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New Developments

Center for Law & Military Operations

CLAMO Publishes New *Rule of Law Handbook*¹

The Center for Law and Military Operations (CLAMO) has published the latest *Rule of Law Handbook*, which is now available online from CLAMO's website.² The new *Rule of Law Handbook* is in its fourth edition and has been updated to include the latest information from practitioners in the field and descriptions of recent rule of law projects.

The *Rule of Law Handbook* is designed to serve as an educational tool to assist judge advocates and paralegals involved in the rule of law mission during on-going military operations.³ Written primarily for judge advocates, the handbook is "not intended to serve as U.S. policy or military doctrine for rule of law operations" but should be used as a resource for judge advocates preparing to participate in rule of law development.⁴

The content of the current handbook shares much in common with earlier editions, though some material has been revised and new chapters have been added since the handbook was last published in 2009. The handbook begins by defining "rule of law" and describing key players in the joint, interagency, intergovernmental, and multinational process. The handbook also outlines the legal framework for rule of law and highlights planning and fiscal considerations for rule of law operations. Theater-specific information for Iraq and Afghanistan is discussed in a separate chapter.

Two new sections have been added to the fourth edition. Chapter 9 discusses rule of law metrics and provides sample checklists to help judge advocates formulate their own "tailored set of metrics for the operation at hand."⁵ Chapter 10 explains how practitioners can use Human Terrain Teams to support rule of law initiatives. The discussion of sharia law in chapter 5 has also been substantially revised.

In addition, the handbook includes rule of law narratives provided by recently deployed practitioners. One article offers the British perspective on support to the informal justice sector in Helmand Province, Afghanistan. Another, written by an Air Force judge advocate, discusses the Central Criminal Court of Iraq. An article by a Senior Legal Advisor with the Department of Justice describes the achievements of the Counter-Narcotics Justice Task Force in Afghanistan. Lastly, several Army judge advocates offer their insights on rule of law efforts undertaken at both the brigade and division levels, while judge advocates who served with the Asymmetric Warfare Group and with a Special Forces battalion also relate their experiences.

Judge advocates serve an important role during rule of law operations, and the *Rule of Law Handbook* represents a useful starting point and guide for practitioners engaged in the rule of law mission. As the handbook itself notes, "Even if the *Handbook* only serves as an introductory resource to further Judge Advocates' professional education on the topic, it will have served a vital purpose."⁶

—Captain Ronald T. P. Alcalá

¹ THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., CTR. FOR LAW & MILITARY OPERATIONS, *RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES* (2010) [hereinafter *ROL HANDBOOK*].

² Publications, Ctr. for Law & Military Operations, <https://www.jagcnet2.army.mil/8525751D00557EFF/0/A86D78669E17E6F9852574DA005E3ADF?opendocument> (follow "Rule of Law Handbook (2010)" hyperlink).

³ *ROL HANDBOOK*, *supra* note 1, at ii.

⁴ *Id.*

⁵ *Id.* at 241.

⁶ *Id.* at iii.

Lore of the Corps

For Heroism in Combat While Paying Claims: The Story of the Only Army Lawyer to be Decorated for Gallantry in Vietnam

Fred L. Borch III
Regimental Historian & Archivist

In May 1968, Major General (MG) John J. Tolson, the Commanding General, 1st Cavalry Division (Airmobile), awarded the Bronze Star Medal with “V” for valor device to his Staff Judge Advocate (SJA), then Lieutenant Colonel (LTC) Zane E. Finkelstein. Finkelstein is the only Army lawyer to be decorated for gallantry in action in Vietnam—and almost certainly will be the only judge advocate (JA) in history to be awarded a decoration for combat heroism while investigating and paying claims.

On 14 December 1967, Finkelstein travelled by helicopter to a Vietnamese village that had been mistakenly bombed by the U.S. Air Force in order to investigate and pay claims to civilians who had been injured or whose property had been damaged in the attack. While the JAG Corps had centralized claims processing in Saigon, Finkelstein decided he would have more flexibility in the field if he were able to pay foreign claims. As a result, he obtained an appointment as a one-man Foreign Claims Commission, and, since the bombed village was not too far from Finkelstein’s location near Camp Evans, South Vietnam, he decided to organize an expedition to investigate, adjudicate, and pay these foreign claims on his own.

Accompanying Finkelstein that day was a warrant officer from the Finance Corps. This individual was the Class B agent who would pay substantiated claims in Vietnamese piasters after Finkelstein investigated and approved them. A platoon of infantry also went with them—to provide security.

After dropping the Americans off at the village, the three UH-1H helicopters departed. The infantrymen then set up a defensive perimeter, and Finkelstein began investigating and processing claims from the Vietnamese civilians.¹

The Americans believed there were no Viet Cong in the area but, unbeknownst to them, the guerillas were not only still in the village, but were, in fact, inside the perimeter. After the Viet Cong “popped out of the holes in the ground

in which they had been hiding,” a furious firefight erupted. Finkelstein stopped his legal work and, using both his .38 caliber revolver and M-16 rifle, joined the infantrymen in repelling the attack.² He also called in air support on the radio—but got artillery fire instead.

After a brief engagement, the Viet Cong fled and Finkelstein returned to his claims work. The helicopters arrived sometime later and the Americans departed for the trip back to Camp Evans—and relative safety. As the official citation for his Bronze Star Medal for Valor explains, Finkelstein was recognized for a “display of personal bravery and devotion to duty” in “continually exposing himself to enemy fire” and having “efficiently investigated, processed and paid 51 claims.”³

Born in Knoxville, Tennessee, on 24 June 1929, Finkelstein received both his A.B. (May 1950) and LL.B. (December 1952) from the University of Tennessee. He excelled in law school, where he served as Editor-in-Chief of the law review and was inducted into the Order of the Coif.

Finkelstein was drafted into the Army in April 1953 and completed basic training at Fort Jackson, South Carolina. After receiving word that he had passed the Tennessee bar examination, then Private Finkelstein transferred to the JAG Corps that same year. In addition to serving in Vietnam as the SJA, 1st Cavalry Division (1967–68), Finkelstein also served as the SJA, Eighth U.S. Army Korea (1975–77). He also saw overseas duty as an Army lawyer in Berlin, Federal Republic of Germany, (1954–57) and Taipei, Taiwan, (1961–63). Then-LTC Finkelstein also served as the Chief, Military Justice Division at The Judge Advocate General’s School, U.S. Army (the forerunner of today’s Criminal Law Division) (1968–71). Perhaps his most noteworthy assignment was as the first Army Legal Advisor and Legislative Assistant to the Chairman of the Joint Chiefs of Staff (1971–75). Finkelstein retired as a colonel in 1983 and lives today in Carlisle, Pennsylvania.

¹ David S. Franke, Finkelstein Oral History, April 1989, 168–71 (on file with The Judge Advocate General’s Legal Center and School (TJAGLCS) Library).

² Telephone Interview with Zane E. Finkelstein (Mar. 15, 2010) (on file with author).

³ Headquarters, 1st Cavalry Division (Airmobile), Gen. Orders No. 2780 (3 May 1968).

While a number of Soldiers who later served as JAs were decorated for combat heroism in Vietnam—for example, both MG (Ret.) Michael Nardotti and Colonel (Ret.) John Bozeman were awarded Silver Stars—Finkelstein is the only JA to have been decorated for gallantry in action while serving as an Army lawyer in Vietnam.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

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

<https://www.jagcnet.army.mil/8525736A005BE1BE>

Army Review Boards and Military Personnel Law Practice and Procedure

Jan W. Serene*

[Editor's Note: This article is an edited summary of a class presentation delivered on 17 March 2010 at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia.]

Introduction

The Army Review Boards Agency, commonly referred to as ARBA, contains fifteen boards that render decisions concerning military personnel issues. As the focus of this discussion is military personnel law, I will not discuss the Army Clemency and Parole Board, which I cover in a military justice course. In addition, because discussion of the issues involved in processing physical disability cases would exceed the time we have today, I will not discuss ARBA's physical disability appeal boards. We will also not be discussing selection boards for promotion, schooling, or command, which fall under the Headquarters, Department of the Army (HQDA), Office of the Deputy Chief of Staff, Personnel/G-1's (ODCSPER/G-1) responsibility, and are, therefore, not part of ARBA.

The Army Review Boards Agency acts for the Secretary of the Army when it decides a case. Regardless of whether our boards are acting in an executive role in making a personnel decision or a quasi-judicial role by reviewing the personnel decisions made by others, we view our mission as being service-oriented. Our mission is to serve Soldiers, Veterans, and their Family Members in a courteous and timely manner. In deciding cases, we follow principles of justice, equity, and compassion with a view toward balancing what is in the best interests of the Army, the public, and the individual under consideration. We operate with transparency, considering only evidence that applicants have had an opportunity to review and comment on. The boards that review personnel decisions made by others issue written rationale explaining the boards' analyses.

Military personnel law is a complex and challenging area in which to practice because myriad and often obscure statutory and regulatory provisions dictate the practices and procedures. For instance, statutory provisions governing officer cases often vary greatly from regulatory provisions governing enlisted cases. The ARBA Legal Office, consisting of four attorneys and one paralegal, assists the Agency and its very capable, experienced staff and board members in the adjudication of cases. Realizing the complexity of military personnel law practice, our legal office does not limit its activities to those responsibilities within the Agency. We also conduct an active outreach program. This presentation is part of that program. We encourage phone calls and emails from the field. We will gladly give you information on the relevant law and the procedures for appeals to the boards. However, we will not advise you on the strategies to use in pursuing or defending your client's case, as we have to maintain our neutrality. Before contacting us with your questions, we ask that you

read the relevant regulations and statutes to the extent you can, so you can ask more probing questions and have a basic understanding of the issues we will discuss.

Army Board for Correction of Military Records

ARBA reviews over 18,000 cases annually. By far our busiest board is the Army Board for Correction of Military Records (ABCMR), which routinely processes over 14,000 cases a year. Congress established the boards for correction of military records (BCMRs) after World War II to reduce the burden on Congress to correct military records through private bills. The ABCMR members, by statute, are civilian employees assigned in the National Capital Region. The members serve on the ABCMR as an additional duty. Title 10 U.S.C. § 1552 authorizes the BCMRs to correct errors or remove injustices from any military record of their respective service.¹

When the statute and ABCMR's governing regulation, Army Regulation (AR) 15-185, refer to "errors," they are referring to factual or legal errors that can disadvantage an individual.² A factual error could be the entry of an incorrect home of record or basic entry pay date. An example of a legal error would be the Army not affording a respondent the right to a separation board guaranteed by regulation. If the ABCMR finds an error, it can correct the applicant's military record to remove the error and/or to cure the harm that flowed from the error. For instance, an applicant improperly discharged could be given a change of reason for the discharge, an upgrade of characterization, and back pay and allowances.

The greater authority of the board comes in removing injustices. This is the utilization of the "tain't fair" rule. In examining a case, the ABCMR will first look to see if there are any factual or legal errors in the records. If the ABCMR determines there are no factual or legal errors to correct or correcting them does not entirely cure the injustice, it applies the "tain't fair" rule in equity. The Army's action, although factually and legally correct, may have led to an unfair result. If the ABCMR believes the result was unfair, it can change or "correct" the records to lead to a different result.

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¹ 10 U.S.C. § 1552 (2006).

² U.S. DEP'T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (31 Mar. 2006).

An example from the Korean Conflict illustrates the Board's equity authority. When the Korean Conflict broke out, the United States did not have sufficient forces in South Korea, so the Army rushed in forces from occupied Japan. One of the deploying units took its orderly, a Japanese national, with them. The orderly was not an Army employee. The officers had hired him to tend to their uniforms and clean their bachelor officer quarters. Shortly after the unit deployed, the North Koreans and Chinese overran its position and detained the Soldiers and Japanese orderly in a prison camp. The Koreans and Chinese bore animosity toward the Japanese because of the Japanese occupation of their countries during World War II. To protect their Japanese orderly from potential mistreatment, the officers in the unit passed him off as a Japanese-American Soldier in the POW camp, and he served out the remainder of the conflict in the camp by all appearances as an American Soldier. The orderly proved quite useful as he served as a translator and liaison between the Americans and their captors. In gratitude for his services after the end of hostilities, the Americans sponsored his immigration to the United States. He joined the Army, served well, retired, and became an American citizen. At a reunion many years later, the other Veterans discovered he had not received service credit for the time he spent in the POW camp.

Someone suggested he seek relief from the ABCMR. He applied seeking service credit toward retirement for his time as a POW. Factually and legally, he was not an Army Soldier during his stay in the POW camp. However, the Board felt that because of his outstanding service in support of the American POWs and his performance of duties as if he had been an American Soldier, it was only fair he should receive the service credit. The ABCMR changed his records to reflect his years of military service, including the time he spent as a POW. That is an example of the authority of the ABCMR. It can create new "realities" or rewrite history to bring about the goal it wants to achieve.

Despite the ABCMR's extraordinary authority in equity, there are legal limitations on what the ABCMR can do. First, the Board must find a service record it can change or create that will lead to the desired result. Second, the ABCMR can only correct an Army record; it cannot correct a Veterans' Administration (VA) record. If an applicant is unhappy with a VA benefits determination, the most the ABCMR can do is change the Army's records to put the Veteran in a better light with the VA. However, it cannot change the VA's records or its determinations. Third, the ABCMR cannot overturn a court-martial conviction in a case tried or reviewed under the Uniform Code of Military Justice.

Applicants need to understand how the ABCMR operates. The ABCMR does not investigate cases. The burden of proof is on the applicant to show by a preponderance of the evidence that there has been an error or injustice. Therefore, it is important that applicants provide any evidence and records they have to support their

positions. The ABCMR will review a Soldier's or Veteran's official military personnel file (OMPF) and may ask an outside agency for an advisory opinion on an application. If the Board acquires an advisory opinion, it will provide that to the applicant with an opportunity to respond to the advisory report before the Board considers the case.

Applicants need to file in a timely manner. Applicants should file within three years after commission or discovery of the error or injustice to satisfy the Board's three-year statute of limitations. However, the ABCMR can waive the statute of limitations for good cause. This means the Board will review all cases ripe for consideration, and waive the statute of limitations if the Board finds error or injustice. In other words, the ABCMR will only invoke the three-year statute of limitations in those cases where it denies the case on the merits.

The most common requests for correction involve awards, separations, promotions, disabilities, evaluation reports, pay, allowances, clemency on court-martial sentences, Article 15s, and memorandums of reprimand. Before adjudicating a case, however, the ABCMR will normally require applicants to exhaust other avenues of appeal. For example, an applicant should appeal an adverse evaluation report through the appeal process provided for in the evaluation regulation before applying to the ABCMR. Requiring exhaustion of other remedies reduces the number of cases that applicants bring before the ABCMR and helps build an administrative record for the Board to review.

Just as it is important for an applicant to present an application supported by evidence, it is also critical for the Government to document a personnel action so that it can withstand scrutiny upon review. For instance, a general officer memorandum of reprimand should adequately describe the misconduct it addresses and should include supporting evidence filed in the OMPF for future reference. Make sure the personnel clerk files a complete copy of a chapter discharge packet in a Soldier's OMPF. If an adverse personnel action is worth pursuing, it is worth taking the extra time to ensure it will withstand scrutiny on appeal.

How do we process cases at ARBA? When a case arrives at ARBA, we assign it to an analyst for the particular board. Some boards have their own dedicated analysts, as does the ABCMR; other boards share a pool of analysts. The analyst researches the case and drafts a recommended decision. Based on a number of factors, the ARBA Legal Office and/or Medical Office might review the recommended decision before it goes to a board for consideration. At a minimum, the analyst's supervisors will review the recommended decision before a board considers it.

The board members review the case and recommended decision. The recommended decision in no way binds the members, and the members can make any changes to the rationale or the decision to reflect the majority of the

members' decision. Some board decisions are the final agency decision on behalf of the Secretary of the Army. Some board decisions are recommendations to our Agency Director—the Deputy Assistant Secretary of the Army (Review Boards) (DASA(RB))—who makes the final decision. For the ABCMR, if the staff recommendation, any advisory opinion, and all of the Board members agree, the Board's action normally is the final Agency decision. If there is a disagreement among any of those individuals, the DASA(RB) makes the final decision for the Secretary of the Army.

Congress exercises an important oversight function for the BCMRs. As the BCMRs exercise Congress's authority as delegated by 10 U.S.C. § 1552, Congress requires that the Boards properly exercise that function.³ To help ensure the independence of the BCMRs in the exercise of their quasi-judicial function, Congress mandated the Boards have independent legal and medical advisors through enactment of 10 U.S.C. § 1555.⁴ To ensure the processes for reviewing requests for correction by any of ARBA's boards are transparent, Congress mandated, through 10 U.S.C. § 1556, that the Boards disclose virtually all communications with anyone outside the Agency to the applicant if that communication pertains directly to the applicant's case or has a material effect on the applicant's case.⁵ To ensure the BCMRs timely process requests for correction and the services properly resource the BCMRs, Congress enacted 10 U.S.C. § 1557 mandating that no case take more than eighteen months to process and that, as of fiscal year 2011, the BCMRs must complete ninety percent of all cases within ten months of receipt.⁶ As we examine the work of ARBA's other boards, bear in mind affected Soldiers, Veterans, or their representatives can appeal unfavorable decisions of these other boards to the ABCMR.

Army Discharge Review Board

Let's turn to a discussion of ARBA's second busiest board, the Army Discharge Review Board (ADRB) governed by AR 15-180.⁷ Congress, through enactment of 10 U.S.C. § 1553, created the DRBs to ensure Veterans' discharges were being properly and fairly characterized.⁸ Congress recognized reasons for separation and characterizations of service could have long-term consequences for the availability of Veterans' benefits and future employability. The ADRB differs from the ABCMR

in several regards. As its name implies, the ADRB's sole function is to review discharges. Unlike the ABCMR, which requires an application to invoke its jurisdiction, the ADRB can review discharges or classes of discharges upon its own motion or at the request of the Army. For instance, if the law, policy, or substantive procedures for a particular type of discharge changed for the benefit of Soldiers, the Army could task the ADRB to review prior discharges to see if the ADRB should upgrade any under the new standards. Whereas the ABCMR has a waiveable three-year statute of limitations for applicant filing, the ADRB has a fifteen-year nonwaiveable statute of limitations. Additionally, although the ABCMR's members by statute must be civilian employees, the ADRB's members traditionally have been military. The ADRB members are active duty officers assigned to ARBA whose full-time duty is to serve as members of ARBA boards. There is no right of personal appearance before the ABCMR, but there is a statutory right to appear (at no expense to the Government) before the ADRB. In fact, an applicant gets two chances at the ADRB. First, the applicant can request a review based solely on the records. If unsuccessful there, the applicant is entitled to a personal appearance, which is a *de novo* review. As to the final major difference between the two boards, the ABCMR can upgrade a discharge given by a general court-martial, whereas the ADRB's statute expressly prohibits it from doing so.

Aside from these differences, the ADRB operates very much like the ABCMR. It reviews discharge actions first for factual and legal errors, and then it examines the discharge based on equity. If the ADRB finds the separation authority approved a discharge on one ground with a certain characterization but the transition point improperly recorded those determinations on a Veteran's discharge (DD Form 214)⁹—that is, the transition point committed a factual error—the ADRB can correct the DD 214 to reflect the separation authority's true action. Correction of a factual error is the only circumstance where the ADRB can leave the Veteran worse off than before the Board considered the case. For instance, if the separation authority approved a discharge based on chapter 14, AR 635-200, with an under other than honorable (UOTH) characterization of service, but the transition point incorrectly recorded a chapter 13 with general, under honorable conditions (GD) characterization, the ADRB can correct the DD Form 214 to reflect the correct reason and characterization.¹⁰

If the ADRB finds the separation authority committed legal error—for instance, the command considered limited use evidence but imposed an other than honorable discharge characterization—the ADRB must upgrade the

³ 10 U.S.C. § 1552.

⁴ *Id.* § 1555.

⁵ *Id.* § 1556.

⁶ *Id.* § 1557.

⁷ U.S. DEP'T OF ARMY, REG. 15-180, ARMY DISCHARGE REVIEW BOARD (20 Mar. 1998) [hereinafter AR 15-180].

⁸ 10 U.S.C. § 1553.

⁹ U.S. DEP't of Defense, DD Form 214, Certificate of Release or Discharge from Active Duty (1 Aug. 2009).

¹⁰ See U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS ch. 14 (6 June 2005) (RAR, 27 Apr. 2010) [hereinafter AR 635-200].

characterization to an honorable discharge (HD) as required by AR 600-85.¹¹ After reviewing a case for factual and legal error, the ADRB will examine the case based on equity. Issues of equity normally focus on the characterization of service—whether the characterization was too harsh. If the apparent norm for a private first class with two positive urinalyses for marijuana (and no other misconduct) is a GD and the applicant received an UOTH characterization, the ADRB can upgrade it to a GD. Similarly, if the going rate for two positive urinalyses fourteen years ago was an UOTH characterization, which the applicant received then, but the going rate today is a GD, as a matter of equity the ADRB can upgrade the discharge under “current standards.”

Like the ABCMR, the ADRB does not investigate cases. It relies primarily on the Veteran’s OMPF and matters the Veteran submits. The Veteran carries the burden of proof in demonstrating by a preponderance of the evidence the discharge was improper or inequitable. However, if the discharge packet contained in the Veteran’s OMPF is irregular on its face, the command runs a substantial risk the ADRB will upgrade the discharge as to reason and/or characterization. Common issues the ADRB sees include limited use evidence with a characterization below HD; no separation board when the Soldier exercised the right to request a board; administrative board procedure requiring the general court-martial convening authority take action, but the special court-martial convening authority approved the separation; and separation with less than an HD issued after the Soldier’s apparent expiration of term of service (ETS).

Involuntary Officer Separations

Separation authority for most types of involuntary enlisted separations resides in the field with summary, special, or general court-martial convening authorities. However, separation authority for most involuntary officer separations remains at HQDA. Next, let’s review the ARBA boards that handle several types of involuntary officer separations. The ARBA Legal Office is responsible for the processing of these boards.

The Department of the Army Active Duty Board (DAADB), discussed in chapter 2, AR 600-8-24,¹² reviews cases of Other Than Regular Army (that is, Reserve) officers serving on active duty whose chains of command have recommended them for release from active duty based on misconduct or substandard performance. The respondent does not appear before a board in the field. The DAADB reviews the officer’s OMPF, matters submitted by the

officer’s chain of command, and the officer’s rebuttal. The DAADB can only release an officer from active duty with an appropriate characterization of service, as it does not sever an officer’s reserve status.

However, an officer’s release from active duty (REFRAD) by the DAADB will not preclude the Army from subsequently pursuing an involuntary separation on the same grounds under other procedures. Ideally, commands should use the DAADB in those cases where a Reserve officer experiences issues that are interfering with successful performance on active duty, but the officer has potential for future mobilization because the issues are temporary. One example would be an officer who cannot develop an adequate family care plan but should be able to do so in the future. In summary, the DAADB is not a quick and easy substitute for the more formal procedures required to eliminate an officer.

Speaking of more formal officer elimination procedures brings us to the next ARBA board—the Army Board of Review for Eliminations. The Board of Review (BOR) reviews officers recommended for elimination by a Board of Inquiry (BOI) in the field, often referred to as the Show Cause Board. The BOR was a statutory requirement, but now, only AR 600-8-24 requires it. To understand the BOR, we need to review the conduct of BOIs.

The Army initiates a show cause proceeding involving an officer through one of two primary means. First, if the local command believes an officer should be separated (for substandard performance of duty, misconduct, moral or professional dereliction, in the interest of national security, or other derogatory information), a general officer in command with a judge advocate or legal advisor available can require the officer to “show cause” why he or she should be retained in the service. This general officer is the General Officer Show Cause Authority (GOSCA). Although the BOI that may result is often called the show cause board, which implies the officer carries the burden of proof, the Army has the burden of proof by a preponderance of the evidence to demonstrate why the officer should be eliminated.

Human Resources Command (HRC) is the second mechanism for initiating a show cause proceeding. When an HRC board non-selects an officer, it also has the option of recommending that the Commanding General (CG), HRC, issue a show cause order to the officer. If the CG, HRC, agrees, he or she sends the required notice to the officer and directs the local command to conduct a BOI, if one is required.

The BOI remains a statutory requirement for the involuntary elimination of probationary officers for which the Army is seeking an UOTH characterization of service and for all nonprobationary officers. The officer (respondent) cannot waive the BOI, although the officer can waive appearance before the BOI. However, the officer can

¹¹ U.S. DEP’T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM para. 10-12 (2 Feb. 2009) (RAR, 2 Dec. 2009).

¹² U.S. DEP’T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006) (RAR, 27 Apr. 2010) [hereinafter AR 600-8-24].

avoid the BOI process by either convincing the GOSCA to rescind the action or by submitting a retirement in lieu of elimination, resignation in lieu of elimination (RILE), or request for discharge in lieu of elimination (DILE). If the Army accepts the officer's retirement, resignation, or request for discharge, that becomes the basis for separation rather than the involuntary separation initiated by the GOSCA, thus avoiding the statutory requirement for a BOI. We will discuss how we process retirements, RILEs, and DILEs later when we talk about the Ad Hoc and Army Grade Determination Review Boards.

The BOI is probably the most labor intensive and time-consuming means of eliminating an officer administratively. As a practitioner representing either the command or the respondent, you should treat it with the same level of attention as you would a court-martial. As much of the procedure is statutorily based, there is little room for error or deviation. For instance, if the respondent is not a Regular Army officer, at least one member of the BOI must be a Reserve officer on active duty. The respondent cannot waive this statutory requirement. Furthermore, there are several pitfalls to avoid. The bases for separation must be clearly set forth in a proper notification letter with factual specificity, much like a court-martial specification. A BOI's findings must likewise be factually specific, rather than conclusory. Ideally, the BOI's findings should mirror the bases set forth in the notification letter or specifically describe how they differ based on the evidence presented at the BOI.

As a practical matter, you will be involved in many more enlisted separation boards than you will officer separation boards. The key to success is remembering the requirements and procedures differ greatly between the two. Be sure to read chapter 4, AR 600-8-24, closely, and follow its dictates scrupulously.¹³ Do not assume because you are familiar with enlisted separation boards under the provisions of AR 635-200, that you can carry that knowledge automatically over to a BOI. Remember that not only the BOI must be convinced that the officer should be eliminated, but the BOR and separation authority must be convinced as well. Therefore, the adequacy of the record compiled by the command, including the record of the BOI, is crucial to a successful separation.

If the BOI votes to retain an officer, that ends the separation action. If the BOI recommends separation (which will include a recommendation for an appropriate characterization), the case goes through HRC to ARBA for conduct of the BOR. The BOR composition mirrors that of the BOI. At least one member must be a colonel and the other two must be lieutenant colonels or above, but all must be senior to the respondent. If the respondent is not a Regular Army officer, at least one member must be a

Reserve officer. The BOR limits its review to the respondent's OMPF, the record of the BOI, any rebuttal from the respondent to the BOI, and the GOSCA's recommendation. The BOR can recommend no action less favorable than that recommended by the BOI. If the BOR votes to retain, that terminates the separation action. If the BOR votes to separate the officer, the BOR recommends a characterization. The DASA(RB) decides whether the officer should be separated, unless the officer is in sanctuary (between eighteen and twenty years of active federal service), in which case the Assistant Secretary of the Army (Manpower and Reserve Affairs) (ASA(M&RA)) decides whether the officer should be separated. The DASA(RB) and ASA(M&RA) can approve no action less favorable than that recommended by the BOR.

Not all officer involuntary separations process under BOI/BOR procedures. That brings us to a discussion of the next ARBA board—the Ad Hoc Board. The Ad Hoc Board is a special board created by ARBA to review cases and advise the DASA(RB) where no statutory or regulatory board is required. As a strictly advisory board of ARBA's creation, respondents have no right to an Ad Hoc Board review, and the Board's recommendations in no way bind the DASA(RB)'s decision authority. When considering a case the Ad Hoc Board will recommend whether an officer should be eliminated, and if so, how that officer's service should be characterized.

The Ad Hoc Board typically reviews three categories of cases. First are officer resignations for the good of the service in lieu of general court-martial (RFGOS)—the officer equivalent of the enlisted chapter 10, AR 635-200 separation.¹⁴ When an officer submits a RFGOS, the command must expeditiously forward it for a decision. The convening authority can proceed to trial but cannot take initial action on the results of trial until after the DASA(RB) decides whether to accept the RFGOS. Approval of the RFGOS will require the convening authority to dismiss the charges and set aside the court-martial, if it has been held. The accused and convening authority cannot deal away any of the Secretary's options concerning the RFGOS. At most, the parties can include the convening authority's agreement to recommend approval of the RFGOS in a pretrial agreement.

The second type of case referred to the Ad Hoc Board involves resignations in lieu of elimination (RILE) or requests for discharge in lieu of elimination (DILE). There is no longer a difference between the two, and an officer facing elimination can apply for either. Similar to these are requests for retirement in lieu of elimination. However, the Ad Hoc Board does not review requests to retire in lieu of elimination because the DASA(RB) will approve all legitimate retirements in lieu of elimination. Pursuant to 10

¹³ *Id.* ch. 4.

¹⁴ AR 635-200, *supra* note 10, ch. 10.

U.S.C. §§ 1186¹⁵ and 14,905,¹⁶ an approved elimination on a retirement eligible officer will be converted to retirement by operation of law; therefore, there is no reason to deny a retirement in lieu of elimination. We will discuss retirements in lieu of elimination more when we talk about the Army Grade Determination Review Board. Note there is no retirement in lieu of court-martial. The convening authority must dispose of court-martial charges before an officer is eligible to retire.

In the first two categories of cases heard by the Ad Hoc Board, the officer can submit a conditional RFGOS, RILE, or DILE. Essentially, the officer offers to resign in lieu of court-martial or elimination in return for a guarantee that the characterization will be no worse than a GD or HD. If the DASA(RB) denies the conditional request, the command will most likely proceed with the underlying court-martial or elimination action unless the officer submits an unconditional request. While the DASA(RB) would routinely accept unconditional RILEs and DILEs, the DASA(RB) will deny RFGOSs when court-martial dispositions are more appropriate.

The third type of case the Ad Hoc Board reviews are probationary officer cases where the command is seeking no worse than a GD characterization. Before we discuss the process of review further, let's define who probationary officers are. Congress raised the maximum allowable length of the probationary period from five to six years a couple of years ago. The Department of Defense recently amended its instruction to allow for an increased probationary period from five to six years. The Army has not yet implemented the enlarged probationary period. For the time being a commissioned officer above the warrant grades with less than five years commissioned service will be a probationary officer.

The probationary period for warrant officers is different. Warrant officers who have less than three years of service since original appointment in their present component are probationary officers. By way of explanation, when the Army appoints a warrant officer as a WO1, the warrant officer is appointed in the Reserves (not the Regular Army) and is not commissioned. If a WO1 remains at that grade for three years, those three years will be as a probationary officer. After promotion to CW2, the Army commissions warrant officers in the Regular Army, which starts a new three-year probationary period from the date of commissioning. Be aware that the CW2's date of commissioning in the Regular Army does not necessarily coincide with the date of promotion to CW2.

The consequences of being a probationary or nonprobationary officer are based in statute. Title 10

¹⁵ 10 U.S.C. § 1186 (2006).

¹⁶ *Id.* § 14,905.

establishes that nonprobationary officers must be afforded a BOI before they can be involuntarily separated. A probationary officer who is facing no worse than a GD characterization is not entitled to a BOI. However, a probationary officer facing the possibility of an UOTH characterization is entitled to a BOI and is processed the same as a nonprobationary officer. As I mentioned earlier, a respondent entitled to a BOI cannot waive the BOI without submitting a RILE or DILE, as it is a required step in the officer involuntary separation process.

The basis for separation helps determine whether a probationary officer will face the possibility of an OTH, and therefore, be entitled to a BOI. Unlike an enlisted Soldier who can receive either an HD or GD when separated under chapter 13, AR 635-200, for unsatisfactory performance,¹⁷ an officer separated for substandard performance of duty under AR 600-8-24 can only receive an HD.¹⁸ A command would normally treat a probationary officer facing possible separation solely for substandard performance as a probationary officer. However, the command must treat any probationary officer at initiation who will become a nonprobationary officer before the final decision on separation as a nonprobationary officer.

The command's desired outcome also helps determine whether the probationary officer will have the right to a BOI. If the GOSCA proposes separation based wholly or in part on misconduct or moral or professional dereliction, the officer could receive an HD, GD, or UOTH characterization. If the GOSCA believes an HD or GD would be an appropriate characterization, the command can use the probationary officer notification memorandum found in AR 600-8-24, effectively limiting the final characterization to no worse than a GD.¹⁹

We often see probationary officers processed as probationary officers submit RILEs and DILEs. Although the submissions clearly indicate the respondents do not want to contest the separation, they are unnecessary. A RILE or DILE waives the requirement to conduct a BOI, and a conditional RILE or DILE seeks to leverage that waiver for a more favorable characterization of service. A probationary officer processed as a probationary officer does not have a right to a BOI; therefore, the probationary officer has nothing to waive.

Army Grade Determination Review Board

The next ARBA board we will discuss is the Army Grade Determination Review Board (AGDRB) governed by

¹⁷ AR 635-200, *supra* note 10, para. 13-10.

¹⁸ AR 600-8-24, *supra* note 12, paras. 1-22a & 4-17(d).

¹⁹ *Id.* fig. 4-3 (Sample format for initiation of elimination).

AR 15-80.²⁰ The mission of the AGDRB is to determine the highest grade in which a Soldier served satisfactorily. A “satisfactory” determination of service at a particular grade has pay implications in three types of cases: disability separations, thirty-year enlisted and warrant officer cases, and officer retirements above warrant officer.

A Soldier separating for a physical disability receives severance or retired pay based on the highest of (1) the pay grade at time of separation, (2) the highest grade satisfactorily served, or (3) the grade to which the Soldier had been approved for promotion. If the Soldier is not serving in his or her highest grade or on an approved promotion list to what would have been the highest grade, the Physical Disability Agency forwards the disability case to the AGDRB for a determination of whether the Soldier served satisfactorily at a higher grade.

An enlisted Soldier retires (in non-disability cases) in the grade held the day before placement on the retired list. If that retired grade is not the highest grade in which the retiree served, the retiree can petition the AGDRB for possible advancement to the highest or intermediate grade. If the AGDRB grants advancement of grade on the retired list, it becomes effective when the retiree’s time on the active duty list plus time on the retired list equals thirty years. Soldiers who retired as warrant officers can also take advantage of this provision. Under the provisions of AR 15-80, if the reduction in grade resulted from misconduct or poor performance, the presumption is that service in the highest grade and any intermediate grade through which reduced is unsatisfactory; therefore, the retiree should not be advanced.²¹ Burden is on the applicant to prove otherwise.

An officer above the rank of warrant officer retires in the highest grade satisfactorily served, not necessarily the grade held the day before placement on the retired list. When an officer applies for retirement, HRC reviews the officer’s file to see if there is any adverse information generated since the officer’s last promotion. If there is, AR 15-80 requires HRC to refer the officer’s case to the AGDRB.²² Even if there is no adverse information in the OMPF, the officer’s command or branch can refer the officer for a grade determination if there is adverse information reflecting conduct since the last promotion that is not required to be filed in the OMPF. We notify the officer what information the AGDRB will consider and provide the officer an opportunity to submit matters. The officer does not have a right to appear before the AGDRB. Note that a warrant officer UP 10 USC § 1371 retires in the warrant officer grade held the day before placement on the retired list, unless the warrant officer previously satisfactorily served in a higher warrant officer grade.

Therefore, warrant officers are not potentially subject to the “adverse” grade determination at retirement that more senior commissioned officers might face.

The AGDRB consists of three officers, all of whom must be senior by date of rank and at least one must be senior by grade to the individual under consideration. The AGDRB by majority vote determines the highest grade satisfactorily served for enlisted cases and all 30-year cases. The DASA(RB) makes the determination for officers below the grade of brigadier general, except for warrant officers involved in 30-year cases. The Secretary of the Army personally makes the determination for brigadier and major generals. The Secretary of Defense personally makes negative grade determinations involving generals above major general.

Former Army Special Review Boards

The term “Special Review Boards” referred to four boards that were formerly part of HQDA, ODCSPER/G-1. During a reorganization of HQDA a couple years ago, the four boards moved to ARBA because they were more similar in function to ARBA’s boards than they were to ODCSPER/G-1’s selection boards. The Army Review Boards Agency no longer uses the term “Special Review Boards” as these boards have become part of the Military Review Boards, which is the term used to describe ARBA’s boards except for the ABCMR and the Army Clemency and Parole Board. The members of the four former Special Review Boards are the same ARBA military members that populate ARBA’s other boards except as noted in the following discussion.

The Department of the Army Suitability Evaluation Board (DASEB), governed by AR 600-37,²³ primarily hears appeals from E-6s and above to transfer adverse information from the OMPF performance section to the restricted section or to entirely remove adverse information from the OMPF. Documents in the OMPF that have their own appeal processes, such as court-martial orders or evaluation reports, fall outside DASEB’s jurisdiction. Applicants do not have a right to appear personally before the DASEB. The DASEB can collect information to corroborate or refute an applicant’s claim, but must provide the applicant an opportunity to review and comment on such information before the DASEB decides the case. The DASEB includes an enlisted member when considering cases involving enlisted personnel. The DASEB does not entertain cases from retirees or other separated Veterans.

Documents susceptible to transfer are limited to Article 15s and memorandums of reprimand, admonition, or

²⁰ AR 15-180, *supra* note 7.

²¹ *Id.* para 2-5.

²² *Id.* para. 4-1.

²³ U.S. DEP’T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION (19 Dec. 1986).

censure. For a transfer, the applicant must prove by substantial evidence that the document has served its intended purpose and transfer would be in the best interest of the Army. Although not required, a memorandum of support from the imposing commander can help meet that burden of proof. However, the imposing authority cannot initiate a request for transfer on the basis the document has served its intended purpose.

A successful appeal for removal of adverse information from the OMPF or its alteration requires the applicant show by clear and convincing evidence that the document is untrue or unjust in whole or in part. However, AR 600-37 expressly excludes Article 15s from DASEB's removal authority.²⁴ After exhaustion of the normal Article 15 appeal process, the ABCMR, rather than the DASEB, has authority to alter, overturn, or remove an Article 15 from the OMPF.²⁵ The imposing authority of a memorandum of reprimand, admonition, or censure, if later investigation determines it was untrue or unjust in whole or in part, can initiate a DASEB application to have the document revised or removed.²⁶

The DASEB, in addition to removing adverse information from an OMPF, can approve the filing of adverse information in the OMPF. In those cases where Army regulations do not authorize filing of adverse information in the OMPF, Army officials can ask the DASEB to authorize filing of information deemed relevant to personnel decisions involving the Soldier. Before considering such action, the DASEB will notify the subject of the adverse information of the proposed action and provide the Soldier an opportunity to review the information and comment on the proposed filing.

The Officer Special Review Board (OSRB) and Enlisted Special Review Board (ESRB), governed by AR 623-3,²⁷ hear appeals of officer and noncommissioned officer evaluation reports. The ESRB membership includes a senior noncommissioned officer senior to the applicant. Applicants must submit appeals to the Boards within three years of the receipt of the evaluation, unless they can present exceptional justification for delay.

The applicant carries the burden of proof to show by clear and convincing evidence that a material error, inaccuracy, or injustice in the evaluation report warrants a correction. Upon finding that a correction is warranted, the Boards can amend the evaluation or remove it from the OMPF. If the applicant has been non-selected for promotion

and the selection board considered the defective evaluation, the Boards can authorize a special selection board to relook the applicant's corrected file. Applicants do not have the right to appear personally before either Board.

The final board we are going to discuss is the Department of the Army Conscientious Objector Review Board (DACORB). As a percentage, this Board generates more litigation against the Army than any of ARBA's other boards. Army attorney involvement is pivotal throughout the processing of conscientious objector (CO) cases. Upon receipt of a CO application, the special court-martial convening authority must appoint an investigating officer who will require legal advice during the conduct of the investigation. In recognition of the sensitivity and complexity of these cases, AR 600-43 requires that the servicing staff judge advocate review the case for legal and factual sufficiency, ensure the applicant's rights have been protected, and recommend appropriate disposition of the case to the general court-martial convening authority (GCMCA).²⁸ Finally, the DACORB membership, in addition to three colonels from ARBA and one military chaplain from the Office of the Chief of Chaplains, contains an attorney from ARBA's Legal Office.

In accordance with AR 600-43, a purported CO can claim one of two possible statuses: 1-A-0 (CO requests assignment to noncombatant duties) or 1-0 (CO who objects to participation of any kind in war in any form and requests discharge).²⁹ The applicant must state which status applies, and an applicant's failure to qualify for 1-0, if requested, will not qualify the applicant for 1-A-0, as the two claims of status are mutually exclusive.³⁰ The applicant's GCMCA can approve 1-A-0 status or recommend denial.³¹ The DACORB can approve or deny 1-A-0 status when the GCMCA recommends denial.³² The DACORB decides all applications for 1-0 status.³³

In closing, if you would like any further information on ARBA's boards, I recommend you consult our webpage (<http://arba.army.pentagon.mil>), call us, or email our legal office.

²⁴ *Id.* para. 7-2(c)(1).

²⁵ *Id.*; see also U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 3-43 (16 Nov. 2005).

²⁶ AR 600-37, *supra* note 23, para. 7-2(f).

²⁷ U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM (10 Aug. 2007).

²⁸ U.S. DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION (21 Aug. 2006).

²⁹ *Id.* para. 1-5(c).

³⁰ *Id.* para. 1-5(d).

³¹ *Id.* para. 2-8.

³² *Id.*

³³ *Id.*

Non-Deployable: The Court-Martial System in Combat from 2001 to 2009

Major Franklin D. Rosenblatt*

I. Introduction

Conventional wisdom holds that the American court-martial system can follow the military anywhere in the world and still function effectively. A group of military law experts recently touted, “In recent years, the system created and governed by the UCMJ [Uniform Code of Military Justice] has continued to operate effectively through the increased tempo of operations and distinctive legal challenges of the ongoing wars in Iraq and Afghanistan.”¹ When speaking in platitudes rather than analyzing actual practice, military lawyers have also joined this refrain: “The military justice system . . . goes wherever the troops go—to provide uniform treatment regardless of locale or circumstances.”² Another group of judge advocates concluded approvingly, “During times of conflict, as always, military members deserve the highest protections. Judge Advocates (JAs) continue to work with commanders during contingency operations to exercise swift and sound justice in sometimes austere conditions.”³

Surprisingly, there have been no empirical studies examining how well the court-martial system has actually performed in America’s recent conflicts.⁴ This paper

attempts such a study, and the findings largely contradict the conventional wisdom. After-action reports from deployed judge advocates show a nearly unanimous recognition that the full-bore application of military justice was impossible in the combat zone. In practice, deployed commanders and judge advocates exercised all possible alternatives to avoid the crushing burdens of conducting courts-martial, from sending misconduct back to the home station, to granting leniency, to a more frequent use of administrative discharge procedures. By any measure—numbers of cases tried, kinds of cases, reckoning for servicemember crime, deterrence of other would-be offenders, contribution to good order and discipline, or the provision of a meaningful forum for those accused of crimes to assert their innocence or present a defense—it cannot be said that the American court-martial system functioned effectively in Afghanistan or Iraq. In an era of legally intensive conflicts,⁵ this court-martial frailty is consequential and bears directly on the success or failure of our national military efforts.

The next four parts will approach this issue from the perspective of the journalist, attorney, military strategist, and policymaker, respectively. Part II explores court-martial practices in Afghanistan and Iraq from 2001 to 2009. After an overview of courts-martial conducted, the part draws on the accounts of hundreds of unit after-action reviews to investigate impediments to deployed justice. Next, the part scrutinizes the types of cases tried and how misconduct in the combat zone is treated differently than other misconduct. Combined, the information in this part finds expression in the “Burger King Theory” of combat zone courts-martial. This theory holds that courts-martial, like Burger King franchises, are sometimes present in the combat zone but cannot go “outside the wire” from the largest, most city-like bases.

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¹ NAT’L INST. OF MILITARY JUSTICE, REPORT OF THE COMM. ON MILITARY JUSTICE, OCTOBER 2009, at 1 (2009). This document is commonly called the “2009 Cox Commission Report.”

² James Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F.L. REV. 185, 191 (2002).

³ CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, FORGED IN THE FIRE: LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS 1994–2008, at 289 (2009) [hereinafter FORGED IN THE FIRE]. This statement was made by the publication’s editors.

⁴ Some related works include Major John M. Hackel, USMC, *Planning for the “Strategic Case”: A Proposal to Align the Handling of Marine Corps War Crimes Prosecutions with Counterinsurgency Doctrine*, 57 NAVAL L. REV. 239, 244 (2009) (considering, “has the Marine Corps missed the mark with deployment justice, particularly with war crimes?”); Colonel Carlton L. Jackson, *Plea-Bargaining in the Military: An Unintended Consequence of the Uniform Code of Military Justice*, 179 MIL. L. REV. 1, 66–67 (2004) (attributing low Army-wide court-martial numbers from 2001 to 2003 to commanders adjusting to wartime realities by increasing their use of administrative discharges to clear growing caseloads); Captain A. Jason Nef, *Getting to Court: Trial Practice in a Deployed Environment*, ARMY LAW., Jan. 2009, at 50 (offering practitioner advice based on the author’s experience and emphasizing how to minimize trial delay from production of

witnesses for courts-martial in Iraq); Captain Eric Hanson, *Know Your Ground: The Military Justice Terrain of Afghanistan*, ARMY LAW., Nov. 2009, at 36 (describing the added difficulties of performing courts-martial in Afghanistan).

⁵ This phrase was coined by Colonel Marc L. Warren. COLONEL MARC L. WARREN, TEACHING THE JAG ELEPHANT TO DANCE . . . AGAIN (Strategy Research Project, U.S. Army War Coll.) (Apr. 9, 2002), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA404517&Location=U2&doc=GetTRDoc.pdf>. Colonel Warren used the term to describe military operations other than war that followed the Cold War. The term may also be an appropriate description of any military campaign where legal considerations are prominent, including Afghanistan and Iraq. As one observer noted, “Based on a very incomplete picture of what’s happening day to day in Iraq, it appears that there’s much more attention to human rights and to the laws of war than, for example, in Vietnam or Korea.” Brad Knickerbocker, *Is Military Justice in Iraq Changing for the Better?*, CHRISTIAN SCI. MONITOR, Aug. 7, 2007, at 1 (quoting Loren Thompson of the Lexington Institute).

Part III provides a legal analysis of two court-martial procedures—good military character evidence and expert witness rules—that each have the potential to thwart efforts to try cases in the combat zone.⁶

Part IV highlights the downstream consequences of a weak regime of criminal adjudication during overseas deployments. Although the present system's weaknesses have several troubling implications, the part is limited to two strategic consequences of combat court-martial frailty: the link between courts-martial and counterinsurgency success, and diminished American legitimacy when perceptions of military impunity foment.

Part V surveys a range of possible solutions to strengthen military justice in combat, including some that are outside the mainstream of current opinion. The suggestions range from minor changes, such as adjusting service regulations, to a wholesale reconsideration of some bedrock principles of military law.

II. The Court-Martial Goes to War: 2001 to 2009

*Wherever there are troops, there will be criminal activity.*⁷

Figure 1⁸ shows the number of special and general courts-martial⁹ conducted in Afghanistan and Iraq from 2001 to 2009. The frequency of special and general courts-martial conducted per 1000 Soldiers per year is shown in figure 2.¹⁰

⁶ “Combat zone” is not a doctrinal Army term, but is used throughout this article to describe the variety of conditions of the American military presence in Afghanistan from 2001 to 2009 and Iraq from 2003 to 2009. Doctrinal operational themes that have variously been applied to each of these combat zones include major combat operations, irregular warfare, peace operations, and limited intervention. On the doctrinal spectrum of violence, these combat zones included unstable peace, insurgency, and general war. For descriptions of these terms, see U.S. DEP’T OF ARMY, FIELD MANUAL 3-0, OPERATIONS ¶ 2-5 (27 Feb. 2008).

⁷ Memorandum for Record from Major Jeff A. Bovarnick, U.S. Army, subject: Notes from the Combat Zone 5 (2002) [hereinafter Bovarnick Memorandum] (on file with author). Major Bovarnick wrote the memorandum while serving as the Chief of Operational Law for Combined Joint Task Force 180 in Afghanistan.

⁸ The statistics in Figure 1 were provided by Colonel Stephen Henley, the Army Chief Trial Judge (on file with author).

⁹ Special and general courts-martial are the two kinds of court-martial that resemble civilian trials. They feature a judge, formal proceedings, prosecution and defense attorneys, (often) a panel of military members for jury, and (often) verbatim transcripts of the proceedings to aid appellate review. Both can adjudge punitive discharges and confinement. The chart does not include the summary court-martial, which “unlike a criminal trial, is not an adversarial proceeding.” *Middendorf v. Henry*, 425 U.S. 25, 26 (1976). See also UCMJ art. 20 (2008); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1301-06 (2008) [hereinafter MCM]; U.S. DEP’T OF ARMY, PAM. 27-7, GUIDE FOR SUMMARY COURT-MARTIAL TRIAL PROCEDURE (15 June 1985).

¹⁰ The chart at Figure 2 should be used as a guide only, since determining the precise number of Soldiers in Afghanistan and Iraq each year was inexact. The author relied on newspaper reporting, statements and releases by military leaders, annual reports to Congress, and occasional statements

The data from these two figures show that courts-martial were scarcer in combat zones than in the rest of the Army. In Iraq, courts-martial began during the first year of operations, peaked in numbers in 2005, then settled into relatively low numbers and frequency. Afghanistan started slower, with no courts-martial held until the fourth year of that conflict, followed by more frequent courts-martial in the middle of the decade, until plummeting numbers in 2008 and 2009. The 672 Army courts-martial tried in either Afghanistan or Iraq from 2001 to 2009 were the majority of all courts-martial in the combat zone among the military services.¹¹

But numbers do not tell the whole story. Vietnam offers an important lesson about assuming the success of the court-martial system based solely on court-martial numbers. After that war, the former commanding general of U.S. forces in Vietnam and the top Army lawyer concluded that the court-martial system did not function effectively despite an impressive number of cases tried. “In view of the developments in Vietnam, especially from 1969 on, it simply cannot be claimed that the military justice system

by the Secretary of Defense. Figure 2 factored in adjustments based on some reported deployment numbers that included members of other services, some reports that did not include special operations forces, and some reports that included Kuwait troop totals in reported Iraq numbers. For these reasons, reporting in the *Army Times* newspaper was a helpful secondary source to confirm primary reports, since its weekly edition includes a chart listing locations and composition of deployed units. Totals for the Army include reservists who are called up to active service. All data is on file with the author. For more on troop deployments, see the helpful historical deployment overview chart at Ann Scott Tyson, *Support Troops Swelling U.S. Force in Afghanistan*, WASH. POST, Oct. 13, 2009, available at http://www.washingtonpost.com/wp-yn/content/article/2009/10/12/AR2009101203142_2.html?nav=emailpage. The author thanks Mr. Daniel Lavering, Librarian at The Army Judge Advocate General's Legal Center and School in Charlottesville, Virginia, and Ms. Monica Parkzes, the Research Librarian at *Military Times* Publications in Springfield, Virginia, for their helpful assistance with finding historical reporting on troop numbers.

¹¹ From 1 January 2002 through 31 December 2009, the U.S. Navy conducted one general and one special court-martial in Iraq, and the U.S. Marine Corps had conducted six general and twenty-one special courts-martial. E-mail from Captain B. W. MacKenzie, Chief Judge, Navy-Marine Corps Trial Judiciary, to author (Feb. 18, 2010 14:09 EST) (on file with author). The U.S. Air Force had fifty cases of misconduct from Afghanistan and Iraq that eventually resulted in a general or special court-martial; however, Air Force records do not indicate the location of the court-martial, meaning that the number includes those that were eventually tried in the United States. E-mail from Brian Hummel, Air Force Legal Operations Agency, Military Justice Div., to author (Feb. 18, 2010 04:26 EST) (on file with author). Based on other accounts, the number of Air Force courts-martial in the combat zone appears to be extremely small. See REPORT OF THE JUDGE ADVOCATE GENERAL OF THE UNITED STATES AIR FORCE TO THE AMERICAN BAR ASSOCIATION 21 (Feb. 2007) (stating that the Air Force did not convene a court-martial in Iraq until December 2006); *AF Holds First Court-Martial in Afghanistan*, A.F. TIMES, Apr. 25, 2008, available at http://www.airforcetimes.com/news/2008/04/airforce_afghan_court_martial_042408w/ (noting that the Air Force held its first court-martial in Afghanistan in April 2008).

Special and General Courts-Martial Conducted, 2001–2009

Jurisdiction	2001	2002	2003	2004	2005	2006	2007	2008	2009
All Army	1206	1438	1343	1353	1546	1358	1446	1165	1166
Afghanistan	0	0	0	7	18	22	28	22	11
Iraq	n/a	n/a	37	117	144	79	92	63	32

Fig. 1

Frequency of Special and General Courts-Martial per 1000 Soldiers, 2001–2009

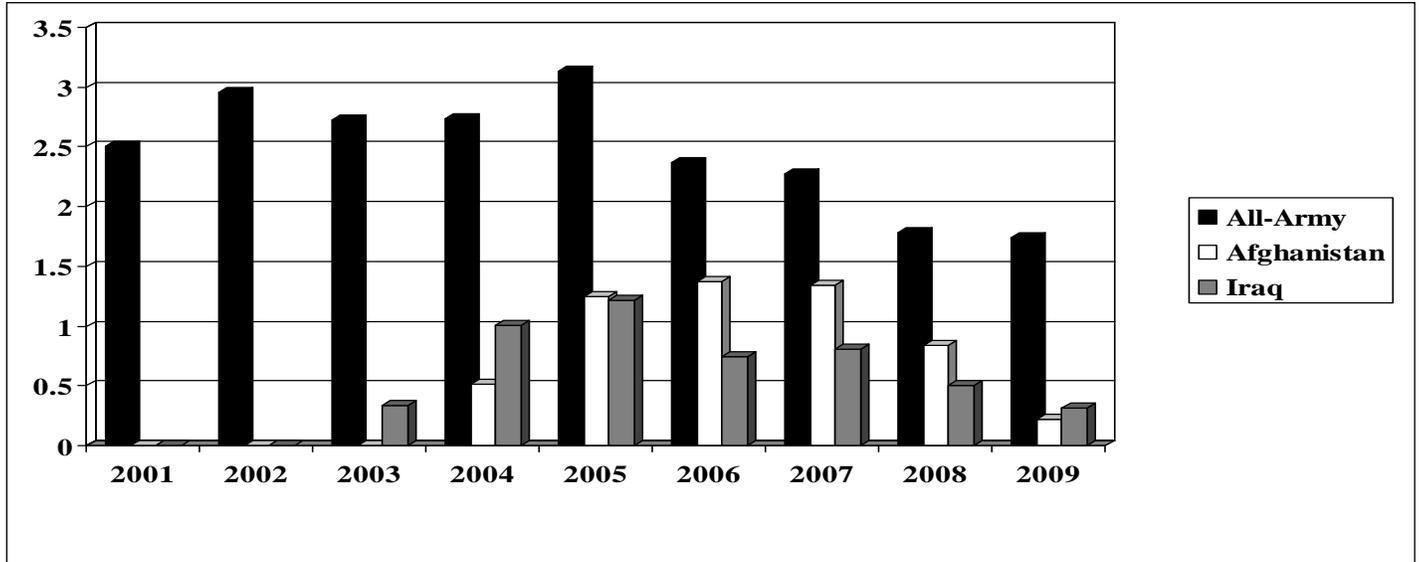


Fig. 2

adequately performed its intended roles in that limited war.”¹² The lack of after-action reviews to document the system’s deficiencies in combat was one focus of their lament.

Many commanders found the procedures less than satisfactory because of the difficulties in performing their operational tasks and at the same time meeting the time restrictions imposed by the military justice system. Many deserving cases simply were not referred to trial, with consequences on discipline impossible to calculate but obviously deleterious. The requirements for the presence of witnesses, counsel, and investigating officer to meet in an Article 32 Investigation (similar to a preliminary examination) were difficult to satisfy. Inability to obtain prompt evidence from departed witnesses, the twelve-month rotation policy, the extension of the right to civilian counsel from the United States, the total disruption of an operational unit when a major court-martial was involved—all of these are variously mentioned by knowledgeable commanders. Regrettably, these comments, observations, and complaints were rarely collected, examined, and evaluated to determine the true impact of the system, and the true impact of the system of military discipline. Statistics do not reflect these serious problems.¹³

Because the only statistics available were case totals, there was no actionable data to compel policy changes to correct combat court-martial deficiencies. The hard-learned lessons of Vietnam, they worried, might be lost without meaningful data to support what was widely known by commanders.

But times have changed, at least as far as court-martial data is concerned. Today, considerably more data on responses to misconduct from Afghanistan and Iraq is available. The Army’s Center for Law and Military Operations (CLAMO) gathered legal lessons learned from most major units that deployed to those two countries, including insights on military justice.¹⁴ This part draws

¹² General William Westmoreland & Major General George Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J. L. & PUB. POL’Y 1, 60 (1980).

¹³ *Id.*

¹⁴ Some of the comments from these after action reports can also be found in four CLAMO publications: (1) *Legal Lessons Learned from Afghanistan and Iraq, Volume 1*; (2) *Lessons Learned from Afghanistan and Iraq, Volume 2*; (3) *Forged in the Fire: Legal Lessons Learned During Military Operations 1994–2008*; and (4) *Tip of the Spear: After Action Reports from July 2008–August 2009*. CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LEGAL

from 276 after-action reviews (AARs) collected by CLAMO from Iraq and Afghanistan.¹⁵ Few AARs were completed in the early years of the Afghanistan conflict, so I interviewed judge advocates then present to fill in the gaps. Combined, this information helps answer questions that numbers alone do not reveal: How closely did court-martial numbers correlate to serious misconduct? What types of cases were brought to trial? What role did a unit’s location play? Is crime committed on deployment treated differently than crime committed in the United States?

A. Beyond the Numbers

1. Major Combat Operations

In Afghanistan and Iraq, a high operations tempo promoted good behavior, while inactivity sowed misconduct. A judge advocate with an Army division that fought through Iraq in 2003 before settling into a base near Mosul, Iraq, wrote, “Expect MJ [military justice actions] to surge in proportion to the length of time you are stationary. As long as the Division was on the move, soldiers were too busy fighting the war to have the time to get into trouble. MJ simply exploded once we became stationary.”¹⁶ Likewise, a judge advocate in Afghanistan in early 2002 credited his unit’s lack of serious misconduct to the intensity of combat operations and the lack of downtime: “Why was the misconduct low in number and severity? A mix of really busy, tired troops, some good luck, good leaders, and good grace, I suppose.”¹⁷ As a caveat to these conclusions, the

LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I: MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001–1 MAY 2003) (2004) [hereinafter LEGAL LESSONS VOLUME I]; CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME II: FULL SPECTRUM OPERATIONS (2005) [hereinafter LEGAL LESSONS VOLUME II]; FORGED IN THE FIRE, *supra* note 3; CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, TIP OF THE SPEAR: AFTER ACTION REPORTS FROM JULY 2008–AUGUST 2009 (2009) [hereinafter TIP OF THE SPEAR]. All after-action reviews (AAR) listed throughout this paper are on file with CLAMO at the Army’s Judge Advocate General’s Legal Center and School in Charlottesville, Virginia. The first three publications include some of the AAR points incorporated into the analysis by the CLAMO editors but do not include all of the military justice lessons found in the unit AARs. These three volumes are unclassified. *Tip of the Spear* has comprehensive coverage of AARs in place of the editorial analysis in the earlier volumes. However, since this comprehensive coverage was limited to thirteen months of AARs, no combination of publications included all of the pertinent AARs, so the author still reviewed each AAR individually. Due to its unfiltered reprinting of AAR comments, *Tip of the Spear* is classified as For Official Use Only, meaning that it is restricted to the public, but all excerpts from AARs in this paper are unclassified. The CLAMO website is <https://www.jagcnet.army.mil/clamo>.

¹⁵ The author obtained permission to access CLAMO’s digital archives.

¹⁶ 101st Airborne Division (Air Assault), Office of the Staff Judge Advocate, After Action Report (AAR) (Operation Iraqi Freedom (OIF)) 51 (2004).

¹⁷ E-mail from Lieutenant Colonel J. Harper Cook, Deputy Staff Judge Advocate, 21st Theater Support Command, to author (Jan. 27, 2010 06:01

fog of major combat operations may make some misconduct more difficult to detect. A judge advocate in Iraq in 2004 initially “thought the size of the caseload was inversely proportional to the operational tempo of the unit. This assessment, however, was false. Crimes occur at all times during the deployment, including times of intense combat activity and during times of relative calm.”¹⁸

Neither special nor general courts-martial were conducted during initial major combat operations. The thirty-seven special and general courts-martial tried in Iraq in 2003 did not begin until later that summer, after “active combat” ended.¹⁹ Meanwhile, no special or general courts-martial were conducted in Afghanistan until 2004, the fourth year of that conflict.²⁰

Several factors may have contributed to the absence of courts-martial in Afghanistan in the first years of combat operations. In the months after 9/11, American military forces had higher morale and were less likely to commit serious misconduct. “A surge of patriotism has kept morale, recruiting and retention high since the attacks on New York and Washington.”²¹ Likewise, a senior judge advocate in Afghanistan in 2002 believed that Soldiers had a clear sense of purpose and were less likely to get into trouble because the United States had just been attacked.²²

Even if a court-martial had been needed early in the Afghanistan conflict, conducting it would have been nearly impossible. The same judge advocate who described conditions in Afghanistan in 2002 recalled,

We would have had to fly in a TC [trial counsel], TDS [trial defense services] Counsel, Judge, court-reporter, etc., and not only were flights erratic but the priority on flying in personnel were more troops and beans and bullets. There was no place to quarter any visitors—water and food were scarce, and there really was no

EST) (on file with author). Lieutenant Colonel Cook served with 3d Brigade, 101st Airborne Division in Kandahar, Afghanistan from January to July 2002, a period of intense ground combat. *Id.*

¹⁸ Captain Christopher M. Ford, *The Practice of Law at the Brigade Combat Team (BCT)*, ARMY LAW., Dec. 2004, at 22, 31.

¹⁹ “Trials of soldiers in the Iraq and Kuwait areas commenced shortly after the active combat phase ended, and increased in number over the summer and fall.” ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES OF THE UNITED STATES SENATE AND THE UNITED STATES HOUSE OF REPRESENTATIVES § 3 (2003) (Comment of the Army Trial Judiciary, within the Report of The Judge Advocate General of the Army).

²⁰ See *supra* text accompanying note 8 (fig.1).

²¹ Thomas Ricks & Vernon Loeb, *Unrivaled Military Feels Strains of Unending War*, WASH. POST, Feb. 16, 2003, at A01.

²² See E-mail from Colonel (Retired) Kathryn Stone, to author (Oct. 29, 2009 13:27 EST) (on file with author). At the time, Colonel Stone was the Staff Judge Advocate for the 10th Mountain Division.

downtime in which to pull our limited troops off of their operational duties in order to run a court.²³

Gradually, however, the “no resources” rationale against conducting courts-martial diminished as U.S. forces became more settled in Afghanistan. As they did so, criminal misconduct began its inevitable percolation. One judge advocate wrote in late 2002 that “some cases warrant a court-martial”²⁴ but explained that the offenders in question were sent back to the United States for trial rather than tried in Afghanistan.²⁵ Reports by CLAMO noted the continuation of this practice throughout the first two years of Afghanistan: “Cases involving more serious misconduct were transferred to the United States for prosecution due, in part, to the austere conditions in Afghanistan.”²⁶

These comments indicate that, once settled, commanders at least had the capacity for air movement (since they could fly accused, escorts, and evidence back to the United States), but that they elected to use those assets to send cases away rather than convene courts-martial in theater. Why was this so? A military paralegal with an infantry unit engaged in combat in Afghanistan in 2009 explained his unit’s reasons for not pursuing courts-martial in country:

Missions don’t stop for courts-martial and if we have to pull a squad off the line to testify against a Soldier who is causing trouble, then someone needs to cover down for them. . . . [O]ur Brigade is already spread very thin and assets are very hard to come by. A squad who would normally be assigned to refit after spending two weeks without a shower or hot chow would be required to stay out longer depending on the duration of the court-martial. Key leaders, such as squad leaders, platoon sergeants, platoon leaders, first sergeants, and commanders end up absent from the fight and leave their units short on leadership. It’s a dangerous

²³ *Id.*

²⁴ Bovarnick Memorandum, *supra* note 7.

²⁵ *Id.*

²⁶ LESSONS LEARNED VOLUME I, *supra* note 14, 237; see also Office of the Clerk of Court, U.S. Army Judiciary, Cases Charged with an Offense Committed in Iraq, Afghanistan, or Kuwait CY 2001 through CY 2009 (Oct. 8, 2009) (on file with author) (showing that thirteen special and general courts-martial were conducted in the United States to adjudicate crime from Afghanistan before the first court-martial was conducted in Afghanistan in 2004). The report from the Office of the Clerk of Court also shows that even after courts-martial began to be conducted in Afghanistan in 2004, the practice of sending offenders back to the United States for adjudication remained common. The author thanks Mr. Randall Bruns from the Clerk of Court office for his assistance in compiling this data.

situation and the unit is more likely to send the Soldier back to the rear provisional unit [at Fort Bragg, North Carolina] to be court-martialed as opposed to doing it out here.²⁷

In combat operations, commanders focused their limited resources on the fight at hand. Sending serious misconduct away was considered a more effective use of resources than conducting courts-martial on site.

2. Witness Production

The most common court-martial difficulty cited by deployed units was securing the live testimony of witnesses.²⁸ A judge advocate with a unit in Iraq in 2009 explained: “Requesting witnesses from the Continental United States (CONUS) or from Iraq and arranging travel proved to be extremely difficult.”²⁹ Units were responsible for preparing civilian witnesses to enter a combat zone, a task that required time, effort, and interagency cooperation. A judge advocate in Afghanistan in 2009 noted some of these difficulties:

Arranging travel for civilian witnesses and defense counsel into theater was very problematic. Civilians must have a passport, country clearance, visa, interceptor body armor (IBA), Kevlar helmet, and a DoD identification card before traveling to Afghanistan for trial. The unit learned the requirements through trial and error. In one case, a civilian witness was unable to board the aircraft leaving Kuwait because of the lack of a DoD ID card.³⁰

Witness issues were often the “make or break” factor in whether courts-martial would occur at all. As a judge advocate in Iraq in 2007 explained, “The most challenging

²⁷ E-mail from Sergeant James Marcum, to author (Feb. 22, 2010 03:25 EST) (on file with author). Sergeant Marcum was a paralegal noncommissioned officer (NCO) with the 4th Brigade Combat Team of the 82d Airborne Division.

²⁸ See *infra* Part III.A for legal requirements to produce witnesses based on the Sixth Amendment. As one judge advocate summarized, “The 6th amendment’s guarantees boil down to this: the government needs to produce all its witnesses in person. Video-teleconference or telephonic testimony may not satisfy the 6th amendment.” 101st Airborne Div. (Air Assault), Office of the Staff Judge Advocate, Task Force Band of Brothers After Action Report 79 (OIF 05-07) (2007) [hereinafter 101st Airborne OIF 2007].

²⁹ 1st Armored Div., Office of the Staff Judge Advocate, After Action Review (OIF) 36 (19 Feb. 2009) [hereinafter 1st Armored OIF 2009].

³⁰ 101st Airborne Division (Air Assault), Office of the Staff Judge Advocate, After Action Review (Operation Enduring Freedom (OEF)) 40 (28 Aug. 2009) [hereinafter 101st Airborne OEF 2009].

aspect of trying cases in Iraq was the specter of calling witnesses forward from outside Iraq to testify and the possibility that the need to obtain such witnesses would derail the court-martial.”³¹ Another judge advocate confirms that witness production demands did indeed cause derailment of deployed courts-martial, writing, “It was extremely challenging to get civilian witnesses into theater. Consequently, in some cases where calling civilian witnesses was unavoidable, the court-martial would move to Atlanta”³²

3. Court-Martial Panels

Selecting and maintaining court-martial panels presented numerous difficulties during deployments.³³ In a combat zone, performing courts-martial with members is logistically complex, involves dangerous travel in bringing all members to the court, and can take leaders away from their combat duties. As one legal office reported, “The unit struggled with convening courts-martial member trials when scheduled to occur. Specifically, many members were located in remote areas of the jurisdiction. This made travel to COB [Contingency Operating Base] Speicher [near Tikrit, Iraq] for courts-martial trials difficult.”³⁴ Panel difficulties extended even to large, stable, garrison-style bases where the pool of potential members was co-located, presumably an “easier” to bring a panel to bring together for court: “[Our division-level command] needed to select three or four different court-martial panels during their deployment because the units changed out so often.”³⁵

Perhaps anticipating these difficulties, numerous senior Army commanders decided outright not to choose panels or convene special and general courts-martial. For example, in early Iraq, at least three Army divisions each decided not to try cases. The 82d Airborne Division declared its commander a General Court-Martial Convening Authority (GCMCA), but only for the purpose of appointing investigating officers for certain administrative investigations.³⁶ The 101st Airborne Division “made the decision not to try any general or special courts-martial in the deployed theater”³⁷ during its yearlong deployment.

³¹ 101st Airborne OIF 2007, *supra* note 28, at 79. Other witness production considerations are discussed later. See Part II.D (discussing the Burger King Theory); Part III.A (requirements to produce character witnesses); Part III.B (requirements to produce expert witnesses).

³² Senior Defense Counsel, Camp Arifjan, Kuwait, After Action Report (13 Oct. 2009).

³³ See V Corps, Office of the Staff Judge Advocate (OSJA), After Action Report (OIF) 13 (May 2007) [hereinafter V Corps OIF 2007].

³⁴ 1st Armored OIF 2009, *supra* note 29, at 37.

³⁵ 10th Mountain Div., After Action Review (OIF) 33 (24-25 June 2009) [hereinafter 10th Mountain OIF 2009].

³⁶ FORGED IN THE FIRE, *supra* note 3, at 242.

³⁷ LESSONS LEARNED VOLUME I, *supra* note 14, at 243.

Likewise, the 3d Infantry Division did not select a panel and “did not try any general or special courts-martial in the deployed theater before it redeployed in August of 2003.”³⁸

4. Military Judges

Units also mentioned the lack of easy access to a military judge in theater as a reason for diverting misconduct away from the court-martial track. One judge advocate wrote, “The argument that there is insufficient work in theater to justify a full-time judge is a self-fulfilling prophecy. Units divert cases from court-martial because there is no judge in theater. This gives the impression there is not enough court-martial work in theater to justify the presence of a judge.”³⁹ Another judge advocate explained his unit’s decision to try serious offenses that would normally warrant general court-martial at summary courts-martial as follows: “Because a full trial at a ‘general’ court-martial was time-consuming—requiring a military judge to fly into Iraq—our brigade often used ‘summary court-martial,’ a trial where the judge could be one of our higher-ranking field grade officers. . . .”⁴⁰ Returning units frequently commented on judicial coverage and flexibility, assessing both in a broad range from poor⁴¹ to excellent.⁴²

³⁸ *Id.* at 242.

³⁹ 1st Combat Support Brigade (Maneuver Enhancement), Task Force Warrior, After Action Review (OEF), June 2008–Sept. 2009, at 14 (20 Oct. 2009) [hereinafter Task Force Warrior OEF 2009]. *But see* Interview with Colonel Stephen Henley, Chief Army Trial Judge, in Charlottesville, Va. (Feb. 18, 2010) [hereinafter Colonel Henley Interview]. Colonel Henley corrected the notion that there was no judge in theater, saying that the Central Command (CENTCOM) theater has been under continuous coverage of an Army judge since 2003. “We can get judges there [to courts-martial in Iraq] within three days.” *Id.* It takes about a week to get a judge to a court-martial in Afghanistan due to greater travel difficulties there. Senior commanders afforded judges and select court-martial personnel high priority for flight manifests, which Colonel Henley believes helps get judges to courts-martial faster. Colonel Henley also noted that trial dockets are posted and publicly available on the Internet, which allows units to plan ahead for trial terms. Starting in the summer of 2010, a full-time judge will serve a one-year tour in Kuwait in order to cover cases in both Iraq and Afghanistan. Currently, an activated reservist judge or judge from the Army’s 5th judicial circuit in Germany serves for two to three months at a time in the CENTCOM theater; if there is not enough work in theater, the judge may return to home station in Germany or the United States. *Id.*

⁴⁰ PATRICK J. MURPHY WITH ADAM FRANKEL, *TAKING THE HILL: FROM PHILLY TO BAGHDAD TO THE UNITED STATES CONGRESS* 124 (2008). The former Captain Murphy served as an Army judge advocate with the 325th Airborne Infantry Regiment of the 82d Airborne Division in Baghdad, Iraq, from 2003 to 2004, before his election to Congress from Pennsylvania’s 8th District.

⁴¹ “If the UCMJ is intended to be expeditionary, the supporting establishment must be as well. We should either deploy judges adequately to satisfy the demand or admit that the UCMJ is a garrison tool. We cannot have it both ways.” Lieutenant Colonel R. G. Bracknell, Staff Judge Advocate, Regimental Combat Team 5, U.S. Marine Corps, After Action Report (OIF) 11 (7 Aug. 2008).

⁴² “The judiciary provided excellent support to the BCT. The judges were available, flexible, and understanding of the challenges associated with conducting cases in a deployed environment.” Brigade Judge Advocate, 3d

5. Other Court-Martial Challenges

In addition to difficulties associated with witness production, panel selection, and access to judges, judge advocates faced a number of other court-martial challenges in theater. For example, given the high operations tempo of combat, military justice was often a less immediate concern, and judge advocates who focused primarily on criminal law in the United States quickly discovered that competing priorities vied for their time and attention on deployments. “In garrison, criminal law is absolutely the number one priority. Once deployed, it became the fifth priority behind DetOps [Detainee Operations], OpLaw [Operational Law], RoL [Rule of Law], and investigations.”⁴³

Additionally, organizational hierarchies that were linear and easily understood in garrison tended to become confused on deployment. Modularity, a “plug and play” concept that emphasizes interchangeable units rather than organic divisions and brigades, “makes all areas of military legal practice difficult” because hierarchies and jurisdictions constantly shift as various units enter and exit theater.⁴⁴ The jurisdictional problems associated with modularity and unit movement were not limited to the early years of the deployments. Units in Iraq and Afghanistan shifted frequently on paper and on the ground, which made determining the higher headquarters in charge of a subordinate unit difficult.⁴⁵ One brigade judge advocate noted the natural consequence of this: “The brigade commander did not always have jurisdiction over personnel assigned to his unit.”⁴⁶

Joint operations that intermixed Soldiers, Marines, Sailors, and Airmen further hindered the efficient application of military justice. “Joint Justice . . . is still a challenge: it is very difficult to track AF and Navy misconduct actions—as well as their investigations into said misconduct.”⁴⁷ Service parochialism often outweighed the

Brigade Combat Team, 101st Airborne Division (Air Assault), After Action Review (OIF) 13 (2009).

⁴³ 101st Airborne OEF 2009, *supra* note 30, at 35.

⁴⁴ TIP OF THE SPEAR, *supra* note 14, at 371.

⁴⁵ *See, e.g.*, 4th Infantry Division, After Action Review (OIF 05–07) 30 (2007) (“The military justice jurisdiction in theater changed constantly due to units being assigned or attached to MND-B [Multi-National Division, Baghdad] either as OPCON [operational control] or TACON [tactical control]”); Memorandum from Staff Judge Advocate, to Commanding General, III Corps, subject: Operation Iraqi Freedom (OIF) After Action Report (AAR) 4 (10 Jan. 2008).

⁴⁶ 101st Airborne Division (Air Assault), 4th Brigade Combat Team, Brigade Judge Advocate, After Action Report (OEF), March 2008–March 2009 (12 May 2009).

⁴⁷ Brigade Combat Team, After Action Review (OIF) 1 (2007) (on file with CLAMO). The unit and author of this AAR are not identified. For analysis of the challenges of inter-service military justice, see Lieutenant Colonel Marc L. Warren, *Operational Law—A Concept Matures*, 152 MIL. L. REV. 33, 66 (1996); Major Mark W. Holzer, *Purple Haze: Military Justice in Support of Joint Operations*, ARMY LAW., July 2002, at 1.

combat commander's ability to seek justice: "The Navy and Marine Corps typically sent their personnel out of theater when misconduct arose."⁴⁸ Another unit wrote, "Although the Manual for Courts-Martial (MCM) permits joint justice, there was no unified service approach to military justice. Each service handled its own military justice matters."⁴⁹

Furthermore, units usually had fewer resources to investigate crime in theater. In garrison, military police investigators (MPI) investigate minor offenses and the Criminal Investigation Division (CID) investigates major offenses. However, MPI do not deploy.⁵⁰ Meanwhile, although CID agents do deploy, their mission expands to other areas, such as the investigation of war crimes allegations and non-combat related deaths, which detracts from the time available to investigate other crimes.⁵¹ Thus, many units were often left to investigate crimes on their own.

The logistics of deployments also create unique challenges in addressing certain crimes. For example, drug offenses are more difficult to pursue on deployment. The detection of drug-related misconduct often depends on a urinalysis, but commanders often have few resources and limited capability to test Soldiers, particularly in austere locations. A paralegal NCO explained,

Urinalysis does not happen as often as . . . in the states. The cups the UPLs [unit prevention leaders] bring with them are all the commanders have for the deployment. . . . Soldiers who have access to hashish, opium, and other narcotics through the local nationals are more likely to experiment (as first timers) or continue their habitual use.⁵²

B. Guilty Pleas: the One Kind of Case that Can Survive in Combat

Guilty plea cases, which ease the Government's burden to present evidence and witnesses to prove the elements of charged crimes, were sometimes the only cases that could be feasibly tried on deployments.⁵³ No deployment AAR from

2001 to 2009 described success at trying multiple contested cases. Instead, most units limited their courts-martial to guilty pleas. One division explained, "Because the 10th Mountain Division held only fourteen guilty pleas and no contested courts-martial, they never actually had to bring in a civilian witness from outside Iraq."⁵⁴ Another Army division in northern Iraq from 2005 to 2007 reported that it tried twenty-two cases, all on their main base, Contingency Operating Base Speicher.⁵⁵ Of those twenty-two cases tried, twenty were guilty pleas, and for each of the other two, the accused waived rights to produce witnesses and to demand a forum of panel members.⁵⁶ Another Army division sent its contested and complex cases back to the United States, where the accused "could exercise all of his or her due-process rights with minimal intrusion on the unit or danger to civilian and non-deployed DoD personnel."⁵⁷

The heavy guilty plea practice may be rooted in past unit experiences that hotly contested cases were too difficult to perform in the combat zone. A judge advocate in Afghanistan in 2009 stated, "The expectation that you will be able to try as many contested cases to the same standard you can in garrison is unrealistic."⁵⁸ Contested cases triggered many of the difficulties described in this part, and successful defense counsel used those issues to their clients' advantage. For example, on the right to produce witnesses, a unit in Iraq wrote, "While the accused may waive their 6th amendment right of confrontation, they have no incentive to do so in a contested case."⁵⁹

Because "tough" cases are difficult on deployments, they were routinely whisked away from the combat zone. A Marine judge advocate wrote: "For Marine Corps war crimes, these decisions have universally been the same: bring the case home."⁶⁰ Another typical comment came from a Special Forces unit, whose commander "referred all serious incidents of misconduct back to the group headquarters at Fort Campbell."⁶¹ These comments, together with the frequent recourse to guilty pleas, show that the Government usually only tried cases in the combat zone if an accused waived procedural rights and plead guilty in

orders. Such cases may not require any witnesses who are not already in country and become even more practicable to try in combat if the accused elects trial by judge alone.

⁵⁴ 10th Mountain OIF 2009, *supra* note 35, at 34.

⁵⁵ See Task Force Band of Brothers, OIF 2007, *supra* note 28, at 67.

⁵⁶ *Id.*

⁵⁷ 25th Infantry Division, Office of the Staff Judge Advocate (Military Justice Division), After Action Report (OIF), September 2006–October 2007, at 2–3 (2007).

⁵⁸ 101st Airborne OEF 2009, *supra* note 30, at 35.

⁵⁹ Task Force Band of Brothers, OIF 2007, *supra* note 28, at 79.

⁶⁰ Hackel, *supra* note 4, at 248.

⁶¹ 5th Special Forces Group (Airborne), 1st Battalion, Battalion Judge Advocate, After Action Report (OEF) (11 Mar. 2010).

⁴⁸ 101st Airborne OEF 2009, *supra* note 30, at 38.

⁴⁹ Brigade Judge Advocate, Office of the Staff Judge Advocate, After Action Report (OEF) 23 (Sept. 2008).

⁵⁰ LESSONS LEARNED, VOLUME II, *supra* note 14, at 200.

⁵¹ *Id.* at 199.

⁵² Sergeant Marcum, *supra* note 27.

⁵³ *But see* Colonel Henley Interview, *supra* note 39. Colonel Henley has personally presided over contested cases in Iraq as a trial judge. Concededly, some contested cases may be more easily performed in the combat zone than others, particularly cases involving uniquely military offenses such as unauthorized absences, disrespect, or failures to follow

exchange for favorable treatment or a limited sentence. Hotly contested cases involving accused who vigorously asserted their rights were most often seen as too troublesome to try in country. Thus, the presence of courts-martial in the combat zone was more a factor of an offender's cooperation with the Government than an offense's impact on the mission.

C. Combat Zone Discounting

Perhaps no other topic is as widely discussed among military justice practitioners yet never officially acknowledged as the "combat zone discount" for deployment misconduct. The term refers to the light or nonexistent punishment deployed offenders receive for crimes that would otherwise be more heavily punished if tried in courts-martial in the United States. Does such a discount exist? In one sense, the opposite may be true. Soldiers on deployment are subject to closer regulation than non-deployed Soldiers. Most are subject to a general order that prohibits certain conduct that would otherwise be acceptable outside the deployed theater, such as drinking alcohol after work or visiting the living quarters of a member of the opposite sex. Because minor infractions such as tardiness or sloppy vehicle maintenance often have greater consequences on a deployment, they also often have greater disciplinary consequences. Soldiers are subject to more regimented rules for the entire deployment, and can face corrective or disciplinary action if they violate them. Bad Soldiers (those who cannot conform their conduct to a stricter set of rules) may tend to fare worse during deployment and suffer a combat zone penalty, but the more narrow subset of truly criminal Soldiers stands to reap a real and tangible benefit from a combat zone discount due to the military's widespread proclivity to avoid courts-martial. An Army Trial Defense Services (TDS) attorney in Afghanistan summarized combat zone discounting for criminal misconduct as follows:

When strategizing cases, the TDS office always considered the environment. Contesting a case in theater is much more difficult on the unit than in a garrison environment and places significant limitations on the government. TDS JAs (judge advocates) should therefore strongly consider contesting cases. However, the TDS office was able, in many cases where they sought a pre-trial agreement, to get much more favorable pre-trial agreements for their clients.⁶²

⁶² U.S. Army, Trial Defense Servs., Combined Joint Task Force-101, Individual Augmentee Attorney, After Action Report (OEF), July 2008–July 2009, at 7 (5 Nov. 2009).

Judge advocates frequently cited "combat zone discounting" in AARs. Admittedly, some discounting may be due to commanders showing leniency to accused members who performed well in the dangers of combat, but the AAR comments focus on the discounting of cases the command would otherwise have taken to court-martial but for court-martial difficulties. As one judge advocate explained, "Commanders did not like the logistical load brought on by trials (or the loss of Soldiers available for the fight), therefore they did not forward many cases for court-martial."⁶³

The military's broad aversion to combat zone courts-martial resulted in highly favorable treatment for many criminal accused who would otherwise have not received such favorable treatment. A judge advocate from a division in Afghanistan noted the need to offer unusually favorable terms in pre-trial negotiations with the defense in order to avoid the burdens of full trials: "You have to triage criminal law processing, and adjust pre-trial agreement terms to encourage more deals."⁶⁴ A military prosecutor from a brigade combat team in Iraq described the process of valuation that he encouraged his commanders to use when weighing the burdens of courts-martial as follows: "The trial counsel had to ensure commanders understood the additional cost in terms of effort and personnel to conduct judicial proceedings in country. This allowed commanders to make a reasonable calculation as to what a case was 'worth.'"⁶⁵ Discounting was often explicit: "V Corps JAs approached defense counsel in many cases and explicitly stated that they were willing to dispose of cases more generously (to the accused) than they otherwise might."⁶⁶

Discounting misconduct was not just an Army phenomenon; similarly situated Marine commanders also tended to shun deployed courts-martial due to their difficulty. One AAR noted, "As a result of . . . prioritization, a decline in MJ [military justice] requirements occurred. Alternative dispositions when available and appropriate were used."⁶⁷ Another wrote, "As a result [of the unique deployed burdens of conducting courts-martial], there were few options for case dispositions. . . . Battalion commanders should be advised prior to deployment of the limitations of military justice support."⁶⁸

⁶³ 3d Armored Cavalry Regiment, After Action Review (OIF), Nov. 2007–Jan. 2009, at 11 (22 Apr. 2009).

⁶⁴ 101st Airborne OEF 2009, *supra* note 30, at 35.

⁶⁵ 1st Brigade, 4th Infantry Division, After Action Report (OIF), March 2008–March 2009, at 13 (28 Apr. 2009).

⁶⁶ LESSONS LEARNED VOLUME I, *supra* note 14, at 247 (2004).

⁶⁷ 2d Marine Expeditionary Force, Executive Summary, subject: OSJA, II MEF After Action Report During OIF 06–08, at 10 (8 July 2008).

⁶⁸ 9th Marines, 1st Battalion, Battalion Judge Advocate, After Action Report (OIF), March 2008–October 2008, at 11 (9 Jan. 2009).

A judge advocate from a brigade-sized unit away from the larger division base in northern Iraq summed up the problem well: “Trial logistics are a nightmare. . . . The risk of a trial being ‘too hard’ is that there will be a ‘deployment discount’ on disposition of charges that will badly skew the application of the UCMJ.”⁶⁹

D. The Burger King Theory of the Combat Zone Court-Martial

If a Soldier can eat at Burger King,⁷⁰ he is also more likely to face court-martial for any serious misconduct he may commit. If he is deployed somewhere without a Burger King, it is less likely that his misconduct will be addressed by court-martial. This notion, which suggests that combat zone courts-martial are rare except on stable, large, garrison-style bases, can be called the Burger King Theory.⁷¹

Undergirding the Burger King Theory are reports from brigade or smaller-sized units that served in remote areas, away from the large “Burger King bases” such as Victory Base Complex in Baghdad or Bagram Air Base north of Kabul. Few such units conducted *any* courts-martial. A brigade in al Anbar province in Iraq in 2009 wrote, “RCT-8 did not conduct courts-martial while deployed. RCT-8 handled all military justice matters through NJP (non-judicial punishment), or sent the accused back to the rear. This saved RCT-8 a substantial amount of time and resources that it otherwise would have spent conducting courts-martial.”⁷² A unit in southern Afghanistan in 2009 wrote, “There is already enough strain personnel-wise on small FOBs [forward operating bases] just to meet the bare essentials for things like tower guard, entry control point teams, and basic staff functions. Pulling people for a court-martial just isn’t possible sometimes. Units on larger FOBs have the people to cover down if necessary.”⁷³ For many small units, going to larger bases to conduct courts-martial was entirely impractical as one judge advocate described:

⁶⁹ Task Force Warrior OEF 2009, *infra* note 39, at 15.

⁷⁰ Burger King is a fast food chain with 7300 independently owned franchises in the United States, including all fifty states and most large active military installations. Burger King also opened franchises for the American military in a handful of large bases in deployment locations such as Kuwait City, Kuwait; Baghdad, Iraq; Balad, Iraq; Bagram Air Base, Afghanistan; and Kandahar, Afghanistan. The Burger King slogan is “Have it Your Way.” See BURGER KING, <http://www.bk.com> (last visited Jan. 16, 2010).

⁷¹ This rule seems opposite of the Burger King slogan, as it holds that only those who do not have access to Burger King can “have it their way” and avoid official sanction for crime. For another theory of linkage between the presence of fast food and international affairs, see The Golden Arches Theory of Conflict Prevention, in THOMAS FRIEDMAN, THE LEXUS AND THE OLIVE TREE 248–75 (1999) (asserting that no two countries with McDonald’s fast food franchises have gone to war with each other).

⁷² Regimental Combat Team 8 (RCT-8), Deputy Regimental Judge Advocate, After Action Report (OIF), at 11 (18 Dec. 2009).

⁷³ Sergeant Marcum, *supra* note 27.

Even a judge-alone SPCM/GCM [special court martial/general court martial] guilty plea typically required a JA traveling to Balad/Baghdad from Tallil to be away from his/her Command for 5–7 days. In Brigades with only one JA and one 27D [Army paralegal], a SPCM/GCM in Balad/Baghdad deprived the Command of its Command Judge Advocate for the trial’s duration and travel time. This deprivation often factored significantly in Commanders’ misconduct disposition analysis and likely resulted in dispositions that arguably were too lenient for the misconduct (e.g., convening Summary Courts-Martial on Camp Adder for hash and valium distributors/users).⁷⁴

For smaller units located away from the large bases, attending to the many demands of courts-martial sometimes even came at the cost of shutting down the regular mission. One unit wrote:

Witness production in Iraq is resource intensive. Even moving Soldiers in theater for a court-martial will tax line units when the Soldiers live and work off Victory Base Complex. Every witness movement requires either a seat on helicopter or convoy. A contested rape case shut down a line company for almost a week as they moved witnesses and managed the other logistics associated with trial.⁷⁵

Even if an accused from a “small base” were tried on a “Burger King base,” he might have grounds to challenge the legitimacy and fairness of the “Burger King base” panel. Many large units took shortcuts with panel selection, giving “preference . . . to members located on or near a main base”⁷⁶ in order to ease the logistical difficulties of bringing panels together for trials. However, the panel member selection criteria in Article 25 of the UCMJ do not include convenience or location of the members.⁷⁷ A defense counsel should be able to show the use of impermissible selection criteria and prejudice in having a “Burger King base” panel decide the case of a “small base” accused, and counsel may petition to include members from similar small bases on the panel. In this way, efforts to conduct courts-

⁷⁴ V Corps OIF 2007, *supra* note 33, at 12.

⁷⁵ 1st Cavalry Division, Office of the Staff Judge Advocate, After Action Review (OIF) 12 (20 Nov. 2007), *quoted in* FORGED IN THE FIRE, *supra* note 3, at 313.

⁷⁶ FORGED IN THE FIRE, *supra* note 3, at 310.

⁷⁷ UCMJ art. 25(d)(2) (2008).

martial of offenses occurring on “small bases” are further complicated.⁷⁸

The Burger King Theory helps make sense of Iraq court-martial numbers. The peak of 144 courts-martial in 2005 coincides precisely with the temporary concentration of U.S. forces onto large “Super FOBs” that year.⁷⁹ When the Iraq Surge dispersed Soldiers to smaller outposts that were closer to the Iraqi security forces and the Iraqi population, fewer courts-martial were conducted (just 63 in 2008 despite the presence of an additional 30,000 Soldiers).⁸⁰ In other words, large units that could successfully prosecute guilty plea cases when all parties were within the walls of a large, city-like base had a more difficult time when those parties were scattered among several remote locations.

The Burger King Theory also helps explain Afghanistan courts-martial numbers. The meager total of eleven courts-martial conducted there in 2009, despite a near doubling of the Army force, is best explained by the effort to spread out the forces to about two hundred small bases and outposts.⁸¹ Interestingly, the trend towards more spread-out forces in Afghanistan (and lower court-martial numbers) coincides with an effort to close all Burger Kings in country.⁸² Thus, Burger Kings and courts-martial were both relative luxuries reserved for the largest bases in Afghanistan. When the mission became more expeditionary and spread to a larger number of austere bases, both Burger Kings and courts-martial dwindled in numbers.

⁷⁸ This problem was observed in Afghanistan and recorded in Hanson, *supra* note 4, at 43–44.

⁷⁹ THOMAS E. RICKS, *THE GAMBLE* 15 (2009) (“He [General George Casey, then the Commanding General of Multi-National Force-Iraq] was pulling his troops farther away from the population, closing dozens of bases in 2005 as he consolidated his force on big, isolated bases that the military termed ‘Super FOBs.’”) (emphasis added).

⁸⁰ Christopher M. Schnaubelt, *Lessons of Iraq: Afghanistan at the Brink*, INT’L HERALD TRIB., Nov. 1, 2008, at 8:

While the increase in troop strength helped enable this shift [towards protecting the population], the new strategy also played a key role by moving coalition forces that were there before the surge off large bases and increasing their presence among the Iraqi population through more patrols and joint security stations with Iraqi soldiers and police.

⁸¹ See Hanson, *supra* note 4, at 36–37. Captain Hanson wrote that by 2009, the Army in Afghanistan had spread across 200 bases and outposts, and judge advocates were only present on nine of those. The Trial Defense Services office and the military courtroom are both on Bagram Air Base. *Id.*

⁸² Karen Jowers, *Whopper of a Decision: McChrystal Shuts Fast-Food Sellers in Afghanistan*, ARMY TIMES, Feb. 22, 2010, at 8 (describing an order by General Stanley McChrystal to limit morale and welfare programs to those tailored for an expeditionary force, a move that involved shuttering Burger King restaurants in Bagram and Kandahar). “Supplying nonessential luxuries to big bases like Bagram and Kandahar makes it harder to get essential items to combat outposts and forward operating bases.” *Id.* (quoting the top enlisted Soldier in Afghanistan, Command Sergeant Major Michael Hall).

Large bases can be reminiscent of civilian life—the atmosphere of a town or small city, civic functions, recreation opportunities, fully functioning utilities, fast food restaurants, and courts-martial whose parties and procedures resemble civilian trials in the United States. Not surprisingly, courts-martial that look like civilian trials seem capable only in such civilianized surroundings. If future operations consist of austere expeditions conducted without the permanent footprint of large bases, then deployed courts-martial may someday become a relic of military history rather than a viable commander’s tool.

III. Procedural Shortcomings of Combat Zone Courts-Martial

*Complicating procedures which add only marginal increases in assurance of accuracy and truth-telling have no place in the combat, operational, or wartime system.*⁸³

Some court-martial procedures that were developed in peacetime have dire, unintended consequences in combat. Because no “combat zone exception” exists for court-martial procedure,⁸⁴ the same rules apply both in and out of a combat theater. This part analyzes “good military character” evidence and expert witness rules, two procedures with at least two characteristics in common. First, each is unique in application to the military. Second, both are broad enough that they can mandate witness travel to the combat zone for nearly any trial, thus hindering efforts to try cases.

A. The “Good Military Character” Defense

In a civilian criminal trial, the defense may not assert that because the defendant is a good employee at work, he is

⁸³ Westmoreland & Prugh, *supra* note 12, at 52.

⁸⁴ INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, 2009 OPERATIONAL LAW HANDBOOK 401 (2009) (“Although legal considerations may differ depending of the mission, court-martial and NJP [non-judicial punishment] procedures remain largely unchanged in a deployed setting.”). Since the Afghanistan and Iraq conflicts began, one procedural change that improved the ability to conduct combat zone courts-martial was the President’s amendment of the *Manual for Courts-Martial* in 2007 to permit a military judge to allow any witness to testify on interlocutory questions by remote means if practical difficulties of producing the witness outweighed the need for personal appearance. See Exec. Order No. 13,430, 72 Fed. Reg. 20,213 (18 April 2007); MCM, *supra* note 9, R.C.M. 703(b)(1). On the other hand, the Army’s adoption of formal rules of practice in 2004 was noted as increasing the formality and complexity of courts-martial. “The Rules of Practice Before Army Courts-Martial, which were revised in May 2004, have placed an increased emphasis on formality, especially where motions practice is concerned. This change is likely to foster an increase in the complexity of future courts-martial.” ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 6 (2004) (quoting the sub-report of the Army Trial Defense Service within the Report of The Judge Advocate General of the Army).

therefore unlikely to have committed a crime. Evidence is only admissible in trial if it is relevant.⁸⁵ In comparison, courts-martial allow a broader range of what is considered “relevant” by allowing evidence of an accused’s “good military character” to be introduced at trial on the merits. Military appellate courts have strengthened this affirmative defense⁸⁶ to the point where an accused can now “smother the factfinder with good soldier evidence regardless of the charges.”⁸⁷

Given this expansiveness, imagination is the only limit of what demonstrates “good military character”; any desirable trait in a servicemember counts. In application, character witnesses are commonly called to testify about their willingness to deploy with an accused.⁸⁸ Other allowable “good military character” testimony includes that an accused is “dedicated to being a good drill instructor,”⁸⁹ lawful,⁹⁰ easygoing,⁹¹ dependable,⁹² and well liked.⁹³ With

⁸⁵ FED. R. EVID. 402; MCM, *supra* note 9, MIL. R. EVID. 402.

⁸⁶ FED. R. EVID. 404(a)(1); MCM, *supra* note 9, MIL. R. EVID. 404(a)(1). Although the military rule is worded exactly the same as the federal rule, military courts have broadly defined “pertinent character trait” as including good military character. The drafters of the Military Rules of Evidence in 1980 recognized a limited right to an accused offering good military character evidence. “It is the intention of the Committee, however, to allow the defense to introduce evidence of good military character when that specific trait is pertinent. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders.” MCM, *supra* note 9, at A22-33. The extent of this rule was tested in a series of military appellate cases in the 1980s, until the Court of Military Appeals broadened the applicability of the defense to nearly any military offense. In deciding that an Airman charged with stealing a television could present character evidence portraying him as an honest and trustworthy person, the court wrote, “We do not believe that it is inconsistent with the policy of Mil. R. Evid. 404(a) to apply this definition in deciding what character traits of an accused are ‘pertinent.’ Thus, for purposes of Military Rule of Evidence 404(a)(1), a character trait is ‘pertinent’ ‘when it is directed to the issue or matters in dispute, and legitimately tends to prove the allegations of the party offering it.’” *United States v. Elliott*, 23 M.J. 1, 5 (C.M.A. 1986). In sum, the court discarded the limiting guidance of the Drafter’s Analysis and opened the door for the admissibility of “good military character” evidence in any case.

⁸⁷ Major Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 15, 22 (summarizing recent military appellate opinions which expanded the “good soldier” defense and allow it to be presented in any court-martial). Major Morris also noted that in most cases, disingenuous use of good military character evidence can be easily rebutted by the prosecution. *Id.* See also Robinson O. Everett, *Military Rules of Evidence Symposium: An Introduction*, 130 MIL. L. REV. 1, 3 (1990) (noting that the military appellate courts have “obliterated” the limitation of allowing only pertinent character traits by permitting the defense of good military character “in almost any conceivable trial by court-martial”). For a defense of the expanded “good military character” defense, see Paul A. Capofari, *Military Rule of Evidence 404 and Good Military Character*, 130 MIL. L. REV. 171 (1990), which argues that “good soldier evidence” in some form has a long tradition in military trials.

⁸⁸ See, e.g., *United States v. True*, 41 M.J. 424, 427 (C.A.A.F. 1995).

⁸⁹ *United States v. Piatt*, 17 M.J. 442, 445 (C.M.A. 1984).

⁹⁰ *United States v. Clemons*, 16 M.J. 44 (C.M.A. 1983).

⁹¹ *United States v. True*, 41 M.J. 424, 427 (C.A.A.F. 1995).

⁹² *United States v. White*, 36 M.J. 306, 307 (C.M.A. 1993).

so many traits to choose from that are permissible and admissible, nearly anyone can qualify as a “good Soldier.”

Some troubling peacetime consequences of allowing unfettered “good military character” evidence have already been studied, but the consequences for the combat zone also deserve consideration.⁹⁴ Military operations in Iraq and Afghanistan demonstrate the egalitarian potential of the defense as an immunity mechanism for any accused. The peacetime trial consideration of “Will this evidence be persuasive?” shifts in the combat zone to “Will this evidence force the Government to produce witnesses, thus requiring them to drop charges?”

Here is how “good military character” can change the equation. If an accused requests production of a witness at a court-martial and the Government does not approve the request, the military judge must decide the issue based on the materiality of the witness,⁹⁵ the judge’s improper denial of a relevant merits witness risks appellate reversal. Because of the limits of military subpoenas,⁹⁶ the trial counsel may be powerless to force a witness to leave the United States, especially if the witness is a civilian or is no longer on active duty in the military. Military judges lack the power to force such witnesses to cooperate or appear at trial.⁹⁷ Ultimately, if the Government fails to provide a

⁹³ *United States v. Hallum*, 31 M.J. 254, 255 (C.M.A. 1990).

⁹⁴ Elizabeth Lutes Hillman, *The “Good Soldier” Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879, 908–09 (1999). Professor Hillman argued that the “good military character” defense serves as an immunity shield to protect high-ranking servicemembers from criminal convictions by masking subtle privileges of gender and race in a military society with few high-ranking women or ethnic minorities.

⁹⁵ A servicemember at court-martial is entitled to the live production of necessary witnesses to support a defense and the right to live confrontation of witnesses offered by the Government in proof of a crime. See U.S. CONST. amend. VI (granting a criminal accused the right to “be confronted with the witnesses against him” and “to have compulsory process for obtaining witnesses in his favor”); UCMJ art. 46 (2008) (granting the defense “equal opportunity to obtain witnesses”); MCM, *supra* note 9, RCM 703(b)(1) (implementing Article 46 of the UCMJ); *United States v. Burnette*, 29 M.J. 473, 475 (C.M.A. 1990).

⁹⁶ A summary court-martial or the trial counsel of a special or general court-martial can issue subpoenas for the production of witnesses. MCM, *supra* note 9, R.C.M. 703(e)(2)(C). Subpoenas cannot compel civilians to travel outside the United States. *Id.* R.C.M. 703(e)(2)(A) discussion. Witnesses who are on active duty can be ordered to travel in lieu of subpoena. *Id.* R.C.M. 703(e)(1).

⁹⁷ *Id.* R.C.M. 703(e)(2)(G); *United States v. Quintanilla*, 56 M.J. 37 (C.A.A.F. 2001) (noting that the military judge’s powers to hold persons in contempt and to issue warrants of attachment are limited to circumstances when a subpoena was properly issued). Because a subpoena “may not be used to compel a civilian to travel outside the United States and its territories,” MCM, *supra* note 9, R.C.M. 703(e)(2)(A) discussion, the military judge at a combat zone court-martial has no real ability to compel or sanction civilian witnesses in the United States. See also 10th Mountain Div., 4th Brigade, After Action Review (OIF) 18 (2009) (“Civilian witnesses would often not appear to testify at trials.”)

necessary defense merits witness,⁹⁸ the military judge may have no other choice than to abate the proceedings.⁹⁹ The Government could propose stipulating to the witness's expected testimony in lieu of live testimony,¹⁰⁰ but the defense will usually have little incentive to agree, especially if the difficulty of producing the witness could delay or entirely thwart the court-martial.¹⁰¹

The "good military character" defense represents a powerful tool that can be used by an accused to pressure the command to back down from a combat zone court-martial. Given the prospect of the "good military character" defense and its associated witness production problems, combat commanders may be understandably reluctant to consider the court-martial option when they must address criminal allegations in their units.

⁹⁸ Prior to the judicial expansion of the "good military character" defense, production of defense character witnesses was more limited. See *United States v. Belz*, 20 M.J. 33 (C.M.A. 1985) (tempering the admissibility of military character evidence against the strength of the Government's case, the weakness of the defense's case, the materiality of the evidence, and the existence of suitable substitute evidence in the record of trial); *United States v. Vandelinder*, 20 M.J. 41, 45 (C.M.A. 1985) (emphasizing that affidavits could substitute for live "good military character" testimony).

According to the Drafters Analysis [to MRE 405(c)], this rule is required due to the world wide disposition of the armed forces which makes it difficult if not impossible to obtain witnesses—particularly when the sole testimony of a witness is to be a brief statement relating to the character of the accused. This is particularly important for offenses committed abroad or in a combat zone, in which case the only witnesses likely to be necessary from the United States are those likely to be character witnesses.

Id. Military Rule of Evidence 405(c), however, has not yet been considered in light of newer confrontation requirements in *Crawford v. Washington*, 541 U.S. 36 (2004), and its military progeny. Even before *Crawford*, military courts treaded lightly when considering whether to restrict live production of defense character witnesses. The affidavit emphasis in *Vandelinder* has not since been applied in military appellate opinions, and common trial practice has emphasized the right to use affidavits *in addition to* rights to live witness testimony. See, e.g., *United States v. McCommon*, WL 2997036 (A.F. Ct. Crim. App. Sept. 3, 2009); *United States v. Voda*, WL 190265 (A.F. Ct. Crim. App. Jan. 26, 2004). A return to the "binding affidavit" holding in *Vandelinder* would sensibly permit the defense to raise "good military character" without crippling the Government by requiring production of out-of-country character witnesses during deployments.

⁹⁹ UCMJ art. 46 (2008); MCM, *supra* note 9, R.C.M. 703(b)(1, 3), *id.* MIL. R. EVID. 804(a)(5).

¹⁰⁰ MCM, *supra* note 9, R.C.M. 811.

¹⁰¹ A Marine judge advocate accurately noted the importance of this motivation during deployments. "In the end, defense will likely continue to require the government to produce necessary and relevant witnesses in person because it can be a successful tactic of taking away the focus of the trial counsel from preparing his presentation of the case." Major Nicole K. Hudspeth, *Remote Testimony and Executive Order 13430: A Missed Opportunity*, 57 NAVAL L. REV. 285, 303 (2009).

B. Expert Witnesses

Expert witness requests also have the potential to derail deployed courts-martial. In general, an accused at court-martial may be entitled to government-funded expert assistance.¹⁰² When seeking an expert, the accused must submit a request to the convening authority with a complete statement of the reasons why employment of the expert is necessary, along with the estimated cost of the expert's employment.¹⁰³ The convening authority must then decide whether to approve the request, deny the request outright, or deny the request but provide a substitute expert. If the convening authority denies the request, the military judge must decide whether the expert is relevant and necessary, and whether the Government has provided an adequate substitute.¹⁰⁴ As with other witnesses, the trial counsel arranges for personal production of the expert.¹⁰⁵

For the Government to provide an accused with an expert witness in the combat zone, the first challenge is to find one. Local civilians in Afghanistan or Iraq may not have the desired American professional credentials or English language ability. While the military may have some experts among its ranks in the combat zone to provide an "adequate substitute," problems remain. First, a law restricting executive branch employees from serving as expert witnesses in cases against the United States may discourage military experts from undertaking this additional role.¹⁰⁶ Second, an accused may argue that the expert assistance he seeks requires independence from the military and an ability to openly criticize military practices; in that

¹⁰² UCMJ art. 46; MCM, *supra* note 9, R.C.M. 703(d); *United States v. Gonzalez*, 39 M.J. 459 (1994) (laying out the three-part *Gonzalez* test, whereby the defense must establish why the expert assistance is needed, what the expert assistance would do for the accused, and why the defense is otherwise unable to provide the evidence that the expert will provide); Lieutenant Colonel Stephen R. Henley, *Developments in Evidence III—The Final Chapter*, ARMY LAW., May 1998, at 1 (offering defense counsel additional considerations for applying the *Gonzalez* test); *United States v. Lee*, 64 M.J. 213 (C.A.A.F. 2006) (requiring that the accused show a reasonable probability exists that the expert would assist the defense and that denial of expert assistance would result in a fundamentally unfair trial). Indigence is not a factor for courts-martial for determining an accused's eligibility for government-funded expert assistance.

¹⁰³ MCM, *supra* note 9, R.C.M. 703(d).

¹⁰⁴ *Id.*

¹⁰⁵ See *supra* Part III.A.

¹⁰⁶ 5 C.F.R. § 2635.805 (2010) states,

Service as an expert witness. (a) *Restriction.* An employee shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which the United States is a party or has a direct and substantial interest

In the Army, the Chief, Litigation Division can authorize the expert appearance of a government employee in a case against the United States. 5 C.F.R. § 2635.805(c) (2010).

case, a military expert may appear too conflicted or restrained to be an adequate substitute.

Without access to nearby experts, the Government may need to hire an expert in the United States, which presents problems for completing courts-martial expeditiously. Much time, effort, and expense may be needed to produce the expert; a typical description of this process came from a judge advocate who wrote that “arranging for expert witnesses to participate in courts-martial held in theater was a difficult and time-consuming process.”¹⁰⁷ Additionally, if the expert is a civilian, the court-martial must operate at the mercy of the expert’s availability, since the court lacks subpoena power over experts to enforce orders and trial appearances.¹⁰⁸

Of course, these logistical concerns matter only if the expert request has merit; frivolous expert requests can be denied. For example, an accused charged with desertion will usually fare poorly in seeking a DNA expert. However, a caveat in military appellate opinions and court-martial rules seem to require a broad finding of “necessary and relevant” for at least one type of expert: those called to support a theory of partial mental responsibility.¹⁰⁹ In cases with specific intent elements, this theory permits the defense to present evidence that the accused did not or could not possess the mental intent to commit a crime.

In *Ellis v. Jacob*, an accused charged with the unpremeditated murder of his 11-year old son sought expert opinion evidence to rebut the element that he possessed the intent to kill or inflict great bodily harm at the time of the offense.¹¹⁰ The defense wished to present expert testimony to show that because the accused had experienced “sleep

deprivation” and “pressure,”¹¹¹ he was psychologically impaired when he committed the crime.¹¹² The Court of Military Appeals agreed with the expert rationale and altered the landscape for expert witness production by holding that partial mental responsibility is a substantive defense that can negate the intent elements of specific intent crimes.¹¹³

With such generalized hardships as “sleep deprivation” or “pressure” permitted, nearly anyone charged with a specific intent crime in the combat zone would have an invitation to seek an expert. If defense counsel can articulate how stress, lack of sleep, or some other routine hardship resulted in a temporary psychological impairment, the accused could qualify for expert assistance with solid backing from military case law.

As a result, in a combat zone, the procedure of requesting expert assistance could become a defense negotiating tactic designed to win dismissal of charges or the granting of favorable treatment. As one unit noticed, “Whether it was the need for expert witnesses, the command’s reluctance to hold courts-martial while deployed, or the requests for transportation assets, etc., the attorneys at TDS fought to get their clients the best possible deal.”¹¹⁴ Ultimately, these difficulties are likely to weigh heavily in a deployed commander’s analysis of whether to try cases.

IV. Effects of Non-Deployable Courts-Martial

The previous two parts described how combat zone courts-martial are fraught with difficulty and are thus largely avoided in practice. The looming question now is: so what? After all, the U.S. military continues to enjoy broad public confidence, evidenced by its repeated top standing in a poll of American public institutions,¹¹⁵ so there is little public agitation for reform to more effectively punish military crime. It may seem harsh, unpatriotic, and unnecessary to emphasize shortcomings in judicial sanction against those who not only serve in the military, but who also serve in

¹⁰⁷ 101st Airborne OEF 2009, *supra* note 30, at 41.

¹⁰⁸ *See supra* note 96.

¹⁰⁹ Partial mental responsibility should not be confused with the affirmative defense of lack of mental responsibility, also known as insanity, which requires a severe mental disease or defect, a burden on the defense to prove the affirmative defense by clear and convincing evidence, and a possibility of findings of not guilty only by reason of lack of mental responsibility. *See* UCMJ art. 50a (2008); MCM, *supra* note 9, R.C.M. 916(k)(1). Other than the defense of lack of mental responsibility, a mental disease or defect cannot be used as an affirmative defense but can be used to negate an element of specific intent such as knowledge, premeditation, or intent. For a good overview of the development of the theory of partial mental responsibility in the military, see *United States v. Axelson*, 65 M.J. 501, 513–17 (A. Ct. Crim. App. 2007).

¹¹⁰ 26 M.J. 90 (C.M.A. 1988); Lieutenant Colonel Donna M. Wright, “*Though This Be Madness, Yet There is Method in It: A Practitioner’s Guide to Mental Responsibility and Competency to Stand Trial*,” ARMY LAW., Sept. 1997, at 18, 25–27 (concluding that partial mental responsibility can allow the defense to present evidence of the accused’s mental condition for specific intent offenses without having to prove lack of mental responsibility); *see also* Major Jeremy Ball, *Solving the Mystery of Insanity Law: Zealous Representation of Mentally Ill Servicemembers*, ARMY LAW., Dec. 2005, at 1, 19–23 (cautioning that the Army court instructions for partial mental responsibility have not changed to reflect the new case law in *Ellis* and changes to RCM 916(k)).

¹¹¹ *Ellis*, 26 M.J. at 91, 93.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ 82d Airborne Div., 3d Brigade Combat Team, Brigade Judge Advocate, After Action Report (OIF) 25 (4 Feb. 2010).

¹¹⁵ In 2009, 82% of polled Americans stated that they had either “a great deal” or “quite a lot” of confidence in the military, the highest of any public or private institution, and very favorable compared to other institutions such as the presidency (51%), the medical system (36%), the criminal justice system (28%) or Congress (17%). *Gallup Poll: Major Institutions* (June 14–17, 2009), available at <http://pollingreport.com/institut.htm> (last visited 15 January 2010). The author credits Major General Charles J. Dunlap Jr. and Major Linell A. Letendre, both U.S. Air Force judge advocates, for pointing him to these polls, from their article, *Military Lawyering and Professional Independence in the War on Terror: A Response to Professor Luban*, 61 STAN. L. REV. 417, 437 (Nov. 2008).

combat. This part answers the “so what” question by exploring the strategic perils of court-martial frailty on deployments.

A. Perceptions of Impunity

An insurgent leader once wrote an anger-laced list of complaints about a powerful foreign country that was occupying his country. Upset with the criminal behavior of the occupiers, he was especially incensed by their practice of whisking soldiers accused of heinous crimes back to their home country. For all he could tell, they were then exonerated in what he described as “mock trials.”

That man was Thomas Jefferson, and the grievances are memorialized in the American Declaration of Independence.¹¹⁶ The circumstances surrounding America’s founding may be different, but the strategic consequences of fomented resentment towards perceived “double standards” of powerful foreign forces are highly relevant to current operations. In recent conflicts, the U.S. military regularly sent cases of serious misconduct away from the combat zone rather than court-martialing on-site.¹¹⁷ When this happened, affected Afghans and Iraqis had little chance to ever hear about the cases again. Without information, they became likely to believe in a widespread practice of criminal exoneration, which altered perceptions of American legitimacy.

1. Perceptions of Impunity in Afghanistan

In Afghanistan, the common practice of sending servicemember misconduct back to the United States had strategic impact. A prominent U.N. official, Philip Alston,

¹¹⁶ THE DECLARATION OF INDEPENDENCE para. 17 (U.S. 1776) (“For protecting them [British soldiers] by mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States.”).

¹¹⁷ An interesting area for further study, but beyond the scope of this paper, is an assessment of how outcomes differ for misconduct committed against foreign civilians that are tried in the United States compared to on deployment. A prominent scholar who studied the issue in seventeen instances—such as the United States after My Lai in Vietnam; Argentina’s “Dirty War”; and Belgian, Canadian, and Italian peacekeepers in Somalia—notes a consistent reluctance by states to fully pursue justice against their own soldiers in domestic trials. See Timothy L.H. McCormack, *Their Atrocities and Our Misdemeanours: The Reticence of States to Try Their ‘Own Nationals’ for International Crimes*, in JUSTICE FOR CRIMES AGAINST HUMANITY 107 (Mark Lattimer & Philippe Sands eds., 2003). “Despite the rhetoric of a commitment to the principle of trying war crimes, the practice of states confirms glaring inconsistencies between those acts which are tried and those which are not—inconsistencies most readily explicable on the basis of an ‘us’ and ‘them’ mentality.” *Id.* at 107–08. Professor McCormack adds that the “domestic trial of members of a state’s own military forces for war crimes is the most politically sensitive of any domestic prosecution for international crimes.” *Id.* at 134. Could it be that on-site courts-martial are less susceptible to these pressures, since they are more likely to be convened for strategic military reasons, are away from domestic pressures, and have local victims nearby?

undertook a study of American responses to military misconduct in Afghanistan, and wrote that the inability of the Afghan people to learn the results of servicemember misconduct impaired the United States’ standing in Afghanistan. “During my visit to Afghanistan, I saw first hand how the opacity of the [American] military justice system reduces confidence in the Government’s commitment to public accountability for illegal conduct.”¹¹⁸ He elaborates, “there have been chronic and deplorable accountability failures with respect to policies, practices and conduct that resulted in alleged unlawful killings, including possible war crimes, in the international operations conducted by the United States.”¹¹⁹

In speaking of both “opacity” and “accountability failures,” Mr. Alston suggests a weak sense of reckoning for military crime in Afghanistan—that interested observers could not attend courts-martial, read about disciplinary results in a local newspaper, or talk to a commander about the status of an investigation or case. When a Western-educated, English-speaking U.N. official with a research staff cannot find out results of misconduct from cases that have been sent back to the United States, the opportunities for ordinary Afghans to learn results of military misconduct are surely slimmer. In an Afghan society with ingrained beliefs about injustice at the hands of Western powers,¹²⁰ perceived “double standards” for servicemember crime likely fuel ambivalence or resentment about the American military mission.

2. Perceptions of Impunity in Iraq

Based on its negotiating priorities, it appears that the Iraqi government was influenced to take action in response to perceptions that American military offenders went unpunished. During 2008 negotiations regarding the ultimate withdrawal of the American military, a top Iraqi objective was to obtain some jurisdiction over American crime.¹²¹ Iraq even sent its top foreign minister to Japan to study terms for civilian prosecution of military crime contained in Japan’s Status of Forces Agreement with the

¹¹⁸ U.N. HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS, PHILIP ALSTON: ADDENDUM: MISSION TO THE UNITED STATES OF AMERICA 24 (28 May 2009), A/HRC/11/2/Add.5, available at <http://www.unhcr.org/refworld/docid/4a3f54cd2.html> [hereinafter ALSTON REPORT] (last visited Jan. 15, 2010).

¹¹⁹ *Id.* at 3.

¹²⁰ Dr. Amin Tarzi, Presentation to the 58th Graduate Course, The Judge Advocate Gen.’s Legal Ctr. & Sch., Charlottesville, Va. (Feb. 19, 2010). Dr. Tarzi is a Senior Fellow at the Center for Advanced Defense Studies, focused on Afghanistan, and the Director of Middle East Studies at Marine Corps University in Quantico, Virginia.

¹²¹ *Iraq Studied SOFA When Setting Trial Criteria for U.S. Servicemen*, KYODO WORLD SERV. (Japan), Mar. 27, 2009.

U.S. military.¹²² In the final agreement, the United States agreed to cede limited criminal jurisdiction over American servicemember misconduct in Iraq.¹²³ At Iraq's insistence, this agreement also committed the United States to seek to hold military trials of servicemembers in Iraq rather than sending them away; when that was not possible, the United States agreed to assist Iraqi victims to attend trial in the United States.¹²⁴ To the extent that the actions of the Iraqi government reflected the will of its people, this agreement indicated Iraqi dissatisfaction with the American military's justice practices against its servicemembers.

The U.S. military was often unable to keep Iraqis informed about the status of cases when those cases were sent back to the United States for adjudication. An officer from a headquarters unit in Baghdad who was responsible for updating Iraqi government officials about the status of military cases in the United States wrote, "There was no central repository cataloging this information, particularly as trials sometimes occurred at home station many months after a unit redeployed. The RoL [Rule of Law] section had difficulty in obtaining updates in some cases, usually resorting to Google searches to try to obtain information."¹²⁵

3. Others "Get It," but the United States Does Not

The United Nations has come to recognize the importance of trying cases where misconduct occurs. In 2003 and 2004, numerous allegations surfaced that U.N. peacekeepers in the Democratic Republic of the Congo (DRC; formerly known as Zaire) were involved in numerous acts of sexual exploitation against local civilians.¹²⁶ When the implicated peacekeepers were sent back to their home countries rather than tried by courts-martial in the DRC,

¹²² *Id.*

¹²³ Steven Lee Myers, *A Loosely Drawn American Victory*, N.Y. TIMES, Nov. 28, 2008, at A5 (describing the U.S.-Iraq strategic framework agreement and the American concession to cede criminal jurisdiction to the Iraqis for off-duty, off-base misconduct committed by American servicemembers).

¹²⁴ Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008.

As mutually agreed by the Parties, United States Forces authorities shall seek to hold the trials of such cases [involving American forces] inside Iraq. If the trial of such cases is to be conducted in the United States, efforts will be undertaken to facilitate the personal attendance of the victim at the trial.

Id. art. 12, ¶ 7.

¹²⁵ Multi-National Force-Iraq, Office of the Staff Judge Advocate (Rule of Law section), Individual Augmentee, After Action Report, October 2008–December 2008 (9 Feb. 2009).

¹²⁶ *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*, ¶ 6, U.N. Doc A/59/710 (Mar. 24, 2005) (prepared by Prince Zeid Ra'ad Zeid Al-Husseini).

civilian dissatisfaction grew and may have endangered the peacekeeping mission.¹²⁷ In response, a comprehensive U.N. report on peacekeeping operations called for "on-site courts martial" among its top priorities.

An on-site court martial for serious offences that are criminal in nature would afford immediate access to witnesses and evidence in the mission area. An on-site court martial would demonstrate to the local community that there is no impunity for acts of sexual exploitation and abuse by members of military contingents. . . . Therefore, all troop-contributing countries should hold on-site courts martial. Those countries which remain committed to participating in peacekeeping operations but whose legislation does not permit on-site courts martial should consider reform of the relevant legislation.¹²⁸

Strategic concern about perceptions that the military members enjoy criminal impunity has grown with America's largest military ally. Great Britain¹²⁹ has improved military prosecutions and increased public transparency of military trials in response to lessons learned in Iraq about the strategic setbacks of shipping crime home.¹³⁰ British lawmakers¹³¹ and military doctrine writers¹³² have each

¹²⁷ *Id.* ¶ 10.

¹²⁸ *Id.* ¶ 35.

¹²⁹ The author thanks Lieutenant Colonel (Lt. Col.) Nigel Heppenstall of the British Army for helpful conversations about the British military tradition. At the time of writing, Lt. Col. Heppenstall was assigned as a British Exchange Legal Officer to CLAMO.

¹³⁰ Michael Evans & Frances Gibb, *Accused Troops Will Face More Robust Courts-Martial, Says Prosecution Chief*, TIMES ONLINE (U.K.), Jan. 2, 2009, available at <http://business.timesonline.co.uk/tol/business/law/article/5430038.ece> (describing the stance of the new top civilian in charge of British military prosecutions, Bruce Houlder, in calling for tougher prosecutions after a series of court-martial acquittals that were considered a setback for the British military in Basra, Iraq. In one of those, seven soldiers from the Queen's Lancashire Regiment and Intelligence Corps were tried by court-martial in England for their involvement in the death of Iraqi detainee Baha Mousa in 2003 in Basra, resulting in one conviction.)

¹³¹ HOUSE OF COMMONS DEFENCE COMMITTEE, IRAQ: AN INITIAL ASSESSMENT OF POST-CONFLICT OPERATIONS, VOLUME II (Sixth Report of Session 2004–05) (U.K.) (23 June 2004):

From the point of view of justice being seen to be done and to winning the confidence of the Iraqi people, I think it would be absolutely wrong to say all our courts martial are going to be held somewhere in the South of England that I do not even know where, being a Scotsman, never mind someone from outside Basra, and I think that is the danger—that we would lose the confidence of the people.

Id. at 17 (statement of Mr. Frank Roy, Defence Committee).

¹³² ARMY FIELD MANUAL VOLUME 1 PART 10, COUNTERING INSURGENCY, at 7-B-3 (draft) (U.K.) (Apr. 2009) ("It is essential that the host nation

emphasized that transparent prosecutions conducted near where crime occurs help the military gain the confidence of the foreign population. In response to allegations that British soldiers beat and killed an Iraqi detainee named Baha Mousa in Basra, Iraq, the British set up a website in Arabic (the predominant language spoken in Basra), with translations of the proceedings from the public inquiry.¹³³

In the United States, however, no American political or military leaders have emphasized the need for on-site courts-martial. American military guidance on venue expresses no preference for trying wartime misconduct where it occurs. “Given the maturity of the Afghan and Iraqi theaters, commanders now have a choice of whether to conduct courts-martial in theater or at home station.”¹³⁴ This means that court-martial decisions are left to logistical questions of where it is “easier” to conduct them. The British emphasis on this issue, and the American lack of emphasis, could be a consequence of the United Kingdom’s collective understanding of the ramifications of military misbehavior after its decades of experience in Northern Ireland.¹³⁵ Or perhaps the losing side of the American Revolution better understands the consequences of sending misconduct back to the home country for perceived “mock trials.”

B. How Unpunished Crime Can Thwart Counterinsurgency Efforts

Counterinsurgency (COIN) is thought of as a competition of legitimacy; the insurgent or counterinsurgent who sways and holds the support of the population wins. “Both insurgents and counterinsurgents are fighting for the support of the populace.”¹³⁶ Crimes committed by combatants directly undermine that side’s legitimacy. “Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short-term COIN efforts.”¹³⁷ When these misdeeds are magnified, COIN success is

population does not develop a perception that British service personnel are being treated with impunity.”)

¹³³ See BAHAMOUSAINQUIREY, <http://www.bahamousainquirey.org/index.htm> (last visited Feb. 23, 2010) (including a link to an Arabic language version of the website).

¹³⁴ FORGED IN THE FIRE, *supra* note 3, at 311.

¹³⁵ As a result of their involvement in Northern Ireland from 1969 to 2007, the British have achieved an admirable factual accounting of the interplay of terrorist incidents, civilian deaths, news reporting, and soldier misconduct. This could serve as a useful groundwork for other studies about the operational and strategic effects of military misconduct. See DAVID MCKITTRICK ET AL., LOST LIVES: THE STORIES OF THE MEN, WOMEN AND CHILDREN WHO DIED THROUGH THE NORTHERN IRELAND TROUBLES (2d ed. 2004).

¹³⁶ U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 1-160 (15 Dec. 2006) [hereinafter FM 3-24].

¹³⁷ *Id.* para. 1-132.

imperiled. “Isolated misdeeds by junior soldiers or small units can adversely affect a theater of war, and undo months of hard work and honorable sacrifice.”¹³⁸ As an example, Army COIN doctrine describes the consequences of French military indiscipline against Algerian insurgents from 1954 to 1962: “Illegal and immoral activities made the counterinsurgents extremely vulnerable to enemy propaganda inside Algeria among the Muslim population, as well as in the United Nations and the French media.”¹³⁹ In short, COIN magnifies misconduct.

Given the strategic nature of misconduct in COIN, having a deployable justice system that allows for punishment and deterrence becomes even more important. A leading military law scholar explains the linkage of deployable justice and the promotion of good behavior:

By having a justice system that can travel with the forces into combat and other operations, a military encourages its forces to respect the rule of law. A military force that respects the rule of law garners respect and trust from the world community. This trust and respect can certainly carry over to world opinion about the legitimacy of the military operations.¹⁴⁰

When the justice system cannot follow the force, misconduct lacks a formal deterrent. The following paragraphs describe some of the risk factors present in our force that, if left unchecked by a meaningful regime of sanction, may threaten COIN efforts.

Soldiers with criminal tendencies can undermine COIN efforts, especially if they can linger without a mechanism for formal sanction. In the past decade, relaxed recruiting standards permitted large numbers of gang members¹⁴¹ and prior felons¹⁴² into the American military. An Army study

¹³⁸ John Nagl & Paul Yingling, *New Rules for New Enemies*, ARMED FORCES J., 25, 25 (Oct. 2006).

¹³⁹ FM 3-24, *supra* note 136, at 7-9.

¹⁴⁰ Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from This Revolution?*, 16 TUL. J. INT’L & COMP. L. 419, 425 (2008).

¹⁴¹ See, e.g., NAT’L GANG INTELLIGENCE CTR., GANG-RELATED ACTIVITY IN THE US ARMED FORCES INCREASING (12 Jan. 2007) (assessing the prevalence of gang members in the military as a threat to national security; noting that gang members join the military to receive military training, to access weapons and explosives, and to avoid incarceration); *Gangs in the Military* (CBS television broadcast July 29, 2007), available at <http://www.cbsnews.com/video/watch/?id=3107605n&tag> (noting the rise of gang violence within the military; showing evidence of gang member presence among U.S. servicemembers in Iraq; and reporting that the Army Criminal Investigation Division increased its number of gang-related crime investigations from nine in 2004 to sixty-one in 2006).

¹⁴² See, e.g., Lizette Alvarez, *Army Giving More Waivers in Recruiting*, N.Y. TIMES, Feb. 17, 2008, at A1 (noting that waivers granted to Army recruits with criminal backgrounds grew from 4918 in 2003 to 8129 in

showed that those who entered on “moral waivers” were more likely to engage in misconduct than other recruits.¹⁴³ Likewise, a leading military thinker asserts that this trend correlates to higher rates of military misconduct: “When enlistment qualifications go down, that means discipline rates go up.”¹⁴⁴ One unit noted a tangible link between moral waivers and combat misconduct: “Our BCT experience was that the vast majority of downrange CMs [courts-martial] were for people with moral waivers on their enlistments.”¹⁴⁵

Noting that COIN is a competition for the support of the civilian population, military forces must be able to deter and discipline those whose misconduct is directed at civilians. In an Army medical study conducted between 2005 and 2007, about ten percent of 1844 Marines and Soldiers surveyed in Iraq stated that they had mistreated non-combatants and damaged civilian property when it was not necessary to do so.¹⁴⁶ It is admittedly difficult to determine

2006, and that recruits with criminal histories made up 11.7% of Army recruits in 2006); Lizette Alvarez, *Army and Marine Corps Grant More Felony Waivers*, N.Y. TIMES, Apr. 22, 2008, at A21 (describing how the Army doubled the number of felony waivers granted in 2007, and how a total of 18% of Army recruits received either felony or misdemeanor conduct waivers in fiscal year 2007).

¹⁴³ See C. Todd Lopez, *DoD Sets Joint Standards for Enlistee Waivers*, SOLDIERS, Oct. 1, 2008, at 21 (describing an Army study of enlistees from 2003 to 2006 that compared enlistees with moral waivers to those who did not require a waiver). The study found that those who entered on waivers had higher rates of misconduct and desertion than other enlistees. It qualified those findings by emphasizing that enlistees with moral waivers re-enlisted at higher rates, scored higher on aptitude tests, and earned proportionally more valor awards and combat badges. Cf. Knickerbocker, *supra* note 5, at 1 (providing a less positive assessment of the effects of allowing criminal waivers).

Waiving rules against recruiting men and women with criminal records is leading to a substantial rise in the number of gang members wearing uniforms and getting trained to use military weapons. Put them in a war zone where death is common and life cheap—that’s a real recipe for wanton killing.

Id. (quoting retired Army Colonel Dan Smith, author and commentator on military affairs).

¹⁴⁴ Knickerbocker, *supra* note 5, at 1 (quoting Gary Solis, author, frequent commentator on military affairs, and Adjunct Professor at Georgetown University Law Center).

¹⁴⁵ E-mail from Captain Eric Hanson, to author (Mar. 21, 2010 03:51 EST) (on file with author). Captain Hanson was the trial counsel of the 173d Airborne Regiment in Afghanistan for fifteen months from 2007 to 2008. Captain Hanson believes that his Regiment conducted over half of all Afghanistan courts-martial during his time there. *Id.* See also Hanson, *supra* note 4.

¹⁴⁶ MENTAL HEALTH ADVISORY TEAM (MHAT) IV OPERATION IRAQI FREEDOM 05–07, FINAL REPORT, Nov. 16, 2006, available at http://www.armymedicine.army.mil/reports/mhat/mhat_iv/MHAT_IV_Report_17NOV06.pdf (containing the results of interviews of 1406 Soldiers and 438 Marines in Iraq on topics such as mental health, well-being, battlefield ethics and suicide prevention); Major General Gale Pollock, Transcript of News Conference, DoD News Briefing with Assistant Secretary Casscells from the Pentagon, May 4, 2007, available at <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=3958> (summarizing the Mental Health Advisory Team’s final report).

if the percentage of American forces now in Iraq and Afghanistan would poll similarly, but even a smaller percentage represents a strategic wild card with the potential to undermine military legitimacy and sour a host population’s goodwill. The need for a deterrent mechanism is powerful in such circumstances, as Soldiers “need to see the results of misconduct.”¹⁴⁷

The Burger King Theory¹⁴⁸ raises a thorny problem concerning the impact of Soldier misconduct. When Soldiers stay on large “Burger King bases,” they spend much of their time among other Americans and away from the local population. As a result, much of the crime they commit does not affect the citizens of the host nation. On the other hand, when they are stationed away from “Burger King bases” and on smaller outposts, they spend more of their time interacting with local citizens. For Soldiers who spend more time with local citizens, the criminal activity they commit will have a proportionally greater effect on the local population. However, these are the same Soldiers who are *least likely* to face court-martial because they are away from large bases.

When counterinsurgent forces commit misconduct against civilians, the local commander may be able to salvage goodwill by communicating effectively with the affected civilian community. A leading thinker on modern COIN theory explains that after U.S. forces commit misconduct, the U.S. commander must address locals with “a clear and focused IO [information operations] campaign explaining exactly what is going on.”¹⁴⁹ Army doctrine cites the ability to “manage information and expectations” as the top contemporary imperative of COIN.¹⁵⁰

However, several impediments may hinder the commander’s ability to manage information about military misconduct. First, a case that is sent back to the United States will often fall under a different commander, and the original commander cannot then attempt to influence the new commander on the disposition of the case.¹⁵¹ Second, adjudicating misconduct at a court-martial away from the combat zone may be neither swift nor certain. One Marine

“[A]pproximately 10 percent of soldiers and Marines report mistreating non-combatants or damaging property when it was not necessary. Only 47 percent of the soldiers and 38 percent of Marines agreed that non-combatants should be treated with dignity and respect.” *Id.*

¹⁴⁷ CLAMO Interview with Major Robert Resnick & Captain Charles Pritchard, 3d Infantry Division, in Charlottesville, Va. (Nov. 20, 2003) quoted in FORGED IN THE FIRE, *supra* note 3, at 290.

¹⁴⁸ See *supra* Part II.D.

¹⁴⁹ E-mail from Major Niel Smith, to author (Oct. 7, 2009 20:01 EST) (on file with author). Major Smith has published four articles in *Small Wars Journal* on COIN strategy.

¹⁵⁰ FM 3-24, *supra* note 136, para. 1-138.

¹⁵¹ United States v. Newlove, 59 M.J. 540 (A. Ct. Crim. App. Aug. 20, 2003).

judge advocate described the delays that plagued stateside courts-martial of combat zone misconduct as follows:

From Camp Pendleton, trial counsel and defense counsel started from scratch with a very complex case in which they lacked basic familiarity with the unit's mission, enemy activities in the area, or other important aspects of the environment in which the misconduct had taken place. The eight cases ultimately required more than fourteen months to prosecute. . . . Similarly, the Haditha case still remains unresolved, more than two years since first being brought to light.¹⁵²

Even if the commander decides that a case is important enough to try in country, he still may not be able to assuage the affected community if he cannot talk about the case. An impairment on his ability to talk about the case is the judicial prohibition against unlawful command influence (UCI). "Commanders at all levels must be mindful of their role in our system of justice and be careful not to comment inappropriately on pending cases in their command."¹⁵³ This restriction may limit a commander's messages to impersonal communiqués such as, "we will investigate all allegations of misconduct," or, "Article 32 is a procedure designed to . . ." rather than impressing his ability to control his forces and address local concerns.¹⁵⁴

One example of how the UCI doctrine proved to be a strategic detriment was its role in delaying reporting of the Abu Ghraib abuse case in Iraq in 2004. "Ironically, it was caution about unlawfully influencing the military justice system that led to the delay in senior officials' appreciating the extent of the Abu Ghraib abuse."¹⁵⁵ As an aspiration, commanders should be mindful of UCI principles but should also be able to candidly discuss civilian concerns on deployments without the need to have their attorney at their side for fear of UCI violations. The proper litmus test should be whether commanders feel unduly constrained in

answering the question "What are you going to do about this?" when posed by an affected local. The UCI doctrine's muzzle effect on command communications appears to be a contributor to the military's poor report card on communicating with affected locals about the status of military crimes in Afghanistan and Iraq. "[T]he military justice system fails to provide ordinary people, including United States citizens and the families of Iraqi or Afghan victims, basic information on the status of investigations into civilian casualties or prosecutions resulting therefrom."¹⁵⁶

V. Proposals to Promote Judicial Goals in the Combat Zone

*They constantly try to escape
From the darkness outside and within
By dreaming of systems so perfect that no one
will need to be good.*¹⁵⁷

Finding that courts-martial in combat zones are prohibitively difficult and that the weak system of deployed justice has negative strategic effects, the remaining issue is how to fix the problem. This part explores a range of possibilities.

A. Emphasis on the Need to Try Cases Where Crime Occurs

One solution is for military and political leaders to emphasize the importance of trying cases in the combat zone whenever practicable, as the British learned in Iraq¹⁵⁸ and the United Nations learned in the Congo.¹⁵⁹ This can be done at little cost by judge advocates, commanders, the media, Congress, and the President. Emphasis alone may have a significant effect. A change in military doctrine would help embolden this emphasis.

B. Communicating about Trials

Admittedly, not every court-martial for combat zone misconduct can be tried in the combat zone. When cases must be tried in the United States, such as when crimes occur at the end of a unit's combat tour as the unit prepares to redeploy, the status of the proceedings must be effectively communicated to the affected population. The British Baha Mousa public inquiry,¹⁶⁰ which used websites with the proceedings translated into the language of the affected

¹⁵² Hackel, *supra* note 4, at 243.

¹⁵³ Lieutenant Colonel Mark L. Johnson, *Unlawful Command Influence—Still with Us*, ARMY LAW., June 2008, at 104, 107.

¹⁵⁴ Any suggestion that this article advocates unlawful command influence ought to be quickly dispelled. The UCI doctrine rightly protects against bad-faith command interference in judicial proceedings. The prohibition on UCI protects servicemembers, but so too do HESCO barriers, Kevlar helmets, and M1A1 tanks—things that, when necessary to win the counterinsurgency fight, have been set aside or modified.

¹⁵⁵ MARK MARTINS, PAYING TRIBUTE TO REASON: JUDGMENTS ON TERROR, LESSONS FOR SECURITY, IN FOUR TRIALS SINCE 9/11, at 124 (2008). Martins is currently a brigadier general (BG) in the U.S. Army's Judge Advocate General's Corps. Brigadier General Martins draws a different conclusion than the author about the UCI lessons from Abu Ghraib, saying that the UCI doctrine should not be diminished. His book instead urges military leaders to place more emphasis on accurate investigations and timely reporting. *Id.*

¹⁵⁶ ALSTON REPORT, *supra* note 118, at 2.

¹⁵⁷ Excerpt from T. S. Eliot, *Choruses from "The Rock"* (1934), in T.S. ELIOT, COLLECTED POEMS 1909–1962 (1964).

¹⁵⁸ *Supra* Part IV.A.3.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

population, should be the guiding example for American reform. The Government should be required to perform additional duties for stateside courts-martial of combat zone crimes that affect foreign civilians, such as establishing websites with trial information in the appropriate foreign language and granting a broader right for foreign persons to travel to the United States to observe trial proceedings.

Instituting these changes would have a twofold effect. First, affected foreign persons would gain a meaningful way to follow cases in person or on the Internet. Second, the added burden imposed for trying cases stateside would incentivize trying cases where misconduct occurs. Although effective communication about wartime misconduct is a strategic imperative and not a judicial one, these requirements could be most easily implemented by amending service military justice regulations. A presidential executive order could induce these changes not just for courts-martial, but also for similar prosecutions conducted in the federal courts.

C. Remove the Judges from the Code Committee

The court-martial troubles of the past decade of combat operations raise a reasonable question: Has the UCMJ kept up with the nature of modern military operations? The statute has not been adjusted at all to reflect any lessons learned from Afghanistan or Iraq. Who should be the impetus for such change?

Surprisingly, the group tasked by Congress to annually recommend changes to the UCMJ has not done so in nearly thirty years. The Code Committee, which consists of the judges of the Court of Appeals for the Armed Forces (CAAF), the individual service judge advocates general (JAGs), and two members of the public appointed by the Secretary of Defense,¹⁶¹ is tasked in UCMJ article 146 to conduct an “annual physical exam”¹⁶² of the military justice system and to report its recommendations to Congress. However, reasoning that it should not intermix the legislative role of recommending statutory changes with the judicial duties of the CAAF judges on the committee, the Code Committee has not furnished recommendations to Congress since 1983.¹⁶³

¹⁶¹ UCMJ art. 146 (2008).

¹⁶² H.F. “Sparky” Gierke, *Five Questions About the Military Justice System*, 56 A.F. L. REV. 249, 252 (2005).

¹⁶³ This is based on conversations the author had with two CAAF judges and CAAF senior staff over the course of the spring of 2010. This reason for a lack of recommendation is never listed in its annual reports, which consist mainly of appellate case statistics and reports from the individual service Judge Advocate Generals.

Since the Code Committee has failed to act, private groups such as the Cox Commission¹⁶⁴ have tried to fill the void by offering a “more comprehensive physical including blood work and an EKG”¹⁶⁵ in 2001 and 2009. While private groups may do laudable work and draw public and congressional attention to problems that deserve legislative focus, there are limits to relying on them exclusively for stewardship of the UCMJ. For example, because these groups are non-governmental, they lack the expertise and insights of active duty military personnel familiar with recent applications of the UCMJ in combat.

To resolve this impasse, Congress should modify the membership of the Code Committee to exclude the CAAF judges. This would leave the Committee in the hands of the service JAGs and the two members of the public appointed by the Secretary of Defense. Freed from the CAAF judges’ worries about intermixing legislative and judicial roles, the service JAG-controlled Code Committee would be free to draft responsive annual recommendations to Congress about how to change the UCMJ.

D. A Reconsideration of Certain Rights

As noted in Parts II and III, the biggest obstacle to deployed justice was the requirement to produce witnesses from outside the combat zone. The pressing priority for the Code Committee (or other body tasked to recommend reform) is to consider the circumstances when alternatives to live witness production—including video teleconferencing and affidavits—would still ensure fair trials. Modifying confrontation requirements for units serving in combat zones is essential to the goal of revitalizing deployed justice. It is unrealistic for the military to unthinkingly follow confrontation developments from civilian courts that were never intended to apply to the military. Testimony by deposition and relaxed confrontation rules were the norms for American courts-martial from the time of the Founding Fathers in the Revolutionary War until after the Civil War,¹⁶⁶ so history can help guide the task of breaking the lockstep between 6th Amendment confrontation requirements and rights in courts-martial.

Similarly, the curtailment of rights to civilian counsel should be considered for combat zone courts-martial. Like the production of witnesses, the logistical challenge of bringing a private attorney in the United States to the combat

¹⁶⁴ Information on the Cox Commission and its reports is available at http://www.wcl.american.edu/nimj/cox_commission.cfm (last visited Mar. 5, 2010).

¹⁶⁵ Gierke, *supra* note 162, at 252.

¹⁶⁶ Frederick B. Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 282–84 (1958).

zone can significantly delay a case.¹⁶⁷ Appropriately limiting requests for civilian counsel in theater would decrease logistical and administrative delays, and would also put a positive spotlight on the professionalism and abilities of Trial Defense Services. A recent proposal, which argues for granting general court-martial convening authorities the ability to abrogate an accused's statutory right to civilian counsel under limited circumstances, offers a useful blueprint of how to implement this.¹⁶⁸

E. Non-Judicial Punishment

A solution to promote judicial goals in areas largely beyond current judicial reach is to strengthen the military commander's non-judicial punishment (NJP) powers in the combat zone. This NJP authority is found in Article 15(a) of the UCMJ. Non-judicial punishment covers minor offenses, allows for certain minor punishments short of confinement,¹⁶⁹ and does not result in a criminal conviction or discharge from the military. It "provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in servicemembers without the stigma of a court-martial conviction."¹⁷⁰

Article 15(a) permits servicemembers to refuse NJP and instead demand trial by court-martial, with one exception: when attached to or embarked in a vessel.¹⁷¹ This exception

¹⁶⁷ See Major John Brooker, *Target Analysis: How to Properly Strike a Deployed Servicemember's Right to Civilian Defense Counsel*, ARMY LAW. (forthcoming Nov. 2010).

¹⁶⁸ *Id.* Major Brooker proposes "Precision-Targeted Abrogation," where a general court-martial convening authority in a combat zone can deny an accused's request for civilian counsel in certain circumstances. *Id.*

¹⁶⁹ Maximum punishments, when imposed by a commander in the rank of major or higher, include correctional custody for thirty days, forfeiture of half pay per month for two months, reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction (more restricted for grades E5 and above), extra duty for forty-five days, and restriction for sixty days. UCMJ art. 15(b)(2)(H) (2008).

¹⁷⁰ UCMJ art. 15; MCM, *supra* note 9, pt. V (Non-Judicial Punishment Procedure).

¹⁷¹ The success of the U.S. Navy through decades with the "vessel exception" should temper any notion that binding NJP will widely imperil servicemember morale. The Navy has historically enjoyed strong success with recruiting and retention; in the last few years, a new program formed to fill a high demand for Soldiers from a surplus of Sailors. See Samantha L. Quigley, "Blue to Green" Program Hits Milestone, MILITARY.COM, Jan. 25, 2007, <http://www.military.com/NewsContent/0,13319,123279,00.html>. Even before this "Blue to Green" program, Navy recruiting and retention were strong. See Journalist First Class Sonja Chambers, *Navy Recruiting Successful in Manning the Fleet*, NAVY.MIL, Oct. 13, 2004, http://www.navy.mil/search/display.asp?story_id=15465. But see Major Dwight H. Sullivan, *Overhauling the Vessel Exception*, 43 NAVAL L. REV. 57 (1996). Colonel Sullivan, a leading military justice scholar and author of the CAAFlog blog (<http://www.caaflg.com>), makes two main points in arguing to scrap the "vessel exception": first, potential exists for commanders to abuse binding NJP, and second, in fairness, servicemembers embarked on ships should not enjoy fewer rights than others who can refuse

is logical; it makes little sense to allow servicemembers to refuse NJP in places where courts-martial cannot be performed, such as on a ship. Applying the same logic, another place where courts-martial largely cannot be performed is in the combat zone. I propose that servicemembers either embarked on a vessel or serving in a combat zone should not have the option to reject NJP and demand court-martial. In such circumstances, NJP should be binding. The relevant sentence of Article 15(a), with the proposed addition italicized, would state:¹⁷²

However, except in the cases of a member attached to or embarked in a vessel, *or entitled to pay for hostile fire or imminent danger*, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment.

The Navy's approach to NJP (called "captain's mast") emphasizes its relationship to discipline, and, ultimately, the performance of military missions. A naval historian compared the Navy's approach to the Army's as follows:

The Navy reposed special faith in its ships' captains and gave them the power to discipline their crews in order to carry out assigned missions. . . . Navy captain's mast resembled a trial. The commander called witnesses, heard evidence, and interviewed the accused at a formal hearing set aside for the purpose. When satisfied that he knew the facts, he handed down a finding and awarded a punishment. . . . Although the Army treated NJP like an administrative task, it permitted appeal from this utterly nonjudicial affair to a court-martial, which had the power to

NJP. The second point would be remedied (though not in the way the author intended) by a more expansive NJP regime in which any servicemember, not just those on ships, is bound to NJP when courts-martial are not feasible. The article encourages, among other alternatives to the "vessel exception" for NJP, the commander's ability to conduct administrative separation boards to separate servicemembers with the possible stigma of an other-than-honorable discharge. *Id.* at 102. However, the article does not compare the fairness, effect on morale, or collateral consequences of these separation procedures to NJP with the "vessel exception." Thus, the article seems to suggest that firing more employees with stigma attached is more just than being able to stay on the job but unable to veto one's own demotion.

¹⁷² This could most easily be done by linking binding NJP to receipt of special pay for hazardous or hardship duty. See U.S. DEP'T OF DEF., REG. 7000.14-R, VOLUME 7A: MILITARY PAY POLICY AND PROCEDURES—ACTIVE DUTY AND RESERVE PAY IN FINANCIAL MANAGEMENT REGULATION (3 May 2005). This way, there is no ambiguity as to whether turndown rights apply in certain places, such as the Kuwait City airport—if the unit personnel or finance section confirms that the deployment pay provisions apply, then NJP is binding.

hand down a federal conviction. But one of the reasons the Navy refused to grant the right of election was that it considered mast a disciplinary matter, not a criminal one, and therefore not suitable for trial by court-martial.¹⁷³

The idea of binding NJP may seem unusual to Soldiers who have never served on ships. Marines, on the other hand, have experience with both vessel service and ground combat deployments. One Marine judge advocate from Iraq noted the advantages of applying binding NJP to the combat zone.

A sailor deployed on the USS Arleigh Burke for local operations for two weeks off the coast of Virginia (as routine as it gets for the Navy) cannot refuse NJP, but a Marine in an infantry battalion in Al Qaim [Iraq], 150 miles from the nearest trial counsel or military judge, can refuse NJP and tie the hands of the commander to administer discipline.¹⁷⁴

Deployed Army commanders similarly often have their hands tied over NJP due to court-martial frailty. One unit explained the dilemma created by the right to refuse NJP in a combat zone saying, “Some Soldiers requested trial by court-martial instead of accepting an Article 15. Commanders found themselves in an awkward position, i.e. prefer charges or administratively separate the Soldier.”¹⁷⁵

Logically, servicemembers’ refusal of NJP should increase where the possibility of court-martial is remote, and the recollection of two experienced TDS attorneys confirms this motivation. One said he advised clients to turn down

NJP “up to ten times a month”¹⁷⁶ and “more than in garrison,”¹⁷⁷ while the other wrote, “I advised turning down Art [Article] 15s all the time in Iraq. . . . It was the deployed environment that caused such recommendations.”¹⁷⁸

Non-judicial punishment can still thrive when away from Burger King bases. Recall that in Afghanistan in 2009 American forces were spread out over two hundred bases and outposts. Of those two hundred, only one had a courtroom and resident trial defense attorneys (Bagram Air Base), and only nine had judge advocates. On the other hand, all two hundred likely either had commanders present or were regularly visited by commanders. With this broader coverage, NJP represents a realistic option for addressing routine wartime disciplinary infractions. However, it is a less useful option if any offender has the power to wholly veto it. In such circumstances, the decision to discipline should rest with commanders, not offenders.

Granting the commander extra NJP power may also serve as an opportunity to create checks on potentially abusive NJP powers. One such safeguard could include a revival of servicemembers’ right to seek redress against a commander under Article 138 of the UCMJ.¹⁷⁹ A provision in one Army regulation has encroached impermissibly on Soldiers’ Article 138 rights by prohibiting its use for courts-martial and NJP.¹⁸⁰ As a result, Article 138 has become nearly extinct; only 21 Article 138 complaints were made in

¹⁷³ WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* 123–24 (1973). In the same section, Dr. Generous also describes how the Navy successfully sought to retain the “vessel exception” when the UCMJ was enacted in 1950. The Army continued the trend identified by Dr. Generous of treating NJP as a form of judicial proceedings, going as far in 2005 as changing the NJP standard of proof to the judicial “beyond a reasonable doubt.” See U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 3-16 (16 Nov. 2005); Captain Shane Reeves, *The Burden of Proof in Nonjudicial Punishment: Why Beyond a Reasonable Doubt Makes Sense*, ARMY LAW., Nov. 2005, at 28. Not only has the Army tampered with commander’s NJP abilities by imposing a legalistic standard of proof, they also have impermissibly limited commander’s statutory NJP powers. For example, the UCMJ authorizes commanders in the rank of Major or above to reduce Soldiers in paygrades E5 and above by two grades, but the promulgating Army regulation limits such commanders to only a one grade reduction. See UCMJ art. 15 (2008) and AR 27-10 *supra* note 173, at tbl.3-1.

¹⁷⁴ Lieutenant Colonel R. G. Bracknell, Staff Judge Advocate, Regimental Combat Team 5, U.S. Marine Corps, After Action Report (OIF) 11 (7 Aug. 2008).

¹⁷⁵ 4th Infantry Div. (Mechanized), 4th Combat Aviation Brigade, After Action Report (OIF), June 2008–June 2009, at 8 (28 Aug. 2009).

¹⁷⁶ Interview with Major Isaac Sprague, U.S. Army Trial Defense Serv. Attorney in Kuwait and Iraq from May 2008 to July 2009, in Charlottesville, Va. (Feb. 18, 2010).

¹⁷⁷ *Id.*

¹⁷⁸ E-mail from Ryan Wood, to author (Aug. 16, 2010 20:47 MST) (on file with author). Mr. Wood is a former U.S. Army Trial Defense Service officer who served in Iraq from Jan. 2007 to Jan. 2008.

¹⁷⁹ UCMJ art. 138 (2008) provides,

Complaints of Wrongs. *Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.*

Id. (emphasis added).

¹⁸⁰ AR 27-10, *supra* note 173, para. 20-5. “For many adverse actions, however, there are other, more specific channels and procedures to ensure the Soldier has an adequate opportunity to be heard. Those specific procedures usually are more effective and efficient for resolving such matters, and Article 138 procedures should neither substitute for, nor duplicate, them.” *Id.*

the last reporting year, 2008.¹⁸¹ The Army justifies restricting this statutory right by claiming that Article 138 remedies are duplicative of military justice remedies.¹⁸² However, this justification fails a plain language analysis: Congress included Article 138 in the same military justice statute that governed courts-martial and NJP, so since there is no stated limitation, Article 138 was designed to co-exist with judicial and NJP rights. The Army's justification also fails because Article 138 provides a specific statutory right to redress grievances to the GCMCA with a follow-on report to the civilian service Secretary. Since military justice procedures lack such a remedy,¹⁸³ Article 138 is never duplicative of military justice remedies. Article 138 may prove especially useful for checking abuse of NJP, which lacks the record of trial and detailed appellate review of courts-martial.¹⁸⁴ This remedy must be measured against the additional burden it would create, but the most appropriate way to temper an overly burdensome law is to change it, not to ignore it.

Another check is needed, and could be created, for expanded NJP against non-commissioned officers. The Army's regulation governing NJP requires that the record of NJP be automatically filed in the permanent section of a Soldier's records when that Soldier is in the grade of E5 (Sergeant) or higher.¹⁸⁵ Out of fairness, all NJP could be filed locally and retained for two years when the NJP is non-elective. If a commander wants the record of NJP included in a Soldier's permanent file, the commander should be required to allow the right to decline NJP and demand court-martial. A change to the Army regulation could quickly fix this.

¹⁸¹ ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES OF THE UNITED STATES SENATE AND THE UNITED STATES HOUSE OF REPRESENTATIVES §§ 3, 21 (2008) (Report of The Judge Advocate General of the Army).

¹⁸² For a trenchant analysis of Article 138 and the history of military rights of redress, see Captain Abraham Nemrow, *Complaints of Wrong Under Article 138, Uniform Code of Military Justice* 2 MIL. L. REV. 43 (1958). The one problem with the article is its dismissiveness of the broad redress rights contained in the UCMJ and insistence that service regulations should accord redress rights similar to those in the older Articles of War, which the author clearly favored. In so doing, the article provided a scholarly justification for the Army to promulgate a regulation that circumvented the radically broader rights in the then-new UCMJ. As a recent Secretary of Defense may have cautioned, "You go to war with the Article 138 you have, not the one you want."

¹⁸³ This should not be confused with discretionary service Secretary review of approved court-martial sentences. See UCMJ art. 74 (2008). Service Secretary review of court-martial results is rare. Non-judicial punishment results often remain at even lower levels, never reaching anywhere near the review level of even the general court-martial convening authority.

¹⁸⁴ Captain William P. Greene, Jr., Article 138: Fact or Fiction? (Apr. 1974) (unpublished manuscript) (on file at The Judge Advocate Gen.'s Legal Ctr. & Sch. Library, Charlottesville, Va.). The article notes examples from Vietnam where Soldiers alleged racism in NJP administration. Article 138, the article argues, can be a meaningful remedy for abusive NJP, which lacks the formal records and process of courts-martial. *Id.* at 23-25.

¹⁸⁵ AR 27-10, *supra* note 173, para. 3-6b (16 Nov. 2005). This author credits Lieutenant Colonel Dan Froehlich for this idea.

VI. Conclusion

Imagine the court-martial system, in all its aspects, personified as a Soldier. A venerable veteran with a long record of service, this Soldier received high marks at his duty stations in the United States, Germany, and Korea. He applies exacting standards to his work, and some even say he is better at his job than any of his civilian counterparts. Although he is a highly specialized Soldier who does not train to directly engage and kill the enemy, his job nonetheless is critical to the military's success in combat.

Despite his successes at his home stations, he has struggled on previous deployments. He had a tough time adapting to the austerity and lifestyle of the combat zone and could not leave the large bases. Constant complications prevented him from doing his job. As a result, he was often considered a liability; others who were not as expert but who could go "outside the wire" were relied on instead. No amount of counseling or rehabilitation was able to cure these deficiencies. With his unit now preparing for yet another deployment, the commander reviews the Soldier's prior duty performance and requirements against his own mission requirements. He simply does not have the time or resources to support this Soldier. Reluctantly, the commander arrives at the inescapable conclusion: this Soldier is non-deployable.

While courts-martial may be non-deployable in their current state, modifying the way military justice is managed on deployments could make courts-martial more portable and relevant in combat. Changes to deployed justice should include emphasizing the need for on-site courts-martial, rightsizing the committee that recommends changes to the UCMJ by jettisoning the CAAF judges, re-thinking the need for certain court-martial rules that were formed blind to their deployed consequences, and following the Navy's example with non-elective nonjudicial punishment when courts are not nearby. The American court-martial system now is quite advanced, but that means little if it is not used where it is needed most.

Narrowing the Doorway: What Constitutes a *Crimen Falsi* Conviction under Revised Military Rule of Evidence 609(a)(2)?

Major Christopher E. Martin*

I. Introduction

Experienced trial practitioners know that when it comes to courtroom testimony, the credibility of a testifying witness is often as important as the substance of the testimony itself.¹ Although witnesses with prior military or civilian convictions are less common in military practice,² the ability to impeach a witness who does have a conviction is a powerful weapon when the opportunity arises. American jurisprudence has long allowed parties to introduce evidence of a testifying witness's prior convictions in order to impeach the credibility of that witness.³ However, some types of convictions are considered more telling of credibility than others. In particular, convictions for *crimina falsi*,⁴ or crimes of dishonesty or deceit, are considered so relevant to credibility that both federal and military rules of evidence mandate their automatic admission for impeachment, without the need to apply any balancing test.⁵ But while the automatic admissibility of *crimen falsi* convictions is largely unchallenged in practice,⁶ defining

exactly what constitutes a *crimen falsi* conviction in the first place is often confusing and contested.

The Supreme Court and Congress tried to reign in this definitional confusion by amending Federal Rule of Evidence (FRE) 609 effective 1 December 2006.⁷ This federal rule, like its military counterpart, Military Rule of Evidence (MRE) 609, governs the use of a prior conviction to impeach a witness testifying at trial. The revision to subsection (a)(2) of FRE 609, in particular, limited automatically admissible *crimen falsi* convictions to those crimes for which “the *elements* of the crime required proof or admission of an act of dishonesty or false statement by the witness.”⁸ By operation of law, the federal changes automatically modified MRE 609 as of 1 June 2008.⁹

The practical differences between the old and new rules are, in some cases, deceptively subtle. Prior to the 2006 revision, FRE 609(a)(2), as well as MRE 609(a)(2), allowed automatic admissibility of a conviction simply if it “involved dishonesty or false statement.”¹⁰ When weighing the admissibility of convictions, federal and military courts embraced this ambiguity by regularly “looking beyond” the elements of offenses to consider whether the circumstances of a crime—not just the crime itself—involved dishonesty or false statement.¹¹ However, by tying an elemental analysis

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¹ A witness who testifies makes his credibility a relevant issue at trial. See THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., THE ADVOCACY TRAINER: A MANUAL FOR SUPERVISORS, at D-1 (2008) [hereinafter ADVOCACY TRAINER].

² As the *Advocacy Trainer* notes, “Counsel are more likely to use this skill with civilian witnesses, since few soldiers enlist with civilian convictions in their records and few are retained following a military conviction.” *Id.* at D-3-1.

³ See, e.g., ROTHSTEIN ET AL., EVIDENCE: CASES, MATERIALS AND PROBLEMS 408–17 (2d. ed. 1998) (discussing federal court rulings on the use of prior convictions to impeach, both before and after the implementation of FRE 609).

⁴ *Crimina falsi* are, essentially, crimes of fraud. See BALLENTINE'S LAW DICTIONARY (3d ed. 1969) (“An offense characterized by fraud through concealment, untruthfulness, false weights, forgery, etc. An offense involving untruthfulness so glaring as to affect the administration of justice injuriously.”); THE LAW DICTIONARY (2002) (“a flexible term for forgery, perjury, counterfeiting, alteration of instruments, and other frauds.”).

⁵ The current Federal Rule of Evidence (FRE) 609 provides, in relevant part, “For the purpose of attacking the character for truthfulness of a witness . . . evidence that any witness has been convicted of a crime shall be admitted . . . if it can readily be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.” FED. R. EVID. 609(a) (emphasis added). Although neither the federal nor military version of rule 609 specifically uses the term “*crimen falsi*,” commentators have generally applied this term to the types of crimes described within subsection (a)(2) of the rule. This article will likewise use the term *crimen falsi* to refer to the crimes addressed in the new FRE 609(a)(2) and MRE 609(a)(2).

⁶ Although the prevailing federal and military practice is to admit *crimen falsi* convictions without FRE (or MRE) 403 balancing, the issue is not entirely resolved. See, e.g., MANUAL FOR COURTS-MARTIAL, UNITED STATES MIL. R. EVID. analysis, at A22-47 (2008) [hereinafter MCM] (“The

application of Rule 403 is unclear.”); see also James Moody & LeEllen Coacher, *A Primer on Methods of Impeachment*, 45 A.F. L. REV. 161, 170–71 (1998) (“Several courts have rule that Rule 609(a)(2) does not require a balancing of probative value against prejudicial effect . . . [but] [a]t least one commentator has an opposite view, reasoning that the admission of *crimen falsi* convictions must be balanced against questions of constitutional problems, military due process, and fundamental fairness.”).

⁷ FED. R. EVID. 609. The U.S. Supreme Court has statutory authority to prescribe the federal rules, subject to a waiting period. 28 U.S.C. § 2072 (2006). If a rule is submitted by 1 May and Congress does not reject, modify, or defer the rule by 1 December, the rule takes effect as a matter of law on 1 December of that year. *Id.* § 2074.

⁸ FED. R. EVID. 609(a)(2) (emphasis added). Before the 2006 FRE revision, Military Rule of Evidence (MRE) 609(a)(2) like the federal rule read in pertinent part: “[E]vidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.” MCM, *supra* note 6, MIL. R. EVID 609(a)(2). The 2008 print edition of the MCM still reflects this old rule. *Id.*

⁹ Military Rule of Evidence 1102 provides that “Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is taken by the President.” MCM, *supra* note 6, MIL. R. EVID. 1102.

¹⁰ FED. R. EVID 609 (amended Dec. 1, 2006). See also discussion of the former version of MRE 609(a)(2), *supra* note 8.

¹¹ See, e.g., United States v. Frazier, 14 M.J. 773 (A.C.M.R. 1982) (explaining that admissibility under MRE 609(a)(2) “may be found in the underlying circumstances involved in the offense which resulted in the conviction.”). *Id.* at 778. See also Moody & Coacher, *supra* note 6, at 171; WEINSTEIN'S FEDERAL EVIDENCE § 609.04(3)(c) (2009) [hereinafter

to *crimen falsi* determinations under the revised rule, Congress has apparently tried to narrow the doorway of automatic admissibility.¹²

In light of the revised MRE 609, this article suggests a framework for determining what convictions under the Uniform Code of Military Justice (UCMJ) fall under *crimina falsi* for purposes of MRE 609(a)(2), meaning they are automatically admissible for impeachment without requiring an MRE 403 balancing.¹³ After laying out an analytical framework, this article then suggests a step-by-step guide practitioners can use to consider potential *crimen falsi* convictions.

II. Analyzing *Crimen Falsi* Convictions

A. Two-Layered Analysis

Delineating which offenses are *crimen falsi* or non-*crimen falsi* is sometimes less obvious than it first seems. The required analysis could, under the revised MRE 609(a)(2), be considered a two-layered review process. On the first layer are convictions that are facially or traditionally held in jurisprudence to be *crimina falsi*. This is determined by looking at the elements of the charged offense itself.¹⁴ Crimes in this category, as regularly held by federal courts, include counterfeiting, forgery, fraud, fraudulent passing of worthless checks, and perjury.¹⁵ A military court, citing federal cases, recounted a very similar list, including “perjury, subornation of perjury, false statement, fraud, swindling, forgery, bribery, false pretenses, and embezzlement.”¹⁶

Because the revised MRE 609(a)(2) mirrors the federal rule, the notes of the Advisory Committee to the 2006 FRE revisions are a useful interpretive guide. The Committee recognized that “[h]istorically, offenses classified as *crimina falsi* have included only those crimes in which the ultimate criminal act was itself an act of deceit.”¹⁷ The proponent must be ready to prove that “the conviction required the factfinder to find, or the defendant to admit, an act of dishonesty or false statement.”¹⁸ Analysis of crimes should also consciously regard the narrowing policy behind the amendment to FRE 609(a)(2).¹⁹ Precisely because *crimen falsi* convictions must be automatically admitted, these categories of crimes must be narrowly construed to avoid “swallowing up” the more restrictive admissibility rules for non-*crimina falsi* under FRE 609(a)(1).²⁰

Federal and military courts have for the most part consistently identified the facially-evident *crimen falsi* offenses.²¹ But as the 2006 Advisory Committee explicitly recognized,²² some crimes may not facially be *crimina falsi* but may, nonetheless, fall under this category because they require “proof or admission of an act of dishonesty or false statement.”²³ These crimes are “in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the propensity to testify truthfully.”²⁴ As the Committee notes, “Evidence in the nature of *crimina falsi* must be admitted under Rule 609(a)(2), regardless of how such crimes are specifically charged.”²⁵ Sorting out those qualifying crimes that are not facially *crimina falsi* is what could be called the second layer of analysis. As one commentator explains, even if the statutory elements of the conviction at issue do

WEINSTEIN] (“The Advisory Committee [to the 1990 amendments to FRE 609] chided courts that admitted convictions ‘such as bank robbery or bank larceny’ for taking an unduly broad view of ‘dishonesty.’”). *Id.*

¹² As the Notes to the Advisory Committee for the 2006 amendment state, other than crimes containing an element of dishonesty or false statement, “Evidence of all other convictions is inadmissible under this subsection, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of the commission of the crime of conviction. FED. R. EVID. R. 609, at 7 (U.S.C.S. 2010) (2006 Committee Notes).

¹³ MILITARY RULES OF EVIDENCE MANUAL § 609.02 (25th ed. 2006) [hereinafter MRE MANUAL]. Military Rule of Evidence 403 provides that, “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MCM, *supra* note 6, MIL. R. EVID. 403 (2008).

¹⁴ WEINSTEIN, *supra* note 11, § 609.04(2)(b).

¹⁵ *Id.* § 609.04(3)(a).

¹⁶ *United States v. Cantu*, 22 M.J. 819, 823–24 (N.M.C.M.R. 1986). *But see United States v. Lee*, 48 M.J. 756, 759 (Army Ct. Crim. App. 1998) (declining to adopt a rule that “categorically includes or excludes bribery as an instance of misconduct that is clearly probative of truthfulness or untruthfulness”). *Id.* at 759.

¹⁷ FED. R. EVID. R. 609, at 7 (U.S.C.S. 2010) (2006 Committee Notes); *see also* WEINSTEIN, *supra* note 11, § 609.04(3)(a) n.13.

¹⁸ FED. R. EVID. R. 609, at 7 (U.S.C.S. 2010) (2006 Committee Notes).

¹⁹ STEPHEN. A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL R. 609, at 9 (2006) (Commentary to 2006 Committee Notes).

²⁰ *Id.* Under FRE 609(a)(1), a conviction for a crime punishable by death or over one year confinement is admissible for impeachment purposes, subject to the appropriate balancing test as specified in the rule. For a witness other than the accused, the balancing test under FRE 403 must be applied. When the accused is the witness, the conviction is admissible only if the probative value of the evidence outweighs its prejudicial effect. FED. R. EVID 609 (a)(1). Military Rule of Evidence 609(a)(1) is identical to the federal rule, except it also expands the eligible types of convictions to those punishable by a dishonorable discharge. MCM, *supra* note 6, MIL. R. EVID. 609(a)(1).

²¹ FED. R. EVID. R. 609, at 7 (U.S.C.S. 2010) (2006 Committee Notes). *See also United States v. Williams*, 642 F.2d 136 (5th Cir. 1981) (conviction for bribery); *United States v. Kuecker*, 740 F.2d 496 (7th Cir. 1984) (conviction for mail fraud); *United States v. Payton*, 159 F.3d 49 (2d. Cir. 1998) (conviction for false statement to government official under oath); *United States v. Williams*, 2003 CCA LEXIS 141 (A.F. Ct. Crim. App. 2003) (conviction for uttering a worthless check with intent to defraud).

²² FED. R. EVID. R. 609, at 7 (U.S.C.S. 2010) (2006 Committee Notes).

²³ *Id.* FED. R. EVID. 609(a)(2).

²⁴ *Id.* FED. R. EVID. R. 609, at 7 (emphasis added).

²⁵ *Id.*

not include “dishonesty or false statement,” the underlying crime will still fall under FRE 609(a)(2) “if the government has to prove deceit or dishonesty to obtain the conviction.”²⁶

The 2006 Advisory Committee’s own example illustrates the subtlety of this analysis. The Committee explains that a conviction for “making a false claim to a federal agent” could be admissible as a *crimen falsi* conviction, regardless of whether the crime was charged under 18 U.S.C. § 1001,²⁷ Material Misrepresentation to the Federal Government, or under 18 U.S.C. § 1503,²⁸ Influencing or Injuring Office or Juror Generally (or “Obstruction of Justice”).²⁹ Whereas 18 U.S.C. § 1001 “expressly references deceit,” 18 U.S.C. § 1503 does not.³⁰

²⁶ WEINSTEIN, *supra* note 11, § 609.04(2)(b).

²⁷ 18 U.S.C. § 1001 (2006) provides in relevant part:

Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism . . . imprisoned not more than 8 years, or both.

Id. § 1001.

²⁸ *Id.* § 1503 provides in relevant part:

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b).

Id. § 1503.

²⁹ FED. R. EVID. R. 609, at 7 (U.S.C.S. 2010) (2006 Committee Notes).

³⁰ *Id.*

Obstruction of justice, which statutorily involves influencing, intimidating, or impeding a witness either corruptly or by the use of threats,³¹ does not necessarily always involve “dishonesty or false statement.” But in the Committee’s example, *crimen falsi* admissibility would turn on whether the *elements* of obstruction of justice under the circumstances at issue required proof of dishonesty or false statement—in this case, making a false claim to a federal agent. Courts have taken a similar view of this crime.³²

As the Advisory Committee’s own example shows, courts may encounter practical difficulty in applying the new MRE 609(a)(2). Courts should no longer look *beyond* an offense at the factual circumstances surrounding its commission to determine whether it qualifies as *crimen falsi*. Clearly, however, courts must still look *behind* the plain language of the crime to determine whether the elements required “proof or admission of an act of dishonesty or false statement.” As the Committee explains, “where the deceitful nature of the crime is not apparent from the statute and face of the judgment,” a proponent may offer “information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted.”³³ At the same time, the inquiry must be reasonably limited. As the Committee states, “[T]he amendment does not contemplate a ‘mini-trial’ in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi*.”³⁴ A practical approach may help clarify the analysis: If the facts of deceit were removed and the accused could still be convicted of the offense, the offense is not *crimen falsi*—the prosecutor did not have to prove that the accused acted deceitfully in order to sustain the conviction.

B. An Example: Analysis of an Article 134 Offense

Because it is not always obvious when a conviction falls under *crimen falsi*, it may be helpful to analyze a current military crime. A conviction for the Article 134, UCMJ, offense of “wearing [an] unauthorized insignia, decoration, badge, ribbon, device, or lapel button” requires proof that the accused “wore a certain insignia . . . [or other military item] upon [his] uniform or civilian clothing”; that he was “not authorized to wear the item”; that the “wearing was

³¹ 18 U.S.C. § 1503.

³² *Id.* § 1503 (Interpretive Notes and Decisions) (“18 U.S.C.S. § 1503 makes unlawful any act, committed corruptly, in endeavor to impede or obstruct due administration of justice, and proper criterion to apply to acts is their reasonable tendency to obstruct *honest and fair administration of justice*.”) (emphasis added); see also *Courtney v. United States*, 390 F.2d 521 (9th Cir. 1968).

³³ FED. R. EVID. R. 609, at 7 (U.S.C.S. 2010) (2006 Committee Notes).

³⁴ *Id.*

wrongful”; and that, “under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.”³⁵ Facially, this offense involves no element of deceit inherent in a traditional *crimen falsi* offense. But it is a closer question as to whether this offense is “in the nature of *crimen falsi*.” Whether this offense requires “proof or admission of an act of dishonesty or false statement” should turn on the meaning of “wrongful.” Arguably, wearing an award on a dress uniform is making a statement (e.g., “I earned a Bronze Star.”). “Wrongful” in this instance means a deliberate, as opposed to merely negligent, act. Wearing an improper award could therefore plausibly constitute a “false statement” for purposes of MRE 609(a)(2) admissibility. Recall that the 2006 FRE Advisory Committee, by its remarks, intended for FRE 609(a)(2) to include crimes “the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness’s] propensity to testify truthfully.”³⁶

As this example illustrates, the lines are not clearly drawn for offenses not historically recognized as *crimen falsi*. Admissibility under MRE 609(a)(2) must be weighed on a case-by-case basis, particularly for Article 134 offenses. Appendix 1 of this article offers a running list of potential *crimen falsi* offenses under the UCMJ, by applying the analysis described above.

C. Application in the Military Courts

One tricky area for military (and, analogously, federal) courts is the interplay between impeachment using *crimen falsi* convictions under MRE 609(a)(2) and specific instances of conduct under MRE 608(b).³⁷ For example, the Army Court of Criminal Appeals in *United States v. Lee*³⁸ weighed the admissibility for impeachment purposes of specific *conduct* that was allegedly indicative of attempted bribery, by reference to a federal case, *United States v. Hurst*.³⁹ *Hurst* had weighed the admissibility for

³⁵ MCM, *supra* note 6, pt. IV, ¶ 113.

³⁶ MRE MANUAL, *supra* note 13, § 609.02.

³⁷ Military Rule of Evidence 608(b), which is identical to the federal Rule, states in pertinent part:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Mil. R. Evid. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . .

MCM, *supra* note 6, MIL. R. EVID. 608(b).

³⁸ *United States v. Lee*, 48 M.J. 756 (A. Ct. Crim. App. 1998).

³⁹ *United States v. Hurst*, 951 F.2d 1490 (6th Cir. 1991).

impeachment purposes of a *conviction* for obstruction of justice, in which the defendant tried to bribe a police officer to falsify a document. The *Lee* court noted approvingly that in *Hurst* “the government was not bound by the nomenclature of the offense (obstruction of justice) and was permitted to cross-examine the defendant with details of the *conduct* (bribery) that was probative of truthfulness or untruthfulness.”⁴⁰ As *Lee* recounts, *Hurst* found that the lower trial judge acted within his discretion when he concluded that the conduct was probative of veracity because “the conduct was not merely bribery . . . but subornation of perjury.”⁴¹

In other words, the *Lee* court found *Hurst*'s “flexible approach”⁴² of looking at the underlying conduct appropriate because it examined specific acts, not a conviction. While this approach probably would have squared with the old version of MRE 609(a)(2),⁴³ it would *not* be appropriate when analyzing convictions under the new version of MRE 609(a)(2), which requires an examination of the underlying elements, not conduct. The distinction between a conduct-based and elemental analysis may seem like mere semantics, but military courts must recognize that the new MRE 609(a)(2) changes the method of analysis. Courts run the risk of mixing standards of admissibility when they cross-reference convictions and specific instances of conduct.⁴⁴

III. A Practitioner’s Checklist for Analyzing *Crimen Falsi* Convictions

Although *crimen falsi* convictions are not the only admissible convictions for impeaching a witness, they are the only *automatically* admissible convictions. They are therefore the practitioner’s first resort when looking to use a conviction for impeachment. This section offers a step-by-step guide for analyzing potential *crimen falsi* convictions.⁴⁵ Appendix 2 presents these steps as a flow chart.

⁴⁰ *Lee*, 48 M.J. at 759 (emphasis in original).

⁴¹ *Id.* (quoting *Hurst*, 951 F.2d at 1501) (internal quotation marks omitted).

⁴² *Id.*

⁴³ Military Rule of Evidence 609(a)(2), like its federal counterpart before the 2006 revision, previously mandated admission of a crime merely if it “involved dishonesty or false statement,” with no reference to the elements of the crime. See *supra* note 8.

⁴⁴ Although federal court opinions have wrestled with the interplay of Rules 608 and 609 more frequently than military courts, they have yet to entirely resolve the issue. See, e.g., *United States v. Osazuwa*, 564 F.3d 1169, 1173 (9th Cir. 2009) (considering whether the plain language of FRE 608 delegates any issues relating to convictions to FRE 609, or rather whether FRE 608 allows extrinsic evidence to be used to prove criminal convictions, and noting that in a survey of 300 federal district judges, opinions were nearly evenly divided on this issue). The Ninth Circuit in *Osazuwa* ultimately held that “evidence relating to a prior conviction is not admissible under Rule 608,” and that “evidence admissible under Rule 609 for impeachment purposes may not include collateral details of the crime of conviction.” *Id.* at 1177.

⁴⁵ See also ADVOCACY TRAINER, *supra* note 1, at D-3-1.

The threshold question for MRE 609(a)(2) admissibility is, is it a conviction? For purposes of MRE 609, a conviction exists when a sentence has been adjudged.⁴⁶ A conviction does not include non-judicial punishment.⁴⁷ A summary court-martial finding constitutes a conviction only if the accused was represented by counsel, or affirmatively waived representation by counsel.⁴⁸ And for trials not presided over by a military judge (such as a “straight” special court-martial), a conviction exists only when reviews under Articles 64 and 66 of the UCMJ are complete.⁴⁹

The second question for admissibility is whether the offense for which the witness was convicted requires “proof or admission of an act of dishonesty or false statement.”⁵⁰ Note that this determination is a federal question, regardless of whether the conviction was secured in federal or state court.⁵¹ The proponent of the evidence has the burden of demonstration.⁵² The proponent should first look to the elements of the crime as defined by the underlying statute. If the outcome is not obvious, the proponent should look to whether the government has to prove deceit or dishonesty to obtain the conviction. It may be helpful to ask the question posed earlier in this article: If the facts were removed as to whether the accused acted deceitfully, could he still have been convicted of the offense at issue?

By a plain reading of MRE 609, *crimen falsi* convictions should be automatically admitted unless a specific restriction in the rule applies. A conviction more than ten years old, for example, is not admissible unless the court determines, “in the interests of justice, that the probative value of the conviction . . . substantially outweighs its prejudicial effect.”⁵³ Convictions are not admissible that have been the subject of a “pardon, annulment, certificate of rehabilitation, or other equivalent procedure”⁵⁴ And, finally, juvenile adjudications are not admissible unless the military judge decides that admission is “necessary for a fair determination of the issue of guilt or innocence.”⁵⁵

⁴⁶ MCM, *supra* note 6, MIL. R. EVID. 609(f).

⁴⁷ United States v. Brown, 23 M.J. 149, 150 (C.M.A. 1987); ADVOCACY TRAINER, *supra* note 1, at D-3-3.

⁴⁸ ADVOCACY TRAINER, *supra* note 1, at D-3-3; *see also* United States v. Rogers, 17 M.J. 990, 992 (C.M.R. 1984).

⁴⁹ *See* UCMJ arts. 64, 66 (2008).

⁵⁰ FED. R. EVID. 609(a)(2).

⁵¹ WEINSTEIN, *supra* note 11, § 609.04(2)(a) (citing United States v. Cameron, 814 F.2d 403, 405 (7th Cir. 1987)).

⁵² *Id.* § 609.04(2)(a) (citing United States v. Papi, 560 F.2d 827, 845-848 (7th Cir. 1977)).

⁵³ MCM, *supra* note 6, MIL. R. EVID. 609(b).

⁵⁴ *Id.* MIL. R. EVID. 609(c).

⁵⁵ *Id.* MIL. R. EVID. 609(d).

Even for admissible *crimen falsi* convictions, military and federal courts limit what specific information about the conviction is admissible in court. Cross-examination of a witness is normally the preferred method for inquiring about a previous conviction.⁵⁶ This cross-examination, however, should be limited to ascertaining the number, date, and nature of each previous conviction.⁵⁷ Greater latitude in cross-examination may be granted if the witness tries to minimize his guilt regarding the prior conviction.⁵⁸ A conviction may also be proved by extrinsic evidence, such as a record of the conviction.⁵⁹ Finally, as a last resort, a prior conviction may be introduced by the testimony of a witness who was present for the announcement of the judgment.⁶⁰

If a conviction does not constitute *crimen falsi* under MRE 609(a)(2), the practitioner should next consider its admissibility under MRE 609(a)(1), subject to the balancing requirements of that rule.⁶¹ And even if no conviction is admissible, specific instances of conduct may be admissible under MRE 608(b).⁶²

IV. Conclusion

The practical effect of the revised MRE 609(a)(2) is to narrow the ability of courts to interpret the underlying facts of *crimen falsi* convictions. But since most UCMJ convictions also qualify for consideration under MRE 609(a)(1), courts still enjoy relatively wide discretion to weigh their admissibility. The recent revisions to FRE 609(a)(2) and MRE 609(a)(2) seem to be a positive step toward limiting the prejudicial effect of automatically admissible convictions, for both witnesses and the accused. Only time and experience will show whether this narrower

⁵⁶ Moody & Coacher, *supra* note 6, at 173. *But see* MCM, *supra* note 6, MIL. R. EVID. analysis, at A22-47 (2008) (“While the language of Rule 609(a) refers only to cross-examination, it would appear that the Rule does refer to direct examination as well.”).

⁵⁷ Moody & Coacher, *supra* note 6, at 173 (citing United States v. Rojas, 15 M.J. 902 (N.M.C.M.R. 1983)); *see also* MRE MANUAL, *supra* note 13, § 609.02(2)(a).

⁵⁸ Moody & Coacher, *supra* note 6, at 174 (citing United States v. Ledford, 1997 U.S. App. LEXIS 29167, at *10 (6th Cir. Tenn. 1997)).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ MCM, *supra* note 6, MIL. R. EVID. 609(a)(1). *See supra* note 20 (discussing the analogous Federal Rule).

⁶² MCM, *supra* note 6, MIL. R. EVID. 608(b) (2008). This rule may only be used, however, to inquire into the underlying conduct, not to prove up an otherwise inadmissible conviction or punishment. *See* United States v. Wilson, 12 M.J. 652, 654 (C.M.R. 1981) (“Evidence of a conviction by summary court-martial or punishment under Article 15 that is inadmissible for impeachment under MRE 609 cannot be elicited from a witness (including the accused) under MRE 608.”); *see also* United States v. Osazuwa, 564 F.3d 1169, 1174 (“We further recognize the unfairness that would result if evidence relating to a conviction is prohibited by Rule 609 but admitted through the ‘back door’ of Rule 608.”).

doorway is labeled clearly enough to guide the courts and practitioners that pass through it.

Appendix A

Crimen Falsi Offenses Under the UCMJ

CF 1: Refers to crimes that are well-established as *crimen falsi*, either because of widely-held judicial recognition or by the facial elements of the crime itself.

Y: The crime is well-established as *crimen falsi*.

N: The crime is not well-established as *crimen falsi*.

CF 2: Refers to all other crimes that are not well-established or facially recognizable as *crimen falsi*. For these crimes:

Y: Military and/or federal courts have previously admitted this crime or an analogous crime as *crimen falsi*.

N: Military and/or federal courts have specifically declined to admit this crime or an analogous crime as *crimen falsi*.

UNK: There is no known federal or military court ruling on *crimen falsi* admissibility of this crime.

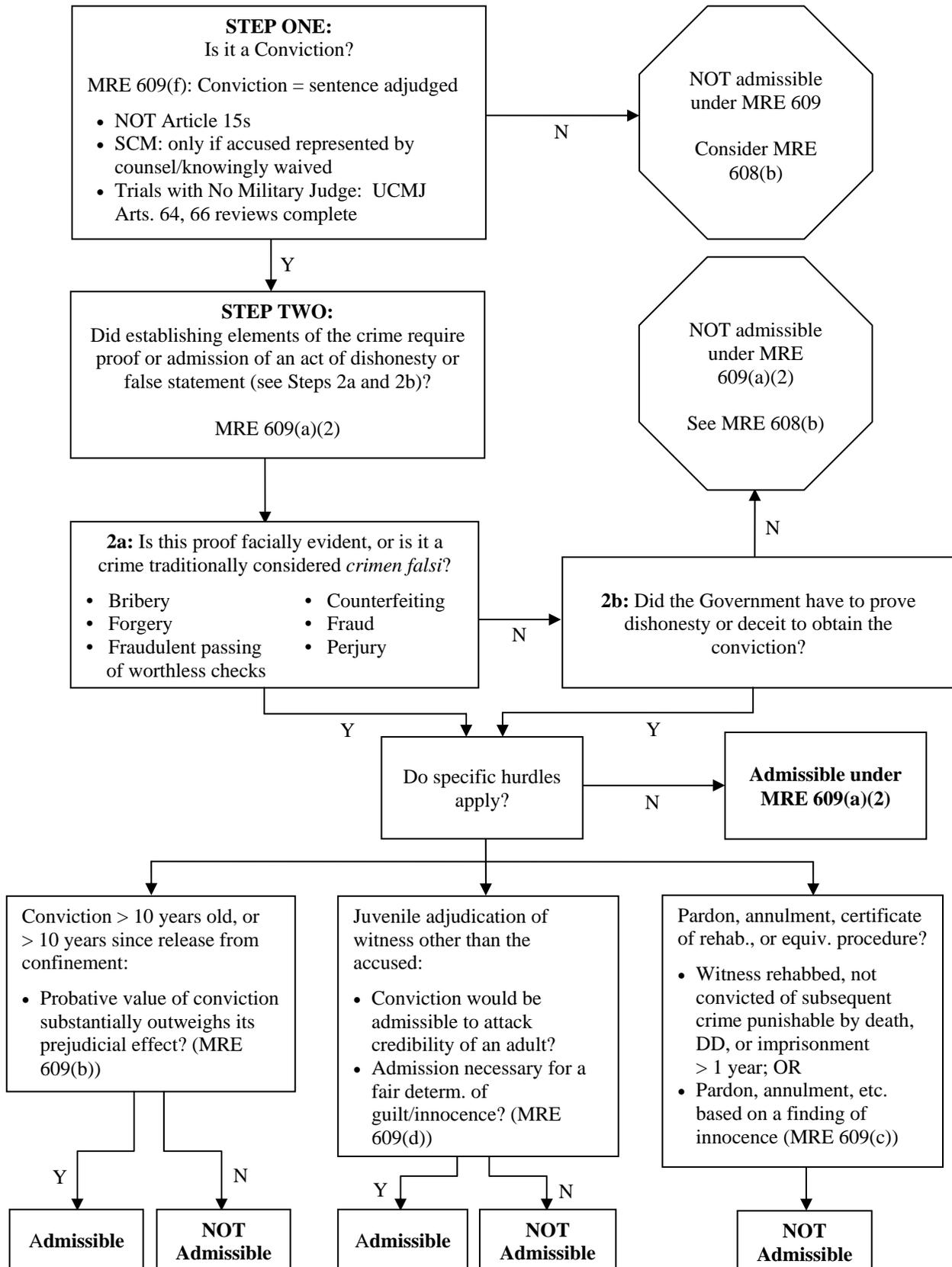
Art.	Description	CF 1	CF 2	Notes
78	Accessory after-the-fact	N	UNK	
79	Lesser included offenses	--	--	Not applicable; see underlying crime.
80	Attempts	--	--	See underlying crime.
81	Conspiracy	N	UNK	
82	Solicitation	N	UNK	
83	Fraudulent enlistment, appointment, or separation	Y	UNK	Requires knowingly false representation.
84	Effecting unlawful enlistment, appointment, or separation	N	UNK	Likely <i>crimen falsi</i> ; requires knowing misrepresentation
85	Desertion	N	UNK	Likely not <i>crimen falsi</i> .
86	Absence without leave	N	UNK	Likely not <i>crimen falsi</i> .
87	Missing movement	N	UNK	Likely not <i>crimen falsi</i> .
88	Contempt toward officials	N	UNK	Likely not <i>crimen falsi</i> .
89	Disrespect toward a superior commissioned officer	N	UNK	Likely not <i>crimen falsi</i> .
90	Assaulting or willfully disobeying a superior commissioned officer	N	UNK	Likely not <i>crimen falsi</i> .
91	Insubordinate conduct toward warrant officer, NCO, petty officer	N	UNK	Likely not <i>crimen falsi</i> .
92	Failure to obey order or regulation	N	UNK	Likely not <i>crimen falsi</i> .
93	Cruelty and maltreatment	N	UNK	Likely not <i>crimen falsi</i> .
94	Mutiny and sedition	N	UNK	Likely not <i>crimen falsi</i> .
95	Resistance, flight, breach of arrest, and escape	N	UNK	Likely not <i>crimen falsi</i> .
96	Releasing prisoner without proper authority	N	UNK	Likely not <i>crimen falsi</i> .
97	Unlawful detention	N	UNK	Likely not <i>crimen falsi</i> .
98	Noncompliance with procedural rules	N	UNK	Likely not <i>crimen falsi</i> .
99	Misbehavior before the enemy	N	UNK	Likely not <i>crimen falsi</i> .
100	Subordinate compelling surrender	N	UNK	Likely not <i>crimen falsi</i> .
101	Improper use of countersign	N	UNK	Likely not <i>crimen falsi</i> .
102	Forcing a safeguard	N	UNK	Likely not <i>crimen falsi</i> .
103	Captured or abandoned property	N	UNK	Likely not <i>crimen falsi</i> .
104	Aiding the enemy	N	UNK	Likely not <i>crimen falsi</i> .
105	Misconduct as a prisoner	N	UNK	Likely not <i>crimen falsi</i> .
106	Spies	N	UNK	Likely not <i>crimen falsi</i> .
106a	Espionage	N	UNK	Likely not <i>crimen falsi</i> .
107	False official statements	Y	Y	Elements require intent to deceive.
108	Sale, loss, damage, destruction, wrongful disposit. of mil. property	N	UNK	Likely not <i>crimen falsi</i> .
109	Waste, spoilage, destruction of non-	N	UNK	Likely not <i>crimen falsi</i> .

	military property			
110	Improper hazarding of vessel	N	UNK	Likely not <i>crimen falsi</i> .
111	Drunken or reckless operation of vehicle, aircraft, or vessel	N	UNK	Likely not <i>crimen falsi</i> .
112	Drunk on duty	N	UNK	Likely not <i>crimen falsi</i> .
112a	Wrongful use, possession, etc., of controlled substances	N	N	<i>See, e.g., U.S. v. Frazier</i> , 14 M.J. 773 (1982) (marijuana technically not within concept of <i>crimen falsi</i>).
113	Misbehavior of sentinel or lookout	N	UNK	Likely not <i>crimen falsi</i> .
114	Dueling	N	UNK	Likely not <i>crimen falsi</i> .
115	Malingering	N	UNK	Arguably <i>crimen falsi</i> if feigned illness to intentionally avoid duty.
116	Riot or breach of peace	N	UNK	Likely not <i>crimen falsi</i> .
117	Provoking speeches or gestures	N	UNK	Likely not <i>crimen falsi</i> .
118	Murder	N	UNK	Likely not <i>crimen falsi</i> .
119	Manslaughter	N	UNK	Likely not <i>crimen falsi</i> .
119a	Death or injury of an unborn child	N	UNK	Likely not <i>crimen falsi</i> .
120	Rape, sexual assault, other misconduct	N	N	<i>See, e.g., Christmas v. Sanders</i> , 759 F.2d 1984 (7th Cir. 1985) (upholding exclusion of rape); <i>Fouk v. Charrier</i> , 262 F.3d 687 (8th Cir. 2001) (upholding exclusion of rape, sodomy).
121	Larceny and wrongful appropriation	N	N	Federal courts divided, but most larcenies excluded. <i>See, e.g., United States v. Jefferson</i> , 23 M.J. 17 (A.F.C.M.R. 1986) (upholding exclusion of shoplifting).
122	Robbery	N	N	Multiple federal circuits exclude robbery.
123	Forgery	Y	Y	Requires intent to defraud.
123a	Making, drawing, or uttering without sufficient funds	Y	Y	Requires knowing intent to defraud. <i>See, e.g., U.S. v. Williams</i> , 2003 CCA LEXIS 141 (A.F.C.C.A. 2003).
124	Maiming	N	UNK	Likely not <i>crimen falsi</i> .
125	Sodomy	N	N	<i>See, e.g., Fouk v. Charrier</i> , 262 F.3d 687 (8th Cir. 2001) (upholding exclusion of rape, sodomy).
126	Arson	N	UNK	Likely not <i>crimen falsi</i> .
127	Extortion	N	UNK	Likely not <i>crimen falsi</i> .
128	Assault	N	N	<i>See, e.g., Carlsen v. Javurek</i> , 526 F.2d 202 (8th Cir. 1975) (upholding exclusion of assault and battery).
129	Burglary	N	N	Multiple federal circuits exclude burglary.
130	Housebreaking	N	UNK	Likely not <i>crimen falsi</i> .
131	Perjury	Y	Y	Requires willful falsehood.
132	Frauds against the United States	Y	UNK	Requires knowing false claim.
133	Conduct unbecoming an officer and a gentleman	N	UNK	Depends on elements of drafted offense.
134	General Article and following	N	UNK	Depends on elements of drafted offense.
134	Adultery	N	UNK	Likely not <i>crimen falsi</i> .
134	Assault with intent to commit specified crimes	N	UNK	Likely not <i>crimen falsi</i> .
134	Bigamy	N	UNK	Likely not <i>crimen falsi</i> .
134	Bribery and graft	Y	Y	<i>But see U.S. v. Lee</i> , 48 M.J. 756 (A. Ct. Crim. App. 1998)
134	Burning with intent to defraud	N	UNK	Likely not <i>crimen falsi</i> .
134	Worthless check by dishonorably failing to maintain funds.	N	N	Only knowingly uttered worthless checks are <i>crimen falsi</i> .
134	Child endangerment	N	UNK	Likely not <i>crimen falsi</i> .

134	Wrongful cohabitation	N	UNK	Likely not <i>crimen falsi</i> .
134	Correctional custody – offenses	N	UNK	Likely not <i>crimen falsi</i> .
134	Dishonorably failing to pay debt	N	UNK	Likely not <i>crimen falsi</i> .
134	Disloyal statements	N	UNK	Likely not <i>crimen falsi</i> .
134	Disorderly conduct	N	UNK	Likely not <i>crimen falsi</i> .
134	Drinking with prisoner, drunk prisoner	N	UNK	Likely not <i>crimen falsi</i> .
134	Drunkenness, incapacitated	N	UNK	Likely not <i>crimen falsi</i> .
134	False or unauthorized pass	N	UNK	<i>Crimen falsi</i> if involves dishonesty or false statement.
134	Obtaining serves by false pretenses	N	Y	<i>Crimen falsi</i> if involves dishonesty or false statement.
134	False swearing	Y	UNK	<i>Crimen falsi</i> if involves dishonesty or false statement.
134	Negligently discharging firearm	N	UNK	Likely not <i>crimen falsi</i> .
134	Willfully discharging firearm to endanger human life	N	UNK	Likely not <i>crimen falsi</i> .
134	Fleeing scene of accident	N	UNK	Likely not <i>crimen falsi</i> .
134	Fraternization	N	UNK	Likely not <i>crimen falsi</i> .
134	Gambling with subordinate	N	UNK	Likely not <i>crimen falsi</i> .
134	Negligent homicide	N	UNK	Likely not <i>crimen falsi</i> .
134	Impersonating an officer	N	UNK	<i>Crimen falsi</i> if involves dishonesty or false statement.
134	Indecent language	N	UNK	Likely not <i>crimen falsi</i> .
134	Jumping from vessel into water	N	UNK	Likely not <i>crimen falsi</i> .
134	Kidnapping	N	UNK	Likely not <i>crimen falsi</i> .
134	Opening, destroying mail	N	UNK	Likely not <i>crimen falsi</i> .
134	Obscene matters in the mail	N	UNK	Likely not <i>crimen falsi</i> .
134	Misprision of serious offense	N	UNK	<i>Crimen falsi</i> if involves dishonesty or false statement.
134	Obstructing justice	N	Y	<i>Crimen falsi</i> if involves dishonesty or false statement.
134	Wrongful interference with adverse admin proceeding	N	UNK	<i>Crimen falsi</i> if involves dishonesty or false statement.
134	Pandering and prostitution	N	UNK	Likely not <i>crimen falsi</i> .
134	Violation of parole	N	UNK	Likely not <i>crimen falsi</i> .
134	Subornation of perjury	Y	UNK	<i>Crimen falsi</i> .
134	Altering public record.	N	UNK	<i>Crimen falsi</i> if involves dishonesty or false statement.
134	Breaking medical quarantine	N	UNK	Likely not <i>crimen falsi</i> .
134	Reckless endangerment	N	UNK	Likely not <i>crimen falsi</i> .
134	Breaking restriction	N	UNK	Likely not <i>crimen falsi</i> .
134	Removal of property to prevent seizure	N	UNK	Likely not <i>crimen falsi</i> .
134	Self-injury without intent to avoid service	N	UNK	Likely not <i>crimen falsi</i> .
134	Offenses by sentinel	N	UNK	Likely not <i>crimen falsi</i> .
134	Soliciting another to commit offense	N	UNK	Likely not <i>crimen falsi</i> .
134	Receiving, etc. stolen property	N	UNK	Likely not <i>crimen falsi</i> .
134	Straggling	N	UNK	Likely not <i>crimen falsi</i> .
134	Wrongful refusal to testify	N	UNK	Likely not <i>crimen falsi</i> .
134	Threat or hoax	N	UNK	Likely not <i>crimen falsi</i> .
134	Communicating threat	N	UNK	Likely not <i>crimen falsi</i> .
134	Wrongful entry	N	UNK	Likely not <i>crimen falsi</i> .
134	Carrying concealed weapon	N	UNK	Likely not <i>crimen falsi</i> .
134	Wearing unauthorized badge, insignia, etc.	N	UNK	<i>Crimen falsi</i> if involves dishonesty or false statement.

Appendix B

Analyzing *Crimen Falsi* Convictions



The Case Review Committee: Purpose, Players, and Pitfalls

Major Toby N. Curto*

*Domestic violence is an offense against the institutional values of the Military Services of the United States of America. Commanders at every level have a duty to take appropriate steps to prevent domestic violence, protect victims, and hold those who commit it accountable.*¹

I. Introduction

Recent reports on domestic violence in the military paint a picture that does little to inspire national confidence in the men and women that serve our country. According to these reports, domestic violence in the military occurs with alarming frequency. For example, between 1992 and 1996, domestic violence occurred as much as five times more frequently in the military population than in civilian homes.² Between 2002 and 2004, there were 832 victims of domestic violence at Fort Bragg alone,³ and in Fiscal Year 2000, the Department of Defense (DoD) Family Advocacy Program substantiated more than 10,500 abuse cases across the DoD.⁴

These figures have not gone unnoticed by both military and civilian leadership. Due to the significant number of reported instances of domestic violence in the Department of Defense, Congress mandated the creation of a Domestic Violence Task Force in the Fiscal Year 2000 Defense Authorization Act.⁵ The Defense Authorization Act required the Secretary of Defense to establish this task force, comprised of twenty four military and non-military members, to formulate a comprehensive plan to deal with the ongoing issue of domestic violence.⁶ One of the areas that received particular attention from this committee and its subsequent reports was the Case Review Committee (CRC).⁷

Case Review Committees at most major installations review a significant number of cases each year. Judge advocates are required to participate in the CRC, so it is imperative that they understand the CRC process. The CRC is a unique organization due to its mission, purpose, and composition, and advising judge advocates must understand its subtle nuances and intricacies prior to participating as a member of the committee.

This article will focus on the judge advocate's role in advising the CRC from four perspectives. First, it will examine what the CRC is, why it exists, who participates in it, and how it is structured. Next, the article will examine pre-meeting requirements, focusing on the documents necessary to properly convene and implement the CRC. Thirdly, the article will focus on the meetings of the committee and how judge advocates must be prepared to advise on issues such as presenting evidence, arriving at findings, and reviewing prior committee decisions. These three sections will also highlight helpful tips and potential areas of concern to provide practical guidance on commonly encountered issues. Finally, the article will briefly review the proposed changes recommended by the DoD task force and how they may impact the future of the CRC. The goal of this article is to provide judge advocates the tools necessary to assist the CRC in fulfilling its mission.

II. Overview of the Case Review Committee

To fully understand the CRC, it is important to review its creation, implementation, chain of command, and mission. Understanding what the CRC is required to do, who the key players are, and how it is structured will not only help keep the mission of this committee in focus, but will also assist judge advocates in their advisory role.

A. Purpose and History

Primary guidance on the CRC is found in Army Regulation (AR) 608-18.⁸ This regulation defines the CRC as "a multidisciplinary team appointed on orders by the installation commander and supervised by the [Military

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¹ Memorandum from Deputy Sec'y of Def., to Secretaries of the Military Dep'ts, subject: Domestic Violence (19 Nov. 2001) [hereinafter Domestic Violence Memo].

² Simeon Stamm, *Intimate Partner Violence in the Military: Securing Our Country, Starting With the Home*, 47 FAM. CT. REV. 321 (2009).

³ Karen Houppert, *Base Crimes*, MOTHER JONES, July/Aug. 2005, <http://www.motherjones.com/politics/2005/07/base-crimes>.

⁴ Domestic Violence Memo, *supra* note 1 (including both physical and sexual assaults).

⁵ Press Release, U.S. Dep't of Def., Defense Task Force on Domestic Violence Releases Annual Report and Strategic Plan (Mar. 9, 2001), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=2851>.

⁶ Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, 113 Stat. 1212.

⁷ Nat'l Ctr. on Domestic & Sexual Violence, *Defense Task Force on Domestic Violence Calls for Culture Shift in the Military*, Apr. 29, 2003, available at http://www.ncdsv.org/ncd_newsspeak.html.

⁸ See generally U.S. DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM para. 2-3(b) (30 Oct. 2007) [hereinafter AR 608-18] (defining the CRC and providing the foundation for numerous additional requirements pertaining to the CRC throughout the remainder of the regulation).

Treatment Facility] Commander.”⁹ The committee exists to “coordinate medical, legal, law enforcement, and social work assessment, identification, command intervention, and investigation and treatment functions from the initial report of spouse or child abuse to case closure.”¹⁰ The CRC operates under the oversight of the Army Family Advocacy Program (FAP) whose stated purpose is similar to the CRC’s: “to prevent spouse and child abuse, to encourage the reporting of all instances of such abuse, to ensure the prompt assessment and investigation of all abuse cases, to protect victims of abuse, and to treat all Family members affected by or involved in abuse.”¹¹ The CRC and FAP are command programs focused on the preservation, safety, stability, and promotion of the family.¹² Their purpose is to promote and encourage stable and productive families in the Army.¹³

The FAP was originally conceived of as the Army Child Advocacy Program in 1975.¹⁴ This program was implemented following a 1979 General Accounting Office study of domestic violence issues in the military.¹⁵ As a result of the study, Department of Defense (DoD) Directive 6400.1, Family Advocacy Program, was drafted in 1981, mandating the creation of programs to address the prevention of domestic violence and the treatment of victims of spouse and child abuse.¹⁶ The directive defines the Family Advocacy Program as “[a] program designed to address prevention, identification, evaluation, treatment, rehabilitation, follow-up, and reporting of family violence,”¹⁷ and specifically required the development of guidelines for case management.¹⁸ Enclosure 1 of the directive defines the CRC similarly to AR 608-18 and includes the language “at the installation level.”¹⁹ The DoD also published a manual on the Family Advocacy Program in

August of 1992²⁰ that “prescribes uniform standards for all installation Family Advocacy Programs (FAPs) and provides installation FAP Officers (FAPOs) with an instrument for executing their programs.”²¹ This manual required each of the military services to establish programs addressing the reporting, investigation, prevention and treatment of instances of domestic abuse.²² The DoD Directive, DoD Manual, and Army Regulation provide the guidance for implementing and running the CRC.

B. Command Structure and Personnel

The CRC is an installation program, and garrison commanders have primary responsibility for overseeing the FAP and appointing members to the CRC.²³ The garrison commander is also responsible for appointing a Family Advocacy Program Manager (FAPM), who oversees the FAP and works under the direction of the Army Community Services director.²⁴ The commander of the garrison military treatment facility (MTF) supervises the CRC.²⁵ Unit commanders are required to report instances of suspected child or spouse abuse, ensure their Soldiers participate in FAP programs and assessments, and attend CRC case presentations pertaining to Soldiers in their command.²⁶

The CRC is composed of the Chief of Social Work Services, who serves as the chairperson, a physician, the installation chaplain, a U.S. Army Criminal Investigation Command Division (CID) representative, the Army Substance Abuse Program (ASAP) Clinical Director, the Provost Marshal, a judge advocate, the FAPM, and the case manager.²⁷ These individuals meet regularly to review cases of domestic violence and recommend treatment and prevention programs. In light of the requirement for judge advocate involvement and the unique mission of the CRC, the specific duties of the judge advocate tasked with advising this committee are discussed below.

III. The Role of Judge Advocates

Judge advocates play a key role in the administration of the CRC. At the highest levels, The Judge Advocate General is required to advise on all legal issues involved in

⁹ *Id.* para. 2-3(b)(1).

¹⁰ *Id.*

¹¹ *Id.* para. 1-6.

¹² U.S. DEP’T OF DEF., DIR. 6400.1, FAMILY ADVOCACY PROGRAM para. E1.1.4 (23 Aug. 2004) [hereinafter DODD 6400.1].

¹³ AR 608-18, *supra* note 8, para. 3-19(b) (“The CRC is an advisory team that can make recommendations to commanders, supervisors, and courts regarding administrative and disciplinary actions for child/spouse abuse offenses. The purposes of the CRC are to identify whether someone has been the victim of abuse, determine if the victim is at immediate risk of further trauma, and coordinate the necessary support services to protect the victim and ameliorate the situation.”).

¹⁴ Lieutenant Colonel Alfred F. Arguilla, *Crime in the Home*, ARMY LAW., Apr. 1988, at 3, 3.

¹⁵ *Id.* at 3 n.7.

¹⁶ *Id.*

¹⁷ DODD 6400.1, *supra* note 12, para. E1.1.4.

¹⁸ *Id.* para. 5.2.14.

¹⁹ *Id.* para. E1.1.1.

²⁰ U.S. DEP’T OF DEF., MAN. 6400.1-M, FAMILY ADVOCACY PROGRAM STANDARDS AND SELF-ASSESSMENT TOOL (Aug. 1992) [hereinafter DOD 6400.1-M].

²¹ *Id.* at foreword.

²² *Id.* para. II.1.1.

²³ AR 608-18, *supra* note 8, para. 1-8(a).

²⁴ *Id.* para. 1-8(a)(2), (d)(1).

²⁵ *Id.* para. 1-8(f)(1).

²⁶ *Id.* para. 1-8(b)(4)–(6).

²⁷ *Id.* para. 2-3(b).

the FAP, train and educate installation judge advocate officers on the legal issues involved in spouse and child abuse cases, and provide staff assistance in the formulation of FAP policy.²⁸ At the installation level, the Staff Judge Advocate (SJA) must provide a representative to the CRC and advise the CRC on all applicable rules and regulations.²⁹ Often this requirement is satisfied by the SJA's appointment of a representative to attend CRC meetings, usually an attorney assigned to the Administrative and Civil Law section of the legal office. The duties of SJAs or their representatives, are clearly defined in AR 608-18.³⁰ These duties include advising commanders and the CRC on applicable laws and regulations affecting current abuse cases, coordinating with federal, state, local, and foreign authorities on criminal prosecutions, participating in the drafting of installation and local memoranda of agreement, and advising the commander and CRC on mandatory reporting requirements.³¹ All personnel involved with the CRC bear responsibility for ensuring compliance with the regulatory requirements.³² Judge advocates will often be consulted on issues involving the CRC and must be well-versed in the regulations governing this committee.

A. Convening the Committee

Several documents must be drafted and reviewed before the CRC meets. These documents, which include appointment orders and memoranda of agreement (MOA), ensure that the committee is established and conducted properly, and provide proper accountability, continuity and efficiency.

1. Appointment Orders

Members of the CRC must be appointed by name on written orders to serve for a specified period of time, usually one year.³³ The CRC has a limited membership, and is not a public meeting.³⁴ Appointment orders are important for two reasons. First, the CRC, as stated above, will convene often to hear cases. The more regular the membership, the more efficient the committee will be in discharging its responsibilities.

The second reason stems from the requirement to conduct training and periodic quality reviews.³⁵ This requirement will be explored more fully below, but the intent is for members to achieve proficiency in their duties and enable the work of the committee to be reviewed and critiqued. This cannot be accomplished if the membership is not fixed. The regulation allows the garrison commander to appoint members and alternates, which provides a workable solution to the persistent problem of permanent members missing meetings due to leave, temporary duty, or other mission requirements.

2. Memoranda of Agreement

Memoranda of Agreement (MOA) are important in the administration of the CRC. Memoranda of Agreement between Army installations and the local community addressing domestic violence issues are required.³⁶ Army Regulation 608-18, appendix E, provides two suggested MOA formats to assist in drafting these agreements. The regulation specifically requires MOAs in two specific areas: within the local command and with local community agencies. An MOA is required within the local command to ensure coordination "between military and civilian agencies involved in the FAP to facilitate collaboration . . . and . . . delineate local policies, responsibilities, and functions according to [AR 608-18]."³⁷

Additionally, the regulation requires an MOA between Army installations and local community agencies to ensure coordination in addressing domestic violence issues.³⁸ This requirement applies to all installations, whether located within the United States or in a foreign country.³⁹ The majority of military installations adjoin civilian communities, and allegations of domestic violence that arise from conduct that occurred off-post requires significant coordination between the Army and civilian authorities. Army Regulation 608-18 defines the optimal relationship between these entities as a "cooperative approach," requiring a "relationship with local communities in identifying, reporting, and investigating child and spouse abuse cases; in protecting abused victims from further abuse in both emergency and nonemergency situations; and in providing services and treatment to Families in which child abuse has occurred."⁴⁰

²⁸ *Id.* para. 1-7(f).

²⁹ *Id.* para. 1-8(l)(1).

³⁰ *Id.* para. 1-8(l).

³¹ *Id.*

³² *Id.* paras. 2-5(d), 2-10(d).

³³ *Id.* para. 2-3(b)(3).

³⁴ *Id.*

³⁵ *Id.* paras. 2-5(d), 2-10(d).

³⁶ *Id.* para. 2-12.

³⁷ *Id.* para. 2-15.

³⁸ *Id.* para. 2-12(a).

³⁹ *Id.* para. 2-12(b); *see generally* U.S. DEP'T OF ARMY, REG. 550-51, FOREIGN COUNTRIES AND NATIONALS INTERNATIONAL AGREEMENTS (2 May 2008) (detailing the specific requirements that must be satisfied in negotiating and entering into Memoranda of Agreement with foreign governments).

⁴⁰ AR 608-18, *supra* note 8, para. 2-11.

The MOA must focus on two key areas: personnel and duties. Not all parties involved in domestic violence cases are required to sign the MOA, but their duties and responsibilities should be specifically delineated.⁴¹ The MOA must address the common issues that arise when dealing with these cases.⁴² These matters include the authority of the installation commander to maintain good order and discipline on the installation, the legal basis for the exercise of civilian authority on the installation, the extent to which information will be shared between the parties to the MOA, delineation of responsibility for investigating and assessing child and spouse abuse cases, emergency and non-emergency response duties, services and treatment of families, and use of local shelters.⁴³

The significance of the MOA is clear. As domestic violence occurs, it must be identified and brought before the CRC, which requires significant coordination between the involved agencies. The recommended treatment plan may require the use of civilian facilities and programs, especially at smaller installations that lack the resources necessary to implement the appropriate treatment plans. In those cases, the governing MOA should address the “agencies primarily responsible for providing services and treatment to Families in which child and spouse abuse has occurred.”⁴⁴

Additionally, when domestic violence occurs off-post, the Soldier may be subjected to interviews or questioning by civilian agencies, and the evidence collected may be retained by the local authorities. The MOA can assist in defining the duties and responsibilities of the parties and outlining the collection and transfer of relevant evidence to the proper channels to ensure efficient and meaningful CRC review.

Judge advocate involvement is required in the MOA drafting, review, and updating process.⁴⁵ The installation SJA is required to review all MOA and other agreements to ensure their legal compliance.⁴⁶ The FAPM is required to conduct an annual review of all applicable MOA to ensure compliance with AR 608-18, identify procedures that do not comply with the regulation, and make recommendations to the installation commander regarding changes and the correction of deficiencies.⁴⁷ The advising judge advocate

should assist the FAPM in conducting this review. Finally, new or modified MOA require a legal review prior to implementation.⁴⁸

Advising judge advocates must ensure the necessary documentation is drafted and reviewed. However, their input does not end there. The meetings of the committee, presentation of evidence, findings determinations, and proposed treatment plans present additional issues and concerns.

B. Conducting the Hearing

Case Review Committee hearings require extensive judge advocate involvement, because they are the most complex part of the process. Allegations of domestic violence are evaluated using a two-part procedure: investigating available evidence to determine whether a particular allegation can be substantiated and assessing the best way to protect the victim and properly treat and rehabilitate the offender.⁴⁹ Evidence is gathered by identifying witnesses, interviewing available witnesses, and collecting physical evidence.⁵⁰ All evidence must be gathered lawfully, to ensure the process is fair and equitable.⁵¹ Case presentation may generate specific questions regarding the type of evidence gathered, the legality of the evidence, the weight of the evidence, and proper findings and treatment recommendations. Judge advocates must be prepared for these questions.

The advising judge advocate’s best means to address these questions is to conduct training for the members of the committee. Annual training, coordinated by the FAPM, is required for all staff officers and tenant organizations.⁵² This training must focus on the proper procedures used to identify and respond to reports of domestic abuse, and the complexities and difficulties likely to be encountered through the duration of these cases.⁵³ Judge advocates should coordinate with the FAPM to provide instruction during this training, which provides judge advocates the opportunity to instruct on legal issues, such as rights warning requirements, access to medical reports, and findings determinations. Leaning forward on this key requirement will highlight deficiencies, answer questions, and prepare committee members for their duties.

⁴¹ See generally *id.* para. 2-13 (describing the following as key military personnel to be addressed in the MOA: Installation or Army community commander; DCA; ACS director; MTF commander; Chief, SWS; FAPM; CRC; RPOC; PM; USACIDC; SJA; Chaplain; and FAC. Key civilian personnel include: Chief, CPS; county or district attorney; presiding judge of family or juvenile court; and other agencies as appropriate).

⁴² *Id.* para. 2-14.

⁴³ *Id.*

⁴⁴ *Id.* para. 2-14(g).

⁴⁵ *Id.* para. 1-8(l)(6), (7).

⁴⁶ *Id.* para. 2-12(c).

⁴⁷ *Id.* para. 2-16.

⁴⁸ *Id.*

⁴⁹ *Id.* para. 3-8(a).

⁵⁰ *Id.*

⁵¹ *Id.* para. 3-9(a), (c).

⁵² *Id.* para. 2-10(d).

⁵³ *Id.*

This training helps achieve several key objectives. First, it helps ensure the evidence presented to the CRC is gathered “by every lawful means available.”⁵⁴ Secondly, it enables the FAP and unit commander to have the best and most reliable evidence available to ensure the program goals of identification, treatment, and prevention are met. Finally, it assists in making this process a cooperative effort “by law enforcement, medical and social work personnel in responding to all spouse and child abuse reports.”⁵⁵ The proper gathering of evidence at the onset of a domestic violence allegation will enable all parties to effectively fulfill their duties and responsibilities, regardless of whether the goal is treatment, prevention, criminal prosecution, or all of the above.

1. Statements

Pursuant to basic principles of constitutional law and criminal procedure, all statements taken from a Soldier suspected of committing a criminal offense must be preceded by a rights advisement under Article 31, UCMJ.⁵⁶ When the incident of alleged abuse is reported through the chain of command, or when the alleged perpetrator is interviewed by CID or the military police as part of a criminal investigation, the rights advisement requirement should be satisfied, and any issues that arise should be answered by the judge advocate assigned to advise those organizations. However, advising judge advocates often must address incriminating statements made by Soldiers outside the context of a criminal investigation, such as those voluntarily made to a social worker when seeking treatment or counseling. Army Regulation 608-18 extensively discusses rights warnings in chapter 3 and appendix H.

Individuals who perpetrate domestic violence crimes are encouraged to seek treatment or assistance by voluntarily disclosing their abuse problems to an FAP counselor.⁵⁷ A FAP case manager or social worker who interviews a Soldier for the purpose of diagnosis and treatment is not required to read the Soldier his rights under Article 31.⁵⁸ Under these

⁵⁴ *Id.* para. 3-9(a).

⁵⁵ *Id.* para. 3-10.

⁵⁶ *Id.* para 3-14(a)(1); *see also* U.S. CONST. amend. V; UCMJ art. 31 (2008).

⁵⁷ AR 608-18, *supra* note 8, para. 3-25 (describing this process as “Self-Referral”).

⁵⁸ *Id.* at app. H-2.

FAP case managers/social workers generally are not required to provide UCMJ, Art. 31 warnings when interviewing a Soldier for the purpose of diagnosis and treatment. If on the other hand, an FAP case manager/social worker questions a Soldier for the purpose of gathering incriminating statements to advance a criminal investigation (in other words, when there is not a medical/clinical reason to ask the question), then the counselor is not acting for the purpose of diagnosis and treatment and should

circumstances, case managers or social workers are not law enforcement officials gathering information for an investigation.⁵⁹ “Their primary concerns are protecting the victim from further harm, gathering information concerning the psychosocial and Family dynamics in order to develop effective treatment plans, and providing the necessary support services.”⁶⁰ However, this does not relieve social workers of their duty to report offenses, nor does it preclude taking action against a Soldier based on his admission.⁶¹

In light of this reporting requirement, the regulation provides scenarios that may require a rights advisement, instructs social workers to read rights to Soldiers, and encourages them to seek advice from law enforcement personnel or their judge advocate when they have questions. When a Soldier self-refers or visits a social worker or FAP counselor and discloses that he may have committed an offense, the social worker should stop the interview and contact CID or the MP for advice pertaining to rights advisement.⁶² Additionally, when a Soldier is the subject of a domestic violence investigation, social workers should not conduct an interview with the Soldier without first contacting law enforcement personnel.⁶³ When social workers are unsure whether a rights warning is needed, they should obtain legal advice prior to conducting the interview.⁶⁴ The regulation specifically highlights the need for legal advice concerning potential privileged communications.⁶⁵

However, though the regulation clearly encourages the use of rights advisements, it is silent regarding the admissibility of a statement made by a Soldier without a rights warning under Article 31. The regulation fails to address whether these statements can be used to substantiate

therefore provide the suspect with UCMJ, Art. 31 warnings prior to questioning the Soldier.

Id.

⁵⁹ *Id.* para. 3-18(e).

⁶⁰ *Id.*

⁶¹ *Id.* para 3-25(b); *see also id.* para. 3-6 (requiring notification of unit commanders in all abuse cases).

⁶² *Id.* para. 3-18(e) (“When a Soldier walk-in or self-referral discloses to a social worker or medical personnel that he or she physically or sexually abused a Family member, the social worker should at this point stop the interview and contact the MP or USACIDC for advice pertaining to proper rights advisement.”).

⁶³ *Id.*

⁶⁴ *Id.* at app. H-3.

⁶⁵ Particular attention must also be paid to those circumstances that may invoke privileged communications. Appendix G of AR 608-18 addresses privileged communications. While an extensive review of privileged communications is outside the scope of this article, one particular issue pertaining to privileges that may arise concerns chaplains. Chaplains are required to sit on CRCs and care must be exercised in identifying potential conflicts, such as a CRC hearing where they have advised a Soldier or obtained privileged information from a Soldier whose case is being reviewed.

a case against a Soldier. However, this is not surprising considering the regulation was not drafted with a view toward criminal prosecutions. Ultimately, because the committee is administrative in nature, incriminating statements made to a social worker without a proper rights advisement are likely admissible at CRC hearings to substantiate allegations of domestic abuse. Judge advocates must be aware that this particular issue is not addressed by the regulation and should strive to minimize its occurrence by stressing the importance of rights advisements and encouraging social workers to seek legal advice whenever advisement questions arise.

2. Medical Records

Army Regulation 608-18 requires MTF commanders to ensure a physician or other health care professional examines all alleged victims of domestic abuse as soon as possible after receiving an initial report of abuse.⁶⁶ If physical injury is alleged, medical reports can provide the necessary evidence to support the claim. In many cases, medical reports, along with statements by the involved parties or witnesses, comprise the evidence that is presented to the CRC during a hearing. In some cases, obtaining and releasing medical reports may present challenges, especially when dealing with civilian organizations. Army Regulation 608-18 addresses the use of medical reports, including how to access, share, and release them.

Subject to certain legal and regulatory restrictions, social workers, physicians, dentists, nurses, and civilian and military law enforcement personnel may share investigative information and records on domestic abuse or violence.⁶⁷ Additionally, a CRC case file must be maintained for all individuals treated or evaluated for suspected child or spouse abuse.⁶⁸ This file must contain information and documents relating to diagnosis, assessment, and treatment of abuse.⁶⁹ The case file ensures that the committee has access to all known facts and evidence, including evidence of medical treatment and diagnosis, when preparing its findings and diagnosis.⁷⁰

However, although the CRC has access to the medical records of victims of domestic abuse, those records are sensitive and must be used with great care to ensure only relevant information is disclosed for the limited purpose of

⁶⁶ *Id.* para. 3-16(a).

⁶⁷ *Id.* para. 6-2.

⁶⁸ *Id.* para. 6-3(a).

⁶⁹ *Id.* para. 6-3(b).

⁷⁰ *Id.* para. 6-2 (“To the extent permitted by applicable law and regulation, social workers, physicians, dentists, nurses, and law enforcement personnel, both civilian and military, may share investigative leads, information, and records to ensure that all facts are fully developed given the total resources and means available.”).

performing official duties.⁷¹ When releasing this information to commanders and supervisors in the course of their official duties, all third party information must be redacted from the copy prior to release.⁷² There is similar guidance in the regulation regarding the release of these records within the DoD, outside the DoD, pursuant to a court order, or when the records are classified as special category records.⁷³

Advising judge advocates must ensure that FAP personnel are aware of the sensitivity of medical records. Review of a case by the CRC is not a blanket release of all medical information pertaining to an individual. Judge advocates are specifically required to provide advice when necessary to resolve any issues that arise regarding access to or disclosure of records.⁷⁴

3. Findings

Every report of spouse or child abuse must be promptly and completely investigated to determine whether an allegation is substantiated or unsubstantiated.⁷⁵ There are three possible CRC findings—substantiated, unsubstantiated, and suspected—and a quorum (two-thirds) of the CRC members on orders must be present to vote at each CRC meeting; a majority of the members must vote to substantiate a case.⁷⁶ The complex nature of the cases, the seriousness of the subject matter, and the need to balance Soldier rights and family member protection make case substantiation a contentious aspect of the CRC process. Because case substantiation has significant ramifications and consequences to Soldiers,⁷⁷ the decision must not be made lightly, and proper training and understanding by those involved can ensure that cases are decided fairly and properly. Training by judge advocates on the nature of evidence, burden of proof, and possible decision alternatives will ensure effective operation of the committee.

⁷¹ *Id.*

⁷² *Id.* para. 6-4(c).

⁷³ *See id.* paras. 6-5 to -8.

⁷⁴ *Id.* para. 6-9. All judge advocates should review the following: The Privacy Act, 5 U.S.C. § 552a, *as amended* (1974); U.S. DEP’T OF ARMY, REG. 340-21, THE ARMY PRIVACY PROGRAM (5 July 1985); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 104 Stat. 1996.

⁷⁵ AR 608-18, *supra* note 8, para. 3-19(a).

⁷⁶ *Id.* para. 2-4(r).

⁷⁷ *Id.* para. 4-4(a) (including courts-martial, non-judicial punishment, letters of reprimand, administrative discharge, bars to reenlistment, termination of government housing, and bars from military installations as possible consequences); *see also id.* ch. 5 (requiring all substantiated cases of domestic violence to be reported to the Army Central Registry and be maintained for twenty-five years).

A case should be substantiated if a preponderance of the information available indicates that abuse occurred.⁷⁸ A preponderance of the evidence, according to the DoD Directive, is met when the information that supports the occurrence of abuse is of greater weight or is more convincing than the information indicating that abuse did not occur.⁷⁹ This definition, however, does little to help resolve the question of when evidence amounts to a greater weight than other evidence. Comparing this definition to the one contained in AR 15-6 provides some insight. In AR 15-6, preponderance of the evidence is defined as “evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion.”⁸⁰ Army Regulation 15-6 offers further guidance by explaining that this decision is not based solely on the amount of evidence provided or the number of witnesses or exhibits presented, but rather on the quality of the evidence, including “the witness’s demeanor, opportunity for knowledge, information possessed, ability to recall and relate events, and other indications of veracity.”⁸¹ Although reasonable minds can disagree over whether evidence substantiating an allegation outweighs evidence to the contrary, arming the members of the CRC with the understanding of how to arrive at that determination is a crucial aspect of the judge advocate’s role in the process.

An unsubstantiated case is one in which the evidence is found insufficient to support the allegation of domestic abuse, and, most importantly for the Soldier, in which the family of the alleged victim is determined to need no services, counseling, or treatment.⁸² This determination closes the case, and the CRC chairperson must notify the commander that the case has been closed.⁸³

The third possible determination is suspected,⁸⁴ which is also referred to as unsubstantiated-unresolved in AR 608-18.⁸⁵ This determination should be made when the case is still under investigation.⁸⁶ A case must be presented to the CRC within thirty days of the initial report to Social Work

Services,⁸⁷ but this is often not sufficient time for a case to be fully investigated. To ensure cases are brought to resolution in a timely manner, the Army regulation and DoD directive allow for up to twelve weeks of further investigation before a case is finally decided by the CRC.⁸⁸ These circumstances necessitate a finding of suspected (or unsubstantiated-unresolved). Army Regulation 608-18 places additional administrative requirements on these types of cases. It requires the minutes of the meeting to include a brief summary of the facts, reasons for the delay, and subsequent updates at each CRC meeting until the case is ready for final determination.⁸⁹

A substantiated allegation requires assessment of the severity of the abuse to determine a treatment plan and provide interim protection to the family if necessary.⁹⁰ The severity of the abuse is determined by analyzing the context and type of abuse: child physical maltreatment, child sexual maltreatment, child neglect, child emotional maltreatment, and spouse/partner maltreatment.⁹¹ Army Regulation 608-18 provides an incident severity index. This index is a helpful tool for classifying differing levels of severity, and it should be provided to all members of the CRC and be available throughout the course of their meeting. The index is not, however, comprehensive or determinative, and it is unlikely to apply perfectly to any particular case.

4. Treatment Plans and Options

Finally, if a case is substantiated, the CRC must determine the type and extent of treatment and prevention training that will be implemented. Some cases of domestic abuse are so severe that disciplinary action must be taken immediately. However, in many situations, treatment, education, and training are recommended to prevent further instances of abuse. These treatment programs are generally described as Level-One and Level-Two Intervention Services.⁹² The treatment programs are diverse and include programs such as parent education and support programs, new parent support programs, general counseling, anger management counseling, and financial management classes.⁹³ The level of treatment and services required in each case will vary by the nature and severity of the incident. The FAPM is required to coordinate prevention and treatment programs and address the available programs

⁷⁸ DODD 6400.1, *supra* note 12, para. E1.1.2.1.

⁷⁹ *Id.*

⁸⁰ U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS para. 3-10(a) (2 Oct. 2006) [hereinafter AR 15-6].

⁸¹ *Id.*

⁸² DODD 6400.1, *supra* note 12, para. E1.1.2.3; *see also* AR 608-18, *supra* note 8, para. 2-4(r) (defining this as unsubstantiated-did not occur).

⁸³ AR 608-18, *supra* note 8, para. 3-26(a)(1)(c). A sample memorandum from the CRC chairperson is included at Figure 3-6 of AR 608-18.

⁸⁴ DODD 6400.1, *supra* note 12, para. E1.1.2.2 (defining a “suspected” case as one “pending further investigation”).

⁸⁵ AR 608-18, *supra* note 8, para. 2-4(r) (explaining that every case should receive “a case determination of substantiated, unsubstantiated-unresolved, or unsubstantiated-did not occur”).

⁸⁶ DODD 6400.1, *supra* note 12, para. E1.1.2.2.

⁸⁷ AR 608-18, *supra* note 8, para. 2-4(t).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* para. 3-8(a).

⁹¹ *Id.* at app. C.

⁹² *See* DoD 6400.1-M, *supra* note 20, paras. C4.7, C4.8, C5.7, C5.8; *see also* AR 608-18, *supra* note 8, para. 3-2.

⁹³ AR 608-18, *supra* note 8, para. 3-2.

in the installation MOA.⁹⁴ Additionally, FAPMs are required to inform the military community of available services “to promote community support and encourage early referral.”⁹⁵ This requirement includes mandatory briefings to commanders and senior enlisted advisers and annual unit briefings by FAP personnel for all Soldiers.⁹⁶ Finally, all CRC members must receive training at least annually on these programs and services to ensure awareness of the options they can recommend.⁹⁷ Judge advocates must be proactive in reviewing documents, ensuring FAPMs are aware of their duties under the regulation, and training CRC members on relevant treatment programs and options.

C. Post Committee Matters

The responsibilities of the CRC do not end after a case is reviewed. The regulation lists several post-hearing responsibilities essential to the management of the committee.⁹⁸ Although, the responsibilities are too numerous to list in detail here, judge advocates must be aware of the continuing duties of the committee they advise. One issue that may arise is the review of a committee’s decision on an allegation of abuse. A Soldier, family member, commander, or the CRC itself may request reconsideration of the committee’s determination.⁹⁹ This review must be requested in writing and must be based on one of the following: (1) an assertion that the CRC did not have all relevant information when it made its finding¹⁰⁰ or (2) a belief that the CRC did not follow the published Department of the Army policy contained in the regulation.¹⁰¹ As is evident from the second basis for challenge, governing the CRC in accordance with the published guidance and regulations is of utmost importance. Though the rehearing of a case is conducted in the same manner as the initial presentation, important additional requirements must also be satisfied. These additional requirements are found in AR 608-18, paragraph 2-6, and should be reviewed by advising judge advocates.

IV. The Way Ahead

The Task Force on Domestic Violence, commissioned in FY 2000, addressed many concerns surrounding the number of domestic violence cases occurring in the military.

⁹⁴ *Id.*

⁹⁵ *Id.* para. 3-2(a).

⁹⁶ *Id.* paras. 3-2(b)(6), (c).

⁹⁷ *Id.* para. 2-10(d).

⁹⁸ *See id.* paras. 2-4 to -5.

⁹⁹ *Id.* para. 2-6(a).

¹⁰⁰ *Id.* para. 2-6(a)(1).

¹⁰¹ *Id.* para. 2-6(a)(2).

The overall goal of the task force was “to provide the Secretary of Defense with recommendations that will be useful in enhancing existing programs for preventing and responding to domestic violence, and, where appropriate, to suggest new approaches to addressing the issue.”¹⁰² This task force submitted three annual reports and made over two hundred specific recommendations.¹⁰³ The task force specifically discussed the CRC and made several recommendations.¹⁰⁴

The task force expressed concern with the efficiency and purpose of the CRC.¹⁰⁵ To alleviate these concerns, the task force recommended the creation of a Domestic Violence Assessment and Intervention Team (DVAIT).¹⁰⁶ The DVAIT would be a multidisciplinary team managed by the FAP, similar to the CRC.¹⁰⁷ However, unlike the CRC, the DVAIT would not substantiate allegations but, rather, would focus on assisting victim advocates with safety plans for victims, determining offenders’ suitability for intervention, and devising intervention plans for offenders, when feasible.¹⁰⁸ The DVAIT would concentrate on the needs of victims in areas such as medical aid, safe housing, financial assistance, child care, legal consultation, and support services.¹⁰⁹ Creating the DVAIT would properly place attention on the victim, and leave commanders and law enforcement personnel to assess the criminality of actions and determine the proper adjudication of cases.¹¹⁰

¹⁰² Lieutenant General Garry L. Parks & Ms. Deborah Tucker, Co-Chairs, Defense Task Force on Domestic Violence, Address Before the Subcommittee on Total Force, House Armed Services Committee, United States House of Representatives (Mar. 19, 2003), *available at* <http://armedservices.house.gov/comdocs/openingstatementsandpressrelease/s/108thcongress/03-03-19parks.html>.

¹⁰³ *Id.*

¹⁰⁴ DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, THIRD YEAR REPORT 2003, at 113, *available at* http://www.militaryhomefront.dod.mil/davlsn/LSN_BINARY_RESOURCE/BINARY_CONTENT/1862501.pdf [hereinafter DEFENSE TASK FORCE ON DOMESTIC VIOLENCE].

¹⁰⁵ *Id.*

The CRC was originally intended to be a case management body focused on clinical intervention in abuse cases. The lines between clinical intervention and command judicial action are often blurred. Some commanding officers defer to the CRC case status decision (substantiation or unsubstantiation) to determine administrative action and referral for clinical intervention. The CRC is often viewed as a quasi-legal body. Victims feel they do not have a voice in the system due to being assisted by the same case manager that assessed the offender, and likewise, accused offenders feel they are being denied due process.

Id.

¹⁰⁶ *Id.* at 116.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 113.

Second, the task force addressed the use of the Incident Severity Index,¹¹¹ which the task force found problematic for several reasons. First, the DoD and each of the Service FAP regulations define severity levels differently, resulting in a lack of uniformity.¹¹² Second, the military differs significantly from the civilian communities, which classify abuse simply at the misdemeanor or felony level.¹¹³ Finally, because the current severity index focuses on the extent of injury, rather than potential risk, most substantiated cases are assessed as mild on the severity index. This creates a perception that severe abuse is not common in the military.¹¹⁴ These findings prompted the task force to recommend discontinuing the collection and reporting of severity level data and instead report only risk assessment data using a DoD-wide risk assessment grid.¹¹⁵

Currently, the recommendations of the task force have not been implemented. Additionally, the number of proposed changes suggests that the entire FAP may be overhauled in the near future. Judge advocates must ensure they are aware of the upcoming changes and are prepared to advise on their implementation when that occurs.

V. Conclusion

The CRC process is complex and labor intensive. This makes the CRC cumbersome to administer, run, and oversee. The emotion, anger, danger, and fear that accompany cases of domestic violence add to the difficulty. For committees to be successful, an understanding of and strict compliance with the regulatory requirements is essential. Judge advocates play a key role in this process, and have the ability and opportunity to positively impact the overall performance and effectiveness of this committee. Early involvement in the process can establish the committee on a solid footing, and a thorough understanding of its policies and procedures can assist all members in the performance of their duties. Finally, proactive training and instruction can address many issues before they arise. The stakes are high, and commanders, Soldiers, and victims deserve nothing less than excellence in this mission. Well-trained and knowledgeable judge advocates who are willing to assert themselves in the process will add tremendous value to this important command program.

¹¹¹ *Id.* at 133; *see also* Stamm, *supra* note 2 (focusing on the severity index in the military and the need for a revamped system consistent with the civilian scheme).

¹¹² DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, *supra* note 105, at 133.

¹¹³ *Id.* at 134.

¹¹⁴ *Id.* at 134–35.

¹¹⁵ *Id.* at 135–36.

USALSA Report
U.S. Army Legal Services Agency

Trial Judiciary Note

**A View from the Bench:
Publishing Exhibits to Court Members**

*Colonel Timothy Grammel**

Scenarios

Imagine that you are a member of a court-martial panel responsible for making some very important decisions. You heard the trial counsel offer into evidence a written confession of the accused, and the judge admitted it. The lawyers have been arguing about whether or not Criminal Investigation Division (CID) agents put words in the accused's mouth. You know that you and the other members of the panel will eventually get to see the confession when you deliberate, but you think that reading the confession yourself now would help you perform your duties as a court member.

Now imagine you are on another court-martial panel. In this homicide case, the amount of force used appears to be the critical issue. The trial counsel offered several 8x10 photographs from the autopsy, and the judge admitted them into evidence. It sounds like the photographs depict the injuries that were inflicted during the homicide, but you do not know for sure because you have not seen the photographs. You shake your head and think that seeing those photographs now would assist you and the other members of the court in understanding and appreciating all the other evidence, the instructions from the judge, and the arguments by counsel.

Introduction

These hypothetical scenarios provide just two examples of counsel doing a poor job of publishing exhibits to the court members. However, they are also symptomatic of a larger problem: Counsel frequently practice trial advocacy in a lawyer-centric manner, rather than view trials as they unfold from the perspective of the court members. Walking into a court-martial, counsel know many facts surrounding the case, including facts that will never be admitted into evidence. During trial, the facts that matter are the facts that are admitted into evidence and are considered by the court members. In order to present cases effectively, counsel must envision in their minds the facts the members know, as the members get to know them.

This article will discuss different methods for publishing exhibits. Deciding how to publish exhibits is not usually taught in law school; it is one of the many trial advocacy skills one learns on the job. Moreover, one method does not fit all situations, even for exhibits within the same trial. The

nature of the exhibit and the context in which it will be used affect how it should be published. An exhibit could be real evidence, like a shirt or a knife, or it could be documentary evidence, like a confession or telephone records. It could be a photograph, a chart, or a diagram, or it could be a video-tape or an audio-recording. Although equally important, this article will not discuss the significant, but separate, topics of when to use certain exhibits, how to lay foundations for exhibits, or how to effectively use exhibits with witnesses. Instead, this article will simply examine the mechanics of publishing exhibits to court members.

Timing

First of all, most admitted exhibits are sent back with the members to the deliberation room.¹ If the members are able to view an exhibit during the trial, such as a bale of marijuana, an enlarged photograph, or an enlarged diagram, viewing the exhibit again in the deliberation room may provide sufficient opportunity to consider the evidence. Viewing the evidence in the deliberation room may also prove adequate if the members already know the contents of an exhibit, such as when a witness has testified about pertinent parts of a personnel record, a written order, or telephone records. In these situations, slowing down the trial to publish the exhibit to the members would not be helpful, and it may be detrimental to the momentum of the proponent's case.

However, if further examination of an exhibit before deliberations would assist or persuade the members, counsel can and should request permission to publish the exhibit once it has been admitted into evidence.² Because each case is different, the ideal time to publish an exhibit will vary. For example, counsel might want to publish an exhibit immediately after it has been admitted into evidence, when a later witness discusses it in more detail, or before argument.

Sometimes, the proponent may not want the members to scrutinize an extensive document until they return to the

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¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 921(b) (2008) [hereinafter MCM].

² *Id.* MIL. R. EVID. 611(a).

deliberation room but also does not want the members to feel rushed by sharing a single copy during deliberations. In such a case, counsel may request the military judge's permission to send extra copies back with the members. This would prevent the members from being distracted by the document in the courtroom and would allow the members to take their time in the deliberation room with their own copies.

Exhibits that Do Not Go Back with the Members to the Deliberation Room

Even though they have been admitted, certain exhibits do not go back to the deliberation room with the court members. Therefore, in order to publish an exhibit properly, the proponent should know whether or not that exhibit will be going back with the members.

As a general rule of thumb, documents or recordings that are the equivalent of witness testimony do not go back with the court members for their consideration during deliberations. Rule for Courts-Martial (RCM) 921 provides, "Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions."³ However, half a century ago in *United States v. Jakaitis*,⁴ the Court of Military Appeals (CMA) stated that "a deposition may not, in the strict sense of the word, be deemed an exhibit. Rather, it is the equivalent of a witness who was unavoidably absent from the trial."⁵ The court held that it was error to permit the court members to take depositions back with them in deliberations.⁶ The reason for the rule is that sending this type of document or recording, such as a deposition, back with the court members would give the proponent an impermissible advantage over a party whose evidence consisted of actual in-court testimony.⁷

Some rules precluding certain evidence from going back with the members have been codified in the RCM and the Military Rules of Evidence (MRE). For example, transcripts of depositions are ordinarily read to the members by the proponent, and the transcripts may not be inspected by the members.⁸ In the discretion of the military judge, recorded depositions may be played for the members or may be transcribed and read to them.⁹ Also, stipulations of expected testimony are read, but not presented, to the members.¹⁰ A

memorandum or record with a past recollection recorded is read into evidence, but it is not admitted into evidence as an exhibit, unless offered by the opponent.¹¹ Also, statements contained in a learned treatise, which were relied on by an expert during direct examination or cross-examination, may be read to the court members, but they will not be admitted into evidence as an exhibit.¹²

Even if not covered within the RCM or the MRE, case law precludes a document or recording that is substantially similar to a deposition from going back with the members in their deliberations. In *United States v. Austin*,¹³ the CMA held that it was prejudicial error to send back with the court members the transcript of the alleged victim's Article 32 testimony, which had been previously admitted into evidence as a prior inconsistent statement under MRE 801(d)(1).¹⁴ The court found "no substantial difference" between a deposition and the verbatim transcript of the alleged victim's Article 32 testimony in that case.¹⁵ It concluded that "a verbatim pretrial-investigation transcript was not an exhibit which RCM 921 would authorize the military judge to send to the members' deliberation room."¹⁶

When the proponent knows that an exhibit cannot go back with the members, the proponent should request permission from the military judge to read the document or to play the recording for the members at the appropriate time within the context of their case. Because some members might think they will be able to take the document or the recording with them to the deliberation room, the proponent can request that the military judge instruct them that they will not take the document or recording with them to the deliberation room. Such an instruction ensures that the members will pay as much attention during the reading or the playing of the exhibit as they would during live testimony. Of course, when counsel read documents to the members, they should do so in a clear and even-handed manner.

Real Evidence

With real evidence, the members' observation of an exhibit during trial, while it is handled by counsel and the witnesses, might not be sufficient to make the point counsel wishes to convey. If the chance to see the exhibit up close or to feel it could help persuade the members, counsel should consider having the members handle the exhibit. Counsel can request to publish the exhibit to the members,

³ *Id.* R.C.M. 921(b).

⁴ 27 C.M.R. 115 (C.M.A. 1958).

⁵ *Id.* at 118.

⁶ *Id.*

⁷ *Id.* at 117-18.

⁸ MCM *supra* note 1, R.C.M. 702(a) discussion.

⁹ *Id.* R.C.M. 702(g)(3).

¹⁰ *Id.* R.C.M. 811(f).

¹¹ *Id.* MIL. R. EVID. 803(5).

¹² *Id.* MIL. R. EVID. 803(18).

¹³ 35 M.J. 271 (C.M.A. 1992).

¹⁴ *Id.* at 275.

¹⁵ *Id.*

¹⁶ *Id.* at 276.

and the military judge may allow it within the judge's discretion.¹⁷ If the request is approved, the judge will generally order the bailiff to hand the exhibit to the member at one end of the panel box, instruct the members to pass it down, and then have the bailiff retrieve it from the last member. Counsel should remember to take any necessary precautions, such as requiring the use of gloves. Also, a firearm should always be cleared and rendered inoperable in a manner that does not change its evidentiary value before it is brought into the courtroom.¹⁸

Documentary Evidence

With documentary evidence, depending on the nature of the document, counsel may want the members to read all or part of the document before they go to the deliberation room. If the members' knowledge of the contents of the document, before they observe the rest of the evidence or before they hear arguments, will assist in the goal of persuasion, then counsel can request to publish the exhibit to the members. The military judge may allow it within the judge's discretion.¹⁹ Some documents can be enlarged on poster boards or projected on a screen or monitor to allow members to read them as the witness testifies. Enlarging the evidence may be the most effective and efficient method for some documents, such as checks. For other documents, such as confessions or telephone records, allowing members to hold the evidence while they read or examine it may be more effective and efficient. In these situations, the proponent may request the military judge's permission to publish a copy of the document to each member.²⁰

When the court members are given copies of an exhibit, the military judge will generally ask the proponent whether the proponent would like the members to read it immediately. Diligent members will naturally want to read everything they receive. Counsel should give them some time to at least orient themselves to the document so they are not looking at it instead of listening to the witness. For some documents, like confessions, counsel will usually want the members to take the time to read the whole document. Counsel can effectively publish other documents, such as telephone records, by giving the members sufficient time to orient themselves to the layout of the document and to have it with them when it is referred to by witnesses or counsel. If the layout of the document is not obvious, the witness should explain how the document is organized. Also, when referring to a document the members have in their possession during the examination of a witness or during argument, counsel should give them sufficient reference

¹⁷ MCM *supra* note 1, MIL. R. EVID. 611(a).

¹⁸ See U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL R. 15.6 (15 Sept. 2009).

¹⁹ MCM *supra* note 1, MIL. R. EVID. 611(a).

²⁰ *Id.*

points and time to locate relevant provisions. This is a matter of both courtesy and advocacy. For lengthy documents, page numbers and sometimes even tabs may assist both the witness and the members in locating the provision to which counsel is referring.

Photographs, Charts, and Diagrams

As with publishing documents, counsel can use different methods to publish admitted photographs, charts, and diagrams to the court members. If the photograph, chart, or diagram has been enlarged or projected and viewed by the members during the testimony of the witness, then nothing further is required. Obviously, during the testimony of the witness, the exhibit should be located where it can be seen by the members, the witness, the military judge, counsel, and the accused. Sometimes it may be necessary, based on the layout of the courtroom, for counsel and the accused to move to see the exhibit. If the location of an exhibit will be an issue, then counsel should ask the military judge before trial where the judge wants the exhibit to be located. If photographs have not been enlarged, counsel can request to publish them to the members, and the military judge may allow counsel to do so within the judge's discretion.²¹ If there is more than one photograph related to the same issue, counsel can publish them together for efficiency. The judge will likely have the bailiff hand all the photographs to the member at one end of the panel box, have the members pass them down one at a time, and then have the bailiff retrieve them from the last member. For large charts and diagrams, enabling all the members to be able to view the exhibits as the witness testifies should serve as adequate publication.

Recordings

After they have been admitted, video and audio recordings can be played during the direct examination or cross-examination of a witness. If a recording is not played during a witness's testimony, the proponent should request permission from the military judge to play the recording for the members in the courtroom. Also, unless precluded by the rules or the military judge, admitted recordings can go back to the deliberation room with the members. However, the proponent of the recording should request that a user-friendly television, tape player, CD player, clean computer, or other similar device be placed in the deliberation room to enable the members to review the recording during closed session deliberations. Alternatively, the proponent can request that the military judge advise the members that, if they need to observe the recording again, the court will be opened and the recording will be played again in the courtroom.²²

²¹ *Id.*

²² See *id.* R.C.M. 921(b).

Conclusion

If clarity of a recording is an issue, the proponent should use all technological and other means to produce the clearest recording possible in advance of trial. A recording that court members cannot hear or understand is not persuasive. Additionally, if unintelligible portions of a recording are so substantial that the recording as a whole is considered untrustworthy, the judge will not admit the recording into evidence.²³

Sometimes, even the clearest version of a recording may contain portions that are difficult to hear or understand on a single listening or without special equipment. When this is the case, the proponent should consider whether a transcript would assist the members in considering the recording. If so, counsel must prepare well in advance and lay the appropriate foundation for the use of a transcript.²⁴ Lastly, counsel should always use common sense in the courtroom and should be adaptable enough to make temporary adjustments to air conditioners, fans, and lights that will assist the members in hearing or seeing an exhibit.

Before each trial, counsel should consider how to best publish each exhibit to the members of the court. Counsel should plan when and how each exhibit should be published and should choose the method of publication that most effectively allows the members to understand, believe, and remember the evidence. In order to achieve these goals, counsel must view the trial, as it unfolds, from the perspective of the court members. Only then can counsel fully appreciate the best way to present evidence and, hopefully, persuade members of the merits of their case.

²³ See *United States v. Craig*, 60 M.J. 156, 160 (C.A.A.F. 2004).

²⁴ The Court of Appeals for the Armed Forces' opinion in *Craig* provides a helpful framework for the foundation and procedural protections required for the use of a transcript of a recording. *Id.* at 160–61.

A View from the Bench: A Military Judge's Perspective on Objections

Colonel Gregg A. Marchessault*

Introduction

As a trial advocate, do you stand in the courtroom and speak the words, "Objection, Your Honor," at the appropriate time and with a valid legal basis? Similarly, do you properly respond to objections made during the presentation of your case? If you don't, you should, because making and responding to objections is a critical trial advocacy skill. As with all aspects of trial advocacy, preparation¹ and anticipation are the key factors to this skill. This note seeks to assist trial advocates in mastering the basics of making and responding to objections in courts-martial proceedings.

Preparing to Make and Respond to Objections

Making and responding to objections is not an inherent skill. It requires serious study and preparation. Of initial consideration are Military Rule of Evidence (M.R.E.) 103²

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¹ The key to effective preparation is planning. After identifying the desired end state, plan backward from the end state by working out the details and timing of each step leading to that end. This backward planning concept is not new and was the subject of two excellent articles on trial planning for trial advocates. See Lieutenant Colonel James L. Pohl, *Trial Plan: From the Rear . . . March!*, ARMY LAW., June 1998, at 21; Colonel Jeffery R. Nance, *A View from the Bench: So You Want to be a Litigator?*, ARMY LAW., Nov. 2009, at 48.

² MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 103 (2008) [hereinafter MCM] (Ruling on Evidence).

(a) *Effect of Erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record; stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. The standard provided in this subdivision does not apply to errors involving requirements imposed by the Constitution of the United States as applied to members of the armed forces except insofar as the error arises under these rules and this subdivision provides a standard that is more advantageous to the accused than the constitutional standard.

and rule 19 of the *Rules of Practice Before Army Courts-Martial*,³ which govern the making of an objection in courts-martial. Additionally, a trial advocate must have a detailed understanding of the Military Rules of Evidence and the foundations required for the admissibility of evidence. To this end, counsel must undertake a thorough study of the rules and have references available at trial that will assist them in making and responding to objections. To assist trial advocates, the Criminal Law Department of The Judge Advocate General's School has prepared an excellent "Courtroom Objections and Answers" handout for use by counsel.⁴ Additionally, trial advocates would be well served by being intimately familiar with an evidentiary foundations text and having it close at hand during trial.⁵

(b) *Record of offer and ruling.* The military judge may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The military judge may direct the making of an offer in question and answer form.

(c) *Hearing of members.* In a court-martial composed of a military judge and members, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the members by any means, such as making statements or offers of proof or asking questions in the hearing of the members.

(d) *Plain error.* Nothing in these rules precludes taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge.

³ U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL r. 19 (15 Sept. 2009) [hereinafter RULES OF COURTS-MARTIAL PRACTICE] (Objections).

When counsel initially enters an objection, he or she will state only "Objection, Your Honor." Counsel will not provide a specific basis for it unless asked by the judge. Opposing counsel will immediately cease examination and await the judge's resolution of the objection. Before making any argument on an objection, counsel will request permission from the judge. Any argument will be direct and succinct. Motions *in limine* are encouraged regarding evidentiary issues counsel believe are likely to be contested at trial. After the judge rules on an objection or makes any other ruling, counsel shall not make further argument or comment, except with the express permission of the judge. After a ruling, counsel may, however, make offers of proof to preserve an objection or issue for appellate purposes or request reconsideration. In trials with members, such offers of proof should normally be made in an Art. 39(a) session. See MRE 103(c).

Id.

⁴ *Infra* Appendix.

⁵ A number of excellent evidentiary foundation texts are available to include David A. Schlueter et al., *Military Evidentiary Foundations* (3d ed. 2007);

Objections Before Trial

Prior to trial, effective advocates anticipate evidence that may be offered by the opposition. When counsel suspect objectionable evidence may be introduced, they should file a motion *in limine* to address their objections up front.⁶ A motion *in limine* has several benefits to include enabling the military judge to rule on the admissibility of prejudicial evidence outside the presence of a panel. Allowing the military judge to address the admissibility of evidence at a motions hearing also affords the judge adequate time to consider and fully research evidentiary issues. Lastly, a ruling on a motion *in limine* provides guidance to counsel for their case preparation and presentation.

Objections During the Trial

Making and responding to objections during trial is one of the most complex and difficult skills required of trial advocates. To be effective you must know the law, know your facts, and be prepared to object or respond within a moment's notice. You must also be able to recognize objectionable questions and evidence. This skill can be acquired through study of the Military Rules of Evidence, the foundations required for the admissibility of evidence, and knowledge of the facts of your case.

When to Object

Assume you have studied the Military Rules of Evidence and the foundations for the admissibility of evidence. You are now counsel in a court-martial and have just heard a question from opposing counsel that you believe to be objectionable. Do you object? In the few seconds it takes to decide whether to object, you should consider several issues,⁷ to include the following: Is the evidence helpful to you? If so, what benefit would you derive from objecting? Is the evidence going to be admitted anyway? If the objection is strictly based on a lack of proper foundation, will opposing counsel be able to fix the problem? Is waiver applicable due to a guilty plea?⁸ Will an objection make the

Edward J. Imwinkelreid, *Evidentiary Foundations* (7th ed. 2008); and Thomas A. Mauet, *Trial Techniques* (7th ed. 2007).

⁶ A motion *in limine* seeks to exclude evidence in a case and is governed by Rule for Court-Martial (RCM). 906(b)(13). MCM, *supra* note 2, R.C.M. 906(b)(13).

⁷ This list of issues to consider is derived in part from an excellent article, Major Norman F. Allen, *Making and Responding to Objections*, ARMY LAW., July 1999, at 38.

⁸ Rule for Court-Martial 910(j) provides that [except for a conditional guilty plea under RCM 910(a)(2)] a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offenses to which the plea was made. MCM, *supra* note 2, R.C.M. 910(j), R.C.M. 910(a)(2).

members look more closely at the testimony? Will an objection heighten the members' curiosity on this issue? Will an objection cast you as an obstructionist in the search for truth in the eyes of the members? Without an objection, how will the witness respond? What evidentiary rule or rules preclude the admission of the evidence? What is the likely response from opposing counsel to your objection and how will you reply? What is the likely response from the military judge? Do you need to object to preserve the issue for an appeal?⁹

These considerations demonstrate that the decision to object is multifaceted and driven primarily by the law and facts of your case. However, just because you have a colorable basis to object does not mean you should object. Counsel must decide whether a question or proffered evidence merits an objection based on the interests of their client.

When Not to Object

It is improper to make an objection solely to disrupt your opponent's case.¹⁰ Panel members and the military judge will recognize the objection for what it is and not be impressed. Such conduct will ultimately impact your credibility in the courtroom.

How to Object

The technicalities of making and responding to objections are subject to rule 19 of the *Rules of Practice Before Army Courts-Martial* and the preferences of your military judge.¹¹ For specific guidance on this issue, counsel should speak with their military judge as part of the Gateway to Practice program¹² or during an R.C.M. 802 session conducted prior to the commencement of a case.

To object, most military judges will simply require you to stand up and say, "Objection, Your Honor." Normally, counsel need not provide a specific basis for an objection unless asked by the military judge. The objection must be

⁹ Failure to timely object to the admission of evidence waives any later claim of error in the absence of plain error. *Id.* MIL. R. EVID. 103(a),(d); *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005).

¹⁰ U.S. DEP'T OF ARMY, REG 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 3.5 (1 May 1992). This rule provides in part: "A lawyer shall not: . . . (c) engage in conduct intended to disrupt a tribunal."

¹¹ See RULES OF COURTS-MARTIAL PRACTICE, *supra* note 3, r. 19.

¹² A Gateway to Practice program is managed by a military judge and provides initial information and guidance on local practice and procedures, reviews trial and defense counsel duties, and addresses areas in which counsel are traditionally weak. It is intended to be conducted in a group setting with special attention paid to those with limited trial experience.

timely¹³ and specific,¹⁴ and counsel are not required to cite evidentiary rules by number to adequately preserve the objection for later appellate review. Opposing counsel should immediately cease examination and await the military judge's resolution of the objection. Before making any argument on the objection, counsel should request permission from the military judge. Any argument should be direct and succinct. So long as counsel make sufficient arguments to make the issue known to the military judge, the issue will be preserved.¹⁵

When objecting, always be crisp, certain, and professional. Your tone of voice when making objections is important. Never sound indignant; a neutral tone is always appropriate. Remember that you are seeking to persuade the military judge to rule in your favor. Never act or sound desperate. A lack of confidence when making an objection may have an impact on a close evidentiary ruling. Additionally, never whine, attempt to get information in through the back door, make an argument without a request from the military judge, or communicate with a witness through an objection. Such conduct is unprofessional and will result in an admonishment from the military judge.

Lastly, with objections, it's the quality that counts, not the quantity.

How to Respond

The process of responding to objections should have started during your case preparation. In most cases, you can anticipate common objections to your evidence and prepare a response to those objections. An especially effective practice is to prepare a short (no more than one page) legal memorandum containing relevant statutory and case law on the various evidentiary issues you expect might arise during your trial. Hand the memorandum to the military judge at the time of an objection with a copy of any case of particular significance. Trial advocates who demonstrate this degree of preparation will see their stock rise with any military judge.

Once an objection is made, stop talking and listen to the objection. Have appropriate references with you in the courtroom to address and respond to the objection (e.g., the *Manual for Courts-Martial*, the Military Rules of Evidence, an evidentiary foundations text, etc.). When prompted by

¹³ "Timely" means objection as soon as the grounds for the objection become apparent which may be immediate (e.g., form of the question), or later (e.g., at the time the evidence is offered when the foundation is deficient).

¹⁴ "Specific" means what the objection is and why (that is, the specific legal ground).

¹⁵ *Datz*, 61 M.J. at 42.

the military judge, succinctly respond to the objection, making sure to address the military judge and not opposing counsel. In panel cases, do not be argumentative in front of the panel. If argument is required, request a UCMJ article 39(a) session outside the presence of the panel from the military judge.

Ruling by the Military Judge

When the military judge has ruled on an objection, the trial should proceed as before the objection. Do not argue with the military judge over a ruling. If you believe the military judge has entered an erroneous ruling, respectfully request reconsideration of the ruling. However, do not expect the military judge to reverse his or her ruling unless you have additional facts, law, or argument to share with the court. Be judicious with requests for reconsideration; they slow the trial process and are perceived as a waste of time by military judges absent an adequate basis for the request. Furthermore, never show emotion due to the ruling. Be prepared to move on as if nothing happened. Lastly, do not thank a military judge for a favorable ruling. It is unseemly.

Continuing Objection

If a military judge provides a definitive ruling on a pre-trial motion *in limine*, there is no need to repeat the objection at trial to preserve the issue for appeal. However, even though counsel do not have to repeat objections to an unconditional, unfavorable ruling decided in an out-of-court session, if the military judge has admitted new or additional evidence at trial, counsel should object to the repetition of the same or similar alleged errors until the military judge states that you need not object to a continuing line of questioning.

Offer of Proof

If the military judge sustains an objection to the tender of evidence, the proponent generally must make an offer to preserve the issue for appeal.¹⁶ Counsel should request to make an offer of proof predicated on the ruling and then be guided by the military judge regarding the making of such an offer at a sidebar¹⁷ or UCMJ article 39(a) session. At a minimum, the offer should include the substance of the proffered evidence, the affected issue, and how the issue is affected by the military judge's ruling. An added benefit of an offer of proof is that the tendered information may

¹⁶ MCM, *supra* note 2, MIL. R. EVID. 103(a)(2).

¹⁷ A sidebar conference is held on the side of the military judge's bench opposite the panel. Such conferences are generally disfavored by military judges due to problems of recording the conferences and the possibility that panel members may overhear the conferences.

persuade the military judge to reconsider his or her evidentiary ruling.

become more than just merely adequate in this skill. Once this skill is mastered, the judicious use of an objection or an astute response to an objection may be the decisive factor in a trial.

Conclusion

Making and responding to objections during a trial is an art involving legal, factual, and tactical concerns. Trial advocates should devote themselves to this art and seek to

Appendix

Courtroom Objections Guide and Answers

Objections to Questions:

Ambiguous – MRE 611(a) – The question may be taken in more than one sense.

Argumentative – MRE 611(a) – (1) Counsel summarizes facts, draws a conclusion, and demands that the witness agree; or (2) Counsel's question is an argument in the guise of a question.

Asked and Answered – MRE 611(a) – Unfair to emphasize evidence through repetition. Greater leeway allowed on cross.

Assumes A Fact Not In Evidence – MRE 103(c) and MRE 611(a) – Question contains a fact that has not been entered into evidence.

Beyond Scope – MRE 611(b) – Question unrelated to examination immediately preceding, counsel should be required to call witness as own.

Bolstering – MRE 608(a) – Attempting to support character for truthfulness prior to attack by opponent.

Calls For Conclusion – MRE 602, 701, 702 – Witnesses must testify to facts, conclusions must be left to the fact finder (and counsel during closing arguments). Watch for “why” and “would” questions. Those often call for conclusions.

Calls For Improper Opinion – MRE 602, 701, 702 – Used when an expert hasn't been properly qualified or when a lay person's testimony would be beyond the scope of the rules.

Calls For Narrative – MRE 103(c), 611(a) – Question may allow witness to ramble and possibly present hearsay, incompetent or irrelevant evidence. Judge has broad discretion here.

Calls For Speculation – MRE 602 – Question requires witness to guess.

Compound – MRE 611(a) – More than one question contained in counsel's question.

Counsel Testifying – MRE 603 – When counsel is making a statement, not asking a question.

Confusing And Unintelligible – MRE 611(a) – Counsel has used unfamiliar words, disjointed phrases or has confused the facts or evidence.

Cumulative – MRE 102 and 611(a) – Repeated presentation of testimony is unfair, unnecessary and wastes time. Judge is responsible to control this.

Degrading Question – MRE 303 – Question is immaterial and used simply to humiliate.

Hearsay (Question) – MRE 802 – Answer would elicit hearsay and no exception has been shown.

Improper – If you know the question is bad but can't think of the basis, use this to give you time to think. The judge may sustain you anyway and supply the basis. If not, you've gained that moment to decide on a basis. Don't overuse this!

Improper Impeachment – MRE 607–610 – Only specific, limited means of impeachment are authorized.

Improper Use Of Memorandum – MRE 612 – Used when opposing counsel has confused present recollection refreshed (MRE 612) and past recollection recorded (MRE 803(5)).

Improper Use Of Prior Statement – MRE 613 – When counsel is attempting to introduce extrinsic evidence of the statement without affording witness opportunity to explain or deny.

Irrelevant – MRE 402 (see also 401 and 403) – Doesn't tend to prove or disprove any fact or circumstance related to any issue before the fact finder.

Leading – MRE 611(c) – When the form of the question suggests the answer.

Misstating The Evidence – MRE 103 – Question either misstates what a witness said earlier or mischaracterizes earlier evidence. Similar to assuming facts not in evidence.

Objections to Evidence (Answers):

Best Evidence Rule – MRE 1002 – If the contents of the document are to be proved, the original must be offered or its absence accounted for.

Cumulative – MRE 102 and 611(a) – Repeated presentation of evidence is unfair, unnecessary and wastes time. Judge is responsible to control this.

Expert Witness Not Qualified – MRE 702 – Lack of foundation for specific expertise.

Hearsay (Answer) – MRE 801–805 – Question didn't call for hearsay, but witness gave it anyway. Counsel should move to strike and ask judge to instruct jury to disregard answer.

Improper Bolstering – MRE 608(a) – Using some form other than character for truthfulness.

Improper Characterization – MRE 404, 405, 611(a) – Attempting to use improper means to prove character.

Improper Lay Opinion – MRE 701 – Failure to limit the opinion to a rational basis of the witness' perceptions.

Incompetent Witness – MRE 104(a), 602, 603, 605, 606 – Lack of qualification, mental capacity, or personal knowledge.

Incompetent Evidence – MRE 103, 104 and Section III – Illegally seized evidence and involuntary confessions and admissions. Ask for a 39(a), if the evidence is even suggested by the question, consider asking for a mistrial.

Irrelevant – MRE 402 (see also 401 and 403) – Doesn't tend to prove or disprove any fact or circumstances related to any issue before the factfinder.

Narrative Response – MRE 103(c) and 611(a) – Witness rambling beyond scope of question.

Prejudice Outweighs Probative Value – MRE 403 – Request immediate 39(a). Argue the 403 balancing test. (Don't ever let the members hear you call evidence prejudicial, it will stick with them!)

Uncharged Misconduct – MRE 404(b) – Not admissible to show action in conformity therewith, see rule for exceptions.

Unresponsive – MRE 103(c) and 611(a) – Answer not to the question asked, usually from a hostile witness.

Lack of Foundation:

For Expert Opinion – MRE 702.

For Exhibit – MRE 104, 401, 801–805.

Exhibit Not Properly Authenticated – MRE 901(a)–903 – Failure to prove that the exhibit is in fact what it is claimed to be.

Privileges:

Used where the question/answer would violate one of the following privileges.

Clergy – MRE 503.

Comment On Or Inference From Claim Of Privilege – MRE 512 – Ask for an instruction.

Government Information/Classified – MRE 505–506.

Spousal Privilege – MRE 504.

Identity Of Informant – MRE 507.

Attorney-Client – MRE 502.

Mental Examination Of Accused – MRE 302.

Self-Incrimination – MRE 301.

Book Reviews

Bad Advice: Bush's Lawyers in the War on Terror¹

Reviewed by Major Laura R. Kesler*

The Bush administration displayed a basic failure to appreciate the best role of its lawyers. Viewing law as an implement of the war on terrorism rather than a set of constraints upon waging it, the administration employed its lawyers as a shock troop of reverse lawfare, not as detached counselors who could anticipate and forestall legal jeopardy. To their own discredit, many of the lawyers accepted, and even gloried in, this perversion of their role.²

I. Introduction

Military lawyers face unique, conflicting “imperatives of duty” in their requirement to serve both commanders and the law.³ On the one hand, judge advocates (JAs) are called on to support commanders and advise them on the legality of proposed courses of action. On the other hand, JAs are required to adhere to distinct ethical standards and the broad spectrum of rules, regulations, statutes, codes, case law, and well-established legal principles that comprise “the law.” The means and ends of military operations and the interests and goals of commanders sometime drastically conflict with the fundamental requirements of ethical advocacy and the rendering of proper legal analysis and advice. In times of perceived crisis, commanders may plan novel actions for which there seem no clear precedents or that sound dubious but potentially lawful under the unique circumstances in which the command is operating. Judge advocates may be forced to navigate alone murky, gray areas of the law and to render sound legal advice to commanders who, in return, may impose significant pressure to find a legal justification to their means or ends.⁴ This conflict gives rise to an important question: How should JAs proceed when pressured externally to provide legal support for a commander’s wishes but pressured internally to oppose them based on legal right or conscience?⁵

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¹ HAROLD H. BRUFF, *BAD ADVICE: BUSH’S LAWYERS IN THE WAR ON TERROR* (2009).

² *Id.* at 285.

³ *Id.* at 61 (discussing this conflict in relation to executive attorneys who serve both the President and the law).

⁴ Lieutenant Colonel (Ret.) Diane Beaver, former Staff Judge Advocate at Guantanamo Bay, claims to have been in just this position when drafting a now-controversial legal opinion authorizing the use of “Category III” interrogation techniques. See, e.g., Philippe Sands, *The Green Light*, VANITY FAIR, May 2008, available at <http://www.vanityfair.com/politics/features/2008/05/guantanamo200805?printable=true¤tPage=all> (last visited Sept. 7, 2009); Statement of Lieutenant Colonel (Ret.) Beaver Before the U.S. S. Armed Servs. Comm. (June 17, 2008), available at http://www.fas.org/irp/congress/2008_hr/061708beaver.pdf (last visited Sept. 7, 2009).

⁵ BRUFF, *supra* note 1, at 7 (describing this dilemma in the context of fifteenth and sixteenth century lawyers and their kings).

In *Bad Advice*, Harold H. Bruff answers this question by providing a set of principles designed to help lawyers navigate controversial, uncharted legal waters.⁶ In doing so, Bruff examines four key policies developed by the Bush Administration during its war on terror⁷ and analyzes them in light of domestic law, customary international law, military law and tradition, and rules of professional responsibility. Though Bruff’s analysis focuses on the relationship between presidents and their executive advisors, the lessons and principles he discusses are applicable and relevant to JAs in their role as command advisors.

II. Format, Organization, and Tone

Bad Advice is a balanced, extensively-documented⁸ account of some of the most controversial decisions ever made in the history of the White House. Relying on both primary and secondary sources, Bruff provides examples of executive legal advisors who acted honorably and admirably,⁹ and distinguishes their advocacy from that of the Bush advisors who he contends failed to do so.¹⁰ Bruff uses these distinctions to illustrate how lawyers—government lawyers especially—should execute their professional duties.

Bruff does an excellent job educating readers on the historical events, legal precedents, and the Bush Administration policies that are relevant to his analysis. He does not assume knowledge on the part of the reader and periodically recaps and builds on information from preceding chapters. Bruff’s ability to state his analysis so clearly likely stems from the fact that he is a legal educator, military veteran, experienced author, and seasoned former

⁶ *Id.* at 3.

⁷ *Id.* at 138–80 (NSA surveillance), 181–98 (detention of enemy combatants), 213–25 (military tribunals), 226–63 (interrogation techniques).

⁸ See *id.* at 299–68 (68 pages of notes) and 369–95 (27-page bibliography).

⁹ See *id.* at 297 (Robert Jackson), 81 (Warren Christopher), and 122, 211, and 284 (Jack Goldsmith).

¹⁰ Most notably, John Yoo, David Addington, William J. Haynes II, and Alberto Gonzales. See *id.* at 119–24.

government attorney—factors which also make him uniquely qualified to write this book.¹¹

Bad Advice is well organized, with information divided into two primary sections. Part I focuses on the past, providing an historical analysis of the relationship between presidents and their attorneys general and the creation of executive legal offices, such as the Office of Legal Counsel. This section illustrates the norms for presidential interaction with lawyers both internal and external to the Executive Branch. Readers should pay close attention to discussion of key legal cases presented in Part I, as these provide background for Bruff's subsequent analysis of current events in later chapters of the book. Part II focuses on contemporary issues, describing in great detail the Bush Administration's decisions and policies in four key areas: surveillance by the National Security Agency, indefinite detention of enemy combatants, the use of military commissions, and the use of controversial interrogation techniques.¹² Bruff provides extensive analysis of how these decisions were shaped by Bush's executive attorneys, especially John Yoo,¹³ David Addington,¹⁴ William J. Haynes II,¹⁵ and Alberto Gonzalez.¹⁶ Bruff criticizes these attorneys for refusing to seriously consider the advice and concerns of experienced military lawyers and federal law enforcement officers, and for providing superficial, incorrect legal opinions.¹⁷ To a lesser degree, Bruff criticizes Bush as well, for intentionally surrounding himself with only the most zealot "yes men" in the War on Terror.¹⁸ Included in Part II are detailed descriptions of the evidence Bruff relies on in making his assertions.¹⁹

¹¹ See Faculty Profile, U. COLO. L. SCH., <http://lawweb.colorado.edu/profiles/>

profile.jsp?id=8 (last visited Sept. 28, 2010). Bruff is a Professor of Law at the University of Colorado at Boulder. He previously served as a lieutenant in the U.S. Coast Guard Reserve and as a senior attorney and advisor to the Department of Justice and the White House. He is the author of numerous books and articles concerning the executive branch and separation of powers.

¹² BRUFF, *supra* note 1, at 138–80, 181–98, 213–25, 226–63.

¹³ *Id.* at 122, 125, 205, 239, 250–52, 271–72, 296.

¹⁴ *Id.* at 119, 125, 295.

¹⁵ *Id.* at 119–20, 214, 273–74.

¹⁶ *Id.* at 121, 208–09, 240, 260, 295.

¹⁷ *Id.* at 272, 273–74, 276, 278 (discussing protests lodged by the FBI and military lawyers), 283 (noting Bush's lawyers "ignored the voices of experience and the counsel of caution and arrogantly propounded overbroad theories of executive power that provided fertile ground for scandal").

¹⁸ See *id.* at 116–25. For example, John Yoo was referred to within the Administration as "Dr. Yes." *Id.* at 125.

¹⁹ *E.g.*, *id.* at 79–83 (Office of Legal Counsel guidelines), 106–07, 134–37, 239–52, 268–72 (John Yoo's memos and information from his autobiography), 272 (FBI "war crimes file").

III. Usefulness and Relevance to Military Lawyers and Commanders

Many aspects of the relationship between a president and his executive advisors mirror those found in relationships between commanders and their legal advisors. Executive and military advisors alike are often called on to evaluate the legality of critical and time-sensitive courses of action. They can be subject to intense pressure from their clients to help them "get to yes." Evaluations and career advancement for both can be tied to their ability to support their clients and help them reach their desired ends.²⁰ *Bad Advice* provides lawyers with strategies for dealing with these realities and illustrates how "getting to yes" may have unexpected, disastrous consequences.

Bad Advice also provides basic information on the law of war that may be useful to military readers. Three chapters²¹ are devoted to analysis of Bush's legal decisions in light of customary international law, the Geneva Conventions, military law and culture, and various military regulations, to include the Uniform Code of Military Justice, Army Field Manual 34-52,²² and "SERE"²³ guidelines. Bruff introduces readers to the concepts of lawfare²⁴ and reverse lawfare,²⁵ and discusses how Bush's advisers used reverse lawfare to evade applicable laws, rules, and regulations.²⁶

IV. Guiding Principles

In the book's introduction, Bruff sets out to provide principles that are designed to help guide and constrain executive advisors and that are "simple enough to be mastered as an everyday guide in a busy world."²⁷ Despite this claim, *Bad Advice* contains no clear list of guidelines. Instead, Bruff weaves lessons throughout the book, articulating various principles as they arise in his analysis. The fact that readers are left to glean these principles on their own is a potential weakness in an otherwise outstanding legal reference. Nevertheless, *Bad Advice* is instructive, pertinent, and relevant to military lawyers and commanders alike.

²⁰ *Id.* at 61–64.

²¹ *Id.* at 199–12, 227–63, 264–83.

²² U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006) (formerly Field Manual 34-52).

²³ BRUFF, *supra* note 1, at 232. SERE stands for "survive, evade, resist, escape." FM 2-22.3, *supra* note 22, at glossary-10.

²⁴ BRUFF, *supra* note 1, at 132–33.

²⁵ *Id.* at 134 ("The administration's primary tactic in reverse lawfare was to deny the applicability of potentially restrictive sources of law . . . in advance of operations.")

²⁶ *Id.* (asserting that the Bush Administration's use of reverse lawfare was fundamentally inconsistent with the rule of law).

²⁷ *Id.* at 3.

The most well-developed and recurring principle is captured in the title of Part I of the book: “Right and Conscience.”²⁸ Bruff suggests that legal advice should not only be technically right, but also conscionable.²⁹ “[This] calls for an assessment of technical legal right, together with the adviser’s assurance that the claim can be advanced in good conscience.”³⁰ *Bad Advice* contains numerous examples of the application of this principle,³¹ and its importance is discussed in nearly every chapter of the book.

A closely related principle is that lawyers should provide the advice a client *needs* to hear, rather than the advice he *wants* to hear.³² Bruff provides examples of violations of this principle³³ and points out that, while such advice can be unwelcome and may be ignored, “a good (and brave) counselor [will find] a way to provide it.”³⁴ Bruff contends Bush’s lawyers violated this principle repeatedly by providing only the advice Bush wanted to hear, not the advice he needed to hear,³⁵ which lead to disastrous results.³⁶

Two other key principles Bruff articulates are the importance of maintaining sympathetic detachment from a client³⁷ and the benefits of cultivating a sense of self-awareness.³⁸ These principles are important to military practitioners because their relationships with commanders are, in some respects, more personal than relationships between others types of attorneys and their clients.³⁹ These personal aspects subject commander–JA relationships to

“the vagaries of human nature,”⁴⁰ which JAs must guard against.

Integral to the principles of right, conscience, sympathetic detachment, and self awareness are two additional principles—the need for integrity and candor.⁴¹ These last two concepts are not only guiding principles, they are obligations,⁴² and they are imperative to a lawyer’s ability to provide honest assessment and analysis. Candor requires that lawyers provide a complete analysis of relevant issues and precedent, rather than limited, superficial analysis designed to get a client to “yes.”⁴³ Lawyers must include discussion of contrary law and precedent in their opinions, and analysis of the same. Bruff directly links candor to conscience, stating, “[A]n important element of good conscience in forming legal opinions is consideration of contrary viewpoints and precedents.”⁴⁴ Bruff examines the concepts of integrity and candor in the context of Bush’s closest legal advisors, discussing these advisors’ failure to fully and properly reveal and discuss legal authority contrary to their position and Bush’s.⁴⁵ “The resulting lack of candor and even of self-awareness fit the administration’s style, but not the lawyers’ responsibilities. It protected neither the clients nor, in the end, the lawyers themselves.”⁴⁶

V. Conclusion

Because legal advice begets action,⁴⁷ it has the potential to cause devastating consequences to both military commanders⁴⁸ and to our country.⁴⁹ When rendered appropriately and correctly, it also has the potential to

²⁸ *Id.* at 5.

²⁹ *Id.* at 368. The question of conscience is not whether a lawyer likes or agrees with the law. The question is whether “the lawyer’s professional conscience [is] sufficiently satisfied with the answer [of legality] to allow him or her to” sign off on it “in the expectation that it will someday be made available for all to see.” *Id.*; see also U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 6(f) (1 May 1992) [hereinafter AR 27-26] (“[A] lawyer is also guided by personal conscience and the approbation of professional peers.”).

³⁰ BRUFF, *supra* note 1, at 8.

³¹ See *id.* at 212, 224, 252, 271.

³² *Id.* at 8, 287.

³³ See *id.* at 8–9.

³⁴ *Id.* at 9.

³⁵ *Id.* at 287.

³⁶ *Id.* at 283 (describing recent detainee-related events as a “blot on our history” and blaming Bush’s legal advisors, claiming, “[T]hey ignored the voices of experience and the counsel of caution and arrogantly propounded overbroad theories of executive power that provided fertile ground for scandal.”).

³⁷ *Id.* at 82 (discussing the concept of sympathetic detachment).

³⁸ *Id.* at 286.

³⁹ Judge advocates deploy with commanders and may share meals and quarters with them. See also FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI, at x (2001).

⁴⁰ BRUFF, *supra* note 1, at 13 (discussing this in the context of relationships between presidents and their executive advisors).

⁴¹ *Id.*

⁴² See AR 27-26, *supra* note 29, para. 6(c) (requiring military attorneys to execute their duties with diligence and honesty). See also *id.* cmt. to r. 2.1 (discussing a lawyer’s duty to give candid advice regardless of the fact it might be “unpalatable” to the client).

⁴³ BRUFF, *supra* note 1, at 250, 269–72, 285, 295.

⁴⁴ *Id.* at 287.

⁴⁵ *Id.* at 284–87.

⁴⁶ *Id.* at 285.

⁴⁷ *Id.* at 264–83. An entire chapter is devoted to this concept.

⁴⁸ Consider Brigadier Janis Karpinski and Colonel Thomas Pappas, who were relieved from command at Abu Ghraib for events they claim were in compliance with policy and legal guidance in place at the time. Simera Simone, *Abu Ghraib Head Finds Vindication in Newly Released Memos*, CNN.COM (Apr. 22, 2009), available at <http://www.cnn.com/2009/US/04/22/us.torture.karpinski/>; BRUFF, *supra* note 1, at 280–81; Major General Anthony Taguba, Army Regulation 15-6 Investigation of the 800th Military Police Brigade (3 Mar 2004), available at <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html> (last visited Sept. 8, 2010).

⁴⁹ BRUFF, *supra* note 1, at 296 (quoting a senior Justice Department lawyer’s opinion that “[i]t will take fifty years to undo the damage” John Yoo did to the White House).

“confer legitimacy on . . . actions.”⁵⁰ For these reasons, it is imperative that military practitioners have a “yardstick” in place before rendering legal advice on murky legal scenarios. The higher the stakes or the more complicated the scenario, the more important this yardstick becomes.

Bad Advice is a helpful guide for military lawyers because it provides historical examples of government advisors who acted wisely, highlights recent examples of government advisors who reportedly acted recklessly⁵¹ and

caused terrible damage,⁵² and provides principles to help steer lawyers through uncertain legal issues. *Bad Advice* is likewise a helpful tool for commanders because it illustrates the importance of creating a balanced, experienced advisory team and describes the professional qualities commanders should demand from and look for in their advisors.

The examples, lessons, and principles presented in *Bad Advice* comprise a treatise from which military practitioners, advisors, and commanders alike can benefit.

⁵⁰ *Id.* at 14.

⁵¹ *Id.* at 292.

⁵² *Id.* at 296.

American Lion¹

Reviewed by Major LaShanda F. Ellis-Ramsey*

“Without union our independence and liberty would never have been achieved; without union they can never be maintained.”²

A vivid depiction of one of the most intriguing, yet controversial, men to serve in the nation’s highest elected office during the nineteenth century, *American Lion* immerses readers in the complex life of our seventh President, Andrew Jackson. Rather than provide a trite recitation of Jackson’s presidency, Jon Meacham, the Editor of *Newsweek*, adeptly chronicles the politics of the Jackson Administration drawn largely from century-old, unpublished letters held in private collections, written by people in Jackson’s innermost circle.

The election of Andrew Jackson in 1828 ushered in a drastic divergence from the elitism that had characterized the presidency since its inception. While all presidents since Washington had served extensive administrative and diplomatic apprenticeships, Jackson had never held a cabinet post or even been abroad. He spoke no foreign languages and wrote English roughly.¹ In stark contrast to his predecessors, Jackson had an extremely modest upbringing and grew up fatherless and, later, an orphan. He gained his fame as a military officer and brought to the White House the same commitment and focus that earned him success on the battlefield and the nickname “Old Hickory.”²

The will of the people is a recurring theme in *American Lion*. By 1828, nearly all states had essentially universal male suffrage, resulting in a surge in eligible voters. In 1828 and 1832, the years of Jackson’s White House victories, record numbers of Americans cast ballots.³ Jackson claimed that his election illustrated that the presidency was no longer insulated from the people, and he advanced a new vision of the President as the direct representative of the people.⁴

This review first examines two critical issues from Jackson’s presidency that Meacham highlights in the book:

the rotation of public officials and the destruction of the Second Bank of the United States, which resulted in the expansion of executive power. The review then critiques Meacham’s treatment of Jackson’s policies concerning Indian removal and slavery. Lastly, the review discusses lessons judge advocates may draw from Jackson’s presidency.

Implementing the practice of rotating public servants was Jackson’s first opportunity to test his “will of the people” theory and to expand the power of the executive office. Critics claimed that Jackson unjustly removed public servants and rewarded loyal supporters with the positions. Meacham briefly discusses Jackson’s motive and rationale for rotating government officials, which Jackson described as an attempt to curtail corruption. The author’s cursory handling of this subject is extremely disappointing because history has since stigmatized the Jackson Administration as the creator of the spoils system.⁵ In contrast to other parts of the book, where he provides detailed analysis and insight, Meacham makes a poor attempt to dispel the myth. Meacham provides scant discussion and little critical examination of the issue and, thus, squanders an opportunity to offer different perspectives from Jackson insiders on the practice. It would have been enlightening to read the accounts of Jackson’s closest advisers as persons attempted to curry favor with the Administration and to hear how Jackson responded to their efforts. Instead, Meacham only provides an extreme example of a former Soldier who stripped completely in the presence of Jackson in an attempt to convince Jackson to retain him in his government position. Unfortunately, Meacham uses the first-hand accounts of Emily Donelson’s letters to weave an elongated version of a political scandal, the Petticoat Affair, rather than highlight the monumental, initial undertaking of the Jackson Administration: the crackdown on corruption.⁶

In contrast, Robert V. Remini’s *Andrew Jackson and the Course of American Freedom, 1822–1832*, provides an in-depth discussion of the rotation of public servants.

The argument Jackson advanced for rotation was the argument of democracy.

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¹ JON MEACHAM, *AMERICAN LION* (2008).

² *Id.* at 249.

³ *Andrew Jackson: A Life in Brief*, MILLER CTR. OF PUB. AFFAIRS, <http://millercenter.org/academic/americanpresident/jackson/essays/biography> (last visited Sept. 14, 2010).

⁴ General Jackson earned the nickname “Old Hickory” from his men during the War of 1812 as result of his strict discipline. He was considered to be as tough as hickory.

⁵ MEACHAM, *supra* note 1, at 43.

⁶ John Yoo, *Andrew Jackson and Presidential Power*, 2 CHARLESTON L. REV. 521, 525 (2008).

⁵ This is an informal practice of rewarding party supporters with positions after winning an election. The appointments are based on loyalty to the party rather than merit.

⁶ Emily Donelson was Jackson’s niece. The Petticoat Affair was an ongoing feud between the socially elite ladies of Washington, D.C., and Margaret “Peggy” Eaton, the flamboyant wife of John Henry Eaton, Jackson’s Secretary of War.

Offices exist for the benefit of the people. No one has an intrinsic right to them; they are open to all. Removal, therefore, does not in itself constitute a wrong. The only wrong that may result is when good men are replaced by bad. What Jackson advanced was the contention that a popular government had been established with his election and any notion of elitism in the operation of government was inimical to the doctrines of republicanism.⁷

Remini provides empirical evidence of the widespread corruption of government officials that Jackson faced on assuming office. Remini also describes how the Jackson Administration helped combat corruption. For example, in a single year, the Administration reduced the expenditures of the Navy Department alone by \$1 million by flushing out “rats” (embezzlers).⁸

The Second Bank of the United States provided yet another opportunity for Jackson to increase the power of the executive. Jackson saw the Second Bank as an evil, corrupt entity that needed to be dismantled. Meacham does a superb job of setting the stage and describing the political context in which Nicholas Biddle, President of the Second Bank, and Jackson would duel. Gambling that Jackson would not want to confront the bank issue on the eve of his bid for re-election, Biddle applied early to recharter the Bank.

The House and the Senate passed a bill in the summer of 1832 to recharter the Bank.⁹ Not to be politically outmaneuvered, Jackson vetoed the bill. For the first time in presidential history, a veto message extensively discussed political, social, and economic, as well as constitutional, objections to legislation.¹⁰

Although it broke from past practice by introducing his policy views, the lasting impact of Jackson’s veto message remains his thinking on the President’s independent authority to interpret and enforce the Constitution.¹¹ Jackson’s brazen wielding of veto power sought to wrestle authority from the Legislative Branch and firmly place it within the Executive Branch. Prior to the Jackson Administration, power had been concentrated in the Legislative Branch where laws were made, Senators were elected, and the slate of candidates for President was decided.

⁷ 2 ROBERT V. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN FREEDOM, 1822–1832*, at 190–91 (1981).

⁸ *Id.* at 187.

⁹ *Id.* at 545.

¹⁰ *Id.*

¹¹ *Id.* at 546.

Armed with power of the veto and the notion that he, as President, served as a direct representative of the people, Jackson continued his bid for re-election in 1832. Harkening to his days as a military tactician, he focused on the objective—re-election—and provided the people with two courses of action: either vote for me as your continued leader or vote for the evil, corrupt Second Bank. Jackson easily won re-election.

With his soldier instincts in full command, Jackson moved in for the kill: the demise of the Second Bank. Against the advice of Congress, Jackson decided to withdraw all federal funds from the Second Bank and transferred them to state banks. William Duane, Secretary of the Treasury, opposed Jackson. Jackson dismissed Duane from his post and provided a revolutionary justification for Duane’s dismissal that expanded the power of the Executive Office.

As Chief Executive, Jackson believed it was his constitutional right to decide how to carry out federal law. In order to execute the law he had to control subordinate officials in the executive branch. If they would not follow his constitutional views and policy priorities, he would exercise his constitutional authority of removal and replace officials who refused to follow his orders.¹²

Jackson was censured for abuse of power. Subsequently, the Senate approved the motion to expunge the censure resolution from the record.

Meacham does a phenomenal job of framing the highly charged issues and the battle between the Executive and Legislative Branches by drawing on accounts in letters written by persons closest to Jackson. By taking this literary approach, *American Lion* reads more like a suspense-filled Tom Clancy or Robert Ludlum novel than a biography discussing historical events.

For all the accolades scholars and historians have rained upon Jackson for his pioneering strategies to expand the power of the Executive, his policies on Indian removal and slavery were abysmal. There is some evidence that Jackson’s actions were motivated by concern for the survival of the Indians, but it is clear that he shared Western prejudice against the native inhabitants and wanted them out of the way.¹³ Although Jackson espoused a paternalistic view towards Indians, his actions were subterfuge for his actual agenda: western expansion. William MacDonald discusses Jackson’s Indian policy in *Jacksonian Democracy*,

¹² *Id.* at 554.

¹³ ROBERT V. REMINI, *THE AGE OF JACKSON* 63 (1972).

The Indians were to be given the choice of remaining on so much of their lands as they could use, or of emigrating westward to lands set aside for their special occupancy. If they remained, however, they must submit to the laws of the state in which they lived; for the supremacy of the state throughout all its borders could not be questioned.¹⁴

Meacham does not capitalize on his expertise as an editor to highlight the flaws of Jackson's policy. Instead of providing thought-provoking commentary, he makes a broad, accusatory statement with little factual support. According to Meacham, "The common theme: As a people Indians were neither autonomous nor independent but were to be manipulated and managed in the context of what most benefited Jackson's agenda—white America."¹⁵ The reader will note that Meacham's analysis of Indian removal lacks the vigor he employed when discussing the Administration's expansion of executive power. The author does little to confront the shameful policy and merely provides a sentence denouncing it in a seven-page chapter devoted to Indian removal. He states, "There is nothing redemptive about Jackson's policy, no moment, as with Lincoln and slavery, where the moderate on a morally urgent question, did the right and brave thing."¹⁶ Meacham offers no stimulating perspective on the fact that Jackson's policies were not affected by existing treaties between Indian nations and the United States in which Indian nations were recognized as sovereign nations. Regrettably, the views Jackson championed in his bank veto message regarding privilege and its disastrous effect on equality did not apply to the Indian.

Slavery was yet another black eye on the Jackson Administration. Despite being a forward-thinker, Jackson allowed his place in society as a plantation owner, coupled with the prevailing, prejudiced views of his era, to influence his policy of avoidance. In the waning years of his Administration, Jackson realized the issue of slavery was bubbling beneath the surface. MacDonald writes in *Jacksonian Democracy*, "Jackson spoke truly when he said that, unless the agitation of this question [slavery] ceased, it would divide the Union."¹⁷ It is unfortunate that a man who has come to be revered in history did not deem slavery a cause worthy of his time and talents. The reader may infer that Jackson was forced to remain neutral on the slavery issue because he could not condemn an institution that was

the backbone of his way of life at the Hermitage in Tennessee.¹⁸

Meacham makes a shoddy attempt to discuss the issue of slavery by describing a reward notice for Jackson's runaway slaves. The notice, which encouraged captors to severely whip his slaves upon capture by offering financial incentives, illustrates Jackson's brutal side. The author relishes in Jackson's military and political victories but turns a blind eye to the battle that Jackson ignored. Meacham provides no insight on the interrelatedness between Jackson's livelihood as a plantation owner and his policies on slavery. As an editor, Meacham is tasked daily with asking tough, probing questions; however, on the slavery issue, Meacham abjures. *American Lion* is void of any critical analysis of Jackson's avoidance of the slavery issue.

Andrew Jackson's presidency serves as a rich fact pattern of lessons in professionalism and leadership applicable to judge advocates. Leaders, like Jackson, are always attempting to blaze a trail. As a result, judge advocates must employ innovative thinking to issues of first impression, recognize the importance of establishing legal precedent, and possess the foresight to ascertain the consequences of their advice.

Moreover, judge advocates must be thorough and tenacious in their legal opinions to superiors. Although most judge advocates are placed in positions where they are junior to other officers in terms of time-in-service, they must realize that they possess a wealth of legal training and expertise. Judge advocates must be confident in their well-researched legal opinions, even if when they are not the favored or expedient course of action, such as in the case of William Duane, Jackson's Secretary of the Treasury, who risked his career as a result of his defiance of Jackson's position on the dismantling of the Second Bank.

In addition, judge advocates can learn from Andrew Jackson's avoidance of the slavery issue. Judge advocates must be willing to not only identify legal issues but also formulate plans to address them. A leader does not leave an issue for his successor to resolve if the problem materialized on his watch. History may have been forever changed had Andrew Jackson confronted the slavery issue with the same vigor he showed when dismantling of the Second Bank.

After 369 pages, what is the final verdict on *American Lion*? The book receives a B+ for form and a C+ for substance. Commendably, Meacham uses the letters of Jackson insiders to illuminate a highly-researched topic; however, he provides little background on Andrew Jackson's early years and military conquests and does not explain how those experiences may have shaped his presidential policies. Meacham focuses an inordinate

¹⁴ WILLIAM MACDONALD, JACKSONIAN DEMOCRACY 172 (1906).

¹⁵ MEACHAM, *supra* note 1, at 96.

¹⁶ *Id.* at 97.

¹⁷ MACDONALD, *supra* note 14, at 304.

¹⁸ The Hermitage is the name of Jackson's mansion and plantation near Nashville, Tennessee.

amount of the book on the Petticoat Affair, which may leave the reader feeling as though he has landed in a gossip column rather than a work of historical non-fiction. The author does not capitalize on his expertise as the Editor of *Newsweek* to inject perspectives on contentious issues that arose during the Jackson Administration, such as slavery and Indian removal. *American Lion* is not recommended for the Andrew Jackson novice because Meacham does not present

a well-balanced critical analysis of all the issues during Jackson's presidency. Overall, *American Lion* reads more like an homage to Andrew Jackson written by an affable, fellow Tennessean than historical non-fiction written by a pertinacious *Newsweek* editor. Lastly, *American Lion* does not add any significant contribution to the topic and pales in comparison to the works of Remini, which provide a more thorough analysis of Andrew Jackson's entire life and not just his eight years in the White House.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at (800) 552-3978, extension 3307.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).

Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (August 2009–September 2010) (<http://www.jagcnet.army.mil/JAGCNETINTER/NET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
GENERAL		
5-27-C20	183d JAOBC/BOLC III (Ph 2)	5 Nov – 2 Feb 11
5-27-C20	184th JAOBC/BOLC III (Ph 2)	18 Feb. – 4 May 11
5-27-C20	185th JAOBC/BOLC III (Ph 2)	15 Jul – 28 Sep 11
5-27-C22	59th Judge Advocate Officer Graduate Course	16 Aug 10 – 26 May 11
5-27-C22	60th Judge Advocate Officer Graduate Course	15 Aug – 25 May 12
5F-F1	215th Senior Officer Legal Orientation Course	24 – 28 Jan 11
5F-F1	216th Senior Officer Legal Orientation Course	21 – 25 Mar 11
5F-F1	217th Senior Officer Legal Orientation Course	20 – 24 Jun 11
5F-F1	218th Senior Officer Legal Orientation Course	29 Aug – 2 Sep 11
5F-F3	17th RC General Officer Legal Orientation Course	1 – 3 Jun 11
5F-F5	Congressional Staff Legal Orientation (COLO)	17 – 18 Feb 11
5F-F52	41st Staff Judge Advocate Course	6 – 10 Jun 11

5F-F52-S	14th SJA Team Leadership Course	6 – 8 Jun 11
5F-F55	2011 JAOAC	3 – 14 Jan 11
JARC 181	Judge Advocate Recruiting Conference	20 – 22 Jul 11

NCO ACADEMY COURSES

512-27D30	1st Advanced Leaders Course (Ph 2)	18 Oct – 23 Nov 10
512-27D30	2d Advanced Leaders Course (Ph 2)	10 Jan – 15 Feb 11
512-27D30	3d Advanced Leaders Course (Ph 2)	10 Jan – 15 Feb 11
512-27D30	4th Advanced Leaders Course (Ph 2)	14 Mar – 19 Apr 11
512-27D30	5th Advanced Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D30	6th Advanced Leaders Course (Ph 2)	1 Aug – 6 Sep 11
512-27D40	1st Senior Leaders Course (Ph 2)	18 Oct – 23 Nov 10
512-27D40	2d Senior Leaders Course (Ph 2)	14 Mar – 19 Apr 11
512-27D40	3d Senior Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D40	4th Senior Leaders Course (Ph 2)	1 Aug – 6 Sep 11

WARRANT OFFICER COURSES

7A-270A0	JA Warrant Officer Basic Course	23 May – 17 Jun 11
7A-270A1	22d Legal Administrators Course	13 – 17 Jun 11
7A-270A2	12th JA Warrant Officer Advanced Course	28 Mar – 22 Apr 11
7A-270A3	11th Senior Warrant Officer Symposium	1 – 5 Nov 10

ENLISTED COURSES

512-27D-BCT	13th BCT NCOIC Course	9 – 13 May 11
512-27D/20/30	22d Law for Paralegal NCO Course	21 – 25 Mar 11
512-27D/DCSP	20th Senior Paralegal Course	20 – 24 Jun 11
512-27DC5	34th Court Reporter Course	24 Jan – 25 Mar 1
512-27DC5	35th Court Reporter Course	18 Apr – 17 Jun 11
512-27DC5	36th Court Reporter Course	25 Jul – 23 Sep 11
512-27DC6	11th Senior Court Reporter Course	11 – 15 Jul 11
512-27DC7	14th Redictation Course	3 – 7 Jan 11
512-27DC7	15th Redictation Course	28 Mar – 1 Apr 11
5F-F58	27D Command Paralegal Course	1 – 5 Nov 10

ADMINISTRATIVE AND CIVIL LAW		
5F-F24	35th Administrative Law for Military Installations and Operations	14 – 18 Mar 11
5F-F22	64th Law of Federal Employment Course	22 – 26 Aug 11
5F-F23	66th Legal Assistance Course	25 – 29 Oct 10
5F-F23E	USAREUR Client Services CLE Course	25 – 29 Oct 10
5F-F24E	2011USAREUR Administrative Law CLE	12 – 16 Sep 11
5F-F28	Income Tax Law Course	6 - 10 Dec 10
5F-F28E	USAREUR Tax CLE Course	29 Nov – 3 Dec 10
5F-F28H	2011 Hawaii Income Tax CLE Course	10 – 14 Jan 11
5F-F28P	2011 PACOM Income Tax CLE Course	3 – 7 Jan 11
5F-F202	9th Ethics Counselors Course	11 – 15 Apr 11

CONTRACT AND FISCAL LAW		
5F-F10	164th Contract Attorneys Course	18 – 29 Jul 11
5F-F11	Government Contract Law Symposium	16 – 19 Nov 10
5F-F12	82d Fiscal Law Course	7 – 11 Mar 11
5F-F14	29th Comptrollers Accreditation Fiscal Law Course	28 Feb – 4 Mar 11
5F-F103	11th Advanced Contract Course	31 Aug – 2 Sep 11

CRIMINAL LAW		
5F-F31	17th Military Justice Managers Course	22 – 26 Aug 11
5F-F33	54th Military Judge Course	18 Apr – 6 May 11
5F-F34	34th Criminal Law Advocacy Course	13 – 24 Sep 10
5F-F34	35th Criminal Law Advocacy Course	20 – 24 Sep 10
5F-F34	36th Criminal Law Advocacy Course	31 Jan – 4 Feb 11
5F-F34	37th Criminal Law Advocacy Course	20 – 24 Sep 10
5F-F34	38th Criminal Law Advocacy Course	20 – 24 Sep 10
5F-F34	39th Criminal Law Advocacy Course	19 – 23 Sep 10

INTERNATIONAL AND OPERATIONAL LAW		
5F-F40	2011 Brigade Judge Advocate Symposium	9 – 13 May 11
5F-F41	7th Intelligence Law Course	15 – 19 Aug 11
5F-F47	55th Operational Law of War Course	22 Feb – 4 Mar 11
5F-F47	56th Operational Law of War Course	1 – 12 Aug 11
5F-F48	4th Rule of Law Course	11 -15 Jul 11

3. Naval Justice School and FY 2010–2011 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	Course Title	Dates
0257	Lawyer Course (010) Lawyer Course (020) Lawyer Course (030)	12 Oct – 17 Dec 10 24 Jan – 1 Apr 11 1 Aug – 7 Oct 11
0258 (Newport)	Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070) Senior Officer (080)	29 Nov – 3 Dec 10 (Newport) 24 – 28 Jan 11 (Newport) 14 – 18 Mar 11 (Newport) 25 – 29 Apr 11 (Newport) 23 – 27 May 11 (Newport) 13 – 17 Jun 11 (Newport) 6 – 9 Sep 11 (Newport)
2622 (Fleet)	Senior Officer (Fleet) (020) Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050) Senior Officer (Fleet) (060) Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110) Senior Officer (Fleet) (120) Senior Officer (Fleet) (130)	14 – 18 Dec 10 (Hawaii) 15 – 19 Nov 10 (Pensacola) 13 – 17 Dec 10 (Hawaii) 10 – 14 Jan 11 (Pensacola) 24 – 28 Jan 11 (Yokosuka) 14 – 18 Feb 11 (Pensacola) 4 – 8 Apr 11 (Pensacola) 9 – 13 May 11 (Pensacola) 16 – 20 May 11 (Naples, Italy) 27 Jun – 1 Jun 11 (Pensacola) 1 – 5 Aug 11 (Pensacola) 1 – 5 Aug 11 (Camp Lejeune) 8 – 12 Aug 11 (Quantico)
03RF	Continuing Legal Education (010) Continuing Legal Education (020) Continuing Legal Education (030)	25 Oct 10 – 21 Jan 11 7 Mar – 20 May 11 13 Jun – 28 Aug 11
03TP	Basic Trial Advocacy (010)	7 – 11 Feb 11

07HN	Legalman Paralegal Core (010) Legalman Paralegal Core (020) Legalman Paralegal Core (030)	26 Jan – 18 May 11 24 May – 9 Aug 11 31 Aug – 20 Dec 11
NA	Intermediate Trial Advocacy (010)	16 – 20 May 11
525N	Prosecuting Complex Cases (010)	11 – 15 Jul 11
627S	Senior Enlisted Leadership Course (Fleet) (020) Senior Enlisted Leadership Course (Fleet) (030) Senior Enlisted Leadership Course (Fleet) (040) Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	8 – 10 Nov 10 (San Diego) 15 – 17 Nov 10 (Norfolk) 13 – 17 Dec 10 (Hawaii) 10 – 12 Jan 11 (Mayport) 31 Jan – 12 Feb 11 (Okinawa) 16 – 18 Feb (Norfolk) 22 – 24 Mar 11 (San Diego) 25 – 27 Apr 11 (Bremerton) 16 – 20 May 11 (Naples) 1 – 3 Jun 11 (San Diego) 1 – 3 Jun 11 (Norfolk) 6 – 8 Jul 11 (San Diego) 8 – 10 Aug 11 (Millington) 20 – 22 Sep ((Pendleton) 21 – 23 Sep 11 (Norfolk)
748A	Law of Naval Operations (010) Law of Naval Operations (020)	28 Feb – 4 Mar 11 (San Diego) 19 – 23 Sep 11 (Norfolk)
748B	Naval Legal Service Command Senior Officer Leadership (010)	25 Jul – 5 Aug 11
748K	Trial Advocacy CLE (020) Trial Advocacy CLE (030) Trial Advocacy CLE (040)	13 – 17 Dec 10 (Hawaii) 20 – 21 Jan 11 (Yokosuka) 14 – 15 Apr 11 (San Diego)
786R	Advanced SJA/Ethics (010)	25 – 29 Jul 11
7485	Classified Information Litigation Course (010)	2 – 6 May 11 (Andrews AFB)
7487	Family Law/Consumer Law (010)	Cancelled
7878	Legal Assistance Paralegal Course (010)	18 – 22 Apr 11
846L	Senior Legalman Leadership Course (010)	25 – 29 Jul 11
846M	Reserve Legalman Course (010)	1 – 12 Nov 10
850T	Staff Judge Advocate Course (010) Staff Judge Advocate Course (020)	25 Apr – 6 May 11 (Norfolk) 11 – 22 Jul 11 (San Diego)
850V	Law of Military Operations (010)	6 – 17 Jun 11
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	20 – 24 Jun 11 26 – 30 Sep 11
932V	Coast Guard Legal Technician Course (010)	8 – 19 Aug 11

961A (PACOM)	Continuing Legal Education (010) Continuing Legal Education (020) Continuing Legal Education (030)	13 – 17 Dec 10 (Hawaii) 17 – 21 Jan 11 (Yokosuka) 16 – 20 May 11 (Naples)
961D	Military Law Update Workshop (010) Military Law Update Workshop (020)	TBD TBD
961G	Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted) (020)	TBD TBD
961J	Defending Complex Cases (010)	18 – 22 Jul 11
3938	Computer Crimes (010)	6 – 10 Jun 11 (Newport)
3759	Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	10 – 14 Jan 11 (San Diego) 28 Mar – 1 Apr 11 (San Diego) 4 – 8 Apr 11 (San Diego) 25 – 29 Apr 11 (Bremerton) 2 – 6 May 11 (San Diego) 6 – 10 Jun 11 (San Diego) 19 – 23 Sep 11 (Pendleton)
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020) Paralegal Research & Writing (030)	30 Nov – 13 Dec 10 7 – 20 Apr 11 18 – 29 Jul 11
4044	Joint Operational Law Training (010)	TBD
4048	Legal Assistance Course (010)	18 – 22 Apr 11
NA	Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (020)	16 – 18 Feb 11 12 – 14 Jul 11
NA	Legal Specialist Course (010) Legal Specialist Course (020) Legal Specialist Course (030)	12 Oct – 17 Dec 10 28 Jan – 1 Apr 11 29 Apr – 1 Jul 11
NA	Paralegal Ethics Course (010) Paralegal Ethics Course (020) Paralegal Ethics Course (030)	25 – 29 Oct 10 7 – 11 Mar 11 13 – 17 Jun 11
NA	Legal Service Court Reporter (010) Legal Service Court Reporter (020) Legal Service Court Reporter (030)	1 Sep – 19 Nov 10 14 Jan – 1 Apr 11 22 July – 7 Oct 11
NA	Leadership Training Symposium (010)	29 Nov – 3 Dec 10 (Washington)
NA	Information Operations Law Training (010)	4 – 18 Mar 11 (Norfolk)
NA	Senior Trial Counsel/Senior Defense Counsel Leadership (010)	4 – 8 Apr 11

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	18 Oct – 5 Nov 10 29 Nov – 17 Dec 10 24 Jan – 11 Feb 11 28 Feb – 18 Mar 11 4 – 22 Apr 11 9 – 27 May 11 13 Jun – 1 Jul 11 11 – 29 Jul 11 15 Aug – 2 Sep 11
0379	Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	25 Oct – 5 Nov 10 6 – 17 Dec 10 31 Jan – 11 Feb 11 7 – 18 Mar 11 11 – 22 Apr 11 16 – 27 May 11 18 – 29 Jul 11 22 Aug – 2 Sep 11
3760	Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	15 – 19 Nov 10 10 – 14 Jan 11 (Mayport) 28 Mar – 1 Apr 11 6 – 10 Jun 11 8 – 12 Aug 11 (Millington) 12 – 16 Sep 11

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	18 Oct – 5 Nov 10 29 Nov – 17 Dec 10 24 Jan – 11 Feb 11 28 Feb – 18 Mar 11 9 – 27 May 11 13 Jun – 1 Jul 11 25 Jul – 12 Aug 11 22 Aug – 9 Sep 11
947J	Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080) Legal Clerk Course (090)	18 – 29 Oct 10 29 Nov – 10 Dec 10 3 – 14 Jan 11 31 Jan – 11 Feb 11 28 Mar – 8 Apr 11 9 – 20 May 11 13 – 24 Jun 11 1 – 12 Aug 11 22 Aug – 2 Sep 11

4. Air Force Judge Advocate General School Fiscal Year 2010–2011 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	Dates
Paralegal Apprentice Course, Class 11-01	5 Oct – 17 Nov 10
Judge Advocate Staff Officer Course, Class 11-A	12 Oct – 16 Dec 10
Paralegal Craftsman Course, Class 11-01	12 Oct – 23 Nov 10
Article 32 Investigating Officer's Course, Class 11-A	19 – 20 Nov 10
Deployed Fiscal Law & Contingency Contracting Course, Class 11-A	6 – 10 Dec 10
Pacific Trial Advocacy Course, Class 11-A (Off-Site, Japan)	13 – 17 Dec 10
Trial & Defense Advocacy Course, Class 11-A	3 – 14 Jan 11
Paralegal Apprentice Course, Class 11-02	3 Jan – 16 Feb 11
Gateway III, Class 11-A	19 Jan – 4 Feb 11
Air Force Reserve & Air National Guard Annual Survey of the Law, Class 11-A (Off-Site)	21 – 22 Jan 11
Homeland Defense/Homeland Security Course, Class 11-A	24 – 28 Jan 11
CONUS Trial Advocacy Course, Class 11-A (Off-Site, Charleston, SC)	31 Jan – 4 Feb 11
Interservice Military Judges' Seminar, Class 11-A	1 – 4 Feb 11
Legal & Administrative Investigations Course, Class 11-A	7 – 11 Feb 11
European Trial Advocacy Course, Class 11-A (Off-Site, Kapaun AS, Germany)	14 – 18 Feb 11
Judge Advocate Staff Officer Course, Class 11-B	14 Feb – 15 Apr 11
Paralegal Craftsman Course, Class 11-02	14 Feb – 30 Mar 11
Paralegal Apprentice Course, Class 11-03	28 Feb – 12 Apr 11
Environmental Law Update Course (SAT-DL), Class 11-A	22 – 24 Mar 1
Defense Orientation Course, Class 11-B	4 – 8 Apr 11
Advanced Labor & Employment Law Course, Class 11-A (Off-Site, Rosslyn, VA location)	12 – 14 Apr 11
Military Justice Administration Course, Class 11-A	18 – 22 Apr 11

Paralegal Apprentice Course, Class 11-04	25 Apr – 8 Jun 11
Cyber Law Course, Class 11-A	26 – 28 Apr 11
Total Air Force Operations Law Course, Class 11-A	29 Apr – 1 May 11
Advanced Trial Advocacy Course, Class 11-A	9 – 13 May 11
Operations Law Course, Class 11-A	16 – 27 May 11
Negotiation and Appropriate Dispute Resolution Course, 11-A	23 – 27 May 11
Reserve Forces Paralegal Course, Class 11-A	6 – 10 Jun 11
Staff Judge Advocate Course, Class 11-A	13 – 24 Jun 11
Law Office Management Course, Class 11-A	13 – 24 Jun 11
Paralegal Apprentice Course, Class 11-05	20 Jun – 3 Aug 11
Judge Advocate Staff Officer Course, Class 11-C	11 Jul – 9 Sep 11
Paralegal Craftsman Course, Class 11-03	11 Jul – 23 Aug 11
Paralegal Apprentice Course, Class 11-06	15 Aug – 21 Sep 11
Environmental Law Course, Class 11-A	22 – 26 Aug 11
Trial & Defense Advocacy Course, Class 11-B	12 – 23 Sep 11
Accident Investigation Course, Class 11-A	12 – 16 Sep 11

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1220 North Fillmore Street, Suite 444
Arlington, VA 22201
(571) 481-9100

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University Law School
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

MC Law: Mississippi College School of Law
151 East Griffith Street
Jackson, MS 39201
(601) 925-7107, fax (601) 925-7115

NAC National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(803) 705-5000

NDAA: National District Attorneys Association
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
(703) 549-9222

NDAED: National District Attorneys Education Division
1600 Hampton Street
Columbia, SC 29208
(803) 705-5095

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

6. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAIBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of JAIBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2011 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2010 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Baucum Fulk, commercial telephone (434) 971-3357, or e-mail baucum.fulk@us.army.mil.

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

(2) Follow the link that reads “Enter JAGCNet.”

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(6) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

2. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact

Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

3. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General’s Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.