



# THE ARMY LAWYER

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**Procuring Expertise in a Pinch: How to Retain Expert Witnesses for Courts-Martial Quickly and Legally**

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**Animal Abuse: Crimes and Concerns**

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## Lore of the Corps

### From a Teenager in China to an Army Lawyer in America: The Remarkable Career of Judge Advocate General John L. Fugh (1934-2010)

By Fred L. Borch  
Regimental Historian & Archivist

While many Army lawyers have rewarding careers, few match the achievements in uniform of John Liu Fugh. Born in Beijing, China in 1934, Fugh came to the United States as a teenager in 1949 and, after graduating from law school, joined the Judge Advocate General's Corps in 1960.<sup>1</sup> For the next thirty-two years, Fugh soldiered as a judge advocate, and made history in 1984 as the first American of Chinese ancestry to reach flag rank.<sup>2</sup> When Major General John Fugh retired from active duty in 1993, he was the top lawyer in the Army and one of only two Chinese-Americans to reach two-star rank. This is the story of his remarkable life and career.

John Liu Fugh was born Fu Liu-ren on September 12, 1934, in Peking, now Beijing, China.<sup>3</sup> The Fugh family was related to Chinese royalty by blood, which meant that the family had a higher status in Chinese society. But they also were third-generation Christians and this explains why his father, Philip, became the private secretary to Dr. John Leighton Stuart, a well-known Presbyterian missionary and educator. Stuart was American (his family were southerners from Alabama), but he had been born in China and was fluent in Chinese. He needed a Chinese assistant, especially after founding a Christian university, called Yenching University, in 1919. Philip Fu was the perfect choice, for he had attended Yenching, spoke English well, and was a Christian. After traveling with Dr. Stuart to the United States in the 1920s—and to make it easier to get along in English-speaking America—Philip Fu added “gh” to the spelling of the family name, so that it became “Fugh”.<sup>4</sup> Philip remained

with Stuart as Yenching grew into one of the top universities in China.

At the end of World War II, with the Communists and Nationalists in open conflict with each other after the surrender of the Japanese, General George C. Marshall, then serving as Secretary of State, was looking for a way to bring the two factions together. He recommended that Dr. Stuart be named the top diplomat in China and, when President Truman agreed, Philip Fugh became the private secretary to U.S. Ambassador Stuart. He accompanied Stuart to peace talks held in Nanjing (Nanking). These talks failed and, in the civil war that followed, the



Sixteen-year-old John Fugh's entry visa



Major General Fugh, the 33d Judge Advocate General

Communists triumphed and the Nationalists fled to Taiwan. As for the Fugh family, 14-year old John Fugh and his mother were trapped in Beijing. Life was unbearable. The Communists, who knew about father Philip's relationship with Ambassador Stuart, would routinely visit the Fugh home at three or four in the morning, take John Fugh's mother, Sarah, away, and then pepper them with questions: “Where is your father? How much money do you have? Where are your guns and ammunition? Where are your secret documents?”<sup>5</sup>

Before the People's Republic of China was formally established in October 1949, the Fughs decided that their lives were in danger and that they had to get out of Beijing. Sarah and John managed to receive an exit visa for Hong Kong and, once present in this British colony, applied to come to the United States. They could only gain entry as “temporary

<sup>1</sup> Memorandum from Lieutenant Colonel Richard Kuzma, for The Judge Advocate General, subject: Chinese-American Flag Officer (29 Dec. 1992).

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

<sup>3</sup> Adam Bernstein, *General Served as Army's Top Lawyer in Gulf War's Wake*, WASH. POST, May 12, 2010, at B5.

<sup>4</sup> STEPHEN PATOIR & CHRISTIAN ROFRANO, AN ORAL HISTORY OF JOHN L. FUGH 2 (2001).

<sup>5</sup> *Id.* at 3, 11-12.

visitors,” however, since Congress had imposed severe restrictions on the number of Asians permitted to immigrate.<sup>6</sup>

Having received permission to come to the United States, the Fughs in 1950 sailed by ship to Japan and Hawaii, and then reached San Francisco. John Fugh, by then 16 years-old, spoke little English. But his parents were determined to make a new life for him and placed him in a private school in New Rochelle, New York. He boarded with a woman and her daughter who lived near the school; it was a very lonely existence. Meanwhile, Fugh’s father and mother had settled in Washington, D.C., where Philip Fugh remained as Ambassador Stuart’s private secretary.<sup>7</sup>

Having learned enough English, young Fugh now enrolled in Western High School in the Georgetown neighborhood of Washington, D.C., and, after graduating in 1953, entered Georgetown University’s School of Foreign Service. Fugh’s plan was to remain a Chinese citizen and then join the Chinese diplomatic service. When he graduated with a B.S. degree in international relations in May 1957, however, Fugh realized that this was going to be impossible: The Communists were not about to welcome the son of a prominent Nationalist into their fold, and the Fughs no longer had connections to the government in Taiwan. A career as a U.S. diplomat was not open to him either, since applicants at the time had to have been citizens for at least ten years before they could take the Foreign Service examination.<sup>8</sup>

This citizenship conundrum existed because of the manner in which the Fugh family had come to the United States. Initially, they had been in a temporary visitor status and had to renew their visas every six months. In June 1952, however, with the help of Ambassador Stuart, Congress passed a private bill that gave Philip, Sarah and John Fugh “permanent residence” status starting the five-year period after which the Fughs could apply for citizenship. John Fugh did, in fact, become a naturalized citizen in 1957.<sup>9</sup> But, not having being able to sit for the Foreign Service exam, and with no other practical skills, he decided to go to law school at George Washington University.<sup>10</sup>

Just before graduating in 1960, and with his student deferment years at an end, Fugh received an induction notice from the Selective Service; the peacetime draft was calling him to the profession of arms. After travelling to Fort Holabird, Md., for his pre-induction physical, 25-year-old John Fugh realized that he did not want to serve two years as an enlisted soldier when he could serve as a lawyer—and as a commissioned officer. In 1960, he accepted a commission as

a first lieutenant in the Army’s Judge Advocate General’s Corps. As Fugh put it in a 2001 oral history, he joined because he “had a sense of obligation. My family managed to come to this country, and I owed something for being here. Military service was a payback.”<sup>11</sup>

In 1961, First Lieutenant Fugh completed eight weeks of Infantry officer training at Fort Benning, Ga., and then reported to The Judge Advocate General’s School, Charlottesville, Virginia, for the basic course in military law.<sup>12</sup> He graduated in May 1961 and went to his first assignment with the Sixth Army at the Presidio in San Francisco, California. He did the usual legal work for a young JAG officer, defending soldiers at courts-martial, reviewing reports of survey and conducting line of duty investigations.<sup>13</sup>

As for the unusual, Fugh was the legal advisor to a board of senior officers appointed to inquire into the capture of two Army aviators by the North Koreans. In early 1964, those two pilots, Captains Ben Stutts and Carlton Voltz, had been on a mission over the

Demilitarized Zone and had mistakenly crossed into North Korea. After developing engine trouble, the two men decided to land their helicopter—not realizing they were on North Korean soil. They were taken prisoner and, after being interrogated, gave much more information than name, rank and service number: They admitted under pressure that they had been on a spy mission. After their release several months later, the board investigated whether the two officers had violated the Code of Conduct while prisoners and whether any such violation was a criminal offense. It concluded after two months of testimony that the men had committed no crimes under the Uniform Code of Military Justice and were blameless.<sup>14</sup>



*Fugh, left, with his three sisters in Beijing, 1944*

Although Fugh relished the camaraderie in the legal office and liked the military lifestyle, the pay was low and

<sup>6</sup> *Id.* at 4-5.

<sup>7</sup> *Id.* at 5-6.

<sup>8</sup> *Id.* at 7.

<sup>9</sup> An Act for the Relief of Philip Fugh, Sarah Liu Fugh, and John Fugh, Priv. L. No. 82-745, 66 Stat. A112 (1952).

<sup>10</sup> Patoir & Rofrano, *supra* note 3, at 6-7.

<sup>11</sup> *Id.* at 7-8.

<sup>12</sup> U.S. Dep’t of Army, DA Form 640-2-1, Officer Record Brief, John L. Fugh (July 1993).

<sup>13</sup> Patoir & Rofrano, *supra* note 3, at 25-26.

<sup>14</sup> *Id.* at 31-34.

Fugh left active duty at the end of his three-year commitment to take a job as an attorney with the Atomic Energy Commission in the San Francisco area.<sup>15</sup>

In July, 1960, Fugh married his wife, June, and had an infant daughter Justina. Civilian life in Berkeley was good for Fugh, but he found he missed the Army's "culture" and "cohesiveness and togetherness."<sup>16</sup> After his old boss at Sixth Army encouraged him to return to the Army, Fugh did just



*Fugh as a Major in 1968*

—returning of the JAG Corps in November, 1964 after a six-month break in service. He came back on active duty with a Regular Army commission and a tour of duty at U.S. Army, Europe, in Heidelberg, Germany.<sup>17</sup>

For the next three years, Captain Fugh worked as the recorder for officer elimination boards, and did some work as an action officer reviewing administrative law matters. But his favorite assignment was as the Deputy Chief for Procurement Law, and his main job was to try cases before the USAREUR Board of Contract Appeals. The jurisdictional limit of the Board at the time was \$50,000, or more than \$380,000 in today's dollars—a significant amount of money in the 1960s. By the time Major Fugh left Heidelberg in 1967 (with toddler son Jarrett joining daughter Justina), he had become an expert in both fiscal law and contract law, which he enjoyed because "it gets down to the bottom line—which is money."<sup>18</sup>

Fugh also had his first taste of working "at the international level" when he was selected to be the legal advisor to the U.S. Representative on the North Atlantic Treaty Organization (NATO) Missile Firing Installation Users Committee. Hawk missiles were being deployed to Europe and the NATO countries were constructing a missile firing site on the island of Crete. There was a User Countries meeting every six weeks, in either Paris or Athens, and Captain Fugh was required to attend, prepare position papers for the U.S. representative and coordinate with high-powered legal advisors from other countries. The most contentious legal issue involved the Greek insistence that contracts for food and other supplies for the firing site go to local national

businesses while the United States and other European representatives wanted competitive bidding. For Fugh, the chief "take-away" from this experience was that an officer often had to think like a diplomat. As he put it: "You can't always say what you think . . . in handling a situation that may be thorny."<sup>19</sup>

The only down-side to his Germany experience was that Fugh tired of being thought of as Japanese. There were still Germans of a certain mind-set who remembered that the Third Reich had been allied with Japan in World War II and, thinking that Fugh was of Japanese ancestry, would believe he was a kindred spirit. Initially Major Fugh, having suffered through the Japanese occupation of China as a boy, would correct these Germans and inform them that he was Chinese. After a while, however, he stopped.<sup>20</sup>

In September, 1967, now Major Fugh returned to Charlottesville to attend the year-long Advanced Course for Army lawyers and, after graduating in May 1968, deployed to Vietnam. Assigned to U.S. Army, Vietnam (USARV), Fugh served as the Deputy Staff Judge Advocate and Chief, Civil Law Division. This latter position meant that he had overall responsibility for all legal matters at USARV except for military justice and foreign claims. Fugh advised on the Geneva Conventions, labor contracts, real estate and currency controls and personnel claims. The work tempo was fast; Fugh worked seven days a week, with only Sunday afternoons off.<sup>21</sup>

But Fugh understood that he had it easy compared with judge advocates in the field. On one occasion, he accompanied the USARV Staff Judge Advocate on a trip to the 101st Airborne Division, then located at Camp Eagle near the Demilitarized Zone. After the USARV lawyers arrived, they had difficulty finding their 101st counterparts, as there were no permanent structures at Camp Eagle apart from "a shack used as the PX."<sup>22</sup> Finally, Fugh found the SJA office, which "was a CONEX container half buried in the ground with a tent in front of it."<sup>23</sup> There was a small wooden sign at the tent entrance that read "SJA." When Fugh walked in; it was impossible to tell who was an officer or who was enlisted, because everyone was bare-chested in the intense tropical heat. As Fugh remembered it, he had brought a six-pack of Coke, and this "small gift" was very much appreciated. "It was a poignant visit. Here I was sitting in air-conditioned USARV offices while my colleagues worked under these severe conditions."<sup>24</sup> To get a better understanding of what troops in the field were experiencing, Fugh also volunteered to serve as part of the aircrew on helicopters flying combat support missions. He was awarded the Air Medal for

<sup>15</sup> *Id.* at 19, 37.

<sup>16</sup> *Id.* at 20, 37, 63.

<sup>17</sup> *Id.* at 20, 41-42.

<sup>18</sup> *Id.* at 44.

<sup>19</sup> *Id.* at 47-48.

<sup>20</sup> *Id.* at 45-46.

<sup>21</sup> *Id.* at 68-69.

<sup>22</sup> *Id.* at 69.

<sup>23</sup> *Id.*

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

“actively participating in twenty-five aerial missions over hostile territory” between January and May 1969.<sup>25</sup>

While his year in Vietnam was a positive experience, Fugh was bothered by “the way our troops viewed the Vietnamese.” Given his Chinese background, he did not like the term “gooks.” As he put it: “I understand we were fighting a war, but I think there was also a racial component.”<sup>26</sup> Fugh remembered one case where a soldier had killed a South Vietnamese civilian while driving recklessly—yet received only non-judicial punishment under the Uniform Code of Military Justice. In another case, soldiers on sentry duty saw an old Vietnamese man on a bicycle and decided “to take him out.” The men shot and wounded him; then they killed him. “They viewed the Vietnamese as though they were not even human. Being an Asian, that bothered me.”<sup>27</sup>

After Vietnam, John Fugh got his dream assignment: the Military Assistance Advisory Group (MAAG) to the Republic of China. While in Vietnam, Fugh had been to Taiwan on temporary duty and, after arriving at the airport in Taipei, was surprised that he could understand everything that was being said by the Taiwanese officials, who spoke Chinese rather than Taiwanese. As a result, Fugh asked for an assignment to the MAAG. Initially, this request was refused because, as his assignments officer told Fugh: “We don’t send Frenchmen to France.”<sup>28</sup> This seemed to be a foolish perspective and Major General Lawrence Fuller, the second-highest ranking lawyer in the Army, thought so too. Fuller approved Fugh’s assignment to Taipei as the MAAG staff judge advocate. This was a big deal: The incumbent was a full colonel and Fugh would be replacing him, yet he was still only a major.<sup>29</sup>

From the beginning, Fugh’s experience was quite remarkable. He not only understood the language, but the culture too. As for the Taiwanese, they were unsure about this American Army officer. At a cocktail party, for example, Fugh was talking with a Taiwanese woman in Mandarin. After some time, she said to him: “Tell me, are you with us or with them?” Fugh’s reply: “I’m with them.”<sup>30</sup> Later, when Fugh participated in negotiating sessions with the Taiwanese authorities, he realized that they were whispering among themselves because they were concerned that he might overhear their conversation.<sup>31</sup>

Although he was in Taipei to provide legal support, Major Fugh’s unique talents caused him to be heavily involved in negotiating a variety of agreements with the Ministry of National Defense. Fugh also often accompanied the MAAG commander, who was an Army major general,

when the latter would give a speech to ensure that the talk was translated accurately.<sup>32</sup>

After three years in Taiwan, Fugh attended the Command and General Staff College. After graduating in May 1973, newly promoted Lieutenant Colonel Fugh reported to be the



*Fugh serving with the First Cavalry at Camp Evans in 1968*

Staff Judge Advocate and Legal Counsel for the Ballistic Missile Defense Office in Arlington, Virginia. Until 1976, he worked on a variety of very high level procurement issues involving not only missiles, but also phased-array radar and supporting equipment, as well as installation facilities.<sup>33</sup>

In 1976, Fugh returned to Germany as the Staff Judge Advocate, 3d Armored Division. This was a plum assignment, but Fugh was apprehensive because his expertise was in procurement, administrative and civil law and the division was a “heavy-duty military justice” operation. Additionally, while Fugh had previously served as the top Army lawyer in Taiwan, that assignment had been in a small office. The 3d Armored Division job involved providing legal services to some 29,000 soldiers and supervising one major and 30 captains in six different offices. Fugh, however, quickly established a good rapport with Major General Charles J. Simmons, the 3d Armored Division commander. In Fugh’s view, part of his success was due to his insistence—which he communicated at regular meetings to the captains in his legal operation—that they “do what’s right” and adhere to the highest professional and ethical standards. At the end of his assignment, Simmons frequently (and publicly) identified Fugh and his Inspector General as the two officers he valued the most on his staff.<sup>34</sup>

<sup>25</sup> Headquarters, U.S. Dep’t of Army, Gen. Order No. 5641 (27 June 1970).

<sup>26</sup> Patoir & Rofrano, *supra* note 3, at 69-70.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 74.

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

<sup>30</sup> *Id.* at 82.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 83.

<sup>33</sup> *Id.* at 89-91.

<sup>34</sup> *Id.* at 97, 103-04.

After his job at the 3d Armored Division ended, Fugh attended the Army War College. After graduation in 1979, the Fugh family moved to Washington, D.C., where Fugh assumed duties as Special Assistant for Legislative and Legal Policy Matters, Office of the Assistant Secretary of Defense. It was the first time that Fugh had served in the Pentagon, but he excelled in this high profile position and worked a number of politically-sensitive issues. Those included whether the American Federation of Government Employees would be permitted to unionize the military, the extent to which former (usually civilian) spouses of military personnel were entitled to a portion of their military retired pay, and whether the services should have a uniform policy on administrative separations for homosexual conduct.<sup>35</sup> At this high level, Fugh worked to find a middle ground that was acceptable to as many interests as possible. As he put it:

I'm not saying that you've got to be political in giving an answer. What I'm saying is that your answer must be legally correct, but more important is how you present it. You can guide your listener to the right decision without sounding confrontational or argumentative about it.<sup>36</sup>

In 1982, now Colonel Fugh became the Chief of the Army's Litigation Division. This was an immensely important job, and very challenging, as Fugh was representing the Secretary of the Army in federal court litigation. He had overall responsibility for ten divisions: contract law; civilian personnel law; litigation; procurement fraud (which he established); environmental law (which Fugh also stood up); contract appeals; defense appeals; trial defense service; regulatory law; and intellectual property.<sup>37</sup>

Success in this position certainly accounts for Fugh being promoted to brigadier general on August 1, 1984. This was a historical first in the U.S. Army—the first time in history that an American of Chinese ancestry had reached flag rank.<sup>38</sup> Just as today, there were very few Chinese-Americans in uniform in the 1980s. According to Fugh, this was the result of a bias against military service in Chinese culture. Those Chinese who desired a career with the government in imperial China, for example, looked for positions as civil servants. “Good iron is not used to make a nail, nor a good man to become a soldier” was an old Chinese proverb, and Fugh believed this explained why a ‘good man’ would seek to be a civilian official rather than a soldier. His military career, he readily admitted, was an anomaly.<sup>39</sup>

With one star on each shoulder, Fugh now assumed duties as the Assistant Judge Advocate General for Civil Law.

In this new job, he expanded the role of Army lawyers by helping establish a one-year fellowship program at the Department of Justice and arranging for experienced judge advocates to be appointed as Special Assistant U.S. Attorneys to prosecute felonies in U.S. District Courts near large Army posts, such as Fort Bragg, North Carolina.<sup>40</sup>



Retired Major General Robert Murray with Fugh in 2008

In July 1988, Brigadier General Fugh returned to China for the first time since he had fled with his mother in 1949. He accompanied General Max Thurman, who was then commander of Training and Doctrine Command, and who would later serve as Army Vice Chief of Staff. The purpose of the trip was to have greater military-to-military contact with the People's Liberation Army. Just as he had experienced when assigned to the MAAG in Taiwan, the Chinese questioned Fugh's allegiance. In Shanghai, a young woman asked Fugh in Chinese why he was wearing an American uniform. “Are you a counterfeit? Are you a fraud? If there's a war between China and the United States, which side will you be on?” Fugh stopped, looked at her and replied, “Which side do you think I'll be on?” That was the end of the conversation.<sup>41</sup>

In May 1989, Fugh was nominated to be a major general and to serve as The Assistant Judge Advocate General. Major General William K. Suter, then serving as The Assistant Judge Advocate General, was nominated to be The Judge Advocate General.<sup>42</sup>

In the two years that followed, however, there was considerable personnel turbulence in the JAG Corps. As a result, in mid-1991, Fugh was a major general; he had been confirmed as the number two lawyer in the Army in late 1990. Major General Suter, however, who had been pending

<sup>35</sup> *Id.* at 116-17.

<sup>36</sup> *Id.* at 142.

<sup>37</sup> *Id.* at 122-26.

<sup>38</sup> Kuzma, *supra* note 1.

<sup>39</sup> Patoir & Rofrano, *supra* note 3, at 227.

<sup>40</sup> *Id.* at 133-34.

<sup>41</sup> *Id.* at 146.

<sup>42</sup> *Id.* at 182.

confirmation to be The Judge Advocate General, had not been confirmed; he retired after the Senate declined to advance him to the top spot in the JAG Corps. (Although his military career was at an end, Suter soon began a very prestigious second career as the Clerk of the U.S. Supreme Court—the top judicial administration job in the country.)<sup>43</sup>

Personnel glitches at the brigadier general-level in the Corps also meant that when Fugh pinned on his second star, there were no more judge advocate one-stars. When Fugh had been nominated for a second star, this triggered the retirement of his fellow brigadier generals who had not been selected for promotion. But, as no colonels had had been selected and confirmed to be brigadier generals, Fugh was the lone active duty general officer in the Corps. Consequently, during operations Desert Shield and Desert Storm (which ran from August 1990 to February 1991), while officially acting as the number two lawyer in the Army, Fugh was wearing all the general officer ‘hats’ in the JAG Corps.<sup>44</sup>

In the high operational tempo of combat operations in Southwest Asia, Major General Fugh got a number of novel questions—and got them at all hours. Late one evening, for example, the Deputy Chief of Staff for Personnel asked Fugh if there would be an “environmental problem” if the Iraqis used chemical or biological weapons against U.S. troops, and if the remains of those killed by such weapons were transported to the United States for burial. When an Army UH-60 was shot down over Iraq and its crew taken prisoner and paraded on Baghdad television, the Defense Department’s top lawyer called Fugh on Sunday morning to get advice on the applicability of the Geneva Conventions to this event.<sup>45</sup>

Fugh was also asked about decisions made by judge advocates in the field. He received a telephone call in the middle of the night from a Marine brigadier general in Saudi Arabia. This officer was calling on behalf of General H. Norman Schwarzkopf, who was questioning legal advice provided by Colonel Raymond P. Ruppert, the top lawyer at U.S. Central Command. The issue was whether a statue of Saddam Hussein, located in a prominent park in Baghdad, could be targeted by U.S. Central Command aircraft. This was prior to the start of the ground war, but the air campaign was under way and there was a great desire on the part of “our pilots” to “take it out.”<sup>46</sup> Ruppert, however, advised against destroying the statue; he argued that it was not militarily necessary and would arguably constitute a violation of the law of armed conflict.<sup>47</sup> ‘Was this good legal advice?’ asked the Marine general. As Fugh remembered it, when he arrived in

the Pentagon a few hours later, he studied some aerial photographs of the statue in the park and the surrounding area. There was no question that Colonel Ruppert was correct. Fugh then made a telephone call to the Marine one-star to confirm both the legality and wisdom of Ruppert’s legal advice, but he made sure that this call was placed to Saudi Arabia in the middle of the night.<sup>48</sup>

The 100-hour war with Saddam Hussein ended in February 1991; Fugh was elevated to be The Judge Advocate General on April 2, 1991. He subsequently implemented a number of changes to the JAG Corps. One was a new policy on term limits: judge advocates serving as either The Judge Advocate General or The Assistant Judge Advocate General (today’s Deputy Judge Advocate General) were limited to four year terms. That is, the Assistant TJAG could not ‘flight up’ to become the TJAG. Additionally, any judge advocate one-star not selected for promotion was required to retire. In Fugh’s view, these reforms were necessary to ensure that deserving colonels had opportunities for promotion to flag rank—opportunities that were limited when one person could be the number two lawyer in the Army and then move up to the top spot.<sup>49</sup>

Fugh also decided that the time had come to better integrate Army Reserve lawyers into the active duty JAG Corps. There had been no overseas deployment of Army Reserve troops for many years (Reservists did not participate in the Vietnam conflict). Yet, of the more than 270 judge advocates who had deployed to the Persian Gulf region in 1990, one-third were from the Reserve. Recognizing the important contributions of these Reservists—and understanding that they would play an important role in future military operations—Major General Fugh directed that the Corps’ world-wide legal conference, previously restricted to active duty judge advocates, now include Army Reserve and National Guard lawyers.<sup>50</sup>

<sup>43</sup> Michael Kirkland, *Under the U.S. Supreme Court: Bill Suter Stepping Down after 22 Years*, UPI, <http://www.upi.com/Under-the-US-Supreme-Court-Bill-Suter-stepping-down-after-22-years/95101358075280/> (last visited June 27, 2016).

<sup>44</sup> Patoir & Rofrano, *supra* note 3, at 186.

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

<sup>46</sup> *Id.* at 201.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 193.

<sup>50</sup> *Id.* at 137.

Finally, for the first time in JAG Corps history, Fugh spearheaded efforts to create a vision for the Corps. He wanted “a succinct statement that would inspire, be clear and challenging, be about excellence, stand the test of time ... be a beacon to guide us, and empower our people.”<sup>51</sup> As a result, in April 1991, Fugh approved the following vision for the Corps: “to be the most competent, ethical, respected, and client-supportive group of legal professionals in public service.”<sup>52</sup> While wording has changed over the years, the spirit of Major General Fugh’s vision for the delivery of legal services in the Army very much remains in place more than 25 years later.<sup>53</sup>

Fugh retired in 1993, after two years as The Judge Advocate General. He could have stayed in this position until 1995, but decided that “it was time to go because ... the JAG Corps needed new leadership.”<sup>54</sup>

Fugh initially joined a large law firm but, after less than a year, was hired by McDonnell Douglas to head up its operations in China. It was the perfect position for John Fugh, given his background and expertise. He and his wife, June, took up residence in Beijing in August 1995, and Fugh began working with the Chinese aviation community. Since McDonnell Douglas wanted to sell passenger aircraft to the Chinese airlines, this was Fugh’s chief focus in his work.<sup>55</sup>

After Boeing acquired McDonnell Douglas, Fugh left the aviation industry for a new job: Chairman of Enron-China. At the time, Enron was heavily involved in building natural gas pipelines and power stations in China. After returning to the United States in February 2000—after four and one half years in China—Fugh worked in Enron’s Washington, D.C. office, where he lobbied for trade legislation that would benefit the U.S. business community in China.<sup>56</sup>

After his retirement from Enron in 2001, Fugh “deepened his involvement with the Committee of 100, an elite Chinese-American advocacy organization,”<sup>57</sup> and ultimately served as the chairman of the group. During this time, Fugh also worked to fulfill a long-held desire to have Ambassador Stuart’s ashes buried on Chinese soil. Since it was Stuart who had made it possible for the Fughs to begin a new life in America, John Fugh believed that it was only fitting that he work to repatriate Stuart’s remains to China—which Stuart himself desired since he had been born in China in 1876.<sup>58</sup>

However, during Mao Zedong’s lifetime, such a repatriation was impossible. When Stuart died in 1962, the

Chinese insisted that no symbol of American imperialism could be buried on Chinese soil. But, working through the Committee of 100, John Fugh “won an audience with powerful Chinese Politburo members, who granted their approval” for the return of Stuart’s remains. “This is a promise that has been fulfilled after half a century,” John Fugh told the New York Times. “Now, Ambassador Stuart and my father can rest in peace.”<sup>59</sup>



*Fugh, left, with Ambassador Stuart and Fugh’s father in 1957*

John Fugh died at the National Naval Medical Center in Bethesda in May 2010, aged 75. Given his remarkable life—from teenager in China to the top uniformed lawyer in the Army—he is not likely to be forgotten. Major General Fugh will always be the first American of Chinese ancestry to reach the stars. He also will be remembered every other year at a two-day JAG Corps symposium named in his honor. At this gathering held at The Judge Advocate General’s Legal Center and School in Charlottesville, Virginia, scholars and practitioners from around the world come together to discuss current legal issues in military operations—a fitting acknowledgement of Fugh’s significant contributions to military law.<sup>60</sup>

*More historical information can be found at*

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

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

<sup>51</sup> *Id.* at 211.

<sup>52</sup> John L. Fugh, *Address to the JAG Regimental Workshop*, ARMY LAW., June 1991, at 3, 6.

<sup>53</sup> *JAGC Mission and Vision*, JAGCNET <https://www.jagcnet.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentId=DEE613DFEC84B73B852579BC006142CE> (last visited July 6, 2016).

<sup>54</sup> Patoir & Rofrano, *supra* note 3, at 212.

<sup>55</sup> *Id.* at 220-21.

<sup>56</sup> *Id.* at 59.

<sup>57</sup> Bernstein, *supra* note 2.

<sup>58</sup> *Id.*

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

<sup>60</sup> Jane Leung Larson, *Major General John L. Fugh Annual Symposium on Law and Military Operations*, COMMITTEE OF 100 (Aug. 2010), [http://committee100.typepad.com/committee\\_of\\_100\\_newslett/2010/08/major-general-john-l-fugh-annual-symposium-on-law-and-military-operations.html](http://committee100.typepad.com/committee_of_100_newslett/2010/08/major-general-john-l-fugh-annual-symposium-on-law-and-military-operations.html).

# Not Your Momma's 32: Explaining the Impetus for Change Behind Key Provisions of the Article 32 Preliminary Hearing

Lieutenant Colonel John Loran Kiel Jr.\*

## I. Introduction

Nearly two years after the private screening of “The Invisible War”<sup>1</sup> to a small audience of influential Senators in Washington, D.C. and a year after an historic hearing conducted by the Senate Armed Services Committee (SASC), which solicited testimony from each of the Service Chiefs and their legal advisors about what they were doing to combat sexual assault in the military, Congress passed what proved to be the equally historic National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA).<sup>2</sup> The FY14 NDAA was consequential because it contained more revisions to the Uniform Code of Military Justice (UCMJ) than at any time since it was appreciably modified decades ago by the Military Justice Act of 1983.<sup>3</sup> To be exact, the FY14 NDAA enacted thirty-six statutory provisions that pertain to sexual assault.<sup>4</sup> One of the most monumental changes was the wholesale revision of Article 32, UCMJ.<sup>5</sup>

The purpose of this article is to highlight for military justice practitioners and potential preliminary hearing officers the reasons behind key revisions to Article 32 and to examine certain aspects of the preliminary hearing that diverge significantly from the pretrial investigation. As a former member of the Joint Service Committee on Military Justice

(JSC)<sup>6</sup> who helped write the rules<sup>7</sup> governing Article 32 preliminary hearings, the author will explain the thought process behind why Congress permitted an exception to the new requirement that the hearing be conducted by a judge advocate, how the role of the preliminary hearing officer (PHO) was designed to specifically prevent the hearing from being used as a discovery tool for the accused, and how the JSC designed an additional safeguard to protect victims who exercise their right not to testify at the hearing from deposition abuse after the hearing. Lastly, the article will examine recommendations made by the Military Justice Review Group (MJRG) to further modify Article 32 in a legislative proposal they recently submitted to Congress titled “The Military Justice Act of 2016.”<sup>8</sup> It is important to note at the outset, that the views expressed in this article are based on the author’s own experience and observations as a member of the JSC and do not necessarily reflect the views of other members of the JSC.

## II. Impetus for Change

During the summer of 2013, three Naval Academy football players were charged with raping a fellow midshipman.<sup>9</sup> The case garnered national media attention

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<sup>1</sup> THE INVISIBLE WAR (Chain Camera Pictures 2012). After viewing this documentary, Sen. Kirsten Gillibrand (D, NY) began to spearhead an effort to remove the decision to prosecute sex assault and other felony-level offenses from commanders and give the responsibility to a senior (O-6) judge advocate. Sen. Gillibrand introduced the Military Justice Improvement Act (MJIA) in 2013 and has attempted to reintroduce it every year since then for a Senate vote. See James Weirick et al., *The Time for Military Justice Reform is Now*, AIR FORCE TIMES, JUNE 7, 2016, 4:27 PM, <http://www.airforcetimes.com/story/opinion/2016/06/07/time-military-justice-reform-now/85558266/> Although the MJIA has yet to garner enough votes for passage, it has been influential in the sense that most of the sex

assault reforms discussed in this article were introduced in an effort to either bolster or defeat it.

<sup>2</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954-55 (2013) [hereinafter FY14 NDAA].

<sup>3</sup> Military Justice Act of 1983, Pub. L. No. 98-549, 97 Stat. 1393 (1983).

<sup>4</sup> See FY14 NDAA §§ 1701-53 (containing thirty-six enacted provisions pertaining to sexual assault).

<sup>5</sup> UCMJ art. 32 (2013).

<sup>6</sup> The Joint Service Committee on Military Justice (JSC) is comprised of two judge advocates from each of the Services, including the Coast Guard. The senior judge advocate serves as a voting group member while the junior judge advocate serves as a working group member. The JSC proposes changes to the Manual for Court-Martial (MCM) in Executive Orders that are submitted to the President for signature. See JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, <http://jsc.defense.gov/> (last visited July 19, 2016).

<sup>7</sup> Rule for Courts-Martial (RCM) 404A sets forth disclosure requirements prior to the hearing and RCM 405 sets forth the rules that govern the hearing. Exec. Order No. 13696, 80 Fed. Reg. 119 (June 22, 2015).

<sup>8</sup> Military Justice Review Group, *Military Justice Act of 2016*, DOD.MIL, [http://www.dod.mil/dodgc/images/military\\_justice2016.pdf](http://www.dod.mil/dodgc/images/military_justice2016.pdf) (last visited July 13, 2016) [hereinafter *Military Justice Act of 2016*]. The Military Justice Review Group submitted to Congress *The Military Justice Act of 2016* on December 28, 2015. *Press Release*, DoD.mil (Dec. 28, 2015), [http://www.dod.mil/dodgc/images/press\\_release\\_dec.pdf](http://www.dod.mil/dodgc/images/press_release_dec.pdf) [hereinafter *MJA Press Release*].

<sup>9</sup> Melinda Henneberger & Annys Shin, *Aggressive Tactics Highlight the Rigors of Military Rape Cases*, WASH. POST (Sept. 1, 2013)

when two reporters from the *Washington Post* ran an exposé titled *Aggressive Tactics Highlight the Rigors of Military Rape Cases*, which focused on the Article 32 pretrial investigation that took over a week to complete and included more than thirty hours of live testimony by the alleged victim.<sup>10</sup> The *Washington Post* piece highlighted a number of provocative questions military defense counsel asked the victim on cross-examination to include whether she “felt like a ho” and how wide she opens her mouth when she performs oral sex.<sup>11</sup> The timing of this investigation was problematic for the military because several Senators who were fresh from viewing “The Invisible War” became convinced that the military had a serious problem and began looking for reasons to overhaul what appeared to them to be a system of justice incapable of properly investigating and prosecuting sexual assault cases.<sup>12</sup> Not even twenty-four hours had passed after the article was published, before members of the JSC and the Judge Advocate Generals (TJAGs) of each of the Services began receiving requests to meet with members of Congress to help them figure out how Congress was going to go about tackling Article 32 reform. A few days after that, the author and his supervisor were asked to meet with senior staffers from the House Armed Services Committee (HASC) (and later the Senate Armed Services Committee (SASC)) who were tasked to examine and rewrite Article 32, UCMJ.<sup>13</sup> Only a few of the staffers at the meeting had prior military experience, so the bulk of the three-hour meeting was spent explaining the Article 32 investigation process and the purpose it served in the military justice system.<sup>14</sup>

Throughout the discussion, the staffers kept comparing the Article 32 investigation to a federal grand jury proceeding,

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<http://www.baltimoresun.com/news/maryland/anne-arundel/annapolis/bs-md-navy-rape-trial-20130901-story.html>.

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

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

<sup>12</sup> Press Release, Boxer, Blumenthal, Speier, Urge Immediate Reform of Military Justice System to Protect Sexual Assault Victims During Article 32 Proceedings (Sept. 25, 2013) (on file with author), <https://www.boxer.senate.gov/?p=release&id=209>.

<sup>13</sup> The author was at the time, the Army working group member of the JSC. His supervisor, Colonel (COL) Mike Mulligan, was the Army voting group member of the JSC. Both officers met with senior staffers from the House Armed Services Committee (HASC) charged with drafting the House rewrite of Art. 32, UCMJ. The meeting took place the first week of September 2013 in the HASC committee room and lasted approximately four hours. A few weeks later, the author met with the Chairman of the Joint Chiefs of Staff’s legal advisor and a lawyer from the White House to answer similar questions about how a pretrial hearing worked and compared it to a civilian grand jury. This assertion is based on the author’s recent professional experiences as a working group member of the JSC from 2012-2015 [hereinafter Professional Experiences-JSC].

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

<sup>15</sup> *Id.* Most of the HASC staffers the author and COL Mulligan met with were lawyers and were familiar with the civilian federal court system to include grand jury proceedings. They understood that the accused finds out about the grand jury proceeding after it has already secretly met and returned an indictment against him. Because the accused does not know

with which they were all familiar.<sup>15</sup> Initially, it appeared that they were considering doing away with Article 32 altogether until we explained that the 5th Amendment grand jury requirement does not apply to members of the armed forces<sup>16</sup> and that the Article 32 pretrial investigation was originally intended to provide a substitute for the grand jury.<sup>17</sup> We also discussed how Congress, when it enacted Article 32 in 1920, intended for the pretrial investigation to serve as a bulwark against trivial or baseless charges from being referred to general courts-martial.<sup>18</sup> From the staffers own reflections, they acknowledged that the military justice system has been widely lauded over the years by critics precisely because of the abundance of due process rights it affords the accused.<sup>19</sup> After discussing with them that unlike a grand jury proceeding, the accused actually knows about the investigation and has substantial rights there, the staffers recognized that the Article 32 investigation was more akin to a federal preliminary hearing conducted under Federal Rule of Criminal Procedure 5.1.<sup>20</sup> Revised Article 32 then, would be modelled after the federal preliminary hearing under Rule 5.1 where the government has the burden of proof to demonstrate that probable cause exists to believe an offense has been committed and that the accused committed it and where the accused possesses the right to cross-examine adverse witnesses, call his own witnesses, and testify on his own behalf.<sup>21</sup>

When meeting with both the HASC and SASC staffers, it was clear that Congress had at least three objectives in mind for the new Article 32 preliminary hearing—first, they wanted to ensure that no victim, military or civilian, could be compelled to testify against her will, second, they wanted to

about the hearing, he has no right to appear, to testify, to call witnesses or to cross-examine adverse witnesses. *Id.*

<sup>16</sup> U.S. CONST. amend. V. The Fifth Amendment specifically exempts “cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger” from the requirement of a grand jury indictment prior to trial in federal criminal court. *Id.*

<sup>17</sup> *United States v. Loving*, 41 M.J. 213, 296-97 (C.A.A.F. 1994).

<sup>18</sup> Lieutenant Colonel William A. Murphy, *The Formal Pretrial Investigation*, 12 MIL. L. REV. 1, 4 (1961). Lieutenant Colonel (Lt. Col.) Murphy lays out a fascinating history of the pretrial investigation beginning with its statutory origins in Article of War 70. *Id.* The author and his supervisor made a number of similar arguments about why the Article 32 investigation was still a useful tool in helping convening authorities prevent baseless charges from being referred to general court-martial. Professional Experiences-JSC, *supra* note 13.

<sup>19</sup> *Larry King Live* (CNN television broadcast Feb. 3, 2007) <http://www.cnn.com/TRANSCRIPTS/0702/03/lkl.01.html>. Host Larry King discussed a variety of aspects of our criminal justice system with famed civilian criminal defense attorneys. *Id.* Part of the discussion centered on an observation made by F. Lee Bailey, one of O.J. Simpson’s criminal defense attorneys, that the military justice system was fairer because of its panel composition than its civilian counterpart. *Id.* This quote from F. Lee Bailey is frequently cited to in the media and in military justice circles as an example of how our system tends to be fairer to the accused in general. *Id.*

<sup>20</sup> FED. R. CRIM. P. 5.1.

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

ensure that the right person with the right training was in charge of the hearing, and third, they wanted to guarantee that the purpose of the hearing was to get to a probable cause determination and not serve as a discovery tool for the accused.<sup>22</sup>

### III. Victims May Refuse to Testify

After reading about the Naval Academy rape case in the newspaper, U.S. Rep. Jackie Speier (D-Calif.), Sen. Barbara Boxer (D-Calif.), and Sen. Richard Blumenthal (D-Conn.), sent a letter to President Barack Obama indicating that they were,

Shocked and alarmed to learn that Article 32 allows sexual assault victims to be questioned in a manner that is intimidating and degrading, and what we believe has a major chilling effect on sexual assault reporting. According to legal experts, no civilian court in our nation would allow the questioning that was allowed in the Article 32 proceeding in the Naval Academy case.<sup>23</sup>

The trio of lawmakers then urged the President to direct the JSC to take “immediate steps to modify Article 32 proceedings in the Manual for Courts-Martial in a way that would mirror the rules that govern preliminary hearings in the Federal Rules of Criminal Procedure.”<sup>24</sup>

Throughout the summer, a number of amendments seeking to reform Article 32 were introduced by various members of Congress.<sup>25</sup> The seminal feature of each of these bills was to ensure that victims of sexual assault could not be forced to testify at a pretrial hearing against their will.<sup>26</sup> The bill that eventually passed was co-sponsored by Reps. Speier and Patrick Meehan (R-Penn.), along with Sen. Boxer.<sup>27</sup> Rep. Speier issued a press release on the day the FY14 NDAA was approved by the Senate declaring that,

It is time we bring the military justice system in line with our civilian criminal courts and give the same rights to brave men and women who come forward to report a crime as their civilian counterparts. If we are serious about addressing the epidemic of sexual assault we must stop treating the victim as the criminal and continue protecting the sexual predators.<sup>28</sup>

The Speier, Boxer, Meehan bill was contained in section 1702 of the FY14 NDAA and it made clear that a victim can refuse to testify at a preliminary hearing.<sup>29</sup> If a victim elects not to testify, the victim shall be deemed “not available” for purposes of the hearing according to the statute.<sup>30</sup> Additionally, Congress also expanded the definition of “victim” to cover more than just sexual assault victims.<sup>31</sup> The term victim encompasses “any person who is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification being considered and is named in one of the specifications.”<sup>32</sup>

### IV. Protecting Victims from Deposition Abuse

After the FY14 NDAA was signed into law by President Obama, the JSC began the deliberative process of deciding how Rule for Court Martial (RCM) 405 should be redrafted to implement the new statute. One of the hot topics it and the Judicial Proceedings Panel (JPP), a Congressional panel set up to examine other aspects of the military justice system, were concerned about was how to prevent victims from having to provide deposition testimony after they exercised their statutory right not to testify at a preliminary hearing.<sup>33</sup> In the same Executive Order that contained RCMs 404A and 405, the JSC amended RCM 702, the rule governing depositions.<sup>34</sup> The old version of RCM 702 stated that a deposition could be ordered after preferal of charges when “due to the exceptional circumstances of the case it is in the interest of justice that the testimony of the prospective witness be taken and preserved for use at an investigation under

<sup>22</sup> Professional Experiences-JSC, *supra* note 13. Congress already knew that Article 32 was originally intended to be a probable cause hearing. Their concern was that the investigation had become a mini-trial instead. See generally Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Servs., 81st Cong. 997 (1949) (statement of Rep. Norblad).

<sup>23</sup> Press release, Boxer, Blumenthal, Speier Urge Immediate Reform of Military Justice System to Protect Sexual Assault Victims During Article 32 Proceedings (Sept. 25, 2013), <http://www.boxer.senate.gov/?p=release&id=209>.

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

<sup>25</sup> Article 32 Reform Act, H.R. 3459, 113th Cong. (1st Sess. 2013). This first version of the amendment was slightly different than the one that passed and was cosponsored by Reps. Jackie Speier (D-Calif.), Patrick Meehan (R-Penn.), Betty McCollum (D-Minn.), Julia Brownley (D-Calif.), and Niki Tsongas (D-Mass.).

<sup>26</sup> *Id.*

<sup>27</sup> FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954-55 (2013).

<sup>28</sup> Press release, Congresswoman Jackie Speier on Inclusion of the Article 32 Reform Act in the National Defense Authorization Act (Dec. 17, 2013), [http://www.speier.house.gov/index.php?option=com\\_content&view=article&id=1318:congresswoman-jackie-speier-on-inclusion-of-the-article-32-reform-act-in-the-national-defense-authorization-act&catid=20&Itemid=7](http://www.speier.house.gov/index.php?option=com_content&view=article&id=1318:congresswoman-jackie-speier-on-inclusion-of-the-article-32-reform-act-in-the-national-defense-authorization-act&catid=20&Itemid=7).

<sup>29</sup> FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954-55 (2013).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> The Judicial Proceedings Panel (JPP) is a follow-on panel to the Response Systems Panel on Adult Sexual Assault, both of which the Secretary of Defense (SECDEF) was directed to establish by Congress in section 576 of the FY13 NDAA. National Defense Authorization Act for Fiscal Year 2013, Pub. Law No. 112-239, § 1702, 126 Stat. 1632, 1759-62 (2013).

<sup>34</sup> Exec. Order No. 13696, 80 Fed. Reg. 119 (June 22, 2015).

Article 32 or a court-martial.”<sup>35</sup> Under the revised RCM 702, the JSC added a modification clarifying that,

A victim’s declination to testify at a preliminary hearing or a victim’s declination to submit to pretrial interviews shall not, by themselves, be considered exceptional circumstances. In accordance with subsection (b) of this rule, the convening authority or military judge may order a deposition of a victim only if it is determined, by a preponderance of the evidence, that the victim will not be available to testify at court-martial.<sup>36</sup>

The intent of this modification was to protect victims from deposition abuse after they exercised their statutory right not to testify at the preliminary hearing and then later opted out of interviews with defense counsel prior to trial.<sup>37</sup> Of course, the JSC understood that there may be circumstances where a victim who declined to testify at the preliminary hearing would not later be available for any number of reasons, and that under those unique circumstances the use of a deposition would potentially be in the interests of justice.<sup>38</sup>

It is also important to underscore that Congress codified the “Military Crime Victim’s Rights Act” in Article 6b of the UCMJ as reflected in section 1701 of the FY14 NDAA.<sup>39</sup> In addition to a host of notification rights and rights to appear at various courts-martial proceedings, victims “have the right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter.”<sup>40</sup> The definition of “victim” here is broader than it is under RCM 405 in that the victim under Article 6b does not have to be named in one of the charged specifications.<sup>41</sup> Congress tasked the Secretary of Defense to develop mechanisms to enforce victim’s Article 6b rights, to include fashioning disciplinary sanctions for anyone who willfully or wantonly

fails to comply with the requirements relating to any of those rights.<sup>42</sup> The JSC’s modification of RCM 702 coupled with Congress’s codification of Article 6b, UCMJ, appears for the moment, to be enough to assuage Rep. Speier’s concerns about subjecting future victims to the type of “intimidating and degrading” cross-examination questions the victim in the Naval Academy rape case was forced to endure at the pretrial investigation.<sup>43</sup>

## V. Judge Advocate Preliminary Hearing Officers—Line Officer Exception

Congress’ next objective was to make sure that the right person, with the right professional training, conducted the preliminary hearing. The HASC staffers at the meeting were surprised to learn that the Army was the only service that primarily utilized line officers and not judge advocate investigating officers (IOs) to conduct pretrial investigations.<sup>44</sup> For almost an hour, the merits of using line officers who were assisted by a judge advocate legal advisor, as IOs, especially in certain types of cases, was explained.<sup>45</sup> The author shared an example from a case he dealt with in Germany that involved a war crime allegation against a platoon sergeant serving in the 38th Route Clearance Platoon of the 541st Sapper Company.<sup>46</sup> Sergeant First Class (SFC) Walter Taylor was alleged to have shot and killed an Afghan civilian female obstetrician in violation of the rules of engagement (ROE).<sup>47</sup> Sergeant First Class Taylor’s platoon was conducting route clearance when they were hit by a complex improvised explosive device (IED) attack.<sup>48</sup> Immediately after the attack, which wounded at least five of his Soldiers, SFC Taylor attempted to set up a defensive perimeter when his patrol came under small arms attack by two white cars that circled around the kill zone minutes after the IED explosion.<sup>49</sup> A third black car attempted to maneuver

<sup>35</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 702 (2012) [hereinafter MCM].

<sup>36</sup> Exec. Order No. 13696, 80 Fed. Reg. 119 (June 22, 2015).

<sup>37</sup> Professional Experiences-JSC, *supra* note 13. After listening to public deliberations from the JPP where they expressed concern about the accused trying to circumvent a victim’s right not to testify at the preliminary hearing by subjecting her to a deposition, and the JSC having the same concerns, the JSC went about tightening up the rule to prevent that from happening on a regular basis. *Id.*

<sup>38</sup> *Id.* The JSC did recognize that in some situations, a victim might not be available to testify at trial and the rule makes accommodations for that too. *Id.*

<sup>39</sup> FY14 NDAA, Pub. L. No. 113-66, § 1701, 127 Stat. 672, 954-55 (2013).

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

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Henneberger & Shin, *supra* note 9.

<sup>44</sup> U.S. DEP’T OF ARMY, PAM. 27-17, PROCEDURAL GUIDE FOR ARTICLE 32(B) INVESTIGATING OFFICER (16 Sept. 1990). This version of the Department of the Army Pamphlet (DA PAM) contemplated that the investigating officer (IO) would be a line officer who had a judge advocate

legal advisor assigned to them during the investigation. *Id.* The Army was the only service that did not utilize judge advocate IOs exclusively but it did occasionally use judge advocates (and sometimes military judges) to preside over high profile Article 32 investigations. Professional Experiences-JSC, *supra* note 13.

<sup>45</sup> *Id.* In addition to talking to the HASC staff about the benefits of having an infantry officer preside over an investigation involving alleged war crimes, we also discussed how in the past, the author had finance officers preside over investigations involving complex basic allowance for housing (BAH) and temporary duty (TDY) fraud charges for example. Professional Experiences-JSC, *supra* note 13.

<sup>46</sup> Kim Murphy, *Four Seconds in Afghanistan: Was it Combat or a Crime?*, L.A. TIMES (June 10, 2012), <http://articles.latimes.com/2012/jun/10/nation/la-na-afghan-shooting-20120614/4>.

<sup>47</sup> *Id.* At the time of the shooting, Sergeant First Class (SFC) Taylor had no idea about the gender or age of the victim. This assertion is based upon the author’s experience as a Defense Counsel for Region VIII, Vilseck Germany, from 2003-2005 [hereinafter Professional Experience-Defense Counsel].

<sup>48</sup> Murphy, *supra* note 46.

<sup>49</sup> *Id.*

around the kill zone shortly after the two white cars fired shots and sped away.<sup>50</sup> Sergeant First Class Taylor and his platoon assumed that the black car was also involved in the attack and fired on it until it came to a complete stop.<sup>51</sup> Once the car stopped, the passenger in the front seat exited the car and proceeded to move towards the trunk area.<sup>52</sup> The passenger ignored SFC Taylor's repeated warnings to put their hands up and get down on the ground so he opened fire.<sup>53</sup> It turned out that the deceased was one of a handful of female obstetricians in all of Afghanistan who was returning from a medical conference with her husband, sixteen-year-old niece, and eighteen-year-old son, when they happened upon the attack.<sup>54</sup> Her husband was the only survivor in the car.<sup>55</sup>

The author explained to the staffers that the convening authority and the staff judge advocate (SJA) wanted to ensure that SFC Taylor got a fair and impartial look at the Article 32 investigation. In order to ensure that the pretrial investigation was fair, impartial, and thorough, the convening authority appointed a lieutenant colonel who had recently relinquished command of a battalion in the 173rd Airborne Brigade Combat Team and the SJA assigned as the IO's legal advisor, a judge advocate who had served previously as an infantry platoon leader in the 3rd Brigade Combat Team, 82nd Airborne Division on his last deployment.<sup>56</sup> The convening authority wanted to appoint someone who had been in combat under the same or similar circumstances that SFC Taylor faced, as opposed to appointing an IO who had not. After several days of examining evidence and hearing from multiple witnesses, the IO concluded the investigation, handed in his lengthy report, and issued findings in his report that SFC Taylor had not violated any of the ROE in effect at the time of the engagement.<sup>57</sup> Furthermore, the IO recommended that the convening authority dismiss the charges, which he promptly did.<sup>58</sup> The author explained to

the staffers that the convening authority, the lawyers representing both parties, and eventually even the accused himself, thought that the Army had done the right thing at the end of the day, by charging the case and fully investigating it at the pretrial investigation with an IO who was himself a combat arms war veteran.<sup>59</sup>

The author and his boss also spoke about other cases where it might make sense to have someone other than a judge advocate serve as the preliminary hearing officer (PHO) due to the kinds of charges involved and the type of specialized training a particular kind of officer, other than a lawyer, might possess.<sup>60</sup> At the end of the day, the staffers and ultimately Congress agreed that when "in exceptional circumstances in which the interests of justice warrant," an impartial officer other than a judge advocate may be better suited to serve as a preliminary hearing officer.<sup>61</sup> It is important to remember though, that this exception does not apply to sexual assault cases as the Secretary of Defense has directed that in sexual assault cases, a judge advocate must always serve as PHO.<sup>62</sup>

While Congress was willing to grant the Army this exception, they were still concerned about assertions that were made in "The Invisible War" and echoed by Sen. Kirsten Gillibrand (D-N.Y.), that the military fosters "a culture where rapists go free, there's no accountability for sexual assault, there's a climate where everything is shoved under the rug and people are actually punished for reporting sexual assault."<sup>63</sup> In an effort to tackle that perception, Congress wanted someone with professional legal training to serve as PHO and they initially only wanted military judges to preside in that capacity.<sup>64</sup> Given the finite number of military judges there are in the Army, the author and his boss explained how that was not a feasible solution. It was explained for instance, that in a typical fiscal year, the Army tries roughly 1,100

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* Sergeant First Class Taylor did not know at the time that the person he was shouting instructions to was a female because of the way she was dressed and covered. Professional Experience-Defense Counsel, *supra* note 47.

<sup>54</sup> Murphy, *supra* note 46. The victim was identified as Dr. Aqilah Hikmat, a forty-nine-year-old mother of four who was head of the obstetrics department at the Ghazni provincial hospital. Professional Experience-Defense Counsel, *supra* note 47.

<sup>55</sup> Murphy, *supra* note 46.

<sup>56</sup> The staff judge advocate (SJA) recommended to the convening authority that he appoint two infantry officers with recent combat experience to conduct the investigation. One as the IO, the other as the legal advisor. Professional Experience-Defense Counsel, *supra* note 47.

<sup>57</sup> Kim Murphy, *Criminal Charges Dismissed Against Soldier in Afghanistan Shooting*, L.A. TIMES (Aug. 9, 2012), <http://articles.latimes.com/2012/aug/09/nation/la-na-nn-afghan-shooting-soldier-20120809>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* Sergeant First Class Taylor, when speaking about the convening authority's decision to dismiss the negligent homicide and dereliction of duty charges after reviewing the IO's recommendation stated, "It's not just a victory for me, it's a victory for all soldiers . . . . They don't have to think in their mind that one of their comrades was being done wrong." *Id.*

<sup>60</sup> A few examples might include appointing a doctor or nurse as preliminary hearing officer (PHO) in a shaken baby case or a finance officer to preside over a complex TDY or BAH fraud case. Professional Experiences-JSC, *supra* note 13.

<sup>61</sup> FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954-55 (2013).

<sup>62</sup> Memorandum from SecDef to Sec'y of the Military Dep'ts et al., subject: Sexual Assault Prevention and Response (Aug. 14, 2013), [http://www.sapr.mil/public/docs/news/SECDEF\\_Memo\\_SAPR\\_Initiatives\\_20130814.pdf](http://www.sapr.mil/public/docs/news/SECDEF_Memo_SAPR_Initiatives_20130814.pdf).

<sup>63</sup> Robert Draper, *The Military's Rough Justice on Sexual Assault*, N.Y. TIMES MAG. (Nov. 26, 2014), [http://www.nytimes.com/2014/11/30/magazine/the-militarys-rough-justice-on-sexual-assault.html?\\_r=0](http://www.nytimes.com/2014/11/30/magazine/the-militarys-rough-justice-on-sexual-assault.html?_r=0).

<sup>64</sup> These staffers, in speaking with the other services, understood that the Navy and Air Force routinely used military judges as Article 32 IOs. They initially liked the idea of having the most seasoned military justice experts preside over the hearing. Professional Experiences-JSC, *supra* note 13.

general and special courts-martial.<sup>65</sup> In Fiscal Year 13 for example, the Army tried 714 general courts-martial, which required at a minimum 714 Article 32 pretrial investigations.<sup>66</sup> By way of comparison, the Air Force, Marine Corps, Navy, and Coast Guard tried 260, 135, 121, and 9 general courts-martial respectively in FY13.<sup>67</sup> In FY12, the numbers were roughly the same—the Army, Air Force, Marine Corps, Navy, and Coast Guard tried 725, 182, 125, 137, and 14 general courts-martial respectively.<sup>68</sup>

It was also explained that a number of charges are dismissed or disposed of in some other way after the pretrial investigation that are not necessarily reflected in reported court-martial statistics and that a conservative estimate of pretrial investigations the Army actually conducts every FY is closer to 1,000.<sup>69</sup> Additionally, the Army only has twenty-seven military judges on active duty who preside over all of its special and general courts-martial proceedings.<sup>70</sup> Adding nearly 1,000 preliminary hearings to the mix would be virtually impossible for twenty-seven active duty judges to handle without causing significant delays in courts-martial proceedings.<sup>71</sup> The author finally noted that the IO in the Naval Academy rape case was a seasoned military judge and he still permitted the cross-examination questions members of Congress were outraged over, despite his training and experience.<sup>72</sup> After considering all of the data points, the staffers decided against recommending that military judges serve as PHOs.

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<sup>65</sup> The author reviewed the U.S. Court of Appeals for the Armed Forces (CAAF) annual reports for fiscal years 2012, 2013, and 2014, added the number of reported general courts-martial tried by the Army for all three FYs and divided by three to determine the average. These reports, along with other fiscal years, are available on the CAAF website. U.S. COURT OF APPEALS FOR THE ARMED FORCES, <http://www.armfor.uscourts.gov/newcaaf/home.htm> (last visited July 11, 2016).

<sup>66</sup> COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED FORCES AND TO THE SECRETARY OF DEFENSE, SECRETARY OF HOMELAND SECURITY, AND THE SECRETARIES OF THE ARMY, NAVY, AND AIR FORCE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE (Oct. 1, 2012 to Sept. 30, 2013), <http://www.armfor.uscourts.gov/newcaaf/annual/FY13AnnualReport.pdf> [hereinafter CAAF FY 13 ANNUAL REPORT].

<sup>67</sup> *Id.*

<sup>68</sup> COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED FORCES AND TO THE SECRETARY OF DEFENSE, SECRETARY OF HOMELAND SECURITY, AND THE SECRETARIES OF THE ARMY, NAVY, AND AIR FORCE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE (Oct. 1, 2011 to Sept. 30, 2012), <http://www.armfor.uscourts.gov/newcaaf/annual/FY12AnnualReport.pdf> [hereinafter CAAF FY 12 ANNUAL REPORT].

<sup>69</sup> The author and his boss spent a considerable amount of time explaining how cases might be disposed of after an Article 32 investigation, to include approval of an administrative discharge in lieu of court martial, dismissing charges, referring to a lesser court-martial, non-judicial punishment, and adverse administrative action. Professional Experiences-JSC, *supra* note 13.

<sup>70</sup> U.S. Army Trial Judiciary, JAGCNET, <https://www.jagcnet2.army.mil/USATJ> (last visited July 11, 2016).

## VI. Judge Advocate Preliminary Hearing Officers—Senior in Pay Grade Exception

Even though the military judge proposal did not move forward, Congress still wanted to make sure that judge advocates with sufficient experience and legal training serve as PHOs. To do this, they included language requiring that the PHO be “equal to or senior in grade to military counsel detailed to represent the accused or the Government at the preliminary hearing.”<sup>73</sup> The Army asked for an exception to this requirement as well. While most of the judge advocates available to serve as PHOs will be captains (paygrade O-3), several of the Army’s special victim prosecutors are majors (paygrade O-4) and lieutenant colonels (paygrade O-5) as are its senior defense counsel (paygrade O-4) and regional defense counsel (paygrade O-5).<sup>74</sup>

Adhering to such a rigid requirement would be onerous in cases where any of these senior lawyers represented one of the parties because the convening authority would likely have to appoint a more senior lawyer from another installation to be able to fulfill the grade requirement.<sup>75</sup> That would mean inevitable delays in the proceedings and a lot of money spent on travel costs.<sup>76</sup> The staffers then wanted to know who else could conduct the hearings without having to bring someone in from another installation. It was explained that in a typical Army Office of the Staff Judge Advocate (OSJA), the only lawyers who would not be routinely conflicted out from serving as PHOs are the captains (paygrade O-3) serving in the administrative law division, claims, and the operational

<sup>71</sup> *Id.* Even if it were possible to supplement the twenty-seven active duty military judges (MJs) with the twenty-three reserve MJs, it would still be impossible to preside over nearly 1,000 preliminary hearings and 1,200 or so general and special courts-martial every year.

<sup>72</sup> Anny Shin, *Two ex-Navy Football Players to go on Trial in Rape Case Despite Judge’s Recommendation*, WASH. POST (Oct. 10, 2013), [https://www.washingtonpost.com/local/two-of-three-ex-navy-football-players-charged-in-alleged-rape-will-face-court-martial/2013/10/10/0544abaa-31ae-11e3-8627-c5d7de0a046b\\_story.html](https://www.washingtonpost.com/local/two-of-three-ex-navy-football-players-charged-in-alleged-rape-will-face-court-martial/2013/10/10/0544abaa-31ae-11e3-8627-c5d7de0a046b_story.html).

<sup>73</sup> FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954-55 (2013).

<sup>74</sup> A search of the current U.S. Army Judge Advocate General’s (JAG) Corps online directory reveals, by position, location, and name, where and how many special victim prosecutors (SVP), regional defense counsel (RDC), and senior defense counsel (SDC) are currently serving on active duty. See *JAG Directory*, JAGCNET, <https://www.jagcnet2.army.mil/Sites/ppto.nsf/JagDirectory.xsp> (last visited on July 21, 2016).

<sup>75</sup> At a typical numbered combat division, the Staff Judge Advocate (SJA) is a Colonel in the paygrade of O-6 and the Deputy Staff Judge Advocate (DSJA) is in the paygrade of O-5. If the RDC or SVP, who are usually in the O-5 grade, represented one of the parties, the only person in the office of the staff judge advocate (OSJA) (likely the installation) who could serve as the PHO might be the DSJA if they were at least equal in grade. Otherwise, the convening authority would have to bring in a senior O-5 judge advocate (JA) TDY to serve as PHO. Professional Experiences-JSC, *supra* note 13.

<sup>76</sup> One factor Congress was concerned about with military justice reform was cost. During sequestration downsizing and budget cuts, both the HASC and the Senate Armed Services Committee (SASC) staffers were cognizant of the fiscal restraints the Services were facing and they understood that adding more TDY expenses would necessarily result in cuts to the commander’s budget elsewhere.

law division, if it had one.<sup>77</sup> Given the human resource limitations and fiscal constraints involved, coupled with the likelihood that delays would impact the government's speedy trial clock, Congress agreed on the caveat that made it into the final statute, which states that "whenever practicable" the PHO will be equal or greater in grade to counsel representing the parties, otherwise the convening authority may appoint someone junior in grade to conduct the hearing.<sup>78</sup>

In the end, Congress achieved its goal of bringing the Army in line with the other services by requiring the appointment of judge advocate PHOs, while simultaneously recognizing that sometimes, when the interest of justice warrants it, a line officer may be better suited to serve as the PHO.<sup>79</sup> Congress also recognized, that sometimes, when a senior officer is not available, the convening authority and the SJA may have to appoint that junior O-3 in the administrative law division to conduct the hearing and they were okay with that too. Conveniently and by design, both exceptions provide SJAs and convening authorities with enough flexibility to conduct preliminary hearings efficiently and effectively.<sup>80</sup>

## VII. Role of the PHO

Congress's final objective for the preliminary hearing was to ensure that its purpose was to focus on the probable cause determination and not on making the hearing a discovery tool for the accused.<sup>81</sup> In order to attain that goal, Congress did three things in the statute.<sup>82</sup> First, it excised the language that previously called for a "thorough and impartial investigation" to be conducted.<sup>83</sup> Second, it replaced that language and also limited the scope of the hearing by requiring a determination whether there is probable cause to

believe an offense has been committed and whether the accused committed it.<sup>84</sup> Third, it required that the presentation of evidence and the examination of witnesses at the preliminary hearing be narrowed in scope such that only evidence that is "relevant to the limited scope of the hearing" be considered at the hearing.<sup>85</sup>

While these additions appear to clarify the hearing's real purpose, one final insertion made by Congress threatened to unravel it all. In laying out the accused's rights at the hearing, which includes the right to be represented by counsel and the right to cross-examine government witnesses, Congress also afforded the accused the right to "present additional evidence in defense and mitigation, relevant to the limited purposes of the hearing."<sup>86</sup> This last phrase led to several months of debates and discussions among the JSC and the TJAGs about the meaning of "in defense and mitigation" and how they could reconcile this right with the requirement to keep the scope of the hearing limited.<sup>87</sup> In fact, for almost two months, the JSC members met with their respective TJAGs to examine the PHO's potential role and how they could help ensure that the scope of the hearing was limited to a probable cause determination.<sup>88</sup>

The TJAGs in turn, met once a month to discuss the issue among themselves.<sup>89</sup> The discussions centered on whether the PHO should be able to *sua sponte* call additional witnesses and ask for more evidence outside of what the parties offered into evidence at the hearing.<sup>90</sup> One primary concern focused on what should happen if the government proved up most of the elements of an offense but not others. Should the PHO be able, for the sake of efficiency and expediency, to call an additional witness or two on their own or issue a *subpoena duces tecum* for additional evidence in order to satisfy the missing elements? The Services were split initially, but after

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<sup>77</sup> Lawyers representing clients (legal assistance attorneys and Special Victim Counsels) could not serve as PHOs, neither can judge advocates (JAs) representing the parties as trial counsel (TCs), or the SJA. That leaves administrative law, claims, and operational law JAs and the operational law section is typically very small and is frequently deployed to contingency operations or exercises. The three operational law attorneys in the I Corps office, for example, are deployed to exercises and planning conferences every month in support of the Corps' Pacific Pathways mission. This assertion is based upon the author's professional experience as the Deputy Staff Judge Advocate at I Corps and Joint Base Lewis-McChord.

<sup>78</sup> FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954-55 (2013).

<sup>79</sup> See *supra* text accompanying note 60.

<sup>80</sup> After speaking with the other services and looking at the courts-martial numbers for several fiscal years, the staffers understood that the Army would be the only Service likely to rely on these necessary exceptions. Professional Experiences-JSC, *supra* note 13.

<sup>81</sup> FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954-55 (2013).

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

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

<sup>84</sup> *Id.*

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

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

<sup>87</sup> Interestingly enough, some of the staffers requested a meeting with the Chair of the JSC shortly after passage of the FY14 NDAA to discuss how changes to the hearing were playing out in practice. Professional Experiences-JSC, *supra* note 13. During the course of the meeting, the staffers seemed caught off guard that the final version of the bill that passed included in it the accused's right to present evidence in defense and mitigation. *Id.*

<sup>88</sup> The Joint Service Committee on Military Justice voting group members are appointed by their respective The Judge Advocate Generals (TJAGs) to sit on the JSC and they meet with them frequently to discuss proposed modifications to the MCM in order to obtain their service's official positions. *Id.*

<sup>89</sup> Sometimes when the JSC cannot resolve key differences among themselves, the service TJAGs will get together to resolve them at their level and issue appropriate guidance to their respective voting group members. *Id.*

<sup>90</sup> Since Congress did not give specific guidance with respect to what the PHO's role was, the services had to figure that out. *Id.* Because each service's military justice practice and culture is different, this particular discussion took several weeks to iron out. *Id.* Some services did not experience the mini-trial effect that others had in recent years and were initially less concerned about restricting the PHO's powers at the hearing. *Id.*

a few meetings, they all agreed that if the government failed to meet its burden of proof at the hearing, then the convening authority had three options—she could dismiss the charges the PHO said were insufficient, she could ignore the PHO’s recommendation and press forward to referral anyways, or she could order another preliminary hearing.<sup>91</sup> What everyone agreed could not happen was to allow the PHO to try and request additional evidence or witnesses on their own.<sup>92</sup> With all of that under consideration, the JSC began to methodically lay out the role of the PHO in RCM 405 to ensure that the scope of the hearing was limited to a probable cause determination the way Congress intended, despite the seemingly contradictory rights and requirements they laid out in the statute.

In a recent edition of the *Military Law Review*, one author who advocates replacing the preliminary hearing with a military grand jury, reviewed all of the recent changes to Article 32 and concluded that, “While the scope of the preliminary hearing was narrowed, the authority given to the PHO was expanded.”<sup>93</sup> He cites as evidence the fact that the PHO can direct the government to order a *subpoena duces tecum* to secure evidence not in the government’s control over the government’s objection.<sup>94</sup> While that is partially true, the rest of the rule states that if the government fails to issue the subpoena after the PHO has determined that the evidence is relevant, not cumulative, and necessary, all the PHO can do is make a note of it in his report.<sup>95</sup> The PHO has no authority to issue his own subpoena to secure the evidence.<sup>96</sup> With regard to evidence that is under the government’s control, if the PHO determines over government counsel’s objection that the evidence is relevant, not cumulative, and necessary, the government shall make “reasonable efforts” to obtain the evidence.<sup>97</sup> The rule does not specify what “reasonable efforts” means, and if the government fails to produce the evidence, the only thing the PHO may do is again, make a note in his report.<sup>98</sup>

Similar restraints on the PHO’s authority also apply to producing witnesses. If the defense requests to hear from a military witness over government objection, the PHO must determine whether the witness is relevant, not cumulative, and necessary based on the limited scope and purpose of the

preliminary hearing.<sup>99</sup> If the PHO makes such a determination, then under the rule, the military witness’s commander then gets to decide, based on operational necessity or mission requirements, if that witness is available to provide testimony at the hearing.<sup>100</sup> If there is a dispute among the parties about the manner in which the military witness will testify, the commander also gets to decide whether the witness will testify in person, by video teleconference, by telephone, or by similar means of remote testimony.<sup>101</sup> The commander’s decisions on each of these issues are final.<sup>102</sup>

Regarding civilian witnesses, if the PHO makes the determination that the witness is relevant, not cumulative, and necessary, government counsel “shall” invite the witness to testify, and if the witnesses agrees to testify, government counsel “shall” make the necessary arrangements.<sup>103</sup> If expense to the government is incurred in procuring the witness however, the convening authority who ordered the hearing shall determine whether the witness will testify in person or by some other alternate means provided in the rule.<sup>104</sup> The PHO again has no authority under the rule to override the convening authority’s determination not to pay for travel for in-person witness testimony.<sup>105</sup>

What the PHO can do under the rule is to question the witnesses called by the parties and even suggest that the parties call additional witnesses or present more evidence in order to help him make a probable cause determination as required under subsection (e) of RCM 405.<sup>106</sup> Even then, the JSC warned that the PHO “shall not call witnesses *sua sponte*,” that the PHO “shall not consider evidence not presented at the preliminary hearing,” and that the PHO “shall not depart from an impartial role and become an advocate for either side.”<sup>107</sup> With all of these restrictions in play, it is difficult to understand how the role of the PHO at a preliminary hearing is more expansive than what the role of the IO used to be at a pretrial investigation under the old statute. In reality, quite the opposite is true.

In conjunction with narrowing the scope of the PHO’s role, the JSC had to figure out other ways to keep the preliminary hearing from becoming a mini-trial before the

<sup>91</sup> MCM, *supra* note 35, R.C.M. 403(b), 404, 407(a).

<sup>92</sup> The services all eventually agreed that in order to properly limit the scope of the hearing’s intent as Congress intended, the PHO could not be permitted to *sua sponte* consider additional evidence and witnesses. *Id.*

<sup>93</sup> Major John G. Doyle, *The Code Indicted: Why the Time is Right to Implement a Grand Jury Proceeding in the Military*, 223 MIL. L. REV. 644-45 (2015).

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

<sup>95</sup> Exec. Order No. 13696, 80 Fed. Reg. 119 (June 22, 2015).

<sup>96</sup> *Id.*

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

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

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

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

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

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

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

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* These restrictions were specifically included to ensure that the PHO could not expand the limited scope of the hearing and turn the proceedings into a mini-trial like what it had become in recent years. Professional Experiences-JSC, *supra* note 13.

trial, like what Congress had witnessed in the Naval Academy rape case.<sup>108</sup> As alluded to earlier, the JSC had to try and discern what Congress meant by permitting the accused to present “evidence in defense and mitigation”.<sup>109</sup> The first thing the JSC did was to scope the term “matters in mitigation” to mean “matters that may serve to explain the circumstances surrounding a charged offense.”<sup>110</sup> The JSC then tried to make clear in the introductory paragraph of RCM 405 that a preliminary hearing was by no means intended to serve as a discovery tool and that it would be limited to an examination of only those issues necessary to determine whether there is probable cause to conclude that an offense has been committed and whether the accused committed it.<sup>111</sup> The JSC also made sure to articulate throughout the rule (twenty times to be exact) that any evidence presented at the preliminary hearing by either party, to include the accused’s right to cross-examine witnesses, present matters in defense and mitigation, and to make a statement, had to be “relevant, not cumulative, and necessary for the limited scope and purpose of the preliminary hearing.”<sup>112</sup>

Whether any or all of the changes discussed thus far will satisfy the three objectives Congress set out to accomplish in reforming Article 32 remains to be seen because they are still novel. Affording military and civilian victims the statutory right not to testify at the preliminary hearing will certainly eliminate the potential for future hostile and abusive interrogation like what took place in the Naval Academy rape case.<sup>113</sup> The revisions to RCM 702 will also ensure that these same victims who also subsequently decline to participate in interviews with the defense after the preliminary hearing are not then automatically subject to being deposed for opting out of that too.<sup>114</sup> In the author’s experience, line officers made fine IOs in the past and will continue to do so by exception.<sup>115</sup> Judge advocates are already proving that they make fine PHOs, even junior ones who find themselves presiding over these hearings by exception.<sup>116</sup>

There will always be challenges in attempting to limit the scope of the hearing to just probable cause, despite the twenty or so helpful reminders the JSC inserted in the rule that any evidence admitted must be “relevant, not cumulative, and necessary to the limited scope and purpose of the hearing”.<sup>117</sup> So long as the accused is entitled to present matters in defense and mitigation and the PHO is required to make a disposition recommendation to the convening authority, there will always be opportunities for a savvy defense counsel to turn the hearing into a lengthy ordeal in some cases.<sup>118</sup> Only time will tell the true impact of these changes and even more change is on the way.

## VIII. Military Justice Act of 2016

On December 8, 2015, the MJRG submitted a legislative proposal to Congress titled “The Military Justice Act of 2016 (MJA).”<sup>119</sup> The proposal is a massive overhaul of the entire military justice system.<sup>120</sup> General Martin Dempsey, Chairman of the Joint Chiefs of Staff at the time, advised the Secretary of Defense to conduct a holistic review of the entire UCMJ.<sup>121</sup> In accordance with the Secretary of Defense’s directive, the MJRG was established and took just over a year to complete its work.<sup>122</sup> One of the major reforms contained in the proposal includes moving discovery from post-referral to pre-referral.<sup>123</sup> A second major reform would include providing military judges the same powers as their civilian counterparts and to let them exercise those powers at pre-referral instead of post-referral.<sup>124</sup> As you will see, these two major reforms tie in to other recommendations the MJRG made to further alter the complexion and function of the Article 32 preliminary hearing.

The MJRG’s first proposal would eliminate the requirement for the PHO to make a disposition recommendation to the convening authority in the final

<sup>108</sup> Henneberger & Shin, *supra* note 9. Professional Experiences-JSC, *supra* note 13.

<sup>109</sup> *Id.* Congress failed to define either term in the statute. The JSC looked at the definition of mitigation in RCM 1001(c)(1)(B) and determined that it was much too broad.

<sup>110</sup> Exec. Order No. 13696, 80 Fed. Reg. 119 (June 22, 2015).

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

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

<sup>113</sup> See Henneberger & Shin, *supra* note 9.

<sup>114</sup> Exec. Order No. 13696, 80 Fed. Reg. 119 (June 22, 2015).

<sup>115</sup> FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954-55 (2013).

<sup>116</sup> Zachary D. Spilman, *Scholarship Saturday: Article 32—Why and What, and a new Keyboard*, CAAFlog (Feb. 28, 2015) <http://www.caaflog.com/category/miljus-scholarship/>. Navy Commander Robert Monahan was a

military judge at the time of the hearing. *Id.* He recommended dismissing the charges against two of the co-accused. *Id.*

<sup>117</sup> Exec. Order No. 13696, 80 Fed. Reg. 119 (June 22, 2015).

<sup>118</sup> *Id.*

<sup>119</sup> *MJA Press Release*, *supra* note 8.

<sup>120</sup> The MJA proposes thirty-seven new articles to the UCMJ, substantive revisions to sixty-eight articles, and includes draft legislative language implementing all proposed changes. See REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS (Dec. 22, 2015), [http://www.dod.mil/dodgc/images/report\\_part1.pdf](http://www.dod.mil/dodgc/images/report_part1.pdf) [hereinafter UCMJ RECOMMENDATIONS].

<sup>121</sup> MILITARY JUSTICE REVIEW GROUP, <http://www.dod.mil/dodgc/mjrg.html> (last visited July 11, 2016).

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

<sup>123</sup> *Military Justice Act of 2016*, *supra*, note 8.

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

report.<sup>125</sup> Under the MJA, the parties and the victim may submit additional information after the preliminary hearing is concluded to the convening authority to better inform his disposition determination.<sup>126</sup> The PHO would have to organize and analyze this additional information and articulate for the convening authority how it is relevant to a disposition determination. The JSC would ultimately have to craft rules that would govern how this information is collected and sealed, if necessary, for consideration by the convening authority.<sup>127</sup> That information would undoubtedly be much broader in scope than information presented at the hearing itself, given the hearing's limited scope. The MJRG explained that this proposed change was

[B]ased in part on a recognition that the convening authority's ultimate disposition decision depends on a broad range of factors relating to good order and discipline—of which the preliminary hearing officer may not be aware and which may not directly relate to the legal or factual strengths or weaknesses of the limited case as presented at the preliminary hearing.<sup>128</sup>

Although the PHO would not have to make a disposition recommendation under the MJA, he would be required to submit a more robust report to the convening authority under a second proposal.<sup>129</sup> Preliminary hearing officers would be required to analyze every specification of every charge and provide a statement of their reasoning and conclusions in light of the limited purpose of the hearing, including a summary of the relevant witness testimony and documentary evidence presented at the hearing along with any of the PHO's observations concerning the testimony of witnesses and the availability of evidence at trial.<sup>130</sup> The report would also include recommendations for any necessary modifications to the form of the charges or specifications and a statement of action taken on evidence adduced with respect to any uncharged offenses.<sup>131</sup> Lastly, the PHO, while not required to consider evidence of disposition during the hearing, would be required to review and analyze the evidence offered by the parties and the victim after the hearing and include a summary of that evidence in the final report.<sup>132</sup> The MJRG figured that by including such a requirement, the convening authority, at least, could make an informed decision as to disposition based

on the PHO's summary in the report as opposed to what they get now—a recommendation in summary form without any analysis.<sup>133</sup>

The MJRG also followed the JSC's lead in protecting victims from deposition abuse after exercising the right not to testify at the preliminary hearing.<sup>134</sup> They proposed statutory language in Article 32 clarifying that a victim's declination to participate in the preliminary hearing "shall not serve as the sole basis for ordering a deposition" under Article 49, UCMJ.<sup>135</sup> Since the MJRG has also proposed expanding the military judge's powers prior to the referral of charges, there will necessarily be a set of rules that govern the use of investigative depositions at preferral and not just at the preliminary hearing or after referral as is currently the case.<sup>136</sup>

The proposal to move discovery from referral to preferral will also have a significant impact on the Article 32 preliminary hearing.<sup>137</sup> Since the defense will have access to almost everything in the government's possession prior to the hearing, it should significantly diminish the defense's inclination to want to try and turn the hearing into a discovery tool. The fact that military judges and part-time magistrates working for the military judge (another separate MJRG proposal) have expanded powers prior to referral, should also eliminate most of the evidentiary issues that the PHO is currently required to consider at the hearing.<sup>138</sup> For instance, one way to eliminate a frequent and complicated evidentiary issue in certain hearings would be to appoint a military judge as the PHO in a sexual assault case where Military Rule of Evidence (MRE) 412 sexual predisposition evidence frequently comes into play.<sup>139</sup> Instead of conducting potentially two separate closed hearings—one before the PHO and another before the military judge prior to trial—there could be one hearing properly convened and executed at the preliminary hearing. There would be no need for the PHO to "assume the power of the military judge" as the current rule contemplates, when you could simply have an actual judge exercise her own powers.<sup>140</sup> The military judge could also rule immediately on evidentiary and any latent discovery issues at the preliminary hearing instead of simply requiring

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

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

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

<sup>128</sup> UCMJ RECOMMENDATIONS, *supra* note 120, at 330.

<sup>129</sup> *Military Justice Act of 2016, supra*, note 8.

<sup>130</sup> *Id.*

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

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> See *supra* text accompanying note 37.

<sup>135</sup> *Military Justice Act of 2016, supra* note 8, at 42.

<sup>136</sup> UCMJ RECOMMENDATIONS, *supra* note 120.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* The MJRG proposes, subject to TJAG approval, that part-time military magistrates (PTMM) be empowered to decide the same issues that the military judge would be asked to resolve, i.e. motions, discovery, depositions, expert witnesses. Professional Experiences, *supra* note 13. Additionally, PTMMs could also preside over the new bench trial under the MJA, which is essentially a special court-martial that could not adjudicate a discharge or confinement for more than 6 months. *Id.*

<sup>139</sup> *Military Justice Act of 2016, supra*, note 8.

<sup>140</sup> Exec. Order No. 13696, 80 Fed. Reg. 119 (June 22, 2015).

the PHO to make a note in his report only to require a judge to sort it out later.<sup>141</sup>

There are hundreds more MJRG recommendations that would drastically alter the current military justice landscape.<sup>142</sup> Some are good, some are not, like the proposal to move discovery from referral to preferral and the amount of time the government will inevitably consume trying to locate and turn over evidence prior to the Article 32 hearing.<sup>143</sup> How would the government ever move a case the magnitude of a *United States v. Hassan* beyond the preferral stage if that were a requirement? The Hassan case involved hundreds of witnesses and hundreds of thousands of pages of medical records, autopsy reports, police reports, victim statements and other evidence stemming from the thirteen counts of premediated murder and thirty-two counts of attempted murder with which Major Hasan was charged.<sup>144</sup> We would still be waiting today to schedule Hassan's Article 32 hearing as the prosecution and defense continued to sort out discovery issues.

## IX. Conclusion

While there are many more pros and cons to the MRJG's legislative proposal, one thing is certain—everybody has a good idea and they are not afraid to share it. Whether these and other reforms ever see the light of day remains to be seen. In the meantime though, the author hopes that you at least have a better understanding about why Congress made some of the historic changes it did to the Article 32 preliminary hearing.

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<sup>141</sup> *Id.*

<sup>142</sup> See *supra* text accompanying note 120.

<sup>143</sup> *Id.*

<sup>144</sup> Michael Muskal and Molly Hennessy-Fiske, *Maj. Nidal Malik Hasan Tells Court-Martial: "I am the Shooter,"* LA TIMES (Aug. 6, 2013), <http://www.articles.latimes.com/2013/aug/06/nation/la-na-nn-nidal-malik-hasan-fort-hood-20130806>.

# Procuring Expertise in a Pinch: How to Retain Expert Witnesses for Courts-Martial Quickly and Legally

Captain Douglas A. Reisinger\*

## I. Introduction

You are days or weeks before trial and find out that you are on the hook to retain an expert witness. There are a wide variety of circumstances that could have led to this urgent scenario: perhaps it is the result of a successful defense motion to compel, a last-minute change in plans for the prosecution, or maybe the request was simply put off for too long (or even forgotten). Now it is crunch time to get an expert witness or consultant in a hurry.

What happens next? Can the office just charge it to the Governmentwide Purchase Card (GPC) or issue Invitational Travel Authorizations (ITAs)? Or, is the staff judge advocate (SJA) office required to go through the contracting office? If so, what documentation does the contracting office require; specifically, do they require quotes from three different experts?

After the court-martial is over, why am I being asked to fill out this “Ratification of Unauthorized Commitment” packet?<sup>1</sup> The convening authority authorized the expert, so why do we have to request ratification of something that is already authorized? And why does any of this matter?

It matters because judge advocates, legal administrators, and paralegals will likely experience this scenario at least once in their careers. Yet, we all find ourselves asking the same basic question each time it comes up. “What are the rules for this again?”

The good news is that both the Defense Finance and Accounting Service Regulation 37-1 (DFAS-IN Reg. 37-1)<sup>2</sup> and the Federal Acquisition Regulation (FAR)<sup>3</sup> streamline the process for fulfilling an expert witness or consultant requirement relatively quickly. However, considering not everyone enjoys perusing the thirty-two chapters and twenty-four appendices of DFAS-IN Reg. 37-1, or the more than 1,800 pages of the FAR to brush up on what is pertinent, this

brief article is intended to serve as a quick reference guide for anyone in need of an expert witness or consultant, but short on time. Governmentwide Purchase Cards purchases,<sup>4</sup> contracts, and under some circumstances ITAs, can all be used to legally procure expert witnesses and consultants for courts-martial. Circumstances and local policies are most often determinative of which option is best for any particular office.

## II. Determining the Method of Acquisition: “Can we Just Charge it?”

Although it is not widely done, there is authority to charge procurement of an expert witness to the GPC. There are two major steps to this method: (1) it requires the expert witness to have a method of processing a credit card payment,<sup>5</sup> and (2) the *total* cost of the expert witness must not exceed the micro-purchase threshold for services, which is currently \$2,500.<sup>6</sup>

If the total lump-sum cost to the government is at or below \$2,500, and the expert witness has a method of receiving payment by credit card, the purchase can be charged to the GPC. However, because the purchase will not be made by a contracting officer, it is good practice for the GPC holder to be aware of any terms included on an invoice or quote from the expert witness. When reviewing these quotes, judge advocates should particularly be on the lookout for terms that bind the government to unreasonable open-ended obligations. Some common, seemingly innocuous terms in many commercial quotes and contracts can violate federal law and even result in a violation of the Anti-Deficiency Act.<sup>7</sup>

Beware of attempts to fit expert costs under the \$2,500 micro-purchase threshold by separating the expert’s consulting fee from travel expenses. Separating the costs in order to avoid the micro-purchase threshold constitutes

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<sup>1</sup> Federal Acquisition Regulation (FAR), 48 C.F.R. § 1.602-3 (2016).

<sup>2</sup> See DEF. FIN. & ACCT. SERV.—INDIANAPOLIS, REG. 37-1, FINANCE AND ACCOUNTING ch. 10 (Jan. 1, 2000) [hereinafter DFAS-IN REG. 37-1].

<sup>3</sup> See FAR § 6 (2016).

<sup>4</sup> See FAR 2.101 (2016); Service Contract Labor Standards, 41 U.S.C. ch. 67 (2016). Acquisition of services are subject to a lower \$2,500 threshold rather than the \$3,500 micro-purchase threshold for goods because of the extensive limitations and requirements imposed on acquisitions over \$2,500 by the Service Contract Labor Standards and the McNamara–O’Hara Service Contract Act of 1965. See 41 U.S.C. §§ 351–358; 41 U.S.C. ch. 67.

<sup>5</sup> Convenience checks are possible, but beware of processing time.

<sup>6</sup> See *supra* note 4.

<sup>7</sup> Anti-Deficiency Act, 31 U.S.C. § 1341 (2016); See Dep’t of the Army—Escrow Accounts and the Miscellaneous Receipts Statute, B-321387 (Comp. Gen. Mar. 30, 2011). The Government Accountability Office (GAO) determined that open-ended indemnification provisions constitute a per se violation of the anti-deficiency act (ADA) because they expose the government to potentially unlimited liability. These indemnification provisions are common “boilerplate” provisions found in many commercial contracts.

purchase splitting, which is prohibited.<sup>8</sup> Consequently, if the combined amount exceeds \$2,500, the GPC cannot be used and alternative methods must be pursued.

Additionally, the Army's GPC operating procedures specifically prohibit using the GPC to pay travel-related expenses.<sup>9</sup> This prohibition is not triggered, however, if the total cost to the government is billed as a single, all-inclusive expert fee with non-severable and non-itemized travel costs. Even then, total cost in excess of \$2,500 will preclude use of the GPC. Several installations have local policies that may further limit use of the GPC.

### III. Contracting for Expert Witnesses

If your expert witness exceeds the micro-purchase threshold, you should consider procuring your expert through a warranted contracting officer at the servicing contracting office.<sup>10</sup> Because this option will require reliance on an external office and considerably more paperwork and lead time, contracting for expert witnesses requires a bit more planning. Although daunting at first, the contracting process can be easily navigable.

#### A. Working with your Local Contracting Office

From a line-unit perspective, contracting offices are often viewed as an additional, unnecessary step in the process that slows down mission accomplishment—a bureaucracy that seems to always need “one more thing” before they can process the request. Staff judge advocate offices may even have the same perception. But contracting officers are kept independent of the units they service (and their purchase requirements) for an important reason,<sup>11</sup> and can usually move acquisitions quite rapidly once the requesting unit provides all of the necessary details.

A direct consequence of the contracting officer being removed from the unit and the purchase requirement (and thereby keeping them impartial), however, is that he or she cannot adequately advise the unit of what will be needed to complete the procurement, or how long it will take, unless the unit provides a detailed explanation of what it needs procured and why. Procurement of expert witnesses is one example where contracting officers can move quickly and deliberately to complete the acquisition once provided all of the information.

#### B. Life in the Fast Lane: Bypassing Federal Competition Rules

Absent an exception, contracting officers are required to seek competition on procurements that exceed the micro-purchase threshold, pursuant to the Competition in Contracting Act of 1984 (CICA).<sup>12</sup> Acquisitions of expert witnesses or consultants for “litigation or disputes,” however, enjoy a statutory exception to federal competition requirements and can bypass the most time-consuming processes of contracting.<sup>13</sup>

This statutory exception enables a contracting officer to bypass the CICA and issue a sole-source contract award “to acquire the services of an expert or neutral person for any current or anticipated litigation or dispute” without competition.<sup>14</sup> This exception also extends to alternative dispute resolution processes and is not contingent on the expert actually testifying at the trial or hearing.<sup>15</sup> Because competing a requirement is ordinarily the most time-consuming part of any procurement, this exception reduces the time needed to contract for an expert witness to only the time needed to put together the paperwork and get it signed.

Moreover, multiple contractor quotes are not necessary and the requirement need not be urgent to use this exception.<sup>16</sup> The contracting officer is still responsible for posting a Justification & Approval (J&A) document detailing why the requirement is not being competed, in addition to drafting and executing the contract itself though. It is therefore critical when the expert witness is an urgent requirement that the requiring unit submits the necessary documents to the contracting office as quickly and accurately as possible.

#### C. Get Contracting the Documents They Need

Every contracting office has its own local policy addressing what must be included in any purchase request. It is of primary importance to have a copy of the most up-to-date policy to ensure a smooth and quick procurement. The following four items, however, are the bare minimum documents required for any expert witness sole-source contract:

- 1) Curriculum vitae or résumé of the expert.
- 2) Funding document.

<sup>8</sup> FAR 13.003(c)(2) (2016).

<sup>9</sup> See DEP'T OF THE ARMY, GOVERNMENT PURCHASE CARD OPERATING PROCEDURES app. C (May 3, 2013).

<sup>10</sup> FAR 1.602-1.

<sup>11</sup> FAR 1.602-2(b) (2016). “Contracting officers shall . . . [e]nsure that contractors receive impartial, fair, and equitable treatment.” *Id.*

<sup>12</sup> 31 U.S.C. §§ 3551-56 (2016).

<sup>13</sup> 10 U.S.C. § 2304(c)(3)(c) (2016).

<sup>14</sup> FAR 6.302-3(a)(2)(iii) (2016).

<sup>15</sup> 10 U.S.C. § 2304(c)(3)(c) & FAR 6.302-3(b)(3).

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

- 3) Draft justification & approval document.<sup>17</sup>
- 4) Court-Martial Convening Authority Expert Approval

A complete and accurate J&A document is the key to both a successful acquisition and a good relationship with the local contracting office. The contracting office will usually prefer to provide a specific template J&A that it wants the unit to use. It is good practice to make contact with the contracting office to get a copy of this template before the need to procure an expert even arises. This ensures the legal office already has the form (and format) on file when it is needed, and the contracting office is not caught off guard when they receive a short-suspense requirements for an expert.

However, unlike most sole-source J&As, procurement of an expert witness need not detail why competition is unavailable or that the requirement is too urgent to survey competition. Instead, the J&A must note the authority for the action pursuant to FAR 6.302-3(a)(2)(iii) and state that the expert witness is required for a court-martial. Providing the expert's credentials on the J&A is also helpful for preserving the file in the event the procurement is later challenged.

For recurring requirements, such as forensic toxicologists or psychologists, the contracting office is also able to enter into one or many blanket purchase agreements, or BPAs.<sup>18</sup> These BPAs, once emplaced, can last several years before needing to be renewed and enable the unit to procure experts as a routine, repetitive task.

#### IV. Invitational Travel Authorizations

Invitational Travel Authorizations (ITAs) can be a quick, convenient method of using unit operations & maintenance funds to cover the travel costs of non-employee experts and consultants to courts-martial. An ITA is typically used to pay the authorized travel costs of unpaid civilian witnesses to a court-martial. This generally suggests that if your agency is

employing an expert that requires compensation, then an ITA is not a viable option due to the non-travel related expenses incurred.

Despite this apparent limitation, Chapter 10 of DFAS-IN Reg 37-1 appears to suggest that an ITA *can* be used as a method of payment for expert compensation with travel.<sup>19</sup> However, it is critical to note that this expansive interpretation of the DFAS regulation does not appear to be rooted in any express legal authority. In fact, the regulation itself goes on to suggest that additional "authorization and prescribed procedures" (an obligating document) must be obtained in order to pay for any expert compensation with an ITA.<sup>20</sup>

Additionally, the Joint Travel Regulations (JTRs) largely contradict the expansive interpretation of the DFAS regulation and are more firmly grounded in statutory authority. The JTRs broadly state that ITAs are applicable to persons not employed by the government and those "intermittently employed by the government as a consultant or expert and paid on a daily when actually employed basis under 5 U.S.C. § 5703."<sup>21</sup> The JTRs, echoing 5 U.S.C. § 5703, explicitly limit the use of an ITA to travel expenses and provides statutory authority that stops far short of permitting the payment of expert compensation using ITAs.<sup>22</sup>

#### V. An Authorized Expense is Different than the Authority to Obligate Funds

Although court-martial convening authorities are the approval authorities for expert requests, convening authorities wield an authority different than that of contracting officers. A convening authority's approval of an expert witness, for example, authorizes an expenditure. It gives the unit authority to spend official funds to procure an expert witness. It does not actually procure the witness; that is left to the GPC holder or contracting officer.

Traditionally, once a requirement exceeds the micro-purchase threshold, the government can become obligated,

<sup>17</sup> See FAR 6.302-3(c); 6.303-1(a), requiring the contracting officer to justify the use of the sole-source action in writing.

<sup>18</sup> See generally FAR 13.303 (2016).

<sup>19</sup> DFAS-IN REG. 37-1, *supra* note 2, ch. 10, para. 100405.F (1)

When the employment of an expert witness is necessary during a trial by a military court, the trial counsel requests the convening authority to authorize an expert before such employment (Rule 703(d), Manual For Courts Martial, 1984). The Invitational Travel Order (ITO) should state the compensation recommended by the prosecution and defense. In addition, travel allowances authorized in paragraph 100405.E may be authorized for travel to and from the place of trial. The terms of the ITO should be specific if the compensation includes travel allowances to and from place of trial or specify the travel allowance authorized in addition to the compensation. Without the authorization and the prescribed procedures, only the ordinary witness fees and travel allowances may be paid for the employment of the witness.

*Id.*

<sup>20</sup> *Id.* Despite this expansive DFAS interpretation, few finance offices are willing to pay expert compensation with an ITA, and instead choose to pay the compensation portion of the expense as a "miscellaneous payment" on a separate Standard Form (SF) 3881. Unless signed by a contracting officer, paying expert compensation with an SF does not alleviate the need for an underlying obligating document.

<sup>21</sup> See DEP'T OF DEF., THE JOINT TRAVEL REGULATIONS, app. E, pt. 1 (Oct. 1, 2014) (Invitation to Travel) [hereinafter JTR].

<sup>22</sup> 5 U.S.C. § 5703 (2016).

An employee serving intermittently in the Government service as an expert or consultant and paid on a daily when-actually-employed basis, or serving without pay or at \$1 a year, may be allowed travel or transportation expenses, under this subchapter, while away from his home or regular place of business and at the place of employment or service.

*Id.*

and official funds committed, only upon the execution of a contract by a warranted contracting officer.<sup>23</sup> This distinction is most important in the period of time between the approval of an expert witness or consultant by the convening authority and the actual finalization of a contract. If units are instead relying on 5 U.S.C. § 5703 and issuing ITAs for travel expenses, and processing compensation as a miscellaneous payment, an underlying obligating document is still necessary.

During this time between authorization by the convening authority and obligation by a contracting officer or GPC holder, both trial and defense counsel are often eager to begin working with their approved expert and may want to make up for lost time by putting the expert to work as soon as the convening authority signs the approval. The danger in doing so is that trial and defense counsel do not have the authority to obligate the government. Compelling performance of services before a contract is finalized, even inadvertently, may result in an unauthorized commitment (UAC).<sup>24</sup>

The ratification process to “fix” a UAC varies depending on the amount of funds needed to cure the improper obligation. But what is important to note about all UACs, regardless of amount, is that the private vendor may treat the agreement as a personal debt of the individual that compelled the performance of services unless and until the debt is endorsed by the individual’s chain of command and ratified by a contracting officer.

Unauthorized Commitments, if approved and ratified, take considerable time to prepare and staff.<sup>25</sup> This may result in expert invoices languishing for months, which raises risks of civil litigation. Trial and defense counsel both would be wise to avoid this scenario by ensuring a contract is signed before compelling any services from expert witnesses and consultants.

## VI. Conclusion

Things are often hectic in the days (and weeks) leading up to trial. Navigating federal procurement rules to retain an expert witness on short notice need not be a time-consuming problem. Despite this, the ability to bypass competition requirements or issue ITAs for travel does not mean that expert witness requirements should be viewed as something that can be routinely delayed and dropped on contracting or the resource manager (RM) the week before trial. While acknowledging that the unpredictable nature of courts-martial often does not lend itself to long lead times, engaging the contracting office or RM early is a reliable recipe for success.

Likewise, engaging an expert for consultations or encouraging him or her to begin travel without a contract or

ITAs in place risks committing a UAC that could have been easily prevented. Unauthorized commitments are best prevented by engaging the RM as early and often as possible to ensure they will be able to issue ITAs for travel expenses, or the servicing contracting office to ensure that it has everything needed to finalize a contract.

Resource managers and contracting offices both operate with a queue of pending purchase requests at any given moment. Submitting an urgent requirement that must be worked immediately essentially “cuts in line” to the front of the queue, delaying all of the earlier submitted requests. Resource managers and contracting offices understand that emergencies happen. Keeping urgent requirements the exception, rather than the rule, will make for a less stressful trial preparation and a better working relationship with the servicing RM and contracting office.

Procuring expert witnesses and consultants is done differently in many legal offices around the DoD. While this would ordinarily be an indicator of a lack of guidance, the reverse is true here; what makes procurement of experts so unique is that there are *multiple* legal authorities that address the matter and all prescribe slightly different guidance on what is the proper method. In other words, it is not a lack of guidance that confuses the issue of expert compensation, but the abundance of guidance. According to 5 U.S.C. § 5703, non-government expert witnesses and consultants are to be classified as *quasi-employees* and not contractors, therefore eligible for ITAs. However, 10 U.S.C. §2304(c)(3)(c) provides statutory authority to procure expert witnesses and consultants through a *contract*, thereby treating experts as contractors. Neither is “wrong,” and a method that works for one legal office may vary depending on the circumstances and local policies in effect.

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<sup>23</sup> FAR 1.602-1 (2016).

<sup>24</sup> FAR 1.602-3(a) (2016).

<sup>25</sup> This assertion is based on the author’s recent professional experiences as the Deputy Command Judge Advocate of the 413th Contracting Support Brigade, U.S. Army Expeditionary Contracting Command, from 12 January 2013 to 14 July 2014.

## Animal Abuse: Crimes and Concerns

Sherry Ramsey, Esq.\*

In El Paso, Texas in 2009, a Fort Bliss Soldier and his wife adopted two dogs. Two weeks later, one was dead and the other—a puppy—had suffered a severely broken leg.<sup>1</sup> Recently at Fort Bragg, a Soldier allegedly took two dogs and slit their throats with a knife. He reportedly faces felony charges of stealing dogs, possession of stolen property and animal cruelty. Authorities reported that the Soldier had previously been charged with domestic violence.<sup>2</sup> These are only a couple of examples of cases of animal abuse within the military, which have garnered the attention and concern of the public.

For anyone who has researched the link between animal abuse and future violent crimes against humans, it is clear these cases present serious implications—even beyond the abuse to the animals involved.<sup>3</sup> Perhaps that is why the Federal Bureau of Investigations (FBI) recently decided to include animal cruelty crimes within the Uniform Crime Report-National Incident Based Reporting System. This decision, which goes into effect in 2016, is a significant departure from the prior system which placed animal cruelty crimes under a general “all other offenses” category.<sup>4</sup> Under this new category, animal cruelty crimes will be considered a crime against society.<sup>5</sup> This serves as serious recognition of the importance of addressing these crimes. Likewise, state laws provide significant consequences for crimes against animals, as all fifty states now provide felony provisions for animal abuse.<sup>6</sup>

The Department of Defense (DoD) is also in the process of addressing this issue. Currently, there is no specific

provision under the Uniform Code of Military Justice (UCMJ) to address animal abuse crimes. It is an offense to abuse a *public* animal under Article 134, but not a private or stray animal.<sup>7</sup> This narrow provision leaves most animals without specific protection under the UCMJ.<sup>8</sup> Article 134, UCMJ is a catch-all provision that is commonly used to address offenses not specifically listed in the Code:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.<sup>9</sup>

Arguably, an accused may be charged under all three clauses of Article 134. Clause one permits charges for animal abuse as a disorder or neglect to the prejudice of good order and discipline in the armed forces; clause two permits charges as an offense that brings discredit upon the armed forces; and clause three permits assimilation of noncapital offenses under state law for crimes not covered by the UCMJ that happen on an installation within the United States.<sup>10</sup> Animal cases might also be charged under Article 133—Conduct Unbecoming an Officer and Gentleman.<sup>11</sup> Further, animal cruelty can be

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<sup>1</sup> Chris Roberts, *Fort Bliss MP Dismissed Over Cruelty to 2 dogs*, EL PASO TIMES (June 19, 2009), [http://www.elpasotimes.com/military/ci\\_12625379](http://www.elpasotimes.com/military/ci_12625379).

<sup>2</sup> The Associated Press, *Fort Bragg Soldier Charged with Taking Owner's Dogs, Cutting Throats*, ARMY TIMES (May 7, 2015), <http://www.armytimes.com/story/military/crime/2015/05/07/fort-bragg-soldier-charged-with-taking-owners-dogs-cutting-throats/70972876/>.

<sup>3</sup> See Sherry Ramsey et al., *Protecting Domestic Violence Victims by Protecting Their Pets*, JUVENILE AND FAMILY JUSTICE TODAY, Spring

2010, at 16-20, [http://www.humanesociety.org/issues/abuse\\_neglect/qa/cruelty\\_violence\\_connection\\_faq.html?referrer=http://search.aol.com/aol/search?enabled\\_terms=&q=studies%20that%20demonstrate%20strong%20link%20animal%20cruelty%20humane%20violence](http://www.humanesociety.org/issues/abuse_neglect/qa/cruelty_violence_connection_faq.html?referrer=http://search.aol.com/aol/search?enabled_terms=&q=studies%20that%20demonstrate%20strong%20link%20animal%20cruelty%20humane%20violence)

<sup>4</sup> U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION UNIFORM CRIME REPORTING PROGRAM NATIONAL INCIDENT-BASED REPORTING SYSTEM USER MANUAL 48 (2013), <http://www.fbi.gov/about-us/cjis/ucr/nibrs/nibrs-user-manual>.

<sup>5</sup> *Id.*

<sup>6</sup> *Animal Protection Laws of the United States and Canada*, ANIMAL LEGAL DEFENSE FUND, [www.aldf.org/resources/advocating-for-animals/animal-protection-laws-of-the-united-states-and-canada/](http://www.aldf.org/resources/advocating-for-animals/animal-protection-laws-of-the-united-states-and-canada/) (last visited July 8, 2016).

<sup>7</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 61 (2012) [hereinafter MCM] (emphasis added).

<sup>8</sup> *Id.*

<sup>9</sup> See 10 U.S.C. § 934 (2012).

<sup>10</sup> UCMJ art. 134 (2012).

<sup>11</sup> *Id.* art 133.

charged as an Article 92 violation if it violates a local animal abuse ordinance or regulation if the offense happened on post.

Article 92 text states the following:

Any person subject to this chapter who—

- (1) violates or fails to obey any lawful general order or regulation;
- (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or
- (3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct.<sup>12</sup>

All of these provisions provide a means to charge these crimes, but without a clear and consistent charge within the UCMJ, it is hard to consistently charge and prosecute crimes against animals.

The Federal Assimilative Crimes Act (18 U.S.C. § 13), is an adoption by Congress of state criminal laws for areas of exclusive or concurrent federal jurisdiction, provided federal criminal law—which includes the UCMJ—has not defined an applicable offense for the misconduct committed.<sup>13</sup> For example, if a person committed an act on a military installation in the United States at a certain location over which the United States had exclusive or concurrent jurisdiction, and the offense is not specifically defined by federal law (including the UCMJ), that person could be punished for that act by a court-martial if it was a violation of a non-capital offense under the law of the State where the military installation was located.<sup>14</sup>

State laws represent how animal abuse crimes can be most effectively charged to appropriately prosecute military personnel in the United States. However, as noted in the in a 2009 congressional report on military justice (The Cox

Commission report) there exists a loophole when animal abuse happens outside of the United States.<sup>15</sup> In the report and in a separate letter to the DoD committee on military justice, Committee Chair Walter T. Cox III noted this loophole stating that there was “not an adequate mechanism for holding these servicemembers criminally accountable when they abuse or abandon these non-public animals.”<sup>16</sup> The report further states, “The Commission believes that this loophole should be closed and has submitted a letter to the Department of Defense asking that appropriate action be taken to address this problem.”<sup>17</sup>

As a result of the attention to this problem, there is a pending executive order (EO) that would finally add animal abuse crimes to the UCMJ. The pending EO would retitle the current 134 offense from “Abusing public animal” to simply “Animal Abuse.” If signed by the President, there would be two types of charges under this new offense: 1) for abusing, neglecting, or abandoning an animal; or 2) for engaging in a sexual act with an animal.<sup>18</sup> The newly-worded offense would put the UCMJ in line with state animal cruelty laws and provide consistency in charging these crimes on military installations around this country as well as around the world.

These crimes are of particular importance considering the substantial amount of research that confirms the strong link between animal abuse and human violence. The FBI has recognized this connection since the 1970s when bureau analysis of the life histories of imprisoned serial killers suggested that many had also killed or tortured animals.<sup>19</sup> In 1988, an FBI study revealed that animal cruelty could be an early warning sign of a serial murderer.<sup>20</sup> Likewise, animal abuse has long been recognized as a red flag in family violence as well as a possible warning sign of future human aggression.<sup>21</sup> Specifically, research has revealed consistent patterns of animal cruelty among perpetrators of common forms of family violence, including child abuse, spouse abuse, and elder abuse. A national survey of battered women’s shelters determined that 85% of shelters indicated that women seeking shelter at safe houses talked about incidents of pet abuse,<sup>22</sup> and additional studies have found that as many as 71% of battered women reported that their pets had been threatened, harmed, or killed by their partners.<sup>23</sup> Animal

<sup>12</sup> 10 U.S.C. § 892 (2012).

<sup>13</sup> MCM, *supra* note 7, pt. IV, ¶ 60(c)(4)(c)(ii); *Id.* R.C.M. 201(d).

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

<sup>15</sup> See NATIONAL INSTITUTE OF MILITARY JUSTICE ET AL., REPORT OF THE COMMISSION ON MILITARY JUSTICE 4-5 (October 2009), <http://www.caaflog.com/wp-content/uploads/Report-of-the-Commission-on-Military-Justice-2009.pdf>.

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

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

<sup>18</sup> See Manual for Courts-Martial; Proposed Amendments, 77 Fed. Reg. 64,853 (Oct. 23, 2012), <https://www.federalregister.gov/articles/2012/10/23/2012-25852/manual-for-courts-martial-proposed-amendments#h-9>.

<sup>19</sup> See ROBERT K. RESSLER ET AL., SEXUAL HOMICIDE: PATTERNS AND MOTIVES (1988).

<sup>20</sup> *Id.*

<sup>21</sup> M. Muscari, *Juvenile Animal Abuse: Practice and Policy Implications for PNPs*, 18 J. OF PEDIATRIC HEALTH CARE 18, 15 (2004).

<sup>22</sup> Frank A. Ascione et al., *The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women who are Battered*, 5 SOCIETY AND ANIMALS 205, 205-18 (1997); see also Marti T. Loring & Tamara A. Bolden-Hines *The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women Who Are Battered* 4 J. OF EMOTIONAL ABUSE 27 (2004).

<sup>23</sup> See Flynn, *Battered Women and Their Animal Companions: Symbolic Interaction Between Human and Nonhuman Animals*, 8 SOCIETY & ANIMALS 102, 102-13 (2000); see generally Loring & Bolden-Hines, *supra* note 20.

abusers are five times more likely to commit violent crimes against people, four times more likely to commit property crimes, and three times more likely to have drug or disorderly conduct offenses.<sup>24</sup>

Further troubling is another study that examined a sample of 44,202 adult males evaluated for sexual misconduct.<sup>25</sup> That study found that bestiality was the single largest risk factor and strongest predictor of increased risk for committing child sexual abuse.<sup>26</sup> These and many more disturbing studies demonstrate that animal abuse is not only a threat to the animals subjected to this cruelty but also to the humans who live, work or engage with the perpetrators of these crimes.

Accordingly, it is important for judge advocates (JA) to treat cases of animal abuse seriously and until a specific crime of animal abuse is added to the UCMJ, to use existing state laws when available. When assimilation of state law is unavailable, JAs should use the best provisions under the UCMJ, as previously discussed, to prosecute these cases. Likewise, it is important to consider other crimes that might be applicable, in addition to the animal abuse. For example, there could also be violations of larceny, burglary, false official statements or other crimes associated with the incident. Treat animal abuse cases like any other case and charge all applicable crimes in order to present your strongest case. As animals are considered property, it is also important to ensure that the animal is forfeited and not returned to the abuser and if possible to prevent any further ownership of new animals that could be subject to abuse.

In domestic and family violence situations or other cases where there are vulnerable victims at risk, it is important to be aware of potential crimes or threats against the animals in the home. Asking a victim targeted questions about animal abuse might allow for additional charges to be filed as well as provide protection for the non-human victims in the family. Understanding and addressing these concerns may also prevent a domestic violence victim from being manipulated by threats or acts of abuse to a beloved animal, which could result in the victim staying in a dangerous situation in order to protect the animal. This concern is common in domestic violence cases and is being addressed by state laws that allow a victim to add family animals to a domestic violence protection order.<sup>27</sup> As we learned during Hurricane Katrina, people will often stay in a dangerous situation to protect a beloved animal.<sup>28</sup> Consequently, it is worthwhile to consider

these issues when dealing with any case of interpersonal violence.

Animal cruelty is a serious crime. As research indicates, there are broad implications and incentives, not only within the home but for the military community to devote resources towards actively enforcing and aggressively adjudicating these crimes. Proactively identifying and responding to these offenses is an important way to prevent future violence—not only against animals, but also against humans. Accordingly, the pending Executive Order to add animal abuse to the UCMJ is an important step to effectuate that goal.

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<sup>24</sup> See CRUELTY TO ANIMALS AND OTHER CRIMES, A STUDY BY THE MSPCA AND NORTHEASTERN UNIVERSITY 8 (1997), <http://www.mspca.org/programs/cruelty-prevention/animal-cruelty-information/cruelty-to-animals-and-other-crimes.pdf>; see also A. Arluke, J. Levin, C. Luke, & F. Ascione, *The Relationship of Animal Abuse to Violence and Other Forms of Antisocial Behavior*, JOURNAL OF INTERPERSONAL VIOLENCE, 14(9) at 963-75 (1999).

<sup>25</sup> See G.G. Able, Presentation at the California Coalition on Sexual Offending 11th Annual Training Conference, Emerging Perspectives on Sexual Abuse Management: What can 44,000 men and 12,000 boys with

sexual behavior problems teach us about preventing sexual abuse? (May 16, 2008).

<sup>26</sup> *Id.*

<sup>27</sup> See National Council of Juvenile and Family Court Judges, JUVENILE & FAMILY JUSTICE TODAY (spring 2010), [http://my.ncjfcj.org/resource/publications/Today/spring2010\\_web.pdf](http://my.ncjfcj.org/resource/publications/Today/spring2010_web.pdf)

<sup>28</sup> See, e.g., Julia Ray, 'Guardian Angels' Swoop Down from Above to Save Lives, AIR FORCE SPECIAL OPERATIONS COMMAND (Nov. 3, 2005), <http://www.afsoc.af.mil/News/ArticleDisplay/tabid/5003/Article/163560/guardian-angels-swoop-down-from-above-to-save-lives.aspx>.

## Larceny in Credit, Debit, and Electronic Transactions

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In a recent article, Edward J. O'Brien and Timothy Grammel detailed the difficulty of charging military personnel under the Uniform Code of Military Justice (UCMJ) with larceny by credit card, debit card, or electronic transactions.<sup>1</sup> They note how challenging it can be to follow the money trail to determine the actual victim in such larceny cases,<sup>2</sup> and implore military prosecutors to follow the guidance provided in the *Manual for Courts-Martial (MCM)*<sup>3</sup> for charging "usual" cases.<sup>4</sup> The authors urge the Court of Appeals for the Armed Forces "to establish more clearly the parameters for what constitutes an 'unusual case.'"<sup>5</sup>

There is a better way to charge these types of offenses without having to determine the identity of the victim. Charge the accused with violating Article 134, UCMJ,<sup>6</sup> based on the federal statute proscribing the use of unauthorized access devices.<sup>7</sup>

### I. The Problem

To establish the offense of larceny,<sup>8</sup> the government must prove beyond a reasonable doubt all the elements of the offense,<sup>9</sup> including that "the property belonged to a certain person."<sup>10</sup> A problem may arise in determining who exactly owned the stolen property. The person whose name appears on the credit or debit card is often not the owner of the property stolen. Usually the victim is the merchant who accepted the credit or debit card, or the bank that issues the card and provides cash in an automated teller machine (ATM) transac-

tion.<sup>11</sup> In the past, charging the wrong victim would not necessarily have been fatal, but more recent military jurisprudence suggests otherwise.<sup>12</sup> The court-martial could save the conviction by finding the accused guilty of larceny from the proper victim by exceptions and substitutions.<sup>13</sup> But typically, the problem is not discovered until the case is on appeal, when it is too late to fix.<sup>14</sup>

The President apparently tried to resolve this issue by explaining in the 2002 Amendments to the *MCM* how to charge such offenses:

Wrongfully engaging in a credit, debit, or electronic transaction to obtain goods or money is an obtaining-type larceny by false pretense. 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 (e.g., withdrawing cash from an automated teller or a cash advance from a bank) is *usually* a larceny of money from the entity presenting the money or a negotiable instrument.<sup>15</sup>

This provision, however, does not explain what makes a case unusual or how to charge it.<sup>16</sup>

### II. The Solution

As part of a "Joint Resolution making continuing appropriations for the fiscal year 1985, and for other purposes,"<sup>17</sup>

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<sup>1</sup> Edward J. O'Brien & Timothy Grammel, *Achieving Simplicity in Charging Larcenies by Credit, Debit, and Electronic Transactions by Recognizing the President's Limitation in the Manual for Courts-Martial*, ARMY LAW., June 2015, at 5.

<sup>2</sup> *Id.* at 12.

<sup>3</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 46.c.(1)(i)(vi) (2012) [hereinafter MCM].

<sup>4</sup> *Id.* at 12.

<sup>5</sup> O'Brien & Grammel, *supra* note 1, at 5.

<sup>6</sup> 10 U.S.C. § 934 (2012).

<sup>7</sup> 18 U.S.C. § 1029(a)(2) (2012).

<sup>8</sup> 10 U.S.C. § 921 (2012).

<sup>9</sup> United States v. Torres, 74 M.J. 154, 157 (C.A.A.F. 2015).

<sup>10</sup> United States v. Cimball Sharpton, 73 M.J. 299, 301 (C.A.A.F. 2014) (quoting MCM, *supra* note 3, pt. IV, ¶ 46.b(1)(b)).

<sup>11</sup> See, e.g., United States v. Endsley, No. 15-0202/AR (C.A.A.F. Jan. 14, 2015); United States v. Gaskill, 73 M.J. 207 (C.A.A.F. 2014) (sum. disp.); United States v. Lubasky, 68 M.J. 260 (C.A.A.F. 2010).

<sup>12</sup> See United States v. Craig, 24 C.M.R. 28, 29 (C.M.A. 1957).

<sup>13</sup> See United States v. Marshall, 67 M.J. 418, 421 (C.A.A.F. 2009) (holding that substituting the name of the individual from whom the accused escaped from custody was a fatal variance because it impaired the accused's ability to prepare and present a defense), *aff'd*, (C.A.A.F. Jan. 15, 2010).

<sup>14</sup> United States v. Lubasky, 68 M.J. 260, 265 (C.A.A.F. 2010).

<sup>15</sup> MCM, *supra* note 3, pt. IV, ¶ 46.c.(1)(i)(vi) (emphasis added); see MCM, *supra* note 3, A-23-17 (Analysis of the Punitive Articles).

<sup>16</sup> See *Cimball Sharpton*, 73 M.J. at 301-02 (holding that, due to the terms of the contract between the bank and the government, the Air Force, not the bank or the merchants, was the victim of the appellant's misuse of a government purchase card).

<sup>17</sup> Pub. L. No. 98-473, 98 Stat. 1837 (1984).

Congress enacted a statute proscribing the use of unauthorized credit, debit, and electronic transactions: 18 U.S.C. § 1029, entitled “Fraud and related activity in connection with access devices.”<sup>18</sup> This statute covers a wide-range of fraudulent activity with respect to credit, debit, and electronic transactions without requiring identification of the victim of a loss. Instead, the focus is on the accused’s use of a particular unauthorized access device.

Before exploring the proscriptive terms of the statute, it is important to understand the broad meaning Congress assigned to the term “access device.”

[T]he term “access device” means any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument).<sup>19</sup>

This definition includes the types of access devices that are most likely to appear in a court-martial—credit, debit, and ATM cards. Most military cases should fall under subsection (a)(2):

(a) Whoever—

(2) knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating \$1,000 or more during that period;

shall if the offense affects interstate or foreign commerce, be punished as provided in subsection (c) of this section.

“[T]he term ‘unauthorized access device’ means any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud.”<sup>20</sup>

There is no requirement to prove there was a victim who suffered a financial loss. All that is required is proof that the accused knowingly and with intent to defraud used an unauthorized access device or devices and thereby obtained anything of value totaling at least \$1,000 in any one-year period.

“[T]he military and civilian justice systems are separate as a matter of law.”<sup>21</sup> Criminal offenses set forth in the United States Code are not applicable to military justice proceedings “except to the extent that the Code or the Manual for Courts-Martial specifically provides for incorporation of such changes.”<sup>22</sup> Article 134 specifically provides for incorporation of offenses under certain conditions:

*Though not specifically mentioned in this chapter,* [1] all disorders and neglects to the prejudice of good order and discipline in the armed forces, [2] all conduct of a nature to bring discredit upon the armed forces, and [3] crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.<sup>23</sup>

Regardless, prosecuting an offense under Article 134 is limited by the preemption doctrine, which “prohibits application of Article 134 to conduct covered by Articles 80 through 132.”<sup>24</sup>

[W]here Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element. Congress has occupied the field if it intended for one punitive article of the Code to cover the type of conduct concerned in a comprehensive . . . way.<sup>25</sup>

The preemption doctrine applies only if (1) Congress intended to limit prosecution in this area of the law to offenses defined in the UCMJ; or (2) if “the offense charged is composed of a residuum of elements of a specific offense.”<sup>26</sup>

Simply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine. For an offense to be excluded from Article 134 based on preemption it must be shown that Congress intended the

<sup>18</sup> Pub. L. No. 98-473, Title II, § 1602(a), 88 Stat. 2183 (1984).

<sup>19</sup> 18 U.S.C. § 1029(e)(1) (2012).

<sup>20</sup> 18 U.S.C. § 1029(e)(2) (2012).

<sup>21</sup> *United States v. McElhane*, 54 M.J. 120, 124 (C.A.A.F. 2000).

<sup>22</sup> *Id.* (quoting *United States v. Dowty*, 48 M.J. 102, 106 (C.A.A.F. 1998)).

<sup>23</sup> 10 U.S.C. § 934 (2012) (emphasis added).

<sup>24</sup> See MCM, *supra* note 3, ¶ 60.c(5)(a).

<sup>25</sup> *United States v. McGuinness*, 35 M.J. 149, 151 (C.M.A. 1992).

<sup>26</sup> *Id.* at 151–52.

other punitive article to cover a class of offenses in a complete way.<sup>27</sup>

There is no evidence that Congress intended Article 121 or any other provision of the UCMJ to cover an entire class of offenses in a complete way. Article 121 was simply intended to combine the offenses of common-law larceny, false pretense, and embezzlement.<sup>28</sup> Military appellate courts have recognized the limited reach of Article 121 by approving theft of services as an offense under Article 134, separate from larceny.<sup>29</sup>

Section 1029(a)(2), on the other hand, is in some ways broader in scope and purpose than Article 121. The purpose of Article 121 is to protect tangible property<sup>30</sup>—“any money, personal property, or article of value of any kind.”<sup>31</sup> Section 1029 covers intangible property as well—“anything of value”—and appears aimed to protect not only the property safeguarded by access devices but also the public confidence in such systems.<sup>32</sup> Therefore, the preemption doctrine does not prevent the incorporation of § 1029(a)(2) into the UCMJ under Article 134.

Military prosecutors could charge use of an unauthorized access device as a violation of clause 3 of Article 134—“crimes and offenses not capital.” But that would require proof of “every element of the crime or offense as required by the applicable law.”<sup>33</sup> Prosecutors, therefore, would have to establish that, by using the unauthorized device with the intent to defraud, the accused obtained anything of at least \$1,000 in value during a one-year period, and the accused’s conduct “affect[ed] interstate or foreign commerce.”<sup>34</sup> Additionally,

prosecution for offenses committed overseas would be restricted by the limited extraterritorial reach of the statute.<sup>35</sup>

By charging the offense under clause 1 or clause 2 of Article 134, instead of clause 3, the government could avoid having to prove that the accused obtained anything of at least \$1,000 in value in any one-year period, the accused’s conduct affected interstate or foreign commerce<sup>36</sup> or that it did not exceed the extraterritorial reach<sup>37</sup> of § 1029. “[N]either clause 1 nor clause 2 requires that a specification exactly match the elements of conduct proscribed by federal law,” as long as the elements establish an offense under one of those clauses.<sup>38</sup> Obtaining anything of value by using an unauthorized access device with the intent to defraud may, under certain circumstances, be prejudicial to good order and discipline and is certainly of a nature to bring discredit upon the armed forces.

### III. The Sticking Point—Maximum Punishment

The sticking point in charging a federal offense under Article 134 is determining the maximum punishment. By statute, the maximum sentence to confinement for a first time violation of § 1029(a)(2) is ten years.<sup>39</sup> Determining the maximum when charged under clause 1 or clause 2 of Article 134 is not as easy.

An individual convicted of violating Article 134 “shall be punished at the discretion of” the general, special, or summary court-martial hearing the case.<sup>40</sup> But that punishment “may not exceed such limits as the President may prescribe for that offense.”<sup>41</sup> The President established three general rules for

<sup>27</sup> *United States v. Erickson*, 61 M.J. 230, 233 (C.A.A.F. 2005) (quotation marks and citations omitted).

<sup>28</sup> *United States v. Willard*, 48 M.J. 147, 149 (C.A.A.F. 1998).

<sup>29</sup> *See, e.g., United States v. Firth*, 64 M.J. 508, 511 (A. Ct. Crim. App. 2006 (citing *United States v. Abeyta*, 12 M.J. 507, 508 (A.C.M.R. 1981)).

<sup>30</sup> *See United States v. Mervine*, 26 M.J. 482, 483 (C.M.A. 1988).

<sup>31</sup> UCMJ art. 121(a).

<sup>32</sup> *See, e.g., 18 U.S.C. § 1029(a)(6)(B)* (prohibiting the soliciting of another with the intent to defraud to sell information regarding an application to obtain an access device); *18 U.S.C. § 1029(a)(8)* (prohibiting the trafficking and possession of a scanning receiver).

<sup>33</sup> MCM, *supra* note 3, pt. IV, ¶ 60.b.

<sup>34</sup> *See United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005).

<sup>35</sup> “A person subject to the [UCMJ] may not be punished under clause 3 of Article 134 for an offense that occurred in a place where the law in question did not apply. . . . Regardless where committed, such an act might be punishable under clauses 1 or 2 of Article 134.” MCM, *supra* note 3, pt. IV, ¶ 60.c.(4)(c)(i); *see United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005). The extraterritoriality provision of § 1029 provides:

Any person who, outside the jurisdiction of the United States, engages in any act that, if committed within the jurisdiction of the United States, would constitute an offense under subsection (a) or (b) of this

section, shall be subject to the fines, penalties, imprisonment, and forfeiture provided in this title if—

(1) the offense involves an access device issued, owned, managed, or controlled by a financial institution, account issuer, credit card system member, or other entity within the jurisdiction of the United States; and

(2) the person transports, delivers, conveys, transfers to or through, or otherwise stores, secrets, or holds within the jurisdiction of the United States, any article used to assist in the commission of the offense or the proceeds of such offense or property derived therefrom.

18 U.S.C. § 1029(h) (2012).

<sup>36</sup> *United States v. Leonard*, 64 M.J. 381, 383 (C.A.A.F. 2007).

<sup>37</sup> *United States v. Taylor*, 66 M.J. 293, 293 (C.A.A.F. 2008) (sum disp.) (concluding that a guilty plea to a specification alleging possession of child pornography was improvident under clause 3 because statute defining the offense to which he pled guilty did not have extraterritorial reach but affirming conviction under clauses 1 and 2).

<sup>38</sup> *Leonard*, 64 M.J. at 383 (citing *United States v. Jones*, 20 M.J. 38, 40 (C.A.A.F. 1985); *United States v. Long*, 6 C.M.R. 60 (C.M.A. 1952)).

<sup>39</sup> 18 U.S.C. § 1029(c)(1)(A)(i).

<sup>40</sup> UCMJ, art. 134, 10 U.S.C. § 934 (2012).

<sup>41</sup> UCMJ, art. 56, 10 U.S.C. § 856 (2012).

determining the maximum sentence: (1) the maximum punishment listed in Part IV of the *MCM*;<sup>42</sup> (2) for offenses not listed in Part IV but that are lesser included or closely related to those offenses, the maximum punishment is “that of the offense listed”;<sup>43</sup> and (3) for other offenses not listed in Part IV, the maximum is “as authorized by the United States Code, or as authorized by the custom of the service.”<sup>44</sup>

The offense of use of an unauthorized access device is not listed in Part IV of the *MCM*. Therefore, the question is whether (2) or (3) above applies. We start by looking at (2). Neither the President nor the Court of Appeals for the Armed Forces has defined the term “closely related.” The most straightforward approach, however, would be to compare elements. Use of an unauthorized access device appears to be closely related to the offense of larceny by wrongfully obtaining, as both share elements involving obtaining things of value by fraud. Although the statutes may serve somewhat different purposes, the elements are sufficiently similar to be closely related. Therefore, we need not analyze the offense under (3).

The President has authorized different maximum punishments for larceny based on the character of the items obtained and their value.<sup>45</sup>

(a) *Military property of a value of \$500 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) *Property other than military property of a value of \$500 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(c) *Military property of a value of more than \$500 or of any military motor vehicle, aircraft, vessel, firearm, or explosive.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(d) *Property other than military property of a value of more than \$500 or any motor vehicle, aircraft, vessel, firearm, or explosive not included in subparagraph e(1)(c).* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.<sup>46</sup>

These maximum punishments should be applied to the knowing use of an unauthorized access device prosecuted under clause 1 or clause 2.

#### IV. Conclusion

Rather than trying to define the actual victim of a larceny by access device, it is better and easier to charge an accused with what he actually did: wrongfully use an unauthorized access device, under clauses 1 or 2 of Article 134.<sup>47</sup> A summary of the offense, including the maximum punishments, a model specification, the elements, and sample instructions, similar to those found in the *Military Judges’ Benchbook* for other offenses, are contained in Appendix I.

<sup>42</sup> *MCM*, *supra* note 3, R.C.M. 1003(c)(1)(A)(i).

<sup>43</sup> *Id.* R.C.M. 1003(c)(1)(B)(i).

<sup>44</sup> *Id.* R.C.M. 1003(c)(1)(B)(ii). If an offense is not included or related to an offense listed in Part IV of the *Manual for Courts-Martial*, is not an offense under the United States Code, and there is no custom of the service as to an appropriate sentence, the maximum punishment is that for a general disorder, confinement for four months. *United States v. Beaty*, 70 M.J. 39, 45 (C.A.A.F. 2011).

<sup>45</sup> *See MCM*, *supra* note 3, pt. IV, ¶ 46.e.(1).

<sup>46</sup> *Id.* ¶ 46.e.

<sup>47</sup> The Military Justice Review Group has proposed Congress enact a new provision similar, but more limited in scope, than this proposal. *See Report of the Military Justice Review Group, Part I: UCMJ Recommendations Article 121a*, at 893 (Dec. 22, 2015).

### Knowing Use of an Unauthorized Access Device

(a) Maximum Punishment:

(1) *Military property of a value of \$500 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Property other than military property of a value of \$500 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(3) *Military property of a value of more than \$500 or of any military motor vehicle, aircraft, vessel, firearm, or explosive.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(4) *Property other than military property of a value of more than \$500 or any motor vehicle, aircraft, vessel, firearm, or explosive not included in (3) above.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(b) Model Specification:

In that (rank and name of the accused) did, (location), (on or about/between) \_\_\_\_\_ 20\_\_ , with intent to defraud, knowingly use (identify the specific access device(s)) that he knew (was) (were) lost, stolen, expired, revoked, canceled, or obtained with intent to defraud, and by such use obtained (identify anything obtained) of (some value) (of a value of more than \$500), such conduct being (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces).

The specification must identify the specific access device or devices used and detail the thing(s) of value obtained. The specification should also allege any factor that will increase the maximum sentence from a bad-conduct discharge and confinement for one year—such as if the value exceeds \$500 or if the thing obtained is military property or a military motor vehicle, aircraft, vessel, firearm, or explosive.

(c) Elements:

(1) That the accused knowingly used a specific access device as alleged;

(2) That the accused did so with the intent to defraud;

(3) That the accused knew that the access device was lost, stolen, expired, revoked, canceled, or obtained with intent to defraud;

(4) That by using the access device, the accused obtained \_\_\_\_\_ of (some value); and

(5) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces.

(d) Definitions and Other Instructions:

The term "access device" means any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument).

18 U.S.C. § 1029(e)(1) (2012).

"Intent to defraud" means an intent to obtain, through a mis-representation, anything of value and to apply it to one's own use and benefit or to the use and benefit of another, either permanently or temporarily.

*Manual for Courts-Martial, United States (MCM)* pt. IV, ¶ 49.c.(14) (2012).

"To the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on

the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, this article does not include these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable. An act in violation of a local civil law or of a foreign law may be punished if it constitutes a disorder or neglect to the prejudice of good order and discipline in the armed forces.

*MCM* pt. IV, ¶ 60.c.(2)(a).

“Discredit” means to injure the reputation of. This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem.

*MCM* pt. IV, ¶ 60.c.(3).

# Factually Insufficient: A Response to the Military Justice Review Group's Appellate Review Proposal

Major Jeremy Stephens\*

## I. Introduction

In the past decade, allegations of rampant sexual misconduct and a toxic culture have plagued the United States military and called into question the functioning of the military justice system. As a result, the Army's civilian leadership and Congress tasked several entities to review the military justice system. One of these, the Military Justice Review Group (MJRG), was given a broad mission to review the Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial (MCM) and to recommend changes. The MJRG's report, if adopted, would result in the most drastic changes since the adoption of the UCMJ. This article discusses changes in the appellate process which, if adopted by Congress, radically limit the available relief for servicemembers convicted at courts-martial.

### *The Military Justice Review Group*

The MJRG resulted from a 2013 request by the then-Chairman of the Joint Chiefs of Staff, General Martin Dempsey, to Secretary of Defense Chuck Hagel for a "holistic review" of the military justice system to ensure it "most effectively and efficiently does justice consistent with due process and good order and discipline."<sup>1</sup> The Joint Chiefs deemed a comprehensive review necessary because of the transformation in the Armed Forces as well as major social changes in the United States since 1983, the date of the last comprehensive review.

In accordance with the Joint Chiefs' request, Secretary Hagel directed "the General Counsel of the Department of Defense (DoD) to conduct a comprehensive review of the UCMJ and the military justice system," including the Manual for Courts-Martial and the various service regulations that govern courts-martial.<sup>2</sup> The Secretary's direction included a requirement to review and implement those provisions of the report of the Response Systems to Adult Sexual Assault Crimes Panel<sup>3</sup> (Response Systems Panel) the MJRG deemed appropriate.

The DoD General Counsel established five guiding principles for the MJRG:

1. Use the current UCMJ as a point of departure for baseline reassessment.
2. Where they differ with existing military justice practice, consider the extent to which the principles of law and the rules of procedure and evidence used in the trial of criminal cases in the United States district courts should be incorporated into military justice practice.
3. To the extent practicable, UCMJ articles and MCM provisions should apply uniformly across the military services.
4. Consider any recommendations, proposals, or analysis relating to military justice issued by the Response Systems Panel.
5. Consider, as appropriate, the recommendations, proposals, and analysis in the report of the Defense Legal Policy Board, including the report of that Board's Subcommittee on Military Justice in Combat Zones.<sup>4</sup>

The MJRG also proclaims the proposed changes would follow the original objectives of the UCMJ—"to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."<sup>5</sup>

Since its inception in 1775, military law in the United States has evolved to recognize that all three components are essential to ensure that our national security is protected and strengthened by an effective, highly disciplined military force. The current structure and practice of the UCMJ embodies a single overarching principle based on more than 225 years of experience: a system of

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<sup>1</sup> REPORT OF THE MILITARY JUSTICE REVIEW GROUP 5 (Dec. 22, 2015), [http://www.dod.gov/dodgc/images/report\\_part1.pdf](http://www.dod.gov/dodgc/images/report_part1.pdf) [hereinafter MJRG REPORT].

<sup>2</sup> Memorandum from Sec'y of Def. to Secretaries of the Military Dep'ts et al., subject: Comprehensive Review of the Uniform Code of Military Justice (Oct. 18, 2013), [http://www.dod.gov/dodgc/images/mjrg\\_secdef\\_memo.pdf](http://www.dod.gov/dodgc/images/mjrg_secdef_memo.pdf).

<sup>3</sup> DEP'T OF DEF., RESPONSE SYSTEMS PANEL REPORT (June 2014), [http://responsesystemspanel.whs.mil/Public/docs/Reports/00\\_Final/RSP\\_Report\\_Final\\_20140627.pdf](http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf) (last visited May 13, 2016).

<sup>4</sup> MJRG REPORT, *supra* note 1, app. C-3.

<sup>5</sup> *Id.* at 5; *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES preamble (2012) [hereinafter MCM].

military law can only achieve and maintain a highly disciplined force if it is fair and just, and is recognized as such both by members of the armed forces and by the American public.<sup>6</sup>

## II. History of Article 66 and its role

One of the unique aspects of the United States' military justice system is Article 66 of the UCMJ. Like most American justice systems, the UCMJ provides for levels of review. The majority of court-martial convictions are reviewed by an initial appellate service court and then, potentially, by the Court of Appeals for the Armed Forces (CAAF), and in limited circumstances, a case may be reviewed by the Supreme Court of the United States.<sup>7</sup> However, aspects of the military appellate system are novel, and most significant among these is the review authority found in Article 66.

Under the current statutory scheme, Article 66 requires each service judge advocate general to refer cases to the respective services' court of criminal appeals (CCA) where the approved sentence includes at least one year of confinement, a punitive discharge, or extends to death.<sup>8</sup> In other words, unlike many other systems of review, review of many courts-martial is automatic. But it is not just the scope of their appellate jurisdiction that makes the service courts' authority remarkable. When the service court acts on the findings and sentence approved by the convening authority, it may affirm only such findings of guilty and sentence as the court finds correct in law and fact and determines, on the basis of the entire record, should be approved.<sup>9</sup> Furthermore, in considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.<sup>10</sup> The service courts are required to determine (1) that the court itself is convinced of guilt beyond a reasonable doubt, and (2) that the findings and sentence approved "should be approved," based on the entire record.<sup>11</sup>

This authority to weigh evidence, judge credibility, determine controverted fact, and affirm only what "should be approved" was of great significance to the drafters of the UCMJ. Harvard Law Professor Edmund J. Morgan, chairman of the Department of Defense special committee that helped draft the legislation which created the UCMJ (and widely

considered the intellectual driving force behind the UCMJ) testified before the House of Representatives Subcommittee on the Armed Services that the Board of Reviews were intended to limit command influence. "We think also that we have lessened command influence by making for all the services [provide a board of review]; namely, that they can review for law, fact, and sentence, so that they need approve only so much of it as they think justified."<sup>12</sup> Professor Morgan added that the idea was that "the board of review in the Judge Advocate's Office will be far away from the scene of the commanding officer who convened the court."<sup>13</sup> Professor Morgan observed that,

Now we can act on the facts. We think that a means of lessening command influence. And when it is a question of law, the case then—in the severe cases—will go to the Judicial Council [the current Court of Appeals for the Armed Forces], which will be a civilian court and, of course, entirely outside the influence of any officer.<sup>14</sup>

General Franklin Riter of the American Legion described his experience in reviewing courts-martial under the Articles of War during World War II in the European Theater.<sup>15</sup> General Riter struggled with finding the appropriate rules to apply to courts-martial, determining that the rules applicable to the federal courts of appeals should apply.<sup>16</sup> But he observed they were simply not a good fit because those rules demanded that the review board accept the witnesses as credible.

And there we ran against that rule of where there is evidence to support the verdict. . . . They would not go behind that. And time and again, if we would have had the right—we knew that certain witnesses must have been plain liars that stood there—to judge credibility of witnesses and weigh the evidence our results would have been different.<sup>17</sup>

Consistent with the views expressed by Professor Morgan and General Riter, Congress enacted the UCMJ with Article 66. The Court of Appeals for the Armed Forces has observed that this statutory mandate is "[an] awesome, plenary, *de novo* power of review [that] grants unto the Court of Military Review authority to, indeed, 'substitute its

<sup>6</sup> MJRG REPORT, *supra* note 1, at 16.

<sup>7</sup> 10 U.S.C. § 867a (2016).

<sup>8</sup> 10 U.S.C.S. § 866(b)(1) (2016). Cases with approved sentences of death have automatic review at both the service court and the U.S. Court of Appeals for the Armed Forces (CAAF). 10 U.S.C. § 867(a)(1).

<sup>9</sup> *Id.*

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

<sup>11</sup> 10 U.S.C. § 866.

<sup>12</sup> *A Bill to Unify, Consolidate, Revise, and Codify The Articles of War, The Articles for the Government of the Navy, and the Disciplinary Laws of the*

*Coast Guard, and to Enact and Establish A Uniform Code of Military Justice: Hearings on H.R. 2498 Before the H. Subcomm. of the Comm. on Armed Services, 81st Cong., 1st Sess. 608 (1949) [hereinafter *House Hearings on the UCMJ*].*

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

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

<sup>15</sup> *Id.* at 662.

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

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

judgment' for that of the military judge. It also allows a 'substitution of judgment' for that of the court members."<sup>18</sup>

### *Carte Blanche to Do Justice, Not Equity*

In 2010, the CAAF addressed the scope of authority granted the service courts by UCMJ Article 66(c). In *United States v. Nerad*, the CAAF considered a decision by the Air Force Court of Criminal Appeals (AFCCA) in which the AFCCA relied on its "awesome, plenary, de novo powers" to determine that a conviction for child pornography "should not" be approved.<sup>19</sup> Senior Airman Nerad was prosecuted for possessing naked photographs of his seventeen-year-old girlfriend. The Air Force Court observed that while it was lawful for the appellant to see his girlfriend naked (the age of consent under the UCMJ is 16), it was *unlawful* for him to possess nude photographs of her that she took and sent to him.<sup>20</sup> The Air Force Court concluded appellant's conduct was "not the sort of conduct which warrants criminal prosecution for possession of child pornography and that this conviction unreasonably exaggerates the criminality of his conduct."<sup>21</sup>

The CAAF reversed the Air Force Court, deciding the scope and meaning of the language "should be approved" was not without limits.<sup>22</sup> While Article 66 demanded a service court only affirm findings and sentences that it: (1) finds correct in law; (2) finds correct in fact; and (3) determines should be approved, based on the entire record, the CAAF concluded this statutory grant did not provide Service courts with unfettered discretion. "[W]hen a [service court] acts to disapprove findings that are correct in law and fact, we accept the [service court] action unless in disapproving the findings the [service court] clearly acted without regard to a legal standard or otherwise abused its discretion."<sup>23</sup>

As the legislative history and case law establish, Article 66 was enacted as a powerful tool to protect the rights of an accused servicemember from unjust conviction and curb command influence. No cases or literature suggests that Article 66, as it is currently written and understood, has not been working as it was originally intended. Nor does anything suggest that Article 66 results in frequent, let alone abundant, unjust windfalls for military accused. Nevertheless, the MJRG proposes to substantially limit Article 66 going forward. However, neither the reasons for such a limitation, nor the quantifiable results, support the MJRG proposal.

<sup>18</sup> *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). In 1995, the Court of Military Appeals (CMA) became the CAAF. While colorfully conveying a service court's power, Judge Walter T. Cox was technically incorrect as it does not allow a substitute judgment merely a review of the entire record to determine what should be approved.

<sup>19</sup> *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010).

<sup>20</sup> *United States v. Nerad*, 67 M.J. 748 (A.F. Ct. Crim. App. 2009).

<sup>21</sup> *Id.* at 751.

### III. Military Justice Review Group Proposal

Both the mechanisms for direct appeal and the jurisdictional bar to get to the service CCA's face wholesale changes in the MJRG proposal. The proposed legislation removes the automatic appeal and instead creates an appeal of right for these same cases while lowering the jurisdictional bar for confinement from one year to more than six months of confinement.<sup>24</sup> However, and more significantly, the manner of review by the courts of criminal appeals also changes drastically under the proposal. Under the MJRG proposal, all accused who meet the jurisdictional bar for CCA review must still present an assignment of error to the appropriate CCA before any review will occur. The CCA's independent duty to review for factual and legal sufficiency is absent from the proposal.

(d) DUTIES "(1) In any case before the Court of Criminal Appeals under paragraph (1) of subsection (b), the Court shall affirm, set aside, or modify the findings, sentence, or order appealed."

....

(e) CONSIDERATION OF THE EVIDENCE (1) In an appeal of a finding of guilty under paragraph (1)(A), (1)(B), or (2) of subsection (b), the Court of Criminal Appeals, *upon request of the accused, may consider the weight of the evidence upon a specific showing of deficiencies in proof by the accused. The Court may set aside and dismiss a finding if clearly convinced that the finding was against the weight of the evidence.* The Court may affirm a lesser finding. A rehearing may not be ordered.<sup>25</sup>

As discussed, currently the courts conduct de novo reviews of every conviction meeting its jurisdictional bar, and must be convinced themselves of guilt beyond a reasonable doubt.

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. *It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.* In considering the record, it may weigh the evidence, judge the credibility of

<sup>22</sup> *Nerad*, 69 M.J. at 146.

<sup>23</sup> *Id.* at 147.

<sup>24</sup> MJRG REPORT, *supra* note 1 at 1134. Section 910 of the Group's proposed Military Justice Act of 2015 discusses the change in appellate court jurisdiction. *Id.* at 612-20.

<sup>25</sup> *Id.* at 1137-38 (emphasis added).

witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.”<sup>26</sup>

The MJRG goes to great lengths to explain the unique nature of the original Article 66, and argues implicitly its continued existence is unnecessary. However the report ignores precisely why the original Article 66 protections remain an important protection to military accused.

Throughout the MJRG proposal, the MJRG seeks to correlate military practice with federal and state practice.

The proposals recommend aligning certain procedures with federal civilian practice in instances where they will enhance fairness and efficiency and where the rationale for military specific practices has dissipated. For example, robust military judiciary and defense counsel organizations are firmly rooted in a system largely constructed prior to their development. These and other systemic changes reflect the growth and maturation of the military justice system since Congress enacted the UCMJ.<sup>27</sup>

The MJRG regularly reiterates this theme in its Report, proposing substantially changing the military’s current practice regarding guilty pleas and calling for the adoption of some form of sentencing guidelines similar to those employed in the federal courts.<sup>28</sup> On the topic of appellate practice, the MJRG proposes “modernizing” the system.<sup>29</sup> The MJRG believes an amendment to Article 66 is necessary to mirror the appellate practice in “federal civilian appellate

courts . . . .”<sup>30</sup> In doing so, the proposed amendment would “increase the efficiency and effectiveness of the appellate process by focusing the courts on the issues raised by the parties.”<sup>31</sup> The proposal would thus, in the MJRG’s view, meet the standards obtained in the federal system.

But pronounced differences exists between courts martial and federal district courts, and in almost every way, those differences cut against military accused. The vast statutory and constitutional differences are readily apparent. Limits on *voir dire* and panel selection;<sup>32</sup> the lack of a unanimous vote for conviction;<sup>33</sup> the absence of grand jury proceedings; and the practice of non-binding Article 32 recommendations, are staples of the original UCMJ, and live on in the MJRG proposal.<sup>34</sup> One of the few counterweights to these due process limits afforded military accused is Article 66, which the MJRG proposes narrowing.

Not only does the UCMJ afford an accused lesser rights than are generally found in federal court practice, those serving as prosecutors, defense counsels, and judges have dramatically less experience than their federal counterparts. As Cully Stimson, an expert in national security and crime control for the Heritage Foundation recently observed, both the Army and Air Force Judge Advocate career model discourages specialization, instead adopting a standard of a “broadly skilled judge advocate.”<sup>35</sup> According to Stimson, a “stark contrast of experience” exists between litigators in at least two of the military services and civilian prosecutors and defense counsel—both state and federal—and military justice is paying the price.<sup>36</sup> And Stimson is not alone in his criticism.<sup>37</sup>

<sup>26</sup> 10 U.S.C.S. § 866 (c) (2016) (emphasis added). The standard of proof used by the courts of criminal appeals has long required it to be convinced itself of guilt beyond a reasonable doubt. *See, e.g.*, *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

<sup>27</sup> MJRG REPORT, *supra* note 1 at 20.

<sup>28</sup> *Id.* at 505-13.

<sup>29</sup> *Id.* at 34.

<sup>30</sup> *Id.* at 609.

<sup>31</sup> *Id.* at 611.

<sup>32</sup> During *voir dire* in a courts-martial, each side receives one peremptory challenge of the empaneled members, all of whom were selected by the convening authority. *See* 10 U.S.C. § 825(d)(2) (2016); MCM, *supra* note 5, R.C.M. 503, 912(g). Conversely in federal district court practice, which the Military Justice Review Group (MJRG) was charged to consider, each side receives at least three peremptory challenges and can receive up to twenty in capital cases. FED. R. CRIM. P. 24(b); *see* MJRG REPORT, *supra* note 1, at 5-6.

<sup>33</sup> Currently, non-capital cases require a two-thirds majority of the panel while capital cases require unanimous verdicts. 10 U.S.C. 852(a) (2016). The MJRG proposal increases the non-capital ratio to three-fourths of the panel and mandates specific panel sizes of four members for special courts-martial and eight members for general courts-martial, while maintaining the twelve member requirement for capital cases. MJRG REPORT, *supra* note 1, at 1050-51, 1090 (sections 401 and 715).

<sup>34</sup> *See* *United States v. Meador*, Docket No. 002-62-16 (C.G. Ct. Crim. App. April 19, 2016). In the Article 62 appeal in *Meador*, the Coast Guard court reversed a trial court judge who ruled an Article 32 preliminary hearing officer’s recommendation was binding on the convening authority. *Id.*; *United States v. Mercier*, Docket No. 001-62-16 (C.G. Ct. Crim. App. March 18, 2016). In the Article 62 ruling in *Mercier*, the court upheld a trial court judge who dismissed a specification where the trial counsel presented no evidence to the preliminary hearing officer at the Article 32 hearing.

<sup>35</sup> Cully Stimson, *Army and Air Force JAG Corps Need Career Litigators Now*, THE DAILEY SIGNAL (May 2, 2016), <http://dailysignal.com/2016/05/02/army-and-air-force-jag-corps-need-career-litigators-now/>.

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

<sup>37</sup> *See also* Major Jeffrey A. Gilberg, *The Secret to Military Justice Success: Maximizing Experience*, 220 MIL. L. REV. 1 (2014); Major Nathan J. Bankson, *A Justice Manager’s Guide to Navigating High Profile Cases*, ARMY LAW., July 2012, at 4; Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1 (1998); Major David L. Hayden et al., *Training Trial and Defense Counsel: An Approach for Supervisors*, ARMY LAW., Mar. 1994, at 21; Kenneth J. Hodson, *Military Justice: Abolish or Change?*, MIL. L. REV. (BICENTENNIAL VOLUME) 579 (1975); Lieutenant Colonel Gary J. Holland, *Tips and Observations from the Trial Bench*, ARMY LAW., Jan. 1993, at 9; Major Fansu Ku, *From Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the Twenty-First Century*, 199 MIL. L. REV. 49 (2009); Major Stephen J. McManus, *TRIALS: Advocacy Training for Courts-Martial*, 35 Rep. 16, no. 3 (2008); Lieutenant Colonel Edye U. Moran, *A View from the*

If the critics are correct, how can the military justice system credibly, let alone efficiently, navigate through a justice system which mirrors the federal system without the skill and experience, seen in the federal system? And if that navigation is not possible, how can the military justice system align with a system—‘modernize’ as the MJRG puts it—that has as its baseline such vast experience?

At some point the desire for increased efficiency in the military justice system loses sight of the touchstone of the military—the servicemembers. In the face of such drastic changes, the American Bar Association (ABA) urged restraint in letters to both the House and Senate armed services committees.

While the ABA takes no position on this proposal, *we urge the Armed Services Committee to proceed with caution before acting on proposals that take any material rights away from an accused. . . .* Automatic appeals to appellate courts outside the local command structure add an additional level of confidence and integrity for those convicted in the UCMJ system and also improve the public perception of the military’s trial process. We ask the Committee to consider whether there is a compelling justification to rescind or diminish this important right at this time.<sup>38</sup>

The MJRG’s proposed revisions to appellate review are a solution in search of a problem, which come up empty-handed and in fact create greater inefficiency. No servicemember currently entitled to seek relief at the CCAs or the CAAF would necessarily be denied that right, they would simply have to face more obstacles to get relief. And they would have to wait longer as the bar is lowered to six months of confinement from the current twelve month mandate. And some research of recent case law explores the breadth of this proposal.

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*Bench: The Guilty Plea—Traps for New Counsel*, ARMY LAW., Nov. 2008, at 61; Major Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 15; Colonel Joe P. Peck, *Critique of Counsel Subsequent to Trial*, 15 A.F. L. REV. 163 (1973); Colonel Charles N. Pede, *The Judge Advocate and the 21st Century*, ARMY LAW., Apr. 2011, at 32; Charles D. Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It*, HERITAGE FOUNDATION (Nov. 6, 2013), <http://report.heritage.org/sr149>.

<sup>38</sup> Letter from Paulette Brown, President, American Bar Association, to House and Senate Armed Services Committees (May 5, 2016), [http://www.abajournal.com/files/ABA\\_letter\\_to\\_House\\_Armed\\_Services\\_Committee.pdf](http://www.abajournal.com/files/ABA_letter_to_House_Armed_Services_Committee.pdf) (emphasis added); see also Terry Carter, *ABA expresses concerns about some proposed changes to the military justice system*, ABA JOURNAL, May 5, 2016, [http://www.abajournal.com/news/article/aba\\_expresses\\_concerns\\_about\\_some\\_proposed\\_changes\\_to\\_the\\_military\\_justice?utm\\_source=internal&utm\\_medium=navigation&utm\\_campaign=navbar](http://www.abajournal.com/news/article/aba_expresses_concerns_about_some_proposed_changes_to_the_military_justice?utm_source=internal&utm_medium=navigation&utm_campaign=navbar).

<sup>39</sup> E-mail from Malcom Squires, Clerk of Court, Army Court of Criminal Appeals, to author (Apr. 11, 2016, 17:02 EST) (on file with author). Both the CAAF and the service courts have long allowed the accused to personally raise issues to the courts even when counsel declines to raise the

#### IV. Use of the Article 66 Power by the Courts of Criminal Appeals

There were twenty-six cases in 2014 and twenty cases in 2015 when the Army court of criminal appeals exercised its independent Article 66 powers and gave relief where appellate and counsel simply filed a case on its merits.<sup>39</sup> The fact these Soldiers would not receive relief under the MJRG shows the breadth of this proposal.

Additionally, despite more than fifty years of case law the MJRG proposes to use the brute force of legislative fiat and dictate the standard of review used by the CCA’s moving from ‘beyond a reasonable doubt’ that an accused is guilty to the lower protections of ‘clearly convincing’ standard.<sup>40</sup> The upheaval this change causes both appellate courts and practitioners who have operated within a beyond a reasonable doubt standard for more than sixty years and developed a significant body of case law, cannot be overstated.<sup>41</sup>

As discussed, one of the guiding principles of the MJRG was to bring the military justice system into harmony with district courts wherever possible.<sup>42</sup> The Group’s recommendation on appellate review not only misplays the tune, but indeed chooses the wrong instrument.

While no civilian jurisdiction vests an appellate court with such vast power, it is important to remember the climate surrounding the birth of the UCMJ. The Code was designed to be a check on command overreach, and thus the need for appellate review by officers removed from a command by both physical geography and technical supervision. The need to protect the process, and more importantly the accused, from unlawful command influence, has no comparison in civilian practice. The role of this review is not something which should be abandoned while the specter of UCI remains in our system.<sup>43</sup>

A few years ago an argument existed that this power, coexisting with the convening authority’s vast post-trial clemency power, was *too* great of a benefit for the accused

issue. “[W]hen the accused specified error in his request for appellate representation or in some other form, the appellate defense counsel will, at a minimum, invite the attention of the Court of Military Review to those issues.” United States v. Grostefon, 12 M.J. 431, 436 (C.M.A. 1982).

<sup>40</sup> 10 U.S.C.S. § 866 (2016); MJRG REPORT, *supra* note 1.

<sup>41</sup> See, e.g., United States v. Turner, 25 M.J. 324 (C.M.A. 1987) (being cited more than 2,000 times for its holding and discussion of the factual sufficiency standard).

<sup>42</sup> MJRG REPORT, *supra* note 1.

<sup>43</sup> See, e.g., United States v. Salyer, 72 M.J. 415, 428 (C.A.A.F. 2013) (CAAF disagreeing with the Navy-Marine court and dismissing a case for prejudice finding an appearance of unlawful command influence (UCI)); United States v. Garcia, No. 20130660, 2015 CCA LEXIS 335, at \*25 (A. Ct. Crim. App. Aug. 18, 2015) (mem. op.) (overturning aside sexual assault convictions where the government counsel injected the stain of UCI during argument); United States v. Howell, No. NMCCA 201200264, 2014 CCA LEXIS 321, at \*35 (N-M Ct. Crim. App. May 22, 2014).

and too much of a burden for a system which needed a clearer sense of finality.<sup>44</sup> However, the 2014 National Defense Authorization Act (NDAA),<sup>45</sup> and to a lesser extent the 2015 NDAA,<sup>46</sup> greatly altered that landscape and dramatically shrunk the clemency powers of a convening authorities. Whereas the accused once possessed a pair of weapons as they stood defending against government overreach, missteps, and legal error, the MJRG completes the disarmament of these same servicemembers.

At some point criminal law cases no longer represent numbers on a page but rather Soldiers, Sailors, Airmen, Coastguardsmen, and Marines whose due process rights would be sacrificed to make the military system more analogous to a civilian system.

The below cases represent just some of the military cases where relief has been granted since 2015—but these servicemembers would not see relief under the MJRG proposals.

#### A. Army Court of Criminal Appeals

As noted above there were twenty cases in 2015 where the Army Court of Criminal Appeals (ACCA) gave relief, though it was not sought by the accused or appellate counsel. Additionally, there have been eight occasions where unrequested relief was granted so far in 2016, one of which is highlighted here.<sup>47</sup>

##### United States v. Sergeant First Class William J. Delgado<sup>48</sup>

Although not raised by counsel, the court reviewed an inappropriate relationship conviction, originally charged as violating Army Regulation (AR) 600-20 and Article 92, and

found the conviction was insufficient. The court held “appellant’s non-consensual sexual assault on Private First Class YCG cannot form the basis to establish a consensual inappropriate relationship.”<sup>49</sup> This conviction was set aside by the ACCA on its own review, again an action not possible under the MJRG proposal.

##### United States v. Sergeant Malcolm Fiamé<sup>50</sup>

Sergeant (SGT) Fiamé pled guilty to larceny and unauthorized sale of military property offenses. During the providency inquiry SGT Fiamé admitted that over the course of divers occasions total value of the property was more than \$500.<sup>51</sup> A brief review of the facts lead the ACCA to conclude that the unauthorized sale offenses should be treated the same as larceny offenses, and the value aggregation principles should remain constant.<sup>52</sup>

This case was also submitted on its merits by appellate counsel without any assigned errors. And while SGT Fiamé received no relief in this 2015 case, the redrawn specifications he stands convicted of and the new law developed by the ACCA are instructive as the ACCA has already used this precedent when granting relief in a pair of cases.<sup>53</sup> The rippling precedential effect flowing from a case such as this would not happen under the MJRG proposed change to appellate review.

#### B. Air Force Court of Criminal Appeals

<sup>44</sup> See Captain David Grogan, *Stop The Madness It’s Time To Simplify Court-Martial Post-Trial Processing*, 62 NAVAL L. REV. 1 (2013); Major John Hamner, *The Rise and Fall of Post-Trial—Is It Time for the Legislature to Give Us All Some Clemency?* ARMY LAW., Dec. 2007, at 1; Craig Whitlock, *Air Force General’s Reversal of Pilot’s Sexual Assault Conviction Angers Lawmakers*, WASH. POST (Mar. 8, 2013), [https://www.washingtonpost.com/world/national-security/air-force-generals-reversal-of-pilots-sexual-assault-conviction-angers-lawmakers/2013/03/08/f84b49c2-8816-11e2-8646-d574216d3c8c\\_story.html](https://www.washingtonpost.com/world/national-security/air-force-generals-reversal-of-pilots-sexual-assault-conviction-angers-lawmakers/2013/03/08/f84b49c2-8816-11e2-8646-d574216d3c8c_story.html).

<sup>45</sup> National Defense Authorization Act for Fiscal Year 2014, 113 Pub. L. No. 66, § 1702, 127 Stat. 672, 954 (2013).

<sup>46</sup> Carl Levin and Howard P. ‘Buck’ McKeon National Defense Authorization Act for Fiscal Year 2015, 113 Pub. L. No. 291, § 531, 128 Stat. 3292, 3362 (2014).

<sup>47</sup> United States v. Baker, No. 20140396 2016 CCA LEXIS 341 (A. Ct. Crim. App. May 13, 2016); United States v. Mozie, No. 20130065, 2016 CCA LEXIS 273 (A. Ct. Crim. App. Apr. 28, 2016) (setting aside a conviction using the court’s Article 66 power after finding error with the Staff Judge Advocate’s post-trial advice); United States v. Scioneaux, No. 20130850, 2016 CCA LEXIS 230 (A. Ct. Crim. App. Apr. 13, 2016) (excising certain words from an assault offense after conducting a factual sufficiency review); United States v. Santiago Serrano, No. 20140166, 2016 CCA LEXIS 165 (A. Ct. Crim. App. Mar. 16, 2016); United States v. Inson, No. 20130557, 2016 CCA LEXIS 130 (A. Ct. Crim. App. Feb. 29, 2016) (sum. op.) (setting aside a conviction for delivering defense information

using its factual sufficiency power); United States v. Davis, No. 20150219, 2016 CCA LEXIS 146 (A. Ct. Crim. App. Feb. 25, 2016) (sum. op.) (setting aside an assault consummated by a battery specification which it found to be an unreasonable multiplication of charges with a reckless endangerment conviction); United States v. Piccirillo, No. 20140897, 2016 CCA LEXIS 56 (A. Ct. Crim. App. Jan. 29, 2016) (sum. op.) (setting aside a conspiracy to commit arson conviction that was not raised by the appellant or counsel). Instances of Article 66 plenary power by the Army court are current as of May 13, 2016.

<sup>48</sup> United States v. Delgado, No. 20140927, 2016 CCA LEXIS 7 (A. Ct. Crim. App., Jan. 6, 2016) (mem. op.).

<sup>49</sup> *Id.* at \*4.

<sup>50</sup> United States v. Fiamé, 74 M.J. 585 (A. Ct. Crim. App. 2015).

<sup>51</sup> *Id.* at 586.

<sup>52</sup> *Id.* at 587.

<sup>53</sup> United States v. Miller, No. 20140429, 2015 CCA LEXIS 586, at \*3 (A. Ct. Crim. App. Dec. 21, 2015) (unpub.) (redrawing Miller’s conviction for selling military property of a value of more than \$500 to reflect a conviction for selling military property of some value); United States v. Goff, No. 20140327, 2015 CCA LEXIS 253 (A. Ct. Crim. App. June 15, 2015) (unpub.) (editing three convictions for selling military property of a value of more than \$500 to reflect convictions of selling military property of some value).

The Air Force Court of Criminal Appeals (AFCCA) has also used its plenary power to review and give relief three times this calendar year, and one case stands out.<sup>54</sup>

#### United States v. Senior Airman Luis Salguero<sup>55</sup>

Senior Airman Salguero's convictions included possessing child pornography, to which he pled guilty and was found provident by the military judge. On appeal, and without being raised by counsel, the court found providency did not extend to two of the forty-one images in the specification as the images did not depict the "sexually explicit conduct" necessary for child pornography.<sup>56</sup>

#### C. Navy-Marine Court of Criminal Appeals

Similar to both the ACCA and the AFCCA, in this calendar year alone, the Navy-Marine Court of Criminal Appeals (NMCCA) has granted relief in a number of cases where the appellate and counsel submitted the matter on its merits, and one standout is highlighted here.<sup>57</sup>

#### United States v. Lance Corporal Dustin Hackler<sup>58</sup>

Lance Corporal (LCpl) Hackler, was charged with sexual assault, and convicted of the lesser-included offense of battery. Although he submitted an assignment of error alleging the evidence supporting the conviction was insufficient, the court went further and questioned in a specified issue "was [] even raised by evidence."<sup>59</sup> The court held the evidence here did not raise the lesser-included offense of battery and set aside the battery conviction. And unlike the above cases, the court also set aside LCpl Hackler's bad conduct discharge and ninety days of hard labor without confinement.<sup>60</sup> Thus solely due to the power of the court to affirm only what is correct in law and fact, LCpl Hackler no longer carries a bad conduct discharge from the military, nor

the stigma such a label holds. This extraordinary relief would, like so many others, be impossible in the proposed system.

#### D. Coast Guard Court of Criminal Appeals

Although none of the twelve cases issued by the Coast Guard Court of Criminal Appeals this year have seen its Article 66 plenary power employed, two of the thirteen opinions from 2015 saw relief granted to an accused after the courts applied its Article 66 power.<sup>61</sup>

#### V. Conclusion<sup>62</sup>

The desire to modernize the military justice system is important and much-needed. However in the area of appellate review of cases, which were referred to trial by the accused's commander, and upon which a panel of individuals chosen by the commander often vote on guilt and a sentence, proposals to lessen the rights of the accused should be eyed skeptically. Change simply for the sake of change, especially when the current system of appellate review is far from broken is unwise.

In our attempts to update the UCMJ and the practice of military justice stakeholders must never lose sight of our *raison d'être*, the servicemembers we serve with every day defending this nation. They will bear the burden of this change. Congress should view limits to appellate review with a dubious eye and remove this proposal from any future legislation.

<sup>54</sup> See also United States v. Gallegos, No. ACM 38738, 2016 CCA LEXIS 208, (A.F. Ct. Crim. App. Mar. 31, 2016) (unpub.); United States v. Ellis, No. ACM 38655, 2016 CCA LEXIS 24 (A.F. Ct. Crim. App. Jan. 12, 2016) (unpub.). Instances of Article 66 plenary power by the Air Force court are current as of May 13, 2016.

<sup>55</sup> United States v. Salguero, No. ACM 38767, 2016 CCA LEXIS 5 (A.F. Ct. Crim. App. Jan. 6, 2016) (unpub.).

<sup>56</sup> *Id.* at \*1-2, \*7; see United States v. Blouin, 74 M.J. 247 (C.A.A.F. 2015).

<sup>57</sup> See also United States v. Mac, No. 201500413, (N-M Ct. Crim. App. Apr. 21, 2016); United States v. Mays, No. 201500372, 2016 CCA LEXIS 252 (N-M Ct. Crim. App. Apr. 21, 2016); United States v. Roller, No. NMCCA 201600008, 2016 CCA LEXIS 203 (N-M Ct. Crim. App. Mar. 31, 2016); United States v. Zambrano, No. NMCCA 201500002, 2016 CCA LEXIS 19 (N-M Ct. Crim. App. Jan. 19, 2016) (unpub.); United States v. Beaumont, No. 201500237, 2016 CCA LEXIS 12 (N-M. Ct. Crim. App. Jan. 12, 2016). Instances of Article 66 plenary power by the Navy-Martine court are current as of May 13, 2016.

<sup>58</sup> United States v. Hackler, No. NMCCA 201400414, 2016 CCA LEXIS 168 (N-M Ct. Crim. App. Mar. 17, 2016).

<sup>59</sup> *Id.* at \*3.

<sup>60</sup> *Id.* at \*26.

<sup>61</sup> United States v. Rogers, No. 1391, 2015 CCA LEXIS 472, (C.G. Ct. Crim. App. July 8, 2015); United States v. Gilmore, No. 1388, 2015 CCA LEXIS 471 (C.G. Ct. Crim. App. July 2, 2015). Instances of Article 66 plenary power by the Coast Guard court are current as of May 13, 2016.

<sup>62</sup> On May 18, 2016 2016, the House of Representatives passed its version of the 2017 National Defense Authorization Act (NDAA) which includes most of the proposals offered by the MJRG. That version of the bill however notably does not include the changes to the factual sufficiency on appellate review discussed in this article nor the requirement that the appellate must raise all issues to the court, though it does lower the jurisdictional bar to six months. See National Defense Authorization Act for Fiscal Year 2017, H.R. 4909, 114th Cong. § 6810 (2016). The Senate passed its version of the 2017 NDAA, which includes these MJRG provisions, on June 14, 2016. See, NDAA for Fiscal Year 2017, S. 2943. Thus, the future of these recommendations by the MJRG is uncertain.

## Book Review

### The Bill of the Century: The Epic Battle for the Civil Rights Act<sup>1</sup>

Reviewed by Major Mark E. Gardner\*

*[N]o army can withstand the strength of an idea whose time has come.*<sup>2</sup>

#### I Introduction

The Civil Rights Act of 1964 was not the first such legislation to be signed into law in the twentieth century, but it was the first to have dramatic impact on the oppressive system of “Jim Crow”<sup>3</sup> laws then pervasive in the American South.<sup>4</sup> These laws prevented black Americans, including those who had just returned from serving their country in World War II, from voting, eating in the same restaurants, and attending the same schools, as white Americans.<sup>5</sup> Beyond the importance of the substance<sup>6</sup> of the Civil Rights Act, the story of its passage through Congress offers a remarkable insight into the American legislative process, and *The Bill of the Century: The Epic Battle for the Civil Rights Act* is essential reading for anyone who wants to understand the political forces at play during the passage of the Act through the legislative process.

Despite the aforementioned quote by Senate Minority Leader Everett Dirksen, the Civil Rights Act of 1964 was no sure-thing. Its path through Congress was tortuous and its existence in any effective form was precarious until it was finally passed by Congress after more than a year of legislative conflict. As the author, Clay Risen, points out, the story of the Civil Rights Act is usually told by discussing the two individuals most commonly considered the prime movers behind the Act: the Reverend Martin Luther King Jr. and President Lyndon B. Johnson.<sup>7</sup> Risen makes the purpose of his book clear when he states his intent is to correct the misconception that King and Johnson deserve all the credit for the Civil Rights Act of 1964, and to tell the story of the large cast of individuals and groups that played a role, from Democratic and Republican representatives in Congress, to civil rights, labor, and religious groups, working outside

Congress and the White House.<sup>8</sup>

Risen argues that the Act is the most important piece of legislation passed in twentieth century America,<sup>9</sup> and it is difficult to disagree with that assessment. When the words “[w]e hold these truths to be self-evident, that all men are created equal . . .”<sup>10</sup> were proclaimed in 1776, it may have been surprising to some that it would take almost two hundred years for equal treatment under the law to be true for all citizens. Risen offers a compelling account of the birth of the law that finally resolved this national cognitive dissonance.

#### II. Congress

The strength of Risen’s book lies in his accounting of the Civil Rights Act’s dramatic passage through both chambers of Congress in 1963 and 1964. He lays the foundation by recounting previous attempts at civil rights legislation after World War II. The 1940s and ‘50s were characterized by small and incremental steps towards civil rights equality on the national level, with sometimes violent reactions, including the murder of civil rights activists by those who opposed it.<sup>11</sup> President Dwight D. Eisenhower signed two civil rights acts into law, in 1957 and 1960, mostly covering voting discrimination.<sup>12</sup> Those acts were so watered down by the mostly southern Democrat opposition in the Senate, that they were generally considered more symbolic than providing any substantial relief from the de facto or de jure disenfranchisement faced by minorities during the post-war period.<sup>13</sup>

However, in the early days of John F. Kennedy’s presidential campaign in 1960, he committed himself to one

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<sup>1</sup> CLAY RISEN, *THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT* (2014).

<sup>2</sup> *Id.* at 220 (quoting Senate Minority Leader of the 1964 U.S. Senate, Everett Dirksen).

<sup>3</sup> The term “Jim Crow” was likely taken from an early 19th century white minstrel entertainer, who performed a song-and-dance routine in blackface called “Jump Jim Crow.” *ENCYCLOPEDIA OF SOUTHERN CULTURE* 213-14 (Charles Reagan Wilson and William Ferris eds., 1989).

<sup>4</sup> Risen, *supra* note 1, at 2. “Jim Crow” was not limited to the South, as the author opens the introduction of the book with the recounting of a black teenager being turned away from the barber shop of the Muehlebach Hotel in Kansas City, Missouri, in July, 1964. *Id.* at 1; *see also id.* at 17 (describing the segregated symphony of Oak Park, Illinois, a suburb of

Chicago).

<sup>5</sup> *Id.* at 15-17.

<sup>6</sup> The Act’s provisions covered, in part, voting rights, equal access to public accommodations, funding to assist school districts in their desegregation plans and prohibition on employment discrimination. *Id.* at 5, 55, 102, 111.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.* at 257.

<sup>10</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>11</sup> RISEN, *supra* note 1, at 10-15.

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

<sup>13</sup> *Id.* at 14.

of the strongest civil rights programs yet.<sup>14</sup> This was a decision he came to regret, according to Risen, because it was practically impossible to follow through with, given the strength of the senior southern Democrats in the Senate,<sup>15</sup> and the filibuster rules they used so effectively.<sup>16</sup> This marks the beginning of the struggle to finally get effective civil rights legislation through the House and Senate to the President's desk for signature, and Risen gives a fascinating chronological account, relying on many first-hand accounts of the players involved in the struggle.

The southern Democrats' stranglehold on the Senate meant that for any chance of success, the Act had to originate in the more liberal House of Representatives and gain momentum before moving to the Senate for debate.<sup>17</sup> This strategy carried its own risks, as there was a danger that some representatives who took a more aggressive approach to civil rights would introduce amendments that would scuttle the bill due to opposition from more conservative representatives.<sup>18</sup> It is at this point in the book that a minor weakness appears. There is no concise explanation of the specific provisions, or titles, of the Act in the early chapters of the book, and it is difficult for a reader not already well versed in the Act to follow Risen's detailed discussions about the debate in Congress regarding those provisions. This reviewer spent a considerable amount of time searching back and forth through the book for descriptions of the Titles being discussed.

Despite the more liberal make-up of the House of Representatives, the Act was not received with open arms and faced a contentious path through the House when President John F. Kennedy's administration introduced it in June 1963.<sup>19</sup> Officials from the Department of Justice<sup>20</sup> kept close

tabs on the bill as it worked its way through the House of Representatives and stepped in as necessary to advocate for the administration's bill over any of the more than one hundred alternatives introduced by House members.<sup>21</sup>

October and November of 1963 was a time of crisis for the Civil Rights Act.<sup>22</sup> The detail Risen provides in his recounting of the Act's emergence from House committee hearings is, in part, what makes this book such a valuable addition to the written history of the Civil Rights Act. More than fifty years after the passage of the Civil Rights Act into law, it is easy to assume that, as Senator Everett Dirksen told a reporter, it was an idea whose time had come and its passage was inevitable.<sup>23</sup> However, Risen makes clear that was not the case, and the bill constantly navigated perilous waters throughout its legislative history. The bill that emerged from the subcommittee was considerably stronger than when it was initially introduced to the House,<sup>24</sup> leading to negotiations between the players in the House and the administration.<sup>25</sup>

In November 1963, the assassination of John F. Kennedy dealt another blow to the Civil Rights Act's chances and it's here in the narrative that Risen turns to Lyndon B. Johnson, who became president upon the death of Kennedy, and is one of the individuals he asserts does not deserve the bulk of the credit for the Act's passage.<sup>26</sup> Johnson, the former Senate Majority Leader, in an unexpectedly eloquent address to Congress, calls on its members to continue the work on civil rights started by President Kennedy.<sup>27</sup> Risen asserts that at this point there was little more for Johnson to do than play "cheerleader and exhorter in chief."<sup>28</sup> While true, Risen makes clear that Johnson did not just sit on the sidelines as a spectator, and there are many examples of Johnson's

<sup>14</sup> *Id.* at 19.

<sup>15</sup> *Id.*; *See also id.* at 13 (discussing the power of the southern Senators, the "true masters of the Senate," who controlled the majority of the committees, including Judiciary, Armed Services, and Finance; essentially giving them the ability to control what legislation made it to the Senate floor for a vote).

<sup>16</sup> Senators could tie up legislation by engaging in endless debate on the Senate floor. *Id.* at 21. The filibuster rules at the time required two-thirds of the senators present to vote for "cloture," or an end to the debate, thereby allowing a vote on the bill itself. *Id.* This meant the nineteen southern Democrats, allying with some conservative Republican senators, could keep any civil rights bill away from a vote on its substantive provisions. *Id.*

<sup>17</sup> *Id.* at 71.

<sup>18</sup> *See, e.g., id.* at 71 (discussing the Kennedy administration's concern that additions to the bill in the House, such as broad school desegregation provisions that would target de facto segregation outside the South, would hinder its ultimate success); *see also id.* at 91 (discussing New York Representative William Miller's questioning, during a House subcommittee hearing, of Attorney General Robert F. Kennedy on whether de facto school segregation was to be a target of the Civil Rights Act).

<sup>19</sup> *Id.* at 77.

<sup>20</sup> The Attorney General, Robert F. Kennedy, led an impressive cast of lawyers in the Department of Justice, including his deputy attorney general, future Supreme Court justice Byron White, and head of the Office of Legal Counsel, Nicholas Katzenbach, a University of Chicago law professor and World War II veteran who spent two years as a prisoner of war and was later appointed attorney general by President

Johnson. *Id.* at 29-30.

<sup>21</sup> Not always to good effect. Early in the bill's existence, in an address before a House subcommittee, Robert Kennedy's lack of knowledge of the details of the bill and his lack of knowledge regarding alternative legislation offered by other representatives was exposed by sometimes hostile questions from committee members. *Id.* at 86-90.

<sup>22</sup> *Id.* at 115.

<sup>23</sup> *Id.* at 220.

<sup>24</sup> Added to the bill were two amendments that would allow the attorney general to join suits, or sue directly, public officials alleged to have engaged in discrimination, and prohibited employment discrimination (enforceable by a fair employment practices committee with cease-and-desist powers) based on race, religion, color, national origin. *Id.* at 113-15. While these were much sought after by civil rights activists, they were not supported by the Republican representatives, such as William McCulloch of Ohio, who the administration and Democratic leadership in the House were lobbying to support the Act. *See also id.* at 111-13 (discussing Representative McCullough's opposition, based on the property rights of owners, to a broader public accommodations title that would ban discrimination in all public accommodations except the smallest boarding houses).

<sup>25</sup> *Id.* at 120-23.

<sup>26</sup> *Id.* at 3.

<sup>27</sup> *Id.* at 139-41.

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

backroom dealings with legislators in an attempt to ensure success.<sup>29</sup>

Risen discusses one interesting amendment to the bill, introduced by Howard Smith, a representative from Virginia, that could have received further attention in the book. Smith, an ardent segregationist,<sup>30</sup> submitted language that added gender to the anti-employment discrimination sections of the Act.<sup>31</sup> Risen speculates that it could have been an attempt to scuttle the bill entirely due to lack of support for anti-gender discrimination legislation in Congress, but does point out that Smith had long been a supporter of the Equal Rights Amendment. Risen notes it is likely that Smith had more than one goal in mind when he introduced the amendment.<sup>32</sup>

Once the bill was introduced in the Senate in early 1964, the fight to get it passed only intensified due to the strength of the more senior southern Democrats who held influential leadership positions in key committees.<sup>33</sup> Rather than compromise to get a weaker bill, as had happened in 1957 and 1960, the southerners opted to try to kill the bill entirely,<sup>34</sup> fearing that any weakness would make them susceptible to attack by segregationists in their home states.<sup>35</sup> This led to the longest filibuster since 1846<sup>36</sup> and Risen again gives a detailed account of the constant negotiation and, occasionally bourbon-fueled, backroom meetings in the Senate in an effort by the bill's supporters to ensure the success of the bill in the Senate.<sup>37</sup> The filibuster by the southern Democrats and their supporters was eventually defeated after a record seventy-five days,<sup>38</sup> and the bill passed the Senate by a vote of seventy-three to twenty-seven.<sup>39</sup> President Johnson signed the bill into law on July 2, 1964.<sup>40</sup>

### III. The Public

Risen devotes far less space to the public's reaction to the civil rights movement and the bill, but very effectively uses it to add context to what was happening in Congress. However, his analysis of the public opinion and its effect on the Civil Rights Act is slightly less convincing than his analysis of the legislative history. Two groups in particular, the Leadership Conference on Civil Rights and the National Council of Churches undoubtedly played a large role by pressuring representatives and senators to vote in favor of the Act,<sup>41</sup> but it is not at all apparent that public opinion across the nation was always firmly in support of all aspects of the Act.

In discussing the March on Washington,<sup>42</sup> Risen asserts that while the newspaper coverage expressed doubt as to any positive impact on the bill's chances in Congress, there was a positive impact on public opinion, in that white viewers of the march would be more likely to accept appeals for support from their religious leaders and write letters of support to their representatives, be more skeptical of anti-civil-rights propaganda, and possibly sign a petition supporting the bill.<sup>43</sup> But Risen offers no source for this assertion, and to the contrary, his book is rife with examples of a lack of public support, and not just in the South. For example, Risen recounts that George Wallace, the staunch segregationist governor of Alabama who stood in the doorway at the University of Alabama to block two black students from registering,<sup>44</sup> received a whopping one-third, or 266,000, of the votes in the Wisconsin Democratic primary election. The Wisconsin governor stated before the primary that even 100,000 votes for Wallace would be a "disaster."<sup>45</sup> Risen also notes a rapidly growing "fear among middle-class whites"<sup>46</sup> that was eroding support for the Act.<sup>47</sup>

<sup>29</sup> See, e.g., *id.* at 215 (discussing Johnson's promise to Arizona senator Carl Hayden that he would push for the Arizona Water Project, a large program to bring water to Phoenix and Tucson, in exchange for support of the Civil Rights Act); *id.* at 226 (discussing a White House promise to open a silver dollar mint in Nevada in exchange for support of a Nevada senator).

<sup>30</sup> *Id.* at 4.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 160-61. Risen does address Smith and his amendment in further detail in a separate article for Slate. Clay Risen, *The Accidental Feminist*, SLATE (Feb. 7, 2014), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/02/the\\_50th\\_anniversary\\_of\\_title\\_vii\\_of\\_the\\_civil\\_rights\\_act\\_and\\_the\\_southern.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/the_50th_anniversary_of_title_vii_of_the_civil_rights_act_and_the_southern.html).

<sup>33</sup> Risen, *supra* note 1, at 166.

<sup>34</sup> *Id.* at 165.

<sup>35</sup> *Id.* at 188.

<sup>36</sup> *Id.* at 217.

<sup>37</sup> *Id.* at 213.

<sup>38</sup> *Id.* at 229.

<sup>39</sup> *Id.* at 237.

<sup>40</sup> *Id.* at 240.

<sup>41</sup> See, e.g., *id.* at 112 (discussing the Leadership Conference on Civil Rights (LCCR) lobbying for a stronger bill after terrorist bombings killed four young black girls at a church in Birmingham, Alabama); *id.* at 135 (discussing "armies" of LCCR activists meeting with representatives); *id.* at 108 (discussing the National Council of Churches spending \$185,000, or \$1.4 million in 2013 dollars, on lobbying and efforts to desegregate churches).

<sup>42</sup> *Id.* at 103-06. The March on Washington involved more than two hundred thousand people traveling to Washington, D.C. in August, 1963, to rally in support of civil rights and to hear Reverend Martin Luther King Jr. give his famous "I have a dream" speech. *Id.*

<sup>43</sup> *Id.* at 107.

<sup>44</sup> *Id.* at 64.

<sup>45</sup> *Id.* at 197.

<sup>46</sup> *Id.*

<sup>47</sup> See, also, *id.* at 108-09 (discussing areas of Ohio that were "running nearly 100 percent against the legislation," according to its congressional representative); *id.* at 214 (discussing George Wallace receiving almost one third of the vote in the Indiana democratic primary election); *id.* at 179

#### IV. Conclusion

Risen offers a well-researched and indispensable addition to the historical accounts of the Civil Rights Act. The detail he offers into the legislative path followed by the Act makes it a must-read for anyone interested in how a momentous, and perhaps controversial, bill reaches a president's desk for signing into law. The level of detail he provides should also be of particular interest to attorneys who find themselves reaching into the legislative history of any law as part of their practice. The competing interests and different motivations at play during a bill's passage through Congress should offer pause for anyone trying to uncover a legislature's intent. Finally, and as Risen points out, at a time when rigid ideology seems to always trump pragmatism in politics, the "passage of the act offers an example of what the country's legislative machinery was once capable of, and what it may well be able to achieve again."<sup>48</sup>

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(discussing senators' mail from New York, Idaho, and parts of the Midwest, running from a four-to-one to a ten-to-one rate against the bill). <sup>48</sup> *Id.* at 6.

## Book Review

### Leaders Eat Last: Why Some Teams Pull Together and Others Don't<sup>1</sup>

Reviewed by Major Brent W. Thompson\*

[L]eaders are expected to eat last because the true price of leadership is the willingness to place the needs of others above your own. Great leaders truly care about those they are privileged to lead and understand that the true cost of the leadership privilege comes at the expense of self-interest.<sup>2</sup>

#### I. Introduction

In *Leaders Eat Last: Why Some Teams Pull Together and Others Don't*, Simon Sinek<sup>3</sup> explains how leaders create loyal and trusting followers who will improve the organization. Sinek became famous on the TED Talk<sup>4</sup> circuit for presenting engaging speeches on leadership and innovation.<sup>5</sup> His written work follows the same conversational and easy to comprehend style as his speeches, although it ultimately falls short of providing the substance and solutions that many readers may desire.

Sinek divides his work into eight parts, but a close reading of the book reveals three broad themes: (1) creating loyalty in organizations, (2) the evolutionary basis of leadership, and (3) leadership lessons. Together, the themes support Sinek's vision of "creat[ing] a new generation of men and women who understand that an organization's success or failure is based on leadership excellence and not managerial acumen."<sup>6</sup>

#### II. Loyalty and Leadership

The book starts strong, with Sinek masterfully surveying the reasons why some people are unfailingly loyal to others. He begins with the story of "Johnny Bravo,"<sup>7</sup> the pilot of a U.S. Air Force A-10 attack aircraft. During a deployment to Afghanistan, Johnny Bravo flew dangerous missions through low cloud cover to provide protective fire for special

operations forces pinned down by enemy fire.<sup>8</sup> The lesson, according to Sinek, is that when leaders "prioritize the well-being of their people," those people will "give everything they've got to protect and advance the well-being of one another and the organization."<sup>9</sup> Military service is a powerful illustration of loyalty "because the lessons are so much more exaggerated when it is a matter of life and death."<sup>10</sup> Sinek's engaging account causes readers to ponder leadership and loyalty under the most difficult circumstances.

Pivoting from military loyalty to employee loyalty in the corporate sector, Sinek describes the turnaround of South Carolina conglomerate Barry-Wehmiller. Initially a failing collection of manufacturing companies, Barry-Wehmiller became a profitable corporation famous for inspiring intense employee loyalty.<sup>11</sup> As he transformed his organization, Barry-Wehmiller chief executive Bob Chapman realized that leadership "is like being a parent, and the company is like a new family to join."<sup>12</sup> After Chapman's epiphany and ensuing culture shift, corporate profits grew while his employees openly declared their love for Barry-Wehmiller and each other.<sup>13</sup> Through the Barry-Wehmiller example, Sinek effectively communicates the enormous responsibilities inherent in organizational leadership.

Based on his studies of the military and corporate sectors, Sinek concludes that organizations succeed when leaders trust their people, and subordinates trust their leader.<sup>14</sup> Sinek refers to a culture of trust and empathy as the "Circle of

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<sup>1</sup> SIMON SINEK, LEADERS EAT LAST: WHY SOME TEAMS PULL TOGETHER AND OTHERS DON'T (2014).

<sup>2</sup> *Id.* at xi (quoting Lieutenant General (Retired) George J. Flynn, U.S. Marine Corps).

<sup>3</sup> Simon Sinek is an adjunct staff member at the RAND Corporation. *Simon Sinek Biography*, START WITH WHY, [https://www.startwithwhy.com/Portals/0/Bio%20and%20Press%20Kit/simon\\_bio\\_long\\_2014.pdf](https://www.startwithwhy.com/Portals/0/Bio%20and%20Press%20Kit/simon_bio_long_2014.pdf) (last visited July 13, 2016) [hereinafter *Sinek Biography*]. He is the author of the bestselling book *Start With Why*. Sinek, *supra* note 1, inside front cover.

<sup>4</sup> Established in 1984, TED (originally Technology, Entertainment, and Design) is a nonprofit organization dedicated to spreading ideas at global conferences through the use of short talks of eighteen minutes or less. *Our Organization*, TED.COM, <https://www.ted.com/about/our-organization> (last visited July 13, 2016).

<sup>5</sup> As of this writing, Sinek's TED Talk, "How Great Leaders Inspire Action" was the third most popular TED Talk of all time. *The Most Popular Talks of all Time*, TED.COM, [http://www.ted.com/playlists/171/the\\_most\\_popular\\_talks\\_of\\_all](http://www.ted.com/playlists/171/the_most_popular_talks_of_all) (last visited July 13, 2016). Sinek's

speech was the second most popular TED Talk at the time of the book's publication. Sinek, *supra* note 1, inside front cover.

<sup>6</sup> *Sinek Biography*, *supra* note 3.

<sup>7</sup> SINEK, *supra* note 1, at 3. Johnny Bravo is the call sign of U.S. Air Force Captain Mike Drowley. *Id.*

<sup>8</sup> *See id.* at 3-8.

<sup>9</sup> *Id.* at 8.

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

<sup>11</sup> *See id.* at 9-18. For the complete Barry-Wehmiller story, see BOB CHAPMAN, EVERYBODY MATTERS: THE EXTRAORDINARY POWER OF CARING FOR YOUR PEOPLE LIKE FAMILY (2015).

<sup>12</sup> SINEK, *supra* note 1, at 17.

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

<sup>14</sup> *See id.* at 18.

Safety.”<sup>15</sup> The primary role for leaders is to protect “those inside their Circle.”<sup>16</sup> Leaders serve as a sort of gatekeeper who decides on what members to let inside the Circle.<sup>17</sup> They are also responsible for the size and strength of the Circle.<sup>18</sup> When the Circle is present and strong, “collaboration, trust and innovation result.”<sup>19</sup> The Circle of Safety neatly ties together Sinek’s ideas on employee loyalty and evolutionary biology.

### III. Evolution and Leadership

In the middle section of his book, Sinek explains the evolutionary underpinnings of the Circle of Safety. As he puts it, “Everything about our bodies was designed with one goal—to help us survive. This includes feelings of happiness.”<sup>20</sup> Through thousands of years of evolution, human bodies developed a complex set of positive and negative emotions to enhance the species’ ability to survive.<sup>21</sup> Consequently, humans have become social machines whose bodies create chemical rewards in a positive leadership culture.<sup>22</sup> Sinek deftly enlightens the reader about the biological bases for protection and support in the work environment.

Sinek begins the section on neurological chemicals with a stimulating question: “It’s common knowledge that we shouldn’t go to the supermarket when we’re hungry. . . . But the more interesting question is, why do we go to the supermarket when we’re *not* hungry?”<sup>23</sup> The answer to the question lies with the chemicals dopamine and endorphins that stimulate the body when it accomplishes a task or reaches a goal.<sup>24</sup> While these chemicals reward primarily selfish action, other chemicals—such as serotonin and oxytocin—reward selfless behaviors.<sup>25</sup> Together, these chemicals incentivize humans to set and accomplish goals that benefit the species.<sup>26</sup> The last chemical that Sinek discusses is

cortisol, which is “the first level of our fight or flight response.”<sup>27</sup> Cortisol provides a valuable service in alerting the body to danger.<sup>28</sup> However, cortisol should only remain in the body temporarily; a constant flow of the chemical can be damaging.<sup>29</sup> A negative work climate increases cortisol levels in employees, which is bad for organizations and the health of their workers.<sup>30</sup> Although the chapters on neurotransmitters are heavy on scientific concepts, Sinek lays his foundation in a straightforward, understandable way.

With the description of neurological chemicals in place, the thrust of Sinek’s argument is that leaders and followers are biologically primed to work together for the sake of the organization. As Sinek puts it, “Trust is a biological reaction to the belief that someone has our well-being at heart.”<sup>31</sup> When leaders fail to set an appropriate culture in their organization, the subordinates experience increased stress and the organization suffers.

It is at this point, about one-third of the way through the book, where Sinek strays from leadership lessons into personal political opinions unconvincingly supported by his neurological theories. Sinek claims that President Reagan’s act of firing air traffic controllers in the early 1980s gave “tacit approval from on high” for business leaders to conduct massive layoffs.<sup>32</sup> He blames market instability on a chemically imbalanced business culture, “[A] system of dopamine-driven performance that rewards us for individual achievement at the expense of the balancing effects of serotonin and oxytocin . . . . It is this imbalance that causes stock markets to crash.”<sup>33</sup> Sinek attributes ills in corporate America to “unbalanced levels of dopamine driving behavior and too much cortisol flowing . . . .”<sup>34</sup> He finds similar faults with the political system, panning former Speaker of the House Newt Gingrich for “tinkering with a system that wasn’t really broken.”<sup>35</sup> Sinek speculates that current partisanship

<sup>15</sup> *Id.* at 22.

<sup>16</sup> *Id.* at 23.

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

<sup>18</sup> *See id.* at 23-25.

<sup>19</sup> *Id.* at 24.

<sup>20</sup> *Id.* at 36.

<sup>21</sup> *Id.* at 37.

<sup>22</sup> *Id.* at 36.

<sup>23</sup> *Id.* at 39.

<sup>24</sup> *See id.* at 39-42.

<sup>25</sup> *Id.* at 46.

<sup>26</sup> *See id.* at 39-52.

<sup>27</sup> *Id.* at 54.

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

<sup>29</sup> *Id.* at 57.

<sup>30</sup> *Id.* Leadership experts used to believe that leaders experienced higher cortisol levels than non-leaders, due to the increased responsibilities of their position. *Id.* However, using samples of military officers and government officials, researchers found that leaders actually possessed lower cortisol levels and reported less anxiety at work. *Id.* A related study revealed a significant inverse relationship between the subjects’ sense of control and cortisol levels. *Id.* Put plainly, if a person feels a greater sense of control at work, they are less likely to feel stressed. Gary D. Sherman et al., *Leadership is Associated with Lower Levels of Stress*, 109 PROC NAT’L ACAD. SCI. U.S. AM. 17903-07 (2012).

<sup>31</sup> SINEK, *supra* note 1, at 66.

<sup>32</sup> *Id.* at 92. Sinek provides no examples, nor cites any source, in support of his contention that business leaders interpreted President Reagan’s action as permission to conduct mass layoffs within their organizations. *See id.* at 224.

<sup>33</sup> *Id.* at 94-95.

<sup>34</sup> *Id.* at 170.

<sup>35</sup> *Id.* at 162. During Gingrich’s tenure, Republicans became the majority party in the House for the first time in forty years. *See Timeline: Clinton’s Years in Office, 1992-2000*, PBS.ORG, <http://www.pbs.org/wgbh/americanexperience/features/timeline/clinton/> (last visited July 13, 2016).

stems from a limited flow of social chemicals: “The reason our Congress is as ineffective as it is, is just a matter of biology.”<sup>36</sup> At several places throughout the section, Sinek seems to abandon his discussion on leadership in favor of advancing a political or ideological agenda.

The middle section of the book is puzzling and contradictory. Sinek discusses the importance of leaders treating people with love and care,<sup>37</sup> but reduces those feelings to simple chemical transactions in the brain.<sup>38</sup> He purports to abhor partisanship, but foments a number of partisan attacks. The book would have been more compelling if Sinek had maintained his earlier technique of simply discussing positive and negative leadership styles and objectively discussing the consequences of each.

#### IV. Leadership Lessons

In the later chapters of the book, Sinek shifts from his foray into pseudoscience and political criticism back to his strength of discussing leadership lessons. Unfortunately, avid leadership book readers will recognize many familiar narratives from earlier books by other authors. Sinek provides no original analysis to these stories, which exist elsewhere in detail. To illustrate his point of looking closely at a problem to find answers, Sinek presents a story of doctors in the 1840s who discovered that handwashing reduced the spread of puerperal fever.<sup>39</sup> Nearly five years earlier, economist Steven Levitt and writer Stephen Dubner spent the greater part of a chapter examining the same subject in their bestselling book *SuperFreakonomics*.<sup>40</sup> Similar examples of rehashed anecdotes abound. Sinek discusses the positive corporate culture at Southwest Airlines,<sup>41</sup> a topic already covered by multiple authors, including Jim Collins in his 2011 bestseller *Great by Choice*.<sup>42</sup> For readers who are interested in Sinek’s tale of U.S. Navy Captain David Marquet and his leadership techniques aboard the submarine USS *Santa Fe*, they are best served by reading the bestseller *Turn the Ship Around!*,<sup>43</sup> which Marquet wrote in 2013. Perhaps most

painfully, Sinek spends several pages retelling Stanley Milgram’s well-known electric shock experiments of 1961.<sup>44</sup> Dozens of writers have already examined the Milgram experiments from virtually every possible angle, and Sinek adds nothing new to the discussion.

Sinek concludes with several business and leadership clichés that seem unoriginal and uninspired. Examples include, “Let us all be the leaders we wish we had;”<sup>45</sup> “We must all start today to do little things for the good of others;”<sup>46</sup> “To be a true leader . . . starts with telling the truth;”<sup>47</sup> and, “Leadership is about integrity, honesty and accountability.”<sup>48</sup> Readers will likely find this advice true, but lacking substance. This section would have been much stronger if Sinek had provided specific recommendations for making organizations into protective and caring environments.

#### V. Conclusion

*Leaders Eat Last* contains some outstanding leadership aphorisms (the title of the book among them). However, the lessons seem as though they are better suited for a concise list of leadership principles.<sup>49</sup> The book reads as an overly long exposition of some essentially simple ideas. For example, Sinek’s “Circle of Safety” concept states that workers are happiest when leaders genuinely care for their subordinates; this seems like a basic principle that does not require several chapters to explain.

Although *Leaders Eat Last* lost momentum in the later chapters, the first section is worthwhile reading for anyone who desires to improve his or her leadership style. Sinek is a gifted public speaker who is capable of delivering incisive leadership lessons. Interested readers will likely gain value from reading Sinek’s earlier work, *Start with Why: How Great Leaders Inspire Everyone to Take Action*,<sup>50</sup> or watching one of his famous TED Talks.<sup>51</sup> All prospective leaders could benefit from the book’s essential lesson: “[L]eaders who are willing to eat last are rewarded with deeply loyal colleagues

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In 1997, after nearly two years of negotiations, President Clinton reached a compromise with Republicans in Congress to balance the budget. *Id.* In 1999, the administration balanced the budget for the first time in thirty years. *Id.*

<sup>36</sup> SINEK, *supra* note 1, at 162.

<sup>37</sup> *See, e.g., id.* at 17.

<sup>38</sup> As Sinek puts it, “Trust and commitment are feelings that we get from the release of chemical incentives deep in our limbic brain.” *See, e.g., id.* at 78.

<sup>39</sup> *Id.* at 182.

<sup>40</sup> STEVEN D. LEVITT & STEPHEN J. DUBNER, *SUPERFREAKONOMICS: GLOBAL COOLING, PATRIOTIC PROSTITUTES AND WHY SUICIDE BOMBERS SHOULD BUY LIFE INSURANCE* (2009).

<sup>41</sup> *See* SINEK, *supra* note 1, at 213.

<sup>42</sup> JIM COLLINS & MORTEN T. HANSEN, *GREAT BY CHOICE: UNCERTAINTY, CHAOS AND LUCK—WHY SOME THRIVE DESPITE THEM ALL* (2011).

<sup>43</sup> L. DAVID MARQUET, *TURN THE SHIP AROUND!: A TRUE STORY OF TURNING FOLLOWERS INTO LEADERS* (2013).

<sup>44</sup> *See* SINEK, *supra* note 1, at 99-107. *See also* STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974).

<sup>45</sup> SINEK, *supra* note 1, at 216.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 150.

<sup>48</sup> *Id.*

<sup>49</sup> *See, e.g.,* COLIN POWELL & TONY KOLTZ, *IT WORKED FOR ME: IN LIFE AND LEADERSHIP* (2012). The book contains General Colin Powell’s “Thirteen Rules” for future leaders. *Id.* at 4-30.

<sup>50</sup> SIMON SINEK, *START WITH WHY: HOW GREAT LEADERS INSPIRE EVERYONE TO TAKE ACTION* (2011).

<sup>51</sup> *See, e.g.,* Simon Sinek, *How Great Leaders Inspire Action*, TED.COM (Sept. 2009), [http://www.ted.com/talks/simon\\_sinek\\_how\\_great\\_leaders\\_inspire\\_action?language=en](http://www.ted.com/talks/simon_sinek_how_great_leaders_inspire_action?language=en).

who will stop at nothing to advance their vision.”<sup>52</sup>

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<sup>52</sup> SINEK, *supra* note 1, inside front cover.

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