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A Deserter in France from 1944 to 1958:

The Strange but True Case of Private Wayne E. Powers

Fred L. Borch
Regimental Historian & Archivist

On 22 March 1958, French police discovered a man concealed under the stairs in a home in Mont d'Origny, France. The man was soon revealed to be Private (PVT) Wayne E. Powers, an American Soldier who had deserted from his unit in mid-December 1944. Since that time, Powers had been hiding out in France and, over the next thirteen years, had fathered five children with the French owner of the home in which he had been caught. What follows is the story of PVT Powers's 1958 trial by court-martial for desertion and its rather surprising aftermath.

Born in Chillicothe, Missouri, on 14 March 1921, Wayne Eldridge Powers had worked as a farmer prior to being drafted in May 1943. After completing basic training in El Paso, Texas, he spent a brief time at Army installations in California and New York before shipping out to England in early 1944. According to the sworn statement that Powers gave in French to an Army criminal investigator after his apprehension in March 1958, he remembered landing in Normandy on "9 or 10 June 1944." Powers explained that he had been a truck driver in France for "five or six months" when, while on his way to an Army depot in Cherbourg, he had picked up a hitchhiker wearing an American uniform. According to Powers, this hitchhiker later robbed him—at gunpoint—of both his truck and its contents. When Powers subsequently showed up without his truck, he was apprehended by agents belonging to the Army's Criminal Investigation Division (CID). According to Powers, these agents accused him of being a "German spy" and beat him during questioning over the next several weeks.¹

Powers claimed to have been released by CID investigators in mid-December 1944. Apparently unable to find his truck company to re-join it, he had started hitchhiking toward Mont d'Origny, a small town located about forty miles from the Belgian border. The previous month, Powers had met this "dark-haired French girl" named Yvette Bleuse in a bar in town and, although Powers spoke no French and Yvette spoke no English, "she gave him a woman's smile after months of murderous combat."² As a result, when Powers showed up at Bleuse's door in Mont d'Origny "approximately one week prior to Christmas in 1944, while the Battle of the Bulge was being fought," she

took him into her home. The two lived together for the next thirteen years.³

During this time period, Yvette Bleuse worked at a factory to support Powers and the five children they had together. As for Powers, he "remained in the house during the daytime" and only went out at night "for a walk and some fresh air." Occasionally, the French police would visit the Bleuse home, as there were rumors that an American deserter was living there. Powers would avoid these gendarmes by hiding in a secret compartment under the stairs in the home—which he also did whenever other strangers would come for a visit.⁴

After the French police turned Powers over to U.S. military authorities in March 1958, CID investigators asked him if he had intended to desert from the Army during the Battle of the Bulge. Powers denied that he had such an intent. When then asked why he did not return to military control when "U.S. forces came back to France" after the war, or notify the American embassy after 1945 that he was living in France, PVT Powers explained that he "was scared." He also said that if he had given himself up to the American authorities, this would have made his "companion" and "children whom I love very much . . . unhappy."⁵

Since Powers claimed to have lost the ability to speak English (he claimed only to be able to understand it), and since Powers had not written to his father or his wife⁶ in Missouri for some thirteen years, the Army naturally concluded that he intended to remain away permanently from his unit and charged him with desertion.

¹ U.S. Dep't of the Army, DA Form 19-24, Statement, 1 June 1954, Powers, Wayne, at 1-3 (26 Mar. 1958) [hereinafter Powers Statement].

² CHARLES GLASS, THE DESERTERS: A HIDDEN HISTORY OF WORLD WAR II, xv (2013).

³ United States v. Powers, CM 400435 (2 Aug. 1958) (Review of the Staff Judge Advocate (12 Aug 1958)) [hereinafter Review of Staff Judge Advocate].

⁴ Powers Statement, *supra* note 1, at 1-3.

⁵ *Id.* at 3.

⁶ Powers had been married when he entered the Army in 1943; his wife, Ruth Killian Powers, filed for divorce in November 1949 on the grounds that Powers had "absented himself for more than one year without just cause." Ruth Powers was granted a divorce in January 1950. She subsequently remarried and moved to Texas.; United States v. Powers, CM 400435, Exh. G (1 Aug. 1958) (providing a Telex message from Commanding Gen., Fort Leavenworth, Kan., to Commanding Gen., Army Commc'ns Zone, Advance Section, Verdun, France (1 May 1958)).

On 1 August 1958, Powers was tried by a general court-martial convened by Brigadier General Robert J. Fleming, Jr., Commanding General, U.S. Army Communications Zone, Advance Section (COMZ-ADSEC), Verdun, France. There was but a single charge: desertion terminated by apprehension in violation of the 58th Article of War.⁷

The proceedings held at the Maginot Caserne in Verdun were quite short, since Powers's defense counsel, judge advocate First Lieutenants (1LT) Leon S. Avakian, Jr. and James A. Stapleton, had advised Powers to enter into a pre-trial agreement with the convening authority. In return for Powers's plea of guilty to the charge and its specification, Brigadier General Fleming agreed that he would disapprove any sentence to confinement at hard labor exceeding six months. Any other lawful punishment imposed by the panel deciding the case, however, could be approved.⁸

At trial, the judge advocate trial counsel, 1LT James D. McKeithan, offered no evidence on the merits and PVT Powers offered no evidence on sentencing; the panel had only a stipulation of fact and argument from trial and defense counsel to consider. Based on the accused's plea and his military record (which included two previous convictions by courts-martial),⁹ the panel sentenced Powers to forfeit all pay and allowances, to be reduced to the lowest enlisted grade, to be confined for ten years, and to be dishonorably discharged.¹⁰ Colonel Edgar R. Minnich, the COMZ-ADSEC Staff Judge Advocate, reviewed the record of trial and recommended to Brigadier General Fleming that he adhere to the pre-trial agreement. As a result, Fleming approved the sentence as adjudged, except that he reduced the ten years in jail to six months in the local stockade.¹¹

From the Army's perspective, good order and discipline required that Powers be tried by a general court-martial. After all, nearly 50,000 Americans had deserted from the Army (and Army Air Force), Navy, Marine Corps, and

Coast Guard during World War II,¹² and many had been court-martialed and received lengthy prison sentences for intentionally leaving their units during wartime. But French public opinion—and even some Americans—did not see it that way, and the Powers case became a “cause célèbre” in both Europe and the United States. The public overwhelmingly viewed this case not as a crime, but as a love story with a fateful ending.

The American embassy in Paris received some 60,000 letters about the Powers case. Virtually all expressed support for the American deserter and pleaded for his immediate release.¹³ Newspapers in France and Germany, as well as in the United States, also covered the story. A number of letters and telegrams from foreign nationals and U.S. citizens arrived at the Pentagon, Congress, and the White House; a handful of these are contained in the allied papers of *United States v. Powers*.

Some of the correspondence asked for clemency for the accused so that he could return to Yvette Bleuse (whom he now desired to marry) and his five children. A high school classmate (Chillicothe High School Class of 1938) sent a telegram to President Dwight D. Eisenhower “urgently” requesting “commutation” of Powers's sentence. “Our class,” wrote Mr. Clark Summers, “had several immortal heroes who would not wish to see this boy persecuted for his very mortal sin.”¹⁴ Similarly, a telegram to the Secretary of the Army from Edward C. Dean of Rockville, Connecticut, “protested” the ten-year sentence given Powers.¹⁵

In a letter to The Judge Advocate General, C. L. King of La Habra, California, complained that it was “inconceivable” to him that the Army had any authority over Powers. King wrote that although he had “spent nearly 5 years in the [N]avy during World War II,” he “could not even agree to a six month sentence” for Powers. Powers's “capture was pure kidnapping” and the “army has done enough damage already . . . [and it should] wash its hands of the whole affair and not antagonize millions more Americans and French.” King closed his letter with these words: “All the drunken, arrogant, incompetent officers of this man's division are now out on pension or else getting fat somewhere on an army post. Are they any better than he?”¹⁶

⁷ Private (PVT) Powers could not be prosecuted under the Uniform Code of Military Justice because his crime had been committed prior to its enactment in 1950.

⁸ Although PVT Eddie Slovik had been executed by firing squad for deserting during the Battle of the Bulge, Brigadier General Fleming apparently never considered the death penalty as a punishment in referring Wayne Powers's case to trial. For more on Slovik, see Fred L. Borch, *Shot by Firing Squad: The Trial and Execution of Pvt. Eddie Slovik*, ARMY LAW., May 2010, at 3.

⁹ Powers had been convicted by a special court-martial for having absented himself without authority from his unit for eight days in January 1944; he also had a conviction by summary court-martial for being drunk and disorderly in uniform in a public place in April 1944. *United States v. Powers*, CM 400435 (1 Aug. 1958) (Review of the Staff Judge Advocate (12 Aug. 1958)).

¹⁰ *Id.*; Headquarters, U.S. Dep't of Army, U.S. Army Commc'ns Zone, Advance Section, Verdun, France, APO 122, Court-Martial Appointing Order No. 11 (1 July 1958).

¹¹ Review of the Staff Judge Advocate, *supra* note 2.

¹² GLASS, *supra* note 1, at xi.

¹³ E-mail from John Brebbia, to author (17 Oct. 2013, 11:13 A.M.) (on file with The Judge Advocate Gen.'s Legal Ctr. & Sch., Charlottesville, Va., Historian's files).

¹⁴ *United States v. Powers*, CM 400435 (1 Aug. 1958) (providing a copy of a telegram from Clark Summers, to The President (Eisenhower)).

¹⁵ *Id.* (providing a copy of a telegram from Edward C. Dean, to the Sec'y of the Army (1 Aug. 1958)).

¹⁶ *Id.* (Letter from C. L. King, to The Judge Advocate Gen. (11 Aug. 1958)).

The Army even received a letter from an attorney acting on behalf of a Hollywood screenwriter. As this lawyer explained, he wanted a copy of the record of trial in the case because his client thought that the Wayne Powers story might be of “possible value for motion picture adaptation and presentation.”¹⁷

On the other hand, some letters expressed a decidedly negative view of PVT Powers. Paul Lutz of Tyler, Texas, insisted that the “ten year sentence was far too light,” and he asked why the Army had made a “deal” with a “cowardly deserter.” Since Powers had deserted during the Battle of the Bulge, Lutz insisted that “some may have died because this man was not there. Yet we are to feel sorry for this man who deserted his comrades and country for a lover.”¹⁸

A letter written by Chester Missahl of Duluth, Minnesota, who had soldiered during World War II, described Powers as a “dirty, stinking coward and war-time deserter.” Missahl complained bitterly about Brigadier General Fleming’s decision to reduce Powers’s sentence to six months’ confinement. Wrote Missahl:

It would seem the original ten year sentence as pronounced by the court-martial was sufficiently light for a traitor whose deserved punishment is a bullet in the back; and such molly-coddling is difficult to believe. Certainly General Fleming should be cashiered at once for such brazen disregard for the rights of the millions who did not turn traitor.

If this be a fair sample of today’s Army, God help us in the next war.”¹⁹

Although Brigadier General Fleming had approved a six-month sentence of confinement, the Army apparently had had enough of Powers—and the adverse publicity surrounding his case. As a result, after the Board of Review (the forerunner of today’s Army Court of Criminal Appeals) approved the findings and sentence in *United States v. Powers*, and after Powers declined to petition the Court of Military Appeals (today’s Court of Appeals for the Armed Forces) for a grant of review, Brigadier General Fleming remitted the unexecuted portion of PVT Powers’s sentence on 2 October 1958.²⁰

The accused was immediately released from confinement in the Verdun Stockade and dishonorably discharged. Since the French government had consented to his remaining in France after his separation from active duty, thirty-seven-year-old Powers remained on French soil and returned to Mont d’Origny and Yvette Bleuse.²¹

So ended the court-martial of the Soldier who had deserted and hidden in France for more than thirteen years. But what happened to Wayne E. Powers? While the record of trial does not answer this question, he apparently did marry Yvette two years after being released from jail. The couple also had a sixth child together.²² It seems highly likely that Monsieur and Madame Powers lived out the remainder of their days together in Mont d’Origny, France.

More historical information can be found at

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

<https://www.jagcnet.army.mil/History>

¹⁷ *Id.* (Letter from Michael A. Wyatt, to the Office of the Judge Advocate Gen., Military Justice Div. (25 July 1961)).

¹⁸ *Id.* (Letter from Paul V. Lutz, to Neil McElroy, Sec’y of Def. (4 Aug. 1958)).

¹⁹ *Id.* (Letter from Chester Missahl, to Sec’y of Def. (6 Aug. 1958)).

²⁰ Headquarters, U.S. Army Commc’ns Zone, Advance Section, Verdun, France, APO 122, U.S. Forces, Gen. Court-Martial Order No. 22 (2 Oct. 1958).

²¹ Memorandum from Major General George W. Hickman, Jr., The Judge Advocate Gen., to Sec’y of the Army, subject: Report on Current Status of Private Wayne E. Powers (9 Sept. 1958).

²² GLASS, *supra* note 1, at xv.

Where's the Sodomy? A Guide for Prosecuting Prejudicial Sexual Relationships After the Possible Repeal of Sodomy Law

Major Jayson L. Durden*

We learnt as law students in Blackstone that there are things which are malum in se and, in addition to them, things which are merely malum prohibitum; but unhappily in the affairs of real life we find that there are many things which are malum in se without likewise being malum prohibitum. In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code.¹

I. Introduction

It is 13 December 2013: Congress has passed and the President has signed the National Defense Authorization Act (NDAA). The Act contains a provision that repeals §925 of Title 10, United States Code, the offense of sodomy.²

On 18 July 2014, three friends John, James, and Kate share a night of drinking, discussing Kate's financial difficulties. John and James tell Kate they can help her with her financial issues by offering her five hundred dollars for a night of fun and excitement. After drinking more alcohol, John, James, and Kate engage in an evening of intimate group activities; specifically, they do not have sexual intercourse, but engage in heterosexual and homosexual sodomy. Of the three, John is married. Moreover, they are all active duty servicemembers of the same command. John is a Sergeant First Class (E-7); James is a Sergeant (E-5); and Kate is a Corporal (E-4).

Should John, James, and Kate be concerned that the command will find out? Should the command pursue charges for this private and consensual activity? Does the command have an interest in deterring this type of behavior? Yes: the three servicemembers should be concerned and the command does have an interest in deterring this type of behavior, as the military holds its members to a stricter accountability than society holds civilians.³ Under Article 92 of the Uniform Code of Military Justice (UCMJ), John, James, and Kate can be held criminally accountable for their actions if their conduct is interpreted as prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.⁴ But is an orders violation sufficient to address the actions of these servicemembers?

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¹ Parker v. Levy, 417 U.S. 733, 764–65 (1974) (Blackmun, J., concurring) (quoting Fletcher v. United States, 26 Ct. Cl. 541, 563 (1891)).

² Although it is the author's opinion that a repeal of § 925 of Title 10 is likely to occur in the near future, for purposes of this article, the repeal is merely a hypothetical [hereinafter Author's Opinion].

³ Levy, 417 U.S. at 765.

⁴ See U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-14 (18 Mar. 2008) (RAR 20 Sept. 2012) [hereinafter AR 600-20]

Despite the beliefs of Congress,⁵ the media,⁶ and the public, the military has rarely prosecuted servicemembers for homosexual conduct or extramarital affairs.⁷ In light of the repeal of "Don't Ask, Don't Tell,"⁸ the Supreme Court's decision in *Lawrence v. Texas*,⁹ and the inevitable repeal of Article 125,¹⁰ will the military still have the ability to

("Relationships between Soldiers of different rank are prohibited if they . . . create an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission."); U.S. DEP'T OF NAVY, U.S. NAVY REGULATIONS 1990, art. 1165 (3 Sept. 1997) [hereinafter NR 1165] (prohibiting fraternization between enlisted).

When prejudicial to good order and discipline or of a nature to bring discredit on the naval service, personal relationships between officer members or enlisted members that are unduly familiar and that do not respect differences in grade or rank are prohibited. Prejudice to good order and discipline or discredit to the naval service may result from, but are not limited to, circumstances which –

- a. call into question a senior's objectivity;
- b. result in actual or apparent preferential treatment;
- c. undermine the authority of a senior; or
- d. compromise the chain of command.

Id., para. 2.

⁵ See Norman Kempster, *Lying, Not Adultery, Is Female Pilot's Top Crime*, *AF Says*, L.A. TIMES, May 22, 1997, http://articles.latimes.com/1997-05-22/news/mn-61313_1_air-force (stating that Sen. Tom Harkin (D-Iowa) accused the military of trying to enforce an outdated moralistic legal code).

⁶ See, e.g., Editorial, *The Discharge of Kelly Flinn*, N.Y. TIMES, May 23, 1997, <http://www.nytimes.com/1997/05/23/opinion/the-discharge-of-kelly-flinn.html?pagewanted=print&src=pm>; Meg Greenfield, *Unsexing the Military: The Pentagon Needs to Work Out Sexual Rules That Can Be Announced with a Straight Face*, NEWSWEEK, June 16, 1997, <http://www.questia.com/library/1G1-19482728/unsexing-the-military-the-pentagon-needs-to-work#articleDetails>.

⁷ See Major Joel P. Cummings, *Is Article 125, Sodomy a Dead Letter in Light of Lawrence v. Texas and the New Article 120?*, ARMY LAW., Jan. 2009, at 1, 10–11 (surveying cases involving prejudicial sex acts from 1992 to 2009, concluding that the prejudicial sex acts were not the gravamen of the cases).

⁸ See Don't Ask, Don't Tell Repeal Act of 2010, Pub L. No. 111-321, 124 Stat. 3515 (repealing Policy Concerning Homosexuals in the Armed Forces, 10 U.S.C. § 654 (2010)).

⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁰ See Author's Opinion, *supra* note 2.

prosecute and hold accountable those who engage in consensual sexual relationships that are prejudicial to the good order and discipline of the armed forces?¹¹ Judge advocates must be prepared to deal with the gap that may emerge in the UCMJ in the prosecution of prejudicial consensual sex crimes. This article offers possible solutions.

In Part I, this article examines the evolution of sexual crimes in the military in the last ten years; specifically, Congress's focus on reforming nonconsensual sex crimes while neglecting reform of consensual sex crimes. Part II of this article analyzes consensual sex crimes and explains how the military might prosecute these offenses as prejudicial sexual relationships. Part III offers prosecutors novel specifications and elements for prejudicial sexual relationships, possible defense challenges, and probable solutions to proving the prejudicial effect of these offenses.

II. Background

Military law practitioners are familiar with the constant revision of military sex crimes over the past ten years, whether by legislation¹² or by case law.¹³ In 2012, practitioners watched the focus on nonconsensual sex crimes morph from many different UCMJ articles into one.¹⁴ They have seen Article 125 carved up and almost repealed.¹⁵ Yet, they have seen little reform in the way consensual sex crimes that are prejudicial to good order and discipline or service discrediting may be prosecuted.¹⁶

A. Article 120 Reform

In October 2004, the President required the Secretary of Defense to review the UCMJ and the Manual for Courts-Martial (MCM) to determine what changes were required to improve sexual assault issues in the military justice system and to conform "more closely to other Federal laws and regulations that address such issues."¹⁷ The Joint Service Committee (JSC) on military justice conducted a review and found that all sexual crimes could be prosecuted under the system that was in place.¹⁸ The system had over fifty years of jurisprudence and had developed the law in sexual assault cases over the years.¹⁹

Military prosecutors used many UCMJ articles to prosecute nonconsensual sex crimes.²⁰ The implementation of an amended Article 120 in October 2007 combined many of these crimes under one article.²¹ The 2007 Article 120 included touching of the genitalia and anus in the definition of sexual contact.²² This effectively made forcible sodomy punishable as an aggravated sexual contact.²³ The 2007 Article 120 remained in effect until the 2012 amendment to Article 120 was enacted in June 2012.²⁴ The 2012 Article 120 divided sexual crimes into three categories: rape and sexual assault of an adult; rape and sexual assault of a child; and other sexual misconduct.²⁵ The 2012 Article 120 expanded the definition of sexual act to include contact of the penis with the anus or mouth.²⁶ It effectively made forcible sodomy punishable as rape or sexual assault.²⁷ This

¹¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 3 (2012) [hereinafter MCM 2012] ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.").

¹² Most experienced military practitioners have now had to prosecute or defend sexual assault cases under three different Article 120s. See *id.* pt. IV, ¶ 45; MANUAL FOR COURTS MARTIAL, UNITED STATES pt. IV, ¶ 45 (2008) [hereinafter MCM 2008]; MANUAL FOR COURTS MARTIAL, UNITED STATES pt. IV, ¶ 45 (2005) [hereinafter MCM 2005].

¹³ *Lawrence*, 539 U.S. at 575 (holding liberty interest protects both consensual homosexual and heterosexual sodomy); *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004) (holding that Appellant's conduct was outside the liberty interest recognized in *Lawrence* because the victim was in the Appellant's chain of command and was a person "who might be coerced" or was "situated in a relationship where consent might not easily be refused").

¹⁴ Compare MCM 2012, *supra* note 11, pt. IV, ¶ 45(b), (c), with MCM 2008, *supra* note 12, pt. IV, ¶¶ 45, 51, and MCM 2005, *supra* note 12, pt. IV, ¶¶ 45, 51, 87, 88, 90.

¹⁵ See Cummings, *supra* note 7, at 2–10; Dwight Sullivan, *The Weirdest Military Justice Story of 2011: The Strange Tale of the Non-Repeal of Article 125* (Jan. 2, 2012), NAT'L INST. OF MILITARY JUSTICE BLOG–CAAFLOG, <http://www.caaflog.com/2012/01/02/the-weirdest-military-justice-story-of-2011-the-strange-tale-of-the-non-repeal-of-article-125-warning-includes-offensive-material/>.

¹⁶ While little reform has taken place in this area, numerous options have been offered. See SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE 289–93, 318–24 (Feb. 2005) [hereinafter SEX CRIMES AND THE UCMJ], available at http://www.defenselink.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc (discussing the option to create a comprehensive Article 134 offense for consensual sexual crimes).

¹⁷ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571, 118 Stat. 1811, 1920 (2004).

¹⁸ SEX CRIMES AND THE UCMJ, *supra* note 16, at 1.

¹⁹ *Id.* at 2.

²⁰ See MCM 2005, *supra* note 12, pt. IV, ¶ 45 (rape and carnal knowledge), ¶ 51 (forcible sodomy), ¶ 63 (indecent assault), ¶ 87 (indecent acts or liberties with a child), ¶ 88 (indecent exposure) and ¶ 64 (assault with intent to commit rape).

²¹ Compare MCM 2008, *supra* note 12, pt. IV, ¶ 45, with MCM 2005, *supra* note 12, ¶¶ 45, 51, 63, 87, 88.

²² MCM 2008, *supra* note 12, pt. IV, ¶ 45.

²³ See Cummings, *supra* note 7, at 2, 13, 15–17 (analyzing the language of the 2007 Article 120 and how it includes punishment for forcible sodomy-type offenses).

²⁴ See Exec. Order No. 13,593, 76 Fed. Reg. 78,451 (Dec. 16, 2011).

²⁵ MCM 2012, *supra* note 11, pt. IV, ¶ 45(b), (c).

²⁶ *Id.* pt. IV, ¶ 45.

rewrite of Article 120 eliminated the offense of indecent act.²⁸ It made forcible sodomy chargeable under Article 120, questioning the applicability of Article 125.

B. Article 125 Repeal

The introduction to this article assumes the repeal of Article 125, and there is good reason for this assumption.²⁹ The lower military courts struggled with whether a conviction for private, heterosexual, noncommercial, consensual adult sodomy could stand.³⁰ For instance, the Air Force Court of Military Review tried unsuccessfully to add the additional factor that the Government must have a compelling interest that justifies prosecution.³¹ In 1986 with the case of *Bowers v. Hardwick*, the Supreme Court answered the question of whether the Government could prosecute acts of private, homosexual, noncommercial, consensual adult, sodomy.³² *Bowers* held that a Georgia Statute criminalizing homosexual sodomy did not violate the fundamental rights of homosexuals.³³ In 2003, the Supreme Court decided *Lawrence v. Texas*, holding that a Texas Statute criminalizing homosexual sodomy furthered no legitimate state interest that could justify intrusion into individuals' personal and private lives.³⁴ This case overruled *Bowers*,³⁵ leaving military practitioners with an

unresolved question. What effect would this ruling have on Article 125, an article prohibiting heterosexual and homosexual sodomy? An answer came in short time.

The United States Court of Appeals for the Armed Forces (CAAF) decided *United States v. Marcum*³⁶ on 23 August 2004. The CAAF identified a tripartite framework, what would come to be known as the *Marcum* factors, for addressing *Lawrence* challenges in the military context and on a case-by-case basis:³⁷

(1) Was the accused's conduct covered by the liberty interest identified by the Supreme Court?³⁸

(2) Did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis of *Lawrence*?³⁹

(3) Were there any additional factors relevant solely in the military context that affected the nature and reach of the *Lawrence* liberty interest?⁴⁰

In *Marcum*, the appellant non-commissioned officer (E-6) was found guilty of non-forcible sodomy with a subordinate senior airman (E-4) who he supervised and rated. Since the conduct involved private, consensual activity between adults, the first factor was satisfied. The CAAF then continued its analysis of the appellant's conduct by applying the second factor. An Air Force Instruction regulating relationships between servicemembers of different rank shed light on the court's analysis, finding that as a subordinate servicemember, the E-4 was a person "who might be coerced or was situated in a relationship where consent might not easily be refused."⁴¹ As such, the appellant's conduct was not in fact covered by the liberty interest identified by the Supreme Court. Analysis under the third factor became an unnecessary step, and the court found Article 125 was constitutional as applied to appellant.⁴²

²⁷ *Id.*

²⁸ *Id.* pt. IV, ¶ 45(b), (c), 90.

²⁹ See S. 1867, 112th Cong. § 551(d) (2011) ("Repeal of Sodomy Article-Section 925 of such title (Article 125 of the Uniform Code of Military Justice) is repealed."); Sullivan, *supra* note 15, at 1 (discussing the differences between the Senate version of the 2011 National Defense Authorization Act and the House version; specifically, the fact that the Senate version contained a provision repealing sodomy, but the House version did not).

³⁰ See *United States v. Fagg*, 33 M.J. 618 (A.F.C.M.R. 1991) (holding that the constitutional right of privacy extends to heterosexual, noncommercial, private acts of oral sex between consenting adults); *United States v. Henderson*, 32 M.J. 941 (N.M.C.M.R. 1991) (affirming conviction for heterosexual, noncommercial, private acts of oral sex between consenting adults); *United States v. Hall*, 34 M.J. 695 (A.C.M.R. 1991) (holding that that right to privacy was not violated by court-martial for heterosexual sodomy consisting of anal intercourse between consenting adults who were married, but not to each other); *United States v. McFarlin*, 19 M.J. 790, 792 (A.C.M.R. 1985) (governmental interest in military necessity was sufficient to limit freedom to engage in heterosexual, noncommercial, private, and consensual acts of sodomy with subordinates).

³¹ *United States v. Fagg*, 34 M.J. 179 (CMA 1992) (reversing the Air Force Court of Military Review, holding that the statute proscribing sodomy was constitutional with respect to accused's conviction for private, heterosexual, noncommercial, consensual oral sex act).

³² 478 U.S. 186 (1986).

³³ *Id.* at 198.

³⁴ 539 U.S. 558, 578 (2003).

³⁵ *Id.* at 578.

³⁶ 60 M.J. 198 (C.A.A.F. 2004).

³⁷ Although the three-part test is collectively referred to as the "Marcum Factors," the first question is a threshold inquiry before you can apply the next two "factors."

³⁸ *Id.* at 207. The Supreme Court ruled in *Lawrence* that "private, consensual, sexual conduct, including sodomy, is a constitutionally protected liberty interest." *Id.* at 202. Thus, another way to state this same question is—did the conduct involve private, consensual, sexual activity between adults? *Id.* at 207.

³⁹ *Id.* ("For instance, did the conduct involve minors? Did it involve public conduct or prostitution? Did it involve persons who might be injured or coerced or who are situated in relationships where consent might not be easily refused?").

⁴⁰ *Id.* at 208.

⁴¹ *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

⁴² *Id.*

Shortly thereafter, in September 2004, the CAAF decided *United States v. Stirewalt*.⁴³ This case involved an enlisted appellant who engaged in sodomy with a senior commissioned officer; consequently, this relationship effected military interests of good order and discipline. The CAAF held that Article 125 was constitutional as applied to appellant because it fell squarely under the third *Marcum* factor.⁴⁴ In essence, *Lawrence* and *Marcum* added an element to the crime of consensual sodomy. The Government could no longer just prove the element of sodomy,⁴⁵ it had to show the military judge⁴⁶ a *Marcum* factor as a legal prerequisite.⁴⁷

The *Marcum* decision had no effect on the prosecution of forcible sodomy under Article 125 because forcible sodomy is not conduct covered as a liberty interest identified by the Supreme Court in *Lawrence*.⁴⁸ The Government continued to prosecute forcible and consensual sodomy with a *Marcum* factor under this article. This continued until Congress broadened the definitions, expanding the type of conduct criminalized under the 2007 Article 120.⁴⁹ Some

⁴³ 60 M.J. 297 (C.A.A.F. 2004).

⁴⁴ *Id.* at 304.

In *Marcum*, we noted that due to concern for military mission accomplishment, “servicemembers, as a general matter, do not share the same autonomy as civilians.” We consider Stirewalt’s zone of autonomy and liberty interest in light of the established Coast Guard regulations and the clear military interests of discipline and order that they reflect. Based on this analysis, we conclude that Stirewalt’s conduct fell outside any protected liberty interest recognized in *Lawrence* and was appropriately regulated as a matter of military discipline under Article 125.

Id. (quoting *Marcum*, 60 M.J. at 206).

⁴⁵ MCM 2012, *supra* note 11, pt. IV, ¶ 51b(1) (“That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.”).

⁴⁶ While this was the state of the law from September 2004 to May 2013, this inquiry is now within the purview of the finder of fact. *See infra* note 85.

⁴⁷ *See* *United States v. Stratton*, No. 201000637, 2012 CCA LEXIS 16 (N-M. Ct. Crim. App. Jan. 26, 2012) (unpublished) (stating that *Marcum* factors are a question of law to be determined by the military judge, not questions of fact to be determined by the finder of fact); *United States v. Harvey*, 67 M.J. 758, 763 (A.F. Ct. Crim. App. 2009) (holding that the military judge did not abuse his discretion by not instructing members on the *Marcum* analysis).

⁴⁸ *See Marcum*, 60 M.J. at 206–08 (forcible sodomy does not get past the first *Marcum* factor, as it is not consensual conduct); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 51 (2002) [hereinafter MCM 2002]. *See also* *United States v. Whitaker*, 72 M.J. 292,293 (C.A.A.F. 2013); *United States v. Brown*, No. 201300020, 2013 WL 5842240 (N-M. Ct. Crim. App. Oct. 31, 2013) (unpublished) (holding that the *Lawrence* analysis was not at issue with respect to forcible sodomy).

⁴⁹ MCM 2008, *supra* note 12, pt. IV, ¶ 45e, h, t(2). Aggravated sexual contact is defined as sexual contact with or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act. *Id.* pt. IV, ¶ 45e. Abusive Sexual Contact is defined as sexual contact with or by another person, if to do so would violate subsection (c) (aggravated

practitioners questioned the applicability of Article 125 for forcible sodomy.⁵⁰ While the 2007 Article 120 allowed for prosecution of sodomy-type offenses, it left lingering questions about the relationship between Article 120 and Article 125. In contrast, the 2012 Article 120 made it clear that sodomy offenses could be charged as rape.⁵¹

If forcible sodomy can be charged under the 2007 and the 2012 Article 120, why is Article 125 still part of the UCMJ? According to some, Congress did not repeal Article 125 because of a concern over bestiality.⁵² The President will likely address that concern with a new Article 134 offense that includes bestiality.⁵³ Thus, with forcible sodomy covered by Article 120,⁵⁴ and bestiality covered under Article 134,⁵⁵ Congress will likely do what it intended to do in 2011⁵⁶ and repeal Article 125. Should this occur, Congress will create a gap in the law relating to the prosecution of other prejudicial sexual relationships.

C. Prejudicial Sexual Relationships

While there has been a considerable amount of legal reform in nonconsensual sex crimes in the military, Congress has not proposed any reform to crimes that are

sexual assault, had the sexual contact been a sexual act. *Id.* pt. IV, ¶ 45h. Sexual Contact is defined as intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person. *Id.* pt. IV, ¶ 45t(2).

⁵⁰ *See Cummings, supra* note 7, at 13–18 (outlining the new language in the 2007 Article 120 and making an argument for a possible Double Jeopardy issue if both forcible sodomy and aggravated or abusive sexual contact are charged).

⁵¹ MCM 2012, *supra* note 11, pt. IV, ¶ 45g(1)(A) (defining sexual act as contact between the penis and the vulva or anus or mouth).

⁵² *See* S.1867, 112th Cong. § 551(d) (2011) (repealing Article 125); National Defense Authorization Act for Fiscal Year 2011, 41 U.S.C. § 403(12)(E) (2011) (did not include repeal of Article 125); Sullivan, *supra* note 15, at 4 (arguing that had Jay Carney, the White House Press Secretary, not received the question of whether the President supports bestiality in the armed forces and the chaos that ensued, that Article 125 would have been repealed in the 2011 National Defense Authorization Act).

⁵³ *See* Manual for Courts-Martial; Proposed Amendments; Notice, 77 Fed. Reg. 64,854, 64,865 (Oct. 23, 2012) (to be codified 32 C.F.R. pt. 152) (proposing changing paragraph 61 of the UCMJ from Abusing Public Animal to Animal Abuse including Sexual acts with Animals).

⁵⁴ *See Cummings, supra* note 7.

⁵⁵ *See* Manual for Courts-Martial; Proposed Amendments; Notice, 77 Fed. Reg. at 64,854, 64,865.

⁵⁶ *See* S. 1867, 112th Cong. § 551(d) (2011) (stating “Repeal of Sodomy Article- Section 925 of such title (Article 125 of the Uniform Code of Military Justice) is repealed).

consensual, but threaten good order and discipline or are service discrediting such as adultery, bigamy, wrongful cohabitation, indecent acts, prostitution, and others. These crimes were charged under Article 134⁵⁷ and can still be charged under Article 134, with the exception of indecent acts.⁵⁸ Consensual sodomy with a *Marcum* factor, however, was charged under Article 125.⁵⁹ With the possible coming repeal of Article 125, how will the Government charge sodomy that is service discrediting or prejudicial to good order and discipline in the future?

III. Where's the Sodomy?

A repeal of Article 125 and the absence of the crime of indecent acts in the UCMJ will leave a gap in the prosecution of prejudicial sexual relationships. This section will define adultery, prostitution, indecent acts, and sodomy and then explain why the conduct of the three servicemembers in the hypothetical does not fit into any of these definitions.

A. Adultery

The UCMJ lists adultery under Article 134.⁶⁰ The elements of adultery are:

(1) That the accused wrongfully had sexual intercourse with a certain person;

(2) That, at the time, the accused or the other person was married to someone else; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.⁶¹

The key term is sexual intercourse. According to the Military Judge's Benchbook, sexual intercourse is "any penetration, however slight, of the female sex organ by the

⁵⁷ MCM 2005, *supra* note 12, pt. IV, ¶ 62 (Adultery), ¶ 65 (Bigamy), ¶ 69 (Wrongful Cohabitation), ¶ 88 (Indecent Exposure), ¶ 89 (Indecent Language), ¶ 90 (Indecent Acts with Another), ¶ 97 (Pandering and Prostitution).

⁵⁸ MCM 2012, *supra* note 11, pt. IV, ¶¶ 45(b), (c), 90 (no longer listing indecent act in any of these punitive articles).

⁵⁹ MCM 2005, *supra* note 12, pt. IV, ¶ 51.

⁶⁰ MCM 2012, *supra* note 11, pt. IV, ¶ 62.

⁶¹ *Id.*

penis."⁶² In the hypothetical posed in the introduction, John, James, and Kate engage in a night of intimate activities, but only homosexual and heterosexual sodomy take place. Technically, a female sex organ has not been penetrated by a penis, so no sexual intercourse occurred. Applying the actual physical details of the hypothetical to the elements above and the Military Judge's Benchbook, these servicemembers could not be charged with adultery.

B. Prostitution

Prostitution has been referred to as the "oldest profession" in the world.⁶³ In the United States, prostitution is illegal in all states but one.⁶⁴ Many of these states have criminal statutes that include not only sexual intercourse, but also sexual acts and sexual contact for money as an act of prostitution.⁶⁵ Most of these statutes also criminalize solicitation of a prostitute and pandering.⁶⁶ The military includes prostitution as a violation of the UCMJ under Article 134,⁶⁷ as well as forcible pandering under the 2007 and 2012 Article 120.⁶⁸ Under Article 134, a servicemember can be prosecuted for prostitution, patronizing a prostitute, and pandering.⁶⁹ While most states criminalize any sexual act performed for compensation, Article 134 defines prostitution with the following elements:

(1) That the accused had sexual intercourse with another person not the accused's spouse;

(2) That the accused did so for the purpose of receiving money or other compensation;

⁶² U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 3-62-1d, at 691 (1 Jan. 2010) [hereinafter BENCHBOOK].

⁶³ RONALD B. FLOWERS, THE PROSTITUTION OF WOMEN AND GIRLS 5 (1998).

⁶⁴ PETER MCWILLIAMS, AIN'T NOBODY'S BUSINESS IF YOU DO: THE ABSURDITY OF CONSENSUAL CRIMES IN OUR FREE COUNTRY 631-32 (1996). For a comprehensive list of all state statutes, see *U.S. Federal and State Prostitution Laws and Related Punishments*, PROCON.ORG, <http://prostitution.procon.org/view.resource.php?resourceID=000119> (last visited Oct. 30, 2013). Prostitution is only legal in eleven of seventeen counties in Nevada. *Id.*

⁶⁵ See KY. REV. STAT. ANN. § 529.010 (West); WASH. REV. CODE ANN. § 9A.88.060 (West); TENN. CODE ANN. § 39-13-512 (West); ALA. CODE § 13A-12-110 (West); N.J. STAT. ANN. § 2C:34-1 (West); MINN. STAT. ANN. § 609.321 (West).

⁶⁶ MCWILLIAMS, *supra* note 64.

⁶⁷ MCM 2012, *supra* note 11, pt. IV, ¶ 97.

⁶⁸ *Id.* pt. IV, ¶ 45c(a), (b); MCM 2008, *supra* note 12, pt. IV, ¶ 45(a)(l).

⁶⁹ MCM 2012, *supra* note 11, pt. IV, ¶ 97.

(3) That this act was wrongful; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.⁷⁰

Only sexual intercourse for compensation is punishable as prostitution under Article 134.

Using the qualifying acts to analyze the hypothetical, John, James, and Kate only engaged in sodomy with one another; specifically, no vagina was penetrated by a penis, meaning no sexual intercourse occurred. This is not an oversight: the prostitution article specifically states that “sodomy for money or compensation is not included,” with follow-on instructions to charge as sodomy.⁷¹ Under the same analysis as Part B above, since sexual intercourse did not occur, the servicemembers in the hypothetical could not be charged with prostitution.⁷²

C. Indecent Act

Indecent acts have been prosecuted in the military for over two decades.⁷³ Prior to the 2007 Article 120, “Indecent Act with Another” was found under Article 134 and required a finding that conduct was to the prejudice of good order and discipline or service discrediting.⁷⁴ In 2007, “Indecent Act” was revised and moved under Article 120, removing the requirement to prove prejudice to good order and discipline or service discrediting.⁷⁵ The UCMJ has defined “indecent” as “a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.”⁷⁶ Military case law shows that consensual sexual acts can be considered indecent.⁷⁷ Even more so, the cases suggest that consensual

⁷⁰ *Id.*

⁷¹ MCM 2012, *supra* note 11, pt. IV, ¶ 97(c).

⁷² This may confuse some practitioners since an act of prostitution for forcible pandering is defined as “a sexual act, sexual contact or lewd act” in the 2007 version of Article 120 and as “a sexual act or sexual contact” in the 2012 version of Article 120. *See id.* pt. IV, ¶ 45c(a), (b); MCM 2008, *supra* note 12, pt. IV, ¶¶ 45(a), (t)(13). But the definition of prostitution for consensual acts only includes sexual intercourse. MCM 2012, *supra* note 11, pt. IV, ¶ 97.

⁷³ SEX CRIMES AND THE UCMJ, *supra* note 16, at 291.

⁷⁴ MCM 2005, *supra* note 12, pt. IV, ¶ 90.

⁷⁵ MCM 2008, *supra* note 12, pt. IV, ¶ 45(a), (k).

⁷⁶ MCM 2012, *supra* note 11, pt. IV, ¶ 45c (c)(6).

⁷⁷ *See* United States v. Carreiro, 14 M.J. 954, 958–59 (A.C.M.R. 1982); United States v. Johnson, 4 M.J. 770, 771 (A.C.M.R. 1978); United States

sexual acts performed in the presence of others can be considered indecent, even if others are engaged in the same conduct.⁷⁸ In addition, the term “wrongful” had also been removed from the elements. After this change, the Government only needed to prove the following two elements:

(1) That the accused engaged in certain conduct; and

(2) That the conduct was indecent conduct.⁷⁹

A military practitioner looking through the 2012 MCM will notice that “indecent act” is no longer included under Article 120 or Article 134.⁸⁰ In fact, it is not in the current UCMJ anywhere.⁸¹

Examining circumstances of the hypothetical, John, James, and Kate did engage in various sexual acts in a group setting and at the same time. Applying those facts to the law, it would be easy to conclude that John, James, and Kate engaged in indecent acts. However, because “Indecent Act” is no longer an enumerated article in the UCMJ, the servicemembers could not be charged.⁸²

D. Sodomy

The 2012 MCM defines sodomy as unnatural carnal copulation with another person or animal.⁸³ The UCMJ allows sodomy to be charged under three different theories: forcible, underage, and consensual or non-forcible.⁸⁴ Under

v. Woodard, 23 M.J. 514 (A.F.C.M.R. 1986), *vacated on other grounds*, 24 M.J. 514 (A.F.C.M.R. 1987); *see also* Major Eugene R. Milhizer, *Indecent Acts as a Lesser-Included Offense of Rape*, ARMY LAW., May 1992, at 4.

⁷⁸ *See* United States v. Brundidge, 17 M.J. 586(A.C.M.R. 1983); United States v. Scoby, 5 M.J. 160 (C.M.A. 1978); United States v. Linnear, 16 M.J. 628 (A.F.C.M.R. 1983); United States v. Berry, 20 C.M.R. 325 (C.M.A. 1956); *see also* Milhizer, *supra* note 77 at 3-4.

⁷⁹ MCM 2008, *supra* note 12, pt. IV, ¶ 45(b)(11).

⁸⁰ *See* MCM 2012, *supra* note 11, pt. IV ¶¶ 45c, 90.

⁸¹ *Id.*

⁸² *See* Manual for Courts-Martial; Proposed Amendments; Notice, 77 Fed. Reg. 64,854, 64,865-64,866 (Oct. 23, 2012) (to be codified 32 C.F.R. pt. 152) (proposing changing paragraph 90 from Deleted to Indecent Conduct and stating that Indecent Conduct includes offenses previously prescribed by Indecent Acts with Another).

⁸³ MCM 2012, *supra* note 11, pt. IV, ¶ 51c (“It is unnatural carnal copulation for a person to take into that person’s mouth or anus the sexual organ of another person or animal; or to place that person’s sexual organ in the mouth or anus of another person or animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation with an animal.”).

⁸⁴ *Id.*; *see also* Cummings, *supra* note 7, at 1 (explaining Article 125 of the 2008 MCM).

the third theory (consensual), the Government need only prove one element:

(1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.⁸⁵

Going back to the hypothetical scenario, the Government could readily prove this crime. John and James engaged in homosexual sodomy with one another and heterosexual sodomy with Kate. Applying that to the element above, they could be charged with sodomy. The Government would then have to plead which *Marcum* factor existed in the conduct that is charged.⁸⁶ The service regulations that forbid fraternization between enlisted ranks would give the Government the military nexus⁸⁷ and allow the Government to show the military judge a *Marcum* factor existed, thus permitting the prosecution of consensual sodomy.⁸⁸ Under the sentencing rule, the Government would also have an aggravating factor that the sodomy was for compensation.⁸⁹ Note, however, that because the hypothetical presumes that Article 125 has been repealed, the possibility of prosecuting consensual sodomy is foreclosed for the Government.

IV. Prosecution

Based on the analysis above, the Government cannot prosecute the servicemembers for adultery, prostitution, indecent acts, or sodomy. The Government can move forward with order violations for John, James, and Kate under Article 92, but the Government could move forward with order violations if the three played golf together every weekend.⁹⁰ Article 92 does not adequately capture the sexual nature and intimacy of these offenses. The Government should be able to prosecute these three members for their sexual conduct's prejudicial effect on good order and discipline. The below section provides some

⁸⁵ MCM 2012, *supra* note 11, pt. IV, ¶ 51. In order to get the charge in front of a finder of fact, the Government will also have to show the military judge that the behavior falls within the tripartite framework for addressing *Lawrence* challenges, otherwise known as the *Marcum* factors. See *United States v. Stratton*, No. 201000637, 2012 CCA LEXIS 16 (N-M. Ct. Crim. App. Jan. 26, 2012) (unpublished). See also *United States v. Castellano*, 72 M.J. 217, 223 (C.A.A.F. 2013) (holding that *Marcum* factors are to be pled in the specification, instructed upon the members, and determined by the trier of fact). These factors, which act as aggravators, are not questions of law to be decided by the military judge. *Id.*

⁸⁶ *Id.*

⁸⁷ See AR 600-20 and NR 1165, *supra* note 4.

⁸⁸ *Marcum*, 60 M.J. at 206–08 (finding the appellant's behavior fell into the second factor, CAAF held that Article 125 was constitutional as applied to Appellant).

⁸⁹ MCM 2012, *supra* note 11, R.C.M. 1001(b)(4).

⁹⁰ AR 600-20, *supra* note 4; NR 1165, *supra* note 4.

suggestions for potential charges once Article 125 is repealed.

A. Charges

Article 134, UCMJ, allows the Government to charge “all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital”⁹¹ Under this article, the Government can charge offenses not covered by Articles 80 through 132, UCMJ.⁹² Since these crimes are not enumerated in the UCMJ, the Government must draft novel specifications.⁹³ The easiest fix for the potential gap in the UCMJ would be to change the term sexual intercourse to sexual act in both the adultery and prostitution elements.⁹⁴ Although a new enumerated Article 134 offense covering all prejudicial sexual relationships could be helpful,⁹⁵ without a change in terms and in the absence of a comprehensive Article 134, the military practitioner is left to draft novel specifications. Below are some possible sample specifications addressing the misconduct that occurred among John, James, and Kate.

1. Adultery

Had sexual intercourse occurred between John and Kate, they could have been charged with adultery.⁹⁶ Recalling the hypothetical, the two only engaged in sodomy. James and Kate are not married to other people, so the sodomy between them would not be covered under an adultery theory. Because adultery is still defined as sexual intercourse between a male and female, the sodomy between John and James would also not be covered under an adultery theory. The following specification and elements could cover John and Kate's misconduct; now that the Government recognizes marriage between two men,⁹⁷ the

⁹¹ MCM 2012, *supra* note 11, pt. IV, ¶ 60.

⁹² *Id.* ¶ 60(c)(5).

⁹³ See MCM 2012, *supra* note 11, pt. IV, ¶ 60(c)(6) (explaining how to draft charges under an Article 134 theory); *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011); *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012).

⁹⁴ This change has already been made for sexual assault, rape, and forcible pandering. See MCM 2012, *supra* note 11, pt. IV, ¶ 45.

⁹⁵ SEX CRIMES AND THE UCMJ, *supra* note 16, at 289–92 (outlining a reform for prejudicial sexual relationships similar to the reform of forcible sexual crimes).

⁹⁶ MCM 2012, *supra* note 11, pt. IV, ¶ 62.

⁹⁷ Prior to June 2013, the Defense of Marriage Act, 1 U.S.C. § 7 (1996) defined marriage as the following:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various

following would also cover adulterous sodomy between John and James.

In that _____ (personal jurisdiction data), (a married man) (a married woman) did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, wrongfully engage in a (sexual act) to wit: (sodomy) (other) with _____, a (married) (woman/man) not (his/her wife) (her/his husband) and that said conduct was (to the prejudice of good order and discipline in the armed forces) (or) (and was) (of a nature to bring discredit upon the armed forces).

Elements⁹⁸ –

- (1) That the accused wrongfully engaged in a sexual act with a certain person;
- (2) That, at the time of the sexual act, the accused or the other person was married to someone else; and
- (3) That, under the circumstances, the conduct was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

2. Prostitution

If John, James, and Kate had engaged in sexual intercourse, they could be charged with prostitution and patronizing a prostitute.⁹⁹ Recalling the hypothetical, the three only engaged in sodomy. The current prostitution charge does not cover their misconduct. The Government could charge the following specifications and elements:

administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

In June 2013, the Supreme Court held the Defense of Marriage Act’s definition of marriage unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment. *See United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

⁹⁸ SEX CRIMES AND THE UCMJ, *supra* note 16, at 319 (outlining a proposed new adultery charge and the terminal elements).

⁹⁹ MCM 2012, *supra* note 11, pt. IV, ¶ 97.

Prostitution Specification for Kate –

In that _____ (personal jurisdiction), did (at/on board-location), (subject-matter jurisdiction data, if required), on or about _____, wrongfully engage in a (sexual act) (sexual contact) to wit: (sodomy) (other) with _____, for the purposes of receiving (money) (_____) and that said conduct was (to the prejudice of good order and discipline in the armed forces) (or) (and was) (of a nature to bring discredit upon the armed forces).

Elements –

- (1) That the accused wrongfully engaged in a sexual act, or sexual contact, with another person;
- (2) That the accused did so for the purposes of receiving money or other compensation; and
- (3) That, under the circumstances, the conduct was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

Patronizing a Prostitute Specification for John and James –

In that _____ (personal jurisdiction data), did (at/on board-location), (subject matter jurisdiction data, if required), on or about _____, wrongfully induced, enticed, or procured _____, a person not (his) (her) spouse, to engage in a (sexual act) (sexual contact) to wit: (sodomy) (other) in exchange for (money) (_____) and that said conduct was (to the prejudice of good order and discipline in the armed forces) (or) (and was) (of a nature to bring discredit upon the armed forces).

Elements –

- (1) That the accused engaged in a sexual act, or sexual contact, with another person not the accused’s spouse;
- (2) That the accused induced, enticed, or procured such person to engage in a sexual act or a sexual contact in exchange for money or other compensation;
- (3) That this act was wrongful; and

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

3. Indecent Act

John, James, and Kate engaged in sexual acts in front of one another. Case law supports that this type of conduct is considered indecent.¹⁰⁰ “Indecent act” is not currently an enumerated offense in the UCMJ.¹⁰¹ The italicized language below is for conduct that occurred in the hypothetical. Case law has supported many other acts as indecent.¹⁰² Here are sample specification and elements:

Specification –

In that _____(personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, wrongfully commit an indecent act, to wit: *engage in sodomy and sexual contact with a (woman)(man) with a third person(s) present in the same room*, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (or) (and was) (of a nature to bring discredit upon the armed forces).

Elements –

- (1) That the accused committed a certain wrongful act with a certain person;
- (2) That the act was indecent; and
- (3) That, under the circumstances, the conduct was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

4. Sodomy

The conduct between John and James is most analogous to adultery, but the military still defines adultery as between a man and a woman.¹⁰³ With the possible repeal of Article 125, how the military holds accountable those servicemembers who are married and engage in sodomy with members of the opposite or same sex is yet unknown. The following sample specification and elements would not only apply to the hypothetical given in this article, but to many other scenarios, such as heterosexual sodomy between non-married servicemembers that rises to the level of prejudicial to good order and discipline or service discrediting conduct.¹⁰⁴

Specification –

In that _____(personal justification data), did at/on board-location), (subject-matter jurisdiction data, if required), on or about _____, wrongfully engage in a (sexual act) (sexual contact) to wit: (sexual intercourse) (sodomy) (other) with _____ and that said conduct was (to the prejudice of good order and discipline in the armed forces) (or) (and was) (of a nature to bring discredit upon the armed forces).

Elements –

- (1) That the accused wrongfully engaged in a sexual act, or sexual contact, with a certain person; and
- (2) That, under the circumstances, the conduct was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

¹⁰⁰ See *United States v. Berry*, 20 C.M.R. 325, 330 (C.M.A. 1956) (holding that consensual fornication in a hotel room while another couple was present constituted an indecent act); *United States v. Hickson*, 22 M.J. 146, 154–55 (C.M.A. 1986) (stating that open and notorious sexual activity is a crime).

¹⁰¹ See MCM 2012, *supra* note 11, pt. IV, ¶¶ 45, 45(b), (c), 90.

¹⁰² See *United States v. Woodard*, 23 M.J. 514 (A.F.C.M.R. 1986) (finding accused guilty of indecent acts for heavy petting with a sixteen-year-old); *United States v. Sanchez*, 11 C.M.A. 216, 29 C.M.R. 32 (1960) (finding accused guilty of indecent act for engaging in sexual acts with a chicken).

¹⁰³ See MCM 2012, *supra* note 11, pt. IV, ¶ 62.

¹⁰⁴ While the Government could charge a number of different offenses under this specification, it is important to remember that purely private sexual encounters between unmarried persons are usually not prosecutable. See *United States v. Izquierdo*, 51 MJ 421, 423 (C.A.A.F. 1999) (holding when the accused and a female engaged in sexual intercourse in the accused’s barracks room, the door was closed and nobody else was in the room, was insufficient to sustain conviction for committing indecent acts with another); *United States v. Leak*, 58 MJ 869, 878 (A. Ct. Crim. App. 2003) (holding that sexual intercourse in a locked office between E-6 and E-4 between classes at NCO Academy not open and notorious to sustain conviction for indecent acts); *United States v. Hullett*, 40 M.J. 189, 191 (C.M.A. 1994) (stating private heterosexual intercourse between consenting adults is not intrinsically indecent).

B. Potential Difficulties with Novel Specifications

There are many difficulties with charging a novel specification. A trial counsel needs to understand everything is not punishable.¹⁰⁵ When charging a novel specification, trial counsel should be aware and ready to argue two additional important concepts. First, was the accused on proper notice that his conduct was criminal? Second, what will be the maximum punishment for this novel specification?

1. Notice

When drafting a novel specification, trial counsel must remember that the reason for drafting the specification and elements is because it is not already enumerated as a crime. Article 134 allows the charging of conduct that is “illegal solely because, in the *military context*, its effect is prejudice to good order or to discredit the service.”¹⁰⁶ This raises an issue as to whether the accused was on notice that the conduct was criminal.¹⁰⁷ If not on notice, the accused can raise a violation of due process under the Fifth Amendment to the United States Constitution.¹⁰⁸ The U.S. Court of Military Appeals, precursor to the CAAF, used factors such as time in service, rank, status, and whether the UCMJ had been explained to the accused under Article 137, UCMJ, to determine if an accused was on “fair notice that conduct prejudicial to good order and discipline in the armed forces and all conduct of a nature to bring discredit upon the armed forces were punishable.”¹⁰⁹ The military practitioner should be ready to answer the notice issue raised when charging novel specifications.

2. Maximum Punishment

The merits have just finished for John at a special court-martial. The panel returned with a finding of guilty to the offense of prejudicial sexual relationship. The judge asks what the maximum punishment is for this offense. The Government states the jurisdictional maximum for the

special court-martial;¹¹⁰ the defense counsel states four months’ confinement and forfeiture of two-thirds pay per month for four months. The Government argues the language of the MCM, which provides:

For an offense not listed in Part IV of this Manual which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed; however if an offense not listed is included in a listed offense, and is closely related to another or is equally closely related to two or more listed offenses, the maximum punishment shall be the same as the least severe of the listed offenses.¹¹¹

The defense then argues that the maximum punishment is four months of confinement and forfeitures of two-thirds pay for four months under the case of *United States v. Beatty*.¹¹² The defense first contends that the offense is not listed in the MCM. The Government would have to concede this point because it is a novel specification. The defense then argues that these offenses are not included in or closely related to another offense in Part IV of the MCM. Ultimately, the Government would have to find articles that are closely related to these prejudicial sexual relationships, i.e., sodomy with a married man is closely related to adultery and sodomy for money is closely related to prostitution.¹¹³ A trial counsel who fails to counter this argument may end up with a conviction, but no meaningful punishment.

¹⁰⁵ See Major Steven Cullen, *Prosecuting Indecent Conduct in the Military: Honey, Should We Get a Legal Review First?*, 179 MIL. L. REV. 128 (2004) (discussing notice of specific conduct with regard to prosecutions of indecent acts); Andrew Tilghman, *Military High Court Debates Sex Tape Case*, MARINE CORPS TIMES, Dec. 3, 2012, at 9 (quoting Judge Charles E. Erdmann, “If you have more than two [people], does that mean it is always . . . indecent?”).

¹⁰⁶ *United States v. Davis*, 26 M.J. 445, 448 (C.M.A. 1988).

¹⁰⁷ *United States v. Guerrero*, 33 M.J. 295, 297 (C.M.A. 1991) (holding that an accused must be on notice that the actions were criminal).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 298.

¹¹⁰ See MCM 2012, *supra* note 11, R.C.M. 201(f)(2)(B) (stating any punishment authorized under R.C.M. 1003 except death, dishonorable discharge, dismissal, confinement for more than one year, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or any forfeiture of pay for more than one year).

¹¹¹ *Id.* R.C.M. 1003(c)(1)(B)(i).

¹¹² 70 M.J. 39 (2011).

¹¹³ *Id.* at 45 (citing *United States v. Melville*, 8 C.M.A. 597, 600–02 (1958)) (holding that the then-unlisted offense of wrongful cohabitation was a general disorder not “closely related” to the offense of adultery, and that therefore the maximum legal sentence was the four months’ confinement authorized for general disorders instead of the one-year penalty imposed for adultery); *United States v. Oakley*, 7 C.M.A. 733, 736 (1957) (holding that the unlisted offense of solicitation of another to administer poison is a separate substantive offense under Article 134, UCMJ, not closely related to the listed offenses of solicitation to desert or to commit mutiny, and is thus punishable only as a simple disorder with a maximum punishment of four months’ confinement and forfeiture of two-thirds pay for a like period); *United States v. Blue*, 3 C.M.A. 550, 552, 556 (1953) (holding that although the MCM sets out a maximum punishment of three years of confinement for the listed Article 134, UCMJ, offense of making, selling, or possessing official documents with intent to defraud, the mere wrongful possession of a false pass is a simple military disorder under Article 134, UCMJ, which carries a maximum sentence of four months).

C. Proving the Charges

When proving novel specifications, the practitioner must prove the elements: the conduct was wrongful and was prejudicial to good order and discipline, service discrediting, or both.

1. Wrongful

Trial counsel must not only prove that the acts occurred, but also that the acts were wrongful for it to be a criminal offense. The term “wrongfully” places a mental component in the elements that must be proven beyond a reasonable doubt.¹¹⁴ “Wrongfulness” has been defined by the courts as having two components: the accused had the mens rea and the lack of a defense.¹¹⁵ Consequently, these prejudicial sexual relationships are not strict-liability crimes and the wrongfulness can be negated by an excuse or justification.¹¹⁶

The military justice practitioner must be cognizant of the effect this can have on trial because the accused can raise a mistake of fact or law defense.¹¹⁷ Trial counsel must charge the acts as general intent or specific intent crimes. The decision to charge as general or specific intent will have an effect on the instructions given to the panel. The Government should argue that the crimes are general intent.¹¹⁸ Trial counsel must then prove beyond a reasonable doubt that the mistake was not reasonable if the accused raises that defense.¹¹⁹

Concerning the hypothetical, the government would have to prove the wrongfulness of John, James, and Kate engaging in these sexual acts. The government could use the order forbidding fraternization between ranks to show the wrongfulness of this conduct. Other facts the government

could introduce is the marital status of John and any other orders that may have been violated during this conduct.

2. Prejudice to Good Order and Discipline

Case law clearly indicates that servicemembers can only be punished for actions that are “directly and palpably” prejudicial to good order and discipline.¹²⁰ The prejudice to good order and discipline cannot be indirect or remote.¹²¹ In such a case, the military judge will instruct the members as follows:

With respect to “prejudice to good order and discipline,” the law recognizes that almost any irregular or improper act on the part of a service member could be regarded as prejudicial in some indirect or remote sense; however, only those acts in which the prejudice is reasonably direct and palpable is punishable under this Article.¹²²

Trial counsel must convince the factfinder that the misconduct is legitimately prejudicial to good order and discipline and not “solely the result of personal fears, phobias, biases, or prejudices of the witnesses.”¹²³ Not all inappropriate sexual relationships are prejudicial.¹²⁴

In the hypothetical presented, the Government will want to show the effect this conduct had within the unit. One piece of evidence the Government may present is how junior servicemembers and other non-commissioned officers feel about the non-commissioned officers in general after this

¹¹⁴ MCM 2012, *supra* note 11, pt. IV, ¶ 62b(1).

¹¹⁵ Major William T. Barto, *The Scarlet Letter and the Military Justice System*, ARMY LAW., Aug. 1997, at 6 (quoting *United States v. King*, 34 M.J. 95, (C.M.A. 1992)) (“[T]he wrongfulness of the act obviously relates to mens rea and lack of a defense, such as excuse or justification.”).

¹¹⁶ *Id.*

¹¹⁷ MCM 2012, *supra* note 11, R.C.M. 916(j); *United States v. Fogarty*, 35 M.J. 885, 892 (A.C.M.R. 1992) (stating the defense of mistake of fact requires that one hold an incorrect belief of the true circumstances). To raise the possibility of the mistake of fact defense, one would have had to believe at the various times he had intercourse with a married woman that she was single. *Id.* MCM 2012, *supra* note 11, R.C.M. 916(l) (stating that mistake of fact as to law is ordinarily not a defense, but the discussion lists two situations that could apply to an adultery case, first that the accused, because of a mistake as to separate non-penal law, lacks the criminal intent or state of mind to establish guilt and secondly when an accused has an incorrect belief based on the reliance on the decision or pronouncement of an authorized public official or agency).

¹¹⁸ BENCHBOOK, *supra* note 62, para. 3-62-1d, at 694.

¹¹⁹ *Id.* para. 5-11-2, at 902-03.

¹²⁰ *Parker v. Levy*, 417 U.S. 733, 753 (1974).

¹²¹ *Id.*

¹²² BENCHBOOK, *supra* note 62, para. 3-60-2A(d), at 682.

¹²³ *United States v. Guerrero*, 33 M.J. 295, 298 (C.M.A. 1991).

¹²⁴ In an adultery case, the judge will instruct the members, “Not every act of adultery constitutes an offense under the Uniform Code of Military Justice.” BENCHBOOK, *supra* note 62, para. 3-62-1(d), at 692; *United States v. Izquierdo*, 51 MJ 421, 423 (C.A.A.F. 1999) (holding when the accused and a female engaged in sexual intercourse in the accused’s barracks room, the door was closed and nobody else was in the room, was insufficient to sustain conviction for committing indecent acts with another); *United States v. Leak*, 58 MJ 869, 878 (A. Ct. Crim. App. 2003) (holding that sexual intercourse in a locked office between E-6 and E-4 between classes at NCO Academy was not open and notorious to sustain conviction for indecent acts); *United States v. Hullett*, 40 M.J. 189, 191 (C.M.A.1994) (stating private heterosexual intercourse between consenting adults is not intrinsically indecent); *United States v. Carr*, 28 M.J. 661, 666 (N.M.C.M.R. 1989) (holding that sexual intercourse consummated on a public beach after midnight in unlighted area where visibility was poor and under the circumstances the act was unlikely to be seen by others would not support conviction for committing indecent act by fornicating in public); *United States v. Hickson*, 22 M.J. 146 (C.M.A.1986) (holding that private sexual intercourse between unmarried persons is not punishable).

event. Trial counsel must look at all the relevant factors and be ready to prove how the misconduct is prejudicial.¹²⁵

3. Service Discrediting

Trial counsel must not presume that the element of service discrediting will be met simply because of the nature of the offense. The Supreme Court has determined that the “use of conclusive presumptions to establish the elements of an offense is unconstitutional because such presumptions conflict with the presumption of innocence and invade the province of the trier of fact.”¹²⁶ The Government must prove every element beyond a reasonable doubt. The courts have been somewhat unclear on how the Government is to prove this element.¹²⁷ It is clear that the public does not need to have actual knowledge of the act.¹²⁸ How others became aware of the misconduct may determine whether it is service discrediting.¹²⁹ The determination as to whether the conduct is service discrediting rests with the trier of fact, and the trial counsel should put on evidence as to how the circumstances surrounding the act make it service discrediting.¹³⁰

In the hypothetical presented, the Government would want to focus on the difference in ranks, the supervisor relationship, and the money exchanged for the sexual acts. Based on that evidence, the government can argue that James, John, and Kate’s actions were service discrediting.

V. Conclusion

The possible repeal of sodomy combined with the removal of indecent acts from the UCMJ will leave a gap in the way the military prosecutes prejudicial consensual sex crimes. This article offered solutions for the military justice practitioner to address these issues. The simple fix for this gap is a rewrite of the elements for adultery and prostitution

and the placing of indecent acts back into the UCMJ.¹³¹ One day the trial counsel may have these options available, but for now the Government will have to figure out a way to get the mission completed. Article 134, UCMJ gives the trial counsel the ability to charge this misconduct. When determining how to properly charge these offenses, it is important to ensure the Government can prove the wrongfulness of the acts, and either the prejudice to good order and discipline or that the acts were of a nature to bring discredit upon the armed forces. One only need look at the headlines to understand how important the issues of prejudicial sexual relationships are to the effectiveness of the military.¹³² The main purpose of the military justice system is to assist in maintaining good order and discipline, which in turn helps strengthen national security.¹³³ The Government must have the option to hold criminally accountable those who engage in prejudicial sexual relationships.

¹²⁵ See *Guerrero*, 33 M.J. at 298 (stating not all cross-dressing is per se prejudicial to good order and discipline, but rather the factors surrounding the events, for example the time, the place, the circumstances, and the purpose for the cross-dressing, all together, which form the basis for determining if the conduct is to the prejudice of good order and discipline); BENCHBOOK, *supra* note 62, para. 3-60-2A(d), at 682 (“[C]onduct prejudicial to good order and discipline is conduct which causes a reasonably direct and obvious injury to good order and discipline.”).

¹²⁶ *United States v. Phillips*, 70 M.J. 161, 164–65 (C.A.A.F. 2011) (citing *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979)); see also *Cnty. Court of Ulster County v. Allen*, 442 U.S. 140, 156–60 (1979).

¹²⁷ *Phillips*, 70 M.J. at 166.

¹²⁸ *Id.* at 165.

¹²⁹ *Id.* at 166.

¹³⁰ *Id.*

¹³¹ The Department of Defense has proposed placing Indecent Conduct in the MCM to replace Indecent Act. See Manual for Courts-Martial; Proposed Amendments; Notice, 77 Fed. Reg. 64,854, 64,865–64,866 (Oct. 23, 2012) (to be codified 32 C.F.R. pt. 152) (proposing changing paragraph 90 from Deleted to Indecent Conduct and stating that Indecent Conduct includes offenses previously prescribed by Indecent Acts with Another).

¹³² See Andrew Tilghmann, *Corrosive Conduct*, ARMY TIMES, Nov. 26, 2012, at 10–11 (outlining the alleged misconduct of numerous general officers, to include General David Petraeus’s alleged affair and improper conduct, General John Allen’s alleged inappropriate relationship with a married woman, Brigadier General Jeffery Sinclair’s alleged inappropriate relationships with subordinates, and General Cartwright’s alleged inappropriate relationship with a subordinate); Molly Hennessy-Fiske, *Air Force Defends Handling of Sex Scandal*, L.A. TIMES (Jan. 23, 2013), <http://articles.latimes.com/2013/jan/23/nation/la-na-lackland-hearing-20130124>.

¹³³ MCM 2012, *supra* note 11.

Getting the Job Done: Meaningfully Investigating Organizational Conflicts of Interest

Major Travis P. Sommer*

You keep going on, but, I mean, the number of pages does not equate to the quality of the review. If that were true then, you know, you could then basically pull out pages of the phone book, staple them together with prose in the front and the back.

... *It's 17 pages. It's nicely typed. You know, it's got headings and tabs and things like that, but I don't know whether it does the job or not.*¹

I. Introduction

Above are the comments Judge Susan G. Braden of the Court of Federal Claims (COFC) made during oral argument regarding the government's Organizational Conflict of Interest (OCI) analysis. In her decision, she concluded that the analysis of the contracting officer (KO) did not get the job done:² the KO failed to conduct an adequate investigation into potential OCIs. As the COFC stated in another case:

The process of identifying and mitigating a conflict is not a bureaucratic drill, in which form is elevated over substance, and reality is disregarded. Nor is it a check-the-box exercise, in which the end result . . . is all but preordained. Rather, as will be seen, the [Federal Acquisition Regulation] calls upon the [KO] to conduct a timely and serious review of the facts presented.³

This article provides a practical outline for getting the job done by conducting a "timely and serious review" of potential OCIs consistent with the Federal Acquisition Regulation (FAR) for every acquisition.⁴ The job of investigating potential OCIs is not complicated. It consists only of identifying, evaluating, and documenting potential OCIs. Although not complicated, if not done correctly, the

agency risks both a successful protest⁵ and the accompanying procurement delays.

The focus of this article is on investigating potential OCIs. It does not discuss the KO's related responsibility to avoid, neutralize, or mitigate OCIs,⁶ nor does it discuss the process for waiving OCIs.⁷ Nevertheless, a meaningful OCI investigation is an essential precondition to both.

Before outlining the investigation process, it is critical to understand what an OCI is. To that end, Part II of this article provides a background on the three general types of OCIs, who is affected by OCIs, and how OCIs relate to other conflicts of interest.

With that background in place, Part III of this article outlines the OCI investigation process, starting with the KO's role. Along with the KO's role is a discussion of the KO's discretion throughout the process and the resources

⁵ A protest is:

a written objection by an interested party to any of the following:

- (1) A solicitation or other request by an agency for offers for a contract for the procurement of property or services.
- (2) The cancellation of the solicitation or other request.
- (3) An award or proposed award of the contract.
- (4) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

Id. 33.101.

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¹ *Axiom Res. Mgmt., Inc. v. United States*, 78 Fed. Cl. 576, 594, 598 (Fed. Cl. 2007) (quoting the judge's comments made during oral argument about the government's Organizational Conflict of Interest (OCI) analysis).

² *Id.* at 600 ("After reviewing the Administrative Record, the briefs, and convening an oral argument, the court has determined that the [contracting officer (KO)] abused his discretion in violation of FAR § 9.5 by awarding the Task Order . . .").

³ *NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 519 (Fed. Cl. 2011) *aff'd*, 473 F. App'x 902 (Fed. Cir. 2012).

⁴ FAR 9.5 (2012) [hereinafter FAR] (providing guidance on OCIs).

⁶ See *id.* 9.504(a)(2) (charging the KO to avoid, neutralize, and mitigate prior to contract award); see generally Keith R. Szeliga, *Conflict and Intrigue in Government Contracts: A Guide to Identifying and Mitigating Organizational Conflicts of Interest*, 35 PUB. CONT. L.J. 639 (Summer 2006) (discussing various mitigation strategies in dealing with OCIs).

⁷ Federal Acquisition Regulation (FAR) 9.503 allows the agency head to waive the application of the FAR OCI rules in particular instances when it is not in the government's interest to apply them. The waiver does not create an exception to the OCI rules, but only waives their application in a single procurement. See *AT&T Government Solutions, Inc.*, B-407720, Jan. 30, 2013, 2013 CPD ¶ 45 (dismissing protest alleging an OCI as academic where the agency waived any OCI just days before the Government Accountability Office (GAO) protest decision was due); Sarah M. McWilliams, *Refining the Art of Compromise: Organizational Conflict of Interest Waivers Under FAR Sections 9.503 and 9.504(e)*, CONT. MGMT. Apr. 2008 (discussing "the advantages of OCI waivers, the applicable legal and regulatory requirements, and practical strategies for crafting waivers to achieve compliance and withstand challenge").

available to the KO. It then details the OCI investigation process, which includes identifying, evaluating, and documenting potential OCIs. Part III concludes with several practical considerations to remember throughout the investigation.

At the end of this article, it will be clear that the job of investigating potential OCIs can be done and must be done. It will also be clear that, although the FAR places the responsibility for investigating OCIs on the KO, the KO's legal advisor plays a critical role in ensuring that the investigation and findings are sufficient and can be defended during subsequent protest litigation. Meaningfully investigating potential OCIs will enable the KO to fulfill her mandate to "avoid, neutralize, and mitigate" potential OCIs.⁸

II. OCI Background

A. Types of OCIs

As contractors consolidate and provide more services to the government, there is greater risk that contractor performance will be tainted by conflicts of interest, in particular OCIs.⁹ Under the FAR, an OCI occurs when "because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage."¹⁰ Within that definition, the term "person" is broadly read to include both individuals and organizations.¹¹ OCIs must be distinguished from personal conflicts of interest.¹² Federal Acquisition Regulation subpart 9.5 (Organizational and Consultant Conflicts of Interest) supplements the definition of "person" and provides specific guidance on OCIs.

The FAR provides underlying principles, general rules, and examples to help the KO identify and evaluate potential OCIs. The two underlying principles are "preventing the existence of conflicting roles that might bias a contractor's judgment" and "preventing unfair competitive advantage."¹³ From these underlying principles, the FAR distills general rules stating, with some exceptions, that OCIs exist where a

contractor performs systems engineering or technical direction work (e.g., resolving interface problems or technical controversies); where a contractor prepares specifications or work statements; where a contractor provides evaluation services; and where a contractor has access to proprietary information.¹⁴ The FAR illustrates the general rules with nine simple examples.¹⁵

The drafters of the FAR recognize that the provided examples are not all-inclusive, but are offered to help the KO apply the general rules.¹⁶ Likewise, the FAR advises KOs that each "individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract."¹⁷ This guidance is problematic because it is both fragmentary and incongruous.¹⁸

Apparently recognizing that the general rules and examples do not cover every situation, the Government Accountability Office (GAO) and the courts¹⁹ divide OCIs into three types: biased ground rules, impaired objectivity, and unequal access to information.²⁰ While a potential conflict may not fit squarely into one of the three types,

¹⁴ *Id.* 9.505-1, 2, 3, 4.

¹⁵ *Id.* 9.508. Example A provides:

Company A agrees to provide systems engineering and technical direction for the Navy on the powerplant for a group of submarines (i.e., turbines, drive shafts, propellers, etc.). Company A should not be allowed to supply any powerplant components. Company A can, however, supply components of the submarine unrelated to the powerplant (e.g., fire control, navigation, etc.). In this example, the system is the powerplant, not the submarine, and the ban on supplying components is limited to those for the system only.

Id.

¹⁶ *Id.* 9.508.

¹⁷ *Id.* 9.505.

¹⁸ Ralph C. Nash, *Organizational Conflicts of Interest: An Increasing Problem*, 20 No. 5 NASH & CIBINIC REP. ¶ 24, May 2006 (stating that the FAR OCI guidance is "inadequate" because it is "fragmentary—containing general rules, specific rules, and examples" and difficult for the KO to decipher "because the segments seem to address different situations with little correlation").

¹⁹ The GAO and the Court of Federal Claims (COFC) have concurrent jurisdiction over bid protests. The Competition in Contracting Act (CICA), 31 U.S.C. §§ 3551-7 (2013), is the source of the GAO's jurisdiction and the Tucker Act, 28 U.S.C. § 1491 (2013), gives the COFC jurisdiction. Federal district court jurisdiction over bid protests terminated on January 1, 2001. *Baltimore Gas & Elec. Co. v. United States*, 290 F.3d 734, 737 (4th Cir. 2002).

²⁰ STEVEN W. FELDMAN, *GOVERNMENT CONTRACT GUIDEBOOK* § 3:35 (4th ed. 2012). *See, e.g.*, *Aetna Gov't Health Plans, Inc.*, B-254397.15, 95-2 CPD ¶ 129 (Comp. Gen. July 27, 1995); *Axiom Res. Mgmt., Inc. v. United States*, 78 Fed. Cl. 576, 592 (Fed. Cl. 2007) (stating that the FAR requires KOs to identify and mitigate unequal access to information, impaired objectivity, and biased ground rules OCIs).

⁸ FAR, *supra* note 4, 9.504(a)(2).

⁹ Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 PUB. CONT. L.J. 25, 26-27 (2005).

¹⁰ FAR, *supra* note 4, 2.101.

¹¹ Gordon, *supra* note 9, at 31 ("We have to presume that the FAR is using the word 'person' in the legal sense, which would include treating a company or other organization as a 'person.'").

¹² *See* discussion *infra* Part II.C.

¹³ FAR, *supra* note 4, 9.505.

categorization provides a useful construct for identifying and evaluating potential OCIs in a way that will be familiar to the reviewing authority. Each type is described below.

1. Biased Ground Rules OCIs

A biased ground rules OCI occurs when “a firm, as part of its performance of a government contract, has in some sense set the ground rules for another government contract by, for example, writing a statement of work or the specifications.”²¹ The conflict occurs because a firm may, intentionally or not, set ground rules that cater to its abilities, to the prejudice of other potential offerors. A biased ground rules OCI consists of two elements: first, the contractor occupies a position of influence based on its performance of a government contract;²² second, the position of influence relates to a future procurement.²³

The FAR addresses biased ground rules OCIs with the two general rules found in FAR 9.505-1 (Providing Systems Engineering and Technical Direction) and 9.505-2 (Preparing Specifications or Work Statements).²⁴ In addition, most of the examples provided in FAR 9.508 are of biased ground rules OCIs. The general rule found in FAR 9.505-1 forbids contractors who provided systems engineering or technical direction on a system from receiving a contract or acting as a subcontractor on a contract to supply the system or any of its major components.²⁵ The reason for this prohibition is that the

contractor providing these activities “occupies a highly influential and responsible position in determining a system’s basic concepts and supervising their execution,” which places it in a position to favor its own products or capabilities.²⁶ There is no exception to this prohibition; however, because both systems engineering and technical direction are defined as including a “combination of substantially all of the activities” listed in FAR 9.505-1, the KO has some discretion in determining whether the work done by the contractor is either systems engineering or technical direction where it includes only some of the activities listed.²⁷

The general rule found in FAR 9.505-2 forbids a contractor from receiving a contract award where it prepared specifications or work statements used in the procurement.²⁸ The FAR does provide limited exceptions for development and design contractors or situations where multiple contractors are involved in drafting the specifications or work statement.²⁹ Despite the exceptions, the KO must be careful when evaluating a potential OCI where the contractor had any role in the drafting of the specifications or work statement.

²¹ *Aetna*, 95-2 CPD ¶ 129, at 8.

²² *See, e.g., Valor Constr. Mgmt., Inc.*, B-405306, Oct. 17, 2011, 2011 CPD ¶ 221, at 5 (finding that because awardee’s input into the Request For Proposals (RFP) was “limited to identifying safety deficiencies and general approaches to remedying them” and that it “furnished no advice or recommendations regarding the scope of the work to be performed or the manner in which it was to be performed” there was no biased ground rules OCI); *compare with Energy Sys. Grp.*, B-402324, Feb. 26, 2010, 2010 CPD ¶ 73, at 6 (finding KO’s determination that an OCI existed reasonable because, in part, the feasibility study done by the protestor “provided recommendations as to which energy conservation projects should be performed and the technical solutions that should be used, and prepared cost estimates”).

²³ *QinetiQ N. Am., Inc.*, B-405008, July 27, 2011, 2011 CPD ¶ 154, at 8 (finding that “because the record does not reflect hard facts to show that [awardee]’s work under the predecessor contract put the firm in a position to materially affect the protested procurement . . . protest that [awardee]’s prior work created a potential or actual biased ground rules OCI is denied.”); *Philadelphia Produce Mkt. Wholesalers, LLC*, B-298751.5, May 1, 2007, 2007 CPD ¶ 87, at 2 (finding no OCI where awardee’s “performance of essentially the same work at other [locations] served as the basis for the current RFP’s performance requirements”).

²⁴ *Aetna*, 95-2 CPD ¶ 129, at 8.

²⁵ FAR, *supra* note 4, 9.505-1.

A contractor that provides systems engineering and technical direction for a system but does not have overall contractual responsibility for its development, its integration, assembly, and checkout, or its production shall not—(1) Be awarded a

contract to supply the system or any of its major components; or (2) Be a subcontractor or consultant to a supplier of the system or any of its major components. . . . Systems engineering includes a combination of substantially all of the following activities: determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design. Technical direction includes a combination of substantially all of the following activities: developing work statements, determining parameters, directing other contractors’ operations, and resolving technical controversies.

Id.

²⁶ *Id.*

²⁷ *See, e.g., QinetiQ*, 2011 CPD ¶ 154, at 8-9 (denying the protest where the KO’s determination that the awardee’s prior work did not constitute technical direction).

²⁸ FAR, *supra* note 4, 9.505-2. The rule has separate provisions applicable to contracts for goods and contracts for services. For goods contracts the general rule is that unless an exception applies where

a contractor prepares and furnishes complete specifications covering nondevelopmental items, to be used in a competitive acquisition, that contractor shall not be allowed to furnish these items, either as a prime contractor or as a subcontractor, for a reasonable period of time including, at least, the duration of the initial production contract.

Likewise, for service contracts where “a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services—or provides material leading directly, predictably, and without delay to such a work statement—that contractor may not supply the system, major components of the system, or the services unless [an exception applies].” *Id.*

²⁹ *Id.*

2. Impaired Objectivity OCIs

An impaired objectivity OCI occurs where “a firm’s work under one government contract could entail its evaluating itself, either through an assessment of performance under another contract or an evaluation of proposals.”³⁰ The two elements of an impaired objectivity OCI are, first, that a contractor is currently performing on a contract and, second, that performance could affect the award or performance of a second contract.

For a finding that current performance could affect a second contract, the contractor must exercise some judgment in the performance of the contract.³¹ As an example, the third general rule found in FAR § 9.505-3 (Providing Evaluation Services) covers a subset of impaired objectivity OCIs by prohibiting contractors from being awarded contracts where a contractor will evaluate its own offers or those of a competitor, unless proper safeguards are in place. The concern with this type of OCI is the firm’s ability to provide the government with impartial advice.

3. Unequal Access to Information OCIs

Unequal access to information OCIs arise where “a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a government contract.”³² The concerns here are that the firm with nonpublic information will have an unfair competitive advantage and that the government is perceived as the source of the advantage.

There are essentially three elements of an unequal access to information OCI. First, a contractor must have access to nonpublic information. If the relevant information has been published or otherwise provided to potential offerors, it is no longer nonpublic.³³ Second, the contractor receives the information as a result of its performance of a government contract. If the contractor receives the information some other way, for example, from a former employee of the competitor, there is no OCI.³⁴ Finally, the

information must provide not just a competitive advantage, but an unfair competitive advantage. Thus, where the information possessed by the contractor is outdated or not relevant to the current procurement, no unfair competitive advantage exists.³⁵ Generally, the informational advantage enjoyed by an incumbent does not create an unfair competitive advantage.³⁶

One significant area of concern within this category of OCIs is the “revolving door” through which employees transition between the government and private sectors.³⁷ When employees leave government service, in many cases, they take with them procurement-sensitive information. This information may include government information, such as independent government cost estimates or source selection plans. It may also include contractor information where the former employee oversaw contract performance. In either case, the potential exists for an OCI when the former employee goes to work or consults for a government contractor.³⁸

B. To Whom Does a Conflict Attach?

In addition to understanding what an OCI is, it is important to understand who can be affected by an OCI.

that it was a “private dispute between private parties that we will not consider absent evidence of Government involvement”).

³⁵ Gen. Dynamics C4 Sys., Inc., B-407069, Nov. 1, 2012, 2012 CPD ¶ 300, at 8 (denying protest where KO determined, in part, that the information was “too remote” to be useful); McKissack-URS Partners, JV, Comp. Gen. B-406489.7, 2013 CPD ¶ 25, at 5 (Jan. 9, 2013) (finding the KO’s determination that the information was stale and not competitively useful where it was more than three years old, bore little resemblance to information submitted with protestor’s proposal, and did not contain pricing information).

³⁶ See, e.g., ARINC Eng’g Servs., LLC v. United States, 77 Fed. Cl. 196, 203 (Fed. Cl. 2007) (citing Snell Enters., Inc., B-290113, June 10, 2002, 2002 CPD ¶ 115 (Comp. Gen. June 10, 2002) for the proposition that “[t]he mere existence of a prior or current contractual relationship between a contracting agency and a firm does not create an unfair competitive advantage, and an agency is not required to compensate for every competitive advantage gleaned by a potential offeror’s prior performance of a particular requirement”); Onsite Health Inc., B-408032, May 30, 2013, 2013 CPD ¶ 138, at 8 (“[I]t is well settled that an offeror may possess unique information . . . due to its prior experience under a government contract, including performance as the incumbent contractor. Our Office has held that the government is not required to equalize competition to compensate for such an advantage, unless there is evidence of preferential treatment or other improper action.”).

³⁷ See generally Stuart B. Nibley, *Jamming the Revolving Door, Making It More Efficient, or Simply Making It Spin Faster: How Is the Federal Acquisition Community Reacting to the Darleen Druyun and Other Recent Ethics Scandals?*, 41 PROCUREMENT LAW. NO. 4, at 1 (Summer 2006) (providing examples of potential OCIs created when government employees transition to the private sector).

³⁸ See, e.g., TeleCommunications Sys., Inc., Comp. Gen. B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 (finding an OCI where awardee had hired a former high-level agency employee).

³⁰ Aetna Gov’t Health Plans, Inc., B-254397.15, July 27, 1995, 95-2 CPD ¶ 129, at 9.

³¹ Nash, *supra* note 18 (“There will be no OCI if the contract does not call for the application of judgment by the contractor.”).

³² Aetna, 95-2 CPD ¶ 129, at 8.

³³ KPMG Peat Marwick, 73 Comp. Gen. 15, 93-2 CPD ¶ 272 (finding unreasonable the agency’s exclusion of offeror because the information received from the agency was in response to a Freedom of Information Act (FOIA) request).

³⁴ The GEO Grp., Inc., B-405012, July 26, 2011, 2011 CPD ¶ 153, at 4 (holding that no OCI existed where GEO’s Vice President provided GEO proprietary information to awardee during the proposal process by stating

While the OCI examples in the FAR discuss OCIs in terms of a single contractor or a single company, the GAO has found that “there is no basis to distinguish between a firm and its affiliates.”³⁹ Thus, “where a subcontractor’s knowledge or interests create an unfair competitive advantage, that advantage is generally imputed to the prime contractor.”⁴⁰ The analysis centers on whether the interests of the prime contractor are “effectively aligned” with those of a subcontractor or other firm such that the conflict should be imputed to the prime contractor.⁴¹ The touchstone for imputing an OCI to another firm is whether there is a financial relationship between the firms or a direct financial benefit to the firm alleged to have an OCI.⁴²

Secondary relationships can be problematic as well. For example, in *McTech Corporation*, the GAO recently upheld a KO’s decision to exclude McTech from the competition based on a relationship of its protégé⁴³ to another entity. McTech intended to compete for a contract to construct dormitories and a conference center at the Department of Homeland Security Training Center in Harpers Ferry, West Virginia. Previous design work for the construction project was done by BrooAlexa Design Joint Venture LLC. Following an anonymous phone call alleging that McTech was closely linked to the project designer, the KO conducted an investigation. The KO found during the investigation that McTech had a Small Business Administration-approved mentor-protégé relationship and six ongoing joint ventures with BrooAlexa LLC. The KO also found that BrooAlexa LLC was the managing member of BrooAlexa Design Joint Venture. Despite McTech’s claim that it did not have a joint venture or other contractual interest with BrooAlexa Design Joint Venture LLC, the GAO found the KO’s conclusion that McTech and BrooAlexa Design Joint Venture were affiliated to be reasonable.⁴⁴

³⁹ Aetna Gov’t Health Plans, Inc., Comp. Gen. B-254397.15, July 27, 1995, 95-2 CPD ¶ 129, at 9.

⁴⁰ Superlative Techs., Inc., Comp. Gen. B-310489, Jan. 4, 2008, 2008 CPD ¶ 12 at 4 n.16.

⁴¹ See *Valor Constr. Mgmt., LLC*, Comp. Gen. B-405306, Oct. 17, 2011, 2011 CPD ¶ 221, at 4 (finding reasonable the KO’s determination that two firms’ interests were not effectively aligned where their relationship “reflected the ordinary relationship between a prime and subcontractor in performance of a single contract”).

⁴² See, e.g., *AdvanceMed Corp.*, Comp. Gen. B-404910.4, Jan. 17, 2012, 2012 CPD ¶ 25, at 9 (stating that GAO looks for “some indication that there is a direct financial benefit to the firm alleged to have the OCI”); *Marinette Marine Corp.*, Comp. Gen. B-400697, Jan. 12, 2009, 2009 CPD ¶ 16, at 24 (finding the lack of “any financial relationship” between the firms made the potential OCI speculative and remote).

⁴³ The Small Business Administration (SBA) administers the Mentor-Protégé Program, which allows established firms to mentor smaller ones with the goal of helping SBA 8(a) participants compete more successfully for federal government contracts. See generally *Mentor-Protégé Program*, SBA.GOV, <http://www.sba.gov/content/mentor-prot%C3%A9g%C3%A9-program> (last visited Nov. 20, 2013).

⁴⁴ *McTech Corp.*, Comp. Gen. B-406100, Feb. 8, 2012, 2012 CPD ¶ 97.

C. The Relationship of OCIs to Other Potential Conflicts

The FAR provides that government business “shall be conducted in a manner above reproach” and that the “general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.”⁴⁵ Thus, OCIs are just one type of conflict that may arise during the procurement process.⁴⁶ Other potential conflicts include Procurement Integrity Act (PIA) violations, antitrust violations, and contracts with government employees.⁴⁷ It is possible that the facts of a particular procurement will create a situation where multiple conflicts may exist (e.g., both a PIA violation and an OCI). Nevertheless, the KO must be careful to distinguish between potential conflicts while recognizing that the existence of one does not necessarily substantiate the other.

In evaluating potential conflicts, the KO must determine which party has the conflict; that is, whether the organization is conflicted or whether a person is conflicted. As the GAO has stated, “there is a distinction between an OCI and a personal conflict of interest: with an OCI, the conflicted party is the organization; with a personal conflict of interest, the conflict is with the individual.”⁴⁸

III. Investigating Potential OCIs

With an understanding of the scope of OCIs, this section focuses on how potential OCIs are investigated. This part first discusses the broad discretion afforded KOs before presenting a step-by-step process for conducting OCI investigations, and concludes with some practical considerations applicable throughout the investigation process.

A. Contracting Officer Discretion

The FAR places the burden of identifying and evaluating potential conflicts of interest squarely on the

⁴⁵ FAR, *supra* note 4, 3.101-1.

⁴⁶ Gordon, *supra* note 9, at 28 (stating that “OCIs are a subset of conflicts of interest”).

⁴⁷ FAR Part 3 discusses improper business practices and personal conflicts of interest, including Procurement Integrity Act violations (FAR 3.104 (2012)), antitrust violations (FAR Subpart 3.3 (2012)), contracts with government employees (FAR Subpart 3.6 (2012)), and personal conflicts of interest (FAR Subpart 3.11 (2012)).

⁴⁸ *Savannah River Alliance, LLC*, Comp. Gen. B-311126, Apr. 25, 2008, 2008 CPD ¶ 88, at 17 (finding that, at most, the conflicts alleged by the disappointed offeror give rise to personal conflicts of interest but not OCIs where the awardee’s director had owned a consulting business and key personnel will remain employees of team members and not become employees of the prime contractor).

shoulders of the KO.⁴⁹ At the same time, the guidance it provides KOs is scant, charging KOs to examine each contracting situation “on the basis of its particular facts and the nature of the proposed contract,” based on the underlying principles of preventing bias in the contractor’s judgment and preventing unfair competitive advantages.”⁵⁰ Given this vague charge, it is not surprising that the FAR advises KOs to exercise “common sense, good judgment, and sound discretion” when investigating OCIs.⁵¹

1. Standard of Review

Fortunately, the GAO and the courts recognize that the FAR gives KOs significant discretion.⁵² The Federal Circuit recognized that “the [KO] enjoys great latitude in handling OCIs.”⁵³ As a result of this latitude, the KO’s decision is given deference by the GAO and the courts. Both the GAO and the courts apply the “arbitrary and capricious” standard of review under the Administrative Procedures Act⁵⁴ when reviewing the KO’s decision.⁵⁵ Under this standard, an agency’s action is arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in

view or the product of agency expertise.”⁵⁶

Under this standard of review, there are generally two situations where the KO’s exercise of discretion will be questioned. First, the KO’s decision will be questioned where she fails to identify a potential OCI (i.e., “entirely failed to consider an important aspect of the problem”).⁵⁷ Second, the KO’s decision will be questioned when her conclusions regarding the OCI do not reasonably follow from the evidence.⁵⁸ To maximize the deference that her decision will receive from either the GAO or court, the KO must both identify and reasonably evaluate potential OCIs.

2. Hard Facts Requirement

While the KO has considerable discretion, the KO must identify hard facts to support her conclusion that an OCI exists. Although the hard facts requirement is not new,⁵⁹ beginning with *Turner Construction Co., Inc. v. United States*,⁶⁰ the courts and GAO have given it renewed attention. Among the issues in *Turner* was whether the Court of Federal Claims misapplied the “hard facts” requirement.⁶¹ The Federal Circuit held that the COFC correctly applied the hard facts requirement, stating that a KO’s OCI finding cannot rely on “inferences based upon

⁴⁹ FAR, *supra* note 4, 9.504(a)(1) (stating that KOs shall analyze planned acquisitions to “[i]dentify and evaluate potential conflicts of interest . . .”).

⁵⁰ *Id.* 9.505. See also Ralph C. Nash & John Cibinic, *Conflicts of Interest: The Guidance in the FAR*, 15 NO. 1 NASH & CIBINIC REP. ¶ 5, Jan. 2001 (stating that in the absence of specific guidance in the FAR, “[b]asically, COs are left to figure it out for themselves”).

⁵¹ FAR, *supra* note 4, 9.505.

⁵² See Richard J. Webber & Patrick R. Quigley, *Turner Construction Co., Inc. v. United States: Hard Facts and Contracting Officer Discretion*, 47 PROCUREMENT LAW. NO. 3, at 1 (Spring 2012).

⁵³ *Turner Constr., Inc. v. United States*, 645 F.3d 1377, 1384 (Fed. Cir. 2011) (affirming COFC decision finding GAO decision to be irrational where the GAO did not apply the proper deference to the KO’s OCI determination).

⁵⁴ 5 U.S.C. § 706 (2012) (stating that the “reviewing court shall . . . hold unlawful and set aside any agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law. . .”).

⁵⁵ See *Jacobs Tech. Inc. v. United States*, 100 Fed. Cl. 198, 206 (Fed. Cl. 2011) (stating that “under the APA, a court determines, based on a review of the record, whether the agency’s decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”); *QinetiQ North Am., Inc., Comp. Gen. B-405008*, July 27, 2011, 2011 CPD ¶ 154, at 6 (stating that the standard of review applied by GAO mirrors the arbitrary and capricious standard mandated by the Court of Appeals for the Federal Circuit); *but see* James J. McCullough, Michael J. Anstett & Brian M. Stanford, *Observations on the Federal Circuit’s Impact on Bid Protest Litigation Since ADRA*, 42 PUB. CONT. L.J. 91, 105 (2012) (observing that prior to *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374 (Fed. Cir. 2009), the GAO did not apply the “arbitrary and capricious” standard under the APA).

⁵⁶ *Phoenix Mgmt., Inc. v. United States*, 107 Fed. Cl. 58 (Fed. Cl. Oct. 9, 2012) (citing *Motor Vehicle Mfrs. Ass’n*, 463 U.S. 29 at 43 (2009)).

⁵⁷ See, e.g., *PCCP Constructors, JV, Comp. Gen. B-405036*, Aug. 4, 2011, 2011 CPD ¶ 156 (finding the KO’s investigation to be unreasonable where it limited its review to what responsibility and role the government employee had in the procurement prior to his retirement without any consideration of the employee’s access to non-public, source selection information); *L-3 Servs., Inc., Comp. Gen. B-400134.11*, Sept. 3, 2009, 2009 CPD ¶ 171, at 7 (finding that the “agency has yet to adequately investigate and reasonably determine the extent and type of information to which [awardee] had access or the efficacy of the non-disclosure agreement and mitigation plans, and absent the results of those inquiries, the record contains inadequate support for a finding that [awardee] did not have an unequal access to information organizational conflict of interest”).

⁵⁸ See, e.g., *Alion Sci. & Tech. Corp., Comp. Gen. B-297022.3*, Jan. 9, 2006, 2006 CPD ¶ 2, at 5 (finding the agency’s conclusion that “no known potential for conflict of interest exists” was unreasonable where awardee acknowledges certain situations where an OCI would be created and concluding that “the agency’s assessment of potential impaired-objectivity OCIs . . . is not adequately supported by the record”).

⁵⁹ Ralph C. Nash, *Preventing Unfair Competitive Advantage: The “Hard Facts” Requirement*, 26 NO. 6 NASH & CIBINIC REP. ¶ 32, June 2012 (“The ‘hard facts’ requirement was enunciated in *CACI, Inc.-Federal v. U.S.*, 719 F.2d 1567 (Fed. Cir. 1983), where the U.S. Court of Appeals for the Federal Circuit reversed a decision of the Claims Court that had enjoined an agency from awarding a contract to a company that had hired the head of the agency’s technical division to prepare its proposal and represent it in negotiations for the contract.”).

⁶⁰ 645 F.3d 1377 (Fed. Cir. 2011).

⁶¹ *Id.* at 1384.

suspicion and innuendo.”⁶²

The courts and the GAO, however, have not clearly defined what constitutes a hard fact. It is clear that a hard fact is less than absolute proof.⁶³ The GAO held that a KO may find “an unfair competitive advantage, even if no actual impropriety can be shown, so long as the determination is based on hard facts, not mere innuendo or suspicion.”⁶⁴ For example, in the category of unequal access to information OCIs, the GAO has found that a showing of access to information, even without proof that the information was actually used, creates a presumption of an OCI.⁶⁵ Though without a clear definition, the KO should be careful and rely on facts that support only a single conclusion.⁶⁶

While there is no definition of hard facts, the courts and GAO have clarified that the burden is on the person asserting an OCI to establish hard facts supporting it.⁶⁷ In this way, there appears to be a presumption that an OCI does not exist where no hard facts exist to support the finding of an OCI. Even where a protest fails to proffer hard facts to support an OCI finding, however, the KO must ensure that her underlying investigation is reasonable.⁶⁸ In such cases, a

⁶² *Id.* at 1387 (internal quotations omitted). Specifically, the court upheld COFC’s finding that the “GAO cited no facts supporting its conclusion that [Turner’s design partner] had access to any information of competitive worth”, but merely relied on inferences when it found that some unnamed employees may have had access to unidentified information. *See generally* Webber & Quigley, *supra* note 52, at 3 (containing a thorough discussion of the *Turner* case from the GAO protests through the Court of Appeals for the Federal Circuit).

⁶³ *McTech Corp.*, Comp. Gen. B-406100, Feb. 8, 2012, 2012 CPD ¶ 97.

⁶⁴ *Id.* at 6. Because of this, some incorrectly distinguish “actual” from “apparent” OCIs; there is no such distinction. Gordon, *supra* note 9, at 40 (“The word ‘apparent’ can cause mischief, or at least confusion, in the context of OCIs. One hears reference to an ‘apparent OCI,’ which sounds like a contrast to an ‘actual OCI.’ It may be more appropriate, however, to say that OCIs are always a matter of appearance.”).

⁶⁵ *TeleCommunications Sys. Inc.*, Comp. Gen. B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229, at 3.

⁶⁶ *See, e.g.*, *VSE Corp.*, Comp. Gen. B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268, at 15 (finding the KO’s conclusion was not based on hard facts where the facts were ambiguous, showing only that the former government employee had access to the computer system but not that the system contained procurement-related files).

⁶⁷ *See, e.g.*, *Distributed Solutions, Inc. v. United States*, 104 Fed. Cl. 368, 390 (Fed. Cl. 2012) (stating that “no hard facts were tendered” by protester and thus no “relevant and viable OCI has been established”); *Diversified Collection Servs., Inc.*, Comp. Gen. B-406958.3, Jan. 8, 2013, 2013 CPD ¶ 23, at 4 (citing *Turner* for the proposition that “OCI determinations must be based on hard facts that indicate the existence or potential existence of a conflict. . . .”); *NikSoft Sys. Corp.*, Comp. Gen. B-406179, Feb. 29, 2012, 2012 CPD ¶ 104, at 4 (“An agency’s decision to exclude an offeror from a competition based on a conflict of interest arising from unequal access to information must be supported by ‘hard facts,’ that is, the agency must specifically identify competitively useful, non-public information to which the offeror had access.”).

⁶⁸ *See, e.g.*, *NetStar-1 Gov’t Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 521 (Fed. Cl. 2011) *aff’d*, 473 F. App’x 902 (Fed. Cir. 2012) (granting

KO should identify hard facts to refute assertions made in the protest and document her efforts to investigate the OCI.

3. OCI Team

In conducting the investigation and identifying the requisite hard facts, the KO should not rely solely upon her own knowledge of the acquisition or the law, but should assemble a team to assist her in the effort.⁶⁹ The FAR specifically advises KOs to seek legal counsel and advice from subject matter experts.⁷⁰ By surrounding herself with a team, the KO will maximize the deference that the GAO or court will afford her decision.⁷¹

The KO’s legal advisor is a key member of the investigation team. The FAR’s guidance on OCIs is limited; thus, application of the FAR OCI provisions alone will not always provide the KO with a defensible decision.⁷² The primary guidance on OCIs comes from case law.⁷³ The legal advisor must be familiar with and ensure that the KO understands the correct legal standard.⁷⁴ The KO receives from her legal advisor relevant research and advice based on the most current case law to inform her evaluation of potential OCIs. In addition, the legal advisor reviews the KO’s finding and evidence upon which it is based to confirm that the KO’s finding is reasonable, consistent with the legal standard, and supported by the evidence. The KO cannot

injunctive relief where the KO “knew or should have known” that a potential OCI existed earlier during the procurement and then failed to adequately investigate the potential OCI); *PCCP Constructors, JV, Comp. Gen. B-405036*, Aug. 4, 2011, 2011 CPD ¶ 156 (recommending that the KO conduct a reasonable OCI investigation where it failed to consider a potential OCI without discussing whether the protestor proffered any hard facts in support of a potential OCI).

⁶⁹ Michael Kracyinovich, *A Contracting Officer Guide for Navigating Organizational Conflict of Interest Waters 4* (Feb. 15, 2012) (unpublished manuscript) (on file with author).

⁷⁰ FAR, *supra* note 4, 9.504(b).

⁷¹ *See, e.g.*, *CACI, Inc.-Fed.*, Comp. Gen. B-403064.2, Jan. 28, 2011, 2011 CPD ¶ 131, at 7 (noting that the “PM and contracting officer, as well as individuals associated with [the agency’s] Office of the General Counsel and Procurement Support Office, all participated in the OCI analysis, and clearly gave ‘meaningful consideration to whether an OCI exists’ . . .”); *The Analysis Grp.*, Comp. Gen. B-401726.3, Apr. 18, 2011, 2011 CPD ¶ 166, at 2 (finding no basis to question the adequacy of the agency’s investigative efforts where, among other things, “the agency assembled an OCI analysis team comprised of technical and program experts . . . to review the question of whether [the awardee] had a potential OCI”).

⁷² *See e.g.*, *Nash*, *supra* note 18 (noting, among others, that the specific FAR guidance regarding information received from the government only addresses information obtained from other contractors).

⁷³ *Id.*

⁷⁴ *See VSE Corp.*, Comp. Gen. B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268, at 19 (finding that, in addition to relying on assumptions, the KO’s decision was based “on an incorrect understanding of the applicable legal standards”).

assume her findings are reasonable without consulting with her legal advisor.

Just as the KO must seek the advice of her legal advisor, there are circumstances where the KO will need to rely on other subject matter experts. Consider, for example, an investigation of a potential unequal access to information OCI where one contractor hired a former government employee. In addition to statements about the former employee's duties, the KO may need to talk with someone in the IT department to get information on how the computer network is set up and what information the former employee had access to.⁷⁵ Similarly, where the information to which the employee had access is very technical, a subject matter expert can help the KO understand whether the information is competitively useful and articulate why or why not. Regardless of whether she includes individuals on her team or merely uses them as a resource, the KO must not undertake the OCI investigation alone, but should leverage the expertise of others to support and insulate her decision regarding the potential OCI.

B. The OCI Investigation Process

With an understanding of the role of the KO in the OCI investigation process, the next step is to discuss the process itself. During the OCI investigation, the KO gathers information necessary to adequately identify, evaluate, and document potential OCIs. Each step addresses a basis for GAO or the court to sustain a protest.

1. Identifying Potential OCIs

The initial step in an OCI investigation is to identify potential OCIs. Where the KO identifies potential OCIs, it is less likely that that a court or GAO will find that the KO failed to consider "an important aspect of the problem."⁷⁶ Most often, the KO will want to cast her net wide enough to ensure she reasonably identifies all potential OCIs.⁷⁷ Creating and comparing a list of potential contractors and a list of conflicted contractors is an effective way to identify potential OCIs.⁷⁸ Doing so makes potential OCIs easier to

⁷⁵ See *id.* at 15 (detailing the KO's investigation into whether a former employee had computer network access to source selection sensitive material and finding that, while she had established that the former employee had access to files based on declarations of those who ran the network, she did not identify specific information that the former employee could access).

⁷⁶ See *supra* note 57 and accompanying text.

⁷⁷ An exception to this is when the OCI investigation is done in response to a protest. In that case, the KO will focus on the potential OCI raised by the protestor. But even in this case, the KO should consider any related OCIs in responding to the protest.

⁷⁸ See Appendix (Creating Two Lists for Identifying Potential OCI) for questions to help create both lists.

identify and also creates a record that can be used to support the reasonableness of the KO's investigation and findings.

The first list that the KO creates is the potential contractor list. This is a list of potential or actual offerors, depending on the current state of the procurement. In addition to potential and actual offerors, the list should include any "friends and relations"⁷⁹ of those offerors; that is, the full spectrum of affiliates, subcontractors, parent companies, and other relationships whose conflicts may be imputed to the offeror.⁸⁰

The second list that the KO creates is the conflicted contractor list. This is a list of contractors with potential conflicts. It includes the contractors who have performed, are performing, or will perform contracts related to the current procurement. It includes contractors who have hired former government employees that worked on the current or related procurement. The KO should also consider including the "friends and relations" of these contractors with potential conflicts.

To identify potential OCIs, the KO simply compares each contractor listed on the potential contractor list against the contractors listed on the conflicted contractor list. The KO should update the lists throughout the procurement. For example, a contractor may hire a former government employee during the procurement process or may propose a subcontractor that the KO did not anticipate.⁸¹ This approach will help the KO identify not only current potential OCIs, but also those related to future procurements. In addition to demonstrating that the KO has considered the important aspects of the problem, properly identifying potential OCIs will also help establish the credibility of the KO.⁸²

⁷⁹ See generally A. A. MILNE, *POOH GOES VISITING* 19 (Dutton Children's Books 1993) (1926) (referencing the various associates of Rabbit, which, according to the illustration, include other rabbits, a squirrel, a hedgehog, mice, and insects).

⁸⁰ Thomas J. Madden, John J. Pavlick Jr. & James F. Worrall, *Organizational Conflicts of Interest/Edition III*, 94-08 BRIEFING PAPERS 1 (July 1994) (advising contractors to examine their "parent company and subsidiaries, affiliates, joint venture partners, and other related entities" when identifying potential OCIs).

⁸¹ See, e.g., PCCP Constructors, JV, Comp. Gen. B-405036, Aug. 4, 2011, 2011 CPD ¶ 156 (sustaining protest where program manager entered employment agreement with contractor and agreed to stop working on the procurement, but in fact remained involved in the procurement up until he left government employment).

⁸² See *Axiom Res. Mgmt., Inc. v. United States*, 78 Fed. Cl. 576, 599-600 (Fed. Cl. 2007) ("[T]he fact that neither [the requiring activity] nor the [KO] initially identified the 'unequal access to information conflict' nor to date has identified an apparent 'impaired objectivity conflict' significantly undermines the court's confidence, both in the [KO]'s conflict identification and wholesale endorsement of a voluntary mitigation plan.").

2. Evaluating Potential OCIs

Once potential OCIs are identified, the next step in the OCI investigation process is to evaluate each one. Because the potential OCI identification process described above is an attempt to identify all potential OCIs, some potential OCIs may not require significant evaluation, while others may involve a significant investment of time and resources.

The first step in evaluating each potential OCI is to determine whether any of the general rules under FAR 9.505-1 through 9.505-4⁸³ apply. These general rules can be described as delineating *per se* OCIs because they constrain the KO's discretion.⁸⁴ In these instances, the KO's evaluation of the potential OCI will focus on why the general rule does or does not apply. In the case of FAR 9.505-1, for example, the KO's analysis will primarily focus on whether the contractor provided systems engineering or technical direction. The advantage gained by the contractor in the subsequent procurement (e.g., the opportunity to influence the ground rules) is not relevant because once the KO determines that the contractor provided systems engineering or technical direction, the general rule does not allow the contractor to receive the contract.

Where the potential OCI does not implicate the general rules, for each identified potential OCI, the KO will determine which type of OCI potentially exists: biased ground rules, impaired objectivity, or unequal access to information.⁸⁵ Once she identifies the type of potential OCI, she will determine whether each element of that OCI exists.⁸⁶ By framing the evaluation by type of OCI, the KO will ensure that she gathers the relevant information and that her conclusions regarding the potential OCI reasonably follow from that information.

Once the KO has made her determination regarding each potential OCI, she should consider any proposed mitigation.⁸⁷ The KO should not consider mitigation prior to performing an initial evaluation of the OCI. Until she

⁸³ See *supra* note 24 and accompanying text. FAR, *supra* note 4, 9.505-3 (Providing Evaluation Services); FAR, *supra* note 4, 9.505-4 (Obtaining Access to Proprietary Information).

⁸⁴ See Webber & Quigley, *supra* note 52, at 6 (arguing that there is a "conclusive presumption of unfairness" where the activities covered by FAR 9.505-1 and 9.505-2(a)(1) and (b) are involved).

⁸⁵ See *supra* Part II.A.

⁸⁶ For example, if the potential OCI is a biased ground rules type OCI the KO would determine whether the potential contractor (1) occupied a position of influence and (2) whether that influence extended to the instant procurement. See *supra* Part II.A.1.

⁸⁷ OCI mitigation consists of actions or plans designed to "eliminate, or at least minimize, the impact of an OCI." Szeliga, *supra* note 6, at 665. For example, where an unequal access to information OCI exists, the government could release the information to all offerors to mitigate the effects of the OCI. See *id.* at 666.

understands the potential OCI and its possible effects, she is not in a position to evaluate whether the proposed mitigation adequately addresses the OCI. The process of evaluation is systematic and fact-intensive. At the same time, there are few bright lines; therefore, the KO must "exercise common sense, good judgment, and sound discretion" throughout the process.⁸⁸

3. Documenting Potential OCIs

Just as the FAR provides little guidance on conducting an OCI investigation, it provides no guidance on how to document that investigation. The FAR merely advises against "excessive documentation" and requires formal documentation of the KO's judgment only when "a substantive issue concerning potential organizational conflict of interest exists."⁸⁹ In at least one case, the court did not question the absence of any documentation regarding a potential OCI.⁹⁰ Despite this outlier, the KO should document her consideration of potential OCIs in every case.⁹¹

Some KOs use a Determination and Findings⁹² to document their investigations, while others use memoranda.⁹³ The format does not appear to matter, as

⁸⁸ FAR, *supra* note 4, 9.505.

⁸⁹ *Id.* 9.504(d).

⁹⁰ Beta Analytics Int'l, Inc. v. United States, 61 Fed. Cl. 223, 227 (Fed. Cl. 2004) (denying plaintiff's request for discovery regarding an OCI where the agency was silent on whether an investigation was done stating "the lack of any mention of an organizational conflict of interest may merely indicate that the contracting officer failed to discover a 'substantive issue concerning [any] potential organizational conflict of interest'").

⁹¹ See Jacobs Tech. Inc. v. United States, 100 Fed. Cl. 198, 212 (Fed. Cl. 2011) ("[T]o discourage future challenges to the adequacy of the OCI analysis, the Court strongly recommends that the analysis be documented.").

⁹² A Determination and Findings (D&F) is "a special form of written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain contract actions." The "determination" is the conclusion and is based on "findings," or facts, necessary to support the conclusion. FAR, *supra* note 4, 1.701. The FAR does not require a D&F for OCI investigations.

⁹³ Compare, e.g., PCCP Constructors, JV, Comp. Gen. B-405036, Aug. 4, 2011, 2011 CPD ¶ 156 (sustaining protest where KO used D&F), and Overlook Sys. Techs., Inc., Comp. Gen. B-298099.4, Nov. 28, 2006, 2006 CPD ¶ 185 (denying protest where KO used D&F), with Gen. Dynamics C4 Sys., Inc., Comp. Gen. B-407069, Nov. 1, 2012, 2012 CPD ¶ 300 (denying protest where KO used Memorandum of Evaluation of Potential OCI), and Cahaba Safeguard Adm'r's, LLC, Comp. Gen. B-401842.2, Jan. 25, 2010, 2010 CPD ¶ 39 (sustaining protest where KO used a memorandum), and C2C Solutions, Inc., Comp. Gen. B-401106.5, Jan. 25, 2010, 2010 CPD ¶ 38 (sustaining protest where KO drafted Pre-award OCI Analysis), and Harmonia Holdings, LLC, Comp. Gen. B-407186.2, 2013 WL 953353 (Mar. 5, 2013) (denying protest where the agency documented the OCI analysis in its acquisition plan). Many decisions do not state how the OCI investigation was documented.

GAO and the courts are more concerned with the substance of the documentation.⁹⁴ Whatever the format chosen by the KO for her findings, it should support the KO's findings by presenting them in a clear and logical manner. The findings should include a description of the investigation process, the relevant facts, the KO's analysis of those facts, and her conclusions based on her analysis. The KO should also include with her findings relevant documents or evidence that supports the facts and her analysis.

C. Practical Considerations

Remembering several practical considerations will help the KO conduct a reasonable OCI investigation. First, she must adequately scope the investigation. Second, she must seek and consider information from the contractor with the potential OCI. Third, she must not blindly rely on the assertions of the potential contractor. Fourth, she must validate the information that she relies upon to make her findings. Finally, she must remember that the OCI investigation does not end.

First, concurrent with identifying, evaluating, and documenting potential OCIs, the KO must ensure the investigation remains properly scoped. This is essential because OCI investigations "can quickly absorb scarce resources."⁹⁵ The FAR recognizes this and advises KOs to "avoid creating unnecessary delays, burdensome information requirements, and excessive documentation."⁹⁶ The scope of the investigation will depend on several factors, such as the type and complexity of the procurement⁹⁷ and when in the procurement process the investigation is being done. For example, an investigation in response to a protest will center on the OCIs alleged in the protest and only rarely would consider the potential OCIs of contractors not next in line for contract award.

Second, while the KO should not seek information outside the scope of the investigation, the KO must consider relevant information provided by a prospective contractor in

⁹⁴ See *NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 519 (Fed. Cl. 2011) *aff'd*, 473 F. App'x 902 (Fed. Cir. 2012) ("The process of identifying and mitigating a conflict is not a bureaucratic drill, in which form is elevated over substance, and reality is disregarded. . . . Rather, as will be seen, the FAR calls upon the KO to conduct a timely and serious review of the facts presented.").

⁹⁵ Sarah M. McWilliams, *Identifying Latent Organizational Conflicts of Interest*, CONT. MGMT, December 2007, at 12.

⁹⁶ FAR, *supra* note 4, 9.504(d).

⁹⁷ See McWilliams, *supra* note 95, at 8 (stating that acquisitions that are high dollar and complex, acquisitions for advisory/technical services, acquisitions for delivery of hardware and systems delivery, and acquisitions from organizations that use a significant embedded contractor workforce for performance of technical and management support are high-risk for generating OCIs).

her OCI investigation.⁹⁸ In addition to this requirement, GAO has imposed an obligation on the KO to give the prospective contractor notice of her OCI concerns and provide the contractor an opportunity to respond.⁹⁹ Generally, this exchange is not considered discussions¹⁰⁰ because OCIs are a matter of contractor responsibility.¹⁰¹ For these reasons, the KO should seek out information from the prospective contractor prior to making her findings.

Third, although the KO should seek out information from the contractor, she should not rely solely upon information provided by the prospective contractor.¹⁰² Further, when she does receive information from a prospective contractor, she must evaluate it herself.¹⁰³ For example, it is not unusual for solicitations to require offerors to certify that they do not have any conflicts of interest.¹⁰⁴ But even when a firm certifies that it has no conflict of interest, the KO must still make her own independent assessment. Where the KO fails to do so, the GAO will find that the investigation was unreasonable.

Fourth, along with independently evaluating contractor-provided information, the KO must validate the information upon which her findings rely. During the course of a protest, the protestor will have the opportunity to rebut the KO's findings.¹⁰⁵ Further, GAO may also request a hearing.¹⁰⁶

⁹⁸ FAR, *supra* note 4, 9.506(d) (2012).

⁹⁹ See *AT & T Gov't Solutions, Inc.*, Comp. Gen. B-400216, Aug. 28, 2008, 2008 CPD ¶ 170, at 4 (sustaining protest where the agency did not provide AT&T the opportunity to respond to OCI concerns prior to disqualification).

¹⁰⁰ Discussions are exchanges between the government and offerors during a negotiated procurement. Under the FAR, if the government engages in discussions with one offeror, it is required to engage in discussions with all offerors in the competitive range. FAR, *supra* note 4, 15.306(d).

¹⁰¹ *Cahaba Safeguard Adm'rs, LLC*, Comp. Gen. B-401842.2, Jan. 25, 2010, 2010 CPD ¶ 39, at 7 ("Where an agency holds exchanges with an offeror regarding the offeror's plan to mitigate identified conflicts of interest, we have held that such exchanges do not constitute discussions and, as a consequence, they do not trigger the requirement to hold discussions with other offerors."); *but see Nortel Gov't Solutions, Inc.*, Comp. Gen. B-299522.5, Dec. 30, 2008, 2009 CPD ¶ 10 (implying that where a change in the mitigation plan affects a technical or cost proposal the exchange would constitute discussions).

¹⁰² See FAR, *supra* note 4, 9.506 (2012) (advising KOs to first seek "information from within the Government and other readily available sources").

¹⁰³ See, e.g., *The Analysis Grp., LLC*, Comp. Gen. B-401726, Nov. 13, 2009, 2009 CPD ¶ 237 (sustaining protest where the agency merely accepted awardee's assertions that there were no OCIs without making its own independent determination).

¹⁰⁴ See, e.g., *id.* at 5–6. FAR 9.507 authorizes the KO to include provisions in the solicitation specific to potential OCIs.

¹⁰⁵ 4 C.F.R. § 21.3(i) (2012). It is also possible that GAO will require the agency to produce additional documents not previously provided by the agency during the protest. *Id.* § 21.3(g), (h), and (j).

The KO's findings may be found unreasonable if the information she relied upon is shown to be inaccurate, incomplete, or incorrect.¹⁰⁷

Finally, the OCI investigation does not end in a static determination.¹⁰⁸ The KO has "an ongoing responsibility to identify and evaluate potential OCIs."¹⁰⁹ An OCI investigation completed during acquisition planning, for example, may not have considered all actual offerors or proposed subcontractors. As a result, the KO will need to reevaluate potential OCIs once initial proposals are received. Further, the KO's initial determination likely does not account for mergers or a contractor hiring a former government employee.¹¹⁰

In the case of a protest, the KO should not stop investigating, even after the agency report is filed with the GAO. The GAO has indicated a willingness to consider new information related to potential OCIs after the agency report is filed.¹¹¹ If new information is provided to the GAO after the initial agency report is filed, the KO may need to include her analysis of that information.¹¹²

IV. Conclusion

Investigating OCIs is a job that must be accomplished. Legal counsel is essential at every stage if the job is to be done correctly; the FAR offers little instruction, and case law is the primary source of guidance on OCIs. Legal counsel must be familiar with applicable case law to advise the KO during the OCI investigation and to defend the KO's conclusions during any subsequent protest litigation.

Aided throughout the investigation, the KO will get the job done when investigating potential OCIs. Her investigation will specifically identify, methodically evaluate, and sufficiently document potential OCIs. Her investigation will support her conclusion—finding no OCI, mitigating the OCI, avoiding the OCI, or waiving the OCI.¹¹³ The KO's thorough and complete investigation will get the job done by strictly avoiding "any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships."¹¹⁴

¹⁰⁶ *Id.* § 21.7(a) (2012) (authorizing GAO to hold hearings in protest proceedings).

¹⁰⁷ *See, e.g.,* Alion Sci. & Tech. Corp., Comp. Gen. B-297342, Jan. 9, 2006, 2006 CPD ¶ 1, at 11 n.17 (noting that an engineer's testimony on the frequency with which OCIs would occur during contract performance contradicted the OCI evaluation and testimony provided by the KO in holding the KO's findings unreasonable).

¹⁰⁸ *See* McWilliams, *supra* note 95, at 8 (outlining a "cradle to grave" process for conducting OCI reviews that includes consideration of potential OCIs at pre-solicitation, evaluation, pre-award, and post-award). *See also* Nuclear Production Partners LLC, B-407948, April 29, 2013, 2013 CPD ¶ 112, at 15 (accepting the KO's conclusion that "various uncertainties" regarding the agency's future, related procurement made its full consideration of the alleged OCI premature prior to the award of the current contract, thus allowing the current procurement to proceed).

¹⁰⁹ *Jacobs Tech. Inc. v. United States*, 100 Fed. Cl. 198, 210 (Fed. Cl. 2011).

¹¹⁰ *See* PCCP Constructors, JV, Comp. Gen. B-405036, Aug. 4, 2011, 2011 CPD ¶ 156 (finding the KO's investigation unreasonable where her OCI investigation was dated six months after the former employee began working for the contractor, yet the KO had not contacted him since his retirement from the agency).

¹¹¹ *McTech Corp.*, Comp. Gen. B-406100, Feb. 8, 2012, 2012 CPD ¶ 97, at 5 ("[A]n agency may provide further information and analysis regarding the existence of an OCI at any time during the course of a protest, and we will consider such information in determining whether the [KO]'s OCI determination is reasonable.").

¹¹² *See* VSE Corp., Comp. Gen. B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268, at 15 (noting that "the [KO] has not commented on the post-hearing declarations, and thus has not made any findings based on the new information" apparently indicating that GAO's role is to evaluate the reasonableness of the KO's investigation and thus cannot use information not considered by the KO to support her findings).

¹¹³ *See* *NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 519 (Fed. Cl. 2011) *aff'd*, 473 F. App'x 902 (Fed. Cir. 2012) (stating that the KO has only three courses of action once she finds an OCI).

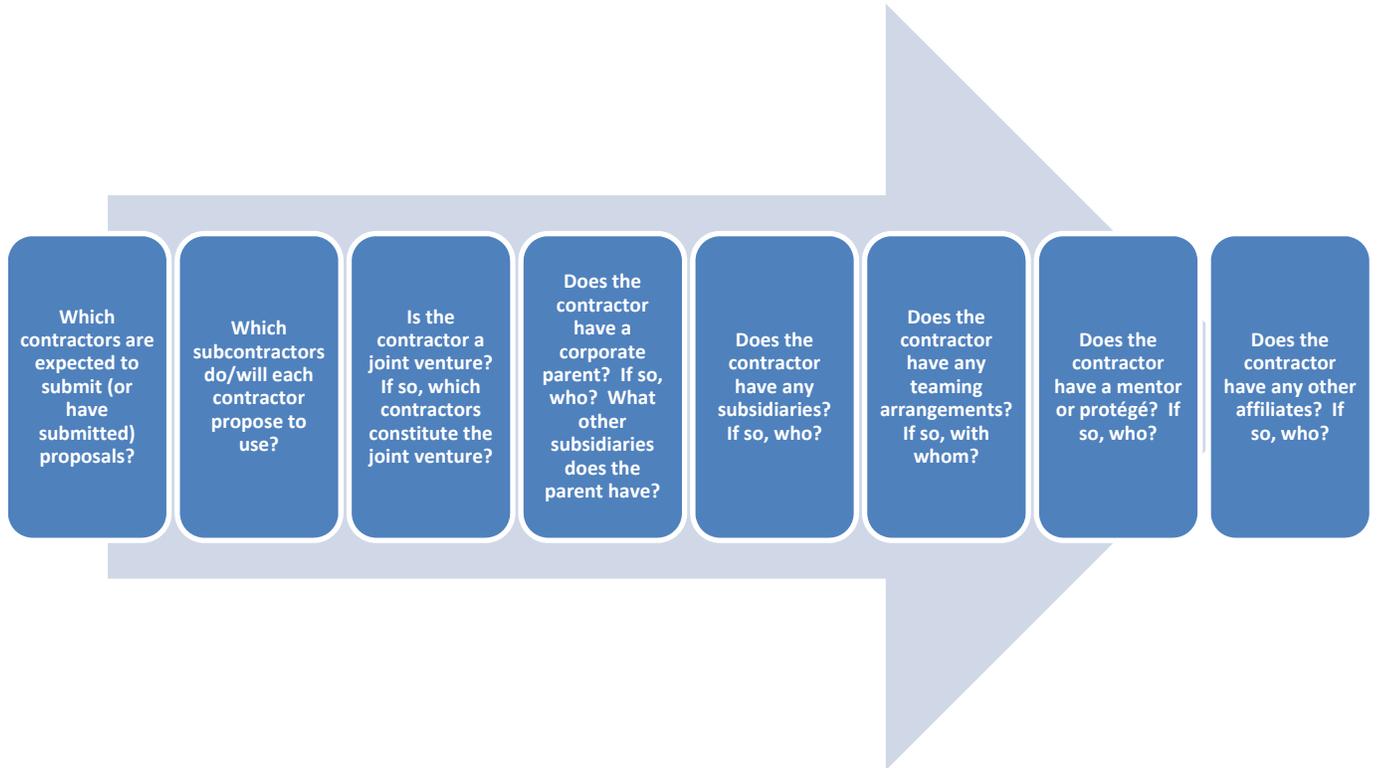
¹¹⁴ FAR, *supra* note 4, 3.101-1.

Appendix

Creating Two Lists for Identifying Potential OCIs

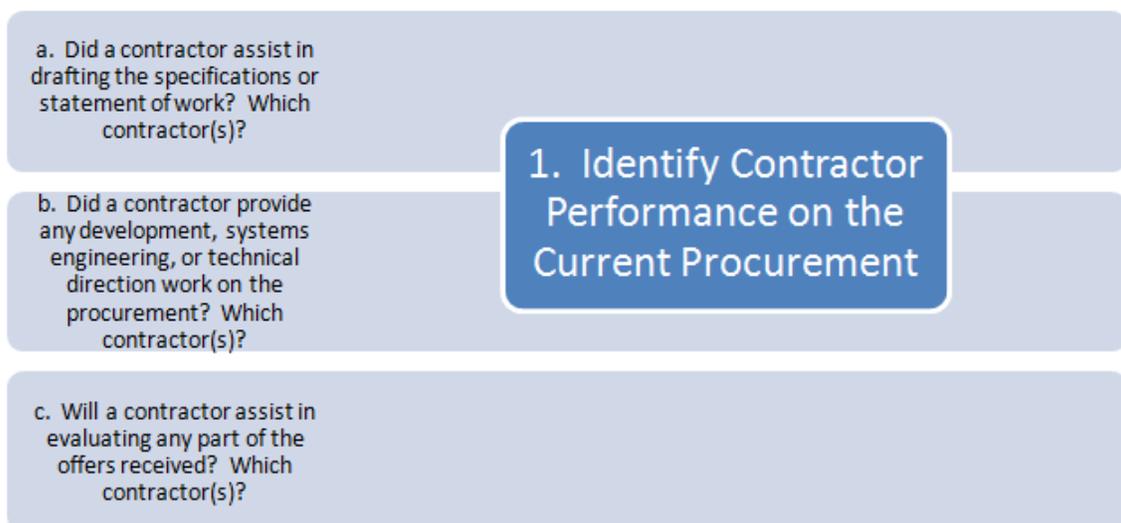
Creating the Potential Contractor List

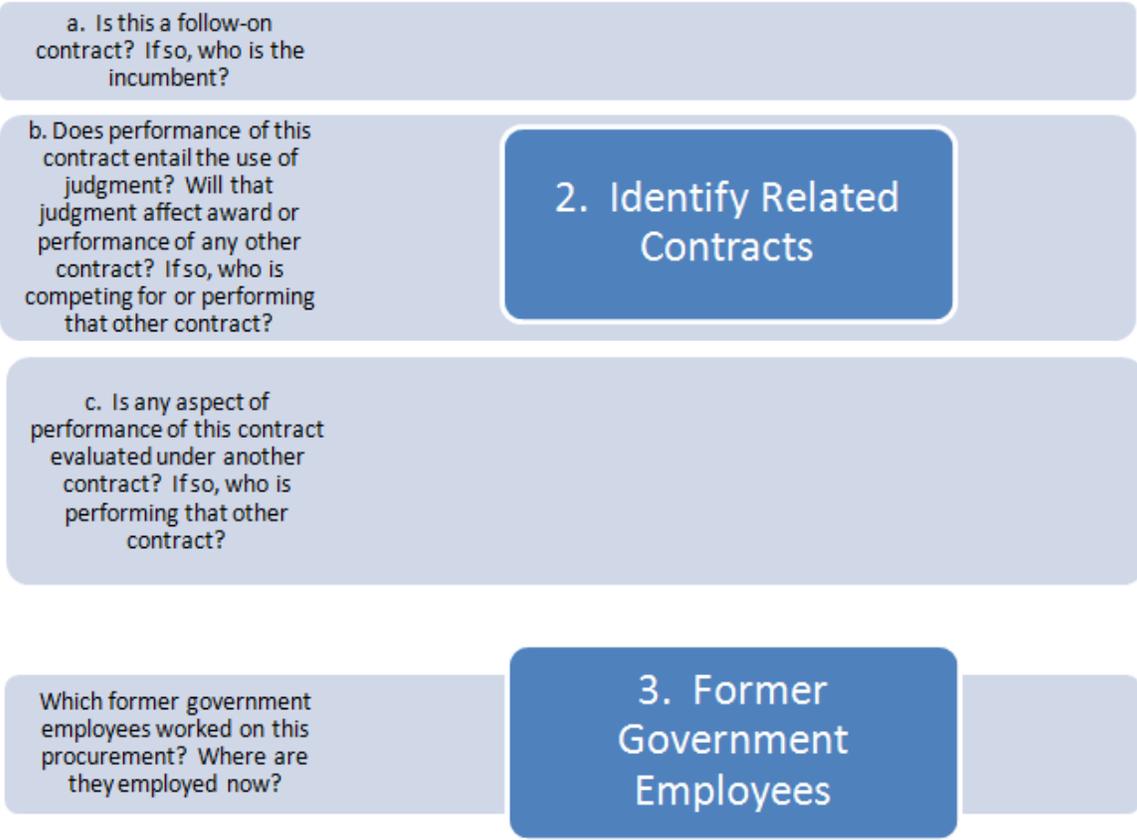
The potential contractor list begins with identifying the contractors that are expected to submit or have already submitted proposals. The KO then builds from that initial list to identify the corporate friends and relations that may have OCIs that can be imputed to the offeror. How extensive this list is will largely depend on the complexity of the procurement. The questions below will ensure firms related to the current procurement are identified.



Creating the Conflicted Contractor List

The steps and questions below will help identify potential sources of OCIs.





For additional questions, see Sarah M. McWilliams, *Identifying Latent Organizational Conflicts of Interest*, CONTRACT MGMT., Dec. 2007, at 16.

Application of Article 2(c) of the UCMJ to Title 32 Soldiers

Major T. Scott Randall*

Introduction

National Guard Soldiers often perform training away from their home states and units in a full-time National Guard status under Title 32.¹ While performing such duty, the question arises regarding whether these military personnel are subject to state or federal codes of military justice for purely military offenses.² To illustrate this issue, consider a Texas Army National Guard Active Guard Reserve (AGR) officer serving in a Title 32 status while attending the Graduate Course at The Judge Advocate General's Legal Center and School (TJAGLCS) in Charlottesville, Virginia. While at the Graduate Course, this officer commits the offense of disrespect toward a superior commissioned officer, who is a Title 10 active duty officer assigned to TJAGLCS as an instructor.

This note presents the traditional analysis regarding Uniform Code of Military Justice (UCMJ) jurisdiction over National Guard Soldiers with particular emphasis on Title 32 duty. It then considers the different state codes of military justice that may be applicable to the hypothetical case described above. Finally, it analyzes Article 2(c) of the UCMJ and concludes that this provision of the UCMJ may be applicable to Title 32 National Guard Soldiers when such Soldiers commit purely military offenses away from their home states.

Review of State and Federal Law Applicable to Title 32

The UCMJ and State Codes of Military Justice

Members of the National Guard may perform duty under three distinct provisions of law.³ They may perform duty as members of the National Guard of the United States under Title 10 of United States Code (U.S.C.).⁴ They may further perform duty as members of the National Guard of

their individual states under Title 32 of U.S.C. (federal funding, but state control), or perform state active duty (state funding and state control).⁵ The UCMJ does not typically apply to Soldiers serving in a military status pursuant to Title 32 or state active duty.⁶ To fill this gap, the majority of states and territories have developed their own codes of military justice.⁷

Chapter 432 of the Texas Government Code is the Texas Code of Military Justice (TCMJ).⁸ Broadly speaking, TCMJ is applicable to all members of the state's military forces who are not in federal service.⁹ Further, the TCMJ applies in all places and to all persons otherwise subject to its provisions while they are serving outside the state and while they are going to and returning from service outside the state, in the same manner and to the same extent as if they were serving inside the state.¹⁰ Like the UCMJ, the TCMJ includes offenses that are purely military.¹¹ For example, § 432.134 of the TCMJ makes it an offense for a Soldier to show disrespect toward his superior commissioned officer.¹² The TCMJ defines an "officer" as a commissioned or warrant officer of the state military forces.¹³ The "state military forces" of Texas are defined as the National Guard of Texas and other militia or military forces organized under the laws of Texas.¹⁴

In contrast, the Commonwealth of Virginia incorporates the entire UCMJ as its state code of military justice.¹⁵ Therefore, Article 89 of the UCMJ (disrespect toward a superior commissioned officer) is specifically incorporated as an offense under Virginia state law.¹⁶ However, the

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¹ See 10 U.S.C. § 101(d)(6)(A) (2013). See also U.S. DEP'T OF ARMY, NAT'L GUARD BUREAU, REG. 350-1, ARMY NAT'L GUARD TRAINING tbl.3-2 (4 Aug. 2009) [hereinafter NGB 350-1]. Title 32 is the title of the U.S. Code under which National Guard Soldiers serve when they are training under State control, but funded with federal money. *Id.* See also 32 U.S.C. § 502 (2013).

² See, e.g., U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 20-2(b) (3 Oct. 2011) [hereinafter AR 27-10].

³ See 32 U.S.C. §§ 326-27 (2013).

⁴ *Id.* § 101(5). National Guard Soldiers serving under Title 10 are subject to the United States Code of Military Justice. See 10 U.S.C. § 802(a)(1) (2013).

⁵ See *id.* § 502; TEX. GOV'T CODE ANN. § 432.001(2) (West 2008) [hereinafter TCMJ].

⁶ See 10 U.S.C. § 802(a)(3) (2013); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 202 discussion (5) (2012) [hereinafter MCM]; see also 32 U.S.C. §§ 326-27 (2006). Under Title 32, National Guard Soldiers may perform full-time National Guard duty or inactive duty training. See NGB 350-1, *supra* note 1, tbl. 3-2.

⁷ See Major Robert L. Martin, *Military Justice in the National Guard: A Survey of the Laws and Procedures of the States, Territories, and the District of Columbia*, ARMY LAW., Dec. 2007, at 30.

⁸ See TCMJ, *supra* note 5, § 432.001.

⁹ See *id.* § 432.002.

¹⁰ See *id.* § 432.004.

¹¹ See *id.* § 432.131.

¹² *Id.* § 432.134.

¹³ See *id.* § 432.001(14).

¹⁴ See *id.* § 432.001(18).

¹⁵ See VA. CODE ANN. § 44-40 (West 2010).

¹⁶ *Id.*

Virginia UCMJ only applies to members of the Virginia National Guard serving in a Title 32 or a state active duty status.¹⁷

Article 2(c) of the UCMJ

Under Article 2(c) of the UCMJ, a person serving with an armed force who: (1) submits voluntarily to military authority, (2) meets minimum competency and age standards, (3) receives military pay and allowances, and (4) performs military duties is subject to UCMJ jurisdiction.¹⁸ In *United States v. Phillips*, an Air Force Reserve lieutenant colonel admittedly ingested marijuana-laced brownies while in a travel status the night before her annual training orders were to begin.¹⁹ The Court of Appeals for the Armed Forces (CAAF) found the officer subject to the jurisdiction of the court under Article 2(c).²⁰ The court reasoned the officer had submitted to military authority by voluntarily traveling on her travel day and accepting the military conditions of her travel to use government quarters.²¹ Further, the officer clearly met age and mental requirements for active service and received pay and allowances for the day of travel.²² The court also found the officer performed military duties on her travel day.²³ The court stated, “Travel is a normal part of military duty. In the discharge of that duty, it was incumbent upon the appellant to adhere to military standards and to the UCMJ.”²⁴ Therefore, the court maintained jurisdiction over the case pursuant to Article 2(c) of the UCMJ.²⁵

¹⁷ See *id.* § 44-40.01.

¹⁸ See 10 U.S.C. § 802(c) (2006). Article 2(c) indicates in full:

Notwithstanding any other provision of law, a person serving with an armed force who (1) submitted voluntarily to military authority; (2) met the mental competence and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority; (3) received military pay or allowances; and (4) performed military duties; is subject to this chapter until such person’s active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

Id.

¹⁹ See *United States v. Phillips*, 56 M.J. 843 (A.F. Ct. Crim. App. 2002).

²⁰ See *United States v. Phillips*, 58 M.J. 217, 220 (C.A.A.F. 2003).

²¹ *Phillips*, 56 M.J. at 846. In affirming the lower court’s holding, the Court of Appeals for the Armed Forces also emphasized that the officer must be “serving with an armed force” as a pre-requisite to finding jurisdiction under Article 2(c). *Phillips*, 58 M.J. at 220. The court easily found that the officer was serving with an armed force on 11 July due to her pay status, receipt of retirement points, and receipt of military benefits such as lodging. See *id.*

²² See *Phillips*, 56 M.J. at 846.

²³ *Id.* at 847.

²⁴ *Id.*

²⁵ *Id.*

In *United States v. Fry*, a Marine was convicted by a general court-martial of being absent without leave, possessing child pornography, and fraudulently enlisting.²⁶ The Marine private argued that his enlistment in the Marine Corps was void because he was subject to a limited conservatorship under California state law at the time of his enlistment and that as a result, the court had no authority to court-martial him.²⁷ However, the court found jurisdiction over the case under Article 2(c) of the UCMJ.²⁸

The court analyzed the opening clause to Article 2(c), “[n]otwithstanding any other provision of law,” and found the language conclusive with respect to congressional intent to preempt or supersede all contrary state or federal law regarding this provision.²⁹ The court stated, “[T]he ‘notwithstanding’ language is a clear statement of law indicating the obvious intent of the drafters to supersede all other laws.”³⁰ Therefore, the court found it was not bound by the California competency order in deciding whether jurisdiction may be found under Article 2(c).³¹ The court then upheld the lower court’s finding that the Marine possessed the requisite mental capacity required by Article 2(c) “at the time of [his] voluntary submission to military authority” for UCMJ jurisdiction to attach.³²

Analysis of State and Federal Law Applicable to Title 32

Pursuant to the TCMJ, only Texas military forces not in a federal status, i.e., not in a Title 10 status, are subject to its provisions.³³ Although the TCMJ has explicit extraterritorial application, it limits the offenses under such code to those

²⁶ *United States v. Fry*, 70 M.J. 467 (C.A.A.F. 2012).

²⁷ *Id.* at 465. A California probate court awarded the Marine private’s grandmother a limited conservatorship over him on the basis of his previously diagnosed autism, arrest record, and impulsivity. *Id.*

²⁸ *Id.* at 468 (citing 28 U.S.C. § 1738 (2013)). (“[D]etermining whether court-martial jurisdiction existed pursuant to Article 2(b) would require a determination of important issues of federalism and comity, which are unnecessary since Article 2(c) offers an alternative means of resolving this case.”). Article 2(b) provides that

[t]he voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

10 U.S.C. § 802(b) (2013); *Fry*, 70 M.J. at 468.

²⁹ *Id.* at 468–69.

³⁰ *Id.* at 469 (emphasis added).

³¹ See *id.*

³² *Id.* The second prong of the Article 2(c) analysis was at issue in the case due to the earlier California court’s conservatorship order over Fry based on his diagnosed autism and other mental health issues. *Id.* at 465.

³³ See TCMJ, *supra* note 5, § 432.002.

wholly involving Texas military forces.³⁴ Hence, the offense of disrespect toward a superior commissioned officer under the TCMJ is only applicable to those cases where an officer of the Texas National Guard is shown disrespect by another member of the Texas National Guard.³⁵ Therefore, the Texas National Guard AGR officer serving at TJAGLCS in a Title 32 status cannot be charged with disrespect toward a superior commissioned officer under the TCMJ for conduct toward a superior Title 10 officer.³⁶

Further, the Texas National Guard officer cannot be charged for the offense of disrespect toward a superior commissioned officer under Virginia state law, as the offense is purely military in nature with no analogous civilian crime under Virginia law.³⁷ Additionally, the Virginia military code is only applicable to members of the Virginia National Guard, not the Texas National Guard.³⁸

Uniform Code of Military Justice jurisdiction does not typically attach to Soldiers serving in Title 32 status,³⁹ though there is no express prohibition in the UCMJ to such application when the Soldier is performing full-time National Guard duty under Title 32.⁴⁰ Army Regulation (AR) 27-10 addresses this omission by explicitly limiting the application of the UCMJ to Soldiers serving in a Title 10 status.⁴¹ Therefore, the Texas National Guard AGR performing duty at TJAGLCS in a full-time National Guard status under Title 32 does not appear to be subject to the UCMJ in any manner.⁴² Consequently, this purely military offense appears to be non-cognizable under both federal and state law.

However, Article 2(c) of the UCMJ may apply in this case. The recent decision in *United States v. Fry* raises the question as to whether the CAAF's interpretation of the broad language found in Article 2(c) would cover a National Guard Soldier serving in a full-time National Guard status under Title 32.⁴³ The court in *Fry* spent a considerable amount of time discussing the first clause of Article 2(c) in

coming to its decision.⁴⁴ The court's analysis of the "[n]otwithstanding any other provision of law" provision was decisive in reaching the conclusion that it was not bound by the California court's findings regarding the Marine's mental capacity to contract.⁴⁵ The court held the "notwithstanding" clause was a clear expression of congressional intent that *all* state and federal law is preempted or superseded with respect to Article 2(c).⁴⁶ This would presumably include any prohibition in applying the UCMJ to Title 32 Soldiers serving in a full-time National Guard status.

Applying the analysis developed in *United States v. Phillips* regarding Article 2(c), the UCMJ would apply to the Texas National Guard AGR serving at TJAGLCS under Title 32.⁴⁷ The initial issue in applying Article 2(c) is whether the accused was serving with an armed force.⁴⁸ The Texas National Guard officer in the Graduate Course is clearly serving with an armed force, i.e., the U.S. Army. Once this threshold question is satisfied, the four-prong analysis set forth in Article 2(c) applies. In this case, the Texas National Guard AGR officer voluntarily submitted to military authority in following the rules and regulations of TJAGLCS by appearing for classes and participating in other activities required for Graduate Course students. Further, the Texas National Guard officer would presumably meet age and mental competence qualifications while at TJAGLCS and receive military pay and allowances. Finally, the Texas National Guard AGR officer would be performing military duties associated with his attendance at the Graduate Course. Therefore, the Texas National Guard officer's service clearly falls within the parameters of Article 2(c) despite the fact that such service is in a Title 32 status.

Conclusion

A Texas National Guard AGR officer serving in a full-time National Guard status while attending TJAGLCS under Title 32 would be subject to the UCMJ under Article 2(c) for purely military offenses.⁴⁹ The expansive language used by the CAAF regarding the application of Article 2(c) would logically apply to supersede any contrary provisions found in AR 27-10 or Article 2(a) of the UCMJ regarding Title 32.⁵⁰ Therefore, the CAAF's holdings in *Phillips* and *Fry*

³⁴ See *id.* §§ 432.001, 432.004.

³⁵ *Id.*

³⁶ *Id.*

³⁷ See VA. CODE ANN. § 44-40 (2010).

³⁸ See *id.* § 44-40.01.

³⁹ See AR 27-10, *supra* note 2, para. 20-2(b).

⁴⁰ See 10 U.S.C. § 802(a)(1) (2013). *But see id.* § 802(a)(3) (limiting application of the Uniform Code of Military Justice for *inactive duty training* to National Guard of the U.S. Soldiers in federal service). Under 10 U.S.C. § 12602, full-time National Guard duty performed by a member of the Army National Guard of the United States shall be considered active duty in federal service as a Reserve of the Army. See *id.* § 12602(a)(2).

⁴¹ See AR 27-10, *supra* note 2, para. 20-2.

⁴² *Id.*

⁴³ See *Fry*, 70 M.J. at 465.

⁴⁴ *Id.* at 469.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See *United States v. Phillips*, 58 M.J. 217, 220 (C.A.A.F. 2003).

⁴⁸ *Id.*

⁴⁹ An offense other than a purely military offense would presumably be cognizable under Virginia state law, thereby making any analysis regarding the application of the UCMJ unnecessary. See *generally* VA. CODE ANN. 18.2-1-18.2-512 (2013).

⁵⁰ See *Fry*, 70 M.J. at 465.

have shown an inclination on the part of the court to subject servicemembers to the UCMJ when facts clearly show the presence and application of military authority.⁵¹ A Texas

National Guard AGR officer serving in uniform at a military educational course would surely present such a case.

⁵¹ *Id.*; *Phillips*, 58 M.J. at 220.

A Month in the Country¹

Reviewed by *Captain Joshua W. Johnson**

*The marvelous thing was coming into this haven of calm water and, for a season, not having to worry my head And, afterwards, perhaps I could make a new start, forget what the War and the rows with Vinny had done to me This is what I need, I thought—a new start and, afterwards, maybe I won't be a casualty anymore.*²

I. Introduction

The list of artistic and cultural exports from Britain to America is long and varied, including Shakespeare, Sherlock Holmes, the Beatles, and *The Office*. Recently, *Downton Abbey*, a British period drama set during World War I, crossed the pond and became a television hit in the United States.³ J.L. Carr's timeless novel, *A Month in the Country*, is yet another British commodity worthy of attention by Americans and specifically by this nation's military leaders, servicemembers, and families in a country that has endured twelve years of combat operations overseas.

A Month in the Country is a short work of fiction that tells the tale of Tom Birkin, a British veteran of World War I, who reflects on the healing power of his summer spent in the English countryside in 1920.⁴ Tom Birkin is suffering from wounds—both seen and unseen—inflicted during his time in combat, and he endures additional pain when his unfaithful wife, Vinny, abandons him.⁵ He accepts a job uncovering a church's wall painting buried by years of neglect in the northern village of Oxgodby, and he discovers a sense of healing and hope, tinged with regret, during his time in the country.⁶

This review highlights the key themes of J.L. Carr's novel, the praiseworthy elements, the flawed elements, and the applicable elements to today's military. Ultimately, the redeeming whole of the book overwhelms its flawed parts. The book is a must-read in today's military environment of

openly confronting and discussing the psychological wounds of war without fear of stigma.⁷ It is an ideal vehicle for generating discussion on resiliency and the struggles of servicemembers and their families. *A Month in the Country* is recommended reading for leaders despite its quirks, especially at a time when the Army encourages "bold, adaptive, and broadened leaders."⁸

II. Healing Through Art, Love, and Fellowship

J.L. Carr's intent was to write "an easy-going story, a rural idyll" with a narrator looking back "regretfully across forty or fifty years."⁹ The author addresses this original intent and more through an emphasis on three key themes tied to the healing of Tom Birkin: art, love, and fellowship. These themes inform the following critical analysis of the book.

First, art plays a predominant role in the book.¹⁰ Tom Birkin is drawn to Oxgodby through his employment in uncovering the medieval wall painting, and he takes great pride in his artistic labor.¹¹ His love and expertise in art is documented throughout the story, and he even imagines the deceased artist speaking to him using the medium of the mural.¹² The actual painting—*A Judgment*—has great symbolism in the story with its depiction of the saved and the damned, infused with its religious message of redemption.¹³ These themes are juxtaposed with Tom

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¹ J.L. CARR, *A MONTH IN THE COUNTRY* (1980) (This book was placed on the Graduate Course reading list by Colonel (Retired) Dave Diner).

² CARR, *supra* note 1, at 20.

³ Jeremy Egner, *A Bit of Britain Where the Sun Still Never Sets*, N.Y. TIMES, Jan. 6, 2013, at AR2, available at http://www.nytimes.com/2013/01/06/arts/television/downton-abbey-reaches-around-the-world.html?_r=0 (describing the tremendous success of *Downton Abbey* in the United States and around the world).

⁴ CARR, *supra* note 1, at 20. The book is "short" in that it is approximately 135 pages.

⁵ *Id.* at 12.

⁶ *Id.* at 20.

⁷ All Army Activities Message, 211/2013, 301715Z Aug 13, U.S. Dep't of Army, subject: Ready and Resilient—Army Suicide Prevention Month (Sept. 2013) [hereinafter ALARACT Message 211/2013] (noting that leaders will continuously execute activities and events that build resiliency and promote education of mental health and suicide risks while reducing stigma).

⁸ U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP Foreword (1 Aug. 2012) (C1, 10 Sept. 2012) [hereinafter ADP 6-22] (describing the Chief of Staff of the Army's leader expectations).

⁹ CARR, *supra* note 1, at xxi.

¹⁰ J.L. Carr was an artist and had taken up landscape painting and sculpting before writing *A Month in the Country*. *Id.* at xv.

¹¹ *Id.* at 8.

¹² *Id.* at 35 (The artist says to Tom, "If any part of me survives from time's corruption, let it be this. For this was the sort of man I was.")

¹³ *Id.* at 75.

Birkin's own redemption and metaphorical resurrection from his war wounds.

Second, love is central to the story of Tom Birkin. J.L. Carr wanted Tom to look back regretfully over many years but, "recalling a time irrevocably lost, still feel a tug at the heart."¹⁴ Love inflicted a wound on Tom when Vinny abandoned him for another man, but Tom's time in Oxboddy also led him to laugh about Vinny leaving him.¹⁵ Missed opportunities at love are key to Tom's regret of Alice Keach—the wife of Reverend J.G. Keach. Tom never seized the moment when he was aware of his love for Alice: "I should have lifted an arm and taken her shoulder And I did nothing and said nothing."¹⁶ He describes losing Alice as the worst moment of his life.¹⁷ Yet, despite the pain of losing Alice, there is the hint that a second chance at love infused Tom with hope that may not have been present before Oxboddy. J.L. Carr never makes clear if Tom Birkin would agree with Tennyson that it is better to have loved and lost than never to have loved at all.¹⁸

Third, and finally, the theme of fellowship was pivotal to Tom's healing. This included the friendship with Kathy Ellerbeck.¹⁹ But the most important fellowship was born between Birkin and his fellow veteran of the war—Charles Moon. They immediately recognized one another as brothers-in-arms; Moon described them as "survivors" and "two of a kind."²⁰ Tom Birkin even shared with Moon his troubles with Vinny.²¹ They shared their post-war struggles and understood each other—they were "men apart."²²

The themes of art, love, and fellowship are central to Tom Birkin's healing process and serve as fertile ground for the analysis that follows.

III. Elements of a Masterpiece

J.L. Carr may have anticipated book reviews and critiques when he penned the following for Tom Birkin: "Well, we all see things with different eyes, and it gets you nowhere hoping that even one in a thousand will see things your way."²³ Fortunately for J.L. Carr, *A Month in the Country* has received plenty of critical acclaim since its first publication in 1980, and is not surprisingly described as "a masterpiece" in Michael Holroyd's introduction to the book.²⁴ Indeed, there are several superlatives to highlight for *A Month in the Country*.

The genius of *A Month in the Country* is its overall simplicity, given that it tackles so many weighty issues in such a small space. The consistent themes of art, love, and fellowship provide guideposts for the reader to follow along in a book without chapters. It is a novel that delves into complex topics including religion, love, sexuality, hope, loss, finality, pariahs, war, and depression. The more likely outcome of this approach in so few pages would be an overwhelmed reader, but J.L. Carr successfully navigates these land mines by making the story about ordinary people going through life's travails in "an easy-going story" during the "candle-to-bed age."²⁵ As a result, the reader is not entirely lost in the depth of the matter.

Carr's vivid, succinct, and efficient prose provides a lesson in effective writing and further makes the seemingly complex story accessible to all. The description of the English countryside transplants you and arouses your senses.²⁶ His narrative of the flirting between Tom and Alice elicits the reader's memories of first love.²⁷ He even makes an old stove an intriguing and entertaining part of the story.²⁸ Carr's use of humor and irony take the edge off complex issues, even engaging in the timeless tradition of jabbing lawyers.²⁹

¹⁴ *Id.* at xxi (describing the author's intent for Tom Birkin's tone in telling his story).

¹⁵ *Id.* at 114.

¹⁶ *Id.* at 129.

¹⁷ *Id.* at 132.

¹⁸ Alfred Lord Tennyson, *In Memoriam A.H.H.* Canto 27 (1849), available at <http://www.poetryfoundation.org/poem/174603>. J.L. Carr does not mention these famous lines from Tennyson's poem, *In Memoriam A.H.H.*, but he does reference "Tennyson weather" as "drowsy, warm, unnaturally still." CARR, *supra* note 1, at 88.

¹⁹ CARR, *supra* note 1, at 35. Birkin states, "[W]e understood each other perfectly from the moment she flung open the door." *Id.*

²⁰ *Id.* at 28–29.

²¹ *Id.* at 77.

²² *Id.* at 97.

²³ *Id.* at 76.

²⁴ *Id.* at xvii. The book also won the Guardian prize, was reprinted many times, and was made into a film in 1987. *Id.* at xix. The Guardian prize is an award given by the British newspaper of the same name to one excellent work of fiction each year.

²⁵ *Id.* at xxi.

²⁶ *Id.* at 19 (vividly describing Tom Birkin's view of the landscape after his first morning in the belfry).

²⁷ *Id.* at 116.

²⁸ *Id.* at 10–11 (describing his mechanical fascination with the stove and interjecting humor by portraying the stove's manufacturers as akin to the "Hapsburgs of the stove world").

²⁹ *Id.* at 15 (mocking the solicitors's "pig-headed refusal" to pay out money until the will's conditions were fulfilled).

A Month in the Country expertly addresses the fleeting nature of happiness and the cruelty of time through precise use of language and imagery. The promise of youth is “when the pulse of living beats strong.”³⁰ That optimism fades, according to Tom Birkin, and “it is now or never; we must snatch at happiness as it flies.”³¹ Moon tells his friend, “You can only have this piece of cake once; you can’t keep on munching away at it.”³² Finally, Birkin looks back with regret on his missed opportunity with Alice that summer in Oxgodby: “So, in memory, it stays as I left it, a sealed room furnished by the past, airless, still, ink long dry on a put-down pen.”³³ J.L. Carr makes the complicated theme of time crystal-clear through his masterful writing, and pens a classic, emotional ending to the story.

The appeal to so many potential readers of *A Month in the Country* is the ability to relate to the emotions of a yearning to escape, a need for healing, lost opportunities, a chance of redemption, and the almighty power of hope and love. These themes are not unique to the British, but rather a human experience that makes the book so enticing.

IV. Flaws in the Brush Strokes

At its base, *A Month in the Country* is about ordinary humans dealing with everyday human struggles. As a result, there are bound to be flaws in the story, given it is a human endeavor. The book is, “like all truly great works of art, hammering you with its whole before *beguiling* you with its parts.”³⁴

J.L. Carr’s brief novel appears rushed in parts and leaves the reader yearning for more development. There is so much earth to plow for the author, and his efficient writing style helps him accomplish the mission in a short space; but many of the characters and side-stories beg for further ink to be spilled. For example, the appearance of Sergeant Milburn and the revelation that Moon was court-martialed for homosexuality seems stilted and forced.³⁵ The follow-on revelation that “things were never quite the same” between Birkin and Moon following the discovery of the court-martial is also not fleshed out accordingly.³⁶ Such an important development deserves more attention and breadth.

³⁰ *Id.* at 101.

³¹ *Id.* at 104.

³² *Id.* at 121.

³³ *Id.* at 135.

³⁴ *Id.* at 75 (emphasis added).

³⁵ *Id.* at 110–11. Sergeant Milburn was a fellow British veteran of the Great War who knew both Birkin and Moon.

³⁶ *Id.* at 112.

Readers may also be distracted or disappointed in parts of the book for several reasons. First, J.L. Carr inserts numerous references to art and literature that require either an art history degree or easy access to the internet. This ties back in with the theme of art; J.L. Carr was a lifelong teacher, but it makes for unnecessary speed bumps in the story.³⁷ The book is really a *tour de force* in the humanities, with all of the references and topics covered, but it assumes too much of the reader. Second, the book contains British idioms and forms of British English, as is expected from this author, which can be difficult to follow. Third, the book at times hovers over the line of heavy pessimism for Tom Birkin that may be inconsistent with other aspects of the book, or stray from a more uplifting theme. Fourth, and finally, the book is slow at times for even its chosen subject matter.

Ultimately, like a fine work of art, the minor flaws in the book’s brush strokes blend in to the background as you examine the majestic whole. *A Month in the Country* is much too valuable as a whole to be undone by its few flawed parts.

V. Application to the Military

A small British work of fiction published in 1980 is not the obvious choice for a current leader’s recommended reading list, but *A Month in the Country* is a deceptively useful book for the military, including judge advocates.³⁸

The U.S. military has been engaged in combat operations for twelve years, and the stress of military service has placed a strain on servicemembers and families. As a result, the Army has initiated a Ready and Resilient Campaign demonstrating the Army’s commitment to building resiliency.³⁹ The Army has instructed its leaders to “continuously execute activities and events that build resiliency and promote education” of mental health issues and the risk of suicide while reducing the stigma.⁴⁰

The Chief of Staff of the Army’s leader expectations include “building agile, effective, high-performing teams”

³⁷ *Id.* at xiv–xv (describing J.L. Carr’s career as a teacher, including time spent in South Dakota, and his work as an artist).

³⁸ Judge advocates and their legal office teammates are not immune to the stress of military service. Judge advocates are also officers and leaders. As Supreme Court Justice Joseph Story once commented, the lawyer should not feel enough is done if he simply has mastered the law, but the lawyer “should addict himself to the study of philosophy, of rhetoric, and of *human nature*. It is from the want of this enlarged view of duty the profession has sometimes been reproached” Joseph Story, *The Value and Importance of Legal Studies*, Miscellaneous Writings of Joseph Story 527 (William W. Story ed. 1852) (emphasis added).

³⁹ ALARACT Message, 211/2013, *supra* note 7.

⁴⁰ *Id.*

and developing “bold, adaptive, and broadened leaders.”⁴¹ Part of leadership is knowing your subordinates and understanding human nature to spot the signs of unseen wounds. A leader’s subordinates and teammates in a military unit may have psychological wounds that require identification and treatment.

A Month in the Country is a useful tool for a leader, including judge advocates, looking to build an agile, effective team; learn about subordinates; and promote the Ready and Resilient Campaign. The short book easily lends itself to a professional development event with plenty of relevant topics to discuss.⁴²

Members of the military and their families can relate to *A Month in the Country* and the desire to escape for healing. Many of those stressed and wounded by service attempt to escape to their own Oxgodby. For example, Bethany Beach, Delaware, rolls out the red carpet for military families affected by the country’s last twelve years of war.⁴³ The town welcomes “Wounded Warriors” and provides gift baskets, kayaks, fishing boats, horses, jet skis, and lodging.⁴⁴ Attendees note that “there is no therapy like talking to someone else with PTSD”—a fellowship comment that could easily have come from Tom Birkin or Charles Moon.⁴⁵

VI. Conclusion

A Month in the Country delivers a complex, relevant, and enjoyable message in a small package. The book’s short list of technical flaws is outweighed by its overall artistic quality and is a must-read. While J.L. Carr’s novel based in the English countryside in 1920 may not be an obvious choice on first impression, a quick read unlocks lessons that any adaptable leader in today’s military can put into practice.

J.L. Carr’s *A Month in the Country* should be listed among the noteworthy literary and artistic exports from Britain to America; but, more importantly, perhaps it can lead to that “haven of calm water” and “new start” for at least one servicemember or family member in the United States.⁴⁶

⁴¹ ADP 6-22, *supra* note 8, *Foreword*.

⁴² Topics range from identifying and discussing psychological wounds, the value in fellowship with servicemembers, perceived social dislocation of servicemembers from the general public (being an outsider), dealing with loss, the importance of renewal, and much more.

⁴³ Petula Dvorak, *Bethany Beach Rolls Out the Red Carpet for Military Families*, WASH. POST, Sept. 5, 2013, http://www.washingtonpost.com/local/bethany-beach-rolls-out-the-red-carpet-for-military-families/2013/09/05/2cecbab6-1648-11e3-be6e-dc6ae8a5b3a8_print.html.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ CARR, *supra* note 1, at 20.

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 3172.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to ATRRS Self-Development Center and click on "Update" your ATRRS Profile (not the AARTS Transcript Services).

Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. 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. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil.

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site:
<http://jagcnet.army.mil>.

(2) Follow the link that reads “Enter JAGCNet.”

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(6) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

2. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

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 Information Technology Division 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 ITD office at (434) 971-3264 or DSN 521-3264.

3. 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. Lavinger, 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.Lavinger.civ@mail.mil.

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