unabated bashing of the military. From the onset, she compares the challenge of reporting on the armed forces to news gathering in China.⁶⁴ Tyson identifies numerous challenges in the armed forces such as bureaucracy and extreme mistrust of outsiders.⁶⁵ However, she falls short in her understanding of the military in general. The military is about law, order, and discipline—principles that Gant was unable to uphold.⁶⁶ Moral courage and candor are essentials for any organization to thrive. Their absence prevents wrongs from being righted. A professional officer must question and disobey unlawful

⁵⁰ *Id.* at 320.

⁵¹ *Id.* at 345.

⁵² The author of this review has served on a number of UN Peacekeeping Operations and has advised commanders on disciplinary measures for soldiers and officers who contravene standing orders of the camp, and therefore identifies that such problems exist in every operational setting.

⁵³ *Ethiopian Saying, Old Sayings and Proverbial Wisdom*, HISTORY OF PAINTERS, http://www.historyofpainters.com/ethiopia_proverbs.htm (last visited Sept. 4, 2014). Ethiopian proverb, meaning love makes insurmountable things look easy. *Id.*

⁵⁴ TYSON, *supra* note 1, at 126. She mentions that she had met hundreds of military officers who were talented, brave, and smart, but none driven by his love for his men as Gant.

⁵⁵ *Id.* at 82 (“As most would view it, I crossed over to the dark side professionally by becoming involved with Jim, and he with me. I saw it differently.”).

⁵⁶ Collins, *supra* note 46.

⁵⁷ TYSON, *supra* note 1, at 288 (“Take him off the gun.”); *id.* (Picture of the author cleaning weapons after training and posing playfully with Gant’s M4 carbine and AK47 rifles), *id.* at 303. She learned how to fire almost every weapon. She wore military fatigues and her job was to pass ammunition to the gunner.

⁵⁸ *Id.* at 256.

⁵⁹ *Id.* at 302, 335.

⁶⁰ *Id.* at 335.

⁶¹ James Norton, *American Spartan*, CHRISTIAN SCI. MONITOR, Apr. 24, 2014, available at <http://www.csmonitor.com/Books/Book-Reviews/2014/0424/American-Spartan>.

⁶² TYSON, *supra* note 1, at 359.

⁶³ *Id.* at 7 (explaining how impressed Tyson was by the sacrifices that those in uniform made by leaving their families time and again to go where they had been ordered).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 8, 38, 52, 63, 80, 100, 131, 241, 290, 294–95. Gant’s hair was too long, and he kept sideburns that were not in regulation; unlawfully outfitted the locals; frequented whorehouses; engaged in fistfights; engaged in self-medication and used drugs; wore unauthorized shoulder patches; wrote his own Standard Operating Procedures; failed to report to his higher command; hired mercenaries; and armed the *arbakai* with weapons meant for U.S. Soldiers, among other infractions.

orders. Consequently, Tyson's apparent dislike for young 1LT Roberts, who reported Gant's misconduct, is unfounded. Her personal animosity is seen in the prose she uses to describe Roberts.⁶⁷ Her sarcasm is evident when she asserts that he was hailed by the chain of command as a whistle-blower and a paragon of moral courage.⁶⁸ She tries to cover up her bias by stating that he was detested by others as well.⁶⁹ In the glossary, she again highlights the contribution of the young lieutenant to the downfall of Gant.⁷⁰

IV. Conclusion

Ann Tyson's *American Spartan* is an invigorating read for military and civilian alike. Despite her bias, the book offers a unique perspective on love, war, loyalty, and organizational failure. As a veteran war correspondent, Tyson offers an unparalleled account of the conflict in Afghanistan while discussing friendship, unwavering loyalty, and the harsh effect of combat on Soldiers. In a world dominated by wars, the book will have influence for both the military and policy makers. The war in Afghanistan still rages, and an understanding of the strengths and weaknesses of Gant's strategy are still very useful. "Achilles absent, is Achilles still."⁷¹

⁶⁷ *Id.* at 341 (describing Roberts as an inexperienced officer who was insecure and uncomfortable with the leadership qualities possessed by Gant).

⁶⁸ *Id.*

⁶⁹ *Id.* at 317.

⁷⁰ *Id.* at 364.

⁷¹ *Id.* at 355. Although Achilles is not present, his presence is still felt through his influence on those who remain. Achilles makes this statement to Hector after mortally wounding him to avenge his friend, Patroclus, whom Hector had killed while Patroclus wore Achilles's armor. Achilles was not present in battle when Hector killed his friend, yet Achilles influenced the battle and Hector should have known that Achilles would avenge the act and kill Hector. *Id.* The reviewer used this to underscore the importance of Gant and what he stands for. Though no longer in the Army, his presence will still be felt for years to come.

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PERIODICALS

By Order of the Secretary of the Army:

RAYMOND T. ODIERNO
General, United States Army
Chief of Staff

Official:

A handwritten signature in white ink, appearing to read "Gerald B. O'Keefe". The signature is stylized and written in cursive.

GERALD B. O'KEEFE
Administrative Assistant
to the Secretary of the Army
