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From Infantryman to Contract Attorney to Judge Advocate General: The Career of Major General Ernest M. Brannon (1895–1982)

Fred L. Borch
Regimental Historian & Archivist

The expertise required to be a first-rate procurement lawyer in the Corps, necessarily acquired through study and practice over a long period of time, probably best explains why judge advocates specializing in contracting historically have been less likely to reach the very top of the Corps. There have been exceptions, however, and Ernest M. Brannon, who served as The Judge Advocate General (TJAG) from 1950 to 1954, is perhaps the most noteworthy. His remarkable career—which began at West Point and ended in Washington, D.C.—included overseas service in China and the Philippines, as well as tours in Ohio, New York and Texas. As TJAG, he oversaw the doubling of the number of uniformed lawyers in the Corps, as well as the inauguration of the Uniform Code of Military Justice (UCMJ) and the reactivation of The Judge Advocate General's School (TJAGSA) in Charlottesville, Virginia—all of which occurred while the Army was at war in Korea.

Born in Ocoee, Florida, on December 21, 1895, Ernest Marion "Mike" Brannon spent his childhood in Ocoee, where he went to grammar school. After attending Marion Institute, a college preparatory school located in Marion, Alabama, Brannon entered the University of Florida. He also worked at a local bank. After World War I began in Europe, and as "war tension" in the United States increased, young Brannon "became interested in the regular Army." He obtained an "alternate appointment" to the U.S. Military Academy (USMA) and left Gainesville for West Point in June 1917.[1]

Since the United States had entered World War I in April 1917, Brannon and the Class of 1917 were graduated early—on 1 November 1918. Ten days later, the war ended in Europe and Second Lieutenant Brannon and his officer classmates returned to West Point as student officers and a second graduation six months later, in June 1919. The entire class then sailed for Europe, where they toured battlefields in France and Italy as guests of the French and Italian governments.

After returning to the United States, Brannon and his fellow Infantry officers made history as members of the first regular class at the newly established Infantry School at Fort Benning, Georgia.[2] After graduation in June 1920, Brannon reported to the 3rd Infantry Regiment, then located at Eagle Pass, Texas. When his regiment moved to Camp Sherman, Ohio, now First Lieutenant (1LT) Brannon went with it.

In January 1921, 1LT Brannon returned to New York City to marry his girlfriend from his West Point days, Marjorie Devitt. He and Marjorie then returned to Ohio, only to be informed that they were to relocate to Tientsin, China, where Mike was to join the 15th Infantry Regiment. While aboard an Army transport ship taking them to China, however, Brannon was diverted to Camp Eldridge in Laguna Province in the Philippines, where he served as battalion and post adjutant.

In November 1922, now Captain (CPT) Brannon joined the 15th Regiment in Tientsin, where he served as assistant adjutant. As in any career, timing and luck are often important. Although Brannon did not know it at the time, the arrival of a new officer in the regiment, Lieutenant Colonel (LTC) George C. Marshall, was an important event. Marshall served as the unit's executive officer and, in this position, had frequent contact with the regiment's assistant adjutant. While there is no way to know if this future Army Chief of Staff and General of the Army had anything to say about CPT Brannon's future, LTC Marshall was an excellent leader who took note of promising young officers—and Brannon certainly fit into this category.[3]

In May 1925, Brannon was ordered to return to the United States in order to attend Columbia Law School for a year—in preparation to be an instructor at the USMA Law Department. Brannon subsequently served on West Point's faculty from 1926 to 1931, returning each summer to resume his studies at Columbia. It was a long process: after leaving West Point in 1931, Brannon completed his final year at Columbia and was awarded his LL.B. in 1932.

After being detailed to The Judge Advocate General's Department in 1931, Brannon's first assignment was in the

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[1] *Ernest Marion Brannon*, ASSEMBLY 123 (Mar. 1984).

[2] Fort Benning was established following World War I, when the Army bought land in 1919 and created a military reservation named in honor of Confederate Brigadier General Henry L. Benning. The Infantry School was created the following year. John M. Wright, Jr., *Fort Benning 1918–1968*, INFANTRY, Sept.–Oct 1968, at 4–11.

[3] General of the Army George C. Marshall was one of the most remarkable men of his generation. A graduate of the Virginia Military Institute, he served in the Army from 1901 to 1945. After retiring as Army Chief of Staff, Marshall served as Secretary of State under Harry S. Truman. His "Marshall Plan"—a massive economic aid package—is widely credited with bringing about the revival of Europe after the devastation of World War II. For more on Marshall, see ED CRAY, GENERAL OF THE ARMY: GEORGE C. MARSHALL, SOLDIER AND STATESMAN (1990).

Contracts Division in the Office of The Judge Advocate General (OTJAG). It was in this job that "he developed a life-long interest in the legal aspects of Army procurement."[4] Then–Major Brannon applied to attend the Army Industrial College (today's Industrial College of the Armed Forces), was accepted and, after graduating, was assigned to the Planning Branch, Office of the Assistant Secretary of the Army. In this position, MAJ Brannon assisted with planning for industrial mobilization in the event of war. He also was one of the War Department's representatives during Senate Committee investigations of the munitions industry, the so-called Nye Committee.

In 1936, MAJ Brannon returned to New York as Assistant Judge Advocate of the 2d Corps Area, located on Governors Island. After gaining some experience with courts-martial (and golf), he returned with his family to Washington, D.C. He was assigned to the Contracts Division, OTJAG. He later became chief of that division and was soon recognized as an expert in government procurement. Such was his authority that he taught Government Contract Law at Georgetown Law School from 1941 to 1943. Now–LTC Brannon also was given the additional duty of Chief of the OTJAG Tax Division.

In 1943, then–Colonel (COL) Brannon sailed for England, where he was assigned as the Judge Advocate, First U.S. Army, then located in Bristol. For his outstanding service as the top lawyer in that unit's headquarters between 20 October 1943 and 31 May 1944, Brannon was decorated with the Bronze Star Medal.[5]

On 11 June 1944, COL Brannon waded ashore at Omaha Beach with First Army as it entered combat in France. It was D+5 and Brannon would remain with the unit as it fought its way across France and Belgium and then into Germany. After Victory-in-Europe or "V-E" Day in May 1945, COL Brannon returned to the United States with First Army and began preparing to deploy to the Pacific, since the First was scheduled to join the fight against the Japanese.

The dropping of two atomic bombs on Japan ended the need for COL Brannon to deploy to the Pacific and he now returned to Washington, D.C., to become the "Procurement Judge Advocate" at Headquarters, Army Service Forces. This was an important position, which explains why the Office of the Procurement Judge Advocate was transferred to the War Department in 1946. The following year, however, the position was transferred again: to OTJAG. Brigadier General Brannon (he had been recently promoted) now became the Assistant Judge Advocate General (Procurement).

During his tenure as the AJAG (Procurement), Brannon was heavily involved in the drafting and passage of the Armed Services Procurement Act of 1947. During the war, the government had used the negotiation method of procurement and this legislation now required the government to return to the "formal advertising and competitive bidding that had been customary in time of peace."[6]

On 26 January 1950, BG Brannon was confirmed by the Senate as TJAG.[7] Any hopes he may have had for a quiet tenure as the Army's top lawyer were dashed almost immediately, as the United States was plunged into war on the Korean peninsula in June 1950. Major General (MG) Brannon now became a war-time TJAG and faced a number of significant challenges.

First, the Army, Navy, and newly created Air Force had only recently finished work on the Manual for Courts-Martial, 1949, and were beginning with its implementation. But this work was now completely preempted with the enactment of the Uniform Code of Military Justice. Since the new UCMJ would take effect on 31 May 1951, MG Brannon now had to oversee the production of yet another Manual for Courts-Martial—based on a criminal statute that was radically different from the Articles of War that had governed military justice in the Army since the Revolution.

Second, the outbreak of the Korean War had triggered the re-call of hundreds of Army Reserve judge advocates, most of whom had served in World War II. Brannon and others realized that these returning judge advocates knew nothing about the new UCMJ and that some sort of instruction on the new Code was necessary—as well as re-fresher training on other legal subjects. The result was that MG Brannon directed that The Judge Advocate General's School be re-activated at Fort Myer, Virginia. Within months, MG Brannon decided that a more permanent location for TJAGSA be found. Consequently, it was Brannon who ultimately decided that the school should be located at the University of Virginia, and it was MG Brannon who selected the school's first commandant, COL Charles E. "Ted" Decker and ensured that TJAGSA had the funding and support that it needed to flourish.

Finally, MG Brannon was TJAG when the Corps doubled in size. The demands of the Korean War and the additional legal responsibilities imposed by the UCMJ resulted in a large number of Reserve judge advocates being called to active duty. The Corps went from 650 judge advocates (350 Regulars, 300 Reservists) to over 1200 officers, of whom about two-thirds were Reserve officers.

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[4] *Ernest Marion Brannon*, *supra* note 1.

[5] Headquarters, First United States Army, Gen. Orders No. 22 (June 6, 1944).

[6] E. M. Brannon, *The Armed Services Procurement Act of 1947*, JUD. ADV. J., BULL. NO. 1, Dec. 1948, at 12.

[7] JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 200 (1975).

Major General Brannon reported in 1952 that 750 of these 1200 judge advocates "were engaged full-time in criminal justice activities."[8] In any event, the personnel challenges that accompanied this huge increase in Army judge advocates required a senior officer with vision.

When MG Brannon retired on 26 January 1954, he left a Corps that was radically different from the one he had entered in the 1930s—and which had markedly changed during his four years as TJAG. When MG Brannon retired on 26 January 1954, he was immediately recalled to active duty to serve one year as executive secretary of President Eisenhower's Commission on Veteran's Benefits, the so-called Bradley Commission. While other TJAGs have been recalled to active duty, it is a rare event in the Corps' history.[9] After retiring a second time, MG Brannon continued to serve for some years as a consultant to the Defense Department in the field of industrial security.[10]

Those who served with MG Brannon in the Corps remembered him as "a man of great patience who took time to understand and care for the people around him."[11] As MG (Retired) Wilton B. Persons put it: "Some Judge Advocates were afraid of him [Brannon] because he was gruff and no nonsense . . . but he was very sharp, on the ball and much liked and admired in the Corps."[12]

General Brannon's ideas about service in the Army were passed on to his grandson, Patrick J. O'Hare, who was a judge advocate for more than 20 years. After retiring as a colonel in 2005, "Pat" O'Hare continues to serve our Corps as the Deputy Director of the Legal Center at TJAGLCS.

As for MG Brannon, he has not been forgotten: each year, the Contract and Fiscal Law Department at The Judge Advocate General's Legal Center and School awards the "Major General Ernest M. Brannon Award" to the Graduate Course student with the highest standing in government procurement law.

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/History

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[8] *Id*. at 209.

[9] Other The Judge Advocate General's recalled to active duty are: MG Blanton Winship, recalled to active duty to serve as a member of the military commission that tried the German U-boat saboteurs during World War II; MG Myron Cramer, recalled to serve as the lone American judge on the Tokyo War Crimes tribunal; and MG Kenneth Hodson, recalled to serve as the first Chief Judge on the Army Court of Military Review (today's Army Court of Criminal Appeals).

[10] *Ernest Marion Brannon*, *supra* note 1, at 123.

[11] *Id*.

[12] Telephone Interview with Major General (Retired) Wilton B. Persons, Jr. (Feb. 8, 2013). Major General Persons served as TJAG from 1975 to 1979.

Children in the Courtroom: Essential Strategies for Effective Testimony by Child Victims of Sexual Abuse

Major Bradley M. Cowan[*]

I. Introduction

A seven-year-old girl enters the courtroom clutching a stuffed teddy bear and staring at the floor. She is a victim of sexual abuse and is the government's key witness in the case against her abuser. The military judge looks up from her notes and, staring directly at you, says, "Trial counsel, please proceed." What happens over the next hour depends in large part on how well you prepared yourself and the witness for this moment.

This article reviews essential strategies for preparing and conducting an effective direct examination of a child witness. Most of the recommendations apply only to children under the age of ten, although they are based on general principles applicable to all witnesses who are victims of abuse.[1] Part II of the article explains why a prosecutor should begin preparing for the direct examination at the earliest stage of the investigation by working with a multidisciplinary team. Part III discusses an often overlooked but essential stage of trial preparation: building rapport. Part IV then describes how to reduce uncertainty and fear by familiarizing the child witness with the courtroom and courtroom procedure. A description of remote live testimony and other courtroom accommodations follows in part V; then part VI explores how to conduct the direct examination with emphasis on pretrial preparation, administering the oath, building rapport in court, using practice narratives, accomplishing anatomy identification, and describing abuse. The article concludes with a guide to preparing children for cross-examination.[2]

II. Early Involvement and the Multidisciplinary Team: Trial Preparation Begins at the Start, Not the End, of the Investigation

Child abuse prosecutors would do well to heed some advice from the medical profession: first, do no harm.[3] Abused children suffer far-reaching psychological trauma from having been abused by someone they loved or trusted.[4] Their families or communities may be torn apart and adults may pressure them to recant.[5] Their immature minds are suddenly forced to make decisions and deal with feelings that can overwhelm even the most stoic adult victims of crime. The justice system should be the last place to add to their anxieties.

The multidisciplinary team (MDT) approach to the investigation and prosecution of child abuse is designed to reduce the additional trauma that children can experience in the judicial process. "An MDT is a group of professionals who work together in a coordinated and collaborative manner to ensure an effective response to reports of child abuse and neglect."[6] It consists of representatives from law enforcement, the prosecution, child welfare agencies, the medical and mental health care community, victim advocate services, and guardians *ad litem* or court-appointed special advocates.[7] The benefits of an MDT are numerous:

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[1] The term "child" is a broad concept that, in its least precise form, refers to any person under the age of 18. However, given that children develop at different paces and that unique circumstances may put a child ahead of or behind his or peers, it is difficult to draw distinct lines between children of different ages. *See* Kathleen Coulborn Faller & Sandra K. Hewitt, *Special Considerations for Cases Involving Young Children*, *in* INTERVIEWING CHILDREN ABOUT SEXUAL ABUSE 142, 144 (Kathleen Coulborn Faller ed., 2007). One of the premises of this paper is that there is not a one-size-fits-all solution for preparing a child of any age for direct examination. The prosecutor must design a trial strategy around each individual child taking into account the child's age, maturity, intelligence, developmental abilities, communication skills, environment, and history of abuse among dozens of other factors.

[2] This article is not intended to be a comprehensive guide to interviewing children about sexual abuse. Prosecutors working in this field should be trained by competent professionals before attempting to talk to children about abuse or conducting a direct examination. *See* Victor I. Vieth, *When Cameras Roll: The Danger of Videotaping Child Abuse Victims Before the Legal System is Competent to Assess Children's Statements*," 7 J. OF CHILD SEXUAL ABUSE 113 (1999) (recommending that judges, attorneys, police officers, and social workers be trained in the art of speaking to a child including training on linguistics, child development, memory and suggestibility, and the ways in which children disclose abuse).

[3] *See* FRANCIS ADAMS, THE GENUINE WORKS OF HIPPOCRATES TRANSLATED FROM THE GREEK WITH A PRELIMINARY DISCOURSE AND ANNOTATIONS 300 (1849) ("The physician must be able to tell the antecedents, know the present, and foretell the future—must meditate these things, and have two special objects in view with regard to diseases, namely, to do good or to do no harm.").

[4] Kathryn Kuehnle & Mary Connell, *Managing Children's Emotional and Clinical Needs*, *in* CHILDREN'S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE 179, 185 (Michael E. Lamb et al. eds., 2d ed. 2011).

[5] AM. PROSECUTORS RES. INST., INVESTIGATION AND PROSECUTION OF CHILD ABUSE 1 (3d ed. 2004) [hereinafter APRI].

[6] MARK ELLS, FORMING A MULTIDISCIPLINARY TEAM TO INVESTIGATE CHILD ABUSE 2 (2d prtg. 2000).

[7] APRI, *supra* note 5, at xxxiii–xxxiv.

> It can reduce the number of interviews a child undergoes, minimize the number of people involved in the case, enhance the quality of evidence discovered in the investigation, make more efficient use of limited resources, educate each agency concerning the needs and interests of the other agencies involved, and minimize the likelihood of conflicts among those agencies.[8]

At least thirty states and the federal government have mandated or authorized joint investigations of child abuse by MDTs.[9] With such widespread use of MDTs in the civilian community, military prosecutors should have little difficulty finding and working with one.

The MDT's first contact with a victim of child abuse usually occurs at a Child Advocacy Center (CAC) where a specially trained forensic interviewer interviews the child about the abuse.[10] The prosecutor and a law enforcement agent should attend this interview. Many CACs have rooms with one-way mirrors or other technology that allow other professionals to observe interviews with children.[11] Prosecutors and investigators should take this opportunity to suggest additional questions to the interviewer in order to develop investigative leads and, as much as possible, to resolve ambiguity about legal elements such as penetration, the time and location of the offense, and the identity of the perpetrator.[12]

By getting involved at this early stage of the investigation, the prosecutor and the investigator minimize the need for additional interviews, thus reducing the number of times that the victim has to relive the abuse by talking about it. After watching the child's interview, the agent should be able to conduct a better interrogation of the suspect[13] and begin the search for corroborating evidence, such as receipts, crime scene photographs, school attendance records, weather reports, etc.[14] Prosecutors also benefit by observing early in the process how well the victim is able to remember and communicate about the details of the abuse.[15] This helps the prosecutor to conduct informed pretrial negotiations with the defense[16] and begin to design a direct examination.[17] Before leaving the CAC, the prosecutor and investigator should introduce themselves to the child and the child's caregiver.[18] This brief interaction begins the long process of building rapport and increasing confidence in the judicial process.

Other members of the MDT provide therapeutic and support services to victims of child abuse and their families.[19] A prosecutor should not ignore this aspect of a victim's experience because it plays a critical role in determining how the victim will testify.[20] A therapist, for example, may help a child overcome a fear of talking about the abuse or look for warning signs of destructive behaviors like substance abuse, running away, or attempting suicide.[21] A victim advocate or social worker can help alleviate a family's fears about loss of income, housing, and other military benefits which, if not addressed, could lead to a recantation.[22] The child welfare agency can monitor the child's home environment and alert the prosecutor to any

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[8] *Id.* at xxix; *see also* Felicia Kitzmiller, *Report Calls for Training, Coordination in Prosecuting Child Sex Abuse Cases*, May 28, 2013, *available at* http://www.goupstate.com/article/20130528/articles/130529685?p=all&tc=pgall&tc=ar.

[9] APRI, *supra* note 5, at xxx; *see also* 18 U.S.C. § 3509(g) (2009); KY. REV. STAT. ANN. § 431.600 (West 2013); MO. ANN. STAT. § 660.520 (West 2013); GA. CODE ANN. § 19-15-2 (2013); N.Y. SOC. SERV. LAW § 423.6 (McKinney 2013); MD. CODE ANN., FAM. LAW § 5-706(g) (West 2013); TEX. FAM. CODE ANN. §§ 264.403, .406 (West 2012); VA. CODE ANN. § 63.2-1503K (West 2013).

[10] APRI, *supra* note 5, at 237; *see also* United States v. Paaluhi, 54 M.J. 181, 183 (C.A.A.F. 2000); *see generally* Kathleen Coulborn Faller, *Forensic and Clinical Interviewer Roles in Child Sexual Abuse*, *in* INTERVIEWING CHILDREN ABOUT SEXUAL ABUSE, *supra* note 1, at 3, 3–9.

[11] APRI, *supra* note 5, at xli; *see also Paaluhi*, 54 M.J. at 183 (describing a forensic interview observed by law enforcement agents).

[12] APRI, *supra* note 5, at 41.

[13] *Id.* at 126, 131–32.

[14] *Id.* at 77.

[15] *Id.* at xli.

[16] *Id.* at 219.

[17] Colin H. Murray, *Nuts and Bolts: Child-Witness Examination*, 31 LITIG. 16, 17 (2005).

[18] APRI, *supra* note 5, at 64.

[19] *Id.* at xxxiii–xxxv.

[20] *See* Gail S. Goodman et al., *Testifying in Criminal Court*, *in* 57 MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT 1, 116 (1992) (noting that "when mothers react to the disclosure of abuse with hostility, distance, or preoccupation with others' needs (i.e., not the child's needs), their children have more difficulty dealing with the additional stress of legal involvement").

[21] U.S. DEP'T OF HEALTH & HUM. SERVICES, TRAUMA-FOCUSED COGNITIVE BEHAVIORAL THERAPY FOR CHILDREN AFFECTED BY SEXUAL ABUSE OR TRAUMA 5–8 (2012), *available at* https://www.childwelfare.gov/pubs/trauma/trauma.pdf; *see also* MARILYN STRACHAN PETERSON & ANTHONY J. URQUIZA, THE ROLE OF MENTAL HEALTH PROFESSIONALS IN THE PREVENTION AND TREATMENT OF CHILD ABUSE AND NEGLECT (1993), *available at* https://www.childwelfare.gov/ pubs/usermanuals/ menthlth/mentlhlth.pdf.

[22] U.S. DEP'T OF JUSTICE, BREAKING THE CYCLE OF VIOLENCE: RECOMMENDATIONS TO IMPROVE THE CRIMINAL JUSTICE RESPONSE TO CHILD VICTIMS AND WITNESSES 14 (June 1999) [hereinafter BREAKING THE CYCLE OF VIOLENCE], *available at* http://www.ojp.usdoj.gov/ovc/publications/factshts/pdftxt/monograph.pdf; *see also* Tamara E. Hurst, *Prevention of Recantations of Child Sexual Abuse Allegations*, CENTER PIECE (Nat'l Child Prot. Training Ctr., Winona, Minn.), 2010, at 3, *available at* http://www.ncptc.org/vertical/Sites/%7B8634A6E1-FAD2-4381-9C0D-5DC7E93C9410%7D/uploads/%7BEDA13E5A-2350-408C-B673-34CAEB3FD7E7%7D.PDF.

sign that the offender has tried to contact the child or that a non-offending parent or a sibling is pressuring the child to recant.[23] Even chaplains can contribute to the work of the MDT by acting a consultant to a mental health professional, acting as a support person for the child, marshaling resources from faith-based organizations, and advising on cultural issues that are important to the child and her family.[24] A prosecutor who works closely with these members of the MDT will be in a better position to eliminate obstacles to the child's participation at trial, explain the dynamics of child abuse to the panel, and present a compelling sentencing case.

The MDT works together at all stages of the investigation and prosecution to achieve two overarching goals: to provide care and support for the victim and to bring the offender to justice. While some members of the team will focus almost exclusively on only one of these goals, neither goal can be achieved without the coordinated response of the entire team. A judge advocate who attempts to prosecute a child abuse case without the help of an MDT risks both a miscarriage of justice and harm to the welfare of the victim.

III. Building Rapport

In ordinary context, "rapport" is defined as "a close and harmonious relationship in which the people or groups concerned understand each other's feelings or ideas and communicate well."[25] This definition also applies to the investigation and prosecution of child abuse, but it connotes much more. Rapport is the first step in a widely used forensic interview protocol, RATAC®, developed by CornerHouse, a nonprofit child abuse evaluation and training center in Minneapolis, Minnesota.[26] CornerHouse describes rapport this way:

> First, an interviewer should establish a child's *comfort* by being aware of and, more importantly, responsive to a child's individual needs within the interview setting. Second, an interviewer should become acquainted with a child's unique mode of *communication*, including language skills, emotions, and individual idiosyncrasies. Finally, an interviewer needs to assess the *competence* of each child being interviewed.[27]

For the forensic interviewer who may have only one encounter with the child, rapport begins and ends with the forensic interview. For the prosecutor, who has numerous encounters with the child, rapport should be incorporated into every meeting from pretrial preparation to direct examination.[28] Prosecutors should take advantage of delays in the investigative and judicial processes to meet regularly with the child and the child's caregiver to build a solid rapport. If at all possible, these meetings should take place at the child's home or some other neutral place where the child feels safe and comfortable.[29] These meetings build trust and confidence between the child and the prosecutor, which will pay dividends in the crucible of the courtroom.

Early in the rapport phase, the prosecutor should avoid talking about the abuse unless the child brings it up. For the first few meetings the prosecutor and the child should talk about things that interest the child like school, friends, and popular culture. This allows the prosecutor to learn about the child's language skills and speech patterns which, in turn, will help the prosecutor develop a direct examination that is appropriate to the child's developmental abilities.[30]

The prosecutor should also ask the child open-ended questions about past events like birthday parties or family vacations. This is called a practice narrative or practice interview because it helps the child practice retrieving memories and telling stories in a narrative fashion.[31] Research has shown that interviewers who use practice narratives obtain more relevant information from children:

> After participating in a practice interview, children [as young as three] provided a greater average number of details in response to each question than allegations made in interviews without a

[23] N.Y. CITY ADMIN. FOR CHILDREN'S SERVICES, POST-DISCLOSURE/CHILD SEXUAL ABUSE DIVISION OF CHILD PROTECTION GUIDELINES FOR UNDERSTANDING AND ADDRESSING RECANTATION 11–14 (Nov. 10, 2010), *available at* http://www.nyc.gov/html/acs/downloads/pdf/pub_child_sexual_abuse.pdf.

[24] *See* Victor I. Vieth et al., *Chaplains for Children: Twelve Potential Roles for a Theologian on the MDT*, CENTER PIECE (Nat'l Child Prot. Training Ctr., Winona, Minn.), 2013, *available at* http://www.ncptc.org/vertical/Sites/%7B8634A6E1-FAD2-4381-9C0D-5DC7E93C9410%7D/uploads/CenterPiece.NL.Vol3.Iss6.pdf.

[25] *Rapport Definition*, OXFORDDICTIONARIES.COM, http://oxforddictionaries.com/definition/english/rapport (last visited June 17, 2013).

[26] Jennifer Anderson et al., *The CornerHouse Forensic Interview Protocol: RATAC®*, T.M. COOLEY J. PRACT. & CLINICAL L. 193, 258 (2010). For updated information regarding the CornerHouse Forensic Interview Protocol, please visit http://www.cornerhousemn.org/protocolupdates.html.

[27] *Id.*

[28] LYNN M. COPEN, PREPARING CHILDREN FOR COURT: A PRACTITIONER'S GUIDE 59–60 (2000); APRI, *supra* note 5, at 334–35.

[29] Murray, *supra* note 17, at 16.

[30] *See* Anderson et al., *supra* note 26, at 215–22 (describing which types of questions are appropriate within developmental age ranges); *see also infra* Appendix B. Permission has been granted by CornerHouse for use of this appendix and is on file with the author.

[31] Kim P. Roberts et al., *Practice Narratives*, *in* CHILDREN'S TESTIMONY, *supra* note 4, at 129, 135–36.

> practice phase. That is, practiced children were willing to talk longer each time a question was posed. Importantly, interviewers who conducted a practice phase also asked fewer questions in the allegations phase, yet their witnesses provided the most detailed reports.[32]

For these reasons, prosecutors should use practice narratives not only during the rapport phase in pretrial interviews, but also any time the child is asked to talk about the abuse including during direct examination.

In choosing a topic for the practice narrative, the prosecutor should select an event that happened only once (e.g., a trip to Disney World) or just one episode of a regularly occurring event (e.g., the child's most recent birthday). This encourages the child to provide details about isolated events and to use specific rather than generalized language ("I had pizza at my birthday party," vs. "I usually have pizza when we go out").

The prosecutor should also use open-ended questions in the practice narrative (e.g., "I would like you to tell me everything you can remember about your last birthday from beginning to end," rather than "Who came to your birthday party?"). Open-ended questions encourage narrative responses and prepare the child for the types of non-leading questions that will be asked on direct examination.[33] They also discourage guessing and invite the child to provide a wealth of detailed information even if the child cannot remember other details like who was at the party or when the party began.

IV. Fear of the Unknown: Teaching Children About Court

Courtrooms and courtroom procedures are completely alien to most children. Such an unfamiliar environment can cause fear and anxiety in any witness, particularly a child. Prosecutors must alleviate this fear by removing the mystery about what happens in a courtroom. Some jurisdictions have created court awareness programs or court schools to teach children what to expect and how to act during a trial. One of the longest running court schools in the country is Kid's Court in King County, Washington.[34] Kid's Court teaches children in a group setting about courtroom procedure and personnel, basic legal terms, what to expect when testifying, how to dress and behave in court, and even how to deal with the stress of testifying.[35] The program is designed for children in three different age groups and there is a parallel program for parents or guardians.[36] If there is a court school near the installation or the child's home, the prosecutor should request that child court-martial witnesses be allowed to participate.

Court schools are not the only resources available to help prepare children for court. The National Children's Advocacy Center has created an interactive DVD called *Home Court Advantage* that gives a virtual tour of a courtroom, teaches children about common legal terms, explains the roles of different court personnel, and answers frequently asked questions.[37] Several online court awareness programs are also available in Canada for both teens and younger children.[38]

In addition to using a court awareness program, the prosecutor should familiarize the child witness with the particular military courtroom where the child will testify.[39] Start with an empty courtroom. Encourage the child to explore the courtroom including the judge's bench, the witness stand, the prosecutor's table, the panel box, and the deliberation room. If possible, let the child see and touch some of the physical items in court like the judge's robe, the gavel, and the court reporter's mask. Let the child use some of the courtroom technology like the microphone, the overhead projector, the dry erase board, and the laser pointer. Describe the roles of the courtroom personnel and explain where they will be during the trial. Do not forget to tell the child that the accused will also be there. Let the child know, however, that the accused cannot talk during the trial and must remain in his seat.[40] If identity is an issue, do not tell the child where the accused will sit. Practice a simple direct examination by asking the child about something interesting like what happened in school that day or her favorite movie. The goal of the tour is to make the courtroom a familiar place where the child feels safe and comfortable testifying.

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[32] *Id.*

[33] *Id.* at 136–37.

[34] KING COUNTY KIDS' COURT, http://www.kingcounty.gov/prosecutor/kidscourt.aspx (last visited May 31, 2013).

[35] DONNA BELIN & DEBBIE DOANE, KING COUNTY KIDS' COURT: A CHILDREN'S COURT AWARENESS PROGRAM TRAINING MANUAL AND CURRICULUM 1–3 (1996) *available at* http://your.kingcounty.gov/prosecutor/trainingmanual.pdf.

[36] *Id.* at 3.

[37] *Home Court Advantage DVD*, NAT'L CHILDREN'S ADVOCACY CTR., http://www.nationalcac.org/ncac-training/hcs-dvd.html (last visited June 19, 2013).

[38] CORY'S COURTHOUSE, http://www.coryscourthouse.ca/ (last visited Mar. 15, 2013); CHILD WITNESS COURT PREPARATION, http://www.childcourtprep.com/ (last visited Mar. 15, 2013); and COURTPREP, http://www.courtprep.ca/ (last visited Mar. 15, 2013).

[39] APRI, *supra* note 5, at 321.

[40] COPEN, *supra* note 28, at 10.

It is also a good practice to let the child see a courtroom in operation.[41] Choose a trial that will not frighten the child. Let the child watch a witness testify and, during recesses, help the child understand what took place during the oath, direct examination, cross examination, and objections. Explain phrases that the child is likely to hear such as "all rise," "objection," "overruled," and "sustained." During a break, introduce the child to some of the courtroom personnel. Let the child see you in the uniform you will wear for trial. Explain that the accused and most of the other people in court including witnesses and the panel will wear a similar uniform because they are Soldiers, not because they are on one side or the other. If you intend to have a support person in the courtroom while the child is testifying, show the child where the support person will sit and explain what rules the support person will have to follow.

Court school and the courtroom tour are designed to help the child become familiar with the physical environment in which she will testify and some of the procedures she will see. The prosecutor must be careful, however, not to overwhelm the child with jargon or try to make her an expert in criminal procedure. The prosecutor should also avoid talking about the abuse during the initial tour of the courtroom if at all possible. The tour should be a positive experience to lay the foundation for the more difficult work of preparing for the direct examination.

V. Remote Live Testimony and Other Courtroom Accommodations

A. Remote Live Testimony

One of a child abuse victim's greatest fears is testifying in front of his or her abuser.[42] If that fear becomes so great that it prevents the child from testifying, the child should be allowed to give evidence outside the presence of the accused. Remote live testimony is an option that prosecutors should consider in child abuse and domestic violence cases, but they must carefully weigh the pros and cons. Testifying remotely is easier than ever with technologies like Skype™ and built-in laptop webcams. But the prosecutor should ask what, if anything, is sacrificed by using this technology. For example, does the camera pick up those subtle characteristics that make children so likeable and sympathetic: their vulnerability, their physical size in comparison to adults, their eagerness to please, their shy and reserved nature in front of strangers?[43] Is the panel able to see the child use demonstrative evidence like anatomically correct dolls and drawings? Can the panel hear the child? Do cameras intimidate the child because the accused use them to film the abuse? These potential drawbacks of remote live testimony, however, are all outweighed if the child is unable to testify in the presence of the accused.

A judge must allow a child to testify remotely if the judge finds that the child, defined as a person under the age of 16,[44] is unable to testify in the presence of the accused for any of the following four reasons:

> (A) The child is unable to testify because of fear; (B) There is substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying; (C) The child suffers from a mental or other infirmity; or (D) Conduct by an accused or defense counsel causes the child to be unable to continue testifying.[45]

Although there are circumstances in which a child is unable to testify because of fear, infirmity, or the conduct of the accused, the most common reason for using remote live testimony is the substantial likelihood that the child will suffer emotional trauma.[46] Usually, this is established at an evidentiary hearing prior to trial through the testimony of a psychologist, social worker, or counselor who has worked with the victim or is at least familiar with the victim's psychological condition and treatment. The court must find that remote live testimony is necessary to protect the welfare of the particular child witness; that the trauma is more than *de minimis*; and that trauma would result, at least in part, from the presence of the accused, not solely from the experience of testifying in open court.[47]

Once the judge finds that the child is unable to testify for one of the reasons stated in the rule, the child must be allowed to testify from a remote location unless the accused voluntarily agrees to be absent from the courtroom.[48] The

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[41] APRI, *supra* note 5, at 321.

[42] COPEN, *supra* note 28, at10.

[43] *See* NATALIE TAYLOR & JACQUELINE JOUDO, THE IMPACT OF PRE-RECORDED VIDEO AND CLOSED CIRCUIT TELEVISION TESTIMONY BY ADULT SEXUAL ASSAULT COMPLAINANTS ON JURY DECISION-MAKING: AN EXPERIMENTAL STUDY 66 (2005), *available at* http://aic.gov.au/documents/5/3/4/%7B53472FA7-7F7B-48E8-B0E6-32D816852F89%7DRPP68.pdf (noting that perceptions among Australian jurors in adult sexual assault cases varied widely between modes of presentation of the victim's testimony including face-to-face, closed circuit television, and pre-recorded statements; and concluding that jurors' pre-existing attitudes, biases, and expectations were more significant factors in juror perceptions than the mode of presentation of testimony).

[44] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 611(d)(2) (2012) [hereinafter MCM].

[45] *Id.* MIL. R. EVID. 611(d)(3).

[46] *See, e.g.*, United States v. Pack, 65 M.J. 381, 382 (C.A.A.F. 2007); United States v. McCollum, 58 M.J. 323, 328 (C.A.A.F. 2003).

[47] *McCollum*, 58 M.J. at 329–30.

[48] MCM, *supra* note 44, MIL. R. EVID. 611(d)(4); R.C.M. 914A (a)(1) and (c).

court must follow certain safeguards, including limiting attendance at the remote location to the child, counsel for both sides, a support person, and equipment operators; using monitors in the courtroom to allow all parties, the panel, the judge, and the public to see the witness; using equipment that allows the voice of the judge to be heard at the remote location; and using equipment that allows private, contemporaneous communication between the accused and counsel.[49] Even if there is no finding prior to trial to allow remote live testimony, the prosecutor should be prepared to use it at the last minute if fear, infirmity, or the behavior of the accused or defense counsel prevents the child from continuing her testimony during the trial itself. Therefore, the prosecutor should have the proper equipment on hand and ready to use at a moment's notice in any case involving a child.

B. Other Accommodations

Remote live testimony is only one of several accommodations for children in the courtroom. Other accommodations include the use of child-sized furniture, witness screens, support persons, comfort items, and even service dogs. Prior to using any accommodation, the prosecutor should either obtain the consent of the defense or request factual findings from the military judge and a ruling that the accommodation is necessary to protect the child from the trauma of testifying or to facilitate the truth-seeking function of testimony.[50]

Two of the least controversial accommodations are to use child-sized furniture and to allow the child to testify from somewhere other than a traditional witness stand.[51] "Nothing in the Constitution preordains that courtrooms be configured in a particular way. So long as the defendant's rights are protected, minor alterations to accommodate children are proper."[52] Sitting in front of a microphone in a witness stand and staring out at a room full of strangers while being asked to describe a sexual assault is difficult enough for adult witnesses; for children, it can be debilitating. One solution is to have the child testify while sitting with the prosecutor on child-sized chairs around a short table in the well of the courtroom. This minor change has several advantages. First, it creates an environment that is more familiar to the child. Child-sized furniture is used at schools, daycares, doctors' waiting rooms, and Child Advocacy Centers. Second, this arrangement reduces the child's field of vision and distracts her from the more intimidating aspects of testifying. By sitting close to the prosecutor and nearer to the ground in a more familiar setting, the child can forget that she is in a courtroom and that other people, sitting higher up and on the periphery, like the panel and the accused, are watching her very closely. Third, using a small table and chairs in the well of the courtroom allows the witness to concentrate on the prosecutor and any demonstrative exhibits on the table in front of her.

Other environmental accommodations include using a screen that allows the accused to see the child but that prevents the child from seeing the accused;[53] allowing the child to enter the courtroom through a side entrance to avoid seeing the accused; and allowing the child to enter and leave the courtroom during breaks while the accused and the panel are outside the courtroom.

Another accommodation is to permit children to testify in the presence of a support person. Federal law allows an adult attendant to accompany the child at all stages of a proceeding, including during the child's testimony.[54] In federal district court "the child attendant [may] hold the child's hand or . . . sit on the adult attendant's lap throughout the course of the proceeding."[55] Several state courts and the District of Columbia have also approved the use of support persons.[56] The support person should be someone who is not on the witness list and should be carefully instructed not to show emotion during the child's testimony or do anything that could be construed as suggesting the answer to the child. The support person can be a relative or family friend or a victim advocate or social worker who has spent time with the child outside of court.

Another accommodation is to allow children to hold a comfort item like a stuffed animal or doll while testifying.

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[49] *Id.* R.C.M. 914A (a)(2)–(5).

[50] Maryland v. Craig, 497 U.S. 836, 855 (1990).

[51] BREAKING THE CYCLE OF VIOLENCE, *supra* note 22, at 16; *see also* United States v. Williams, 37 M.J. 289 (C.M.A. 1993) (no violation of the right to confrontation where the accused's ten-year-old daughter testified from a chair in the center of the courtroom with her side turned toward the accused); United States v. Thompson, 31 M.J. 168 (C.M.A. 1990) (no violation of the right to confrontation where the accused's two sons testified with their backs turned toward the accused).

[52] JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES 218 (5th ed. 2011).

[53] *See* People v. Rose, 808 N.W.2d 301, 308–18 (Mich. Ct. App. 2010), *cert. denied*, 132 S. Ct. 2773 (2012) (mem.). Neither the Court of Appeals for the Armed Forces nor the service courts of appeals have addressed the issue of witness screens.

[54] 18 U.S.C. § 3509(i) (2010).

[55] *Id.*

[56] *See, e.g.,* Holmes v. United States, 171 F.2d 1022 (D.C. Cir. 1948) (allowing nine-year-old to sit on mother's lap); State v. Johnson, 528 N.E. 2d 567 (Ohio 1986) (allowing eight-year-old to sit on aunt's lap); Baxter v. State, 522 N.E.2d 362 (Ind. 1988) (allowing nine-year-old to hold hand of support person); Soap v. State, 562 P.2d 889 (Okla. Crim. App. 1977) (allowing seven-year-old to hold hands with support person); United States v. Brown, 2012 CCA LEXIS 448, at *17–18 (N-M. Ct. Crim. App. Nov. 28, 2012) (unpublished) (allowing a seventeen-year-old to testify while a victim advocate sat in a nearby chair). Neither the Court of Appeals for the Armed Forces nor the Army Court of Criminal Appeals has addressed the issue of support persons.

This accommodation depends upon the particular needs of the child and should only be used where the comfort item would truly help the child overcome a fear of testifying.[57] Comfort items should not be used as props or gimmicks to make the child appear vulnerable or to elicit an emotional response from the panel.[58]

An emerging area of witness accommodations involves the use of service dogs to accompany children and other victims of abuse to court. The program began in King County, Washington, in 2003 and has spread to seventeen states.[59] In one case, "Ellie," a facility dog belonging to the King County Prosecutor's Office, was allowed to sit at the feet of a developmentally disabled adult witness while he testified in order to reduce the witness's anxiety.[60] King County is also using service dogs in forensic and pretrial interviews.[61] In one case involving domestic violence against a woman and her five-year-old son, prosecutors were stymied when the boy refused to talk about the abuse to either a caseworker or a therapist.[62] Running out of options, prosecutors brought in a service dog. The boy immediately opened up and provided a detailed account of the abuse.[63] The use of service dogs has also attracted the attention of researchers. One study of preschool children found that the presence of a service dog during a physical examination resulted in lower heart rates, blood pressure, and behavioral distress.[64]

Whether using comfort items or service dogs, the prosecutor should use common sense and take some general precautions to protect the integrity of the process. First, no child accommodation should be used as a reward. Prosecutors should avoid saying or doing anything that implies that the child witness will be rewarded with a visit to a service dog or the gift of a coloring book or doll if the child testifies against the accused.[65] Second, accommodations should be used for a particular purpose designed to assist a particular child witness. The prosecutor should be prepared to justify to the court why a particular accommodation is necessary. Third, accommodations should not be used to create sympathy for the child or to suggest that the accused is guilty. The prosecutor should request limiting instructions ordering the panel to disregard any accommodations. With these guidelines in mind, the judicious use of child-friendly accommodations will improve children's courtroom experiences and promote the ultimate goal of direct examination to present all the relevant facts to the panel.

VI. The Direct Examination

A. Pretrial Preparation

The direct examination is the culmination of months of investigation and preparation. By the time the child testifies in court, the child should be familiar with how the courtroom is set up, how to take the oath or a developmentally appropriate equivalent, and how to tell a narrative story through practice narratives. Proper pretrial preparation of any witness also includes preparing that witness to give relevant testimony while avoiding objectionable or unfairly prejudicial answers; teaching the witness to answer questions thoroughly and succinctly in order to meet all the legal elements; reminding the witness of previous statements and resolving inconsistencies; and making the witness aware of potential questions on cross-examination.[66] This kind of preparation is not only good trial strategy; it is common courtesy to the witness. How much to prepare and when to do it is a matter of judgment for the prosecutor in consultation with the multidisciplinary team and the child's caregiver. Each case will be different depending on the child's age, attention span, intelligence, and maturity. The prosecutor should let the child know why it is necessary to prepare for trial, ask how she feels about it, and address all of her questions or concerns.

B. The Oath

The direct examination itself begins with an oath to testify truthfully.[67] For most children aged ten and older, the

[57] Smith v. State, 119 P.3d 411 (Wyo. 2005) (fifteen-year-old allowed to hold teddy bear); State v. Cliff, 782 P.2d 44 (Idaho Ct. App. 1989) (eight-year-old holding doll upheld); State v. Hakimi, 98 P.3d 809 (Wash. Ct. App. 2004) (seven-year-old allowed to carry a doll); State v. Marquez, 951 P.2d 1070 (N.M. Ct. App. 1997) (twelve-year-old allowed to hold a teddy bear).

[58] State v. Gevrez, 148 P.2d 829 (Ariz. 1944) (daughter of homicide victim not allowed to testify while holding doll belonging to the mother as it was designed to appeal to the sympathy of jurors); State v. Palabay, 844 P.2d 1 (Haw. App. 1992) (harmless error to allow a child to testify while holding a doll where there was no evidence of a compelling need for the item).

[59] Emily L. Foley, *Creature Comfort: A Former Lawyer Brings Calm to the Courtroom*, O: THE OPRAH MAG., Jan. 2013, at 37; *see also* Arin Gencer, *Court-System Canine Helps Put Kids at Ease; Victims, Witnesses Open Up to Carroll County Prosecutors*, BALTIMORE SUN, June 2, 2008, at 1A.

[60] State v. Dye, 283 P.3d 1130, 1132 (Wash. Ct. App. 2012).

[61] Casey McNerthney, *Dogs Give Prosecutors a Hand in Difficult Cases*, SEATTLE POST-INTELLIGENCER, Sept. 3, 2007, at B1.

[62] *Id.*

[63] *Id.*

[64] Sunny L. Nagengast et al., *The Effects of the Presence of a Companion Animal on Physiological Arousal and Behavioral Distress in Children During a Physical Exam*, 12 J. OF PEDIATRIC NURSING no. 6, Dec. 1997, at 323–30.

[65] James M. Wood & Sena Garven, *How Sexual Abuse Interviews Go Astray: Implications for Prosecutors, Police, and Child Protection Services*, 5 CHILD MALTREATMENT 109, 110 (2000).

[66] APRI, *supra* note 5, at 323.

[67] MCM, *supra* note 44, MIL. R. EVID. 603.

prosecutor can use the same oath that adult witnesses take.[68] For younger children or children with developmental disabilities, the prosecutor should design an oath that will "impress on the particular child the importance of telling the truth."[69] There is no formula; the oath can be as simple as a promise to tell the truth and an acknowledgment from the witness that there are negative consequences for lying.[70] For example, "Do people get in trouble for lying? Do you promise to tell the truth?"

Judges, prosecutors, and investigators sometimes ask children to explain what it means to tell the truth or to distinguish between the truth and a lie.[71] Although this line of questioning is not uncommon, it is not a prerequisite for testifying.[72] If a child has trouble distinguishing between the truth and a lie or between reality and fantasy, the child's confusion goes to the weight of the testimony, not its admissibility.[73] Scientific evidence supports this result: "Research has demonstrated that eliciting an age-appropriate oath from children (such as 'Do you promise that you will tell the truth?') increases children's honesty even among children who fail truth-lie competency tasks."[74]

Nevertheless, asking a child to demonstrate that she knows the difference between the truth and a lie can enhance her credibility with a panel or judge. With this purpose in mind, Dr. Thomas Lyon has developed a demonstrative aid that consists of a series of truth-lie tasks and morality tasks.[75] It allows the child to demonstrate not only that she knows the difference between the truth and a lie, but that she knows there are negative consequences for lying. Dr. Lyon's method has the added benefit of putting child witnesses at ease during their testimony by appealing to their desire to show adults that they can answer the questions correctly.[76]

C. Rapport-Building and the Practice Narrative

After the oath, the prosecutor should use the rapport-building strategies discussed above.[77] This includes having the child provide basic biographical information like name, age, and family structure. The prosecutor can help the child create visual depictions like "face pictures" and "family circles" to convey biographical information about the child and her family.[78] These simple drawings help the interviewer and the child communicate more effectively:

> Drawings can assist in building rapport with a child because drawing, typically, is an engaging activity and is an appropriate tool of communication with all ages of children. Also, drawings can reduce the intensity of the interview process. Engaging the child in creating a visual work, like a drawing, can remove direct focus from the child; as a result, the child becomes more relaxed and information-gathering is enhanced.[79]

If the abuser is someone who is related to the child or lived with the child, a diagram of the child's family can later help the panel understand the relationship between the child

[68] *See id.* R.C.M. 807(b)(2) discussion (F). The requirement to take an oath should not be confused with competence. Every person, except the military judge and members of the court-martial, is competent to be a witness as long as that person has personal knowledge of the matter or is testifying as an expert. *Id.* MIL. R. EVID. 601, 602, 605, 606, 702. Age, by itself, is not a sufficient basis for challenging the witness's competence. United States v. Lemere, 16 M.J. 682, 686 (A.C.M.R. 1983); *see also* FED. R. EVID. 601 advisory committee's note ("A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence."); 18 U.S.C. § 3509(c)(4) (2009) ("A child's age alone is not a compelling reason [to conduct a competency examination in U.S. federal district court].").

[69] United States v. Washington, 63 M.J. 418, 425 (C.A.A.F. 2006); *see also* MCM, *supra* note 44, MIL. R. EVID. 603 (the oath should be "in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so"); R.C.M. 807(b)(2) (requiring an oath that "appeals" to the witness's conscience).

[70] *Lemere*, 16 M.J. at 686; *see also* United States v. Morgan, 31 M.J. 43, 47–48 (C.M.A. 1990) (describing how a prosecutor struggled to administer the oath to a four-year-old witness but nonetheless satisfied Military Rule of Evidence 603).

[71] *See, e.g.*, *Washington*, 63 M.J. at 424; United States v. Johnson, 49 M.J. 467, 474 (C.A.A.F. 1998); United States v. Hollis, 54 M.J. 809, 814 (N-M. Ct. Crim. App. 2000); United States v. Marshall, 52 M.J. 578, 580 (N-M. Ct. Crim. App. 1999).

[72] *See Morgan*, 31 M.J. at 47 ("We have never suggested that children might be incompetent to testify based on some general inability to understand an oath or affirmation to tell the truth.").

[73] *Lemere*, 16 M.J. at 686.

[74] Thomas D. Lyon, *Assessing the Competency of Child Witnesses: Best Practice Informed by Psychology and Law*, *in* CHILDREN'S TESTIMONY, *supra* note 4, at 69, 80 (citations omitted).

[75] Thomas D. Lyon & Karen J. Saywitz, Qualifying Children to Take the Oath: Materials for Interviewing Professionals (May 2000) (unpublished), http://works.bepress.com/thomaslyon/9/. A sample of Dr. Lyon's materials is reproduced in Appendix A. Permission has been granted by Dr. Thomas D. Lyon to use of this appendix and is on file with the author.

[76] This assertion is based on the author's recent professional experiences as the Special Victim Prosecutor for Maryland, Virginia, and the Military District of Washington, U.S. Army Legal Services Agency, from 8 August 2010 to 31 July 2012 [hereinafter Professional Experiences]. The author used Dr. Lyon's demonstrative aid in courts-martial in 2011 and 2012 with three child witnesses, one of whom had a developmental disability. All three children answered the truth-lie tasks and morality tasks correctly. Two of the children spontaneously expressed a desire to answer the questions again. A prosecutor intending to use Dr. Lyon's demonstrative aid should submit it to the military judge and defense counsel prior to trial to allow the judge to rule on any defense objections.

[77] *See supra* Part III.

[78] Anderson et al., *supra* note 26, at 268.

[79] *Id.*

and the accused. The family circle, however, should not be used during the rapport phase to identify the abuser unless the child brings it up spontaneously.[80] As with any demonstrative exhibit, drawings by a child or prosecutor should be marked for identification and the prosecutor should state on the record what exhibit the child is using.

After eliciting some biographical information, the prosecutor should use a practice narrative.[81] Practice narratives during the direct examination accomplish the same goals as they do in rapport including putting the child at ease, encouraging narrative responses, and "strengthen[ing] the child's ability to provide more candid and detailed accounts of abuse later in the interview."[82] According to one researcher, using practice narratives during the direct examination can reduce a child's anxiety while improving the quality of her testimony:

> Preliminary questions about innocuous topics in court would allow the child witness to acclimate herself to the courtroom and to relax before the topic of interest is introduced. Through a series of open-ended questions asking the child to elaborate on her narrative (e.g., "You said you hit a piñata. Tell us what happened next" or "You said you played in a bouncy. Tell us about playing in the bouncy"), the attorney could accustom the child to provide a chronological narrative without the need for leading or closed-ended questions.[83]

D. Anatomy Identification

The next step in the direct examination should be anatomy identification. The purpose of anatomy identification is to demonstrate a young child's ability to differentiate between genders and to understand the child's vocabulary for different body parts.[84] Anatomy identification requires the use of anatomical diagrams depicting unclothed male and female children. The prosecutor should choose diagrams that reflect the age, ethnicity, and physical development of the child. The prosecutor should mark the diagrams as prosecution exhibits for identification and, working from the head down, ask the child to identify major body parts including the breasts, genitalia, and buttocks. As the child identifies the body parts, the prosecutor should label the body parts on the diagram. The prosecutor should offer the exhibit into evidence only after the prosecutor is finished labeling it.

Children have a variety of different names for body parts, particularly the genitalia, breast, and buttocks. The prosecutor should always use the terms that the child uses and never attempt to correct the child or ask the child to use a clinical term in place of her own. The prosecutor should use the term exactly as the child uses it, even if that means temporarily suspending the rules of anatomy and grammar. The author once was involved in a case in which a five-year-old girl referred to the buttocks as "front butt" and the vulva as "butt."[85] Without an anatomical diagram, the child and the attorneys would have been talking about two different types of contact and thus two different offenses.

E. Describing the Abuse

Once the prosecutor and the child have established a common vocabulary for body parts, it is time to ask about the abuse. In the RATAC® protocol, this portion of the interview is called the Touch Inquiry and Abuse Scenario.[86] There are as many ways to begin the touch inquiry and abuse scenario as there are ways to disclose abuse. Each child's disclosure and circumstances are different and the prosecutor should take these differences into account when designing a direct examination about the abuse. The prosecutor should consult the multidisciplinary team, especially the forensic interviewer or social worker, to craft questions that will elicit relevant information without being unnecessarily suggestive or leading.

One method used in forensic interviews is the touch survey in which the child is asked about different touches including "hugging, tickling, spanking, hitting, and private touches."[87] Another method is to use anatomical diagrams to ask the child whether she has ever seen or touched, for example, someone else's penis or buttocks or whether someone else has ever seen or touched hers.[88]

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[80] *Id.*

[81] *See supra* Part III.

[82] Anderson et al., *supra* note 26, at 272.

[83] Lyon, *supra* note 74, at 73.

[84] Anderson et al., *supra* note 26, at 273. Anatomy identification is generally used with children under the age of ten, although it may be used with older children to clear up any confusion about anatomical terms that arises during the direct examination. *Id.* at 274.

[85] Professional Experiences, *supra* note 76.

[86] Anderson et al., *supra* note 26, at 290.

[87] Julie Kenniston & Erna Olafson, *Feelings Faces and Touch Survey Instructions*, THE CHILDHOOD TRUST FORENSIC INTERVIEW TRAINING 177 (Aug. 2004).

[88] John C. Yuille et al., *Interviewing Children in Sexual Abuse Cases*, *in* CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING CHILDREN'S TESTIMONY 95, 107 (Gail S. Goodman & Bette L. Bottoms eds., 1993).

The touch inquiry and abuse scenario must be specific to the child's perception of the abuse. Using a generic question to begin the inquiry can have disastrous results. For example, a child abuse victim may answer "no" when asked if she has ever been given a bad touch. Not all child abuse victims think of sexual contact as a bad touch. The abuser may have convinced the child that the sexual touching was good or for a non-sexual purpose like bathing or playing a game. This does not mean that a prosecutor should never ask about bad touches. If the child told her teacher, for example, that her cousin gives her bad touches, that might be an appropriate way to begin the touch inquiry. In any event, the prosecutor must design the touch inquiry to elicit an appropriate response based on the child's individual circumstances.

The prosecutor should use open-ended questions that invite the child to say as much as possible about the abuse.[89] For example, "You said that Joe put his private part in your private part. Tell me everything you can remember about the time that Joe put his private part in your private part." "[I]f the child struggles to respond or cannot respond, the questions can then be rephrased into a more specific question or into a multiple-choice question."[90] Acceptable questions include, for example, "Did Joe ever do anything to your mouth?" or "Did you see Joe that day at school or at the house or somewhere else?"[91] The prosecutor should also use "scaffolding" to help a child retrieve memories of an event and tell a coherent story:

> "[S]caffolding" could assist developmentally immature children's retrieval of memory information. By asking a series of detail-oriented questions—"Did you do anything when you were at that house?" "What did you do?" "Was someone there when you did [what the child reported]?" "Who was there?",—the interviewer offers "cues" or "cognitive supports" that allow the child to access his or her memory. This process is perceived to be developmentally appropriate because . . . even very young children are believed to possess the capacity for recognition memory through the use of scaffolding.[92]

Scaffolding and focused questions can help the child reach the limits of her memory and ability to observe, leaving it up to other witnesses and physical or documentary evidence to fill in any gaps. Such evidence is crucial in any child abuse trial because children, particularly those who have been abused repeatedly, often do not have the capacity to understand time, frequency, duration, geographical location, age, and other factors that are necessary to prove jurisdiction and the elements of the offense. Prosecutors should think creatively about linking an element of the child's testimony with other evidence that together can fill a gap. For example, if a child knows that the abuse happened when she was in first grade, the prosecutor can use school records or the mother's testimony to establish when the child was in the first grade.

VII. Cross-Examination

Two common fears that children have about testifying are being subjected to harsh questioning and being accused of lying.[93] The prosecutor can help the child witness manage these fears by thoroughly preparing the child for cross-examination. As with other aspects of trial, the first step in confronting fear is reducing uncertainty. "Some young children believe that they will go to jail if they give the 'wrong answer,' or that the defendant will yell at them."[94] The prosecutor should explain that cross-examination is a normal part of every trial and that it is designed to help the accused by showing that a witness is confused, mistaken, biased, or lying.[95] The prosecutor should tell the child what questions the defense counsel might ask and encourage the child to answer them during pretrial preparation.[96] The prosecutor should emphasize to the child that "I don't know" and "I don't understand" are acceptable answers.[97] The prosecutor should also explain that if a lawyer asks a question more than once, it does not mean that she got the answer wrong or that she should change her answer. The prosecutor should tell the child that the child's job is to always tell the truth and that she should correct the attorneys or the judge if they say something that is untrue while they are asking a question.[98] Finally, the prosecutor should

[89] SHERRIE BOURG CARTER, CHILDREN IN THE COURTROOM: CHALLENGES FOR LAWYERS AND JUDGES 100 (2005).

[90] *Id.*

[91] *Id.*

[92] Anderson et al., *supra* note 26, at 208.

[93] COPEN, *supra* note 28, at 10; John R. Spencer, *Evidence and Cross-Examination*, *in* CHILDREN'S TESTIMONY, *supra* note 4, at 285, 301.

[94] John E.B. Myers, Karen J. Saywitz & Gail S. Goodman, *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L.J. 3, 59 (1996).

[95] *See* BLACK'S LAW DICTIONARY 433 (9th ed. 2009) ("The purpose of cross-examination is to discredit a witness before the fact-finder in any of several ways, as by bringing out contradictions and improbabilities in earlier testimony, by suggesting doubts to the witness, and by trapping the witness into admissions that weaken the testimony.").

[96] APRI, *supra* note 5, at 323–24.

[97] COPEN, *supra* note 28, at109.

[98] *Id.*

explain that lawyers and judges can sometimes be grumpy but that it has nothing to do with the witness.

The prosecutor should use objections and pretrial motions to ensure that cross-examination does not unfairly frighten or confuse the child.[99] The prosecutor should file pretrial motions as early as possible before trial so that the prosecutor knows what rules will apply and prepare the child accordingly.[100] For example, the prosecutor should ask the court to require counsel to use developmentally-appropriate language when questioning a child.[101] The prosecutor should also insist that counsel speak gently in the presence of the child and refrain from using intimidating gestures, facial expressions, or pacing.[102] The prosecutor should also ask for regular breaks during a child's testimony both for the child's comfort and to avoid overwhelming the child's limited attention span.[103]

VIII. Conclusion

An effective direct examination of a child requires preparation, planning, and patience. Preparation begins with a multidisciplinary team of professionals that are dedicated to conducting a thorough investigation while protecting the welfare of the child. The foundation of the direct examination is the rapport between the prosecutor and the child, which includes building trust while learning about each child's unique circumstances and individual needs. The prosecutor builds on this foundation by teaching the child about court and reducing fear and anxiety about testifying. The prosecutor then designs a space where the child can testify effectively by surrounding the child with accommodations. In the direct examination, the prosecutor uses developmentally appropriate language, diagrams, drawings, practice narratives, scaffolding, and focused questions to help the child tell the panel or judge about the abuse. Finally, the prosecutor prepares the child to withstand cross-examination while asking the court to protect the child from harassment and intimidation. Within this framework, the prosecutor will advance the twin goals of child abuse prosecution: to see that justice is done and to safeguard the welfare of the child.

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[99] The military judge has the authority to limit cross-examination "so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." MCM, *supra* note 44, MIL. R. EVID. 611(a).

[100] Victor I. Vieth, *A Children's Courtroom Bill of Rights: Seven Pre-Trial Motions Prosecutors Should Routinely File in Cases of Child Maltreatment*, CENTER PIECE (Nat'l Child Prot. Training Ctr., Winona, Minn.), 2008, *available at* http://www.ncptc.org/vertical/Sites/%7B8634A6E1-FAD2-4381-9C0D-5DC7E93C9410%7D/uploads/%7B4D59E999-6CB5-4F95-8302-95FD8BD5823A%7D.PDF.

[101] *See* State v. Dwyer, 149 Wis. 2d 850, 440 N.W.2d 344 (1989) (discussing the need to question children in a language they understand); *see generally*, ANNE GRAFFAM WALKER, HANDBOOK ON QUESTIONING CHILDREN (2d ed. 1999); *see also* Myers et al., *supra* note 94, at 63 ("A simple guideline with children under age eight is to use short sentences, one to two syllable words, simple grammar, and concrete, visualizable words.").

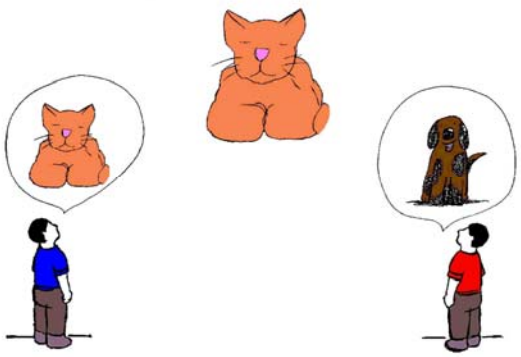
[102] *See* Myers et al., *supra* note 94, at 73 ("Children can be quite frightened by raised voices and animated argument. . . . [B]ecause young children view the world from an egocentric perspective, they are likely to assume that arguments between attorneys are a sign that they—the child—did something wrong.").

[103] *See id.* at 70 ("It is not sufficient to tell a child, 'If you want a break, just ask.' Most children *cannot* take the initiative to request a recess.").

Appendix A

Qualifying Children to Take the Oath: Materials for Interviewing Professionals[104]

TRUTH VS. LIE TASK



Here's a picture. Look at this animal--what kind of animal is this?
OK, that's a [child's label].

LISTEN to what these boys say about the [child's label]. One of them will tell a LIE and one will tell the TRUTH, and YOU'LL tell ME which boy tells the TRUTH.

(*point to boy on the left*) THIS boy looks at the [child's label] and says "IT'S a [child's label]."
(*point to boy on the right*) THIS boy looks at the [child's label] and says "IT'S a PUPPY."

Which boy told the TRUTH? (correct answer is boy on the left.)

MORALITY TASK

Here's a Judge. She wants to know what happened to these boys.
Well, ONE of these boys is GONNA GET IN TROUBLE for what he says, and YOU'LL tell ME which boy is GONNA GET IN TROUBLE.
LOOK [child's name],
(point to left boy) This boy tells the TRUTH.
(point to right boy) This boy tells a LIE.

Which boy is GONNA GET IN TROUBLE? (correct answer is boy on the right)

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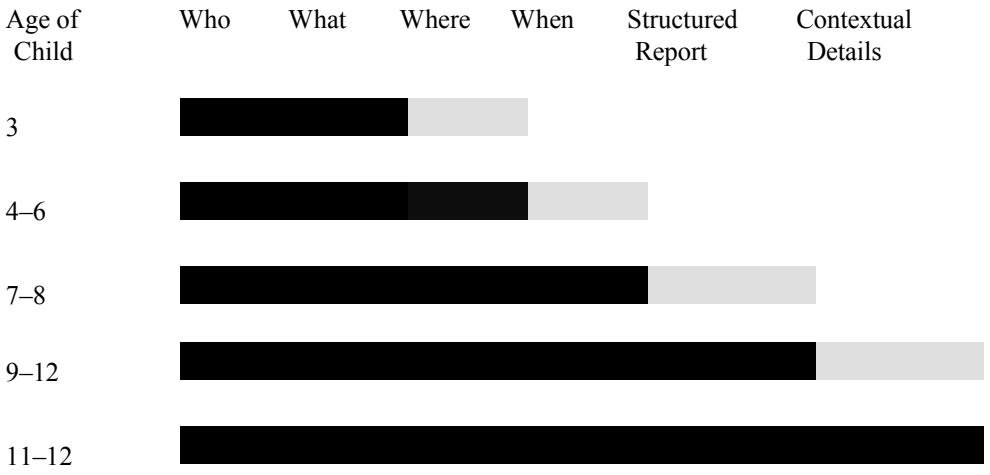
[104] Lyon & Saywitz, *supra* note 75.

Appendix B

Guidelines for Age-Appropriate Questions[105]



[105] Anderson et al., *supra* note 26, at 215–16 ("[T]he black areas denote types of information children in the corresponding age group would typically have the ability to provide. The gray areas denote types of information that children in the corresponding age group might or might not be able to provide.").

Putting Fire & Brimstone on Ice: The Restriction of Chaplain Speech During Religious Worship Services

Major Michael E. Schauss[*]

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[1]

I. Introduction

It is early Monday morning and you have just settled into your desk with a fresh cup of coffee to start checking your e-mail. Suddenly, the commander swings by your office and tells you that he has an "issue" he wants to hand off to you "real quick." He is concerned about what some of the chaplains are saying during worship services. At mass on Sunday, the commander heard the Catholic chaplain read a letter from the bishop addressing the new federal health care law; the letter said that the law denies Catholics their religious freedom, was a "blow to a freedom that you have fought to defend and for which you have seen your buddies fall in battle," and that "we [Catholics] cannot—we will not—comply with this unjust law,"[2] and the parishioners should contact Congress about legislation to reverse it. The commander said that having the chaplain talk about disobeying laws worried him.

Next, the commander tells you that he has also received complaints that another chaplain is telling his congregation that they have to "witness" to their fellow Soldiers and tell them that they will "burn in hell" if they do not accept Jesus Christ as their Savior. Soldiers who attend these services are now constantly attempting to convert their fellow Soldiers, on and off duty.[3] Finally, the commander tells you he heard that one chaplain gave an anti-homosexual sermon, where the chaplain said, "all the gays and lesbians should be rounded up and put behind a large electrical fence and given food and supplies, but they would all die out because they could not reproduce."[4] The commander says these are all "hot button" issues and that he is worried about the impact they will have on the command. As he quickly leaves your office, he tells you to get back to him and let him know how he can stop the chaplains from saying these things during their services. As you slowly put down your coffee, you realize that today is not going to go as you planned.

Can military authorities restrict what a chaplain says during a religious worship service without violating the First Amendment's free speech and free exercise protections? Although citizens do not abandon their constitutional rights at the recruiting station door, the differences between the civilian and military communities warrant a different application of those protections. Because of the military's need to ensure mission accomplishment and maintain good order and discipline, the restriction of chaplain speech during worship services will not violate the free speech and free exercise protections of the First Amendment if the speech is determined to be a danger to mission accomplishment or good order and discipline.

This article explores the circumstances in which the military may restrict chaplain speech during religious

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[1] Parker v. Levy, 417 U.S. 733, 758 (1974).

[2] Terrence P. Jeffery, *Archbishop to U.S. Troops: Obamacare Reg 'Is a Blow to a Freedom . . . for Which You Have Seen Your Buddies Fall in Battle'* (Feb. 6, 2012), http://cnsnews.com/news/article/archbishop-us-troops-obamacare-reg-blow-freedomfor-which-you-have-seen-your-buddies. On 26 January 2012, Archbishop Broglio, the archbishop for the Archdiocese of Military Services, United States of America, issued a letter to be read by all Catholic military chaplains during their next Sunday service. After learning of the letter, the Chief of Chaplains (Army) directed that the letter was not to be read at mass, stating that the letter had not been coordinated with his office, and, later, that they were concerned that the letter contained language "that could be misunderstood in a military environment." In a compromise, the letter was read at mass, without the "will not . . . comply with this unjust law" language. A full paper copy of the letter was offered for distribution at the conclusion of the services. The Army was the only service that made any objection to the letter. Archbishop Broglio's letter can be found at http://www.milarch.org/site/apps/nlnet/content2.aspx?c=dwJXKgOUJiIaG&b=7656203&ct=11609821.

[3] *See* HEADQUARTERS, U. S. AIR FORCE, REPORT, THE REPORT OF THE HEADQUARTERS REVIEW GROUP CONCERNING THE RELIGIOUS CLIMATE AT THE U.S. AIR FORCE ACADEMY 11, 46 (22 June 2005) (This scenario is derived from The Report of the Headquarters Review Group Concerning the Religious Climate at the U.S. Air Force Academy.).

[4] Steve Lyttle & Joe DePriest, *Catawba Pastor's Anti-Gay Sermon Sets Off a Firestorm* (May 23, 2012), http://www.charlotteobserver.com/2012/05/23/3259057/pastors-anti-gay-sermon-spurs.html#storylink=cpy (This scenario is based on a sermon given by the Reverend Charles Worley of Providence Road Baptist Church, Maiden, North Carolina. A video of the sermon can be found at http://www.charlotteobserver.com/2012/05/22/3259096/local-pastor-calls-for-death-of.html.).

worship ceremonies.[5] First, this article assesses how different legal standards developed, in both the civilian and military contexts, to determine what is protected and unprotected speech under the First Amendment. Then, the article examines the differences between how free exercise protections are applied to military personnel verses their civilian counterparts. Next, the article describes the effect of the 1993 Restoration of Religious Freedom Act, and its subsequent application, on the normal judicial deference given to military authority concerning the application of First Amendment protections to military personnel. Finally, having laid out the standards governing the First Amendment protections afforded to a chaplain's speech during a religious service, the article applies those standards to the scenarios posed above to determine whether the restriction of that speech would pass constitutional scrutiny.

II. Protected Versus Unprotected Speech

The right to free speech is not absolute and not all speech is protected by the First Amendment. Fighting words, libel, obscenity, and words of incitement that represent a clear and present danger do not receive the full protection of the First Amendment.[6] The leading Supreme Court decision addressing speech that is unprotected because it poses a clear and present danger is *Schenck v. United States*.[7]

Schenck was the general secretary of the Socialist Party who was convicted under the Espionage Act of 1917 for interfering with recruiting and enlistment activities and attempting to cause insubordination in the military.[8] Schenck mailed pamphlets to men recently drafted that equated the draft to unlawful imprisonment and urged the men not to report to induction.[9] In denying Schenck's appeal for a new trial on the grounds that his conviction violated his right to free speech, Justice Holmes responded for the Court that

> [t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic . . . [t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[10]

The *Schenck* opinion does not provide a clear judicial standard to determine when speech is a clear and present danger, but it does advise that "the character of every act depends upon the circumstances in which it is done."[11] This idea establishes the framework that enables the same words to be protected when uttered by a private citizen on a public street corner but unprotected when spoken by a member of the military.

A. Unprotected Speech in the Civilian Environment

What constituted unprotected speech in the civilian context was clarified by *Brandenburg v. Ohio*.[12] Brandenburg was a member of the Ku Klux Klan who invited a local television reporter to attend a Klan rally and cross burning. The reporter filmed Brandenburg making several speeches about avenging what he perceived as the government's continued suppression of the white race.[13] After the footage was broadcast, Brandenburg was charged and convicted under an Ohio criminal statute that prohibited advocating violence as a means of political reform. In reversing his conviction on free speech grounds, the Supreme Court clarified *Schenck's* clear and present danger standard, stating that the "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of a law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[14]

B. Unprotected Speech in the Military

After *Brandenburg*, it was clear that for speech to be unprotected as a "clear and present danger" it must be more than mere advocacy—it had to be the verbal equivalent of lighting a match that would inevitably ignite violence. In *United States v. Priest*,[15] the U.S. Court of Military Appeals (COMA) applied *Brandenburg* to free speech challenges in the military, and did so in the combustible atmosphere of the Vietnam War. Priest was a Navy enlisted man charged with

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[5] For a discussion of other military religious issues—such as accommodating Soldiers' desire to wear religious apparel, religious invocations at ceremonies and staff meetings, and excessive proselytizing of one Soldier by another—and a framework for analyzing religious issues in the Army, see Major Michael J. Benjamin, *Justice, Justice Shall You Pursue: Legal Analysis of Religion Issues in the Army*, ARMY LAW., Nov. 1998, at 1, 17.

[6] Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 917 (2009).

[7] 249 U.S. 247 (1919).

[8] *Id.* at 247.

[9] *Id.* at 248.

[10] *Id.* at 249.

[11] *Id.*

[12] 395 U.S. 444 (1969).

[13] *Id.* at 444–47.

[14] *Id.* at 447.

[15] 45 C.M.R 338 (C.M.A. 1972).

several violations of Article 134, Uniform Code of Military Justice, for printing and distributing pamphlets outside the Pentagon that contained disloyal statements.[16] In affirming Priest's conviction, the court set out to define the limits on free speech within the military.[17] The court examined *Brandenburg's* tolerance of contemptuous speech and the advocacy of violent change and deemed it unworkable within the military environment. While civil government could still function in the face of such speech, provided it was not a likely precursor to anarchy, military considerations tilted the scale in favor of stricter limits.[18] The court found:

> While *Brandenburg v Ohio* [citation omitted] apparently provides the current test for the civil community in forbidding the punishment of the mere advocacy of unconstitutional change, the danger resulting from an erosion of military morale and discipline is too great to require that discipline must already have been impaired before a prosecution for uttering statements can be sustained. As we have said before, the right of free speech in the armed services is not unlimited and must be brought into balance with the paramount consideration of providing an effective fighting force for the defense of our Country.[19]

The court then affirmed that the "clear and present danger" standard from *Schenck* governed the limits of free speech within the military and that the court's inquiry in this case was "whether the gravity of the effect of the accused's publications on good order and discipline in the armed forces, discounted by the improbability of their effectiveness on the audience he sought to reach, justifies his conviction."[20] Denying collateral relief in this case five years later, the U.S. Court of Appeals for the District of Columbia rearticulated this test, stating:

> the Schenck case counsels that it must evaluate the potential of the words themselves to erode loyalty, discipline, and morale, in light of the context in which they are uttered, to determine the likely effect of the words on military efficiency . . . .
>
> The government does not have the burden of showing a causal relationship between Priest's newsletter and specific examples of weakened loyalty, discipline or morale; the question for the court-martial is whether there is a clear tendency of this type of speech to diminish them.[21]

Two years after COMA issued its opinion in *Priest*, the Supreme Court decided to weigh in on the issue of free speech limits within the military. In affirming an officer's Article 133 and Article 134 convictions in *Parker v. Levy*,[22] the Court adopted the COMA's reasoning in *Priest*, also rejecting the *Brandenburg* standard of "imminence." The Court found that CPT Levy's speech, urging African-American soldiers to disobey orders to deploy to Vietnam, "was unprotected under the most expansive notions of the first amendment"[23] and that

> while the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[24]

The U.S. Court of Appeals for the Armed Forces (CAAF) further delineated free speech limits within the military in *United States v. Brown*[25] and *United States v. Wilcox*.[26] In *Brown*, a group of Louisiana National Guard troops were mobilized to Fort Hood during Operation Desert Storm and were upset over their living and working conditions. They complained to several local media outlets and arranged private bus transportation back to Louisiana.[27] In denying Brown's challenge that his conviction under 10

[16] *Id.* at 340–42 (The pamphlets contained instructions on how servicemen could receive assistance in deserting to Canada, included a recipe for gunpowder, and included statements threatening violence to end the war in Vietnam.).

[17] *Id.* at 344.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 344–45.

[21] Priest v. Sec'y of the Navy, 570 F.2d 1013, 1018 (D.C. Cir. 1977).

[22] 417 U.S. 733 (1974).

[23] *Id.* at 761.

[24] *Id.* at 758.

[25] 45 M.J. 389 (C.A.A.F. 1996).

[26] 66 M.J. 442 (C.A.A.F. 2008).

[27] *Brown*, 45 M.J. at 392–93.

U.S.C. § 976[28] violated his First Amendment freedoms of association and speech, the CAAF offered the most concise standard for unprotected speech in the military. Citing *Priest*, the CAAF stated that the "test in the military is whether the speech interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to the loyalty, discipline, mission or morale of the troops [citation omitted]. This is a lower standard than requiring an 'intent to incite' or an 'imminent' danger."[29] This articulation of the test unambiguously removes any intent requirement on the part of the speaker.[30] A speaker does not have to intend his speech to endanger good order and discipline for it to do so and be restricted by proper military authority.

In contrast to these cases, the CAAF reversed an Article 134 conviction in *United States. v. Wilcox*,[31] partly on the grounds that the speech at issue was not unprotected dangerous speech. Unlike the unprotected speech in *Parker*, *Priest*, and *Brown*, which was directed at servicemembers, the speech in *Wilcox* consisted of racist and white supremacist comments on the defendant's private online profiles and statements unknowingly made to an undercover CID agent in a private online chat room. The CAAF found that because there was "no evidence that any of the Appellant's statements were directed at military members or ever reached his unit," the speech posed no danger to the military mission or to good order and discipline.[32]

C. Does a Chaplain Have a Special Status for Free Speech?

The Army recognizes that chaplains have a "dual functionality": they serve as religious leaders and as religious support staff officers.[33] But does this dual status give them a greater right to free speech than other servicemembers? In *Rigdon v. Perry*,[34] several chaplains brought suit against the Secretary of Defense challenging directives issued by the various services prohibiting military chaplains from participating in the Project Life Postcard Campaign, a program of the Catholic church that encouraged parishioners to send postcards to their Senators urging them to override President Clinton's veto of the ban of partial birth abortions, claiming the directives violated their right to free speech.[35] The prohibition against the chaplains' participation in the program was based on the Defense Department's belief that to do so would violate Department of Defense Directive (DoDD) 1344.10, which prohibits servicemembers from using their authority or influence to solicit votes for a particular candidate or issue.[36]

In rejecting the DoD's argument, the district court found that this "indirect" solicitation was not the sort of activity targeted by the DoD directive and that chaplains "conducting worship . . . surrounded by all the accouterments of religion . . . are acting in their religious capacity, not as representatives of the military . . . ."[37] At this point, it becomes very important to distinguish between what the *Rigdon* decision stands for, and what it does not. *Rigdon* stands for the idea that when a chaplain speaks during a religious service, he is not speaking from a position of government authority. This means that a chaplain's speech during religious services is not subject to the same restrictions that normally govern a government employee's speech during the performance of his official duties.[38] However, what the *Rigdon* ruling does not do is create a free expression forum where a chaplain has the same free speech rights as a private citizen.[39] Although a chaplain may not be speaking from a position of military authority during a religious service, a chaplain is still a servicemember and his speech will be viewed through a *Parker* lens to determine if it is unprotected dangerous speech. Speech is unprotected and dangerous if it interferes with or prevents the orderly accomplishment of the mission, or presents a clear danger to loyalty, discipline, mission, or morale of the troops. It does not cease to be so simply because it is spoken from the pulpit.

The law governing unprotected speech in the military is fairly settled and has been consistently applied by the courts.

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[28] 10 U.S.C. § 976 (2006) (prohibiting the formation of, or membership in, any type of military labor organization; also prohibiting the organization of any type of strike, march, or demonstration).

[29] *Brown*, 45 M.J. at 395.

[30] *Cf* United States v. Priest, 45 C.M.R. 338, 345 (C.M.A. 1972) (quoting United States v Schenck, 39 S. Ct. 247, 249 (1919)) ("If the act (speaking, or circulating a paper), its tendency and the intent with which it is done, are the same, we perceive no ground for saying that success alone warrants making the act a crime.").

[31] 66 M.J. 442 (2008).

[32] *Id.* at 450.

[33] U. S. DEP'T OF ARMY, REG. 165-1 ARMY CHAPLAIN CORPS ACTIVITIES para. 3-1b (3 Dec. 2009) [hereinafter AR 165-1].

[34] 962 F. Supp. 150 (D.C. Cir 1997).

[35] *Id.* at 152. The chaplains also argued that restricting them from participation in the campaign was a violation of the Religious Freedom Restoration Act (RFRA) and their right of Free Exercise—those claims will be discussed later in this article.

[36] *Id.*; U.S. DEP'T OF DEF., DIR. 1344.10 POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES para. 4.1.2.2 (19 Feb. 2008).

[37] *Rigdon*, 962 F. Supp. at 150–60.

[38] Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89, 138 (Fall 2007).

[39] *Id.*; *see also* David E. Fitzkee & Captain Linell A. Letendre, *Religion In the Military: Navigating the Channel Between the Religion Clauses*, 59 A.F.L. REV. 1, 33 (2007), *contra* Steven K. Green, *Reconciling the Irreconcilable: Military Chaplains and the First Amendment*, 110 W.VA. L. REV. 167 (2007) (in establishing chaplaincy, military created forums for religious expression in which it cannot impose content or viewpoint requirements).

A servicemember's speech is unprotected dangerous speech and subject to restriction when it is directed at other servicemembers;[40] and is of the type of speech with the propensity to diminish loyalty, discipline, mission, and morale;[41] presents a clear danger to loyalty, discipline, mission, or morale of the troops;[42] or interferes with or prevents the orderly accomplishment of the mission.

III. Free Exercise

A person's right to freely exercise his religious beliefs, often intertwined with issues of free speech, is also strongly protected by the First Amendment. Although the freedom to believe is absolute, the freedom to act in accordance with one's belief, like the right to free speech, is not absolute and may be subject to government restriction.[43] In stark contrast to the clarity of what is unprotected speech in the military, congressional action and judicial inconsistency have left the issue of free exercise protections within the military in a state of ambiguity.

A. Free Exercise in the Civilian Context

As the jurisprudence surrounding the Free Exercise Clause developed, the unconstitutional restriction of religious conduct typically manifested itself in one of two forms: a burden is placed on a religious practice through the application of a generally applicable law, or a law restricting certain conduct because of its religious motivation. *Employment Division v. Smith* and *Church of the Lukumi Babalu Aye v. City of Hialeah* illustrate these situations.

The plaintiffs in *Employment Division v. Smith* challenged the denial of their unemployment benefits because they were terminated from their jobs at a drug rehabilitation center for misconduct, specifically, for ingesting peyote, a Schedule I controlled substance.[44] The plaintiffs, both members of the Native American Church, argued that they had ingested the peyote for sacramental purposes at a religious ceremony and that denying their unemployment claim because of their adherence to a religious requirement violated their free exercise rights under the First Amendment.[45] In denying the free exercise claim, the Court declined to apply a strict scrutiny standard, holding instead that a neutral and generally applicable law that burdens a religious practice does not require a compelling government interest.[46] In contrast, specifically intended to restrict a religious practice or suppress a particular religious group are reviewed under strict scrutiny and can only be lawful if they advance a compelling government interest and are narrowly tailored.[47]

In *Church of the Lukumi Babalu Aye v. City of Hialeah,* the City, in response to the Church taking up residency within the City, passed a series of ordinances that effectively prohibited ritual animal sacrifice, a central tenet of the Santeria faith practiced by the Church.[48] Although the ordinances did not prohibit religious conduct on their face, the Court found that their collective effect, and the legislative history surrounding their creation, left little doubt that their true intent was to specifically suppress Santeria animal sacrifice. Therefore, the ordinances could only be upheld if they were narrowly tailored to advance a compelling government interest.[49] The court held that they were not.[50]

B. Free Exercise within the Military

The Supreme Court has explored the boundaries of the First Amendment's protection of a servicemember's right to the free exercise of religion in only one case: *Goldman v. Weinberger*.[51] Goldman challenged the Air Force's uniform regulation that prohibited the wear of headgear while indoors, which thus forbade Goldman to wear a yarmulke as required by his Orthodox Judaism.[52] In affirming the Air Force's enforcement of its regulation and denying Goldman's First Amendment claim, the Court reaffirmed its view that "the military is, by necessity, a specialized society separate from civilian society."[53] Justice Rehnquist, delivering the opinion of the Court, stated that:

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[40] United States v. Wilcox, 66 M.J. 442, 450 (2008).

[41] Priest v. Sec'y of the Navy, 570 F.2d 1013 (D.C. Cir. 1977).

[42] United States v. Brown, 45 M.J. 389, 392–93 (1996).

[43] Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

[44] Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 874 (1990).

[45] *Id.*.

[46] *Id*. at 883.

[47] *Id.*

[48] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 527–28 (1993).

[49] *Id.* at 533–46.

[50] *Id.* at 546. The city argued that the ordinances were enacted to protect the public health and to prevent cruelty to animals. Considering these interests, the Court noted the ordinances were entirely under-inclusive, leaving the non-religious killing of animals within the city untouched. *Id.*

[51] 475 U.S. 503 (1986).

[52] *Id*. at 504–05. Air Force Regulation (AFR) 35-10 did not specifically prohibit the wearing of a yarmulke, it simply prohibited the wearing any (and all) headgear while indoors. Although not dispositive in the case, it was noted that Goldman had previously worn his yarmulke within the base hospital for years without incident and that it was first treated as a uniform violation shortly after he testified for a defendant in a court-martial. *Id.*

[53] *Id.* at 508 (quoting United States v. Parker, 417 U.S. 733, 743 (1974)).

> Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps [citations omitted]. The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service."
>
> These aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment [citation omitted] . . . . In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.[54]

The Court rejected Goldman's argument that strict scrutiny should be the standard of review in his case. It did not, however, clarify the standard of review it was using. The dissenting opinions of Justices Brennan and O'Connor took the majority to task for this.[55]

It is also unclear whether the judicial deference shown in that case extends to all military actions that infringe on a servicemember's free exercise rights, or only to regulations and orders that are "reasonable and evenhanded[],"[56] the equivalent of a "neutral and generally applicable" law, like Oregon's criminal law that prevailed in the *Smith* case.[57] The reasoning in *Goldman* suggests that the Court will apply this deference broadly. The rationale it gave for deference to military judgment, particularly in the area of maintaining good order and discipline, is that courts are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."[58] When military authorities are executing their responsibility to enact military policy, as directed by the executive and legislative branches, judicial deference to the military should be at its greatest. This reasoning holds even when the order in question is neither neutral nor generally applicable.

C. Reaction to *Goldman* and *Smith*

Neither *Goldman* nor *Smith* registered well with Congress. Within a year of the *Goldman* decision, Congress directed the military to enact policies to accommodate the individual religious practices of servicemembers, including the wear of religious clothing and religious items, dietary issues, and religious days of observation.[59] The DoD issued a policy directing commanders to grant religious accommodation requests unless doing so would "have an adverse impact on military readiness, unit cohesion, standards or disciple."[60] Army regulations contain similar language.[61]

Congress also acted to compensate for *Smith* by enacting the Religious Freedom Restoration Act (RFRA) in 1993, stating that "[the] [g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . if [the government] demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."[62] Although the RFRA was eventually ruled unconstitutional as applied to the states,[63] it remains binding on the federal government and both the Senate and House reports on the legislation made clear that there was no military exception. However, while Congress wanted future free exercise claims in the military to receive a meaningful strict scrutiny review, Congress still

[54] *Id.* at 507 (citation omitted).

[55] *Id.* at 506.

[56] *Id.* at 510.

[57] *See* Hartmann v. Stone, 68 F.3d 973, 985 (6th Cir. 1995) ("those religiously offensive regulations to which the Court has deferred [as in *Goldman*] appear to have always been, on their face, neutral and generally applicable").

[58] Chappell v. Wallace, 462 U.S. 296, 305 (1983) (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962)) (In *Chappell*, the Court dismissed a Sailor's *Bivens* suit against his superior officer for alleged constitutional violations—based on the special nature of the military, the suit could not stand.).

[59] Fitzkee & Linell, *supra* note 39 at 64.

[60] U.S. DEP'T OF DEF., INSTR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (10 Feb. 2009).

[61] AR 165-1, *supra* note 33, para. 2-1c ("Commanders will approve Soldiers' requests for accommodation of specific religious practices whenever possible, subject to the limits of military necessity"); U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 5-6 (18 Mar. 2008) (laying out what constitutes "military necessity" in this context in some detail, and requiring commanders to respond to accommodation requests in writing) [hereinafter AR 600-20]; *see also* Benjamin, *supra* note 5, at 10–11.

[62] 42 U.S.C. § 2000bb-1 (2006).

[63] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

intended for the courts to maintain judicial deference to the military. In addressing this issue, the House stated:

> [the] examination of such regulations in light of a higher standard does not mean the expertise and authority of military . . . officials will be necessarily undermined. The Committee recognizes that religious liberty claims in the context of . . . the military present far different problems . . . than they do in civilian settings . . . . [M]aintaining discipline in our armed forces, [is] recognized as [a] governmental interest[] of the highest order.[64]

The Senate felt the same way, although its language regarding the continued viability of *Goldman's* judicial deference was more direct:

> Under the unitary standard set forth in the act, courts will review the free exercise claims of military personnel under the compelling governmental interest test. The committee is confident that the bill will not adversely impair the ability of the U.S. military to maintain good order, discipline, and security. The courts have always recognized the compelling nature of the military's interest in these objectives in the regulations of our armed services. Likewise, the courts have always extended to military authorities significant deference in effectuating these interests. The committee intends and expects that such deference will continue under this bill.[65]

D. Application of *Goldman*'s Deference Under RFRA's Scrutiny

The Sixth Circuit took on this issue in 1995 in *Hartmann v. Stone.* This case examined an Army regulation that prohibited a Family Child Care (FCC)[66] provider from conducting any religious practices during the in-home daycare program.[67] The plaintiffs—parents who wished for their children to engage in such practices—claimed this violated their free exercise rights under both the First Amendment and the RFRA. The Sixth Circuit declined to address the RFRA claim because the challenged regulation specifically prohibited religious conduct on its face, and the regulation was "not neutral and generally applicable."[68] (This reasoning is curious. Although the RFRA was passed in direct response to the Supreme Court's ruling in *Smith*, which was about the religious impact of a neutral and generally applicable criminal statute, nothing in the RFRA's text or legislative history limits its application to such cases.)[69]

The Sixth Circuit instead focused on the First Amendment claim, and the amount of deference due to the Army. It reviewed the regulation under strict scrutiny, requiring that the law be narrowly trailored to advance a compelling governmental interest.[70] The court did not view *Parker v. Levy* deference (i.e., recognizing the military as a "specialized society" with disciplinary needs) as part of the "compelling governmental interest" test. Instead, it viewed this deference "as a separate option open to the military to justify its regulation," stating that "once we conclude that [a] regulation would fail the normal constitutional test we still must determine whether, in the face of what is normally a constitutional violation, the court must defer to military judgment."[71]

In accordance with this view, the Sixth Circuit first reviewed the Army regulation under strict scrutiny and found that it violated the First Amendment's Free Exercise Clause. The Army claimed that the regulation was designed to prevent itself from seeming to endorse or become closely entangled with religion. However, the family care providers it covered were not employed or paid by the government; the contractual relationship was between parents and providers, and the Army simply regulated the transactions. Thus, the Army had no interest in keeping those transactions irreligious.[72] Turning next to the question of deference, the court recognized that the unique nature of the military's

[64] H.R. REP. NO. 103-88 (1993).

[65] S. REP. NO. 103-111, at 11 (1993).

[66] Under the Army's Family Child Care (FCC) program, after undergoing training and certification, military family members are authorized to provide child as independent contractors from Government owned housing on a military installation. The program allows the Army to prevent unregulated child care services on installations, to relieve the burden on its Child Development Centers (CDC), and to take advantage of cost savings on CDC infrastructure. *See* U.S. DEP'T OF ARMY, REG. 608-10, CHILD DEVELOPMENT SERVICES ch. 6 (15 July 1997).

[67] Hartmann v. Stone, 68 F.3d 973, 975 (6th Cir. 1995).

[68] *Id.* at 978.

[69] The court explained its reasoning as follows: The RFRA was designed to undo the Supreme Court's holdings in *Smith* and *Babalu Aye.* Those cases involved facially neutral laws that incidentally burdened religion. "The Supreme court never intended *Smith* and *Lukumi Babalu Aye* to affect the methodology of dealing with those laws or rules that directly burden religion because they are not neutrally and generally applicable. . . ." *Id.* Since the regulation in *Hartmann* was not neutral— it specifically targeted religious practice, though not specific sects—the court reasoned that it was beyond the scope of the harm Congress was trying to correct, so that the RFRA would not apply. *Id.* However, as noted below, the court used the same "strict scrutiny" analysis as if the RFRA had applied.

[70] *Id.* at 979 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993)).

[71] *Id.* at 983 n.7.

[72] *Id.* at 985.

function "has required courts to defer to Army judgment on many aspects of internal operations, including the proper scope of uniformity, discipline and morale," but went on to find that, in prohibiting the religious conduct of non-servicemembers in their homes, "the Army has wandered far afield," and that "[i]t stands not in an area where the link to its combat mission is clear, it does not even stand in an area where the link is attenuated but nonetheless discernible."[73] The court held the regulation to be unconstitutional.

The Federal District Court for the District of Columbia was the next to stride onto the sticky wicket in *Rigdon v. Perry*, in which military leaders had warned chaplains not to encourage their parishioners to participate in the "Project Life Postcard Campaign" because it allegedly violated DoD policy.[74] As noted above, the court found that the campaign did not violate the policies against lobbying and political activity while on duty. Although that ruling settled the issue, the court went further and addressed the free exercise and RFRA issues. Assuming *arguendo* that the DoD political activity and lobbying restriction did prohibit the chaplains from taking part in the campaign, the district court found that prohibiting participation in the Postcard Campaign would be censorship of the chaplains' preaching and create a substantial burden on the free exercise of their religion.

The court acknowledged that the military had a compelling interest in preventing potential political conflicts from developing among the ranks and affecting good order and discipline, and in maintaining "a politically disinterested military." However, the district court did not agree that restricting this particular call to action in a chaplain's sermon would advance such an interest.[75] The court noted that the chaplains were not (as far as the evidence showed) planning to ask their congregants to proselytize among other servicemembers for the postcard campaign, implying that such conduct might have infringed on the government's compelling interest.[76] Although it did not reference the *Goldman* decision, the district court did briefly mention the deference normally afforded to the military concerning speech and its potential effect on good order and discipline. However, because the government did not provide any evidence of how this conduct "would in any way enhance a potential for 'political conflicts' . . . let alone create a clear danger to the loyalty, discipline or morale of the troops,"[77] deference to military judgment was not warranted.

E. The Question of Deference—Importing Clarity from RFRA Application in Federal Prisons

While *Rigdon* and *Hartmann* offer some useful guidance as to how much a commander may restrict religion, they do not establish a logical or coherent model for applying *Parker v. Levy* deference to restrictions on religion in RFRA cases. *Hartmann* in particular makes deference a separate step of the analysis, to be applied only *after* the Government has failed to establish that its action was the least restrictive way to advance a compelling governmental interest. *Rigdon* found that the Government's restriction did not further its compelling interests—and did not explicitly address deference at all. A better model is to be found in RFRA cases arising in prison litigation.

Prison authorities, like military ones, receive a degree of deference based on the need for good order and discipline in the institutions they supervise.[78] In enacting the RFRA, Congress treated the military and prisons in a similar manner. While Congress did not exempt either institution from RFRA claims, it also expected courts to continue their deferential treatment of military judgments and prison determinations concerning what was necessary in maintaining good order, discipline, and security.[79] The federal circuit courts that have dealt with prisoners' RFRA claims have logically harmonized the two mandates. They have done this by explicitly applying deference when

[73] *Id.* at 984–85.

[74] Ridgon v. Perry, 962 F. Supp. 150, 152 (D.D.C. 1997).

[75] *Id.* at 161–62. The court noted that the chaplains were not (as far as the evidence showed) planning to ask their congregants to proselytize among other servicemembers for the postcard campaign, implying that such conduct might have infringed on the government's compelling interest.

[76] *Id.*; *see also* Benjamin, *supra* note 5, at 17 (noting that chaplains should avoid proselytizing Soldiers to avoid establishment clause issues).

[77] *Id.*

[78] "[S]imply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. 'Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" Bell v. Wolfish, 441 U.S. 520, 545-46 (1979) (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)).

[79] H.R. REP. NO. 103-88 (1993) ("Pursuant to the Religious Freedom Restoration Act, the courts must review the claims of prisoners and military personnel under the compelling governmental interest test. . . .The Committee recognizes that religious liberty claims in the context of prisons and the military present far different problems for the operations of those institutions than they do in civilian settings. Ensuring the safety and orderliness of penological institutions, as well as maintaining discipline in our armed forces, have been recognized as governmental interests of the highest order"); S. REP. NO. 103-111, at 10, 12 (1993) ("The committee does not intend the act to impose a standard that would exacerbate the difficult and complex challenges of operating the Nation's prisons and jails in a safe and secure manner. Accordingly, the committee expects that the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline . . . The courts have always recognized the compelling nature of the military's interest in [good order, discipline, and security] . . . Likewise, the courts have always extended to military authorities significant deference in effectuating these interests. The committee intends and expects that such deference will continue under this bill.").

conducting the "least restrictive means" portion of strict scrutiny analysis.[80] Essentially, the courts have agreed that once prison officials provide sufficient justification that a policy which burdens a prisoner's free exercise right is the least restrictive means of maintaining order and discipline, then "the courts must defer to the expertise judgment of prison officials."[81] While not expounding upon what they would consider as sufficient justification, the circuit courts were clear in that they would not accept "conclusionary statements and post hoc rationalizations."[82]

Making deference an explicit part of the strict scrutiny analysis makes more sense than making it a separate analysis as in *Hartmann* or something not mentioned as in *Rigdon*. The courts should use this approach in military free speech-free exercise cases. In the meantime, existing case law can still help the judge advocate advise his commander as to how far he may go in restricting the advice of his religious support staff officers.

IV. Application

Revisiting the three hypothetical situations proposed in this article's introduction—assume the commander wants to order each of the three chaplains to refrain from giving similar sermons again. Will the orders survive a constitutional challenge?

A. Free Speech Challenge to the Commander's Order

As previously stated, a servicemember's speech is unprotected dangerous speech, and subject to restriction, when the speech is directed at other servicemembers and it is the type of speech with the propensity to diminish loyalty, discipline, mission, and morale; presents a clear danger to loyalty, discipline, mission, or morale of the troops; or interferes with or prevents the orderly accomplishment of the mission. In the introduction's hypotheticals, all three sermons where given at chapels located on a military installation and were certainly directed at servicemembers. Whether the sermons are unprotected dangerous speech depends on whether they fall within one of the proscribed categories. A simple way to answer this question is to compare the sermons to the speech that has already been found to be unprotected dangerous speech.

1. The Bishop's Letter

When compared to the language in the *Priest*, *Parker*, *Brown*, and *Wilcox* cases, is there unprotected dangerous speech in the bishop's letter? The issue of the chaplain requesting the parishioners to contact their congressional representative can be quickly dispensed with—this is not unprotected or dangerous as noted in *Rigdon*. Servicemembers have a statutory right to contact individual members of Congress[83] and a chaplain asking them to exercise that right, in a religious service they are voluntarily attending in which he does not speak for the government, is not affecting morale, discipline, or mission accomplishment. The same cannot be so easily said about the rest of the chaplain's letter.

This letter implicates both *Parker* and *Brown.* Captain Parker argued that, because their rights were being denied through racial discrimination in the United States, African-American Soldiers should refuse to go to Vietnam. *Brown* involved mobilized National Guard troops advocating and organizing to leave their mobilization site and return home because of their belief that their treatment and living conditions were unjust. The speech in the bishop's letter is similar to the speech in *Parker* and *Brown* in that it advocates disobeying the law in response to perceived unjust treatment, casting the perceived wrong as being more egregious in light of the listener's military service. Specifically, the bishop's letter argues that while Catholic servicemembers were fighting to protect their constitutional freedoms, one of those very freedoms was being curtailed by the passage of the new federal health care law.

Although the bishop's letter, unlike the speech in *Parker* and *Brown*, is encouraging Catholic servicemembers to disobey a federal law instead of a military order, this is just as harmful to discipline. Civilian control of the armed forces is fundamental to a democratic society, and encouraging Soldiers to disobey civilian laws—especially when giving a specifically military justification for it—undermines this fundamental component of discipline.[84] While the chaplain's speech is not a criminal "disloyal statement" like the ones prosecuted in *Priest*, it could easily be determined that speech claiming that, while servicemembers were fighting and dying for the rights of others, their own rights were being restricted by the government, is speech that has the propensity to diminish their loyalty, discipline, mission,

[80] Hoevenaar v. Lazaroff, 422 F.3d 366, 370 (6th Cir. 2005); Hamilton v. Schriro, 74 F.3d 1545, 1554 (8th Cir. 2003); Diaz v. Collins, 114 F.3d 69, 71 (5th Cir. 1997); Mack v. O'Leary, 80 F.3d 1175, 1179 (6th Cir. 1997), *vacated on other grounds*, 522 U.S. 801 (RFRA not applicable to the states); May v. Baldwin; 109 F.3d 557, 564 (9th Cir. 1997)).

[81] *Hoevenaar*, 422 F.3d at 370.

[82] *Hamilton*, 74 F.3d at 1554 n.10; *May*, 109 F.3d at 564 (prison officials cannot satisfy the demands of the RFRA with mere assertions of unfulfilled security objectives).

[83] 10 U.S.C. § 1034(a) (2006).

[84] *See* United States v. Hardy, 46 M.J. 67, 74 (C.A.A.F. 1997) (refusing to require a "jury nullification" instruction because it "would provide court members with an authoritative basis to determine that service members need not obey unpopular, but lawful, orders from either their civilian or military superiors. To permit such action would be antithetical both to the fundamental principle of civilian control of the armed forces in a democratic society and to the discipline that is essential to the successful conduct of military operations.").

and morale. The commander can restrict this letter without violating the chaplain's free speech rights.

2. Proselytization and the Internment Sermon

The speech in these two sermons is unlike the unprotected dangerous speech in *Priest*, *Parker*, or *Brown* in that it does not encourage disobedience of military authority. Instead, the speech in these sermons does something different; it encourages the development of conditions that allows servicemembers with distinguishing characteristics to be disparaged and treated differently.

The military knows firsthand that there is a direct link between the disparate treatment of servicemembers and good order and discipline, unit morale, and mission accomplishment. During the Vietnam War, racial tensions between black and white servicemembers were an ever present impediment to good order and disciple, unit morale, and ultimately, mission accomplishment. During the conflict in Vietnam, racial tensions reached a boiling point, even spilling over into full blown race riots.[85] More recently, Fort Bragg and the 82d Airborne Division experienced the impact that intolerance can have on mission accomplishment in 1995, when three of its members, who were white supremacists, murdered two black civilians in Fayetteville, North Carolina.[86] The Army's equal opportunity and extremist activities policies reflects the understanding that there is a link between speech that disparages other servicemembers based on their race, color, gender, religion or national origin, and unprotected speech that presents a clear danger to the loyalty, discipline, or morale of military personnel.[87]

To be clear, speech that decries certain practices or beliefs as immoral or sinful is not the same as extremist speech or speech that disparages other servicemembers because of their race, gender, religion national origin, or any other basis. This is a difference in kind, not in degree. Condemning the belief or practice is different from vilifying the believer or practitioner. As in *Priest*, it is not necessary for the commander to show that the chaplain's speech actually caused any incidents of diminished loyalty, discipline, morale, or mission accomplishment for it to be unprotected dangerous speech; simply that his speech is of the type with the "clear tendency" to cause these secondary effects. Considering the observed secondary effects that disparaging speech can have on a unit, the critical question regarding these sermons is whether this is the type of speech that has the potential to disparage servicemembers of different faiths and servicemembers who are homosexual, and the answer in both cases is "yes."

In the case of the "proselytize and damnation" sermon, the command has already experienced a negative impact from the chaplain's speech; the command has received complaints from Soldiers claiming that they are being harassed by the members of his congregation. The sermon on homosexuality goes to the extreme of questioning the worth and right of homosexuals to exist as people—including homosexual Soldiers with whom the congregants are serving or may be serving in the future.[88] A commander could hear these sermons and determine that they present a clear and present danger to the loyalty, discipline, mission, or morale of the command. The commander can restrict these sermons without violating the chaplains' free speech rights.

B. Free Exercise Challenge to the Commander's Orders

The analysis to determine if the order to the chaplains violates their free exercise rights begins with determining whether that the commander's order has placed a burden on their exercise of religion. It does. Preventing a congregant from receiving a religious publication containing religious speech substantially burdens his free exercise rights;[89] directly ordering a preacher not to engage in religious speech can only be a greater burden.[90] The commander's order still does not violate the free exercise rights of either the chaplain or his congregation if it is the least restrictive way to advance the military's compelling interest of maintaining order, disciple, morale, and mission accomplishment. It is.

[85] FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT 40–41 (2001) (race riot at Camp Baxter, Da Nang, in 1970); Captain Denise M. Burke, *Changing Times and New Challenges: The Vietnam War*, 26 THE REPORTER 120, 124 (1999) (race riot at Travis Air Force Base, California, in 1971).

[86] Major Walter M. Hudson, *Racial Extremism in the Army*, 159 MIL. L. REV. 1, 30 (1999) (Incidents of extremism in the military, although limited, can have a disproportionate impact in a force comprised of more one-third minority servicemembers.).

[87] AR 600-20, *supra* note 61, para. 4-12, ch. 6.

[88] "Religious groups may try to use religion as a sword to trump other important values. In the past, some religious groups have requested to purchase, use, or display 'religious' literature that was anti-Semitic, anti-Catholic, or degrading to women. As a command/leadership matter, commanders should deny requests for this type of literature. . . . Neither free speech, nor free exercise rights override the commander's obligation to maintain good order and discipline and to effectuate army equal opportunity values." Benjamin, *supra* note 5, at 18 n.140.

[89] Clema v. Jones, 745 F. Supp. 2d 1171, 1188 (N.D. Okla. 2010) (when prisoner was not allowed to receive several issues of a religious publication due to their contents, his free exercise rights were burdened; but the government's action was upheld because it supported the penological interest of maintaining security, since the materials in question contained "gang-related material or other material that creates an unsafe prison environment").

[90] *See* Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981) (government action, which "put[] substantial pressure on an adherent to modify his behavior and to violate his beliefs," placed a burden on the free exercise of religion).

The commander is not broadly prohibiting speech or regulating sermons. He is simply ordering that his chaplains' sermons not disparage other servicemembers based on their religion or sexual orientation, or encourage the disobedience of any lawful order or state or federal law. As previously discussed, the threat to the unit that the commander is trying to combat is disparaging comments and disobedience, which is why the commander's order targets those specific aspects of the chaplains' sermons. The commander's order does not prohibit a chaplain from expressing his religion's view of homosexual conduct as immoral or sinful or prohibit a chaplain from expressing a religiously based objection to a state or federal law. It does not prohibit "witnessing" or proselytization per se, though it does prohibit chaplains from imposing a religious duty on their congregants to witness to their fellow Soldiers.

The military does not have to "encourage debate or tolerate protest," and giving Soldiers the option of deciding what authority to obey or ignore, or deciding who they will or will not serve with based on religious beliefs or sexual orientation, would undermine the "instinctive obedience, unity, commitment, and esprit de corps"[91] that is necessary for a military organization to function. So would pressuring Soldiers to pressure other Soldiers to adopt their religious views. The proposed order is narrowly tailored to meet a compelling governmental interest and is lawful.

In advising the commander on these issues, the judge advocate should also memorialize the factual issues and legal analysis in writing before the commander issues the order, even if only in a memorandum for record. This will be useful if the order is contested at higher levels of command, or years later in litigation.

V. Conclusion

Whenever a commander takes an action that has an impact on a Soldier's First Amendment rights, whether actual or perceived, emotions and opinions run high. They will certainly do so if a commander finds himself ordering a chaplain not to say specific things during a religious service. However, the command can still do so, provided his action is strongly anchored to a reasoned military determination that the questionable chaplain speech will damage the command's morale and good order and discipline, or will disrupt mission accomplishment.

[91] Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

Start with Why: How Great Leaders Inspire Everyone to Take Action[1]

Reviewed by *Major Ryan Kerwin*[*]

The best is he who calls men to the best.[2]

I. Introduction

Walk through a bookstore or an airport newsstand and you will see them: books claiming they hold the secret to becoming an effective leader, can change the way you think, and show you how to operate like a giant of industry. For the most part, these book jacket exclamations are aimed at people with type-A personalities who desire to improve their lives and their careers. The themes the authors of those books explore could apply to a variety of jobs or endeavors, from aspiring CEOs or owners of fledgling businesses, to military leaders and even athletic coaches. As the *New York Times* reported in 2007, it is not just those aiming for the top of their respective professions who are reading to gain an edge; already established CEOs and captains of industry still devour tomes on leadership as well as the classics, and they frequently credit their personal libraries as a key to their success.[3] Ultimately, the pitch from these books is one will achieve success by understanding certain aspects of human nature, and applying this knowledge in a manner that will inspire others. They explore ideas such as the notion that the split-second decisions are often the correct ones[4]; they assert that if you get the right people on your team your venture will be successful.[5] There are also countless books chronicling the success of iconic business leaders such as Steve Jobs of Apple, Inc.,[6] and Howard Schultz of Starbucks, Inc..[7] Simon Sinek's book, *Start with Why: How Great Leaders Inspire Everyone to Take Action*, is of that same genre: a sort of self-help guidebook that aims to provide the reader with new insight into what makes leaders different and, in turn, successful. A judge advocate searching for renewed inspiration in the realm of leadership might pick up this book and find some valuable lessons.

Mr. Sinek is a well-known motivational speaker, professor, and member of the Rand Corporation.[8] He has developed and marketed "Why," a concept described as "the purpose, cause or belief that drives every one of us."[9] The interest in Sinek's interpretation of what makes an effective leader has resulted in invitations to meet with numerous government officials, corporations, members of the U.S. military, and to speak at the prestigious TED conference.[10] *Start with Why* is Sinek's proclamation that by focusing one's vision on why we do things and articulating that message, aspiring leaders will inspire others. Mr. Sinek writes that "this book is about a naturally occurring pattern, a way of thinking, acting and communicating that gives some leaders the ability to inspire those around them."[11]

The author uses a device he calls "The Golden Circle" as the focal point of his argument.[12] As the book's title suggests, asking "why" we do things rather than "what" we do or "how" we do them is the key to developing a persuasive, successful leadership style.[13] It could be applied to motivate subordinates, or consumers that leaders in business hope will buy their products. The Golden Circle—literally an illustration of a round target in which the outer ring is "What," the middle ring "How," and the bull's eye "Why"—also serves as a figurative illustration that focuses the reader on what is truly important when it comes to leadership.[14] While most people are consumed with what to do or how to do it, Sinek argues that it is only by asking, "Why are we doing this?" and then effectively communicating that message, that leaders truly rise to an

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[1] SIMON SINEK, START WITH WHY: HOW GREAT LEADERS INSPIRE EVERYONE TO TAKE ACTION (2009).

[2] Quote attributed to ancient Greek poet Hesiod (c. AD 750-650), QUOTESANDPOEM.COM, http://thinkexist.com/quotation/the_best_is_he_who_calls_men_to_the_best-and/209066.html (last visited Sept.10, 2012).

[3] Harriet Ruben, *C.E.O. Libraries Reveal Keys to Success*, N.Y. TIMES, July 21, 2007, http://www.nytimes.com/2007/07/21/business/21libraries.html?_r=1.

[4] MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005).

[5] JIM COLLINS, GOOD TO GREAT: WHY SOME COMPANIES MAKE THE LEAP . . . AND OTHERS DON'T (2001).

[6] WALTER ISSACSON, STEVE JOBS (2011).

[7] HOWARD SCHULTZ AND JOANNE GORDON, ONWARD: HOW STARBUCKS FOUGHT FOR ITS LIFE WITHOUT LOSING ITS SOUL (2011).

[8] Author Biography, STARTWITHWHY.COM, http://www.startwithwhy.com/About/Biography.aspx (last visited Sept. 10, 2012).

[9] *Id.*

[10] *TED Talks: Simon Sinek: How Great Leaders Inspire Action*, TED.COM, http://www.ted.com/talks/lang/en/ simon_sinek_how_great_leaders_inspire_action.html (last visited September 10, 2012). Technology, Entertainment, and Design (TED) is a four-day conference attended by leaders from a cross-spectrum of industries; it offers over 50 speakers and events geared toward inspiration and the sharing of new ideas. Mr. Sinek spoke at the TED Conference in September 2009. *Id.*

[11] SINEK, *supra* note 1, at 1.

[12] *Id*. at 37.

[13] *Id.* at 1.

[14] *Id*. at 37.

ethereal level.[15] To illustrate his assertions, Mr. Sinek uses examples from successful businesses, pioneers of industry, and historical figures. The question is: Does this hypothesis work? The reader will find the answer: It depends.

II. Style Over Substance

Ironically, the strength of *Start with Why* is also its weakness. While Sinek effectively presents strategic-level ideas along with concise, real-world examples to substantiate them, the lack of hard facts and specific details detracts from the overall message of why leaders should start with "why." This systemic problem begins early in the book when Sinek first describes his own creation, the "Golden Circle."[16] He claims the Golden Circle concept was "inspired by the golden ratio—a simple mathematical relationship that has fascinated mathematicians, biologists, architects, artists, musicians and naturists since the beginning of history."[17] He goes on to explain that many well-known historical figures, including Pythagoras and da Vinci, have used the golden ratio to create some of the most lasting contributions to human history and the advancement of mankind.[18] Although intriguing, the author never explains what the golden ratio entails and likewise never describes how any of these historical figures used it to create their masterworks. Part of the hook with the concept of the golden ratio is that intellectuals of remarkable stature relied upon it to create ideas that changed the world and still affect us today. Failing to provide evidence of this, however, detracts somewhat from the author's overarching hypothesis.

Along those same lines, throughout the book the author continues to offer intriguing explanations as to why some leaders are successful while others are not, and the reader must settle for vague descriptions of how they achieved this success. As with the golden ratio, Sinek never dives into the details. A discerning reader will be interested in Sinek's hypothesis concerning the focus on "why" we do things, but is left wanting when no substantive examples are presented.

The practices of highly successful businesses provide the backdrop for many of the contemporary examples Sinek relies upon to support his argument.[19] A great deal of the book is spent discussing why the Apple Corporation is so successful while other computer, phone, and electronic companies have not achieved that level of commercial success.[20] Sinek puts forth a compelling argument that Apple's success is not necessarily due to selling a superior product, but came about and continues instead because of an innovative vision that is effectively communicated to consumers.[21] He describes the culture that surrounds a company like Apple to include not only the passion of its employees but also the consumers who are fervently loyal to their brand.[22] Apple's customers return again and again, he argues, because they have effectively marketed a vision and an identity—"a why" instead of a "what" (i.e., a computer).[23] Their customers believe they are innovators themselves and see Apple as an extension of their persona, despite the fact that it is one of the largest corporations in the world.[24] That, argues Sinek, is due to do the expert marketing of Apple's "why." Their advertisements encourage Apple customers to "Think Different," and it is this vision that keeps customers coming back for the latest Apple product.[25] This blueprint for success is repeatedly illustrated with other companies such as Southwest Airlines[26] and even with historical figures such as Martin Luther King, Jr.[27] and the Wright Brothers.[28] Their commonality is they all were able to focus, according to the author, on macro-level ideas and articulate their visions while others became bogged down with "what" to do or "how" to do it.

The problem again, as with the lack of facts describing the "golden ratio," is that these historic and business-model examples lack support in the form of verifiable facts. Sinek asserts that the Wright Brothers succeeded because they "knew WHY it was important to build" a flying machine.[29] There is no concrete evidence of this claim, however, that the "why" truly was the Wright Brother's motivation. Instead, the author contrasts them with Samuel Pierpont Langley, a contemporary who was also building an airplane in an attempt to gain fame and notoriety.[30] The Wright Brothers succeeded before Langley, Mr. Sinek argues,

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[15] *Id*. at 228 (This is the over-arching theme of the book, regularly appearing within each chapter.).

[16] *Id.* at 37, 218.

[17] *Id.* at 37.

[18] *Id.* at 38.

[19] *Id*. at 3–4, 27, 48–49, 83–88, 140–41, 186–95, 198–99, 204–05. The author relies heavily on business models to illustrate success as well as failure. Examples include Apple, Microsoft, Starbucks, Continental Airlines, Southwest Airlines, Honda, and Colgate.

[20] *Id.* at 3–4, 45–46, 63–69, 43–46, 154–64, 209–11.

[21] *Id*. at 54–59.

[22] *Id*. at 41–42.

[23] *Id.* at 164–65.

[24] *Id*.

[25] *Id.* at 155.

[26] *Id*. at 70–73.

[27] *Id*. at 126–30.

[28] *Id*. at 97–99.

[29] *Id*. at 97.

[30] *Id.* at 96.

because their vision and their grasp of the "why" differed from Langley's mundane and unimaginative pursuit of "what" and "how" in his endeavor to become the first to fly.[31]

Similarly, the author claims that it was President John F. Kennedy's compelling leadership alone that propelled the space program to achieve the astounding success of putting a man on the moon six years after Kennedy's death.[32] What Sinek neglects to address, though, is the immense impact that the space race between the United States and the Soviet Union had on the development of the U.S. Apollo 11 mission. While there is no doubt that Kennedy's vision was a motivating factor, the aerospace competition between the two Cold War countries that resulted in the moon landing began well before President Kennedy took office.

III. The Big Picture

Despite these minor flaws, what the book lacks in detail, it makes up for with captivating, accessible ideas that a leader at almost any level can apply. While "what" we do and "how" we do it are, more often than not, technical endeavors, determining an effective "why" is often considered an art form. Most companies sell a product by telling you what it is and how it works.[33] Companies like Apple, Southwest Airlines, Starbucks, and Harley-Davidson, suggests Sinek, sell an image. Why else, he asks, would someone get a tattoo of the Harley-Davidson logo?[34] That notion does not seem very strange, given the image that Harley-Davidson has spent years cultivating.[35] Could you picture someone getting a tattoo of the corporate logo of Motorola? Probably not. And yet Motorola is a corporation, just as Harley-Davidson is. Sinek theorizes the difference is that Harley-Davidson has developed a vision projected at their consumers that focuses less on the actual product and instead highlights an image of who they are and who *you* will be if you buy into this image as well.[36]

One of the more persuasive examples that the author uses to illustrate what can be accomplished when a charismatic leader is effective at projecting his message is Martin Luther King, Jr.[37] Sinek rightly recognizes the monumental effect Dr. King had on those who heard him speak.[38] Although his story is used to illustrate the point that a powerful vision that is conveyed to the masses can create a cultural and political movement, the impact Dr. King had on others is vastly different from that of the corporations the author discusses. One glaring difference, and a testament to Dr. King's leadership skills, was his ability to influence and motivate people to act in the face of physical harm and even death. Unlike the die-hard followers of Apple products or Southwest Airlines, those who marched with Dr. King were drawn together to fight for equality and to change the course of U.S. —and human—history; notably, they did so despite facing immense adversity. Sinek draws the correlation between Dr. King and successful CEOs most effectively when he describes how a clear, visionary agenda communicated at a strategic level can have an incredible impact on people and the world.[39]

The author's example of famed explorer Ernest Shackleton's ability to lead his crew through a harrowing expedition shows that the analysis of strategic-level communications and how vital they are to an organization's success; this is indeed the strongest argument Sinek makes throughout *Start with Why*.[40] In addition to the Martin Luther King, Jr. example to illustrate the importance of "why" in a political, cultural, and historical context, Sinek next moves on to explore business models. What is boils down to, it seems, is just good marketing. The reader must infer here that merely making quality products at affordable prices is not enough to actually achieve the immense success and transcendent innovation at the level of corporations like Apple.[41] "There is a big difference between repeat business and loyalty," Mr. Sinek writes.[42] That theme throughout *Start with Why*—effectively communicating the "why"—is the key to an effective leader: one who garners that loyalty, not just repeat business, be it from customers in the marketplace or subordinates in the workforce.

IV. Conclusion

Books like *Start with Why* exist because people clearly desire to know what makes great leaders so effective, and why some businesses thrive while others fail. The concept of

[31] *Id.* at 98.

[32] *Id.* at 38.

[33] *Id.* at 58–59.

[34] *Id*. at 162–63.

[35] *Id.*

[36] *Id.*

[37] *Id*. at 126–30.

[38] *Id*.

[39] *Id*. at 129.

[40] *Id.* at 90, 92. Another similar, and fascinating, historical example in *Start with Why* is the Antarctic expedition of famed explorer Ernest Shackleton. Faced with extraordinarily harsh conditions and grave danger, the men on the expedition never wavered. *Id.* It was a testament to Mr. Shackleton's leadership that he was able to motivate his crew to accomplish feats that most thought were both physically and psychologically impossible. The author argues that those very skills can be used in any environment, be it boardroom or battlefield. *Id.* at 90.

[41] *Id.* at 27–28.

[42] *Id.* at 28.

"why" on its face is certainly interesting, as Sinek conceives it. Some readers, however, will not be able to get past the lack of detail or explanatory facts in the examples the author presents. If, however, a judge advocate reader's goal is to enjoy a refresher on leadership with an emphasis on how to inspire others and build loyalty, *Start with Why* is worth exploring. What it lacks in hard data, precise facts, and convincing supportive evidence, it makes up for with lofty ideas, strategic-level visions, and clear messages. For Mr. Sinek, maybe that is the whole point.

Manhunt, the Ten-Year Search for Bin Laden from 9/11 to Abbottabad[1]

Reviewed by *Major Jonathon H. Cody*[*]

The leaders of the U.S. military seemed to have convinced themselves that the American public could not tolerate casualties—even in the pursuit of Osama bin Laden.[2]

I. Introduction

The author of *Manhunt*, Peter L. Bergen, is a national security analyst for *CNN*, as well as a fellow at both the New America Foundation and New York University's Center on Law and Security.[3] Bergen stands out from other Bin Laden authors because he personally interviewed the terrorist mastermind.[4] Bergen journeyed to Afghanistan in 2007 to meet with Bin Laden,[5] forming the basis of his critically acclaimed works *Holy War, Inc.*, and *The Osama Bin laden I Know*. Unfortunately, *Manhunt* fails to replicate the deep analytic prose of Bergen's previous books.

Manhunt is a narrative overview of the hunt for Osama Bin Laden, detailing the search for the world's most wanted, starting with President Clinton's unsuccessful air strikes in 1998, followed by the failure of the Bush Administration to take decisive action to capture Bin Laden at Tora Bora in 2001,[6] and ultimately ending with the decision by President Obama to raid his Abbottabad compound in 2011. The story is presented in a simple timeline form, guiding the reader from event to event through the eyes of the various analysts, decision-makers, and strategists involved in the manhunt. Bergen obviously used his journalistic talents and skills when writing *Manhunt*, as the structure of the book mimics that of a lengthy news article. However, that is not necessarily a compliment, as presenting such an encompassing story in the same simplistic style as a recap of yesterday's Red Sox-Yankees ballgame detracts from the serious nature of this work.

II. Critique of *Manhunt*

Manhunt reads like a lengthy news article: first it gives the reader a basic history of the event in question, then it provides various quotes from witnesses and key players, and finally ties the story together with heavy flashes of alliteration. Although *Manhunt* is 359 pages, the book is a quick read. Large typeface, a detailed set of reporter's notes, and a lengthy bibliography are the primary reasons for that length. As a result, despite its high number of pages, the average reader can read this book quickly.

There are two main flaws with *Manhunt*. First, Bergen relies too heavily on the statements of interviewees and other journalists' work to piece together the story of the hunt for Bin Laden.[7] While Bergen did cross-reference when possible, he admits that he was forced to rely upon selectively furnished documents or a single person's memory, viewpoint, or hearsay to complete the narrative.[8] The astute reader will quickly identify two deficiencies with his methods: Bergen relays self-serving statements of interested parties as prima facie evidence of what actually transpired;[9] and he describes what various actors were thinking or feeling, when it is clear this is merely conjecture on his part.[10]

The second area where Bergen fails is a lack of substantive analysis. For an author with such impressive credentials, *Manhunt* is surprisingly devoid of the scrutiny and analysis of events beyond their role in the basic narrative of the hunt for Bin Laden. For example, Bergen piques the reader's interest with a socially relevant area of discussion specifically, the expanded role of female analysts at the CIA following the debacle at Tora Bora,[11] but then inexplicably dismisses it with little fanfare. Such quick dismissal is maddening, particularly when Bergen notes how these expanded responsibilities were a sharp departure from the culture within the CIA before 9/11,[12] and was apparently a result of the perceived or actual multi-tasking capabilities

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[1] PETER L. BERGEN, MANHUNT, THE TEN-YEAR SEARCH FOR BIN LADEN FROM 9/11 TO ABBOTTABAD (2012).

[2] *Id.* at 49.

[3] Simon and Schuster Author Page, http://authors.simonandschuster.com/Peter-L-Bergen/1782915/biography (last visited Sept. 7, 2012).

[4] BERGEN, *supra* note 1, at xix.

[5] *Id*.

[6] Mary Anne Weaver, *Lost at Tora Bora*, N.Y. TIMES, Sep. 11, 2005, *available at* http://www.nytimes.com/2005/09/11/magazine/11TORA BORA.html?pagewanted=all&_r=0 (detailing how Bin Laden and his forces were cornered in the mountains of Tora Bora, a region of Afghanistan. In this battle, the United States relied primarily on U.S. Special Forces and CIA personnel to coordinate local Afghan and Pakistani forces to cut off Bin Laden's escape, rather than risk substantial U.S. Forces. The decision ultimately failed and Bin Laden escaped).

[7] Michiko Kakutani, *Bin Laden's End, From the Beginning*, N.Y. TIMES, May 4, 2012, at C23.

[8] BERGEN, *supra* note 1, at xx.

[9] *Id.* at 205.

[10] *Id.* at 11.

[11] *Id*. at 77.

[12] *Id.* at 78.

inherent among women.[13] To offer evidence of how much the culture at the CIA did change, Bergen provides examples of misogynistic comments about the role of women at the CIA spoken by senior CIA officers.[14] Yet, Bergen disappoints by refusing to provide deeper context. Rather, he simply moves on with his narrative of Bin Laden's death.

In this instance, the result of Bergen's desire to emphasize the narrative deprives the reader of any analysis on the culture change within the CIA and how such a change was representative of the entire nation. Additionally, the reader is robbed of the comparison between Bin Laden's beliefs on the role of women and the end result of how inclusiveness in America ultimately led to his downfall.[15] While the author recognizes this and other key issues raised during the search for Bin Laden, he fails to more fully probe them to the reader's satisfaction.

III. Analysis by the Author

A. Contrasting Tora Bora and Operation Neptune Spear

Where Bergen does succeed is in his analysis of the circumstances surrounding the manhunt for Bin Laden, and in this realm he does yeoman's work. First, Bergen demonstrates how the key decision-makers in *Operation Neptune Spear*, the air-assault operation into Bin Laden's compound at Abbottabad, differed from their Tora Bora counterparts. Specifically, Bergen shows how Obama and the other decision-makers asked the hard questions of the analysts and military planners, in sharp contrast to the analysts and military planners at Tora Bora, who were free to rely upon various assumptions and rosy scenarios.[16] Examples of some of these hard questions Obama asked revolved around various "what-if" scenarios about Pakistani involvement,[17] as opposed to the incongruous beliefs regarding the capabilities of Pakistani and Afghan forces displayed at Tora Bora.[18]

The result of President Obama's hard questions asked by President Obama was the requirement for a backup quick-reaction force with additional air assets.[19] Though he did not specify what the exact requirements would be, Obama defined the outlines of a backup plan, and let the military experts make specific determinations.[20] These hard questions asked by Obama, and his subsequent reliance on experts to make the right determinations, led to mission requirements that saved the operation.[21] Bergen explains why the hard questions were so important and such a dramatic departure from previous operations.

B. *Operation Eagle Claw*: Where the Analysis Needs to Begin

Just as World War I and World War II are inextricably linked, and the study of either war requires a look at what happened before 1914,[22] a serious analysis of the hunt for Bin Laden, to include its failures and eventual success, must be studied within the context of several seemingly unrelated operations that preceded it. Decades before Bin Laden was cornered in the mountains at Tora Bora and long before his eventual death in Abbottabad, a single military operation, *Operation Eagle Claw*, would be responsible for the outcome of each operation targeting Bin Laden: both in what decision-makers learned, and what they did not.

Operation Eagle Claw was the code name for the unsuccessful attempt to rescue American hostages in Iran in 1980.[23] The political fallout from the failed operation was immediate, likely providing the necessary push to sweep the Carter administration out of the White House.[24] However, the shortcomings of the failed joint operation were identified in the Holloway Commission and addressed in 1987 as part of the Cohen-Nunn amendment to the 1987 National Defense Authorization Act.[25] The resulting changes led to the successful integration of regular and special operations forces, spurring some of the greatest advancements in joint tactics.[26]

While the tactical and strategic partnerships between the services developed, however, Bergen notes that the shadow of *Operation Eagle Claw*'s failure continued to loom large in the hunt for Bin Laden, effectively tying the hands of those who advocated bold, decisive action to find and

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[13] *Id.*

[14] *Id.* at 77.

[15] *Id*. at 14.

[16] *Id.* at 181.

[17] *Id*.

[18] *Id*. at 46–47.

[19] *Id*. at 182.

[20] *Id.*

[21] *Id.*

[22] JOHN KEEGAN, THE SECOND WORLD WAR 10 (Penguin Books 2005) (1990).

[23] BERGEN, *supra* note 1, at 148.

[24] Jimmy Carter, *Iran Hostage Rescue Should Have Worked*, USA TODAY, Sept. 17, 2010, http://www.usatoday.com/news/washington/2010-09-17-iran-hostages-jimmy-carter_N.htm.

[25] Charles T. Kamps, *Operación Eagle Claw: La Misión de Rescate de los Rehenes Americanos en Irán*, AIR & SPACE POWER J. INT'L. 3, 18 (2006).

[26] Bryan Brown, *US Special Operations Command, Meeting the Challenges of the 21st Century*, JOINT FORCES Q., 1st Quarter 2006, at 38, 40.

complete the kill.[27] Because the tactical lessons of *Operation Eagle Claw* were evident in improved joint operations, the political fallout from the failed mission would effectively handicap the nation's strategy.[28] The fear of political consequences resulting from the unsuccessful operation—which doomed one president, and also haunted two others, Bush and Clinton—retarded both administrations' actions in an attempt to limit individual liability.[29]

Operation Eagle Claw embodied the politician's primary rule: first, do no harm. Following this rule, in an attempt to mitigate failure, both Bush and Clinton hunted for Bin Laden too cautiously. Clinton limited his response to Bin Laden's attack against the U.S. embassies in Tanzania and Kenya with missile strikes in Sudan and Afghanistan, rather than a more effective, but far more dangerous, human strike package.[30] In the same vein, the Bush administration hesitated against deploying a few battalions of Army Rangers to cut off Bin Laden's escape and press their advantage at Tora Bora, fearful of exposing those Soldiers to harsh conditions and enemy fire.[31]

In both cases, the Clinton and Bush administrations determined that the political costs associated with the loss of U.S. Soldiers were too high a price to be paid in the pursuit of one man.[32] The difference between the situations, however, is that Clinton's fear was justified. While the bombings of the U.S. embassies were horrendous, in early 2001, Bergen himself noted there were few options for going after Bin Laden.[33] Combined with the still-fresh images of Army Rangers being dragged naked through the streets of Mogadishu and the political suspicion expressed by the limited missile strike itself,[34] the political will for Clinton to mount a larger attack was not present.

The situation for the Bush administration was far different. Overwhelmingly, the country supported Bush's initial invasion of Afghanistan.[35] Yet, the author details how, when presented with the prospect of high casualties for U.S. Soldiers, the decision-makers on the ground of Tora Bora and in the Bush administration opted for the less risky strategy, relying heavily on local ground forces and U.S. air power.[36]

Bergen suggests that part of what crafted Obama's departure from the previous administrations was a lack of personal influence from the war in Vietnam. The author correctly notes that Obama's relative youth left him free of the influence of the Vietnam War.[37] Bergen suggests that one of the reasons Obama has been so amenable to direct targeting and an expansion of drone strikes is his detachment from the Vietnam experience.[38] In contrast, both Clinton and Bush found themselves bound by the limitations on the use of hard power in Vietnam.[39]

IV. *Manhunt* and the Principles of War

For the military practitioner, *Manhunt* provides multiple examples of how to conduct either a successful or a failed operation. *Manhunt* also unwittingly provides an excellent example on the state of incompatibility between the different branches of America's armed forces. This inconsistency, which was supposed to be rectified by the recommendations of the Holloway Commission, is identified by Bergen in a passage about the leadership qualities of Admiral McRaven.[40]

In his interviews with Admiral McRaven and other military planners, Bergen demonstrates how, despite three decades of joint operations and training, the doctrine among the services remains miles apart. Specifically, Admiral McRaven identifies six factors that are necessary for the success of a special operations mission: repetition, surprise, security, speed, simplicity, and purpose.[41] The descriptions of these six factors are surprisingly similar to the Army's Principles of War: Objective, Offensive, Mass, Economy of Force, Maneuver, Unity of Command, Security, Surprise, and Simplicity.[42] Unwittingly demonstrating just how out of synch the different services are, Admiral McRaven describes the formulation of these six factors as being something

[27] BERGEN, *supra* note 1, at 80.

[28] *Id.* at 160.

[29] *Id.* at 50.

[30] *Id.* at 201.

[31] *Id.* at 49.

[32] *Id.*

[33] *News Hour with Jim Lehrer Transcript*, PBS, (May 29, 2001), http://www.pbs.org/newshour/bb/international/jan-june01/bombing_5-29.html.

[34] James Bennett, *U.S. Cruise Missiles Strike Sudan and Afghan Targets Tied to Terrorist Network*, N.Y. TIMES, Aug. 21, 1998, http://partners.nytimes.com/library/world/africa/082198attack-us.html.

[35] David Moore, *Public Overwhelmingly Backs Bush in Attacks on Afghanistan*, GALLUP NEWS SERV., Oct. 8, 2001.

[36] BERGEN, *supra* note 1, at 49.

[37] *Id*. at 112.

[38] *Id.*

[39] *Id*.

[40] *Id*. at 168.

[41] *Id*.

[42] U.S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS 2-6 (14 June 1993) [hereinafter FM 100-5]; *see also* U.S. DEP'T OF ARMY, FIELD MANUAL 100-25, DOCTRINE FOR ARMY SPECIAL FORCES 1-3, 1-4 (1 Aug. 2009).

new.[43] Yet, the Principles of War have been the bedrock of Army doctrine since they were first published in 1923 in the *Field Service Regulations, United States Army.*[44]

Army officers will recognize that among the Principles of War, one of the most important is Objective. Objective directs that "every military operation [be directed] toward a clearly defined, decisive, and attainable objective."[45] Nowhere is the lack of focus on the Objective of an operation more clear than the operation to capture Bin Laden at Tora Bora.

While planners grappled with the problem of how to attack the heavily fortified defense of the mountainous area of Tora Bora, Bergen notes that rather than direct all available assets to the operation, the Bush White House directed a shift of resources from the Tora Bora fight in Afghanistan to planning for operations in Iraq.[46] By ignoring the objective of the most pressing operation, the subsequent shift in resources away from the manhunt for Bin Laden guaranteed the failure to seize the initiative at Tora Bora.[47] Coupled with an inability to seize the initiative, there was an inability to amass forces for a decisive engagement, and a lack of unity of effort—all key Principles of War.[48] By initiating the war in Iraq, the Bush administration denied analysts and war fighters the capabilities they needed to successfully hunt Bin Laden,[49] failing to maintain focus on the hunt for Bin Laden and the fight in Afghanistan.

In contrast, Bergen then explains how Obama's winding down of the war in Iraq paved the way for *Operation Neptune Spear*. By reorienting forces back to Afghanistan, drone strikes in Afghanistan and Pakistan were expanded ten-fold.[50] Additionally, repositioning assets from Iraq to Afghanistan resulted in an increase of special operations mission from 200 per year to 2000 by 2010.[51] The drone strikes were so effective that Bergen wryly notes that the job of the Number Three-ranking member of Al Qaeda was quickly becoming the most dangerous job in the terrorist organization.[52] The end result of this amassing of assets was the successful identification of Bin Laden's whereabouts.[53]

However, the hunt for Bin Laden did not end with knowing where he was. At the time President Obama decided to execute the mission to kill Bin Laden, after years of analysis and resources poured into the mission, the certainty that the target was in fact Bin Laden could only be predicted with a fifty percent confidence level.[54] This low level of confidence is what makes Obama's decision to send in a human strike package so audacious. In sharp contrast to the decisions made by Bush and Clinton, Bergen notes how Obama went with the most dangerous mission package available, rather than an unmanned strike of some kind.[55] It is at these times, when Bergen is uncovering and analyzing situations like this, when *Manhunt* is at its narrative best.

V. Conclusion

For the military lawyer, *Manhunt* is useful only as a primer for the historical background surrounding *Operation Neptune Spear*. The most important legal aspects of the hunt for Bin Laden—such as his status as a constant combatant, the legal implications of incursions into Pakistan's airspace, and the killing of unarmed persons at the Bin Laden compound—are left without any context or enough information to make the tough legal calls.[56] Even aside from its lack of legal analysis, the book is of limited benefit to officers in the profession of arms due to the alliterative narrative detail, which replaces thoughtful analysis with panache and flair.

As a long news article detailing the hunt for Bin Laden, however, the book is mostly a success. While there is no bold thesis contained in this work, the author does note that Bin Laden failed to appreciate the kind of military response that would flow from the 9/11 attacks, and that politicians and senior military officers, seemingly disconnected from the nation's psyche, initially felt it was not worth the cost of U.S. casualties to capture him. Further, *Manhunt* does provide the reader some context about the types of difficulties encountered by analysts and decision-makers at all levels. Finally, there are numerous pictures and maps to help keep the mainstream reader's attention, just like a news article.

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[43] BERGEN, *supra* note 1, at 168.

[44] U.S. DEP'T OF ARMY, FIELD MANUAL 3-90, TACTICS 2-6 (4 July 2001) [hereinafter FM 3-90].

[45] FM 100-5, *supra* note 42, para. 2-4.

[46] BERGEN, *supra* note 1, at 50.

[47] *Id.*

[48] FM 3-90, *supra* note 44, paras. 2-4, 2-5.

[49] BERGEN, *supra* note 1, at 120.

[50] *Id.* at 142.

[51] *Id.* at 165.

[52] *Id.*

[53] *Id.* at 132.

[54] *Id.* at 205.

[55] *Id.*

[56] *Id.* at 186.

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 servicemembers and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices.

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 ATTRS 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 ATRRS Self-Development Center and click on "Update" your ATRRS Profile (not the AARTS Transcript Services).

Go to ATTRS 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 ATTRS 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. Continuing Legal Education (CLE)

The armed services' legal schools provide courses that grant continuing legal education credit in most states. Please check the following web addresses for the most recent course offerings and dates:

a. The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS).

Go to: https://www.jagcnet.army.mil. Click on the "Legal Center and School" button in the menu across the top. In the ribbon menu that expands, click "course listing" under the "JAG School" column.

b. The Naval Justice School (NJS).

Go to: http://www.jag.navy.mil/njs_curriculum.htm. Click on the link under the "COURSE SCHEDULE" located in the main column.

c. The Air Force Judge Advocate General's School (AFJAGS).

Go to: http://www.afjag.af.mil/library/index.asp. Click on the AFJAGS Annual Bulletin link in the middle of the column. That booklet contains the course schedule.

3. Civilian-Sponsored CLE Institutions

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 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
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

4. 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 (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, students must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, 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 2014 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 hours, 1 November 2013 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact MAJ T. Scott Randall, commercial telephone (434) 971-3368, or e-mail Thomas.s.randall2.mil@mail.mil.

5. Mandatory Continuing Legal Education

a. 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).

b. 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.

c. 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.

d. Regardless of how course attendance is documented, it is the personal responsibility of Judge Advocates 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.

e. Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. Training Year (TY) 2013 RC On-Site Legal Training Conferences

The TY13 RC on-site program is pending policy and budget review at HQDA. To facilitate successful execution, if the program is approved, class registration is available. However, potential students should closely follow information outlets (official e-mail, ATRRS, websites, unit) about these courses as the start dates approach.

Date	Region, LSO & Focus	Location	POCs
19 – 21 Jul 13	Heartland Region 91st LOD Focus: Client Services	Cincinnati, OH	1LT Ligy Pullappally Ligy.j.pullappally@us.army.mil SFC Jarrod Murison jorrod.t.murison@usar.army.mil
23 – 25 Aug 13	North Western Region 75th LOD Focus: International and Operational Law	Joint Base Lewis-McChord, WA	LTC John Nibbelin jnibblein@smcgov.org SFC Christian Sepulveda christian.sepulveda1@usar.army.mil

2. 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.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

a. The Judge Advocate General's School, U.S. Army (TJAGSA), 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 Vista™ Enterprise and Microsoft Office 2007 Professional.

b. The faculty and staff of TJAGSA 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.

c. 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.

d. 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.

4. The Army Law Library Service

a. 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.

b. 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.

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