# THE ARMY LAWYER

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**Lore of the Corps**

# A Murder in Manila—and then a Hanging

*By Fred L. Borch*[*]

*Regimental Historian & Archivist*

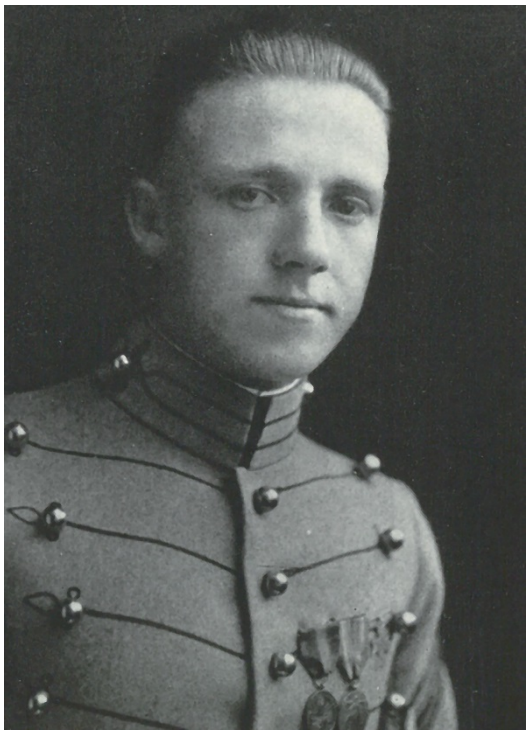
"Army Officer Hanged For Killing His Fiancée" screamed the headline in the *Boston Daily Globe*[1] the article that followed described how, on March 18, 1926, 25-year old Second Lieutenant (2LT) John S. Thompson calmly "and without making any statement . . . walked to a scaffold" where a noose was placed around his neck. Moments later, when Thompson met his end, his death made history. He was the first American officer to be executed in peacetime[2] and the only graduate of the U.S. Military Academy to be executed for a crime.

Born in Pernassus, Pennsylvania, in 1899, John Sewell "Tommy" Thompson did not enter West Point from civilian life as most cadets of this era. Instead, he enlisted in the Army in June 1917 and, on the basis of a competitive examination, obtained a spot as a cadet in 1920.[3]

After graduating in 1924 as a Second Lieutenant and receiving a commission as an officer in the Signal Corps, Thompson was assigned to the Philippines. He took the train from New York to San Francisco and then travelled by ship across the Pacific to the Philippines. He arrived at Fort William McKinley, located just outside Manila, in November 1924.[4]

In the Army of the 1920s, dinners and dancing were the focal point of many young, unmarried officers' lives outside of work. Many servicemembers traveled to Manila to meet up at the Army and Navy Club or the Manila Hotel to eat, drink, and socialize.[5]

Shortly after arriving in the Philippines, Thompson, then twenty-five years old, met Audrey Burley, the 16-year-old step-daughter of Captain Hamilton P. Calmes, an Army doctor serving in the Islands[6] at a party on a barge. She had "black, bobbed hair" and "pretty, bewitching eyes."[7] She was five foot four inches tall and weighed about 110 pounds.[8] While the records in Thompson's case do not contain many details about Audrey, she seems to have been quite popular, despite (or perhaps because of) her youth. She had a wide circle of friends and enjoyed dinners and dances with friends. She seemed to have been quite extroverted and was interested in acting; she danced the hula-hula in an amateur theatrical performance the night of her death.[9]



Second Lieutenant John S. Thompson, 1924

By February 1925, Thompson was infatuated with Burley. She was, he told his mother, "the most wonderful girl

[*] The author thanks Mr. Gordon Smith of Edmonton, Canada, for alerting him to the existence of the Thompson case. A version of this article was first published in the Winter 2015 edition of Prologue, the quarterly of the National Archives and Records Administration.

[1] *Army Officer Hanged For Killing His Fiancée*, BOSTON DAILY GLOBE, March 18, 1926, at A3.

[2] *Id.*

[3] *See* Gen. Courts-Martial 168928, National Archives and Records Administration [hereinafter GCM 168928], Findings and Conclusion of Medical Board in the Case of 2d Lieut. John S. Thompson, at 7-8 (on file with the Records of the Judge Advocate General, Record Group 153).

[4] GCM 168928, *supra* note 3, Memorandum from the Testimony of the Insanity Board.

[5] *See, e.g.*, JOSEPH P. MCCALLUS, THE MACARTHUR HIGHWAY AND OTHER RELICS OF AMERICAN EMPIRE IN THE PHILIPPINES (2010).

[6] GCM 168928, *supra* note 3, Letter from Dwight Davis, Secretary of War, to President Calvin Coolidge 1, Examination of Lieut. John S. Thompson at 10.

[7] GCM 168928, *supra* note 3, Letter, John S. Thompson to mother, May 25, 1925, at 1 [hereinafter Letter to Mother].

[8] GCM 168928 *supra* note 3, Autopsy Report, Audrey C. Burleigh, April 6, 1925, at 1.

[9] GCM 168928, *supra* note 3, Letter to Mother, *supra* note 6, at 6.

I ever met" and "the first girl to whom I ever said 'I love you.'"[10] After Audrey moved to Fort McKinley from Manila, she and Thompson became inseparable. He wrote to his mother:

> We went out night after night just by ourselves, generally to the Club or in back of it. It was wonderful with the tropical moonlight and Audrey's eyes and lips, which were more wonderful than any moon lit up for lovers. Sometimes we would hire a car for an hour or so during the evening. We loved to perfection. As Audrey said later over the phone, there wasn't any one could show us how to love.[11]

By April 1925, however, Thompson had grown despondent. Congress had changed the rules on pay for Army officers with prior enlisted service, meaning that Thompson's years of uniformed service prior to West Point would no longer count toward his salary.[12] This upset Thompson because he believed he could no longer afford to marry Audrey.[13] In addition, Audrey's mother had decided that her daughter should return to the United States at the end of April, and John Thompson was beside himself over this turn of events. While Audrey had promised to remain faithful him—and apparently even promised that she would secretly marry him before returning to the United States—Thompson was convinced that her departure would mean the end of their relationship.[14]

Even by the standards of the 1920s, in which both men and women held what we today would view as quite conservative ideas about the role of females in society, Thompson's views on women were out of step with his peers. As First Lieutenant W. H. Kendall put it in a sworn statement as part of the investigation into Burleigh's murder, "Thompson seemed to have the idea that his duty was to safeguard the chastity of any women he liked. He had . . . very strong and puritanical ideas of the relations between men and women."[15] According to Kendall, Thompson "did not believe in sexual intercourse before marriage and even considered kissing to be immoral."[16] While many of Thompson's contemporaries agreed with the former (at least in theory), his views on kissing were definitely out of step with the times.

John Thompson decided that there was only one way out of his predicament. Late in the evening on Saturday, April 4, 1925, he took a loaded Colt .45 caliber automatic pistol, which he had obtained from the arms room several months earlier, and hired a taxicab to take him to the Manila Hotel. He was looking for Audrey Burleigh, who had previously agreed to go to a dance with Thompson at the hotel.[17]

After arriving at the hotel, and learning that Audrey was at the Army and Navy Club, Thompson went by taxicab to that location, where he found and invited Audrey to go for a drive with him. As Thompson told his mother in a letter, written to her while he was locked up awaiting his trial by courts-martial, Thompson and Audrey began talking in the backseat of the taxicab.

> I started asking her is she loved me. She said once she had but wouldn't if I were going to act like this. . . . I was in a daze. . . . If she had only coaxed me like she always did to get me to do things and kissed me, I would have turned back. But she had no way of knowing my purpose, that I had lost control of myself.
>
> She leaned forward and kicked at the back of the head of the dumb Filipino driving the car. I pulled the automatic out, never loving her more than I did then. I, mercifully, can remember nothing from then 'til I saw her falling over on the seat, crying "I love you."
>
> Mother, that is what makes me want to be myself deprived of life . . . . I knew Audrey was wonderful and the best girl on the earth, but I didn't know they made them that loving and brave. Five shots had entered her body causing eleven wounds and she told the one who had done it that she loved him.[18]

Thompson continued in this letter that he had turned the gun on himself and that he intended to shoot himself in the heart. But, when he pulled the trigger, the sixth cartridge had not fed into the chamber of the Colt .45 and there was no discharge. Thompson said his "nerves were gone" and, apparently distraught and confused, he made no attempt to re-load the pistol and attempt once again to shoot himself.[19]

Thompson thought briefly about returning to his quarters on Fort McKinley to obtain more ammunition with which to commit suicide. He decided against this course of action, however, as he claimed to have forgotten where he had put

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[10] *Id.* at 1.

[11] *Id.*

[12] *See* Act of June 10, 1922, ch. 212, sec. 1, 42 Stat. 627.

[13] *Id.* at 1–2.

[14] GCM 168928, *supra* note 3, Letter from Dwight Davis, Secretary of War, to President Calvin Coolidge 2.

[15] GCM 168928, *supra* note 3, Statement of First Lieutenant W. H. Kendall 1.

[16] *Id.*

[17] GCM 168928, *supra* note 3, Interview, Colonel C. H. Conrad of 2nd Lieutenant John Sewell Thompson, April 6, 1925, Government Exhibit No. 7, at 15 [hereinafter Interview].

[18] Letter to Mother, *supra* note 6.

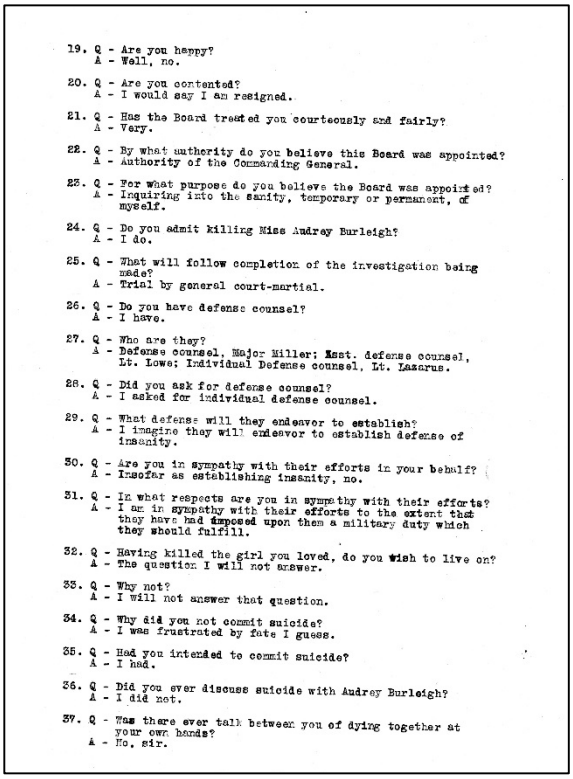
[19] Interview, *supra* note 15, at 19.

the ammunition in his room. Consequently, he told the taxi driver to take him to the 15th Infantry Regiment's guardhouse at Fort McKinley. On the way over, he claimed to have "kissed Audrey on the cheek and held her hand."[20]

Thompson arrived at 1:20 A.M. He got out of the automobile, walked up on the porch of the guard house and said to Corporal William M. Mamgun: "I am Lt. John S. Thompson, Qrs. 54, self-confessed slayer of Miss Audrey Burleigh. Lock me up, take her to the hospital."[21]

The following day, on the morning of April 6, Colonel (COL) C.H. Conrad, Jr. came to the guard house to question Lieutenant Thompson about the slaying of Audrey Burleigh. At this time, there was no requirement under either military or civilian law to advise a person suspected of a crime that he had a right to consult with a lawyer. Under the Articles of War, however, which set rules for the admissibility of evidence at courts-martial, any statement Thompson might made to Conrad could only be used at his trial if Thompson were told that he did not have to saying anything. He also had to be informed that anything he might say could be evidence against him.[22]

After Conrad advised Thompson of these rights, the young lieutenant decided to "make a full statement of the facts of the case." Conrad then put Thompson under oath and began questioning him.[23]



19. Q - Are you happy?
A - Well, no.

20. Q - Are you contented?
A - I would say I am resigned.

21. Q - Has the Board treated you courteously and fairly?
A - Very.

22. Q - By what authority do you believe this Board was appointed?
A - Authority of the Commanding General.

23. Q - For what purpose do you believe the Board was appointed?
A - Inquiring into the sanity, temporary or permanent, of myself.

24. Q - Do you admit killing Miss Audrey Burleigh?
A - I do.

25. Q - What will follow completion of the investigation being made?
A - Trial by general court-martial.

26. Q - Do you have defense counsel?
A - I have.

27. Q - Who are they?
A - Defense counsel, Major Miller; Asst. defense counsel, Lt. Lowe; Individual Defense counsel, Lt. Lazarus.

28. Q - Did you ask for defense counsel?
A - I asked for individual defense counsel.

29. Q - What defense will they endeavor to establish?
A - I imagine they will endeavor to establish defense of insanity.

30. Q - Are you in sympathy with their efforts in your behalf?
A - Insofar as establishing insanity, no.

31. Q - In what respects are you in sympathy with their efforts?
A - I am in sympathy with their efforts to the extent that they have had imposed upon them a military duty which they should fulfill.

32. Q - Having killed the girl you loved, do you wish to live on?
A - The question I will not answer.

33. Q - Why not?
A - I will not answer that question.

34. Q - Why did you not commit suicide?
A - I was frustrated by fate I guess.

35. Q - Had you intended to commit suicide?
A - I had.

36. Q - Did you ever discuss suicide with Audrey Burleigh?
A - I did not.

37. Q - Was there ever talk between you of dying together at your own hands?
A - No, sir.

Statement of Lieutenant Thompson April 18, 1925

Thompson admitted that he had contemplated killing Audrey Burleigh as early as April 2. He explained that he truly loved Audrey, that she definitely loved him and that she said would marry him before leaving the Philippines. Nonetheless, he ultimately decided to end her life for two reasons. First, Thompson was upset about being deprived of longevity pay for service as an enlisted man and as a cadet at West Point—money that Thompson insisted he needed if he were to marry Audrey Burleigh. "My other reason," he told COL Conrad, "was fear of the loneliness to which I would be subject to the next two years without her, and the doubt as to whether things would be quite the same then as before."[24]

The entire interview conducted by Conrad was recorded by a female typist, Miss Robertson, who typed out more than 200 questions and answers. Lieutenant Thompson then made minor pen-and-ink corrections to the statement, and signed it "John S. Thompson." At trial, this lengthy confession was admitted into evidence.[25]

Thompson's trial by general courts-martial opened at Fort McKinley on May 4, 1925. Lieutenant Thompson faced a single charge:

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[20] *Id.*

[21] GCM 168928, *supra* note 3, Statement of Corporal William M. Mamgun, Board of Medical Officers, April 22, 1925.

[22] Interview, supra note 15,, at 14.

[23] *Id.*

[24] *Id.* at 18.

[25] *Id.*

> In that Second Lieutenant John S. Thompson, Signal Corps, did, at Manila, Philippine Islands, on or about the 5th day of April, 1925, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one, Audrey Burleigh, a human being, by shooting her with a pistol.[26]

The proceedings opened on May 4—only a month after the slaying—so that a number of witnesses, who were scheduled to soon leave the Philippines for the United States, could testify prior to departing. After they testified, the proceedings were adjourned for three months so that Thompson's two defense counsel, 2LTs Frank L. Lazarus and Leslie E. Simon, who planned to defend Thompson using an insanity defense, could obtain depositions from the United States. The hope was that depositions from Thompson's family and friends would address his mental condition and provide support for the insanity plea.[27]

Based on Thompson's confession to the crime, and his admission that he had contemplated killing Audrey days prior to the shooting, it was very likely that the prosecutor, Major (MAJ) Thomas A. Lynch, would prevail on the merits.[28] The only viable defense was some sort of insanity plea or diminished capacity at the time of the offense. Certainly Thompson's explanation for murdering the young girl he professed to have loved made little sense to those who heard it, and his actions immediately after the slaying only underscored the belief—at least of some observers—that he was "not quite right."[29]

Based on the circumstances surrounding Audrey Burleigh's homicide, the Army had already decided to look into Thompson's "mental and physical condition." Consequently, on April 18, a Board of Medical Officers consisting of three Army physicians, examined John Thompson. They unanimously concluded that he was sane at the time of the crime.[30] In July, this same board met a second time to again inquire into Thompson's sanity because of the depositions obtained by Thompson's defense counsel from the United States. After carefully examining the depositions, and re-examining the accused, the three Army physicians again concluded that "Lieutenant John S. Thompson did not at the time of the offense charged suffer from any mental defect or derangement" that prevented him from controlling his actions. The Board further concluded that, at the time of the murder, he was able to appreciate "right or wrong" and that he was now able to understand the nature of the trial proceedings and cooperating in his own defense.[31]

Despite the opinion of the Board of Medical Officers, there was every reason to think that an insanity defense might still prevail at trial, given the unusual circumstances of the homicide and Thompson's decidedly abnormal behavior. But Thompson would have none of it. When his court-martial reconvened three months later, on August 3, 1925, Thompson refused to allow his counsel to raise the insanity defense, even going so far as to threaten to fire them if they persisted in raising the defense. Thompson believed it would be dishonorable to claim insanity when he believed himself to be sane and that an insanity plea would bring shame and embarrassment to his family.[32]

But, while Thompson refused to plead insanity, he did raise a new defense: that he could not be convicted of premeditated murder because he lacked the requisite malice. The defense now contended that the accused could not be found guilty as charged because Thompson had killed Audrey Burleigh while "in the grip of and because of passion or fear aroused by the thought of losing" her. This meant that he was guilty of manslaughter and not murder.[33]

It was a novel defense but one that did not have much chance of success. It was elementary law in the 1920s, as it is today, that in order for a provocation of some type to reduce murder to manslaughter, that provocation must be sufficient "to excite uncontrollable passion in the mind of a reasonable man."[34] Disappointment over a reduction in military pay and fear of losing the love of a sixteen-year-old girl simply was not going to be adequate provocation, as a matter of law.

Lieutenant Thompson's trial lasted a total of four days: August 3 and 4, and September 1 and 2, 1925. On the last day, the court-martial panel adjourned for deliberations. When the panel members returned hours later, Brigadier General (BG) Charles J. Symmonds, the president of the court, announced that the jury, "upon secret written ballot," had first voted on the accused's sanity. Said Symmonds: "The accused was, at the time of the commission of the alleged offense, so far free from mental defect, disease, or derangement . . . both (1) to distinguish right from wrong and

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[26] GCM 168928, *supra* note 3, U.S. War Department, Adjutant General's Office Form No.594, Charge Sheet, April 8, 1925, at 2.

[27] United States v. John S. Thompson, No. 015589 (Sept. 29, 1925) 68.

[28] For more on the remarkable life and career of Lynch, see Fred L. Borch, *The Life and Career of Thomas A. Lynch: Army Judge Advocate in the Philippines and Japanese Prisoner of War*, ARMY LAW. March 2015, at 1.

[29] GCM 168928, *supra* note 3, Letter from Rev. Dr. J. Milton Thompson to Secretary of War Dwight F. Davis, Subject: 2nd Lieutenant John S. Thompson, Signal Corps, Court Martial Case, at 2.

[30] GCM 168928, *supra* note 3, Supplemental Proceedings, Special Orders No. 45, Aug. 1, 1925.

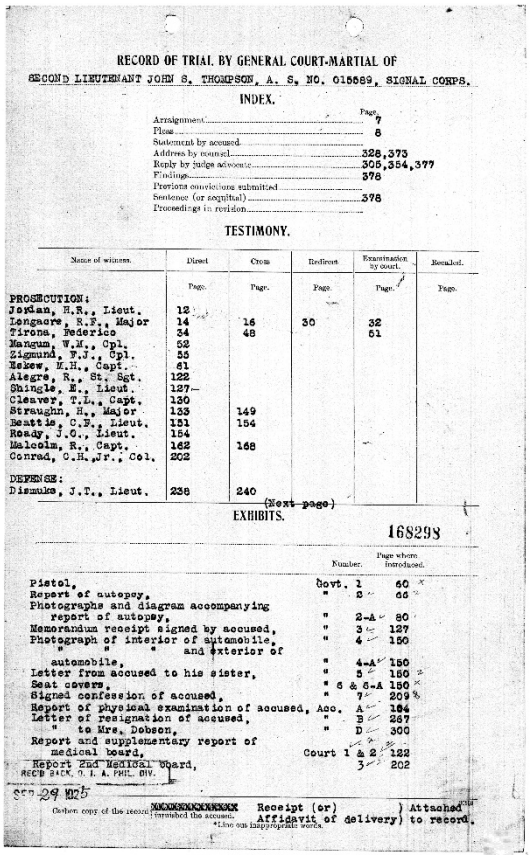
[31] GCM 168928, *supra* note 3, Letter from Rev. Dr. J. Milton Thompson to Secretary of War Dwight F. Davis, Subject: 2nd Lieutenant John S. Thompson, Signal Corps, Court Martial Case, at 4.

[32] *Id.*

[33] United States v. John S. Thompson, No. 015589 (Sept. 29, 1925) at 377.

[34] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 443 (1921) [hereinafter MCM 1921].

(2) to adhere to the right."[35] General Symmonds then stated that the court members had voted on the issue of guilt or innocence, and found Thompson guilty of premediated murder. His sentence: to be hanged by the neck until dead.[36]



RECORD OF TRIAL BY GENERAL COURT-MARTIAL OF
SECOND LIEUTENANT JOHN S. THOMPSON, A. S. NO. 015589, SIGNAL CORPS.

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Clothes copy of the record furnished the accused. XXXXXXXXXXXXXX Receipt (or) Affidavit of delivery) Attached to record.

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Record of Trial, *United States v. John S. Thompson*

Looking at the record in John Thompson's case, it is not too difficult to understand the verdict. First of all, it is difficult to convince a jury that an accused was insane at the time he committed a crime, especially when that crime is one of extreme violence. But there were other factors that made the verdict of guilty highly likely. The victim was but sixteen years old, and the officers sitting in judgment of Thompson no doubt viewed her as an innocent young girl whose life had been taken from her for no good reason. Her status as the step-daughter of a fellow officer almost certainly influenced their decision too. Finally, there was no provocation, no lover's quarrel that might have enraged Thompson. On the contrary, since the accused had admitted thinking about murdering his fiancée for some days prior to the shooting, BG Symmonds and his fellow jurors were likely to see Thompson's actions as premeditated. Certainly the fact that Thompson fired five bullets from his Army pistol into Audrey meant this was no accident. Finally, for a second lieutenant to be brooding about a loss of pay, and using that as an excuse for murder, at least in part, would have engendered no sympathy.

Under the military criminal law of the 1920s, there was no appellate court that could hear an appeal from Thompson as would have occurred in a civilian criminal prosecution. On the contrary, Congress provided only that after Major General (MG) William Weigel, the Philippine Department commander who had convened the court-martial, took action on the findings and sentence, would a three-member "Board of Review" examine Thompson's trial for any irregularities.[37] This board, consisting of three Army judge advocates who were experts in criminal law, was located at the War Department in Washington, D.C. Additionally, because Thompson had been condemned to death, this sentence must be personally approved by the president. This is still the rule today.[38]

Consequently, the entire record in Thompson's case went by boat from Manila to San Francisco, and then by train to Washington, D.C. It was first examined by the Board of Review. That board's decision—and recommendation—went next to MG John A. Hull, The Judge Advocate General of the Army. The Army lawyers in his office studied the Thompson record and were the focal point for any correspondence from Thompson's family, friends and the public relating to the case. After General Hull and his staff had completed their review of Thompson's court-martial, Hull signed a memorandum containing a recommendation in the case for President Calvin Coolidge. Hull's memo went to the president by way of Dwight F. Davis, the Secretary of War.[39]

Thompson's father, the Reverend Dr. J. Milton Thompson, was a prominent Presbyterian minister with a church on Long Island, New York. He had considerable influence, and immediately hired New York City attorney Newton W. Gilbert to advocate on behalf of his son. He also enlisted George W. Wickersham, who had served as U.S. Attorney General from 1909 to 1913, to appear personally before General Hull in his War Department office and plead for Lieutenant Thompson's life.[40] Associates and colleagues of the Thompson family also wrote letters requesting clemency.[41]

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[35] United States v. John S. Thompson, No. 015589, Sept. 29, 1925, at 378.

[36] *Id.*

[37] GCM 168928, *supra* note 3, Judge Advocate General's Department, Board of Review (1926).

[38] *See* UCMJ art. 71a (2012); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1207 (2012).

[39] GCM 168928, *supra* note 3, 1st Ind., J. A. Hull, The Judge Advocate General to Dwight F. Davis, Secretary of War.

[40] GCM 168928, *supra* note 3, Letter fromRev. Dr. J. Milton Thompson to Major General John A. Hull, The Judge Advocate General, Re: Second Lieutenant John S. Thompson, Dec. 28, 1925, at 1.

[41] GCM 168928, *supra* note 3, Letter from Newton W. Gilbert to Secretary of War, Jan. 13, 1926; *Id.* Letter, Officers, Members and Congregation of Sage Memorial Presbyterian Church, to Major General John A. Hull.

The gist of their argument—as Reverend Thompson put it in a December 28, 1925 letter to General Hull—was that while Lieutenant Thompson had shot and killed Audrey Burleigh, this murder was the direct result of an "uncontrollable impulse" arising out of "an adolescent complex."[42] The Thompson family—Reverend Thompson, his wife and his daughter—had been "amazed, astounded, perplexed and bewildered" by the "revolting nature" of the homicide. But they were convinced that the "abnormal" aspects of the slaying must indicate that their son and brother was insane; there could be no other explanation.[43]

Major General Hull knew that Thompson's mental state was the key to the proper recommendation. Consequently, he asked MAJ (Dr.) J. B. Anderson, then stationed at Walter Reed General Hospital, to look at the Thompson files and give his opinion as to the accused's sanity and mental responsibility.[44]

On January 7, 1926, MAJ Anderson wrote to Judge Advocate Major General Hull. Having "carefully examined the record . . . . with special attention to the reports of the two Medical Boards and to the various affidavits furnished by his parents," Hull concluded that "there is no evidence of insanity." On the contrary, Anderson agreed with the psychiatrists who examined Thompson prior to his trial in Manila. They determined that Thompson exhibited "antisocial behavior" and "excessive jealousy," and that he sought "gratification of personal desires without regard to the rights of others."[45] What might today be labeled as 'narcissism,' however, did not mean that Thompson was insane—at least as a matter of law.

The Thompson papers reveal one other factor that almost certainly had some impact on his case. This factor was that another homicide had occurred in Manila about the same time as Thompson had murdered his fiancée.

As Colonel N. D. Ely, the Chief, Military Justice Division, explained in a memorandum, this was germane because a Private William M. Johnson had been sentenced to death—and hanged—for murdering a fellow Soldier. As Ely put it, Johnson was a Soldier "with little or no education and obviously of a low mental type" and, after a quarrel and fight with another Soldier, Johnson ambushed that Soldier and killed him. He was tried by general court martial, convicted of pre-meditated murder, and his death sentence carried out while Thompson's case was under discussion. In Ely's view, Thompson deserved to be executed for "firing five bullets . . . into . . . an innocent 16-year old girl, a member of a brother officer's family."[46] As he wrote,

> I am convinced that if after a simple private soldier has been hanged for shooting another soldier, an officer of the same Division escapes with any less punishment after he has been convicted of the brutal murder of an innocent young girl, the effect on discipline and morale of the Philippine Division will be as bad as could possibly be imagined.
>
> I have always maintained that the chief justification for punishment of crime is its deterrent effect on others and I think that this is a typical instance in which, under the circumstances . . . the death penalty should be inflicted, not only because it is fully merited but also for the further reason that the discipline of this particular Division and the Army as a whole require it. I believe if capital punishment is every justified in time of peace it is not only justified but actually demanded in this case.[47]

The Thompson family knew about this other homicide, and they were worried that it would affect John Thompson's case. This explains why Reverend Thompson wrote a letter to President Calvin Coolidge on January 20, 1926 in which he implored the president to distinguish between the two cases and not let "the question of discipline in the Army" and any desire for uniformity of result to influence Coolidge's decision.[48]

In a final six-page typed letter to President Coolidge, dated January 25, 1926, Reverend Thompson again stressed that his son's life should be spared because he was "mentally incompetent." The theme of this letter was that the younger Thompson was "abnormal" when it came to girls. "He would fall violently in love with some girl . . . . and he assumed a propriety interest in her and attempted to direct every act of hers." According to his father, this resulted in "a number of episodes which bear a great similarity to the situation in Manila."[49] Reverend Thompson then told the president the following story about his son as a teenager:

> He took out riding a young lady, Marian Andrews, in the early evening. He proposed to marry her

[42] GCM 168928, *supra* note 3, Letter from Rev. Dr. J. Milton Thompson to Major General John A. Hull, The Judge Advocate General, Re: Second Lieutenant John S. Thompson, Dec. 28, 1925, at 3.

[43] *Id.* at 2.

[44] GCM 168928, *supra* note 3, Memorandum to The Judge Advocate General of the Army from Major J.B. Anderson, Medical Corps, Jan. 7, 1926.

[45] *Id.*

[46] GCM 168928, *supra* note 3, Memorandum for The Judge Advocate General from Colonel N.D. Ely, Chief, Military Justice Section, Subject: Record of Trial in the Case of Second Lieutenant John S. Thompson, Signal Corps.

[47] *Id.* at 2.

[48] GCM 168928, *supra* note 3, fromLetter, rev. Dr. J. Milton Thompson to Honorable Calvin Coolidge, President of the United States, Re: The Case of Lieut. John S. Thompson, U.S.A., Jan. 20, 1926, at 1–2.

[49] GCM 168928, *supra* note 3, Memorandum for His Excellency, The President of the United States, from Rev. Dr. J. Milton Thompson, Jan. 25, 1926, at 1.

> immediately. She declined. He pulled a revolver from his pocket and pointed it at her face and said she would marry him or he could kill her. She wisely said alright, she would marry him but she needed to go home first to get some things. She reached home, found her mother in great anxiety waiting outside the door and thereby escaped him.[50]

Reverend Thompson then closed this story with this sentence: "He enlisted in the Army the next morning."[51]

One has to wonder what President Coolidge and his advisors must have thought when they read about young Thompson and Marian Andrews. Rather than engendering sympathy for Lieutenant Thompson, it seems highly likely that Reverend Thompson's disclosure caused the White House to conclude that he was a dangerous psychopath who had found refuge in the Army and managed to attend West Point and earn a commission. Was what happened to Audrey Burleigh foreseeable?

In the end, efforts to save John Thompson were all to no avail. In his one-page recommendation to Secretary of War Dwight Davis, General Hull wrote that "the undisputed facts in the case show a cruel and premeditated murder." He further insisted that not only was there "no evidence of any psychosis, but that on the contrary Lieutenant Thompson . . . . was sober, sane and fully responsible for his acts." Davis, in his nine-page recommendation to President Coolidge, informed the president that Thompson was "guilty of the unprovoked and atrocious murder of an innocent young girl."[52]

On February 9, 1926, President Coolidge confirmed the death sentence in Lieutenant Thompson's court-martial.[53] Slightly more than a month later, on March 18, 1926, John Sewell Thompson climbed the stairs to the gallows, which were located in a warehouse at Fort McKinley. He had no last words. After the hangman put a noose around his neck, and tied Thompson's hands behind his back, the one officer and eight enlisted men present in the warehouse witnessed the trap door open and Thompson plunge to his death. He was the first American officer to be executed in peacetime and remains the only graduate of West Point to be hanged.[54]

President Calvin Coolidge confirmed Lieutenant Thompson's Death Sentence on February 9, 1926

Whatever one may think of the merits of the Thompson murder case, the fact is that everyone involved in the trial and its aftermath died long ago. For obvious reasons, those related by blood or marriage to Lieutenant Thompson or to his victim, Audrey Burleigh, are unlikely to disclose any connection to them at this time. Similarly, the U.S. Military Academy at West Point prefers that this graduate remain forgotten—as would any institution of higher learning with a similarly situated alumni.

But *United States v. Thompson* is a case that should not be forgotten. It shows that human beings then, as now, are capable of making tragic decisions with horrific consequences. After all, a murder was committed in Manila for apparently no good reason—a homicide that caused much suffering in both the Burleigh and Thompson families for many years. The court-martial record with its many depositions and letters also provides a window into what life was like in the Army in the Philippine Islands in the 1920s. This, too, is what makes Thompson's case worth reading about. Finally, for those interested in the history of the military criminal legal system, *United States v. Thompson* is a first-class example court-martial conducted in the Army in the years before World War II.

*More historical information can be found at*

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

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

[50] *Id.* at 2.

[51] *Id.*

[52] GCM 168928, *supra* note 3, Letter from Dwight Davis, Secretary of War, to President Calvin Coolidge 1, Examination of Lieut. John S. Thompson at 9.

[53] GCM 168928, *supra* note 3, War Department, Gen. Court-Martial Orders No. 5, Feb. 9, 1926.

[54] *Army Officer Hanged for Killing His Fiancée*, *supra* note 1, at A3.

# Advising Special Forces

*Major Ian W. Baldwin*[*]

## I. Introduction

You have arrived. You previously asked for an assignment as a special forces battalion judge advocate and now here you are. Your new paralegal noncommissioned officer (NCO), Staff Sergeant (SSG) Smith, has escorted you to your new office. Before you can gather yourself, Smith starts briefing you.

"Ma'am,[1] I'm really glad you're here. The battalion commander wants to know what to do with one of our Soldiers who popped up on the blotter—here it is." You see something about bringing an unregistered weapon onto post. Standard stuff, you think, as you begin to think through possible courses of action for the command. You wonder if this generates an automatic general officer memorandum of reprimand (GOMOR) from the Office of the Staff Judge Advocate (OSJA) of your higher headquarters at Fort Bragg or at the garrison OSJA. You also make a mental note to check on any withholding policies and find the battalion commander's office very soon. You reply, "OK, thanks. What's next?"

"Well, now that you're here, I don't have to ask group legal to take care of these things," he replies. "This is a training concept for one of our teams," he continues. "They're going out to a training area on a different installation and are thinking about training on someone's farm. These aren't tough to do, and I can draft them for you." You start to ponder this issue, but SSG Smith is not yet done.

"Another thing that I had to go to group for was support on legal briefings. We have a few teams kicking out, one on a Joint Combined Exchange Training (JCET) and one on an Execute Order (EXORD) mission." You are about to say that all of that is no problem, when an NCO wearing a special forces tab[2] steps into the office.

He asks for help with his "tab revo" packet, but you have no idea what that means. You buy yourself some time by asking if he can return after lunch. The NCO looks a little nonplussed, but he agrees. SSG Smith says, "Way to think on your feet, sir. But this office helped push that tab revo through." You nod, but you still do not know what a tab revo is.

Before you can ask, SSG Smith says, "Sir, I've been wanting to take paternity leave for a while now. Taking care of the underlap and all . . . I'm just about to lose out on it. So, can you do without me for the next ten days?" All of what you have just seen and heard probably is not too difficult, you think. You just do not know what you do not know. You swallow hard. "Sure," you hear yourself saying.

The foregoing provides a typical sampling of the issues that special forces (SF) battalion judge advocates (JA) regularly confront. This article will introduce a newly-assigned SF battalion JA to the practice of a legal advisor to SF units. Further, the following will especially help the SF battalion JA who cannot make it to off-site courses at the beginning of his assignment,[3] thereby enhancing his ability to

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[1] Positions for women as Special Forces Battalion Judge Advocates and Paralegal non-commissioned officers (NCOs) have recently opened. *See* U.S. DEP'T OF ARMY, DIR. 2015-08, EXPANDING POSITIONS IN OPEN OCCUPATIONS FOR THE ASSIGNMENT OF FEMALE SOLDIERS WITHIN U.S. SPECIAL OPERATIONS COMMAND (25 Feb. 2015); Military Personnel Message, 15-088, U.S. Army Human Res. Command, subject: Implementation of Army Directive 2015-08 (23 Mar. 2015). *See also* Special Insert, *U.S. Army Special Operations Command ARSOF 2022, Part II*, SPECIAL WARFARE, July-Sept. 2014, at 1, 19, http://www.dvidshub.net/publication/issues/22683 (highlighting progress on "Project Diane" which "expand[s] service opportunities for women and explore concepts to leverage gender in the conduct of [special] operations") [hereinafter Special Insert]. Women have been serving in previously open positions as group judge advocates and group support battalion judge advocates.

[2] U.S. DEP'T OF ARMY, REG. 600-8-22, MILITARY AWARDS para. 8-49 (11 Dec. 2006) (RAR 24 June 2013) [hereinafter AR 600-8-22]. The special forces tab is commonly referred to as a "long tab." *See e.g. What does It Take to Become a Green Beret?* SAND DIEGO UNION-TRIBUNE (Aug. 26, 2015 1:48 PM), http://www.sandiegouniontribune.com/news/2015/aug/26/green-beret-special-forces-requirements/

[3] *Course Information*, JOINT SPECIAL OPERATIONS UNIV., https://jsou.socom.mil/Pages/CourseInformation.aspx?CourseName=Joint Special Operations Legal Advisor Course (last visited May 31, 2016); E-mail from Major Jeff Rohrbach, Group Judge Advocate, 5th Special Forces Group (Airborne), to author (Sept. 23, 2014 09:15 EST) (on file with author); Interview with Captain Keith Schellack, Battalion Judge Advocate, 3d Battalion, 5th Special Forces Group (Airborne) (Dec. 3, 2014).

practice preventive law.[4] This article will change the issues from "unknown unknowns" into "known knowns" and "known unknowns."[5]

This article will proceed in four more parts. Part II will broadly explore the attributes of special operations, special operations forces (SOF), the SOF mission, and SOF Soldiers. The article will not address how one receives assignment as a SF battalion JA,[6] the storied history of the SF Regiment,[7] or specific SF unit composition.[8] Based on Part II, Part III will address the practical considerations for the SF battalion JA in rendering legal advice. Part IV will then examine specific substantive considerations of practicing at a SF battalion. Finally, Part V concludes the article.

## II. The Special Forces' Mission Requires Unique People

### A. Statutes and Doctrine

Special operations forces are "special" both by statute and by the Secretary of Defense's (SecDef) designation. Although many look at SOF and SF as superior to conventional forces,[9] one has to follow up with the question, "better at what?" The "what" is the particular group of core activities that Congress has set aside for SOF. The "who" is whomever the SecDef designates to accomplish SOF core activities.[10] Special operations forces are "[t]hose Active and Reserve Component forces of the Services designated by the SecDef and specifically organized, trained, and equipped to conduct and support special operations."[11] Special forces Soldiers, also called "Green Berets"[12] because of their distinctive headgear, fall under this definition as a subset of SOF.[13]

Special operations are those "operations requiring unique modes of employment, tactical techniques, equipment and training often conducted in hostile, denied, or politically sensitive environments and characterized by one or more of the following: time sensitive, clandestine, low visibility, conducted with and/or through indigenous forces, requiring regional expertise, and/or a high degree of risk."[14] Within these operations, SOF executes statutorily specified core activities[15] for example, "direct action," "strategic reconnaissance," "unconventional warfare," "foreign internal defense," and "counterterrorism."[16]

A unique SOF headquarters commands SOF subordinate commands. United States Special Operations Command (USSOCOM) is a unified combatant command with responsibilities similar to those of a service, military department, or defense agency.[17] United States Special Operations Command commands Joint Special Operations Command, Air Force Special Operations Command, Marine Special Operations Command, Naval Special Warfare Command, and U.S. Army Special Operations Command (Airborne) (USASOC(A)).[18] United States Army Special Operations Command (Airborne) in turn commands, among other units, First Special Forces Command (Airborne) (1st SFC(A)).[19] Additionally, USSOCOM commands the theater special operations commands (TSOCs).[20] The TSOCs serve under the operational control (OPCON)[21] of each combatant

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[4] U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 5-3 (30 Sept. 1996) (RAR 13 Sept. 2011) [hereinafter AR 27-1]; U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 4-6 (18 Mar. 2013) [hereinafter FM 1-04].

[5] *See* Transcript, DoD News Briefing-Sec'y Rumsfeld and Gen. Myers (Feb. 12, 2002), http://archive.defense.gov/transcripts/transcript.aspx?transcriptid=2636

[6] This is a topic a Judge Advocate Captain should address with his or her Staff Judge Advocate and the Personnel, Plans and Training Office.

[7] *See generally Special Forces History*, U.S. ARMY SPECIAL OPERATIONS COMMAND, http://www.soc.mil/USASFC/SFhistory.html (last visited May 31, 2016).

[8] *See generally infra* Part VIII.

[9] "Conventional forces" is the preferred doctrinal term to "general-purpose forces." Jeffrey Hasler, *Defining War*, SPECIAL WARFARE, Jan.-Feb. 2011, at 12, 16–17. *See also* JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 55 (8 Nov. 2010) [hereinafter JOINT PUB. 1-02].

[10] *See* 10 U.S.C. § 167(i) (2012); *see also* ELVIRA N. LOREDO ET AL., AUTHORITIES AND OPTIONS FOR FUNDING USSOCOM OPERATIONS 3–4 (2014).

[11] JOINT PUB. 1-02, *supra* note 9, at 236.

[12] *Green Berets*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY & MUSEUM, http://www.jfklibrary.org/JFK/JFK-in-History/Green-Berets.aspx (last visited May 15, 2016).

[13] *See* U.S. DEP'T OF ARMY, DOCTRINE REFERENCE PUB. 3-05, SPECIAL OPERATIONS paras. 3-57 to 3-63 (31 Aug. 2012) [hereinafter ADRP 3-05].

[14] JOINT PUB. 1-02, *supra* note 9, at 236.

[15] 10 U.S.C. § 167(j); JOINT CHIEFS OF STAFF, JOINT PUB. 3-05, SPECIAL OPERATIONS II-2 (16 July 2014) [hereinafter JOINT PUB. 3-05]; FM 1-04, *supra* note 4, para. 14-3. *See also infra* note 126 to 130 and accompanying text.

[16] 10 U.S.C. § 167(j).

[17] 10 U.S.C. §§ 164(c), 167(a), (e)–(f); DAVID TUCKER & CHRISTOPHER J. LAMB, UNITED STATES SPECIAL OPERATIONS FORCES 97 (2007); U.S. DEP'T OF DEF., DIR. 5100.01, FUNCTIONS OF THE DEPARTMENT OF DEFENSE AND ITS MAJOR COMPONENTS, para. 4(e) (21 Dec. 2010); U.S. SPECIAL OPERATIONS COMMAND, PUB. 1, DOCTRINE FOR SPECIAL OPERATIONS 11 (5 Aug. 2011) [hereinafter USSOCOM PUB. 1].

[18] 10 U.S.C. § 167(e)(2)(C); USSOCOM PUB. 1, *supra* note 17, at 11–14.

[19] This command will merge into Special Warfare Command (Airborne). Special Insert, *supra* note 1, at 10–11. United States Army Special Forces Command (Airborne) has recently changed its designation to 1st SFC(A).

[20] Michael D. Tisdel et al., Theater Special Operations Command Realignment, at slide 4 (17 June 2014) (PowerPoint presentation) INTERNATIONAL COMMAND AND CONTROL INSTITUTE, http://www.dodccrp.org/events/19th_iccrts_2014/post_conference/presentations/005.pdf, (last accessed 22 Mar. 2016)

[21] JOINT PUB. 1-02, *supra* note 9, at 189.

command (CCMD).[22] First SFC(A) provides SF units for employment by TSOCs, usually in alignment with the SF groups' respective regional focus.[23]

Legislation "gave the [USSOCOM] its own line in the defense budget and the authority to develop and acquire SOF-specific equipment . . . ."[24] Special operations forces "must use unorthodox approaches"[25] that "require unconventional equipment and training."[26] This statutory authority means that USSOCOM can equip its forces with materiel that each service procures, also known as "service-common" [27] equipment, and can also procure USSOCOM's own, "special operations-peculiar"[28] equipment.

Special forces are not different because of any purported mystique.[29] The substantive difference between conventional Soldiers and SF Soldiers, among others, is that the above missions drive different modes of operation. These missions require "hand-picked, distinctively prepared personnel." [30] The ability to escape conventional forces' strictures has undoubtedly motivated Soldiers to volunteer for assessment, selection, and continued service in the SF Regiment.[31]

B. The Characteristics and Abilities of Special Forces Soldiers Make Them a Unique Army Client

As stated above, U.S. Army special forces[32] are a subset of SOF. An outward distinction is that only SF Soldiers get to wear the SF Tab.[33] This emphasis on SOF vs. SF may seem a pedantic technicality, but people often confuse the terms,[34] and mastery of terminology—and a willingness to ask about it[35]—can help boost a JA's credibility.

Another way to view the general characteristics of the SF Soldier is through the lens of the five "SOF Truths."[36] Truth 1 is, "Humans are more important than hardware."[37] "(The Special Forces Operating Command) has often stressed that its philosophical approach is to 'equip the warrior, not man the equipment.'" [38] Truth 2 is, "Quality is better than quantity." Special Forces only accepts Soldiers into its ranks those who meet the requirements, those Soldiers who "have an uncommon will to succeed."[39]

Truth 3 is, "[SOF] cannot be mass produced," and Truth 4 is, "Competent [SOF] cannot be created after emergencies occur."[40] "[S]pecial operations require creative approaches to problem-solving that sometimes defy American norms and military doctrine without violating fundamental American values."[41] Achieving this judgment takes time; therefore, it cannot materialize on demand in an emergency.[42] Special forces Soldiers feel comfortable working and making decisions in so-called gray areas, which requires a "unique ability to lead in ambiguous circumstances."[43]

Truth 5 is, "most special operations require non-SOF assistance." [44] The battalion JA is part of that non-SOF assistance. Most operations will require legal advice and support. The SF battalion JA and paralegal NCO provide this assistance as a staff section.

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[22] *See* 10 U.S.C. § 167(d)(1); MICHAEL D. TISDEL ET AL., *supra* note 20, at slide 4.

[23] *See U.S. Army Special Forces Command*, U.S. ARMY SPECIAL OPERATIONS COMMAND, http://www.soc.mil/USASFC/HQ.html (last visited May 15, 2016).

[24] National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 1311(c), 100 Stat. 3816, 3983 (1986); TUCKER & LAMB, *supra* note 17, at 97; USSOCOM PUB. 1, *supra* note 17, at 3-4; LOREDO ET AL, *supra* note 10, at 3-4.

[25] TUCKER & LAMB, *supra* note 17, at 149.

[26] *Id.*

[27] JOINT PUB. 1-02, *supra* note 9, at 230.

[28] 10 U.S.C. § 167(e)(4)(A); JOINT PUB. 1-02, *supra* note 09, at 237.

[29] *See* TUCKER & LAMB, *supra* note 17, at 45.

[30] STAFF OF H. ARMED SERV. COMM., 100TH CONG., UNITED STATES AND SOVIET SPECIAL OPERATIONS: A STUDY 73 (Comm. Print 1987) (primarily written by John M. Collins) [hereinafter Collins, SPECIAL OPERATIONS].

[31] *See* TUCKER & LAMB, *supra* note 17, at 49.

[32] JOINT PUB. 1-02, *supra* note 9, at 236.

[33] AR 600-8-22, *supra* note 2, para. 8-49. *But see id.* tbl.8-1.

[34] *See, e.g.*, Major E. John Gregory, *The Deployed Court-Martial Experience in Iraq 2010: A Model for Success*, ARMY LAW., Jan. 2012, at 6, 6 n.3 (2012).

[35] Lieutenant Colonel Mike Ryan, *Azimuth, Distance, and Checkpoints: Thoughts on Leadership, Soldiering, and Professionalism for Judge Advocates (JA)*, ARMY LAW., Aug. 2005, at 40, 43–44 [hereinafter Ryan, *Thoughts on Leadership*]; Interview with Captain Schellack, *supra* note 3; Telephone Interview, Captain Jack Einhorn, Battalion Judge Advocate, 4th Battalion, 3d Special Forces Group (Airborne) (Dec. 9, 2014).

[36] *SOF Truths*, U.S. SPECIAL OPERATIONS COMMAND, http://www.socom.mil/Pages/SOFTruths.aspx (last visited May 15, 2016). *See also* Collins, SPECIAL OPERATIONS, *supra* note 30, at v; U.S. DEP'T OF ARMY, DA PAM. 600-3, COMMISSIONED OFFICER PROFESSIONAL DEVELOPMENT AND CAREER MANAGEMENT ch. 16 (3 Dec. 2014); U.S. DEP'T OF ARMY, PAM 600-25, U.S. ARMY NONCOMMISSIONED OFFICER PROFESSIONAL DEVELOPMENT GUIDE ch. 8 (28 July 2008) [hereinafter DA PAM. 600-25].

[37] *SOF Truths*, *supra* note 36.

[38] TUCKER & LAMB, *supra* note 17, at 149.

[39] *Id.* at 148.

[40] *SOF Truths*, *supra* note 36.

[41] TUCKER & LAMB, *supra* note 17, at 149.

[42] *See id.* at 50-51.

[43] Master Sergeant Walter K. Treichel, *Change of Command*, SPECIAL WARFARE, Apr.-June 2013, at 10.

[44] *SOF Truths*, *supra* note 36.

## III. The Special Forces Battalion Judge Advocate

### A. Serving as a Personal Staff Officer[45] in Support of Special Forces

The battalion JA should expect to educate staff and commanders on a JA's role,[46] especially when his legal advice might be viewed as placing constraints on a commander's desired course of action.[47] The battalion JA should help other staff officers fulfill their responsibilities, while not undermining them.[48]

To add value as a counselor, the battalion JA must get himself into the room for meetings or discussions.[49] A predicate step is to have the appropriate clearances for access to classified information.[50] Prior to arriving at an assignment, a battalion JA should at the least assemble the required paperwork for a prospective Top Secret clearance.[51] The battalion JA must be in a position to give advice, and if that requires rucking, driving or jumping, then he does it.[52]

As the legal expert, the commander expects the battalion JA to use his own initiative to educate the command team and staff and take care of the unit's Soldiers.[53] The commander expects the battalion JA to exercise not only competence but also creativity within the constraints of law, regulation, and policy.[54] The battalion JA must remain aware that the SF Soldier and commander will approach a problem with great comfort in operating up to legal limits while not crossing them.

Gaining trust is a foundational requirement for effective legal services.[55] One way to gain trust from the unit's Soldiers is, within ethical bounds, to provide legal assistance.[56] To gain trust, the battalion JA must have credibility.[57] The battalion JA must carry himself well,[58] embracing the role as the legal expert who supports operators[59] but is not an operator himself.[60] The JA who has the courage to admit that he does not know the answer, but will find it, and then keep that promise, can gain credibility as well.[61]

Part of delivering legal services is cultivating relationships outside of the battalion. Often due to concurrent command and area jurisdiction, the garrison OSJA presents matters on behalf of the group to the general court-martial convening authority for decisions.[62] The battalion JA has to balance the requirements of his operational and technical chains.[63] The group judge advocate (GJA), the technical supervisor, expects the battalion JA to operate independently within her intent, to include that of the 1st SFC(A) SJA.[64] The battalion JA can help his battalion by conducting independent reviews that the GJA can either adopt or adjust, thereby setting conditions for favorable, expedient decisions up the chain of command.[65]

### B. Leading and Mentoring the Paralegal NCO in Delivering Effective Legal Services

Under the battalion JA's supervision, the paralegal NCO provides legal services to the battalion. To best serve the

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[45] U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS paras. 2-24, 2-105, 2-113 (5 May 2014) [hereinafter FM 6-0].

[46] UCMJ art. 6(b) (2012); AR 27-1, *supra* note 4, paras. 3-2, 5-2 to 5-3; U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS r. 1.13 & r. 1.13 cmt. (1 May 1992) [hereinafter AR 27-26]; FM 1-04, *supra* note 4, paras. 1-4, 1-7, 1-12, 2-40; FM 6-0, *supra* note 45, paras. 2-105, 2-113, 9-162. *See* Judge James E. Baker, *National Security Process and a Lawyer's Duty: Remarks to the Senior Judge Advocate Symposium*, 173 MIL. L. REV. 124, 132 (2002) [hereinafter Baker, *Lawyer's Duty*].

[47] Colonel Richard D. Rosen & Lieutenant Colonel Kathryn Sommerkamp, *Military Legal Practice Maxims: A Potpourri of Random Thoughts*, ARMY LAW., June 2001, at 22, 23 [hereinafter Rosen & Sommerkamp, *Maxims*].

[48] *Id.* at 27-28; Lieutenant Colonel Mike Ryan, *Setting Conditions for Success: Seven Simple Rules for New Staff Officers*, ARMY LAW., Oct. 2006, at 33, 36 [hereinafter Ryan, *Seven Simple Rules*].

[49] Lieutenant Colonel Marc L. Warren, *Operational Law—A Concept Matures*, 152 MIL. L. REV. 33, 40–41 (1996); Major Candace M. Besherse, *The Godfather: Seven Lessons on Providing Effective Counsel*, ARMY LAW., July 2011, at 32, 33, 33 n.13-17.

[50] Major Gary L. Walsh, *Role of the Judge Advocate in Special Operations*, ARMY LAW., Aug. 1989, at 4, 6.

[51] Interview with Captain Schellack, *supra* note 3.

[52] *See* Ryan, *Thoughts on Leadership*, *supra* note 35, at 45-46.

[53] *See* Baker, *Lawyer's Duty*, *supra* note 46, at 132.

[54] LINDA ROBINSON, MASTERS OF CHAOS: THE SECRET HISTORY OF THE SPECIAL FORCES 326 (2005); Rosen & Sommerkamp, *Maxims*, *supra* note 47, at 22-23.

[55] *See* Walsh, *supra* note 50, at 6.

[56] Interview with Captain Schellack, *supra* note 3. *See infra* Part IV.B (addressing avoiding conflicts of interest).

[57] Walsh, *supra* note 50, at 6.

[58] Ryan, *Thoughts on Leadership*, *supra* note 35, at 40-42. *See* Warren, *supra* note 49, at 41.

[59] Ryan, *Seven Simple Rules*, *supra* note 48, at 33.

[60] Ryan, *Thoughts on Leadership*, *supra* note 35, at 46.

[61] *Id.* at 43-44; Interview with Captain Einhorn, *supra* note 35.

[62] Interview with Captain John Swords, Battalion Judge Advocate, 1st Battalion, 10th Special Forces Group (Airborne) (Dec. 10, 2014).

[63] Memorandum from The Judge Advocate General to Judge Advocate Legal Service Personnel, subject: Use of Technical Channel of Communications-Policy Memorandum 14-04 (22 Jan. 2014); Interview, Captain Jason McKenna, Battalion Judge Advocate, 1st Battalion, 3d Special Forces Group (Airborne) (Dec. 3, 2014).

[64] FM 1-04, *supra* note 4, paras. 14-6, 14-11.

[65] Interview with Captain McKenna, *supra* note 63.

battalion, the JA must care enough to lead, mentor, invest time in, and look out for the paralegal NCO and his Family. The battalion JA should also take special note of the paralegal NCO's professional and personal goals and provide time and encouragement to the paralegal NCO to achieve them. Not only will the paralegal NCO benefit, but the battalion and the Army will benefit as well.

The battalion JA must lead, and that includes counseling.[66] No Soldier wants to arrive at the end of a rating period and then discover that he had not lived up to his supervisor's expectations.[67] The battalion JA must prepare for and execute the initial counseling and the quarterly counseling. Practically, regular counseling will help the battalion JA complete the noncommissioned officer evaluation report (NCOER) on time. The battalion JA should seek technical chain advice from his GJA and group paralegal NCO in completing the NCOER. The operational NCO leadership can offer advice as well, and will want to review it ahead of time.

Leadership also includes substantive actions. The battalion JA needs to supervise the paralegal NCO in accordance with professional ethics.[68] The paralegal NCO can conduct legal research and writing and give briefings. He can draft legal reviews of investigations and training concepts for the battalion JA to edit, review, and sign. Concurrently, the battalion JA should note areas for improvement and mentor the paralegal NCO accordingly.

The battalion JA should let the paralegal take the initiative wherever possible. The battalion JA can empower the paralegal NCO to run the office: keep track of issues and clients, screen for conflicts, etc. He should track training events including airborne operations and act as the section noncommissioned officer in charge (NCOIC) to help the battalion support company.

The battalion JA should recognize the paralegal NCO's achievements by submitting nominations for commander's coins or awards and supporting requests for schools. This support not only helps the paralegal NCO, it also lets the JA's chain of command know that he is supporting the unit and is willing to advocate for his subordinates. Thus, the paralegal NCO becomes part of a legal team that can better meet its substantive responsibilities.

## IV. The Six Core Legal Disciplines in the Context of Special Forces Operations

### A. Administrative Law[69]

Special forces' command structure makes for unique command policies at each level. Applicable regulations and policies reside at the following levels: Department of Defense (DoD), USSOCOM, CCMD, TSOC, USASOC(A), 1st SFC(A), garrison, group, and battalion. Each higher headquarters might have adjusted regulations on certain activities more restrictively than law and regulation would otherwise allow. That knowledge also means that a battalion JA should look for opportunities to help guide requests for exceptions to policy through the chain of command.[70]

Additionally, battalion policy letters help govern day-to-day activities and may contain punitive provisions.[71] The battalion JA should work with the battalion adjutant (S-1) to review new policy letters—particularly those dealing with Uniform Code of Military Justice matters. The battalion JA should do this when the battalion commander decides to rewrite them either on his own, or otherwise. The paralegal NCO should read, brief, and discuss the policy letters with the battalion JA before the battalion JA renders legal advice.

#### *1. Financial Liability Investigations of Property Loss and Other Investigations*

The battalion JA needs to help guide the financial liability investigations of property loss (FLIPL) process in support of the battalion supply officer (S-4).[72] Drafting appointment letters, in-briefing financial liability officers (FLOs),[73] and reviewing FLIPLs will be a significant part of battalion JA's practice.[74] The paralegal NCO can help make this a battle drill.

Advising on investigations appointed pursuant to Army Regulation 15-6 is another significant portion of the battalion JA's practice. Investigations in general give the commander an opportunity to get a more accurate picture of his

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[66] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 2-3 (6 Nov. 2014 ) [hereinafter AR 600-20]; *see* Major Todd W. Simpson, *Supervising Paralegals in Accordance with the Rules of Professional Conduct*, ARMY LAW., Jan. 2014, at 24, 31.

[67] *See* U.S. DEP'T OF ARMY, DOCTRINE REFERENCE PUB. 6-22, ARMY LEADERSHIP para. 7-60 (1 Aug. 2012) (C1, 10 Sept. 2012). *But see* LEONARD WONG & STEPHEN J. GERRAS, LYING TO OURSELVES: DISHONESTY IN THE ARMY PROFESSION 10-11 (2015).

[68] AR 27-26, *supra* note 46, r. 5.3, 5.5. *See generally* Simpson, *supra* note 66.

[69] FM 1-04, *supra* note 4, paras. 5-31, 5-34 to 5-35.

[70] *See* Rosen & Sommerkamp, *Maxims*, *supra* note 47, at 24.

[71] *See* UCMJ art. 90 (2012); Major Troy C. Wallace, *Command Authority: What Are the Limits on Regulating the Private Conduct of America's Warriors?*, ARMY LAW., May 2010, at 13, 14-16.

[72] *See generally* Major Jason S. Ballard, *The New FLIPL: A Article for Practitioners*, ARMY LAW., Oct. 2014, at 45.

[73] *See generally* U.S. DEP'T OF ARMY, PAM. 735-5, FINANCIAL LIABILITY OFFICER'S GUIDE (9 Apr. 2007).

[74] U.S. DEP'T OF ARMY, REG. 735-5, PROPERTY ACCOUNTABILITY POLICIES para. 13-39 (10 May 2013) (RAR 22 Aug. 2013); Ballard, *supra* note 72, at 52.

command—although Soldiers in general typically do not like being investigated.[75] Completed investigations can help protect the command and Soldiers against post hoc allegations of wrongdoing. The battalion JA needs to know which incidents trigger an investigation and which incidents fall under particular investigative agencies' purview.[76]

*2. Standards of Conduct*

The battalion JA will also assist in the implementation of the GJA's ethics program. The GJA will likely be the appointed "ethics counselor"[77] for the group. Helping the GJA will usually entail issue spotting. The battalion JA should stay attuned to possible violations of the Joint Ethics Regulation (JER) because many outside agencies want to associate themselves with SF Soldiers and their status. The battalion JA must be familiar with the regulations, especially the JER,[78] regarding these types of solicitations and educate the command for its situational awareness. Possible areas of conflict include endorsements, contests, competitions, speaking engagements, donations to the Army and individual Soldiers, acceptance of travel benefits from non-federal entities (NFEs),[79] and post-government employment.[80] Battalion JAs will likely assist their GJAs with administration requirements for financial disclosures, namely Office of Government Ethics (oge) 450 reports.[81]

*3. Taking Care of Soldiers and Their Families*

The battalion JA will also assist with the family readiness group (FRG),[82] a commander's program.[83] A commander must establish an FRG "in accordance with [regulations] to provide activities and support that encourage self-sufficiency among its members by providing information, referral assistance, and mutual support."[84] A family readiness support assistant (FRSA) helps administer the FRG for the commander. Family readiness support assistants help "maintain the continuity and stability" of FRGs.[85] A battalion JA who maintains close contact with the FRSA can help the FRG adhere to regulatory requirements, especially since a garrison command will probably have an applicable regulation as well.[86]

The JER permits NFEs, alongside DoD programs, to assist SF Soldiers.[87] One of these DoD programs is the USSOCOM Care Coalition. The USSOCOM Care Coalition "provide[s] direct, lifelong assistance to SOF personnel who are wounded, ill, or injured through effective follow up contact and collaboration with multidisciplinary teams . . . , medical case managers and other military agencies."[88] The Army Chaplain Corps provides Strong Bonds programs.[89] Non-federal entities who actively assist the command find ways to contribute as well.[90] The battalion JA contributes himself by providing legal assistance to Soldiers and their Families.

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[75] *See* U.S. DEP'T OF ARMY, REG. 380-67, PERSONNEL SECURITY PROGRAM paras. 8-2 to 8-3 (24 Jan. 2014); U.S. DEP'T OF ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAG) para. 2-2.a (23 Nov. 2012).

[76] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES app. B (9 June 2014); Required Admin Investigations Chart JAGCNET (6 Oct. 2014), https://www.jagcnet2.army.mil/Sites%5C%5Cadministrative law.nsf/0/3DEDAB198F3A6B6185257DA40073814B/%24File/Required%20Admin%20Investigations%20Chart%20(6OCT14).docx.

[77] U.S. DEP'T OF DEF., 5500.7-R, JOINT ETHICS REGULATION (JER) para. 1-212 (30 Aug. 1993) (C7, 17 Nov. 2011) [hereinafter JER].

[78] *See generally id.*; U.S. DEP'T OF ARMY, REG. 1-100, GIFTS AND DONATIONS (15 Nov. 1983); U.S. DEP'T OF ARMY, REG. 1-101, GIFTS FOR DISTRIBUTION TO INDIVIDUALS (1 May 1981).

[79] JER, *supra* note 77, para. 1-217.

[80] See generally *Ethics Counselor's Deskbook*, U.S. DEP'T OF DEF. STANDARDS OF CONDUCT OFFICE (SOCO), http://www.dod.mil/dodgc/defense_ethics/resource_library/deskbook/deskbook_index.html (last accessed May 15, 2016) (providing a number of resources on the above topics).

[81] U.S. DEP'T OF ARMY, FINANCIAL DISCLOSURE MANAGEMENT USER GUIDE 274 https://www.fdm.army.mil/documents/FDM_User_Guide.pdf. (last accessed Mar. 22, 2016). *See* Major Alan J. Cook, *Notes from the Field: An Overview and Practitioners' Guide to Financial Disclosures*, ARMY LAW., Nov. 1996, at 45, 45, 52-56.

[82] AR 600-20, *supra* note 66, para. 5-10.b(7)(g).

[83] U.S. DEP'T OF ARMY, REG. 608-1, ARMY COMMUNITY SERVICE para. 4-6.a (13 Mar. 2013) [hereinafter AR 608-1].

[84] *Id.* para. 4-6.a. *See also* AR 600-20, *supra* note 66, para. 5-10.b(7)(g).

[85] AR 608-1, *supra* note 83, para. 4-6.c.

[86] *See generally id.* app. J; Major Laura A. Grace, *Good Idea Fairies: How Family Readiness Groups and Related Private Organizations Can Work Together to Execute the Good Ideas*, ARMY LAW., Sept. 2012, at 25.

[87] *See generally* JER, *supra* note 78, ch. 3.

[88] *Care Coalition*, USSOCOM, http://www.socom.mil/Care%20Coalition/Advocacy.aspx (last visited May 18, 2015). *See also* The Wounded Warrior Act of 2008, Pub. L. No. 110-181, §§ 1601–76, 122 Stat. 431, 431-85 (2008); JER, *supra* note 78, paras. 3-400 to 3-401.

[89] Memorandum from Chief of Chaplains to Command Chaplain Offices et al., subject: Total Army Fiscal Year 2015 (FY15) Strong Bonds Program Management, Resourcing and Training (2 July 2014), https://www.milsuite.mil/book/servlet/JiveServlet/download/530415-510166/FY15%20Strong%20Bonds%20MOI.pdf.

[90] *Charitable Missions*, SPECIAL FORCES ASS'N, http://www.sfahq.org/charitable-missions/ (last visited May 15, 2016); SPECIAL FORCES CHARITABLE TRUST, http://www.specialforcescharitabletrust.org (last visited May 15, 2016); Interview with Captain McKenna, *supra* note 63.

A. Legal Assistance[91] and Claims[92]

The battalion JA has to balance providing legal assistance to his Soldiers with providing legal support to the battalion commander.[93] To avoid conflicts of interest, a battalion JA can brief his operational chain of command so that it can determine how to prioritize the battalion JA's efforts.[94] For example, if the chain of command wants to focus the battalion JA's efforts toward legal support to the Soldier, it can do so with an appreciation that if a legal issue arises with that Soldier, commanders will have to seek legal advice from the GJA or another battalion JA.[95] Conversely, the chain of command may want to focus legal support on itself, i.e., the Army, acting through its appointed officials,[96] with the understanding that the battalion JA would have to refer Soldiers to the garrison OSJA legal assistance office, GJA, or sister SF battalion JAs. Within the frame of the GJA's legal assistance policy, the battalion JA should discuss this topic with his chain of command.[97] The paralegal NCO can also help the battalion JA with preventive law emails, briefings for Soldiers, and coordination for garrison OSJA help. The paralegal NCO should also use the Client Information System.[98]

Finally, although the battalion JA does not run a claims processing office, he must be aware that claims issues arise anywhere in the world.[99] The battalion JA should know where SF teams are deploying and the service and local office responsibility for claims processing.[100] The battalion JA will ensure that units know to give him a call, and he can monitor daily situation reports for claims issues.

B. Military Justice and Adverse Administrative Personnel Actions[101]

Adverse administrative actions and military justice actions are not the same thing, but they often live in the same neighborhood. Although adverse administrative and military justice actions occur less frequently in SF than in conventional units,[102] the command will expect the battalion JA to help guide these processes efficiently to completion[103] and serve as recorder or trial counsel as needed. Just as in conventional units, SF units may determine that a Soldier, must be separated from the service in accordance with regulation.[104] In giving advice, the battalion JA should be prepared to explain the impacts of a separation on a Soldier such as special pays and bonuses.[105] A separation for an enlisted Soldier might dovetail with other adverse administrative actions.

One possible adverse administrative action for an enlisted SF Soldier in Career Management Field (CMF) 18[106] is revocation of his SF Tab. The "tab revo" is a significant command action that results in a huge emotional impact[107] with the potential for grave post-service consequences. This personnel action happens when the Commander, U.S. Army John F. Kennedy Special Warfare Center, usually on the recommendation of a SF Soldier's chain of command, revokes that Soldier's SF Tab.[108] This action should occur

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[91] FM 1-04, *supra* note 4, paras. 5-55, 5-58 to 5-60. *See generally* U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM (21 Feb. 1996) (RAR 13 Sept. 2011) [hereinafter AR 27-3]; U.S. DEP'T OF ARMY, REG. 27-55, NOTARIAL SERVICES (17 Nov. 2003).

[92] FM 1-04, *supra* note 4, paras. 5-45 to 5-47, 5-49 to 5-50. *See generally* U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS (8 Feb. 2008); U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES (21 Mar. 2008).

[93] *See* AR 27-1, *supra* note 4, para. 2-5.a.

[94] AR 27-3, *supra* note 91, para. 4-9; Memorandum from The Judge Advocate General to Judge Advocate Legal Service Personnel, subject: Professional Responsibility-Policy Memorandum 14-02 (22 Jan. 2014); Interview with Captain Schellack, *supra* note 3.

[95] *See* AR 27-1, *supra* note 4, para. 2-5.a; FM 1-04, *supra* note 4, paras. 5-59 to 5-60.

[96] AR 27-26, *supra* note 46, r. 1.13 & r. 1.13 cmt.

[97] FM 1-04, *supra* note 4, para. 4-3.

[98] Memorandum from Deputy Judge Advocate General to Judge Advocate Legal Service (JALS) Personnel, subject: Directive to Use Judge Advocate General's Corps Enterprise Applications-DJAG Policy Memorandum 14-02 (3 Sept. 2014).

[99] *See infra* Part IV.E.

[100] *See* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 291 (2014) [hereinafter OPLAW HANDBOOK].

[101] FM 1-04, *supra* note 4, paras. 5-1 to 5-2, 5-7, 5-11. *See generally* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (3 Oct. 2011).

[102] *See* TUCKER & LAMB, *supra* note 17, at 50-51.

[103] *See* LINDA ROBINSON, ONE HUNDRED VICTORIES: SPECIAL OPS AND THE FUTURE OF AMERICAN WARFARE 146-47 (2014).

[104] *See generally* U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005) (RAR 6 Sept. 2011); U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFER AND DISCHARGES ch. 4 (12 Apr. 2006) (RAR 13 Sept. 2011).

[105] U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 7A, subpara. 080103D, tbl.8-2 (June 2014); U.S. DEP'T OF ARMY, REG. 601-280, ARMY RETENTION PROGRAM, paras. 5-10.a, 5-13 (31 Jan. 2006) (RAR 15 Sep. 2011); Interview with Captain Schellack, *supra* note 3. *See* Military Personnel Message, 15-068, U.S. Army Human Res. Command, subject: Selective Retention Bonus (SRB) Program (3 Mar. 2015), https://www.hrc.army.mil/Milper/15-068.

[106] U.S. DEP'T OF ARMY, REG. 611-1, MILITARY OCCUPATIONAL CLASSIFICATION STRUCTURE DEVELOPMENT AND IMPLEMENTATION para. 6-3 (30 Sept. 1997). A career management field (CMF) is a "grouping a grouping of related [military occupational specialties] (MOSs) that is basically self-renewing and managed in terms of both manpower and personnel considerations. The CMF is used in the development, counseling and management of enlisted personnel." *Id*. The CMF 18 identifies special forces (SF) Soldiers and is the SF contingent of the Army Special Operations Forces. *See* DA PAM. 600-25, *supra* note 36, para. 9-1.

[107] Interview with Captain McKenna, *supra* note 63.

[108] AR 600-8-22, *supra* note 2, para. 1-31.c(9); Information Paper, U.S. Army Special Forces Command (Airborne), subject: Involuntary

concurrently with CMF 18 reclassification[109] and should be completed by the time a separation is complete, if separation is persued. By doing these actions in this order, the discharge paperwork (DD Form 214) should no longer reflect the Special Forces Tab and CMF 18. If the command does not separate the Soldier, then the reclassification from CMF 18 means that the Soldier will return to an assignment in the conventional forces.[110] Revoking a "Special Operations Support" qualification is the equivalent for SF support personnel, and it is a simpler process since Military Occupational Speciality reclassification is not required but rather just a Department of the Army Form 4187 ordering personnel action.[111]

C. Fiscal and Contract Law[112]

United States Special Operations Command receives its own line of funding through Major Force Program 11 (MFP-11).[113] "The major features of SOF funding are the distinction between MFP-2 [Department of the Army funding] and MFP-11 and the special-purpose language of statutory authorities. Major Force Program 11 was created to allow USSOCOM to pay for SOF-peculiar goods and services."[114] Special operations forces can still acquire "service-common" equipment. The battalion JA should be aware when Soldiers want to use MFP-11 funds inappropriately for MFP-2 goods or services[115] and vice versa.

Various appropriations and agreements support SF operations. Counter-terrorism funds, commonly referred to as "1208 funds," from the original section in the 2004 act, can also fund SF training operations abroad.[116] Joint combined exchange training events involve SF units training foreign nation forces.[117] Joint combined training exchange events primarily benefit the SF units—thus answering the purpose prong of fiscal analysis—who improve their ability to train others.[118] With Joint Combined Exchange Training, battalion JAs should anticipate questions about what SF units can purchase for their foreign partner units.[119] Acquisition and Cross Servicing Agreements could provide a means to do this.[120] Additionally, the issue of accepting gifts from the partner force and purchasing gifts will frequently arise.[121] Finally, the battalion JA should pinpoint how SF units can participate in training under authority of the Department of State or other government agencies.[122]

D. International and Operational Law[123]

The law binds SF operations, just as any other military operation. Since SF Soldiers look different, or at least are equipped differently than conventional forces, some observers might infer that SF operations are legally unbound. In fact, given the high profile and strategic nature of SF operations, legitimacy of American action through adherence to international and operational law can take on an even greater priority for a special forces commander.[124]

Special forces units routinely take on unique missions such as unconventional warfare, security force assistance, and foreign internal defense.[125] Familiarity and continued involvement with the SF unit's plans and operations will help guide legal advice.[126] Unconventional warfare poses unique

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Revocation of SF Tabs and MOS Reclassification Actions Due to Misconduct (12 Aug. 2009).

[109] *See* U.S. DEP'T OF ARMY, REG. 614-200, ENLISTED ASSIGNMENTS AND UTILIZATION MANAGEMENT, para. 5-5 (26 Mar. 2009) (RAR 11 Oct. 2011).

[110] *Id.* paras. 5-5.n(5), 5-5.o.

[111] *See* All Army Activities Message, 284/2013, 251955Z Oct. 13, U.S. Dep't of Army, subject: Establishment of Additional Skill Identifier (ASI) K9 (Special Operations Support).

[112] FM 1-04, *supra* note 4, paras. 5-39, 5-44.

[113] LOREDO ET AL., *supra* note 10, at 18.

[114] *Id.*

[115] Interview with Captain Swords, *supra* note 62.

[116] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1208, 118 Stat. 1811, 2086 (2004); OPLAW HANDBOOK, *supra* note 100, at 241. *See* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1208 (2014).

[117] 10 U.S.C. § 2011 (2012). *See* CONTRACT & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, FISCAL LAW DESKBOOK 10-11 (2014).

[118] *See generally* U.S. SPECIAL OPERATIONS COMMAND, DIR. 350-3, JOINT COMBINED EXCHANGE TRAINING (18 Nov. 2005) (superseded).

[119] Interview with Captain Swords, *supra* note 62.

[120] *See generally Acquisition and Cross-Servicing Agreements*, INTELINK, https://intellipedia.intelink.gov/wiki/Acquisition_and_Cross-Servicing_Agreements_ (last accessed May 15, 2016).

[121] *See* U.S. DEP'T OF DEF., DIR 1005.13, GIFTS AND DECORATIONS FROM FOREIGN GOVERNMENTS para. 4.4, encl. 3 (19 Feb. 2002) (C1, 6 Dec. 2002). *See also* U.S. DEP'T OF ARMY, REG. 37-47, OFFICIAL REPRESENTATION FUNDS OF THE SECRETARY OF THE ARMY para. 2-1 (18 Oct. 2012).

[122] *See* Andru E. Wall, *Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action*, 3 HARV. NAT'L SEC. J. 85, 94 & n.19 (2011).

[123] FM 1-04, *supra* note 4, paras. 5-14 to 5-15, 5-19 to 5-20, 5-22 to 5-25, 5-27.

[124] JP 3-05, *supra* note 15, at IV-11. *See* ADRP, *supra* note 128, paras. 1-37 to 1-38; Walsh, *supra* note 50, at 5.

[125] *See generally* Captain Rimas Radzius et al., *1st SFG(A) Operational Cycle: The Continuous Execution of FID and UW*, SPECIAL WARFARE, Jan.-Mar. 2014, at 29.

[126] Ryan, *Thoughts on Leadership*, *supra* note 35, at 44; Interview with Captain Schellack, *supra* note 3. *See* Judge James E. Baker, *LBJ's Ghost: A Contextual Approach to Targeting Decisions and the Commander in Chief*, 4 CHI. J. INT'L L. 407, 423-24 (2003).

legal issues.[127] Unconventional warfare is "activities conducted to enable a resistance movement or insurgency to coerce, disrupt, or overthrow a government or occupying power by operating through or with an underground, auxiliary, and guerrilla force in a denied area."[128] Security force assistance is a SF "core activity" that encompasses "activities that contribute to unified action by the U.S. Government to support the development of the capacity and capability of foreign security forces and their supporting institutions."[129] Foreign internal defense is a SF "core operation" that supports "another government or other designated organization to free and protect its society from subversion, lawlessness, insurgency, terrorism, and other threats to its security."[130]

*1. Home-Station Training*

A battalion JA should become familiar with 1st SFC(A) Regulation 350-1 and battalion training policy letters. Regulation 350-1 governs training and sets forth unique requirements and timelines for training concepts to be approved.[131] Two training events in particular need significant lead-time: realistic military training (RMT) and training civilian law enforcement agencies (CLEA).[132]

Military units can conduct RMT off military installations or federal property with proper approval.[133] Training in certain environments not available on U.S. Government lands can benefit SF units uniquely.[134] A commander at the proper level with prior coordination with certain civilian officials can authorize RMT.[135] In preparing for RMT, the battalion JA should support the Operations Officer (S-3) and company planners.[136] Just as with RMTs, CLEAs require lead-time for proper approval and proper execution.[137] If SF units train with CLEA, then the battalion JA should brief his SF units on the Rules for the Use of Force,[138] and posse comitatus.[139] Beyond training, CLEA may request the assistance of SF units to help respond to emergencies and other CLEA operations.[140]

*2. Training Abroad and Deployed Operations*

The foundation for these operations is authorities. At a minimum, these authorities will reside in an EXORD or deployment order (DEPORD).[141] Once a battalion JA understands his commander's intent and the established authorities,[142] the JA can help advocate through technical channels for any additional authorities or appropriate approval levels the unit might need.

A key restriction in training operations is that SF Soldiers may not train foreign units that have committed gross human rights violations.[143] Vetting will occur before the mission begins, but the battalion JA will have to brief his SF units on what constitutes "gross human rights violations"[144] and what to do if SF units observe them.[145]

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[127] *See generally* Michael N. Schmitt & Andru E. Wall, *The International Law of Unconventional Statecraft*, 5 HARV. NAT'L SEC. J. 349 (2014). *See also* FM 1-04, *supra* note 4, para. 14-12.

[128] ADRP 3-05, *supra* note 13, para. 2-2.

[129] *Id.* para. 2-19. *See generally* FM 1-04, *supra* note 4, ch. 15.

[130] ADRP 3-05, *supra* note 13, paras. 2-1, 2-5. *See also* FM 1-04, *supra* note 4, para. 14-13. "Core operations are the military missions for which SOF have unique modes of employment, tactical techniques, equipment, and training to orchestrate effects, often in concert with conventional forces." ADRP 3-05, *supra* note 13, para. 2-1.

[131] *See generally* U.S. ARMY SPECIAL FORCES COMMAND (AIRBORNE), REG. 350-1, TRAINING (8 Apr. 2014).

[132] *Id.* paras. 6-12.h(5)(b), 6-15.b(2).

[133] *See generally* U.S. DEP'T OF DEF., INSTR. 1322.28, REALISTIC MILITARY TRAINING (RMT) OFF OF FEDERAL REAL PROPERTY encl. 3, fig. (18 Mar. 2013) (C2, 13 May 2014) [hereinafter DODI 1322.28].

[134] *See* Press Release, USSOCOM Public Affairs, UPDATED PRESS RELEASE: Exercise readies SOF for threats abroad (Apr. 20, 2015), http://www.army.mil/article/146794/UPDATED_PRESS_RELEASE__Exercise_readies_SOF_for___/. *See also* J. David McSwane, *In Jade Helm operation, Texas gives early lessons on the 'human domain'*, STARS & STRIPES (May 8, 2015), http://www.stripes.com/news/us/in-jade-helm-operation-texas-gives-early-lessons-on-the-human-domain-1.345361.

[135] DODI 1322.28, *supra* note 133, encl. 3, fig.

[136] *See generally* UW-JAG, https://www.milsuite.mil/book/groups/baldwin (last visited May 15, 2016).

[137] U.S. DEP'T OF DEF., INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES encl. 3, para. 1.f (27 Feb. 2013); Policy Memorandum 05-17, Headquarters, U.S. Special Operations Command, subject: United States Special Operations Command (USSOCOM) Policy on Military Support and Assistance to Domestic Law Enforcement Agencies (7 Dec. 2005) (superseded).

[138] *See generally* CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, DOMESTIC OPERATIONAL LAW ch.4, 10 (2013) [hereinafter DOMOPS LAW HANDBOOK].

[139] 10 U.S.C. §§ 371–82 (2012); 18 U.S.C. § 1385 (2012).

[140] *See generally* DOMOPS LAW HANDBOOK, *supra* note 138, ch.8.

[141] JOINT PUB. 1-02, *supra* note 9, at 72, 91; JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATION PLANNING xvi, II-15 to II-17 (11 Aug. 2011) [hereinafter JP 5-0]; Interview with Captain McKenna, *supra* note 65. See Chairman of the Joint Chiefs of Staff Manual (CJCSM) 3122.01 series publications for the format for EXORDs and DEPORDs. JP 5-0, *supra*, at xvi, II-15 to II-17.

[142] *See* Wall, *supra* note 122, at 86 n.2; JOINT CHIEFS OF STAFF, J7, INSIGHTS & BEST PRACTICES FOCUS PAPER, AUTHORITIES 6-19 (July 2013).

[143] Memorandum from Sec'y of Def. to Sec'ies of Mil. Dep'ts et al., subject: Implementation of Section 8057, DoD Appropriations Act, 2014 (division C of Public Law 113-76) (18 Aug. 2014) [hereinafter DoD Leahy Law Memo].

[144] *Id.* at Tab A, p. 2.

[145] *Id.* at Tab A, p. 1.

All SF groups have a regional focus, so the battalion JA should be attuned to the international agreements and the legal systems[146] of nations that SF Soldiers visit, train, and operate in. This familiarity extends to any applicable status of forces agreements (SOFAs) or defense cooperation agreements (DCAs). Soldiers need to be aware of their status protections or absence thereof.[147]

A battalion JA can help prepare SF Soldiers for tough decisions\ when he finds an opportunity to provide advanced training vignettes on rules of engagement (ROE)[148] or similar directives. This training presupposes the JA's fluency with ROE, targeting, fires, close air support, and close combat attacks.[149] Along with these directives, the battalion JA should understand the legal considerations of non-standard uniforms.[150]

*3. Intelligence Law*[151]

Title 10, Title 50, and Executive Order (E.O.) 12,333 empower the Secretary of Defense to conduct intelligence activities.[152] Army Regulation 381-10 implements E.O. 12,333 and DoD Regulation 5240.1-R.[153] Combatant Command regulations potentially add to the body of authorities that govern intelligence operations. Under this umbrella, SF units pursue their unique "intelligence requirements."[154] Special Forces units have identified and validated that "intelligence necessary for operations against specific individuals is best derived from the time-consuming work of establishing relationships with indigenous personnel."[155] In addition to "intelligence activities," SF units may be called on to conduct "traditional military activities"[156] (TMA) such as "operational preparation of the environment," "preparation of the environment," "advanced force operations," and other operations as required.[157]

*4. Detainee and Interrogation Operations*[158]

In both fixed-facility detention and detainee collection points, the battalion JA needs to have anticipated the potential legal pitfalls. A firewall stands between military police and intelligence operations.[159] Statute establishes Field Manual 2-22.3 as the law in this area, and DoD directives are similarly well established.[160] Only trained and certified interrogators are permitted to interrogate (as distinguished from tactical questioning),[161] which applies not only to military police but also to SF Soldiers.[162] Moreover, in a mature theater, interagency relationships will play a significant role.

Special forces units taking detainees while moving behind enemy lines presents tough legal issues. The battalion JA can best serve his unit by preparing vignettes ahead of time.[163] Special Forces Soldiers may also encounter civilians in this situation. Civilians may give away SF Soldiers' presence, resulting in the Soldiers' deaths. This is not an

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[146] *See, e.g.*, *Guide to Law Online: Nations*, LIBRARY OF CONGRESS, http://www.loc.gov/law/help/guide/nations.php (last visited May 31, 2016).

[147] *See generally* OPLAW HANDBOOK, *supra* note 100, ch. 7.

[148] FM 1-04, *supra* note 4, paras. 7-39 to 7-40. *See* Major Winston S. Williams, *Training the Rules of Engagement for the Counterinsurgency Fight*, ARMY LAW., Jan. 2012, at 42, 46-47.

[149] *See* FM 1-04, *supra* note 4, ch. 7. *See generally* JOINT CHIEFS OF STAFF, JOINT PUB. 3-09, JOINT FIRE SUPPORT (12 Dec. 2014).

[150] W. Hays Parks, *Special Forces Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 512-13 (2003); Walsh, *supra* note 50, at 7; INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCHOOL, U.S. ARMY, LAW OF ARMED CONFLICT DESKBOOK 164, 164 n.37 (2014).

[151] *See generally* MARK M. LOWENTHAL, INTELLIGENCE: FROM SECRETS TO POLICY (6th ed. 2014); U.S. DEP'T OF DEF., DIR. 5143.01,UNDER SECRETARY OF DEFENSE FOR INTELLIGENCE (24 Oct. 2014) ; U.S. DEP'T OF DEF., DIR. 5240.01, DOD INTELLIGENCE ACTIVITIES (27 Aug. 2007) (C1, 29 Jan. 2013) ; FM 1-04, *supra* note 4, paras. 2-22, 5-28.

[152] Exec. Order No. 12,333, 3 C.F.R. § 200 (1981) (as amended). Usually referenced as "twelve-triple-three." Ali Watkins, *Most of NSA's Data Collection Authorized by Order Ronald Reagan Issued*, MCCLATCHYDC (Nov. 21, 2013) http://www.mcclatchydc.com/news/nation-world/national/national-security/article24759289.html.

[153] *See generally* U.S. DEP'T OF DEF., 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS (7 Dec. 1982); U.S. DEP'T OF ARMY, REG. 381-10, U.S. ARMY INTELLIGENCE ACTIVITIES (3 May 2007).

[154] TUCKER & LAMB, *supra* note 17, at 149.

[155] *See id.* at 138.

[156] COLONEL RICHARD C. GROSS, DIFFERENT WORLDS: UNACKNOWLEDGED SPECIAL OPERATIONS AND COVERT ACTION 7 (2009).

[157] JOINT PUB. 3-05, *supra* note 15, at II-4 to II-5; ADRP 3-05, *supra* note 128, paras. 1-44 to 1-47, 2-36. *See* 10 U.S.C. § 167(j)(10) (2012). For further study on the advanced subjects of "intelligence activities" vs. "traditional military activities," and Title 50 vs. Title 10, *see generally* Lieutenant Colonel Joseph B. Berger, III, *Covert Action: Title 10, Title 50, and the Chain of Command*, JOINT FORCES Q., 4th Quarter, 2012, at 32; GROSS, *supra* note 156; Wall, *supra* note 122.

[158] *See generally* DEP'T OF DEF., DIR. 2310.01E, DOD DETAINEE PROGRAM (19 Aug. 2014); U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS para. 4-12 (6 Sept. 2006) [hereinafter FM 2-22.3]; U.S. DEP'T OF ARMY, FIELD MANUAL 3-63, DETAINEE OPERATIONS (28 Apr. 2014), FM 1-04, *supra* note 4, ch.8.

[159] FM 2-22.3, *supra* note 158, para. 4-12.

[160] The Detainee Treatment Act of 2005, Pub. L. No. 109-163, § 1402(a), 119 Stat. 3136, 3475 (2006); DEP'T OF DEF. DIR. 3115.09 DOD INTELLIGENCE INTERROGATIONS, DETAINEE DEBRIEFINGS, AND TACTICAL QUESTIONING (11 Oct. 2012) (C1 15 Nov. 2013).

[161] FM 2-22.3, *supra* note 158, para. 1-17. "Tactical questioning is expedient initial questioning for information of immediate tactical value. Tactical questioning is generally performed by members of patrols, but can be done by any [Department of Defense] DoD personnel." *Id.*

[162] FM 2-22.3, *supra* note 158, para. 1-20.

[163] Walsh, *supra* note 50, at 7.

unusual circumstance and the battalion JA needs to train SF Soldiers on the proper procedures.[164]

## V. Conclusion

With the above information, any situation resembling the opening vignette becomes less daunting. The unknown unknowns focus into known unknowns. The newly assigned SF battalion JA has a basic understanding of his duly appointed Army client and his Army client's needs. He has enough substantive insight to ask questions, research, and reason across all legal disciplines. Service as a SF battalion JA is a great opportunity to develop and to practice as a broadly skilled judge advocate for those who want the challenge of providing legal support to Special Forces.

[164] *See* George R. Lucas, Jr., *"This is Not Your Father's War"—Confronting the Moral Challenges of "Unconventional" War*, 3 J. NAT'L SEC. L. & POL'Y 329, 333-34 (2009).

Appendix. Suggested Readings

The following resources can further the reader's understanding of the various topics in this article.[165] Hyperlinks, where available, help ease access to the resources.

I. Statutes

10 U.S.C. § 167 (2012), *available at* http://uscode.house.gov/view.xhtml?req=(title:10 section:167 edition:prelim) OR (granuleid:USC-prelim-title10-section167)&f=treesort&edition=prelim&num=0&jumpTo=true#sourcecredit

50 U.S.C. § 3038 (Supp. I 2013), *available at* http://uscode.house.gov/view.xhtml?req=(title:50 section:3038 edition:prelim) OR (granuleid:USC-prelim-title50-section3038)&f=treesort&edition=prelim&num=0&jumpTo=true

50. U.S.C. § 3093 (Supp. I 2013), *available at* http://uscode.house.gov/view.xhtml?req=(title:50 section:3093 edition:prelim) OR (granuleid:USC-prelim-title50-section3093)&f=treesort&edition=prelim&num=0&jumpTo=true

II. Executive Order

Exec. Order 12,333, 3 C.F.R. § 200 (1981) (as amended), *available at* http://www.archives.gov/federal-register/codification/executive-order/12333.html

III. Joint Chiefs of Staff Doctrinal Publications

JOINT CHIEFS OF STAFF, JOINT PUB. 3-05, SPECIAL OPERATIONS (16 Jul. 2014), *available at* http://www.dtic.mil/doctrine/new_pubs/jp3_05.pdf

JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATION PLANNING (11 Aug. 2011), *available at* http://www.dtic.mil/doctrine/new_pubs/jp5_0.pdf

JOINT CHIEFS OF STAFF, J7, INSIGHTS & BEST PRACTICES FOCUS PAPER, AUTHORITIES 6–19, *available at* https://www.milsuite.mil/book/servlet/JiveServlet/download/124112-1-408900/Authorities-%20JS%20J7%20Deployable%20Training%20Division.pdf.

IV. Department of Defense Directives and Instructions

DEP'T OF DEF. DIR. 3115.09 DOD INTELLIGENCE INTERROGATIONS, DETAINEE DEBRIEFINGS, AND TACTICAL QUESTIONING (11 Oct. 2012) (C1, 15 Nov. 2013), *available at* http://www.dtic.mil/whs/directives/corres/pdf/311509p.pdf

U.S. DEP'T OF DEF. DIR. 2310.01E , DOD DETAINEE PROGRAM (19 Aug. 2014), *available at* http://www.dtic.mil/whs/directives/corres/pdf/231001e.pdf

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U.S. DEP'T OF DEF., INSTR. 2200.01, COMBATING TRAFFICKING IN PERSONS (CTIP) (15 Sept. 2010), *available at* http://www.dtic.mil/whs/directives/corres/pdf/220001p.pdf

U.S. DEP'T OF DEF., INSTR. 2310.008E, MEDICAL PROGRAM SUPPORT FOR DETAINEE OPERATIONS (6 June 2006), *available at* http://www.dtic.mil/whs/directives/corres/pdf/231008p.pdf

U.S. DEP'T OF DEF., INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES (27 Feb. 2013), *available at* http://www.dtic.mil/whs/directives/corres/pdf/302521p.pdf

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[165] E-mail from Lieutenant Colonel Terri Erisman, Staff Judge Advocate, U.S. Army Special Forces Command (Airborne), to author (Oct. 5, 2014 09:46 EST) (on file with author).

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V. United States Special Operations Command Directives, Publications, and Policies, and Web Sites

USSOCOM PUB. 1, DOCTRINE FOR SPECIAL OPERATIONS, https://jdeis.js.mil/jdeis/socom_pdf/USSOCOM%20Pub%201.pdf

*Course Information*, JOINT SPECIAL OPERATIONS UNIV., https://jsou.socom.mil/Pages/CourseInformation.aspx?CourseName=Joint Special Operations Legal Advisor Course (last visited May 31, 2016)

*Course Information*, JOINT SPECIAL OPERATIONS UNIV., https://jsou.socom.mil/Pages/CourseInformation.aspx?CourseName=Introduction to Special Operations Forces (Fully On Line) (last visited May 31, 2016)

*Course Information*, JOINT SPECIAL OPERATIONS UNIV., https://jsou.socom.mil/Pages/CourseInformation.aspx?CourseName=Introduction to Irregular Warfare - Distance Learning (Pilot) (last visited May 31, 2016)

VI. U.S. Army Regulations

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VII. 1st Special Forces Command (Airborne) Regulations, Policies, Publications, and Web Sites

U.S. ARMY SPECIAL FORCES COMMAND (AIRBORNE), REG. 350-1, TRAINING (8 Apr. 2014)

Special Insert, *U.S. Army Special Operations Command ARSOF 2022, Part II*, SPEC. WARFARE, Jul.-Sept. 2014, *available at* http://www.dvidshub.net/publication/issues/22683

SF HISTORY PAGE, http://www.soc.mil/USASFC/SFhistory.html.

VIII. U.S. Army Doctrinal Publications

U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY (18 Mar. 2013), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm1_04.pdf

U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS (5 May 2014), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm6_0.pdf

U.S. DEP'T OF ARMY, DOCTRINE PUB. 3-05, SPECIAL OPERATIONS (31 Aug. 2012), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/adp3_05.pdf;

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DAVID TUCKER & CHRISTOPHER J. LAMB, UNITED STATES SPECIAL OPERATIONS FORCES (2007)

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461 (2014), *available at* http://harvardnsj.org/wp-content/uploads/2014/01/Huntley-Levitz-Controlling-the-Use-of-Power-in-the-Shadows.pdf

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**Working with Civilian Counsel: A Military Practitioner's Roadmap**

*Major Michael G. Botelho*[*]

*Illegitimi non carborundum*[1]

## I. Introduction

It is your first day as a defense counsel. You have been counseling clients on administrative separations[2] and non-judicial punishment[3] all day. Your next client sits down and tells you he has been charged with sexual assault[4] and hired a civilian counsel. You call the civilian counsel to discuss the case and learn he has over twenty years of experience in criminal law but has never tried a court-martial.

The relationship with the client and the civilian defense counsel starts off well, but eventually the civilian counsel refuses to share any information or strategy with you prior to the Article 32 hearing.[5] However, during the Article 32 hearing, the civilian counsel knows the facts of the case and does extremely well cross-examining witnesses. As trial approaches, the civilian defense counsel is not returning calls or emails and has missed a couple of pretrial order deadlines, but you know this is not uncommon for civilian defense counsel. You continue to document these issues with the case, but you are still concerned. You ask the client to come in and discuss your concerns about the civilian counsel, but the client tells you he trusts the civilian attorney and is not worried. You further explain to your client that you have been trying to prepare for his case but the civilian attorney's lack of communication has made it difficult to determine the theory of the case, which impacts whether you can request an expert or file certain motions.[6] You also explain to the client that as associate counsel you are generally bound by the lead counsel's direction in a case.[7]

The lack of communication between you and the civilian counsel continues until three days prior to trial, when he calls to complain about how fast trial approached and does not think he is ready. He wants to file a motion for continuance, but you know it is not likely to be granted if he remains on the case.[8] Your worst fears have been realized and you scramble to prepare to conduct the court-martial yourself. You draft a motion for continuance in case the civilian attorney cannot pull it together in time for trial or, worse, is a no-show.[9] The next

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[1] The phrase "Illegitimi non carborundum" means, roughly, "don't let the bastards grind you down." MARK ISRAEL, ALT-USAGE-ENGLISH, http://alt-usage-english.org/excerpts/fxillegi.html (last visited Feb. 18, 2016). The expression"[s]eems to have originated with British army intelligence early in World War II. Various variant forms are in circulation." *Id.*

[2] *See* U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005) (RAR, 6 Sept. 2011) (providing authority to involuntarily separate an Enlisted Soldier prior to his term of service for various reasons). *See also* U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006) (RAR, 13 Sept. 2011).

[3] UCMJ art. 15 (2012).

[4] UCMJ art. 120 (2012).

[5] UCMJ art. 32 (2012).

[6] For example, in an Article 120, Uniform Code of Military Justice (UCMJ), case where the defense is consent, a Deoxyribonucleic acid (DNA) expert is not necessary and a request for an expert or motion to compel would most likely be denied. *See* MANUAL FOR COURTS-MARTIAL, R.C.M. 703 (2012) [hereinafter MCM]. However, if the defense theory is the sex act did not occur, defense would be able to state the grounds or set forth the relief sought to request a DNA expert, should government deny the request. *Id.*; *see also id.* R.C.M. 905.

[7] *See* MCM, *supra* note 6, R.C.M. 502(d), 505 (concerning withdrawal or substitution of counsel); *see also* MCM, *supra* note 6, R.C.M. 506; ("Where the conflict concerns defense tactics, the military counsel must defer to the civilian counsel if the accused has made the civilian counsel chief counsel. If counsel are co-counsel, the client should be consulted as to any conflicts between counsel."). U.S. DEP'T OF ARMY, REG. 27-10, para., C-2(b)(3), MILITARY JUSTICE (11 May 2016) [hereinafter AR 27-10]; U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26]; U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL (1 Nov. 2013), http://jpp.whs.mil/Public/docs/03_Topic-Areas/04-SVC_VictimAccess/20150116/37_ArmyJudiciary_RulesofCourt_20131101.pdf [hereinafter Rules of Practice].

[8] *See* MCM, *supra* note 6, R.C.M. 805(c) discussion ("The military judge may, however proceed in the absence of one or more defense counsel, without the consent of the accused, if the military judge finds that, under the circumstances, a continuance is not warranted and that the accused's right to be adequately represented would not be impaired."). *See also* AR 27-10, *supra* note 7, para., C-1(b)(2) ("Dissolution. An attorney should not normally be assigned as a counsel to a case unless he or she can be expected to remain for the trial or adverse administrative proceeding.").

[9] MCM, *supra* note 6, R.C.M. 506(c) ("Except as otherwise provided in Rules for Courts-Martial. 505(d)(2) and subsection (b)(3) of this rule, defense counsel may be excused only with the express consent of the accused, or by the military judge upon application for withdrawal by the defense counsel for good cause shown."). Absent good cause, a civilian

day the civilian attorney tells you he has it under control and made the decision as lead counsel to concede some issues and withdraw his previously filed motion for continuance.[10] You again try to discuss a division of labor and the civilian attorney tells you he's "got it."

Trial begins and the civilian counsel turns to you and asks you to handle voir dire. Your fears of him not being prepared return, but you were at least prepared for voir dire since you submitted the list of questions when the civilian attorney also missed that deadline. The civilian attorney delivers a weak opening statement and returns to the defense table, where you ask him what the plan for sentencing is. He responds with a blank look.[11] The train wreck of a trial continues to unfold.

When things go well, military defense counsel can gain tremendous experience from working with civilian counsel. However, when things do not go well, military defense counsel must be prepared for the worst-case scenario so they do not fail their clients.[12] Using the court-martial process as a backdrop, this article examines best practices and lessons learned to help counsel navigate the relationship between military and civilian counsel to allow the defense team to better represent the best interests of their client.[13] This article has four parts, taking the reader from the formation of a military and civilian defense counsel's relationship to its termination and providing best practices for every stage of the court-martial. Part II of this article outlines a brief overview of an accused's rights, discusses the increase in civilian counsel appearances, examines some of the applicable professional responsibility rules, and offers best practices to help appointed military counsel navigate the often nuanced relationship of military and civilian counsel. Next, Part III explores pre-trial practices, covers issues that often arise between military and civilian counsel, and offers best practices when a civilian counsel is released just prior to trial. Then Part IV addresses common issues during trial, post-trial practices, and lessons learned; finally, Part V presents general best practice tips from current and former military and civilian defense counsel.

## II. Overview

Once charges[14] are preferred,[15] an accused is usually directed to meet with a detailed Trial Defense Services attorney, who has been previously sworn under Article 42(a) and is qualified and certified under Article 27(b) of the Uniform Code of Military Justice (UCMJ).[16] An accused is entitled to detailed counsel and may request individual military counsel[17] of his choosing—if reasonably available—or an accused may hire civilian counsel at his own expense.[18]

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counsel's unexplained or unexpected absence in a case would no doubt have major implications on their continued ability to practice in military courts. *See* MCM, *supra* note 6, R.C.M. 109.

> Sanctions may include but are not limited to indefinite suspension from practice in courts-martial and in the Courts of Criminal Appeals. Such suspensions may only be imposed by the Judge Advocate General of the armed service of such courts. Prior to imposing any discipline under this rule, the subject of the proposed action must be provided notice and an opportunity to be heard. The Judge Advocate General concerned may upon good cause shown modify or revoke suspension.

*Id.*; *see also* AR 27-26, *supra* note 7, at i ("Violations by non–government attorneys may result in imposition of sanctions pursuant to RCM 109, Manual for Courts–Martial.").

[10] *See* MCM, *supra* note 6, R.C.M. 805.

[11] This assertion represents an extreme example and is based on the author's recent professional experiences as Defense Counsel, Trial Defense Services—Hawaii Field Office, from 30 June 2011 to 2 July 2013 [hereinafter Professional Experience]. Civilian counsel unfamiliar with the court-martial process often overlook sentencing and tend to rely heavily on the judge advocate for an explanation of the process and importance of sentencing case preparation. *See also* Military-Civilian Counsel Survey submitted to all branches of service and civilian attorneys (sixty-two anonymous respondents) to solicit opinions relevant to this article (survey opened 19 Nov. 2015, closed on 18 Feb. 2016) (on file with author) [hereinafter Military-Civilian Counsel Survey]. "The two things that are radically different from civilian practice is voir dire and sentencing." E-mail from Colonel Edward J. O'Brien, Defense Criminal Advocacy Program, Highly Qualified Expert, to author (Feb. 10, 2016, 15:30 EST) (on file with author). Sentencing in the civilian sector is often accomplished via a sentencing report sixty days after sentencing vice a military court-martial, which conducts an adversarial hearing immediately after sentencing. *Id.*

[12] *See* AR 27-26, *supra* note 7.

[13] *Id.*

[14] MCM, *supra* note 6, R.C.M. 307(c)(2) ("A charge states the article of the code, law of war, or local penal law of an occupied territory which the accused is alleged to have violated."). *See also* MCM, *supra* note 6, R.C.M. 308.

[15] *What is Prefer?*, THE LAW DICTIONARY, http://thelawdictionary.org/prefer/ (last visited Feb. 18, 2016) ("To bring before; to prosecute; to try; to proceed with").

[16] MCM, *supra* note 6, R.C.M. 502(d)(1).

> To be certified by the Judge Advocate General concerned under Article 27(b), a person must be a member of the bar of a Federal court or the highest court of a State. The Judge Advocate General concerned may establish additional requirements for certification. When the accused has individual military or civilian defense counsel, the detailed counsel is "associate counsel" unless excused from the case.

*Id.*; *see* R.C.M. 506(b)(3).

[17] MCM, *supra* note 6, R.C.M. 506.

[18] *Id.*; *see also* AR 27-10, *supra* note 7, para. C-2(b)(1)(a)-(c). Note, despite recent updates, AR 27-10's regulatory guidance which recommends providing a list of local attorneys seems to be showing its age, as it is now not uncommon for internet-marketed civilian practitioners who focus on military justice cases to fly across the country or overseas to make court appearances.

> (1) Military counsel will not recommend any specific civilian counsel. The best method is to show the accused a list of local attorneys. This list should be compiled by personnel in the SJA office and representatives of the local bar association. This will ensure that local attorneys who have no interest in such referrals will not appear on the list. The accused must be told that—

A. Civilian Defense Counsel Courts-Martial Appearances Are on the Rise

In 2001, there were 1,192 total courts-martial and 112 cases involving civilian counsel, which represented 9.40% of the cases.[19] Since 2001, with slight decreases in 2002, 2004, and 2011, the instances of Soldiers hiring civilian defense counsel have been on the rise, and as recently as 2014, the civilian defense counsel representation percentage rose to 19.57% (189 out of 966 courts-martial), more than double the 2001 rate.[20]

While the exact reasons for the increase in civilian representation is beyond the scope of this paper,[21] one possible reason for the increase in civilian defense counsel appearances may be due to the 2012 Department of Defense (DoD) report on sexual assault in the military.[22] The DoD report on sexual assault highlighted the issue of sexual assault and resulted in a renewed focus for the DoD and Army's Sexual Assault Prevention and Response (SAPR) Strategic Plan's "commitment to eliminating sexual assault from the Armed Forces."[23] Other potential reasons include: combat deployments that increase Soldiers' cash flow,[24] making hiring civilian counsel affordable for even junior enlisted Soldiers. The internet makes it much easier for Soldiers to seek civilian counsel of their choosing;[25] and Soldiers, especially junior enlisted, have a general mistrust of the appointed military counsel's role and competence.[26] Regardless of the reasons for the increase in civilian defense counsels' representation of Soldiers, both civilian and military defense counsel owe a duty to their client[27] and

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(a) This list is not exclusive.

(b) He or she is not limited to the services of a local attorney.

(c) The listing of an attorney is not necessarily an endorsement of the attorney's capability or character. The accused should be reminded that the responsibility for the choice is solely his or hers.

*Id.*

[19] Mr. Homan Barzmehri, United States Army Criminal Court of Appeals Clerk of Court, Courts-Martial Involving Civilian Defense Counsel Calendar Year 2001 through Calendar Year 2014 (forwarded to author from United States Army Trial Defense Services) (Oct. 25, 2015, 10:50 EST) (undated and unpublished Microsoft Excel Spreadsheet) (on file with author).

[20] *Id.* In 2014, civilian defense counsel represented Soldiers 189 times out of a total 966 cases. *Id.*

[21] *See* Charles "Cully" Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It*, HERITAGE (Feb. 18, 2016), http://www.heritage.org/research/reports/2013/11/sexual-assault-in-the-military-understanding-the-problem-and-how-to-fix-it (comparing military counsel to civilian counsel and noting the lack of a career litigation track in the military puts military defense counsel at a disadvantage to their civilian counterparts who "graduate" to sexual assault cases). "Defendants would be represented by learned defense counsel who have handled years of misdemeanor cases, and lower-level felonies, before graduating to sexual assault cases." *Id.* Deployed Soldiers generally have less financial obligations than non-deployed Soldiers, and combat pay entitles Soldiers to certain tax exemptions resulting in significant savings. Professional Experience, *supra* note 11.

[22] *See* U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2012 vol. 1 (Apr. 15, 2013), http://sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault- VOLUME_ONE.pdf.

[23] *See* U.S. DEP'T OF DEF., DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM (23 Jan. 2102).

[24] U.S. DEP'T OF TREASURY, INTERNAL REVENUE SERVICE, PUBLICATION 3 (2014), CAT. NO. 46072M, ARMED FORCES' TAX GUIDE, 8-10 (2014). Deployed Soldiers generally have less financial obligations than non-deployed Soldiers and "combat pay" entitles Soldiers to certain tax exemptions resulting in significant savings. *Id.*

[25] Professional Experience, *supra* note 11; *see also* Military-Civilian Counsel Survey, *supra* note 11.

[26] Professional Experience, *supra* note 11. Oftentimes, at an initial client meeting, many Soldiers express mistrust of their appointed Trial Defense Services' attorney simply because of their status as a military officer. However, appointed military counsel may overcome a client's skepticism by explaining counsel's role in the process and gaining the trust and confidence of the Soldier throughout the period of representation. *Id.* Despite gaining a client's trust, some Soldiers simply feel better picking and hiring civilian counsel of their choosing even when the civilian counsel he or she chooses has little to no prior court-martial experience. *Id.*; *see also* Military-Civilian Counsel Survey, *supra* note 11. Soldier-clients also often assume their Trial Defense Services' attorney works for, or reports to, the government's chain of command. *Id.*

[27] *See* United States v. Wade, 388 U.S. 218 (1967) (highlighting the differences between a defense counsel's ethical obligation to their client and a government attorney's obligation to the sovereign whose obligation is not to "win a case" but to ensure that "justice be done."). "The United States Attorney is the representative . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* at 256.

> [D]efense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course.

*Id.* at 256, 257. It necessarily follows that in order to prevent the "conviction of the innocent" or adequately "defend [their] client," civilian and military counsel must work together towards that end. *Id.*; *see also* U.S. DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES, JUDGE ADVOCATE LEGAL SERVICES para. 2-5 ("Conflict of Interests: [T]he assistance provided will comply with the policies of superiors responsible for supervising the defense function. . . ."); *see also* AR 27-26, *supra* note 7, r. 1.1 ("Competence: A lawyer shall provide competent representation to a client."); AR 27-10, *supra* note 7, r. 1.3 ("Diligence: A lawyer shall act with reasonable diligence and promptness in representing a client and in every case will consult with a client as soon as practicable and as often as necessary after undertaking representation."). *Id.*

because of that duty must work together to represent those interests.

## B. Rules of Practice Before Courts-Martial

### *1. Right to Counsel*

While military members have a Sixth Amendment right to counsel,[28] it is not an absolute right.[29] Once a military defense counsel is detailed, he is obligated to begin preparations for an accused's defense immediately, whether civilian counsel is hired or subsequently withdraws from a case.[30] While one approach may be for military counsel to assume the role of a superficial attorney who is often seen as the "potted plant,"[31] this is not advisable. It would be inconsistent with the rules[32] and military defense counsel may find themselves as the lead counsel on the eve of a court-martial if a request for civilian counsel is denied[33] or if a civilian defense counsel's withdrawal request has been approved by the court.[34]

### *2. Associate Counsel*

Absent an excusal,[35] detailed defense counsel assumes the role of associate or assistant counsel once civilian defense counsel has been retained[36] or once a request for individual military counsel is approved.[37] "[C]ivilian counsel is expected to treat an associate military attorney as a professional equal," and both counsel are expected to treat each other with respect and professional courtesy.[38] However, once lead counsel has been established, "Responsibility for trial of a case may not devolve upon an assistant who is not qualified to serve as defense counsel."[39] Therefore, it is critical for judge advocates to assess their particular expertise in a given case and communicate that to their civilian counterpart or their senior defense counsel so appropriate measures can be taken in the event the associate counsel has to assume role of lead counsel.[40] In the event of a conflict or disagreement, assuming lead counsel has not violated the Rules of Professional Conduct for Lawyers,[41] military defense counsel must defer to the lead counsel[42] and must follow certain procedures before disclosing that disagreement to the accused, the convening authority, or the

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[28] U.S. CONST. amend. VI.

[29] United States v. Rhoades, 65 M.J. 393 (C.A.A.F. 2008).

> [U]nder the Sixth Amendment, the accused in a criminal proceeding has the right to the assistance of counsel for his defense; under the Uniform Code of Military Justice, an accused has the right to representation by military counsel provided at no expense to the accused, and the accused may be represented by civilian counsel; the right to counsel of choice under the Sixth Amendment, as well as under the UCMJ, [*is not absolute*]; the need for fair, efficient, and orderly administration of justice may outweigh the interest of the accused in being represented by counsel of choice; for example, disqualification of an accused's chosen counsel due to a previous or ongoing relationship with an opposing party, even when the opposing party is the government, does not violate the Sixth Amendment.

*See Opinion Digest Right to Counsel*, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, http://www.armfor.uscourts.gov/newcaaf/digest/IB9.htm (last updated June 1, 2016); *see also* United States v. Miller, 47 M.J. 352 (C.A.A.F. 1997) (applying eleven factors to determine whether a judge abused his discretion in granting a motion for continuance). *But see* Major John W. Brooker, *Target Analysis: How to Properly Strike a Deployed Servicemember's Right to Civilian Defense Counsel*, ARMY LAW., Nov. 2010 (arguing a Soldiers' right to civilian counsel should be abrogated in certain instances to promote efficiency of justice and fix the logistical problems associated with conducting courts-martial in theater). The article's scope did not include working with civilian counsel. *Id.*

[30] *See* MCM, *supra* note 6, R.C.M. 506(c).

[31] *Potted*, YOURDICTIONARY, http://www.yourdictionary.com/potted (last visited Feb. 18, 2016) ("[C]ondensed or summarized, often to the extent of being superficial, overly terse, etc.").

[32] *See* AR 27-10, *supra* note 7, para. 5–8, Professional Standards. Note, portions struck through were deleted in AR 27-10's most recent update:

> a. The Army "Rules of Professional Conduct for Lawyers" (see AR 27–26) are applicable to lawyers involved in court-martial proceedings in the Army.
>
> . . . .
>
> ~~c. Judges, counsel, and court-martial clerical support personnel will comply with the American Bar Association Standards for Criminal Justice (current edition) to the extent they are not inconsistent with the [Uniform Code of Military Justice], the [Manual for Courts-Martial], directives, regulations, the 'Code of Judicial Conduct for Army Trial and Appellate Judges,' or other rules governing provision of legal services in the Army.~~
>
> ~~d.~~ c. Personnel involved in court-martial proceedings are encouraged to look as well to other recognized sources (for example, decisions issued by State and Federal courts or ethics opinions issued by the American Bar Association (ABA) and the States) for guidance in interpreting these standards and resolving issues of professional responsibility.

*Id.*

[33] Professional Experience, *supra* note 11; *see also* Military-Civilian Counsel Survey, *supra* note 11.

[34] *See* MCM, *supra* note 6, R.C.M. 506(c).

[35] *See* MCM, *supra* note 6, R.C.M. 502(d)(6). *See also* MCM, *supra* note 6, R.C.M. 505(d)(2)(A), (B). Defense counsel may be excused from representing an accused prior to the formation of the attorney-client relationship; however, once an attorney-client relationship is formed, excusal is subject to the provisions of Rule for Court-Martial (RCM) 505(d)(2)(B). *Id.*

[36] *See* MCM, *supra* note 6, R.C.M. 506.

[37] *Id.*

[38] *See* AR 27-10, *supra* note 7, para. C-2(b)(2).

[39] *See* MCM, *supra* note 6, R.C.M. 502(d)(6).

[40] Professional Experience, *supra* note 11; *see also* Military-Civilian Counsel Survey, *supra* note 11.

[41] *See* AR 27-26, *supra* note 7.

[42] *See* AR 27-10, *supra* note 7, para. C-2(b)(3).

tribunal, or submitting a request to be relieved of his responsibilities due to such a disagreement.[43]

### 3. *Ineffective Assistance of Counsel*

If military and civilian defense counsel cannot find a way to resolve their disagreements or work together to represent an accused adequately, both counsel may end up committing errors that lead to ineffective representation or a charge of ineffective assistance of counsel. This is true even if a judge advocate decides to assume the role of potted plant or a civilian counsel chooses to make all of the decisions as lead.[44] *Strickland v. Washington*[45] established the standard for ineffective assistance of counsel. Ineffective assistance exists when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[46] In order to prevail on a claim of ineffective assistance, an appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance.[47] Further, an appellant has the burden of demonstrating that (1) his counsel was deficient, and (2) he was prejudiced by such deficient performance.[48] An appellant must show that his trial defense counsel's allegedly deficient performance resulted in "[e]rrors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[49] An appellant must also show prejudice, e.g., "demonstrate that any errors made by his trial defense counsel were so serious that they deprived him of a fair trial, 'a trial whose result is reliable.'"[50] Succeeding on a claim of ineffective assistance of counsel is a difficult task,[51] however; regardless of how much a military counsel is involved with civilian counsel's performance, both military and civilian counsel succeed or fail as a team.[52] Succeeding or failing as a team is true despite a military attorney's decision to assume the role of potted plant. Additionally, ineffective assistance of counsel in the military justice system is not just a grounds for appellate relief of an adjudged sentence but also may provide the basis for a standards of conduct review of all members of the trial defense team.[53] The stakes are high.

### 4. *Professional Misconduct*

In rare cases,[54] military counsel may encounter a civilian counsel who disregards the American Bar Association's model rules of professional conduct (Model Rules) or his state's bar rules.[55] In these cases, the military defense counsel must be mindful of the various services' regulations.[56] The various services typically adopt the Model Rules, therefore, judge advocates must also be aware of the reporting requirements for violations of Model Rule 8.4, which Army Regulation (AR) 27-26 Rule 8.4 incorporates and restates almost verbatim.[57] In extreme cases, The Judge Advocate General of each service has the ability to bar a civilian

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[43] *Id.*

[44] *See* Military-Civilian Counsel Survey, *supra* note 11.

> I have heard Trial Defense Services' (TDS) attorneys say "since [the civilian attorney] is the lead counsel, it's their case to run with," or words to that effect. This is a mistake. The TDS attorney needs to be prepared to litigate on his or her own in case the civilian attorney bows out. Even if the civilian attorney is not communicating, the defense is still a joint effort.

*Id.*

[45] Strickland v. Washington, 466 U.S. 668, 687-96 (1984). *See also* Loving v. United States, No. 06-8006/AR, (C.A.A.F. 2009) (applying the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984)).

[46] Strickland v. Washington, 466 U.S. 668, 691-96 (1984).

[47] *Id.*; *see also* United States v. Scott, 24 M.J. 186, 188 (C.M.A. 1987).

[48] *Strickland*, 466 U.S. at 691-96.

[49] *Id.*

[50] *Id.*

[51] United States v. Hernandez, No. 200501599, 2007 CCA LEXIS at 183 (A.F. Ct. Crim. App. June 12, 2007) ("The appellant 'must surmount a very high hurdle.'"); United States v. Smith, 48 M.J. 136, 137 (C.A.A.F. 1998) (quoting United States v. Moulton, 47 M.J. 227, 229 (C.A.A.F. 1997)).

[52] United States v. Sickels, No. 20110110, 2013 CCA LEXIS at 563 (A. Ct. Crim. App. July 23, 2013) ("[D]efense counsels' failure to investigate and interview such potential witnesses fell below the minimum standard of professional representation; Defense counsels' failure to present anything in extenuation and mitigation at sentencing was deficient and the result of deficient preparation for the sentencing hearing."). The court in *Sickels* did not distinguish between the actions of the civilian and military counsel and applied the standard established in *Strickland* to both counsel. *Id.*

[53] U.S. DEP'T OF DEF., 5500.7-R, JOINT ETHICS REGULATION (JER) (17 Nov. 2011) [hereinafter JER]; *see also* U.S. DEP'T OF DEF. STANDARDS OF CONDUCT OFF., http://www.dod.mil/dodgc/defense_ethics/ (last visited May 3, 2016).

[54] Professional Experience, *supra* note 11; *see also* Military-Civilian Counsel Survey, *supra* note 11.

[55] MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2016) [hereinafter MODEL RULES].

[56] AR 27-26, *supra* note 7; *see also* U.S. DEP'T OF NAVY, JAGINST 5803.1D, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL (1 May 2012); U.S. DEP'T OF AIR FORCE, INSTR. 51-110, PROFESSIONAL RESPONSIBILITY PROGRAM atch 2, (5 Aug. 2014); U.S. COAST GUARD, COMMANDANT INSTR.M5800.1, COAST GUARD LEGAL PROFESSIONAL RESPONSIBILITY PROGRAM (1 June 2005).

[57] *See* AR 27-26, *supra* note 7, r. 8.4 (following the MODEL RULES, *supra* note 55, r. 8.4 cmt.) (with language stricken). Note, all but the stricken language appears in AR 27-26 rule 8.4:

> It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice; (e) state or imply an ability to influence improperly a government agency or official ~~or to achieve results by means~~

attorney from practicing at courts-martial[58]—a fact of which most civilian attorneys new to representing Soldiers at courts-martial are unaware.

## III. Military and Civilian Defense Counsel Pre-trial Practice

### A. Competence to Practice

As previously discussed, counsel must be competent[59] to practice, but competence in civilian court does not often translate into competence to practice in a courts-martial.[60] While experience among civilian defense counsel varies, military defense counsel may find themselves detailed to a case with civilian defense counsel who has years of *civilian* criminal defense experience but has little to no *court-martial* experience.[61] Conversely, a military defense counsel may lack the breadth of general courtroom time compared to their civilian counterpart, but have a solid grasp on court-martial procedures and, more importantly, have a relationship with and an understanding of procedures required or desired by their government counterparts.[62]

Lack of court-martial experience does not render an attorney incompetent per se, but Rule 1.1, both in the Model Rules and AR 27-26 require an attorney to possess the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[63] Lack of thoroughness[64] and preparation reasonably necessary [65] is often where military counsel take issue with civilian counsel.[66] A civilian counsel can certainly satisfy Model Rule 1.1 prior to his or her first court-martial and ignorance of military culture and court-martial procedures do not necessarily constitute incompetence; however, military counsel must be proactive in ensuring civilian counsel is thoroughly prepared.[67] If military counsel either allows or cannot prevent a civilian counsel from appearing at trial unprepared, the possibilities for professional misconduct, violation of competency requirements, and a charge of ineffective assistance *for both counsel* increase exponentially.[68]

Oftentimes, prior to making a decision to hire civilian counsel, a client may ask the military counsel for a recommendation.[69] Military counsel cannot recommend a specific civilian counsel[70] but can provide their client with a non-exclusive list of local attorneys as long as the client understands that the list does not constitute an endorsement of the civilian attorneys' competence to practice or character.[71] The client must also be informed that they are not limited to

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> ~~that violate the Rules of Professional Conduct or other law~~; or (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

MODEL RULES, *supra* note 55, r. 8.4.

[58] *See* Partington v. Houck, 723 F.3d 280 (D.C. Cir. 2013), petition denied, (U.S. Dec. 2, 2013) (No. 13-414). Partington, a retired U.S. Army Judge Advocate, was suspended from practice before naval courts for "fil[ing] an appellate brief containing statements Partington knew were false and misleading. . . ." *Id.* at 291.

[59] *See* AR 27-26, *supra* note 7, r. 1.1. ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.") *See also* MODEL RULES, *supra* note 55, r. 1.1.

[60] Professional Experience, *supra* note 11; *see also* Military-Civilian Counsel Survey, *supra* note 11.

[61] *Id.*

[62] *Id.* This does not suggest or assume that civilian attorneys with more courtroom time than judge advocates will automatically perform better or are more able to represent their Soldier-clients. *Id.*

[63] *See supra* note 56.

[64] *Id.*

[65] *Id.*

[66] Professional Experience, *supra* note 11; *see also* Military-Civilian Counsel Survey, *supra* note 11.

[67] E-mail from COL(R) Edward J. O'Brien, Defense Criminal Advocacy Program, Highly Qualified Expert, to author (Feb. 10, 2016, 15:30 EST) (on file with author).

> I want to know that [the civilian attorney] has prepared his portion of the division of labor. Our procedures are very similar to procedures in the federal court because of [UCMJ] Article 36 [(2012)]. Most of our procedures are similar to state court procedure, but less so. [C]ivilian counsel can [generally] pull off openings, closings, witness examinations, instructions, etc. The two things that are radically different from civilian practice is voir dire and sentencing. [M]y concerns for competence are really limited to civilian counsel who plan to do voir dire (they need to know we do not select a jury, we deselect members) and sentencing (we do an adversarial hearing immediately after findings, we do not execute a sentencing report 60 days after findings). Civilian counsel who are former judge advocates are fine if prepared. Civilian counsel without any military [court-martial] experience are the ones who [tend to] cause problems.

*Id.*; *see also* Military-Civilian Counsel Survey, *supra* note 11.

> I have seen civilian attorneys essentially take the money and dump the work on Trial Defense Services' (TDS) attorneys. It [i]s unfortunate and not as common as we probably think, but it does happen. The best the TDS attorney can do is work the case. When the civilian attorney jumps in at the end and wants to do things like cross-examining the star government witness, but the TDS attorney has done all the cross preparation, then the TDS attorney needs to stand up and confront the civilian counsel. It's unpleasant to do, but the client is entitled to a prepared attorney.

*Id.*

[68] *See* AR 27-26, *supra* note 7, r. 1.1, 8.4; MODEL RULES, *supra* note 55, r. 1.1, 8.4; *see also* Professional Experience, *supra* note 11; Military-Civilian Counsel Survey, *supra* note 11.

[69] *Id.*

[70] *See* AR 27-10, *supra* note 7, para. C-2(b)(1)(a)-(c).

[71] *Id.*

the services of a local attorney, and the decision to hire a civilian attorney rests with the client.[72]

Drawing back to our hypothetical scenario, upon learning a client has hired civilian counsel, military counsel should immediately contact the civilian defense counsel and inquire into their experience generally, and specifically regarding courts-martial. If a civilian counsel has no experience in court-martial matters, it is incumbent upon the military defense counsel to discuss this issue with civilian counsel in order to determine whether counsel can provide competent representation.[73]

If the military counsel develops concerns about the civilian attorney's competence to practice because of inexperience, or more importantly, lack of thoroughness or reasonable preparation,[74] he or she should document those concerns in a memorandum for record[75] and discuss those concerns with civilian counsel.[76] If a disagreement regarding competence to practice still exists, the military counsel should inform civilian counsel of the intent to discuss those concerns with their client but should attempt to do so with the civilian counsel present.[77] If the military counsel still has concerns regarding a civilian counsel's competence to practice or the civilian counsel refuses to discuss the issue with the client, military counsel must inform the client.[78] If the client is aware of those concerns and the client chooses not to heed the advice of military counsel regarding the civilian counsel's lack of competence, the military counsel should bring the issue to the attention of the senior or regional defense counsel. If the issue still cannot be resolved, military counsel should "inform the convening authority—pre-referral—or request a UCMJ, Article 39(a) session[79]—post-referral, whichever is appropriate, or ask to be relieved of his or her responsibilities as counsel."[80]

Lack of prior courts-martial experience does not render an attorney incompetent per se, but adequate preparation and a willingness to understand the rules and culture in which they are operating will go a long way toward building a competent and effective defense team.[81]

## B. Court-Martial Culture

Again, consider the hypothetical from the introduction. If a civilian attorney tells you he's "got it" and refuses to share information with you, as military counsel, you must continue to work on that relationship–early and often–and insert

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[72] *Id.* Note, Army Regulation 27-10's regulatory guidance, which recommends providing a list of local attorneys, seems to be showing its age, as it is now not uncommon for Internet-marketed civilian practitioners who focus on military justice cases to fly across the country or overseas to make court appearances. *Id.*

[73] *See* AR 27-10, *supra* note 7, para. C-2(b)(2), (3)(a-b). ("Military attorneys and counsel are bound by the law and the highest recognized standards of professional conduct."). *Id.* "The D[epartment] of the A[rmy] has made the Army 'Rules of Professional Conduct for Lawyers' (see AR 27–26), and the 'Code of Judicial Conduct for Army Trial and Appellate Judges' applicable to all attorneys who appear in courts-martial.") *Id. See also* AR 27-26, *supra* note 7, r. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.").

[74] Interview with former Trial Defense Services Attorney (Jan. 4, 2016). During one case, the trial defense services attorney had concerns regarding the mental competency of co-counsel. *Id.* A precarious position to be in, this attorney engaged the civilian attorney and the trial defense services chain of command, yet still found the situation difficult to navigate. *Id.* Ultimately, the best interests of the client were met; however, the attorney stated the following when reflecting on the experience:

> Military defense counsel have the responsibility to walk the line between protecting the attorney client relationship between the Soldier and his attorney and protecting the system from clear ineffective assistance of counsel. The defense counsel may not promote nor denigrate the abilities of a particular attorney, and may not communicate their personal feelings about the retained civilian counsel to the client. In this relationship, the military defense counsel takes a secondary seat at the table in every way possible, but still retains great responsibility in the representation. It is a difficult position. A military defense counsel should only contact an outside party if there is a physical or mental condition materially impacting the ability of the civilian counsel to represent the client as a continuing violation of Army Rule 1.16. *See also* ABA Formal Opinion 03-431: "A lawyer who believes that another lawyer's mental condition materially impairs her ability to represent clients, and who knows that that lawyer continues to do so, must report that lawyer's consequent violation of Rule 1.16."

*Id.*

[75] *See also* AR 27-26 *supra* note 7, r. 1.15 ("Safekeeping Property: Complete records of such account funds and [*other property*] shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation."); U.S. DEP'T OF ARMY, REG. 25-50, PREPARING AND MANAGING CORRESPONDENCE (17 May 2013) (Administrative Revision 6 July 2015) [hereinafter AR 25-50]; Professional Experience, *supra* note 11. "Contemporaneous notes are as worth their weight in gold" when responding to claims of ineffective assistance of counsel. E-mail from COL(R) Edward J. O'Brien, DCAP, Highly Qualified Expert (Feb. 9, 2016, 15:32 EST) (on file with author). "Get in the habit of drafting memoranda for records, because you never know what issue will be raised later." *Id.* "One way to ensure contemporaneous records are kept is for counsel to email themselves, which proves when the record was created." E-mail from LTC Franklin D. Rosenblatt, Deputy Chief, U.S. Army Trial Defense Service (Feb. 13, 2016, 22:30 EST) (on file with author).

[76] *See* AR 27-26, *supra* note 7, r. 1.1. Military defense counsel must carefully approach a conversation about competence to practice with civilian counsel, and it is strongly recommended military counsel first discuss the issue with the technical chain. Professional Experience, *supra* note 11. *See also* Military-Civilian Counsel Survey, *supra* note 11.

[77] *See* AR 27-10, *supra* note 7, para. 5-8, app. C-2(3)(a-b); *see also* AR 27-26, *supra* note 7, r. 1.1; MODEL RULES, *supra* note 53, r. 1.1.

[78] *Id.*

[79] *See* MCM, *supra* note 6, R.C.M. 803, 804, 805, 901-10.

[80] *Id.*

[81] Military-Civilian Counsel Survey, *supra* note 11.

yourself into the process and document your attempts to do so.[82]

One way military counsel can build the trust of his client and civilian counterpart, who may lack court-martial experience, is to explain the role of a military defense attorney and educate them on the military justice process.[83] Oftentimes, clients and civilian defense attorneys do not trust military counsel.[84] Most clients view military counsel as representatives of the command—the same command that is prosecuting them.[85] Some civilian counsel view appointed counsel in a similar light; however, this perception can be overcome if both the client and the civilian defense counsel understand the process. For example, in civilian courts it is common for multiple continuances to be granted on short notice in a given case, whereas most military judges will require strict adherence to a pre-trial order and docketing timeline.[86] Military counsel should provide civilian counsel with a copy of the rules of court[87] and share their knowledge of, and experience with, a particular military judge, which can prove invaluable to both a client and civilian attorney.[88] It may also be helpful to provide civilian defense counsel with relevant portions of the *Military Judges' Benchbook*[89] and courts-martial script so they can distinguish between military and civilian offenses and know what to expect in court.[90] Perhaps most important, a military defense counsel's relationship with command and government counterparts often goes a long way to avoid common pre-trial issues, resolve disagreements, and assist in working toward a more favorable outcome for a client.

C. Division of Labor

Lead and associate counsel are distinct roles that cannot operate independently.[91] Civilian and military defense counsel must establish and clarify their respective roles early and often and determine what the division of labor looks like.[92] Civilian and military defense counsel must be clear on who is responsible for discovery issues, motions practice, and adherence to the pre-trial order.[93] Military defense counsel must also have a plan when the civilian counsel does not adhere to the rules of court[94] (e.g., disregards pre-trial order deadlines) or ignores the established plan.[95] If civilian counsel refuses to establish or adhere to a division of labor, military counsel should prepare for the case as if they were the lone counsel.[96] As pretrial deadlines approach, military counsel should re-engage civilian counsel a few days before to remind him of the deadline. If the civilian counsel is unwilling to comply with a pretrial order or is generally unresponsive to military counsel's requests for information, the military counsel should inform the civilian counsel of any motions he intends to file—if a response is not received from him—and when he intends to file them. The military counsel must also inform the civilian counsel of any actions he intends to take if

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[82] *Id.*

[83] *See* MCM, *supra* note 6, R.C.M. 502(d)(6)(A).

[84] Professional Experience, *supra* note 11. *See also* Tim Bilecki, *What You're up Against* (Feb. 16, 2016), http://www.bileckilawgroup.com/What-Youre-Up-Against.aspx (discussing the disadvantages of a military defense counsel, "Your Military Defense Attorney Will Be Outnumbered and May Be Outmatched"). *See also* Michael Waddington, *Select Your Military Lawyer With Care Or Become Another Statistic* (Feb. 13, 2016), http://www.ucmjdefense.com/ ("Assigned military defense teams are outnumbered 5 to 1 by prosecution teams, and the prosecution will use every tactic they can to manipulate all aspects of a case and thwart the ability to mount an adequate defense"); Military-Civilian Counsel Survey, *supra* note 11. "Upon [civilian counsel's] entrance in the case, he convinced the client to fire me. He told the client that all Trial Defense Services' attorneys were terrible, that we were overworked, lacked resources and were generally not as fantastic as he was." *Id.*

[85] Professional Experience, *supra* note 11. Civilian counsels' experiences and perceptions of military counsel vary greatly, e.g., those with prior service as a judge advocate understand and work within the system very well, while others, even with prior service, use their clients' mistrust of the military to keep their client at a safe distance from military defense counsel. *Id.* However, military counsel may serve as the first impression of a civilian counsels' perception of the military and should take care to earn their trust and confidence in order to properly develop that relationship. *Id.*

[86] *Id.*

[87] *See supra* note 7.

[88] RICHARD A. POSNER, HOW JUDGES THINK (2008); *see also* Major Casey Z. Thomas, *How Judges Think*, ARMY LAW., at 86, Jun. 2009 "[I]f counsel can successfully identify the individual judge's 'zone of reasonableness,' which is 'the area within which [the judge] has discretion to decide a case either way without disgracing himself,' then counsel is more likely to be victorious" *Id.* (quoting POSNER, *supra*).

[89] U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES, MILITARY JUDGES' BENCHBOOK (10 Sept. 2014).

[90] Professional Experience, *supra* note 11; *see also* Military-Civilian Counsel Survey, *supra* note 11.

[91] *See* MCM, *supra* note 6, R.C.M. 502(d), 505, 803 (concerning withdrawal or substitution of counsel); *see also* MCM, *supra* note 6, R.C.M. 506; AR 27-10, *supra* note 7; AR 27-26, *supra* note 7; Rules of Practice, *supra* note 7.

[92] Professional Experience, *supra* note 11; *see also* Military-Civilian Counsel Survey, *supra* note 11.

> At the beginning of the representation, there needs to be a conversation between the attorneys, and only the attorneys, about their relative experience and their expectations about one another. Lay out early a divvying up of the tasks. Whenever the TDS attorney does work, email that work to the civilian counsel to keep them updated. If the TDS attorney believes civilian counsel is taken advantage of him [or] her, communicate that fact to civilian counsel. Worst case, the TDS attorneys should simply prepare as if the civilian counsel isn't a member of the team—an extreme solution, but one that happens.

*Id.*

[93] *Id.*

[94] Rules of Practice, *supra* note 7.

[95] Professional Experience, *supra* note 11; *see also* Military-Civilian Counsel Survey, *supra* note 11.

[96] *Id.*

the civilian counsel does not act (e.g., negotiate a plea deal, discuss concerns with the client, or request withdrawal from a case).[97] In other words, if military counsel has concerns about a civilian counsel's strategic or tactical direction in a case, he should attempt to resolve those concerns with the civilian counsel, the client, and their technical chain, if necessary. In the absence of a response or resolution of an issue with civilian counsel, military counsel should continue diligent case preparation, which may include drafting motions and maintaining contemporaneous notes throughout in the event civilian counsel is released, withdraws, or arrives unprepared. If civilian counsel withdraws, military counsel will be prepared to try the case as lead counsel or articulate why the court should grant a continuance.

### D. Release of Civilian Counsel

The most common reason a civilian attorney will withdraw from a case or elect to terminate the representation of an accused is failure of an accused to pay his fees.[98] The release of civilian counsel, especially when done close to trial, can significantly impact a case, especially if the civilian counsel insists on handling all pre-trial matters, or worse, if military counsel assumes the role of potted plant.[99] If the military counsel is truly unprepared to take over a case on the eve of trial, he must request a continuance; however, getting a continuance is not guaranteed.[100] Military counsel must stay in contact with the client and civilian counsel throughout the court-martial process to anticipate and adapt to any issue the presence or absence of civilian counsel presents.[101]

## IV. Military and Civilian Defense Counsel Trial and Post-Trial Issues

### A. Division of Labor During Trial

Once the trial approaches, if the civilian counsel is still on the case, military counsel must still prepare for and expect the unexpected. Military and civilian counsel must have a clear understanding and delineation of responsibilities during trial. Military counsel must also have a plan in the event the civilian counsel fails to complete his responsibility on a particular portion of the trial and be prepared to take over if necessary, or bring the issue to the attention of the judge in order to request a continuance or request withdrawal from the case.[102]

### B. Worst-Case Scenario

Assume it is the day of trial and it is clear the civilian defense counsel is unprepared. Now consider the hypothetical and assume the military counsel has followed the steps recommended above (i.e., previously discussed concerns with civilian counsel, client, senior or regional defense counsel, convening authority and the judge if necessary) and, despite expressing those concerns, proceeds to trial. Assume the military counsel has prepared for every aspect of the trial because of the civilian counsel's lack of preparedness. The military counsel is in a position to discuss his concerns with civilian counsel, and the client again, and is prepared to assume the duties as lead counsel. If the civilian counsel does not allow the military counsel to participate in a meaningful way during trial, and the civilian counsel's performance during the trial approaches ineffective assistance, military counsel should bring the issue to the attention of the judge and seek to withdraw from the case.[103] If the judge refuses to allow the military counsel to withdraw from the case, the military defense counsel should continue to document and maintain contemporaneous notes of the pre-trial, trial, and post-trial decisions of the civilian counsel with which the military counsel disagrees.[104]

### C. Post-Trial Practice

Civilian counsel rarely, if ever, handle post-trial matters for an accused.[105] Unless an accused retains a civilian counsel for post-trial matters, once a trial concludes, the military counsel is usually left to handle all post-trial

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[97] *Id.*

[98] *Id. See also* DEFENSE COUNSEL ASSISTANCE PROGRAM (DCAP) SENDS, Vol. 8-17, WORKING WITH CIVILIAN COUNSEL (12 Jun. 2014) (citing United States v. Boone, 42 M.J. 308 (C.A.A.F. 1995)). In *Boone*, the civilian defense counsel informed the court that if he does not receive payment from a client then he does not work on the case. *Id.*

[99] Professional Experience, *supra* note 11; *see also* Military-Civilian Counsel Survey, *supra* note 11.

[100] United States v. Miller, 47 M.J. 352 (C.A.A.F. 1997) (applying eleven factors to determine whether a judge abused his discretion in granting a motion for continuance); Professional Experience, *supra* note 11. For example, on the eve of trial with many witnesses located throughout the globe, a judge denied a client's request for a continuance based on the recent hiring of civilian counsel. Citing the Miller factors, the judge determined that: the extremely late hiring of civilian counsel provided inadequate notice to the court, the number and complexity of the motions filed tended to prove military counsel was prepared to argue the case, and the expense associated with bringing multiple international witnesses to trial outweighed the client's interest in hiring civilian counsel. *Id.*

[101] Professional Experience, *supra* note 11; *see also* Military-Civilian Counsel Survey, *supra* note 11.

[102] *See* MCM, *supra* note 6, R.C.M. 502(d), 505, 803 (concerning withdrawal or substitution of counsel); *see also* MCM, *supra* note 6, R.C.M. 506; AR 27-10 *supra* note 7; AR 27-26, *supra* note 7; Rules of Practice, *supra* note 7; Professional Experience, *supra* note 11; Military-Civilian Counsel Survey, *supra* note 11. In one case, after a subpar closing argument by the civilian attorney, the military defense counsel requested to deliver a supplemental closing which was granted. *Id.*

[103] Professional Experience, *supra* note 11; *see also* Military-Civilian Counsel Survey, *supra* note 11.

[104] *Id.*

[105] *Id.*

matters.[106] Therefore, military counsel should anticipate this and address post-trial representation with the client multiple times, beginning well in advance of trial. Counsel should meet with the client again after trial to review the post-trial strategy and the client's decision in light of the adjudged sentence. Counsel should use the most current version of Defense Counsel Assistance Program (DCAP) Form 3: Post Trial and Appellate Rights Advisement Form[107] to guide the discussion and record the client's decisions.

## V. Best Practices—Judge Advocate and Civilian Defense Counsel Perspectives[108]

The military defense counsel must prepare for a case as if he was the lone counsel.[109] Establish a clear division of labor early and, if possible, reduce the division of labor to writing.[110] Draft a memorandum to the client that addresses your role as associate counsel.[111] Keep your technical chain abreast of any issues and engage Defense Counsel Assistance Personnel sooner rather than later.[112] "Maintain regular communication with civilian counsel throughout the case in order to minimize surprises."[113] A civilian counsel's lack of military affiliation can be advantageous to a client both in court, in front of members, and out of court, when dealing with the government.[114] However, there are also times when

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[106] *Id.* Post-trial matters include assisting an accused in the submission of any matter requesting relief pursuant to Article 60 of the UCMJ. MCM, *supra* note 6, R.C.M. 1105, 1106.

[107] The Defense Counsel Assistance Program (DCAP) prescribes various forms designed to assist military defense counsel in advising their clients. *See* Professional Experience, *supra* note 11. Failure to use DCAP forms (where required) may constitute ineffective assistance of counsel. *See* United States v. Axtell, 72 M.J. 662 (A.F. Ct. Crim. App. 2013); *See also* United States v. Mongkeya, 2013 CCA LEXIS 862 (A.F. Ct. Crim. App. 2013); United States v. Riley, 72 M.J. 115 (C.A.A.F. 2013) (findings set aside where the military counsel did not advise client of the consequences of sex offender registration.). The DCAP Sex Offender Registration Advice contains information for military counsel to advise a client of the consequences of a qualifying conviction requiring sex offender registration. *See* Defense Counsel Assistance Program, DCAP Form 1, Sex Offender Registration Advice.

[108] This section represents the author's recent professional experience and input from five civilian attorneys (more than fifteen were queried) and fifty-one Army, Air Force, Navy and Marine judge advocates who answered a multi-question survey, which elicited examples of best practices and general practice tips to assist judge advocates assigned to cases with civilian defense counsel. Some of the more common answers provided were incorporated in this section. None of the suggestions in the paper or this section should act as a substitute for legal advice. Judge advocates are strongly encouraged to consult with their technical chain or the rules to address questions or conflicts with the suggestions provided.

[109] *Id.*

[110] *See* Military-Civilian Counsel Survey, *supra* note 11. "Make sure that a division of labor is in writing. Make sure that the client knows that you are not the lead counsel; they made their choice of counsel and you respect that. Defer to the civilian counsel in front of the client."

> Figure out as soon as possible what [the civilian counsel's] level of knowledge is with respect to military tribunals, and supplement as much as possible. Make sure the civilian attorney feels comfortable asking you to work on the case, and coming to you with questions. [G]et a division of labor set up as early as possible in order to minimize the [civilian] attorney dropping work on [military counsel] at the last minute. Make sure to touch base with the civilian attorney a few days before major deadlines to [ensure] deadlines are met.

*Id.*

[111] *See* Military-Civilian Counsel Survey, *supra* note 11. A sample Scope of Representation Memorandum for Record can be found in Appendix. *See also* AR 25-50, *supra* note 74. Military defense counsel should consult AR 25-50's format requirements and modify the sample Memorandum to suit his or her needs. Though the memorandum in the Appendix may help clarify the military counsel's role to the client, it may not protect an attorney from a subsequent charge of ineffective assistance of counsel. The Sample Scope Memorandum for Record was graciously provided by a current trial defense services' attorney.

[112] Professional Experience, *supra* note 11. Defense Counsel Assistance Personnel are extremely helpful and accessible day or night. *Id.* Many Highly Qualified Experts are former military judges, who, oftentimes provide their personal cell phone number to assist with a variety of issues encountered by military counsel. *Id.*

[113] *See* Military-Civilian Counsel Survey, *supra* note 11.

[114] *See also id.* "In some instances, civilian counsel may get away with asking tough or harsh questions of a particular witness in front of members, e.g., a junior enlisted Soldier or an officer senior in rank to the defense counsel." *Id.* "As a civilian attorney, I was not going to have to [Permanently Change Station] to another legal job that was not litigation. Second, I can hire an investigator. An investigator is an essential tool to defending a criminal case." *Id. But see id.* "The military attorney should handle any portion of the case in which the civilian may use incorrect terminology or show a lack of understanding of the military system, especially in front of members." *Id. But see id.*

> No matter how much updating I tried to do as a civilian attorney regarding military law, the TDS attorney always had the most up-to-date information on the law. The TDS attorney also knew the local legal environment, both on the command side and [Office of the Staff Judge Advocate] side. Trial Defense Services knew the trial counsel's proclivities (good and bad) regarding litigation, the local [Military Judge's] stance on issues and pet peeves, and the makeup of the panel. Trial Defense Services' counsel also had access to military resources that civilian counsel had a tougher time accessing, for example access to witnesses through the military chain of command.

*Id.*; *see also* "[As a civilian] I'm not worr[ied] about rank structure, unlawful command influence, or UCMJ authority over me personally. I'm not bucking for a trial counsel slot or promotion, or the next judge advocate assignment." *Id.* Civilian attorneys who completed the survey noted an overall advantage in using the media to publicize his or her case, where appropriate. "[Use] of the media called public attention to command unreasonableness, with good fallout for the client." *Id.* Military members must receive approval through their technical chain prior to speaking with, or release of, official information:

> Department of Defense policy requires any official information intended for public release that pertains to military matters, national security issues, or subjects of significant concern to the DOD be cleared by appropriate security review and P[ublic] A[ffairs] offices prior to release. This includes materials placed on the Internet or released via similar electronic media.

*see* DEP'T OF DEFENSE DIRECTIVE 5230.9, CLEARANCE OF DOD INFORMATION FOR PUBLIC RELEASE (22 Aug. 2008); *see also* U.S. DEP'T

a military counsel may be in a better position to handle a certain part of a trial.[115] Military and civilian counsel should discuss their strengths and weaknesses and use those to the defense team's advantage.[116] "Learn, be open minded, and take an active role in the case."[117] "Don't be afraid to express your opinion."[118]

## VI. Conclusion

For military defense counsel, there are many rules to be mindful of. The skilled practitioner must be cognizant of these rules and be proactive in finding solutions when problems arise in order for military and civilian counsel to make their representation of clients most effective. Military and civilian defense counsel owe it to their clients to find ways to work around cultural differences and professional disagreements. When civilian and military counsel have a plan and work together, everyone is better off. When disagreements between civilian and military counsel occur, it is important to document those concerns, address them with the appropriate people, and always remember to act in the client's best interest. The defense is effective or ineffective as a team.

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OF ARMY, REG., 360-1, THE ARMY PUBLIC AFFAIRS PROGRAM (15 Sep. 2000). Military counsel should address a civilian's lack of access to classified evidence early since the process to gain a clearance can be cumbersome. A unit's designated intelligence officer is responsible for assisting with this process. *See* U.S. DEP'T OF ARMY, REG., 380-5, SECURITY, DEPARTMENT OF THE ARMY INFORMATION SECURITY PROGRAM (29 Sep. 2000).

> As a prosecutor[,] I had a case involving a civilian attorney who needed access to secret documents. It was a pain because they had to fill out an application for a security clearance and were missing documents. There was also a lag in the processing time. Ultimately, the civilian attorney never obtained a security clearance. [G]etting access to classified documents is tedious.

Military-Civilian Counsel Survey, *supra* note 11. "[R]equesting a clearance is a [d]ouble edged sword [because requesting a clearance for civilian counsel] makes prosecution harder for the government, but it is still a pain for the defense, logistically." *Id. But see id.* ("[Requesting a security clearance or access to classified documents] could be a benefit because the prosecution might give up trying").

[115] *See* Military-Civilian Counsel Survey, *supra* note 11.

> [V]oir dire and sentencing should be handled by the uniformed counsel. Voir dire because I want them to feel comfortable answering questions, and I think there is a greater comfort level speaking with a fellow uniformed person. I think that the uniformed counsel should handle sentencing because I usually try to portray my client as "one of us," and I think that [comes] better from a military member. Also, if we are in sentencing, the panel is probably tired of hearing from the civilian attorney.

*Id. But see id.* "If a client is paying for a civilian counsel, I believe the client should get his [or] her money's worth and have the civilian counsel handle the most significant portions of the trial, which generally include voir dire, closing, and primary, significant witnesses." *Id.*

[116] *See* Professional Experience, *supra* note 11; *see also* Military-Civilian Counsel Survey, *supra* note 11.

[117] *Id.*

[118] *See* Military-Civilian Counsel Survey, *supra* note 11.

> Communicate consistently and clearly. Figure out what the [civilian defense counsel's] expectations and experience are and let them know what your limitations and strengths are. Take advantage of civilian defense counsel's knowledge, experience, and expert networks, but don't be afraid to voice your opinion—[t]he same goes for working with detailed counseled. Military and civilian counsel bring different expectations, strengths, and resources to the table so use those to your team's advantage. If you don't communicate clearly, those things get lost and can negatively impact your client.

*Id.*; *see also id.* "Call and set up a meeting if civilian defense counsel has not already done so. If possible meet in person and go to each other respective offices. Offer to be part of the team. Have lunch with co-counsel and talk shop." *Id.* "Communication seems to be the trickiest issue, and it usually seems to be that the civilian attorney is not communicating well with the TDS attorney or, sometimes, the client. The best the TDS attorney can do is keep up the emailing/phone calling as much as possible." *Id.*

OFFICE SYMBOL ## MONTH 201#

MEMORANDUM FOR RANK FIRST LAST, XXXX Company, XXXX Battalion, XXXX Brigade, Fort XXXX, XX ZIP

SUBJECT: Retention of Civilian Defense Counsel—Scope of Representation

1. On_____, I was detailed to represent you concerning the charges preferred against you. On _____, we met and established an attorney-client relationship. During that initial meeting, we also discussed the scope of my representation of you pertaining to this matter (recorded on DCAP Form 7a).

2. On_____, we met in my office to review your case and allow me an opportunity to hear your recollection of the matters concerned in this case. During that meeting, I also advised you of various rights concerning the court-martial process (recorded on a Memorandum for Record).

3. On_____, I received notice via electronic mail that you have retained _____, civilian defense counsel, to represent you in this matter. During a phone conversation that same day, you verified that you had retained _____ to represent you and we discussed your wishes concerning my continued participation and role in your case.

4. In accordance with Army Regulation 27-26, Rules of Professional Conduct for Lawyers, Rule 1.2, "a lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which these decisions are to be pursued. . . . In a criminal case, . . . the lawyer shall abide by the client's decision, after consultation with the lawyer, as to choice of counsel as provided by law, a plea to be entered, selection of trial forum, whether to enter into a pretrial agreement, and whether the client will testify."

5. It is my understanding that you wish to have me continue to assist in your representation concerning this matter. However, you have retained _____ to serve as lead counsel. That is, _____ will have primary responsibility for communicating the status of your case with you. He will also be responsible for communicating with the court, requesting any necessary delays, making motions, interviewing and requesting experts and witnesses, negotiating with counsel for the government, developing a tactical case plan for trial, and presenting your case at trial.

6. I will continue to serve as associate counsel for your case. That is, I will follow _____'s lead while providing him the full measure of my own legal analysis and experience. I will relay messages from _____ to you concerning the status of your case, as necessary. I will also participate in the preparation and presentation of your case, and otherwise assist, as we deem necessary and appropriate.

7. If you have any questions concerning the scope of my representation of you in this matter, you may reach me at DSN XXX-XXXX or by email at _____.

NAME
CPT, JA
Defense Counsel

I have read and understood the memorandum above concerning the scope of representation.

Date_____.

NAME
RANK, USA
Accused

**The Right to See: A Due Process Analysis of Access to Information in Army Adverse Administrative Proceedings**

*Major John T. Soron*[*]

*Our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.—Chief Justice Earl Warren*[1]

## I. Introduction

Imagine you are an Administrative Law (ADLAW) attorney asked to referee a dispute between two of your peers. One is a trial counsel; the other is the defense counsel for a lieutenant under investigation for an inappropriate relationship. After much debate, the lieutenant's unit decided to simply give the lieutenant a referred Officer Evaluation Report (OER). The lieutenant's counsel contacts you because he only received a heavily redacted fragment of the commander's inquiry that forms the basis for the referred OER and none of the supporting evidence. The counsel argues that the unit deprived his client of a meaningful opportunity to respond. The trial counsel insists that the unit provided everything that is required by the regulation, and there is no requirement to give the lieutenant the supporting evidence. Both sides asked for your opinion. After reading Army Regulation (AR) 15-6, *Procedures for Investigating Officers and Boards of Officers*,[2] and AR 623-3, *Evaluation Reporting System*,[3] you determine that both sides have merit since both regulations have language that is ambiguous and seemingly contradictory. You also know that because he is a junior officer, a referred OER might trigger a separation under AR 600-8-24, *Officer Transfers and Discharges*,[4] or at the very least might lead to non-selection in an upcoming promotion board. Realizing the gravity of the issues with potential non-disclosure, you need a way to respond that is legally fair to all parties but within the scope of law and regulation.

Judge advocates and other military practitioners often face issues similar to this one, especially with the large number of critical and complex investigations taking place in the modern Army after nearly fourteen years at war.[5] These investigations range from mere fact finding inquires all the way to formal elimination proceedings, many containing their own unique procedures.[6] Nevertheless, these investigatory processes have one common denominator: they are governed by due process.[7] What this means in definite terms is less clear. As Chief Justice Earl Warren stated in the Supreme Court's decision in *Hannah v. Larche*, "Due process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts."[8] In other words, while due process exists in all of the various administrative procedures within the Army, the specifics vary depending on the exact type of procedure.[9] In addition, Army regulations sometimes provide an incomplete picture of due process rights, despite seemingly similar procedures.[10]

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[1] Earl Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. REV. 181, 188 (1962).

[2] U.S. DEP'T OF THE ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (1 April 2006) [hereinafter AR 15-6]. While this paper was initially drafted using the October 2nd, 2016 version of AR 15-6, it has been updated to reflect the recent changes in the regulation.

[3] U.S. DEP'T OF THE ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM para. 3-28 (31 Mar. 2014) [hereinafter AR 623-3].

[4] U.S. DEP'T OF THE ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006) (RAR 13 Sept. 2011) [hereinafter AR 600-8-24].

[5] *See, e.g.*, Raffi Khatchadourian, *The Kill Company: Did a Colonel's Fiery Rhetoric Set the Conditions for a Massacre?*, THE NEW YORKER, July 6, 2009 at 41. The article discusses the role played by Colonel (COL) Michael Steele, then Commander of the 3d Brigade Combat Team, 101st Airborne Division (Air Assault), in the alleged massacre during the 2006 operation in Samara, Iraqi commonly known as "Operation Iron Triangle." *Id.* This high profile incident was initially investigated using an Army Regulation (AR) 15-6 investigation, portions of which the author obtained in a Freedom of Information Act request and subsequently cited in his work.

[6] *See generally* Captain Arthur Hasseig, *The Soldier's Right to Administrative Due Process: The Right to be Heard*, 63 MIL. L. REV. 1 (1974) (listing various types of regulatory procedures that required administrative due process circa 1974); *see also* Major Jack F. Lane, Jr., *Administrative Due Process and Army Regulation 15-6*, ARMY LAW., May 1974, at 1 (discussing the myriad of administrative actions that can trigger judicial review). The breadth of administrative actions of today's Army mirror those discussed by both Captain (CPT) Hasseig and Major (MAJ) Lane and include flags, administrative investigations, memorandum of reprimand, adverse evaluations, and separations or eliminations from service. *See infra* Part III.

[7] *See* Hasseig, *supra* note 6, at 1.

[8] Hannah v. Larche, 363 U.S. 420, 442 (1960).

[9] *See generally* Hasseig, *supra* note 6, at 24.

[10] *Compare* AR 15-6, *supra* note 2, para. 1-9c, *with* AR 623-3, *supra* note 3, para. 3-28.

However, violating due process rights in any adverse administrative investigation can lead to reversible error if, and when, that action comes under the scrutiny of judicial review.[11] Understanding both the requirements and limitations of due process can ensure that actions survive judicial scrutiny while simultaneously achieving the Government's objectives and being fair to the individual respondent.[12]

This article provides guidance to practitioners about how due process considerations factor into the interpretation of various Army administrative regulations and procedures.[13] Part II reviews the Supreme Court's treatment of administrative due process rights, identifying their known legal contours. Additionally, part II examines how federal courts have applied these due process principles when reviewing allegations of error in adverse military administrative procedures. Part III lays out a methodology that practitioners can use to ensure the satisfaction of a subject's minimal due process rights. Part III then explains how to use that methodology to examine the right to information contained in five common Army administrative procedures. If the methodology exposes any regulatory ambiguity, part III discusses the legal authority that can be used to fill those gaps. Part IV addresses the interplay between due process rights and the Privacy Act of 1974, specifically examining how the "routine use exception" would apply to accusatory information contained in the investigation. In the end, this methodology serves as a tool to ensure fair, equitable, and legally sound administrative processes.

## II. The Judiciary's View of Due Process

The right to due process, as embodied in the 5th Amendment of the Constitution, is one of the most litigated issues within American jurisprudence.[14] The relevant language of the amendment itself seems fairly straightforward: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law."[15] Nevertheless, the full scope of these rights remains somewhat unclear, leading to the age old legal question, "how much process is due?"[16] While courts and commentators have consistently held that minimal due process in a non-criminal context includes notice and the opportunity to respond, even these basic requirements are open to debate with their application often driven by specific nuanced facts.[17] Unfortunately, because of the wide variety of processes and procedures within the federal government, no hard and fast interpretation is possible.[18] However, existing federal case law gives some guidance about what is required under certain situations and what is not.

### A. The Supreme Court's Due Process Pendulum

The Supreme Court first started to significantly wrestle with the question of how much process is due in non-criminal

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[11] A service member has several administrative and judicial avenues to challenge an adverse administrative finding. *See* discussion *infra* Part III. Once the servicemember exhausts his or her administrative remedies, he or she may sue for relief, most commonly under the Administrative Procedure Act (APA). Administrative Procurement Act, 5 U.S.C. §§ 701-06 (2016). Should a court determine that the Government has violated that act or due process principles in general, they can grant appropriate relief. *See, e.g.*, Jones v. United States, 7 Cl. Ct. 673 (1985) (reversing a discharge for a Soldier under chapter 16, AR 635-200 with seventeen years of service because he was denied due process rights). For an in depth discussion on the applicability of the APA's judicial review provisions as they apply to the military, see Major Thomas R. Folk, *The Administrative Procedure Act and the Military Departments*, 108 MIL L. REV. 135, 156-58 (1985).

[12] *See* Lane, *supra* note 6, at 1; *see also* Major Richard D. Rosen, *Thinking About Due Process*, ARMY LAW., Mar. 1988, at 3 (discussing the potential limits of required due process in administrative investigations while still allowing such actions to survive judicial scrutiny).

[13] There are several Army administrative regulations and procedures discussed in this article. *See, e.g.*, AR 15-6, *supra* note 2, para. 1-9c; U.S. DEP'T OF THE ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 2-2b (6 June 2005) (RAR 6 Sept. 2011) [hereinafter AR 635-200]; AR 600-8-24, *supra* note 4, para. 4-11; U.S. DEP'T OF THE ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 3-4b (19 Dec. 1986) [hereinafter AR 600-37]; U.S. DEP'T OF THE ARMY, REG. 600-20, ARMY COMMAND POLICY para. 2-17 (6 Nov. 2014) [hereinafter AR 600-20]; AR 623-3, *supra* note 3, para. 3-28, DEP'T OF THE ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAG) para. 2-6 (11 May 2016) [hereinafter AR 600-8-2]. While not addressed in this paper, comparable administrative due process rights are also enumerated. *See* U.S. DEP'T OF THE ARMY, REG. 27-10, MILITARY JUSTICE para. 3-16b and 3-18 (11 May 2016); U.S. DEP'T OF THE ARMY, REG. 735-5, PROPERTY ACCOUNTABILITY PROCEDURES para. 13-34 to -35 (10 May 2013) (RAR 22 Aug. 2013) [hereinafter AR 735-5]; U.S. DEP'T OF THE ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS para. 3-8f(6), 4-17 (4 Sept. 2008); U.S. DEP'T OF THE ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES para. 3-3 (29 Nov. 2010) (RAR 3 Sept. 2012). For an in-depth discussion of some unique factors in the inspector general's process and the interplay with access to information, see Lieutenant Colonel Craig A. Meredith, *The Inspector General System*, ARMY LAW., July 2003, at 20.

[14] *See, e.g.*, Lieutenant Colonel Dulaney L. O'Roark, *Military Administrative Due Process of Law as Taught by the Maxfield Litigation*, 72 MIL. L. REV. 137, 144-45 (1976). In this article from the post-Vietnam drawdown era, Lieutenant Colonel O'Roark analyzed a potential due process violation in a change in the Army's officer promotion system and how these alleged violations came into play in a pending lawsuit. *See id.* This era saw the first significant application of due process principles in military administrative investigations as well as the judiciary's willingness to examine these proceedings. *See* discussion *infra* Section II.B.

[15] U.S. CONST. amend. V. Due process case law also analyzes section 1 of the XIV Amendment when individual state action is involved, not federal. *See* Hasseig, *supra* note 6, at 2. However, the underlying concepts of due process between the V and XIV Amendment mirror each other in this area. *Id.*

[16] *See generally* O'Roark, *supra* note 14, at 146; Rosen, *supra* note 12, at 5-6; Hasseig, *supra* note 6, at 2-3.

[17] *Id.* In a purely military context, an involuntary discharge prior to expiration of term of service provides the best example of the balancing of these interests. As the type of discharge sought, length of service, and characterization of service all change, so too does the amount and nature of due process available to a respondent. *See infra* Part III.B.

[18] *Id.*

proceedings during the post-World War II era.[19] In 1951, the Court decided *Joint Anti-Fascist Refugee Committee v. McGrath*, which examined the use of the Attorney General's Loyalty Review Board list against alleged communist sympathizers.[20] While the Court did not decide the case on due process grounds,[21] Justice Frankfurter's concurrence introduced a due process rationale into the decision:

> But "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula . . . . Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.[22]

Justice Frankfurter further elaborated that due process is not simply a matter of legal convenience, but a right that exists no matter what external pressures may exist on the Government, to include national security concerns.[23] As he continues, "The Attorney General is certainly not immune from the historical requirements of fairness merely because he acts, however conscientiously, in the name of security."[24]

The Supreme Court further refined their application of due process boundaries in the 1959 case of *Greene v. McElroy*. In *Greene*, an executive employee of a defense contractor was denied a security clearance due to his purported past communist associations.[25] The Department of Defense based its determination largely on confidential information that was not shared with the plaintiff during his administrative review.[26] After he was unable to gain meaningful employment, the Plaintiff sued the Secretary of Defense because of adverse stigmatization, and the case eventually came before the Supreme Court.[27] While the Court relied on a lack of legal authority in the governing statue to decide the case in favor of the Plaintiff,[28] the opinion, authored by Chief Justice Warren, takes on a distinctly due process tone when addressing whether the Government's refusal to disclose the confidential information unfairly harmed the Plaintiff.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination.[29]

From the *Greene* holding, one tangible aspect of administrative due process appears—when Government action significantly puts an individual's liberty interest at stake, the right of confrontation and cross examination attach as part of the respondent's opportunity to respond.[30] Therefore, the Plaintiff in *Greene* was denied due process when the Government deprived him of the information used to revoke his clearance and remove him from his job.[31]

In the 1960 case of *Hannah v. Larche*, the Supreme Court clarified the scope of the right to confrontation and cross-examination established in *Greene*. In *Hannah*, several local election officials in Louisiana sued the Federal Commission on Civil Rights to obtain the identity of

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[19] *See* Hasseig, *supra* note 6, at 4-5 (outlining the contemporary history of due process litigation).

[20] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951). In this case, several charitable organizations challenged the appearance of their names on the Attorney General's Loyalty Review Board list for supposed Communist sympathies. *Id.* The list would then be circulated to all parts of the federal government. *Id.* Individuals who contributed to these organizations would be shunned from federal employment, essentially outlawing contribution to them by anyone associated with the federal government. *Id.*

[21] *Id.* at 137-42.

[22] *Id.* at 162-63.

[23] *Id.*

[24] *Id.* at 173. However the Court arguably took the opposite position six years before in *Korematsu v. United States*, 323 U.S. 214 (1944), a decision where Justice Frankfurter wrote a concurrence recognizing the validity of the military order interning the plaintiff without minimal due process. *Id.* at 224-25.

[25] Greene v. McElroy, 360 U.S. 474, 475-92 (1959); *see also* Hasseig, *supra* note 6, at 5-7 (concisely laying out the facts of *Greene*).

[26] *Greene*, 360 U.S. at 491-92.

[27] *Id.*

[28] *Id.* at 508.

[29] *Id.* at 496.

[30] *Id.*

[31] *Id. But see* Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 898-99 (1961) (holding that the rights discussed in *Greene* did not apply because the plaintiff, a short order cook who was also denied a security clearance and access to a military installation, was not denied her livelihood but simply one of many similar short order cook jobs, and the effects of her termination were not stigmatizing).

witnesses who purportedly were to testify against them.[32] Relying heavily on the *Greene* decision from the previous term, the petitioning officials argued that the Commission's refusal to identify these witnesses denied the officials their due process right to confront their accuser.[33] The Supreme Court disagreed; distinguishing *Greene* from *Hannah*, the Court held that because the nature of the Commission was investigatory, not adjudicatory, the rights discussed in *Greene* did not apply.[34] According to the Court, if a proceeding was merely investigatory, then it did not require more formal rights for those testifying, such as the identity of potential accusers.[35] On the other hand, once the proceedings took on an adjudicatory function, the bundle of respondent's rights substantially increases to the more trial-like paradigm.[36] Therefore, drawing from a combination of the *Greene* and *Hannah* holdings, should a Government proceeding change from an investigatory function to an accusatory one with a significant liberty interest at stake, trial-like rights of appraisal, confrontation, and cross examination attach in some form.[37]

Several subsequent cases provide further guidance on the scope of these rights in various types of administrative proceedings. In *Goldberg v. Kelly*, the Supreme Court held that when a significant property interest was at stake—in this case indigent welfare benefits—the right to counsel and a hearing would also attach.[38] In the companion cases of *Board of Regents of State Colleges v. Roth* and *Perry v. Sindermann*, the Court held that when a university's policy provided an implication of tenure, substantially more trial-like due process would attach upon termination as compared to a state school where no such policy existed.[39] Finally, in *Goss v. Lopez*, the Court extended heightened due process rights to high school students facing suspension where that suspension would have long-term stigmatization on the student and the potential for error by the school administrators was fairly high.[40]

From this line of cases, certain contours emerge for constitutionally based administrative due process rights. First, Government action against a person's established liberty or property interests triggers due process in some form, no matter what the context.[41] Second, due process expands when a proceeding changes from an investigatory function to an adjudicatory one; the rights of appraisal, confrontation, and cross-examination vest in some manner.[42] Finally, as the potential harm increases, so does the degree of the due process, expanding from simple notice and opportunity to respond up to a full, trial-like process.[43]

B. The Judicial View of Due Process in the Military

While the Supreme Court's case law establishes a roadmap on how to apply due process to Government action as a whole, the specialized nature of the military colors this application of due process within the military administrative context.[44] The Supreme Court has long established that the military is a specialized society with specific matters that are within the discretion of the military to decide.[45] For example, in *Orloff v. Willoughby*, the Court dismissed a physician's

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[32] *See generally* Hannah v. Larche, 363 U.S. 420, 421-30 (1960) (laying out the facts of the case). The respondents in this case were being investigated for allegedly violating the voting rights of African Americans within their districts. *Id.*

[33] *Id.* at 426-27, 442-43.

[34] *Id.* at 442.

> The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. An analysis of these factors demonstrates why it is that the particular rights claimed by the respondents need not be conferred upon those appearing before purely investigative agencies.

*Id.*

[35] *Id.* at 443-44.

[36] *Id.* at 450 (quoting Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294 (1933)); *see also Hannah*, 363 U.S. at 488-89 (Frankfurter, J., concurring) (providing perspective on the difference between an investigatory body and one with an accusatory function).

[37] *Id.*; *see also* Greene v. McElroy, 360 U.S. 474, 496 (1959).

[38] Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970) ("Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. . . . Particularly where credibility and veracity are at issue, . . . written submissions are a wholly unsatisfactory basis for decision.").

[39] *Compare* Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Certain attributes of 'property' interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."), *with* Perry v. Sindermann, 408 U.S. 593, 602 (1972) ("A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure.").

[40] Goss v. Lopez, 419 U.S. 565, 580 (1975) ("Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed.").

[41] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. at 162-63 (1951).

[42] *Greene*, 360 U.S. at 496; *see also* Hannah v. Larche, 363 U.S. 420, 488-89 (1960) (Frankfurter, J., concurring).

[43] *Goldberg*, 397 U.S. at 268-69; *see also Goss*, 419 U.S. at 578-79.

[44] *See generally* Rosen, *supra* note 12, at 3-4 (discussing possible limitations of due process concerns in military contexts). *But see* Lane, *supra* note 6, at 1 (discussing recent losses by the Government in civil trials for cases involving apparent due process violations by the military at service schools). Given the timing of his article, MAJ Lane was presumably talking about the *Wasson* and *Hagopian* cases. *See infra* Section II.B.1.

[45] Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953). *See* Colonel Darrell L. Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL. L. REV. 1 (1975) (providing an in depth, historical analysis of the evolution (and devolution) of this so called non-reviewability doctrine).

habeus corpus action against the Army challenging the decision not to grant him a commission as a medical officer.[46] As the Court stated:

> But judges are not given the task of running the Army. . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.[47]

The Supreme Court's reluctance not to second-guess military action has generally filtered into lower court decisions involving military administrative actions.[48] Generally, judicial review of military actions only involves reviewing the "legality of prescribed administrative procedure."[49] So long as those procedures pass basic constitutional scrutiny, courts will not interject their opinions.[50] For example, in *Sims v. Fox*, the Fifth Circuit initially found an Air Force officer's discharge unconstitutional because he was not afforded a hearing; however, upon rehearing en banc, the Court held that the procedure did provide minimal due process given the interest at stake.[51] Therefore, so long as the proceedings contain minimal due process, the courts will refrain from substituting their own judgment.[52] Despite this deference, courts tend to grant relief when a plaintiff shows that a proceeding actually violates due process—usually through the inadequacy of the proceedings or where the military violates its own regulations.[53] As the level of potential harm increases for a respondent, so does the level of scrutiny that the court will give to each specific process.[54]

*1. Inadequacy of Proceedings*

Courts will first scrutinize military administrative proceedings when the proceedings themselves do not contain adequate due process. The Second Circuit addressed this issue in two similar cases in the 1970s, *Wasson v. Trowbridge*[55] and *Hagopian v. Knowlton*,[56] both dealt with the procedures for discharging service academy cadets for cause.[57] In *Wasson*, the court held that a third-year United States Merchant Marine Academy Cadet who was pending dismissal for excessive demerits was first entitled to a hearing; however, the court declined to define the specific requirements of the hearing and instead deferred to the military authorities to establish the necessary procedures.[58]

Five years later, the Second Circuit expanded its holding in *Hagopian*, a case involving the dismissal of a third-year cadet from the United States Military Academy at West Point once again for excessive demerits during a semester.[59] During his separation proceedings, the plaintiff sought legal advice and requested a hearing with the assistance of counsel.[60] The Academy leadership denied both requests, and when the plaintiff asked for assistances from the Academy's

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[46] *Id*. at 84-86.

[47] *Id.* at 93-94; *see also* Parker v. Levy, 417 U.S. 733, 756-57(1974) (noting that courts are reluctant to second guess the judgment of the executive branch and military officials in purely military affairs, based largely on the fact that the military is a unique organization with its own customs and traditions).

[48] Allgood v. Kenan, 470 F.2d 1071, 1073 (9th Cir. 1972) ("Judicial review of Army administrative determinations is quite limited. Courts will review military determinations by habeas corpus to insure that rights guaranteed by the constitution or by military regulations are protected. Where, for example, the military has prescribed a procedure for entertaining requests for release by reason of a soldier's conscientious objection, see, e. g., AR 635-20 habeas corpus will lie to review the military's disposition of such requests.").

[49] Reed v. Franke, 297 F.2d 17, 20 (4th Cir. 1961).

[50] *Id.* at 27.

[51] *Compare* Sims v. Fox, 492 F.2d 1088 (5th Cir. 1974) (holding that the plaintiff, a junior officer being separated with an honorable discharge but a negative separation designation number, had demonstrated an adequate liberty interest to require a hearing prior to discharge), *with* Sims v. Fox, 505 F.2d 857 (5th Cir. 1974) (en banc) (holding that the same plaintiff had not shown an adequate liberty and property interest that would require a hearing before a board). *See also* Rew v. Ward, 402 F. Supp. 331 (D.N.M. 1975) (holding that an Airman had a liberty interest in remaining in the United States Air Force, but procedures providing her written notice of offense along with dates and names of witnesses, and allowing her chance to respond with assistance of counsel were adequate to satisfy due process). Besides the military status of the plaintiffs, a key difference between these cases and *Greene* is the degree of resulting stigmatization. Unlike the plaintiff in *Greene*, whose termination for lack of security clearance caused significant professional stigmatization, the plaintiffs in *Sims* and *Rew* faced little harm since no facts about the basis of their discharges appeared on their Certificate of Release or Discharge from Active Duty. *Compare Sims*, 505 F.2d at 860, *with* Greene v. McElroy, 360 U.S. 490-93 (1959).

[52] *Sims*, 505 F.2d at 864.

[53] *See generally* Haessig, *supra* note 6, at 18-19. A third ground for judicial review, specifically whether the military's action complies with a governing statute, does not directly involve due process considerations per se. *See generally* Peck, *supra* note 45, at 40-42 (noting three traditional grounds of judicial review as of the 1960s).

[54] *See, e.g.*, Bland v. Connally, 293 F.2d 852, 858 (D.C. Cir. 1961) (voiding a U.S. Naval Reservist's discharge under other than honorable conditions when no hearing was given). "What is challenged is the right of the service to introduce the element of punishment of 'labeling' into the involuntary separation, by characterizing the discharge derogatorily. The position of the dischargee is thus much stronger than that in *Greene* . . . ." *Id.* Of note, the plaintiff in *Bland* faced a discharge "under conditions other than honorable." *Id*. at 854.

[55] Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967).

[56] Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972).

[57] *See also* Major John H. Beasely, *The USMA Honor System—A Due Process Hybrid*, 118 MIL. L. REV. 187, 199-204 (providing detailed facts about both *Wasson* and *Hagopian* and placing them contextually into a larger expansion of due process litigation during the early 1970s).

[58] *Wasson*, 382 F.2d at 812. Of note, the *Wasson* court did not extend the Plaintiff the right to counsel nor did it afford him the right to examine confidential fitness reports without an evidentiary hearing that showed the nature of the information in question. *Id*. at 812-13.

[59] *Hagopian*, 470 F.2d at 204-05.

[60] *Id*. at 206-07.

legal department, they informed him that they were "discouraged from counseling cadets who were called to appear before conduct boards."[61]

After the Academy's Academic Board recommended dismissal, the plaintiff sued alleging that his pending separation violated his due process rights, and he requested injunctive relief.[62] When the case reached the Second Circuit, the court held that the Academy's proceeding violated the plaintiff's due process rights because of the interests associated with a both a college education and a career as an officer.[63] The court further held that due process in this case would have been satisfied if the plaintiff had been afforded the right to appear before the board and to at least consult with legal counsel.[64] The court understood it was expanding its holding in *Wasson*, but attributed this specificity to the difference in size and scale of West Point compared to the Merchant Marine Academy, as well as, the nature of this particular board proceeding.[65] Finally, the court attempted to define a standard upon which it could judge these types of due process cases where the outcome would "give the reader a 'feel' for what is fundamentally fair in a particular instance."[66] *Wasson* and *Hagopian* both reinforce the conclusion that if the military's procedures do not afford minimal levels of due process, the courts will intervene.

*2. Regulatory Violations*

In addition to looking at procedural inadequacies, courts will also grant relief in cases where the military violates its own regulation.[67] The general theory is that once a governmental agency, such as the Army, prescribes a rule either through statute or regulation, due process mandates that the agency follow that rule.[68] For example, in *Bluth v. Laird*, the Fourth Circuit granted relief when an Army physician claimed that the Army failed to follow its own regulation for processing and subsequently denying his deferment from duty overseas.[69] Ruling against the Government, the *Bluth* court stated, "[I]n exercising its discretion, the military will be held to the positive commands it has imposed on itself as to what procedures and steps are to be followed . . . ."[70] While these cases may reinforce an argument that an agency must be wary of unnecessarily providing procedural rights, they also demonstrate that once the Government creates these rights, they must be followed.[71]

*3. The "Mindes" Test*

While the cases cited above are not exhaustive, they reinforce both the judiciary's deference towards the military as well as its duty to ensure adequate due process based on various precedents and other authorities. In *Mindes v. Seaman*, the Fifth Circuit took the analysis a step further by creating a workable test for trial courts tasked with determining whether an administrative action warrants intervention.[72] *Mindes* involved an Air Force officer who was separated from service as a result of an evaluation report that he claimed contained factually inaccurate information.[73] After exhausting his administrative remedies, the Plaintiff sued for relief.[74] In its opinion, the Fifth Circuit surveyed similar case law to set forth known parameters for judicial review of military administrative actions.[75] The court first determined that it had jurisdiction so long as a plaintiff (a) successfully claimed a violation of a constitutional right or that the military failed to follow an applicable statue or its own regulation; and (b) the plaintiff exhausted his administrative remedies.[76] Once these conditions had been met, a court could then examine whether it should intervene:

> A district court faced with a sufficient allegation must examine the substance of that allegation in light of the policy reasons behind nonreview of military matters. In making that examination, such of the following factors as are present must be

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[61] *Id.*

[62] *Id.*

[63] *Id.* at 209.

[64] *Id.* at 210-11. The court declined to grant the Plaintiff the right to counsel at the proceeding and access to confidential fitness reports prepared by plaintiff's tactical officer. *Id.* at 212-13.

[65] *Id.* at 211 ("With a cadet population of several thousand, it is unlikely that the members of the Board, drawn from several departments, would have a sufficient acquaintanceship with the cadet to be able to appraise him or determine his 'potential for retention' merely on the basis of his letter to it.").

[66] *Id.* at 209.

[67] *See* Rosen, *supra* note 12, at 7-10. *See also* Peck, *supra* note 45, at 40-42 (discussing the Supreme Court's evolution into this area).

[68] *Id.*

[69] Bluth v. Laird, 435 F.2d 1065, 1067 (4th Cir. 1970). Major Bluth, an Army physician, also claimed he had not been properly trained in his basic branch prior to receiving orders for Vietnam, also violating Army regulations. *Id.*

[70] *Id.* at 1071. *See also* Feliciano v. Laird, 426 F.2d 424 (1970) ("When a clear cut duty imposed by a regulation is not performed, mandamus will issue to compel the federal officer to fulfill his obligation."). *But see* Peck, *supra* note 45, at 2-3 (noting the irregular application of this principle by various circuits).

[71] *See generally* Rosen, *supra* note 12, at 7-10. Major Rosen argued that the Military, especially subordinate commanders, must be wary of granting new procedural due process rights through policies and regulations in order to prevent unnecessarily and costly litigation. *Id.*

[72] Mindes v. Seamen, 453 F.2d 197 (5th Cir. 1971).

[73] *Id.* at 198.

[74] *Id.*

[75] *Id.* at 199-201.

[76] *Id.*

weighed (although not necessarily in the order listed).

1. The nature and strength of the plaintiff's challenge to the military determination. Constitutional claims, normally more important than those having only a statutory or regulatory base, are themselves unequal in the whole scale of values—compare haircut regulation questions to those arising in court-martial situations which raise issues of personal liberty. An obviously tenuous claim of any sort must be weighted in favor of declining review.

2. The potential injury to the plaintiff if review is refused.

3. The type and degree of anticipated interference with the military function. Interference per se is insufficient since there will always be some interference when review is granted, but if the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief.

4. The extent to which the exercise of military expertise or discretion is involved. Courts should defer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific military functions.[77]

The Fifth Circuit subsequently added an additional step of addressing whether the regulation was drafted for the benefit of the individual Soldier or for the service.[78] The *Mindes* test presents both trial courts and litigators a concise yet practical analysis for these issues drawing from Supreme Court case law down to individual regulations.

## III. Regulatory Analysis Framework for Military Practitioners

The above analysis show that courts view Army regulations not simply as rules written in a vacuum, but also containing principles drawn from significant judicial precedents governing due process. In other words, Army regulations are not simply positivist legal authority but do contain essential constitutional elements.[79] Military practitioners should keep these factors in mind when analyzing compliance or non-compliance with a regulatory provision.

This case law also provides a roadmap for practitioners to use when analyzing a due process issue arising from regulatory ambiguity, such as whether to grant access to information discussed in the opening scenario. To analyze these types of issues, practitioners must first identify the type of interest at stake for the respondent: liberty, property, or both.[80] Next practitioners must determine whether the administrative proceeding in question is investigative or adjudicatory, conducting an analysis similar to *Hannah v. Larche*.[81] As *Hannah* showed, when the process turns from investigatory to adjudicatory, the respondent is entitled to more robust protections.[82] Third, practitioners must determine what rights the regulation requires—proper appraisal of the government's action, confrontation of that action, and cross examination of the information presented—given the interest at stake.[83] Within this step, practitioners must address whether these rights are positive or constitutional and whether they are adequate given the interest involved.[84] Next, practitioners should examine any concerns that the procedure places unnecessary burdens on the Government.[85] Lastly, practitioners should examine the entire process for a final check on whether the outcome is fundamentally fair and objectively "feels" right.[86]

Using this methodology, most Army regulations satisfy due process scrutiny when examining the right to information, but a few have some significant gaps. In cases of doubt, practitioners should use the governing case law to make a due process determination about whether or not to grant access to the information.

### A. The Baseline: Army Regulation 15-6

[77] *Id*. at 201. *See also* Peck, *supra* note 45, at 73-77 (balancing the various elements of the *Mindes* test).

[78] Silverthorne v. Laird, 460 F.2d 1175 (5th Cir. 1972) (comparing the regulatory process to determine whether a Soldier is a conscientious objector with the regulatory process for an administrative separation).

[79] *Cf.* Rosen, *supra* note 12, at 6-10. Major Rosen argued that the positive nature of Army regulations was what primarily drove due process analysis and that the procedural protections granted by many regulations were largely a creation of the specific governing statute or regulation in question. *Id.*

[80] *See generally* Greene v. McElroy, 360 U.S. 474, 491-92 (1959) (identifying liberty and property interests in a case of continued employment), *and* Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (discussing welfare benefits as significant property interest).

[81] *See* Hannah v. Larche, 363 U.S. 420, 440-41 (1960) (discussing investigatory roles of the commission in question), 442-51 (discussing the role of purely investigative bodies).

[82] *Id.* at 488-89 (Frankfurter, J., concurring).

[83] *Greene*, 360 U.S. at 496.

[84] *Id. See also* Rosen, *supra* note 12, at 6-10.

[85] *See* Silverthorne v. Laird, 460 F.2d 1186 (5th Cir. 1972); *see also* Mindes v. Seamen, 453 F.2d 202 (5th Cir. 1971).

[86] *See* Hagopian v. Knowlton, 470 F.2d 209 (2d Cir. 1972) ("Because of the factors controlling what process is due usually vary from case to case, prior decisions on the subject cannot ordinarily furnish more than general guidelines which might give the reader a 'feel' for what is fundamentally fair in a particular instance.").

The Army's primary administrative investigative regulation, AR 15-6, *Procedures for Administrative Investigations and Boards of Officers*, serves as a baseline standard for all other regulatory procedures as well as a procedure to use when no other regulation applies.[87] It provides commanders with a mechanism for obtaining facts and recommendations on any issue within their purview to investigate.[88] While primarily an investigative tool, AR 15-6 itself can transition to an adjudicatory function and mandates certain additional rights when this occurs.[89] Paragraph 1-12c enumerates these rights:

> [W]hen adverse administrative action is contemplated against an individual . . . including an individual designated as a respondent, based upon information obtained as a result of a preliminary inquiry, administrative investigation, or board of officers conducted pursuant to this regulation, the appropriate military authority must observe the following minimum safeguards before taking final action against the individual:
>
> (1) Notify the person in writing of the proposed adverse action and provide a copy, if not previously provided, of *that part of the findings and recommendations of the investigation or board and the supporting evidence on which the proposed adverse action is based*…
>
> (2) Give the person a reasonable opportunity, no less than 10 days, to reply, in writing, and to submit relevant rebuttal material.
>
> (3) Review and evaluate the person's response.[90]

Paragraph 1-12d further elaborates that if another regulation provides a different procedure for adverse administrative action, that regulation will govern so long it "provide[s] procedural safeguards, such as notice to the individual and opportunity to respond."[91]

This provision of AR 15-6 satisfies all the necessary due process requirements discussed in case law, especially the right to have access to adverse information. Its instructions should be taken at face value without alteration, absent some other clear regulatory authority.[92] While not specifically identifying whether a liberty or property interest is at stake, it can be used in either situation.[93] As noted, while the regulation is primarily investigative, it recognizes that an investigation often turns into an adjudicatory function and provides additional rights when this occurs.[94] These include the rights (1) to be apprised of the nature of the adverse action; (2) to confront the evidence used in the adverse action; and (3) to cross-examine through the use of a written rebuttal.[95] Finally, this process is fundamentally fair because it allows for broad access to adverse information, the scope is clear, and the rights of parties are protected—the rights of appraisal, confrontation, and cross examination—and codified in the regulation itself.[96] When in doubt, practitioners representing both the Government and an individual respondent should always default to the rule contained in AR 15-6.

B. Derogatory Information: Army Regulation 600-37 and Army Regulation 600-20

Closely aligned with AR 15-6 are the procedural rights contained in AR 600-37, *Unfavorable Information*,[97] and AR 600-20, *Army Command Policy*, governing reliefs from command.[98] Both regulations involve situations similar to *Greene v. McElroy* where the respondent faces a significant liberty interest and potentially career ending stigmatization.[99] For AR 600-37, this action is the filing of an administrative reprimand in an official military personnel file;[100] in AR 600-20, the action is removal from command, a position that the Army recognizes as one with special "authority and responsibility" over other Soldiers.[101]

Since both regulations carry long-term implications for a respondent's career, both of these processes are adjudicatory[102] and they both afford due process rights nearly

[87] AR 15-6, *supra* note 2, para. 1-1.

[88] *Id.* para. 1-6.

[89] *Id.* para. 1-12a.

[90] *Id.* para. 1-12c (emphasis added).

[91] *Id.* para. 1-12d.

[92] Prior to the April 1st, 2016 revision of the regulation, some legal offices have undertaken the practice of redacting personally identifiable information (PII) from AR 15-6 investigations, to include identities of witnesses, and often cite the Privacy Act as authority. Such practice deprives a respondent of the right to cross examine witnesses to the proceedings and creates a situation analogous to *Greene*. The April 1st, 2016 revision to AR 15-6 may cause additional confusion on this point with the addition to references to the Privacy Act in paragraph 1-12c(2). The interplay between the Privacy Act and due process is discussed in Section IV *infra*.

[93] *Accord* AR 735-5, *supra* note 13, para. 13-25 (mandating use of an AR 15-6 investigation under five different property loss and accountability scenarios); AR 635-200, *supra* note 13, para. 2-10g (directing that administrative reparation boards initiated under AR 635-200 use the formal board procedures of AR 15-6).

[94] AR 15-6, *supra* note 2, para. 1-12c.

[95] *Id.*

[96] *Id.*

[97] AR 600-37, *supra* note 13, para. 3-4b.

[98] AR 600-20, *supra* note 13, para. 2-17.

[99] *See generally* Greene v. McElroy, 360 U.S. 474, 491-92 (1959).

[100] AR 600-37, *supra* note 13, para. 3-4b.

[101] *See generally* AR 600-20, *supra* note 13, para. 1-5 (discussing the unique position of command in the Army).

[102] *See generally* Hannah v. Larche, 363 U.S. 442 (1960).

identical to AR 15-6: (1) proper notice to include information that the initiating official relied on, and (2) the opportunity to reply with a written rebuttal that the initiating official must consider prior to final determination.[103] Given that both of these regulations constitute otherwise minor administrative actions and do not directly result in the termination a Soldier's status in the Armed Forces, they afford adequate due process. Furthermore, both regulations enumerate the right to see both the basis of the derogatory action and any evidence used to support it. This again affords adequate appraisal, confrontation, and cross-examination.

C. Separations: Army Regulation 635-200 and Army Regulation 600-8-24

The two active duty separation regulations, AR 635-200, *Active Duty Enlisted Administrative Separations*, and AR 600-8-24, *Officer Transfers and Discharges*, further develop the rights enumerated in AR 15-6. Both regulations address policies and procedures for the involuntary termination of a Soldier's military career for cause and granting a discharge under less than honorable conditions.[104] Therefore, both procedures are also adjudicatory since a discharge under less than honorable conditions can have significant stigmatization on the ability to gain meaningful employment outside the military.[105]

The separation proceedings themselves, and the rights associated with them, reflect the distinction the Supreme Court drew in both *Greene v. McElroy* and *Cafeteria and Restaurant Workers Union v. McElroy*: The potential for increased loss in professional standing affords more robust due process rights.[106] As a result, the exact procedural protections afforded to respondents increase with either their time in service or the nature of discharge sought.[107] Despite this, the minimal procedural protections afforded to Soldiers include the right to adequate notice, the right to inspect the documents forming the basis for separation, and, at a minimum, the opportunity to provide a written response.[108]

As with AR 15-6 and AR 600-37, both regulations enumerate the right to examine evidence used in both proceedings and to allow for assistance of counsel in interpreting and using that evidence.[109] Both regulations afford ample due process by preserving the right to be apprised of the separation action, the right to confront both witnesses and evidence used in the proceedings, and the right to cross-examine that evidence. In fact, as the potential for long-term stigmatization inside or outside the military increases, so do the rights associated with each procedure, ranging from a written response to a trial-like board proceeding.[110] Therefore, the procedures outlined in both regulations adequately capture the spectrum of administrative due process rights that the Supreme Court envisioned in its case law. The regulations place heavy burdens on the government, but because each can result in long term consequences for the respondents, their procedures are necessary and fundamentally fair.

D. Evaluation Reports: Army Regulation 623-3

Despite primarily being a rating and evaluation tool, AR 623-3, *Evaluation Reporting System*, also contains significant due process considerations since adverse evaluations carry long-term career implications.[111] The regulation primarily evaluates the performance of officers and non-commissioned officers (NCOs) "who are best qualified for promotion and assignment to positions of greater responsibility."[112] All officers and NCOs undergo some form of periodic evaluation throughout the course of their duties.[113] These evaluations, either in the form of OERs, Academic Evaluation Reports (AERs), or Non-Commissioned Officer Evaluation Reports (NCOERs), are routine, administrative matters that do not trigger due process. However, AR 623-3 contains provisions for adverse evaluations under certain criteria.[114] Once this

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[103] *See* AR 600-37, *supra* note 13, para. 3-4b (enumerating the specific rights); AR 600-20, *supra* note 13, para. 2-17 (incorporating AR 15-6 by reference). Army Regulation 600-37 also contains a right to appeal the reprimand to the Department of the Army Suitability Evaluation Board (DASEB). AR 600-37, *supra* note 13, para. 7-2.

[104] *See generally* AR 635-200, *supra* note 13, paras. 2-1, 2-2 (outlining the general notice requirements for certain separations initiated under the regulations); AR 600-8-24, *supra* note 13, paras. 4-1, 4-2 (providing criteria for initiation of officer elimination proceedings).

[105] *See, e.g.*, Bland v. Connally, 293 F.2d 858 (D.C. Cir. 1961) (discussing stigmatization of an Other than Honorable discharge).

[106] *Compare* Greene v. McElroy, 360 U.S. 496 (1959), *with* Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 898-99 (1961). The interests are also similar to the distinction the Supreme Court drew in *Bd. of Regents v. Roth* and *Perry v. Sindermann* between tenured and non-tenured employees. *See also* Bd. of Regents v. Roth, 408 U.S. 577 (1972); Perry v. Sindermann, 408 U.S. 602 (1972).

[107] *See* AR 635-200, *supra* note 13, paras. 2-2c(4) (mandating that a Soldier with over six years of total active and reserve service receive a hearing before an administrative separation board), 3-7e (mandating that no Soldier will be separated under the regulation with discharge characterization of other than honorable unless he or she has been afforded the right to present their case before a separation board); AR 600-8-24, *supra* note 13, para. 4-20 (defining the term probationary officer versus a nonprobationary officer and providing probationary officer's their rights related to being discharged).

[108] AR 635-200, *supra* note 13, para. 2-2b; AR 600-8-24, *supra* note 13, para. 4-11.

[109] *Id.*

[110] *Id.*

[111] *See, e.g.*, Mindes v. Seamen, 453 F.2d 197, 198-99 (5th Cir. 1971) (detailing how an Air Force officer's career ended as a direct result of a bad evaluation).

[112] AR 623-3, *supra* note 3, para. 1-8a(2).

[113] *Id.* para. 1-8b.

[114] *Id.* paras. 3-25, 3-26.

occurs, the evaluation becomes analogous to an administrative reprimand under AR 600-37 due to the implications on an officer or NCO's career.[115] Furthermore, under certain situations, an adverse OER can directly trigger an officer's elimination under AR 600-8-24.[116] Therefore, the referral of an evaluation report is an adjudicatory administrative proceeding because it puts an Officer or NCO's liberty interests at stake once again through potential career-ending stigmatization.

Even though its effects are comparable to AR 15-6, AR 600-37, and AR 600-20, the referral procedures in AR 623-3 do not measure up to the protections contained in the other regulations, arguably making them deficient in enumerated due process. The procedures themselves outlined in paragraph 3-28 of AR 623-3 include only initial notification and opportunity to comment and they only apply to OERs and AERs, not NCOERs.[117] Furthermore, compared to all the regulations examined, AR 623-3 does not contain language similar to the baseline due process protections seen in paragraph 1-9c of AR 15-6.[118]

One contributing factor to the lack of due process language is the manner in which AR 623-3 mandates the use of derogatory information in an evaluation. Under AR 623-3, only complete and verified derogatory information can be used in an evaluation.[119] These rules imply that the necessary due process safeguards are filled by other regulations, such as AR 15-6.[120] However, the failure to include the usual due process language in AR 623-3 creates a situation where an evaluation might rely on verified derogatory information contained in an informal commander's inquiry and minimal due process has yet to be afforded. Prior to the April 1st, 2016 revision, AR 15-6 itself would also imply that this omission is proper because it specifically references "an adverse evaluation report" when discussing other regulatory procedures that supersede AR 15-6's organic provisions.[121] Because access to supporting evidence is not specifically addressed in paragraph 1-9d of the October 2nd, 2006 version of AR 15-6 as a universal baseline right, a close reading might suggest that a respondent is not entitled to this right unless enumerated in the governing regulation.[122]

The circular logic of this regulatory gap previously led to situations similar to the introduction, which are nearly analogous to *Greene v. McElroy* because a respondent simply cannot challenge the information used against him.[123] Practitioners should be wary of subscribing to this interpretation of AR 623-3 because it arguably violates fundamental fairness.[124] The spectrum of jurisprudence—originating in the Supreme Court, extending through the Federal Courts, and enumerated in all other similar regulations—all support the proposition that if the Government uses information in an adjudicatory manner, then the Government must provide that information to the respondent in order to satisfy due process. Furthermore, the burden on the Government to provide this information is de minimis compared to the potential harm to a respondent. The April 1st, 2016 revision of AR 15-6 actually address this issue in one of its major changes to the now paragraph 1-12.[125] These changes should clarify this issue going forward. However, if practitioners are concerned about the legal authority that allows them to release any relevant adverse information, specifically when trying to comply with AR 15-6's new reference to the Privacy Act (discussed below), they need only look to the cited case law. Practitioners representing individual respondents should also look to this authority to justify their requests to obtain information if access is denied.

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[115] *Id. See also Mindes*, 453 F.2d. at 198-99.

[116] *See* AR 600-8-24, *supra* note 13, para. 4-2c(4) (listing a referred Officer Evaluation Report (OER) as one of the basis for initiation of elimination under the regulation).

[117] AR 623-3, *supra* note 3, para. 3-28.

[118] *Compare* AR 623-3, *supra* note 3, para. 3-28b, *with* AR 15-6, *supra* note 10, para.1-12c.

[119] *See* AR 623-3, *supra* note 3, para. 3-19 (mandating that only verified derogatory information be used in evaluations and directing evaluations not be delayed due to incomplete investigations).

[120] *Id.*

[121] U.S. DEP'T OF THE ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, para. 1-9d (1 April 2006) [hereinafter Old AR 15-6]. ("[D]iscussing the lack of a requirement to refer an investigation conducted under this regulation to a soldier prior to giving the soldier *an adverse evaluation report* based upon the investigation *because the regulations governing evaluation reports provide the necessary procedural safeguards*.") (emphasis added).

[122] *Id.*

[123] E-mail from Captain David Ford, Chief, Client Services, 101st Airborne Div., to author (Dec. 09, 2014, 16:53 EST) (on file with author) (noting that his office has seen several issues about releasing information to investigation respondents). *See also* Greene v. McElroy, 360 U.S. 496 (1959). While chapter 4 of AR 623-3 covers requests for commander's inquiries and appeals in the Officer Evaluation Report (OER), Academic Evaluation Report (AER), and Noncommissioned Officer Evaluation Report (NCOER) process, these all occur after the filing of an evaluation when the stigmatizing harm to a respondent's career has already been done. AR 623-3, *supra* note 3, para. 4-1. Further, AR 623-3 specifically states that a commander's inquiry does not have to follow the procedures of AR 15-6, thus preventing a respondent from arguing that the protections of paragraph 1-12c apply. *Id.* para. 4-4c.

[124] *See* Hagopian v. Knowlton, 470 F.2d 209 (2d Cir. 1972) (noting how prior cases set forth a "feels fair" standard for objective review).

[125] *See* AR 15-6, *supra* note 2, para. 1-12d ("AR 623–3, however, prescribes that the referral procedures specified in AR 15–6 will be followed before initiating or directing a relief for cause, if the relief is contemplated on the basis of an AR 15–6 investigation."). Notwithstanding this change, Army Regulation 623-3 itself would require a much larger change, amending paragraph 3-28 to include language similar to all three rights in AR 15-6, paragraph 1-12c and expanding it to NCOERs.

E. Flag Reports: Army Regulation 600-8-2

Like AR 623-3, AR 600-8-2, *Suspension of Favorable Personnel Actions (Flag)*, relies heavily on the due process contained in other regulations. Therefore, practitioners need to be aware of the same due process pitfalls when reviewing action taken under AR 600-8-2 alone. The regulation's primary purpose is to "institute[] a system to guard against the execution of specified favorable personnel actions for Soldiers not in good standing (for example, unfavorable status)."[126] In other words, it maintains the status quo for Soldiers who are undergoing some sort of unfavorable process such as being the subject of an administrative investigation.[127] The regulation specifically states that a flag is not punitive and it is not the final disposition in any adverse action.[128] Therefore, it is intended to merely be an investigatory tool that creates a situation analogous to the Plaintiffs in *Hannah v. Larche* who merely faced an investigation rather than the Plaintiff in *Greene v. McElroy* who was harmed by one.[129] As a result, the enumerated due process is minimal—written notice of the flag.[130]

Normally, these rights would be sufficient since AR 600-8-2 contemplates some other follow on action occurring.[131] However, situations might develop where the flag process turns adjudicatory, potentially endangering a liberty interest, and thus requiring more robust due process. For example, if the lieutenant in the introduction was promotable, flagging him would also result in a Department of the Army (DA) imposed flag "F" for removal from a promotion selection list.[132] His promotion would be suspended until the matter is resolved.[133] If the final outcome results unfavorably for the respondent, he may be removed from the promotion list, significantly affecting his career.[134] While AR 600-8-2 relies on due process requirements contained in other regulations, as the analysis of AR 623-3 shows, these requirements may not adequately afford a respondent access to the information used against him. If a situation arises that exposes an individual flagged using code "F" or another similar code to some long-term career consequences, that individual should be afforded the baseline rights in AR 15-6, paragraph 1-12c. Therefore, practitioners should read those due process rights into these types situations unless another process affords more robust due process protections.

IV. Privacy Act Considerations

One concern practitioners often cite when trying to determine the proper release of information is whether the restrictions contained in both the Privacy Act of 1974[135] and AR 340-21, *The Army Privacy Program*[136] limit access. This concerned is now heightened with AR 15-6, paragraph 1-12c making specific reference to complying with both the Privacy Act and the Freedom of Information Act (FOIA) when releasing information to respondents.[137] While a full analysis of the Privacy Act, its interplay with the FOIA,[138] and the ramifications of noncompliance are outside the scope of this article, practitioners should know that all of the relevant authority favors disclosure of information to a subject of an investigation, especially if that disclosure affords administrative due process.[139]

According to both the statute and the governing Army policy, the Privacy Act provides protections to individuals who have personal information kept "in a system of records" retrieved by the individual's name or other personally identifying information.[140] When an agency collects personal information on an individual, that individual has the right to inspect that information absent a specific exemption prohibiting the disclosure.[141] Therefore, practitioners must understand that the Privacy Act is first and foremost a program that allows individuals access to information

[126] AR 600-8-2, *supra* note 13, para. 1-8.

[127] *Id.* paras. 2-1e, 2-2 (listing the Army's nontransferable flag codes, to include *inter alia* "L" for commander's investigation, "A" for adverse action, and " D" for a referred OER or a relief for cause).

[128] *Id.* paras. 2-1b, 2-1c.

[129] *Compare* Greene v. McElroy, 360 U.S. 496 (1959), *with* Hannah v. Larche, 363 U.S. 420 (1960).

[130] AR 600-8-2, *supra* note 13, para. 2-6.

[131] *Id.* para. 2-1c, para. 2-9b (listing the various rules for removing various flags).

[132] *Id.* para. 2-2e. Flag code "F" is initiated by Headquarters, Department of the Army, when a Soldier is pending "removal or consideration for removal" from a command, promotion, or school selection list. *Id.*; *see also* Memorandum for Record from Chief, DA Promotions Branch, U.S. Army Human Res. Command (HRC), subject: Information Paper on HQDA Flag—Removal from a Selection List (F) (18 July 2013) (discussing the applicability of an "F" flag and the procedures that HRC will follow when the derogatory information has not yet been seen by the promotion board).

[133] *Id.*

[134] *Id.*

[135] 5 U.S.C. § 552a (2012).

[136] U.S. DEP'T OF THE ARMY, REG. 340-21, THE ARMY PRIVACY PROGRAM (5 Ju1y 1985) [hereinafter AR 340-21].

[137] *See* AR 15-6, *supra* note 2, para. 1-12c(1) (stating that any release of information made under the regulation must comply with FOIA and the Privacy Act).

[138] 5 U.S.C.§ 552 (2012); U.S. DEP'T OF THE ARMY, REG. 25-55, THE DEP'T OF THE ARMY FREEDOM OF INFORMATION ACT PROGRAM (1 Nov. 1987) [hereinafter AR 22-55].

[139] *See* Colonel (R) Richard L. Huff & Lieutenant Colonel Craig E. Meruka, *Freedom of Information Act to Personal Information Contained in Government Records: Public Property or Protected Information*, ARMY LAW., Jan. 2010 at 2; Major Lassus, *TJAGSA Practice Note: Administrative and Civil Law Notes*, ARMY LAW., Nov. 1991, at 44-50 [hereinafter TJAGSA Note].

[140] 5 U.S.C. § 552a(b) (2012); AR 340-21, *supra* note 136, para. 1-1.

[141] AR 340-21, *supra* note 136, para. 1-5.

collected on themselves when that record is retrieved by their name or a personal identifier (e.g. the "LTC Smith 15-6 Investigation"). While the Army has established several exemptions, such as the "general legal files exception" that practitioners might think would apply,[142] provisions such as AR 15-6, paragraph 1-12c show that the Army did not intend for an exemption to apply for an investigation adversely used against an individual. However, should practitioners consider withholding information because they believe an exemption applies, they should first balance both the statute's language and the reason behind the exemption with the potential harm to a respondent should non-disclosure occur.

The second Privacy Act concern many practitioners have is that disclosing information contained within an investigation, specifically statements and other evidence, might violate a third party's Privacy Act rights. This concern generally should not control the overall decision about whether to release, primarily because the information contained in the evidence is not normally kept within a system of records since it is not retrieved by the third party's name or personal identifier.[143] However, even if it was kept within a system of records, the information could still be disclosed under the routine use Privacy Act exemption so long as the type of disclosure is properly noticed as a routine use disclosure and the actual disclosure itself is compatible with the reason behind the information's initial collection.[144] In a typical AR 15-6 investigation, any information collected during the investigation would generally fall under routine use since (1) that information is compatible with the purpose of the investigation, and (2) the Army has provided a routine use notice.[145] This would include the identity of the party providing the information so that a respondent may use it to confront and cross-examine the investigation.[146] However, if the investigation contains information whose initial collection was not compatible with the investigation, such as a third party's Enlisted Record's Brief (ERB), that information should be removed.[147] When determining whether to release information, practitioners should remember that the Privacy Act's primary purpose synchs with due process. Unless specifically prohibited by another statute or regulation, or unless the compatibility test fails, practitioners should err on the side of releasing information in order to satisfy due process.

## V. Conclusion

Returning to the scenario highlighted in the introduction, as the ADLAW attorney, you should now recognize that a failure to provide the lieutenant with the commander's inquiry and supporting evidence would deny the lieutenant adequate due process. You can therefore provide a legal opinion stating that due process requires the release of those portions of investigation related to the lieutenant's actions. As authority, you can cite to AR 15-6, paragraph 1-12c and discuss how in the absence of more specific protections, this paragraph should apply even though the investigation is merely a Commander's Inquiry. If necessary, you can also cite to cases such as *Greene v. McElroy* to support releasing adverse information to a respondent when there is the possibility of significant career stigmatization. Finally, should the unit raise any Privacy Act concerns about disclosing the evidence in the investigation, you can opine that the disclosure is covered by the routine use exception since release of that evidence is compatible with the original intent of its collection.

Justice Frankfurter's words that due process "is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process" are as applicable today as they were when first written in 1951.[148] Due process comes in many forms, but it possesses certain fundamental characteristics that are always present no matter what specific procedure is used. These rights include the right of a respondent to be apprised of the action taken against him or her, the ability to confront the information used to form this appraisal, and the right to cross-examine that information in some form. Nearly every Army Regulation involving the potential loss of a significant liberty or property interest clearly reflects these concepts. However others, such as AR 623-3 and

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[142] *Id.* para. 5-5g. Paragraph 5-5 contains all of the Army's listed Privacy Act exemptions. Others examples include, but are not limited to, Department of the Army Inspector General files, *id.* para. 5-5a, Court Martial Files, *id.* para. 5-5h, and U.S. Army Criminal Investigation Command's (CID) informant registries, *id.* para. 5-5i.

[143] *See generally* 5 U.S.C. § 552a(a)(5) (2012) (defining "system of records); s*ee also* Henke v. United States Dep't of Commerce, 83 F.3d 1453, 1460-61 (D.C. Cir. 1996) (holding that the test for determining a system of records is whether the information is actually retrieved by an individual's name, not simply retrievable).

[144] 5 U.S.C. § 552a(a)(7) (2012). *See* TJAGSA Note, *supra* note 139, at 44-45 (explaining how the routine use exemption operates); *see also* U.S. Army Criminal Investigation Command, *Criminal Investigation Note: Release of Reports of Investigation to Respondents of Administrative Actions*, ARMY LAW., Apr. 1987, at 46 (noting that CID reports of investigation are releasable to respondents in an AR 635-200 separation proceeding under the routine use exception).

[145] AR 340-21, *supra* note 136, para. 3-1, 3-2 (providing routine disclosure notice). The most common method of collecting evidence in an Army investigation is on a DA Form 2823, Sworn Statement. That form provides a Privacy Act notice informing an individual of potential routine uses of the information. U.S. Dep't of the Army, DA Form 2823, Sworn Statement (Nov. 2006).

[146] *See generally* Greene v. McElroy, 360 U.S. 496 (1959). Redaction of certain PII, such as a witness's social security number, would be proper so long as that redaction does not deprive a respondent of a meaningful opportunity to confront the accusations and the accusers. *Id.*

[147] *See* TJAGSA Note, *supra* note 139, at 48-49 (outlining the current interpretation of the compatibility principle). In the example given, since the personal and administrative information contained on the Enlisted Records Brief (ERB) was not collected specifically because the third party was under investigation, its disclosure would not be compatible with the investigation routine use disclosure. Disclosure of the subject's ERB would be allowed because it is information contained in a system of records on the subject himself. *Id.*

[148] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162-63 (1951).

AR 600-8-2, contain ambiguity that might lead to an unfair denial of due process. Using case law and focusing on the type of interest involved, the type of action used, and the adequacy of the rights enumerated, military practitioners can clearly identify any of these regulatory gaps and read the appropriate due process protections into the regulation when not enumerated. That way, military practitioners can ensure fundamental fairness for both the Government and the respondent in any procedure where a Soldier stands to lose some interest protected by very the Constitution that the Soldier has sworn to support and defend.

**Book Review**

# Ashley's War: The Untold Story of a Team of Women Soliders on the Special Ops Battlefied[1]

Reviewed by *Major Heidi M. Steele*[*]

*Thank you for rising to the challenge of being female warriors in today's Army . . . [Y]our presence here has been foretold by the generations of women that preceded us in military service to the nation . . . Know too that the eyes of the Army and, increasingly, the Nation, are on you. This is an opportunity for failure as much as it is [for success]. Do not block out the voices of opposition[;] study them and defeat their words and prejudices through brilliant action.*[2]

## I. Introduction

In April, 2015, the U.S. Army Ranger School opened its first class to female Soldiers.[3] Many would argue that the accomplishments of the women detailed in Gayle Tzemach Lemmon's latest book, *Ashley's War: The Untold Story of a Team of Women Soldiers on the Special Ops Battlefield*, was the impetus not only for that event, but for Defense Secretary Ash Carter's decision last winter to lift all gender-based restrictions on military service.

The relatively unknown group of twelve trailblazers became the first female Soldiers to be recruited, trained, and deployed to the front lines with Special Operation units fighting the Global War on Terror in Afghanistan.[4] Lemmon, a former Fulbright scholar, *New York Times'* bestselling author, and military spouse, has written extensively on foreign policy, national security, and global women's issues, making her uniquely situated to tell this story.[5]

## II. Summary

In 2009, eight years after the 2001 U.S.-led invasion into Afghanistan, the war was at a stalemate. United States Special Operations Commander, Admiral Eric Olson, "believed that America was never going to kill its way to victory in Afghanistan," and instead, needed a more "knowledge-based" approach.[6] Olson determined that a serious knowledge-gap existed when Special Operations Forces (SOF) failed to meaningfully engage the female populace of Afghanistan, thereby missing out on critical intelligence and social influence.[7] After research and analysis, Olson concluded that this mission could not be accomplished by male Soldiers, since their communications with Afghan women would constitute a form of "cultural trespass."[8] The only viable pathway to success that Olson saw was to recruit and train an elite group of female Soldiers who could serve alongside SOF Soldiers.[9]

Olson's proposals were initially met with what Lemmon

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[1] GAYLE TZEMACH LEMMON, ASHLEY'S WAR: THE UNTOLD STORY OF A TEAM OF WOMEN SOLDIERS ON THE SPECIAL OPS BATTLEFIELD (2015).

[2] LEMMON, *supra* note 1, at 144 (excerpt from Captain Tara Matthew's letter to the Cultural Support Team (CST) members upon graduation from the program).

[3] *See* C Todd Lopez, *First Women to Attend Ranger Course*, ARMY.MIL (Jan. 16, 2015), https://www.army.mil/article/141327/First_women_to_attend_Ranger_Course/?from=RSS ("The Army announced Jan. 15 that female Soldiers will be allowed, for the first time, to attend the Army's Ranger Course . . . .").

[4] *Id.* at ix

> At a time when the divide between those who volunteer to fight America's wars and those who never served is wide and growing, it is more important than ever to know who these soldiers are and why they sign up to fight for the sake of the rest of us.

*Id.* "I will be thankful always for the opportunity to shine a light on a world with which too few of us are familiar." *Id.* at 283.

[5] *Gayle Tzemach Lemmon: Author and Journalist*, GAYLELEMMON, http://gaylelemmon.com/about (last visited May 11, 2016).

[6] LEMMON, *supra* note 1, at 5–6. Admiral Eric Olson, who retired in August 2011, after more than thirty-eight years of service, was the "first Navy [Sea, Air and Land (SEAL)] ever to be appointed to three-star and four-star flag rank, as well as the first naval officer to be [United States Special Operations Command (USSOCOM's)] combatant commander." WIKIPEDIA, https://en.wikipedia.org/wiki/Eric_T._Olson (last visited May 11, 2016).

[7] LEMMON, *supra* note 1, at 5–8.

[8] *Id.*

> Pashtunwali, an unwritten tribal code governing all aspects of community life, delineates the laws and behaviors of the Pashtun people. At the heart of the system is the principal of *namus*, which defines the relationship between men and women, and establishes the primacy of chastity and sexual integrity of women within a family.

*Id.* at 6.

> The ancient practice of *purdah*, or the seclusion of women from public view, makes women in these regions nearly invisible . . . foreign troops cause a serious affront to Afghan families when a male soldier even catches sight of a woman's face. Searching a woman is an even graver offense. By engaging with Afghan women the male soldiers are disrespecting them as well as the men in their family charged with protecting them. The act violates a code of honor that lies at the very foundation of their society.

*Id.* at 7.

[9] *Id.* at 8. During his research, Olson looked to the Iraq War when conventional forces set up the "Lioness" program around 2003, which placed an ad hoc group of female Soldiers and Marines on security patrols

describes as an "unenthusiastic reception" around Special Operations Command (SOCOM) headquarters and seemed to run afoul of the U.S. military's Direct Combat Exclusion Rule.[10] However, the tide changed during the surge of U.S. troops into Afghanistan in 2010[11] when Olson received an official Request for Forces from Admiral William McRaven, the Commander of the Joint Special Operations Command (JSOC), for female Soldiers to accompany U.S. Army Rangers on missions.[12] After consulting with his legal advisor, Olson "learned that as long as he 'attached' rather than 'assigned' women to these special operation units, he could put them almost anywhere. Including on missions with Rangers."[13] In the spring of 2010, the all-female SOF Cultural Support Teams (CSTs) were born.[14]

Lemmon introduces readers to twelve female Soldiers—including First Lieutenant Ashley White–Stumpf, the book's main character—who were among the first to answer the call to serve on the newly-formed CSTs.[15] Lemmon chronicles the women's journey through the rigorous assessment and selection process known as the "100 Hours of Hell," held at Camp Mackall where the candidates were subjected to a week of all night work sessions and all day ruck marches, running, obstacle courses, and mental acuity testing.[16] For those that made the cut, Lemmon details their intense, but abbreviated six week mission preparation program where they received training in human dynamics, cross-cultural communications, Afghan language, culture, and history, negotiation and mediation, tactical questioning, searching, and coping mechanisms for combat stress.[17] Finally, Lemmon recounts their journey to Afghanistan, where they integrated with their SOF brethren and where their bravery and skills were put to the test.[18]

## III. Strengths

*Ashley's War* powerfully documents the accomplishments and sacrifices of the first all-female special operations CST. The book resonates in part because Lemmon does not push an overtly feminist agenda, but instead recognizes that letting these women's stories speak for themselves is enough. The book is the culmination of Lemmon's twenty-months of travel wherein she conducted hundreds of interviews with members

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and checkpoints designed to prevent suicide bombings. *Id.* This program also served as a precursor to the Female Engagement Teams later established by the Marines in Afghanistan in early 2009. *Id.* at 8–13. *See also* Matt Pottinger, Hali Jilani, & Claire Russo, *Half–Hearted: Trying to Win Afghanistan without Afghan Women*, SMALL WARS J., smallwarsjournal.com/blog/journal/docs-temp/370-pottinger.pdf (last visited May 11, 2016).

[10] LEMMON, *supra* note 1, at 13. On January 13, 1994, then-Secretary of Defense Les Aspin officially rescinded the military's outdated "risk rule" and in its place enacted the Direct Combat Exclusion Rule. *Id.* The new rule precluded women from "being assigned to units below brigade level where the unit's primary mission was to engage directly in ground combat. *Id.* This policy barred women from serving in the infantry, artillery, armor, combat engineers, and special operations units of battalion size or smaller." KRISTY KAMARCK, CONG. RESEARCH SERV., R42075, WOMEN IN COMBAT ISSUES FOR CONGRESS, at summary (2015).

[11] President Barack Obama sent an additional 30,000 U.S. troops to Afghanistan in 2010 in order to "seize the initiative, while building the Afghan capacity [to] allow for a responsible transition of our forces out of Afghanistan." President Barack Obama, Remarks by the President in Address to the Nation on the Way Forward in Afghanistan and Pakistan (Dec. 1, 2009), https://www.whitehouse.gov/the-press-office/remarks-president-address-nation-way-forward-afghanistan-and-pakistan.

[12] LEMMON, *supra* note 1, at 14-17.

> McRaven was a practical problem-solver. What would have been unthinkable just five years earlier because of preconceptions about American servicewomen in combat as well as ignorance about the role of women in Afghan culture now became unavoidable. McRaven made a decision: female soldiers would now *officially* accompany the Rangers on target. Ideology be damned.

*Id.* at 17 (emphasis added). Admiral William McRaven retired in 2014 after more than thirty-eight years of service and after having "commanded at every level within the special operations community. . . . McRaven is credited for organizing and overseeing the execution of Operation Neptune Spear, the special ops raid that led to the death of Osama bin Laden on May 2, 2011." *William H. McRaven*, WIKIPEDIA, https://en.wikipedia.org/wiki/William_H._McRaven (last visited May 11, 2016).

[13] LEMMON, *supra* note 1, at 18.

[14] *Id.* The CSTs would not only serve alongside the Army Rangers, but also the Green Berets, the Navy SEALS, and other special mission units. *Id.* at Book Jacket.

[15] *Id.* at 24. The other Soldiers chronicled in the book are: Lane Mason, Amber Treadmont, Kate Raimann, Anne Jeremy, Leda Reston, Rigby Allen, Kristen Fisher, Tristan Marsden, Kimberly Blake, Cassie Spaulding, and Sarah Walden. *Id.* Lemmon notes, however, that "[m]ost names have been changed to protect those involved and those still connected to the special operations community. Some details have been omitted for the sake of security." *Id.* at ix. Many of the women described in the book, however, have done interviews with the press subsequent to the release of *Ashley's War*. *See* Sandra Sobieraj Westfall, *Meet the Real-Life G.I. Janes who Served with Special Ops in Afghanistan*, PEOPLE MAG. (Apr. 24, 2015), http://www.people.com/article/reese-witherspoon-buys-rights-army-girls-special-ops-afghanistan.

[16] LEMMON, *supra* note 1, at 53. Major Patrick McCarthy was the architect of the CST selection process which was designed to test the "[S]oldier's ability to maintain composure, apply logic, communicate clearly and solve problems in demanding environments. It's as much a mental test as it is a physical one." Kevin Maurer, *In New Elite Army Unit, Women Serve alongside Special Forces, but First they Must Make the Cut*, WASH. POST (Oct. 27, 2011), https://www.washingtonpost.com/lifestyle/magazine/in-new-elite-army-unit-women-serve-alongside-special-forces-but-first-they-must-make-the-cut/2011/10/06/gIQAZWOSMM_story.html.

[17] *Id.* at 96.

[18] *Id.* at 280.

> In June 2013, the Cultural Support Teams were a topic of discussion at a Pentagon news conference focused on integrating women into jobs that previously had been off-limits to them, including roles as special operators. "Quite frankly, I was encouraged by just the physical performance of some of the young girls who aspire to go into the cultural support teams," said the Special Operation Command's Major General Bennet Sacolick, who called the program a "huge success." He went on to say, "*They very well may provide a foundation for ultimate integration*."

*Id.* (emphasis added).

of the CST and their families, members of the special operations community, and senior military leaders.[19] Lemmon's extensive research as well as her use of vibrant imagery and engaging narrative creates a dramatic but credible story that accurately depicts the amazing journey of these young women while also capturing the nuances and complexities of the war in Afghanistan.

While Lemmon quite obviously respects the women she has chosen to write about in *Ashley's War*, she does not sugar coat problems with the CST program. Instead, she makes it a point to highlight the training inequities and lack of resources devoted to preparing the women of the CSTs for their real-world missions. By the time SOCOM and JSOC leaders finally saw a need for the CST program, Lemmon points out,"[c]ommanders were impatient for the skills female [S]oldiers could provide, and they wanted the women out doing their jobs *now*."[20] That lack of foresight coupled with the urgent need for female enablers resulted in the women receiving only six-weeks of training, compared to the eighteen-months to three-years their male Army Ranger and Green Beret counterparts normally receive.[21]

Still, Lemmon describes in compelling fashion how the women overcame their lack of training when they soon found themselves in the thick of it in Afghanistan: fast-roping out of aircraft in the middle of the night, humping fifty pounds of gear over miles of mountainous terrain, traversing through explosive-laden fields, entering the homes of insurgents, and running for their lives under a hail of small-arms fire.[22] Throughout her narrative, Lemmon masterfully weaves in anecdotes of their bravery, resourcefulness and resilience in the face of these glaring inequities, especially that of Ashley. Ashley was a tough Soldier nicknamed "megatron quiet blonde" who could rope climb with a weighted vest using only her arms, ruck march for unlimited miles, and was known to have fashioned an office out of a broom closet just so she could be close to the Tactical Operations Center. She found a way to bake fresh bread downrange for her fellow Soldiers but was also adept at communicating with Afghan women in the middle of a combat mission while searching for insurgents and intelligence.[23] Tragically, Ashley lost her life while out on a night raid with the Rangers when a daisy-chain IED was detonated. Lemmon poignantly closes the book with a quotation from Ashley's remembrance ceremony, delivered by a fellow CST member:

> When Ashley White–Stumpf became an angel she was at the apex of her life. She was a newlywed with an incredibly loving and supporting husband. She had just purchased her first home. She had a good job and an amazing family. And yet Ashley asked, "what can I do, how can I make a difference?" Think about that for a minute. How much better would this world be if every person, at the happiest, most fulfilled point in their life, thought not of themselves, but of the good they could do for things bigger than themselves?[24]

## IV. Weaknesses

Despite the book's strong thematic messages and literary strengths, there are a few notable shortcomings. In addition to Ashley, Lemmon highlighted eleven other trailblazing young women from the first CST in *Ashley's War*. The effect, however, is that the number of characters is unwieldy, making parts of the story hard to follow, forcing the reader to refer back to their biographies contained in earlier chapters. The character treatment suffered because Lemmon was only able to develop most of them superficially, leaving the reader wanting more.

There were also a number of critical omissions, which, if addressed, would make the narrative feel more complete. Once the women deployed to Afghanistan, for instance, Lemmon focuses the remainder of the story on the females attached to the Rangers conducting the direct–action missions. She completely neglects the experiences of the women serving with the Green Berets conducting the just-as-vital village stability operations. Lemmon also fails to provide any sort of meaningful closure in the final chapters or epilogue[25] about what became of these female heroes once they returned home. The fate of an interpreter to which

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[19] *Id*. at ix.

[20] *Id*. at 100.

[21] *Id*. at 96.

[22] *Id.* at 198.

> Amber heard the sound of small arms fire. Bullets started spraying all around them as villagers greeted them with round after round. Amber kept moving and studied the men in front of her, watching as they switched from a fast sprint to an unpredictable pattern of running and ducking, using buildings for cover. She had never had proper infantry training, only a half-day tutorial in the CST summer course. The Rangers, on the other hand, specialized in this kind of combat evasion and had prepared extensively for precisely this kind of situation. . . . [S]he coached herself as they tore through the village. Just do what these guys are doing and *do not* screw up. She kept running. Do not let it be the girl who gets the bullet.

*Id.*

[23] *Id*. at 210.

[24] *Id*. at 281.

[25] *See Id.* at epilogue. First Lieutenant Jennifer Moreno, only briefly mentioned in the epilogue, was the second member of the CST program killed in Afghanistan. She died October 6, 2013. Adam Ashton, *Details of Death of Army Nurse in Afghanistan*, THE WASH. TIMES (Apr. 29, 2014), http://www.washingtontimes.com/news/2014/apr/29/details-of-death-of-army-nurse-in-afghanistan/?page=all. Moreno, a nurse from Madigan Army Medical Center, chose to help a wounded Soldier injured by an improvised explosive device in the middle of a booby-trapped field at an Afghan bomb-making compound, losing her life while trying to reach the Soldier. *Id.*

Lemmon devotes an entire chapter is never known. Additionally, the unfortunate timing of the book's publication leaves readers unaware that the entire CST program has been disbanded, despite the continued U.S. presence in Afghanistan.[26]

## V. Conclusion

*Ashley's War* is a story that needed to be told. Lemmon's book shines a spotlight on the undeniable strength, courage, and dedication of this group of women warriors, and in doing so, helps secure their place in history.[27] After all, the Soldiers depicted played a critical role in advancing the conversation about women in the military, from "Should they serve in combat?" to "How can we best train and equip them to serve in combat?"

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[26] According to Lieutenant Commander Ligia Cohen, spokeswoman for U.S. Special Operations Command, the Cultural Support Team program was phased out as Afghan troops took the lead in operations. Gretel C. Kovach, *"Ashley's War" an Inside Look at Cultural Support Teams and a Fallen Hero*, SAN DIEGO UNION TRIB. (Apr. 4, 2015), http://www.sandiegouniontribune.com/news/2015/apr/03/ashleys-war-book-review/5/.

[27] LEMMON, *supra* note 1, at 257. Lieutenant General John Mulholland, the head of the Army Special Operations Command, was quoted as saying this about the women of the CST:

> Make no mistake about it, these women are warriors; these are great women who have also provided enormous operational success to us on the battlefield by virtue of their being able to contact half of the population that we normally do not interact with. They absolutely have become part of our special operations family. *They absolutely will write a new chapter in the role of women soldiers in the United States Army and our military and every single one of them have proven equal to the test.*

*Id.* (emphasis added).

**Book Review**

# Kill Chain: The Rise of the High-Tech Assassins[1]

Reviewed by *Major James K. Wolkensperg*[*]

*If you know the enemy and know yourself, you need not fear the result of a hundred battles.*[2]

## I. Introduction

Andrew Cockburn, celebrated author of *Rumsfeld*[3] and the Washington editor of *Harper's*, examines the provocative topic of drones in his latest book, *Kill Chain*. Cockburn provides a convincing critical examination of the history of remote sensors and weapon systems which also scrutinizes the overarching strategy of targeted killings. His collection of compelling episodes and recurring real-life characters keeps a reader turning the pages. More importantly, he provides a well-timed looking glass through which the realities and perceptions of drone warfare and our national counterterrorism strategy can be examined.

A must-read for military, intelligence, and political audiences involved in making tough decisions about cutting-edge questions at every level, *Kill Chain* provides important perspectives and further invigorates a topic that rightly inspires heated debates. For audiences exploring these questions thoroughly for the first time, *Kill Chain* may fuel fears, but it should ultimately fuel interest and research into these complex and novel issues.

## II. History in the Form of Stories

*Kill Chain*'s chapters weave their way through an impressive collection of stories that recount the history and development of drones and the strategy behind their use. The narrative is not at all chronological, but Cockburn successfully uses themes and focal points throughout the book to keep the reader thoroughly engaged. For example, the first chapter draws the reader in by presenting the findings of a military investigation in compelling prose, using quotations from a radio transcript interspersed with background and commentary to tell the story of a drone strike gone bad.[4] Although the resulting deaths of dozens of civilians, including women and children, could paint a picture of a simple mistake, a rogue pilot, or a thoroughly corrupt system, Cockburn successfully presents a portrait of numerous personnel scattered across the globe, from Afghanistan to Nevada, armed with complex machines and genuinely trying to do what they believe to be the right thing with limited information and tools.[5]

Cockburn's chosen style presents stories rather than arguments, although his journalistic personality and personal conclusions characteristically shine through the results of his penetrating research. The earliest history he includes comes from World War II and tells the story of the Allies' consideration of the pros and cons of assassinating Hitler.[6] This story effectively sets the stage for further consideration of the global strategy against terrorists that has become known euphemistically as "targeted killing."[7] Churchill supported the idea of assassinating Hitler, but the Allied experts on Germany generally disagreed. One British expert on Germany in particular explained that killing Hitler,

> [W]ould almost certainly canonize him and give birth to the myth that Germany would have been saved if he had lived. . . . As a strategist, Hitler has been of the greatest possible assistance to the British war effort. . . . He is still in a position to override completely the soundest of military appreciation and thereby help the Allied Cause enormously.[8]

The Allies never successfully assassinated Hitler and Cockburn sees that as a potentially good thing. The Allied operation that killed Schutzstaffel (SS) General Reinhard Heydrich resulted in the Germans immediately slaughtering "[t]housands of Czechs, including the entire male population of the village of Lidice, as well as the last surviving Jews of Berlin."[9] Cockburn later assesses the strategy and results of high value targeting in later conflicts.

## III. Memorable Protagonists

Cockburn successfully ties a wide variety of stories together not only by returning to his main themes, but also through his captivating cast of recurring real-life characters. He translates his interviews and research of these servicemembers, bureaucrats, and agency officials into

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[1] ANDREW COCKBURN, KILL CHAIN: THE RISE OF THE HIGH-TECH ASSASSINS (2015).

[2] SUN TZU, THE ART OF WAR loc. 77 (Lionel Giles trans., 1994) (1910).

[3] ANDREW COCKBURN, RUMSFELD: HIS RISE, FALL, AND CATASTROPHIC LEGACY (2007);

[4] COCKBURN, *supra* note 1, at 1–16.

[5] *Id.*

[6] *Id.* at 74–76.

[7] *Id.* at 116.

[8] *Id.* at 75.

[9] *Id.* at 76.

convincing portraits of real people involved in complex decisions, helping the lessons they learn (or fail to learn) sink in even more effectively for the reader.

Rex Rivolo, for instance, is introduced to readers as a young, Bronx-born fighter pilot in Vietnam[10] who flew 531 combat missions.[11] After the war, Rivolo earned a doctorate in physics, taught astrophysics at the University of Pennsylvania, and worked on the Hubble space telescope program for the National Aeronautics and Space Administration.[12] Cockburn includes such details about Rivolo's background to illustrate Rivolo's personality and genius, assets Rivolo later applies to drones and targeting strategies.[13]

In the 1990s, Rivolo applied his skills to an analysis of the Drug Enforcement Agency (DEA) operations in South America, discovering first that the DEA's strategy of targeting and eliminating drug lords actually increased drug supplies in the United States.[14] In 1995, Rivolo came up with a plan that successfully doubled the price of cocaine in New York and Los Angeles, making it less accessible for Americans.[15] Rivolo reappears throughout the book, perhaps most notably as part of General Raymond Odierno's special team evaluating the high-value targeting operations strategies in Iraq.[16]

Another of the many intriguing personalities Cockburn includes in *Kill Chain* is retired Marine Lieutenant General Paul Van Riper.[17] Van Riper participated in Millennium Challenge 2002, the largest and most elaborate war game ever held,[18] as the commander of the enemy red team fighting the blue United States forces.[19] The blue team's assets included a larger force of men and machines, including more advanced technology, but Van Riper applied unpredictable tactics and "[o]nly a few days in, the war was over, and the twenty–first century U.S. military had been beaten hands down."[20] *Kill Chain* provides numerous examples of enemy (or nominally friendly) leaders easily outsmarting U.S. methods reliant on machines in Vietnam,[21] Serbia,[22] Iraq,[23] Afghanistan,[24] Pakistan,[25] and Yemen.[26]

Van Riper resigned from the war game and submitted a scathing report, which was promptly classified so outsiders could never read it.[27] This story, like others included in *Kill Chain*, is reminiscent of a scene from the movie *The Pentagon Wars*,[28] which presented a caricature of the bureaucratic morass leading to the creation of the Bradley Fighting Vehicle. In one scene, an Army general explains to a congressional committee that during combustibility tests the fuel tanks of the Bradley were filled with water instead of fuel, saying, "If the tanks had been filled with fuel there's a good chance the vehicle would have exploded. . . . If the vehicle had exploded we wouldn't be able to run additional tests!"[29]

## IV. Hubris and Omniscience

*Kill Chain* documents Van Riper's public critique of the doctrine of "'information superiority' . . . which he said consisted of 'sweeping assertions and dogmatic platitudes.'"[30] Van Riper told Cockburn that he was amazed "that people who were smart could believe this stuff. The hubris was unbelievable."[31]

Cockburn presents significant evidence throughout *Kill Chain* that drone systems and targeting strategies are not nearly as effective as numerous extremely intelligent people claim in apparent good faith. For example, Cockburn quotes General Joseph Votel as saying, in earnest, "We want to be everywhere, know everything, and we want to predict what happens next."[32] This impressive claim or aspiration, presented to open the final chapter of *Kill Chain*, paints a stark contrast to the collection of contrary evidence in the rest of the book, successfully illustrating serious limitations in the U.S. intelligence community's reliance on technology.

Rather than referring back to an earlier story, Cockburn illustrates the contrast between General Votel's claims and the ground truth by pointing out that three days after Votel's

[10] *Id.* at 26.

[11] *Id.* at 93.

[12] *Id.*

[13] *Id.* at 94.

[14] *Id.* at 101.

[15] *Id.* at 104.

[16] *Id.* at 164–67.

[17] *Id.* at 134.

[18] *Id.* at 133.

[19] *Id.* at 135.

[20] *Id.* at 136.

[21] *See, e.g., id.* at 17–31.

[22] *See, e.g., id.* at 62.

[23] *See, e.g., id.* at 153–67.

[24] *See, e.g., id.* at 122–23, 189–200.

[25] *See, e.g., id.* at 229–30.

[26] *See, e.g., id.* at 235–39.

[27] *Id.* at 136.

[28] THE PENTAGON WARS (Home Box Office, 1998).

[29] *Id.*

[30] COCKBURN, *supra* note 1, at 48–49.

[31] *Id.* at 49.

[32] *Id.* at 244.

speech, the Central Intelligence Agency (CIA) "unleashed a hail of drone–launched missiles across southern Yemen, killing some sixty–five people."[33] Weeks later, government officials could not name a single one of the targets.[34] The public outcry led both Votel and the CIA to initiate investigations that concluded mostly militants had been killed, contradicting the testimony of survivors in the detailed investigation conducted by the non-governmental organization Human Rights Watch, which concluded, "[P]robably all and certainly most of the victims were civilians."[35] All three investigations illustrate that the use of drones falls far short of current hopes or claims of omniscience. The conclusions of the official investigations may cause additional concern considering that earlier in *Kill Chain* Cockburn refers to a *New York Times* article citing administration officials explaining that when reviewing a drone strike, "[A]ll military–age males [are] combatants . . . unless there is explicit intelligence posthumously proving them innocent."[36]

Cockburn successfully uses this technique to deconstruct lofty claims by senior officials through the evidence of his research presented as an engaging narrative. George W. Bush, as a presidential candidate, laid out his strategy to transform the national defense: "We must be able to strike from across the world with pinpoint accuracy . . . with unmanned systems. . . . Influence is measured in information, safety is gained in stealth, and force is projected on the long arc of precision guided weapons."[37] *Kill Chain* presents case studies that show each of these plans are not as successful as initially hoped or as officials continue to claim, such as President Barack Obama's 2012 remarks about "very precise precision [sic] strikes."[38]

The illusion of omniscience not only affects policy and the accuracy of intelligence, but also the battlefield, especially when the illusion leads commanders at the highest level to believe that they know the reality on the ground, causing confusion and frustration. Cockburn echoes the martial wisdom of those he interviewed, stating, "It was extremely dangerous for the higher commander to try to get involved in the rapid pace and details of the firefight and thereby lose his focus on and grasp of the overall battle."[39] He shows how this principle plays out in his detailed assessment of the battle of Takur Ghar in Afghanistan,[40] and in briefer examples, such as when General Wesley Clark orders the destruction of two tanks he sees on video from a drone in Kosovo.[41] General Tommy Franks later followed suit when he ordered the destruction of a Toyota Corolla by drone strike in Afghanistan.[42] After the Toyota exploded, the two-star general directing all allied air forces in Afghanistan exhibited confusion and frustration by exclaiming, "Who the hell ordered that?"[43]

## V. Conclusion

The captivating stories in *Kill Chain* provide a wealth of opportunities to reassess U.S. military and intelligence policy and strategy. Drones may not be the best tools for every task. President Dwight D. Eisenhower famously said about World War II: "The Jeep, the Dakota, and the Landing Craft were the three tools that won the war."[44] His comment illustrates that most problems do not require the most costly and complex tools. In one of the book's asides, Cockburn describes a government review of U.S. Border Patrol operations using six Reaper drones resulting in the capture of 5,103 undocumented aliens and drug smugglers and compared it to a U.S. Border Patrol operation using a rented Cessna light aircraft equipped with a simple infrared sensor that led to more than 6,500 captures.[45] The drone operation cost $7,054 per person captured while the Cessna operation cost only $230 per person.[46] Considering the cost comparison of these two operations, Eisenhower's quote about the utility of the Jeep is less relevant than his warnings about responsibility regarding the military-industrial complex in his farewell address.[47]

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[33] *Id.* at 248.

[34] *Id.*

[35] *Id.*

[36] Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES (May 29, 2012), http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html. *See also* COCKBURN, *supra* note 1, at 217.

[37] COCKBURN, *supra* note 1, at 63.

[38] *Id.* at 232.

[39] *Id.* at 66.

[40] *Id.* at 124–32. The battle involved an overwhelmed sea, air and land (SEAL) team and a rescue force of Army Rangers facing approximately 1,000 insurgents, while their headquarters believed intelligence that reported less than 250 foreign fighters. *Id.* at 128–29. Cockburn quotes the two-star general in command of the operation congratulating his team after bombing a single car that had been the focus of their video feed, saying, "Hell, I've been trying to shoot a truck on that damned road for two days!" *Id.* at 129. Additionally, Takur Ghar demonstrated that an outdated A-10 "Warthog" could provide not only more effective close air support than numerous more expensive, modern, and technologically advanced systems, but also achieve a more realistic appraisal of the situation on the ground by observing the battle with the pilot's naked eye. *Id.* at 129–30.

[41] *Id.* at 65.

[42] *Id.* at 118–20.

[43] *Id.* at 119.

[44] David Stubblebine, *Jeep*, WORLD WAR II DATABASE, http://ww2db.com/vehicle_spec.php?q=243 (last visited May 11, 2016).

[45] COCKBURN, *supra* note 1, at 179.

[46] *Id.*

[47] President Dwight D. Eisenhower, Farewell Address (Jan. 17, 1961), http://www.americanrhetoric.com/speeches/dwightdeisenhowerfarewell.html ("The potential for the disastrous rise of misplaced power exists and will persist. We must never let the weight of this combination endanger our liberties or democratic processes.")

Today's headlines highlight the importance of examining the issues raised in *Kill Chain*. Recently, police handcuffed and detained a fourteen-year-old high school freshman in Irving, Texas, named Ahmed Mohamed who dreams of attending the Massachusetts Institute of Technology.[48] Ahmed brought a clock he made at home to school, and his school's administrators believed it looked like a bomb.[49] Ahmed received a public outpouring of sympathy, including a tweet from President Obama, who invited him to the White House.[50] The media immediately picked up on the President's invitation[51] and in twenty-four hours the message had been re-tweeted almost half a million times.[52] The next day, the popular *Gawker* blog posted the headline, *Obama's Drone Program Probably Would Have Killed Ahmed the Clock Kid*.[53] The article backs up the claim of the title by explaining how "signature" drone strikes are based on a target's "pattern of life activity" and that the Administration has justified killing American citizens in the past, including a sixteen-year-old American citizen in Yemen.[54] The author then asks you to imagine Ahmed living in Yemen and seen by a drone pilot in Nevada on a video feed taken from 10,000 feet in the air, watching Ahmed assembling wires and metallic pieces in a case.[55] The article concludes, "There's every reason to believe he'd have been vaporized, with far less procedure, oversight, and recourse than Ahmed faced in Irving, Texas."[56]

The *Gawker* article referred to many of the sources used by Cockburn, and reading *Kill Chain* will prepare readers to closely analyze stories about drone strikes. But, above all, the lessons from *Kill Chain* will help us all strive to live up to the mandate from President Obama, that "as Americans, we reject the false choice between our security and our ideals."[57]

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[48] Manny Fernandez & Christine Hauser, *Handcuffed for Making Clock, Ahmed Mohamed, 14, Wins Time With Obama*, N.Y. TIMES, Sept. 17, 2015, at A1.

[49] *Id.*

[50] President Barack Obama (@POTUS), TWITTER (Sept. 16, 2015, 12:58 PM), https://twitter.com/POTUS/status/644193755814342656.

[51] Fernandez & Hauser, *supra* note 48.

[52] President Obama, *supra* note 49.

[53] Sam Biddle, *Obama's Drone Program Probably Would Have Killed Ahmed the Clock Kid*, GAWKER (Sept. 17, 2015), http://gawker.com/obamas-drone-program-probably-would-have-killed-ahmed-t-1731145274.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] President Barack Obama, Remarks by the President at the U.S. Naval Academy Commencement (May 22, 2009), https://www.whitehouse.gov/the-press-office/remarks-president-us-naval-academy-commencement.

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