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Major Alexander N. Pickands

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Writing with Conviction: Drafting Effective Stipulations of Fact

Major Alexander N. Pickands*

I. Introduction

Three documents should form the backbone of the Government's case against a servicemember: the charge sheet, the prosecution memorandum, and the stipulation of fact. Most practitioners know the benefit of preparing a thorough prosecution memorandum, required by supervisors in some jurisdictions. Trial counsel would also dramatically improve their practice by preparing a draft stipulation of fact for every case, both contested and uncontested alike. The stipulation of fact is one of the most important documents trial counsel produce. Unfortunately, when drafted, stipulations appear as creatures of extremes: either the trial counsel has aggressively included unnecessarily loaded language and inappropriate information or, out of a fear of doing so, the trial counsel has created a bland and conclusory document that fails to assist the finder of fact and sentencing authority.

A properly crafted stipulation should furnish more than merely the factual predicate for the accused's plea or a guide for the military judge's providence inquiry. A well-drafted stipulation should also convey a compelling story of the accused, including his choices, thoughts, and actions, as well as how these affected the victim, the unit, and public. An effective stipulation is, quite simply, the Government's perfected theory of the case. It represents the trial that would have occurred if all witnesses testified in the most persuasive fashion to all pertinent facts; all documents contained only incriminating facts without distracting complications or exculpatory information; all evidentiary questions were resolved in favor of the Government; and the whole sum of the tale left no opportunity for the accused to assert a defense or provide plausible extenuation or mitigation. Despite the importance of the stipulation of fact, it is completely overlooked during the training of new judge advocates and is often given short-shrift by inexperienced counsel and busy supervisors. This article will guide trial counsel to correctly draft and properly employ stipulations of fact.

This article explains the importance of the stipulation of fact in the preparation of uncontested and contested cases, as well as how to marshal facts to support a plea, how to analyze and resolve potential defenses or factual ambiguities, and how to persuasively (and reasonably) convey the Government's theory of the case. Nine distinct tasks are conceptually grouped in three stages of work: (1) laying the groundwork, (2) composing an effective narrative, and (3) packaging a persuasive stipulation.

There is no perfect, static model. Effective stipulations appear in many different formats and use many different persuasive devices; however, this article will provide new trial counsel with a solid method for preparing stipulations. It will also offer experienced counsel a review of relevant law and a selection of various techniques to supplement their knowledge.

II. The Nature and Uses of the Stipulation of Fact

Stipulations of fact serve several purposes at trial. Although the stipulation's *raison d'être* is to undergird the factual basis for the accused's guilty pleas, it is also used to (1) present matters in aggravation,¹ (2) furnish evidence of guilt as to contested charges during the Government's case, provided that use was contemplated by the parties,² (3) present information

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¹ See, e.g., *United States v. Ross*, 34 M.J. 183, 187 (C.M.A. 1992) (allowing the use of a stipulation that included more than twenty incidents of uncharged misconduct to show the “continuous nature of the charged conduct and its full impact on the military community”).

² See *United States v. Resch*, 65 M.J. 233, 237–38 (C.A.A.F. 2007) (acknowledging an accused's right to consent to the Government's use of his stipulation of fact to prove contested charges, but finding an insufficient basis to conclude that the accused knowingly consented to the expanded use of his stipulation); *United States v. Banks*, 36 M.J. 1003, 1006 (A.C.M.R. 1993) (acknowledging accused's right to consent to expanded uses of the stipulation, but finding no valid consent without proper inquiry by the military judge into the accused's understanding of the effect of the stipulation).

to the court that would have been otherwise inadmissible, or inadmissible in a certain form,³ (4) provide information to the convening authority to support a decision to grant or deny clemency, and (5) assist appellate review.⁴ As a practical matter, an effective stipulation that fully supports the factual basis for the accused's plea will, as a necessary consequence, also develop a record that will assist the sentencing authority, the clemency authority, and the appellate courts. All other functions are, therefore, dependent upon and subordinate to a detailed and persuasive recounting of facts for the trial and appellate judges.⁵

When a military accused pleads guilty,⁶ he forfeits some of the most important rights granted by the Constitution, Congress, and attendant case law: the right against self-incrimination,⁷ the right to trial by court-martial at which he could confront and cross-examine witnesses,⁸ the right to obtain relief for improperly obtained evidence,⁹ and the right to challenge deficiencies in the Government's pre-trial processing of the case.¹⁰ Because a guilty plea waives so many important rights—and in recognition of the potentially coercive effect the military environment can have on an accused—the military judge is responsible for carefully advising the accused of his rights,¹¹ ascertaining whether his plea is voluntary,¹² and ensuring his plea accurately reflects his misconduct.¹³ The stipulation of fact is concerned with this last issue; the record must contain an account of the facts underlying the plea that is sufficiently detailed to avoid a “substantial basis in law or fact” for questioning the plea.¹⁴

³ See, e.g., *United States v. McCrimmon*, 60 M.J. 145, 154 (C.A.A.F. 2004) (allowing the inclusion of uncharged misconduct); *United States v. Glazier*, 26 M.J. 268 (C.M.A. 1988) (“[W]e see no reason why evidence, even though otherwise inadmissible under the Military Rules of Evidence, cannot come into the trial by way of stipulation.”).

⁴ See, e.g., *United States v. Sweet*, 42 M.J. 183, 185 (C.A.A.F. 1995) (relying on facts contained within a stipulation to resolve a challenge to the factual sufficiency of a plea).

⁵ Because it is a voluntary, bilateral agreement, parties may expressly limit the permissible uses for the stipulation. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 811 (2008) [hereinafter MCM]; *Glazier*, 26 M.J. at 270 (“The scope, or the permitted use, of the stipulation in a trial or proceeding normally is self-evident from the terms of the document. . . . [S]ubject to limitations imposed by the military judge, a stipulation may be used in accordance with the agreement or understanding between the parties.”). There are, however, few legitimate reasons for the Government to allow such restrictions when the accused genuinely desires to enter into a pretrial agreement. The sole exception to this premise would be an agreement to allow the Government to use the stipulation to support its case on the merits with regard to other unrelated or greater contested offenses. Only an accused who finds himself in the position to obtain a remarkably favorable pretrial agreement would likely accede to such an aggressive use of the stipulation.

⁶ The Uniform Code of Military Justice (UCMJ) expressly contemplates the option of an accused to enter a plea of guilty. UCMJ art. 45 (2008); MCM, *supra* note 5, R.C.M. 910. However, the option does not rise to the level of a constitutional right and can therefore be limited in the interests of justice. *McCrimmon*, 60 M.J. at 152 (citing *Santobello v. New York*, 404 U.S. 257 (1971)); *United States v. Penister*, 25 M.J. 148, 151 (C.M.A. 1987).

⁷ MCM, *supra* note 5, R.C.M. 910(c)(5); see also *United States v. King*, 30 M.J. 59, 68 (C.M.A. 1990) (discussing the right to have counsel present during custodial interrogation). See generally U.S. CONST. amend. V; UCMJ art. 31.

⁸ MCM, *supra* note 5, R.C.M. 910(c)(3). See generally U.S. CONST. art. I, § 2; amend. VI.

⁹ MCM, *supra* note 5, R.C.M. 905(b)(3); MIL. R. EVID. 311(i), 312 to 317 (guilty plea waives Fourth Amendment challenges to government searches, seizures, inspections, body views and intrusions, and wire and electronic interception); MIL. R. EVID. 321(g) (guilty plea waives improper witness identification).

¹⁰ *Id.* R.C.M. 707(e) (speedy trial issues); R.C.M. 905(b)(1), (3) (defects in the preferral, forwarding, investigation or referral of charges); R.C.M. 910(j) (any factual issues of guilt); *United States v. Santoro*, 46 M.J. 344, 347 (C.A.A.F. 1997) (defects in the specifications short of failure to state an offense). *But see United States v. Johnston*, 39 M.J. 242, 243 (C.M.A. 1994) (refusing to apply the doctrine of waiver to challenges based upon allegations of unlawful command influence). The waiver of many of these issues can also be prevented by an accused who litigates his motion before entering his plea. See, e.g., *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (explaining speedy trial issues waived by guilty plea unless fully litigated before acceptance of pleas) (citing *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005)).

¹¹ MCM, *supra* note 5, R.C.M. 910(c). The necessary elements of the inquiry and rights advisement spring from *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969), and its progeny and is codified in the Manual for Courts-Martial. MCM, *supra* note 5, R.C.M. 910.

¹² MCM, *supra* note 5, R.C.M. 910(d). The standard is that the plea must be made “voluntarily, knowingly, and intelligently, ‘with sufficient awareness of the relevant circumstances and likely consequences.’” *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (quoting *Brady v. United States*, 397 U.S. 742, 747 (1970)).

¹³ MCM, *supra* note 5, R.C.M. 910(e); *United States v. Mitchell*, 66 M.J. 176, 177–78 (C.A.A.F. 2008); *United States v. Aleman*, 62 M.J. 281, 283 (C.A.A.F. 2006); *Care*, 40 C.M.R. at 253.

¹⁴ *United States v. Yanger*, 67 M.J. 56, 57 (C.A.A.F. 2008); see also *United States v. Inabinette*, 66 M.J. 320, 321–22 (C.A.A.F. 2008); *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). Factual ambiguities or inconsistencies, if significant, will impugn the providence of the plea. See generally UCMJ art. 45(a) (2008); art. 66(c); MCM, *supra* note 5, R.C.M. 910(d), (e).

The stipulation of fact should be the most extensive and elaborate document introduced by either party at trial because a thorough stipulation will bolster the providence inquiry and foreclose later appellate challenges to the legal sufficiency of the plea. Although non-collateral issues are normally resolved by appellate courts upon review of the entire record, legally sufficient findings of guilt must be supported by facts admitted at trial for both contested and uncontested cases.¹⁵ Trial judges and appellate courts are explicitly authorized to rely on facts contained in a stipulation to establish the necessary predicate for findings of guilt.¹⁶ Conversely, appellate courts may not use a bland, conclusory stipulation to support an inadequate providence inquiry.¹⁷ Well-written stipulations may resolve factual ambiguities or reinforce inadequate inquiries by clarifying the factual predicate of a plea,¹⁸ as well as foreclose defenses not discussed by the judge.¹⁹

A truly effective stipulation should go beyond this minimum and provide the trial judge with a compelling account of the accused and his conduct that will inform the sentencing decision. The following sections will outline a solid process for preparing a stipulation designed to meet the expectations of military judges and appellate courts. More importantly, the resulting stipulation should also fulfill the Government's primary obligation: to present a clear, powerful account of the truth that will bring the accused to justice.

III. Laying the Groundwork

Trial counsel can make important strides or stumble early in the preparation of a case. The most vulnerable portion of the Government's case occurs during the translation of a jumbled collection of facts from numerous sources into a coherent and reasonable charge sheet. It is no coincidence that the first three, and most critical, steps to constructing an effective stipulation involve this process.

A. STEP ONE: Gather All the Facts

Early and direct involvement in all information-gathering efforts is essential. "For trial counsel, this begins with proper legal advice to law enforcement personnel who are investigating the alleged criminal activity."²⁰ Rendering proper legal advice involves more than simply answering questions as they arise; it requires that trial counsel meet with investigators, review their investigative plan, and explicitly divide labor between offices.

Maintaining positive relationships with investigators can ensure trial counsel are informed of attempts to question suspects or significant witnesses, such as the alleged victim, before they occur. At this stage, trial counsel should meet frequently with investigators to discuss, at a minimum, (1) the elements of suspected offenses, (2) the elements of foreseeable defenses, and (3) any prior statements, interviews, and most importantly, previously unsuccessful attempts to interview individuals. Failure to address these issues with regard to suspects can often result in, at best, partial admissions rather than true confessions.²¹ At worst, unguided questioning can result in inadmissible statements or no statements at all. Finally,

¹⁵ See *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980) ("[E]vidence from outside the record will not be considered by appellate authorities to determine anew the providence of the plea."); *United States v. Stokes*, 65 M.J. 651 (A. Ct. Crim. App. 2007).

¹⁶ *United States v. Sweet*, 42 M.J. 183, 185 (C.A.A.F. 1995).

¹⁷ See, e.g., *Aleman*, 62 M.J. at 284 (finding the stipulation and inquiry insufficient as to an element of an offense of suffering the wrongful disposition of military property).

¹⁸ See, e.g., *United States v. Lewis*, No. 36401, 2006 CCA LEXIS 197 (A.F. Ct. Crim. App. Aug. 25, 2006) (unpublished) (relying on the stipulation of fact to establish multiple distributions of cocaine in support of an "on divers occasions" specification when the inquiry only clearly established one distribution); *United States v. Brown*, 30 M.J. 911, 911 (A.C.M.R. 1990) (upholding an inquiry wherein the military judge did not clearly advise the accused of each of the elements, because the accused "acknowledged that everything in the stipulation was true, and candidly admitted that he possessed the cocaine and the marijuana in the amounts alleged").

¹⁹ See, e.g., *Prater*, 32 M.J. at 434-37 (using both the stipulation of fact and the providence inquiry to resolve a potential defense); *United States v. Turley*, No. 02-01960, 2003 CCA LEXIS 184, *6 (N-M.C.C.A. Aug. 22, 2003) (unpublished) ("Given the stipulation of fact and the appellant's statements during the providence inquiry, taken as a whole, we conclude that the military judge had no duty to delve any further into the appellant's consumption of alcohol.").

²⁰ Lieutenant Colonel Lawrence M. Cuculic, *Trial Advocacy—Success Defined by Diligence and Meticulous Preparation*, ARMY LAW., Oct. 1997, at 4 n.1.

²¹ The recently revised Article 120 most accurately demonstrates this point. Under the previous statutory scheme, the Government was charged with proving only two elements: that the accused "commit[ed] an act of sexual intercourse by force and without consent . . ." 10 U.S.C. § 920 (2000). The current scheme includes a dizzying array of fourteen different offenses, several of which implicate defenses explicitly unavailable to others within the same article. See 10 U.S.C. § 920 (2006). It was difficult for an investigator to obtain admissions as to both original elements of Article 120; now, the investigator has to be aware of all of the elements of any of the offenses contained within the current Article 120 and elicit responses regarding any that may potentially apply. Judge advocate involvement in the interview plan is essential.

intrepid trial counsel should endeavor to be present as an unseen observer during interviews, observing the investigators' progress and making useful adjustments.

Fact development is a process, not a solitary task. It requires constant review of evidence that has been gathered—not simply to catalogue its existence, but to reveal further avenues for inquiry, judge the credibility of witnesses and reliability of information, and identify valid, supportable inferences upon which the case may come to rely. At least once per week, trial counsel should review each open case and consider what new facts have been identified, decide how those facts affect the theory of the case, and determine what further tasks are implicated by the new additions.

B. STEP TWO: Review the Applicable Law

Although the applicable provisions will vary from case to case, judge advocates should always refresh their understanding of (1) the punitive articles of the Uniform Code of Military Justice (UCMJ) and the relevant discussion in Part IV the Manual for Courts-Martial (*MCM*),²² (2) the panel instructions in the *Military Judges' Benchbook*,²³ (3) the Rules for Courts-Martial (RCM),²⁴ and (4) the Military Rules of Evidence (MRE).²⁵ Trial counsel should also consult the latest edition of the *Crimes and Defenses Deskbook* to orient themselves and begin a review of applicable law.²⁶

The punitive articles, their discussion, and the panel instructions should help trial counsel identify offenses and identify charging alternatives should additional evidence arise. The statutory language and panel instructions should guide trial counsel when drafting charge sheets²⁷ and stipulations of fact. After identifying possible offenses, trial counsel should create an elements matrix which lists the charged offenses and the elements of those crimes, and provides space for known facts and evidentiary sources. Trial counsel should continually populate these fields as information becomes available.²⁸ A preparation tool of this kind, when accompanied by an understanding of the applicable law, can assist trial counsel to identify, organize, and evaluate relevant evidence that may support or disprove elements of the charged offenses.²⁹

Trial counsel must review applicable case law to ensure the facts of their case support the offenses.³⁰ Appellate decisions, particularly ones derived from guilty pleas, contain valuable discussions concerning the legal sufficiency of evidence to support convictions.³¹ These decisions provide myriad examples that can be analogized to, or distinguished from, the trial counsel's present case and should be required reading when drafting a stipulation.

Finally, trial counsel should review RCMs and MREs for guidance on which facts and what evidence will be admissible at trial, permissible in a stipulation, or questionable for either purpose. Trial counsel should not rely solely on experience; they should refresh their knowledge of the procedural rules during the preparation of every case.³²

²² MCM, *supra* note 5, pt. IV.

²³ U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (15 Sept. 2002) (C2, 1 July 2003) [hereinafter BENCHBOOK].

²⁴ MCM, *supra* note 5, pt. II.

²⁵ *Id.* pt. III.

²⁶ CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 337, CRIMES AND DEFENSES DESKBOOK (2008).

²⁷ U.S. Dep't of Def., DD Form 458, Charge Sheet (May 2000).

²⁸ An example spreadsheet is included at Appendix B. Facts and their evidentiary sources must be catalogued separately. Many pieces of evidence, especially statements, will include facts that may support more than the offense. Additionally, many pieces of evidence include facts of varying reliability or even admissibility.

²⁹ "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MCM, *supra* note 5, MIL. R. EVID. 401.

³⁰ One of the worst positions in which a trial counsel can find himself is arguing the viability of specifications based on a cursory or outdated review of the applicable case law. Motions for a finding of not guilty are routine in contested cases, and legal sufficiency of the evidence is questioned in almost every uncontested case; trial counsel will *always* need a current understanding of the precedents. *See id.* R.C.M. 917.

³¹ Legal sufficiency is a question of law that appellate courts review de novo. *United States v. Tollinchi*, 54 M.J. 80, 82 (C.A.A.F. 2000). A conviction is legally sufficient if a reasonable fact-finder could have determined that each of the elements of an offense was satisfied beyond a reasonable doubt. *United States v. Day*, 66 M.J. 172, 173 (C.A.A.F. 2008). During this analysis, the appellate court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Rogers*, 54 M.J. 244, 246 (C.A.A.F. 2000) (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)).

³² In addition to the text of the rules, trial counsel should consult a comprehensive reference that will provide a procedural context for the individual rules. One of the most useful is David A. Schlueter, *Military Criminal Justice: Practice and Procedure* (6th ed. 2004). Trial counsel should routinely consult chapters 6 (charging), 9 (plea bargaining), 12 (pretrial agreements), 14 (pleas), and 16 (sentencing). *Id.*

C. STEP THREE: Make Appropriate Charging Decisions

Various resources discuss the basics of drafting charges and specifications, but few resources explain the “how” and “why” of charging decisions.³³ Almost all trial advocacy guides begin with the assumption that a case already exists—in other words, that proper charging decisions have already been made. These materials focus on preparing counsel to prosecute existing charges, not on ensuring success from the start by drafting charges consistent with a considered, coherent, and compelling theory of the case.³⁴ Although outside the scope of this article, some discussion of the charging process is necessary because charging choices profoundly affect the clarity and persuasiveness of cases.

At a minimum, select charges and draft specifications³⁵ that (1) allege all essential facts,³⁶ (2) are supported by sufficient evidence, and (3) are “consistent with the interests of justice.”³⁷ The first goal—adequately alleging facts to properly state an offense—should be a simple task; RCM 307, the discussion that follows RCM 307(c)(3), and the model specifications provided in Part IV of the *MCM* provide sufficient instruction.³⁸ The model specifications are like recipes in a cookbook—follow them, and the result will almost always be palatable. On the other hand, only very experienced, naturally talented, or inherently lucky cooks can deviate from the recipe and still deliver a masterpiece.³⁹

The second goal—alleging only those offenses supported by sufficient evidence—is simply a matter of choice. Although some prosecutors choose to “[e]rr on the side of liberal charging and be prepared to withdraw as the case develops,”⁴⁰ the better practice for trial counsel is to have a solid understanding of the facts *before* charging the servicemember with a crime. In addition to the ethical considerations implicated by consciously over-charging,⁴¹ over-charging often yields unprofessional results. Instead, counsel should always deliver a clean and strong charge sheet to the convening authority and the military judge. Charging offenses based on insufficient evidence and then relying on further investigation to develop the case will ultimately diminish the trial counsel’s credibility.

The final goal—charging consistent with the interests of justice—encompasses two fundamental concepts that highlight the dangers of over-charging and even charging liberally. First, charges must appropriately reflect the seriousness of the conduct. In other words, avoid multiplicitous charges or an unreasonable multiplication of charges.⁴² Second, charging

³³ The notable exception appears to be a brief article concerning “tactical charging.” Faculty, The Judge Advocate Gen.’s Legal Ctr. & Sch., U.S. Army, *The Art of Trial Advocacy: Tactical Charging: Choosing Wisely the Terrain on Which You Want to Fight!*, ARMY LAW., Sept. 2002, at 54 [hereinafter *Tactical Charging*].

³⁴ See *id.* at 54 (“Tactical charging focuses on preferring only those charges that are consistent with the government’s theory or provide a particular tactical advantage for the prosecution. Unfortunately, many trial counsel complete their charging analysis after determining ‘what’ they can charge.”).

³⁵ Violations of the UCMJ are alleged in the form of charges and specifications. *MCM*, *supra* note 5, R.C.M. 307(c)(1). The “charge” identifies the particular provision of the UCMJ, law of war, or penal law of a local territory alleged to have been violated. *Id.* R.C.M. 307(c)(2). The “specification,” the heart of the military pleading, is a “plain, concise, and definite statement of the essential facts constituting the offense charged.” *Id.* R.C.M. 307(c)(3).

³⁶ *Id.* R.C.M. 307(c)(3).

³⁷ NAT’L DISTRICT ATTORNEY’S ASS’N, NATIONAL PROSECUTION STANDARDS 130 (1991) [hereinafter *PROSECUTION STANDARDS*].

³⁸ Another source of model specifications is Chapter 3 of the *Benchmark*, which contains the panel instructions regarding each offense following an updated model specification. *BENCHMARK*, *supra* note 23; see also CRIMINAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, 31ST CRIMINAL LAW ADVOCACY COURSE DESKBOOK A-1 to -4 (2009) [hereinafter *CLAC DESKBOOK*] (reviewing the basics of the charging process and common legal errors); Cuculic, *supra* note 20, at 5–6 (discussing common drafting errors).

³⁹ There will be rare cases in which no enumerated offense adequately encompasses the misconduct and the trial counsel or commander believes the misconduct should be subject to criminal sanction. In these circumstances, the trial counsel should meet with her Chief of Military Justice for guidance before drafting a novel specification under Article 133 or, more commonly, Article 134. See *CLAC DESKBOOK*, *supra* note 38, at A-6 (providing a methodical approach to researching and drafting novel specifications).

⁴⁰ *Id.* at A-2; see also Major Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 18 (“It often makes sense to err on the side of over-charging and then to reassess the case after the Article 32 investigation is complete. Chiefs should be liberal in recommending that charges be dropped after the Article 32 before referral.”).

⁴¹ See U.S. DEP’T OF ARMY, REG. 27–26, RULES OF PROF’L CONDUCT FOR LAWYERS R. 3.8(a) (1 May 1992) (stating trial counsel shall “recommend to the convening authority that any charge or specification not warranted by the evidence be withdrawn”); MODEL RULES OF PROF’L CONDUCT R. 3.8(a) (2008) (stating prosecutors “shall refrain from prosecuting a charge . . . not supported by probable cause”); see also AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 3–3.9 (3d ed. 1993) (“A prosecutor should not institute cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.”); PROSECUTION STANDARDS, *supra* note 37, R. 43.3 (“The prosecutor should file only those charges which he reasonably believes can be substantiated by admissible evidence at trial.”).

⁴² Trial counsel often confuse the two concepts. “Multiplicity” is “[t]he improper charging of the same offense in several counts” BLACK’S LAW DICTIONARY 1036 (7th ed. 1999) Doing so violates an accused’s protection against double jeopardy. U.S. CONST. amend. V. See generally *United States v.*

decisions should not be based on improper motives, such as using charges solely to leverage guilty pleas, pleas to lesser charges, or cooperation in other cases.⁴³

The “gravamen method” of charging should serve as a best practice in this area. In all cases, some facts reflect conduct strongly offensive to good order and discipline, while others are tangential to the central misconduct. “[C]ounsel (and complaining commanders) [must focus] on the gravamen of the offense by . . . articulat[ing] what it is about the conduct that is offensive or irritating. . . . [T]hat question will help reveal conduct that is truly derelict from that which is merely ignorant, inane, or indiscreet.”⁴⁴ When focusing on the accused’s conduct, select the most serious charge that is clearly supported by available, admissible evidence. Be conservative when selecting charges beyond the gravamen offense. These offenses should only be charged with good reason. One justifiable reason might be for offensive purposes, such as creating an evidentiary advantage; for example, charging conspiracy to ensure that co-conspirators’ statements in furtherance of the conspiracy will not be considered hearsay.⁴⁵ Another good reason might be defensive in nature, such as avoiding exclusionary rules, including those relating to uncharged misconduct.⁴⁶

Avoid reflexively charging misconduct. Although the gravamen method of charging may appear to be in tension with the military justice system’s preference for charging all known offenses at one time,⁴⁷ the rules do not prevent (or relieve) trial counsel from using sound judgment when selecting charges. Bottom line: the charging decision should be a reasoned, calculated, and educated choice that supports a coherent theory. No stipulation of fact can cure an incoherent theory.

IV. Composing a Powerful Narrative

The first stage of work, including gathering facts, reviewing the law, and making sound charging decisions, is common to all courts-martial. During the next stage of work, trial counsel should construct an account of the facts that tells a compelling story and develops the rudimentary theory presented by the charges themselves.

A. STEP FOUR: Identify Persuasive Themes

All courts-martial, contested and uncontested, share a single purpose: to reveal and redress past events the fact-finder did not observe. As a result, there is an inherent tension between the fact-finder’s skepticism and the advocate’s position in all proceedings. The advocate’s task is to overcome that skepticism so that the fact-finder accepts as real the events described. The skepticism is most directly a product of law; it is the burden of persuasion placed upon the Government to establish the accused’s guilt. It is also important to understand that it is a product of human psychology.

“The theory of a case . . . is the fact picture to be presented and the references to logic, consistency, and, above all, *human experience*, that support acceptance of that fact picture by the fact finder. ‘What happened, and why do we believe it?’”⁴⁸ Trial counsel who wish to powerfully and persuasively relay their theories have myriad advocacy techniques to employ and many more comprehensive resources to which to turn; however, the single most powerful tool in their arsenal will always be a short, simple theme based on the accused’s own motives.

Teters, 37 M.J. 370 (C.M.A. 1993) (stating the general rule that multiple convictions and punishments under different statutes, for the same act or course of conduct, is unlawful without a clear expression of congressional intent to the contrary).

“Unreasonable multiplication of charges,” on the other hand, is a doctrine aimed at preventing prosecutorial overreaching. The prohibition is codified in RCM 307(c)(4), and the legal test is most explicitly described in *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001) (providing five factors for analyzing whether the number of charges and specifications reasonably represent the conduct of the accused). Although the Court of Appeals for the Armed Forces explicitly rejected the notion that the doctrine is equitable in nature (to protect its appellate jurisdiction), rather than a legal standard, trial counsel would do well to treat it as both in practice. See MCM, *supra* note 5, R.C.M. 1003(c)(1)(C) (if convicted of two specifications that are essentially the same, the maximum punishment is the greater of the two) Despite the title of the paragraph, “multiplicity,” this rule is often aimed at remedying unreasonable multiplication of charges during the sentencing phase.

⁴³ See, e.g., PROSECUTION STANDARDS, *supra* note 37, R. 43.4 (inappropriate leveraging).

⁴⁴ Morris, *supra* note 40, at 18.

⁴⁵ MCM, *supra* note 5, MIL. R. EVID. 801(d)(2).

⁴⁶ *Id.* MIL. R. EVID. 404(b).

⁴⁷ See *id.* R.C.M. 307(c)(4), R.C.M. 601(e)(2) (rule and discussion).

⁴⁸ PETER L. MURRAY, BASIC TRIAL ADVOCACY 53 (1995) (emphasis added).

Themes convey the trial counsel's theory in small, powerful, and memorable portions. "Themes are the psychological anchors that [fact-finders] instinctively create to distill and summarize what the case is about. . . . Themes become the essential tool [fact-finders] use to reduce a large amount of information and summarize their attitudes about that information in easily remembered words and phrases."⁴⁹ Trial counsel will discover many of their most powerful themes when identifying the gravamen offense: What about the accused's conduct, if true, most warranted punitive action? The best themes do not label the accused, such as "thief," "thug," or "brute," but characterize the accused's choices. His reasons for choosing one course of action over another may or may not be logical, intelligent, or even effective at achieving his goals, but they are essential to understanding the "what" and the "why" of events described at trial.

The necessity of demonstrating the accused's motives becomes clearer when one considers that the mind is essentially a pattern-recognition device. "[H]uman beings do not evaluate facts in isolation, but rather tend to make sense of new information by fitting each new fact into a preexisting picture."⁵⁰ This process, sometimes known as script theory, can be demonstrated as follows:

Think about these words and phrases: popcorn, coming attractions, tickets, summer blockbusters. What do you see in your mind? Chances are good that you have envisioned an entire movie theater, and not just any movie theater, but probably one that you have attended recently or often. That theater is your script. You can "see" the box office, the candy counter, the lobby, the posters. Even if you attempt self-consciously to focus on "popcorn" to the exclusion of the theater, you will probably envision a particular bag or box or bucket of popcorn familiar from your past experience.⁵¹

How does this work to trial counsel's advantage? Script theory relies on the concept that people avoid uncertainty and desire validation as a means to achieve a safe, certain, and stable picture of the world.⁵² The stable, certain picture of the world people yearn for most involves other people's behavior.⁵³ In other words, our natural desire to understand ourselves forces us to study other people. Good advocates address this need within the fact-finder. Even if an accused's motive or intent is not an element of any charged offense, trial counsel should always address it.

B. STEP FIVE: Organize Logically

Although the contents will often dictate the best format for the stipulation, bear in mind the following guidelines that apply to *all* stipulations. First, list facts in numbered paragraphs, each of which should convey a single thought. The single thought may require one sentence or ten to communicate the idea effectively, but no more than one thought should be included in a paragraph. Second, use a separate section to describe the accused only if necessary to establish an element of an offense; for example, you must include such a section for an accused whose service history is necessary to support a conviction for desertion.⁵⁴ Third, incorporate matters in aggravation throughout the stipulation, in the context of the accused's actions. Do not wait to place them in a separate section at the end. The trial is meant to be bifurcated, not the stipulation. Fourth, avoid a separate disclaimer of defenses. The facts that foreclose all relevant defenses should be stated in context with the facts supporting each specification.⁵⁵

Beyond the necessary elements of the opening and closing paragraphs, there is no "perfect" format for a stipulation. The stipulation's structure and organization should flow from the charges and the facts themselves. Trial counsel can organize facts in chronological order or group them by supported charges and specifications. Both approaches feature advantages and

⁴⁹ THOMAS A. MAUET, TRIAL TECHNIQUES 62 (6th ed. 2002).

⁵⁰ STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 32 (3d ed. 2004); *see also* MAUET, *supra* note 49, at 15 ("We try to make sense of the world around us, and use stereotypes—our beliefs and attitudes—to organize our views of that world.").

⁵¹ LUBET, *supra* note 50, at 32.

⁵² *See id.* ("New information is confusing, especially when presented piece by piece. Thus, people 'call up' scripts so as to impose order on uncertainty or confusion.").

⁵³ *Id.*

⁵⁴ The accused's personal and service data will be established with the charge sheet, the Soldier's record brief, and the military judge's colloquy with the accused. The more times the trial counsel recites this information, the more likely incorrect or inconsistent data may be transmitted.

⁵⁵ Most trial counsel, if they include a separate disclaimer of defenses, succumb to the temptation to fill the space with conclusory statements like "the accused was not suffering from a severe mental disease or defect." That conclusion, like all others, is up to the military judge—and the judge will need *facts* to make that determination.

disadvantages. Chronological presentation often produces a concise, easily understandable story; however, this method of organization can lead to omissions of critical information because unwary trial counsel may draft the document without comparing the facts with the elements of the offenses. Grouping facts to support each offense addresses this pitfall and can ease drafting. Grouping facts also assists the military judge during the providence inquiry because facts are logically presented with their corresponding elements. On the other hand, this approach will often result in longer narratives with redundant information repeated to support elements common to several offenses.

Adroit trial counsel should exploit the advantages of both techniques by using a chronological narrative that also flags portions pertaining only to certain specifications.⁵⁶ Trial counsel should first identify facts whose relevance does not depend on a specific time or event, as well as facts common to all offenses, and then list them in a stand-alone section at the beginning of the stipulation. The remaining facts should then be presented chronologically in sections labeled according to the supported specification, which avoids the need to introduce information in the order the offenses appear on the charge sheet.

C. STEP SIX: Draft and Refine

When drafting stipulations of fact, trial counsel must limit themselves to facts or reasonable inferences stated as facts.⁵⁷ Individual paragraphs of the stipulation should be composed with the primary purpose of the stipulation in mind. Trial counsel must persuade the reader that the accused is guilty and must fill in potential gaps in the judge's providence inquiry.⁵⁸ Ironically, trial counsel most often fail to achieve either goal because they include legal positions and conclusory language.⁵⁹ Parties cannot stipulate to a legal conclusion within the purview of the fact-finder; they may only stipulate to the facts from which a conclusion can be reached.

1. Facts That Support the Charges

While trial counsel should be conservative when deciding what to charge, they should exercise a policy of liberal inclusion when drafting a stipulation. Drafting a stipulation begins by choosing which facts to include in the document. The guiding principle is simple: everything in the stipulation must have a basis.⁶⁰ Permissible bases include direct knowledge of the accused, indirect knowledge of the accused, and reasonable inferences drawn from other facts and evidence.⁶¹ In short, trial counsel should include any fact (1) for which there is some basis, (2) that the accused is willing to admit is true, and (3) that will advance the Government's theory of the case. Drafters cannot shy away from setting forth a person's thoughts, feelings, and motives as incontrovertible fact. With regard to the accused, the trial counsel *must* do so.

Liberal inclusion of facts will often draw in otherwise inadmissible evidence. Trial counsel may incorporate facts derived from evidence that would be otherwise inadmissible at trial.

⁵⁶ Most trial counsel will find it much easier to tell the story from a third-person perspective. This kind of narrative can encompass facts not directly observed by the accused and is therefore well-suited for factually elaborate cases. Nothing prohibits the trial counsel from using a first-person narrative, which may be appealing for uncomplicated cases. Counsel should rarely employ this format, however; unless it was composed with care, its tone and phraseology will likely contrast sharply with the accused's own responses during the providence inquiry. Neither the judge nor a panel need be reminded so explicitly that the Government supplied the words needed to convict the accused.

⁵⁷ Another cardinal rule when composing a stipulation is that defense counsel should never be allowed to draft any part of it. It is a Government document—the Government document representing all of the facts the Government has the burden to prove. In the event that defense counsel produce a “draft stipulation” to submit with an offer to plea, the trial counsel should skim through it and then toss it into the recycle bin.

⁵⁸ A thorough stipulation supplements the judge's “conclusions and leading questions that merely extract from an accused ‘yes’ and ‘no’ responses during the providence inquiry.” *United States v. Negron*, 60 M.J. 136, 143 (C.A.A.F. 2004). Conversely, if the stipulation itself is composed of legal conclusions, it adds nothing to the inquiry and will not assist the appellate courts' determination as to the sufficiency of the evidence supporting a conviction.

⁵⁹ See *United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002) (finding that the accused's answers of “Yes, sir” amounted to “legal conclusions with which appellant was asked to agree without any admissions from him to support them. As such, they were ‘mere conclusions of law recited by an accused [that] are insufficient to provide a factual basis for a guilty plea.’”) (quoting *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)); *accord* *United States v. Tenk*, 33 M.J. 765 (A.C.M.R. 1991); *United States v. Vinson*, 33 M.J. 1073 (A.C.M.R. 1991); *United States v. Duval*, 31 M.J. 650 (A.C.M.R. 1990).

⁶⁰ See MCM, *supra* note 5, R.C.M. 811(c) discussion; see also *United States v. Craig*, 48 M.J. 77, 80 (C.A.A.F. 1998); *United States v. Bertelson*, 3 M.J. 314, 317 (C.M.A. 1977).

⁶¹ See, e.g., *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977) (finding accused provident when stipulation included facts outside his direct knowledge and those inferences that followed obviously from the stated facts).

Subject to limitations which might be imposed by the military judge “in the interest of justice,” R.C.M. 811(b), we see no reason why evidence, even though otherwise inadmissible under the Military Rules of Evidence, cannot come into the trial by way of stipulation. . . . This is particularly true in a negotiated guilty plea where the accused is willing to stipulate to otherwise inadmissible testimony in return for a concession favorable to him from the Government, assuming no overreaching by the Government.⁶²

This rule specifically applies to uncharged misconduct and matters in aggravation.⁶³ In this context, the prohibition against “overreaching” appears to address the voluntariness of the accused’s plea.⁶⁴ Government overreaching can be inferred from the contents themselves if they appear to serve no legitimate purpose.⁶⁵ It is important to note that while parties may relinquish any objection to the admissibility of the stipulated facts, this does not usurp the military judge’s role to consider prohibitions against those facts.⁶⁶ Accordingly, parties cannot introduce facts by stipulation when there is a specific prohibition against the admission of that particular form of evidence, such as that for polygraph results.⁶⁷

To avoid repeating bare legal conclusions, trial counsel should ask themselves “how?” and “why?” for each fact that they include in the stipulation. When the drafter states a legal conclusion, such as the satisfaction of a particular element of an offense, counsel should then think “because . . .” and continue the thought. For example, “the accused’s conduct was prejudicial to good order and discipline, because . . .” What follows “because” will address the elements more fully by describing both the effect (discredit to the service or disruption of discipline) and the cause (the accused’s choices).

2. Facts That Support the Sentence

Although the parties can stipulate to the admissibility of certain facts and evidence, the facts must always be relevant to some issue before the court.⁶⁸ The relevance of sentencing information is limited to evidence specifically allowed by RCM 1001 and its interpreting cases. Generally, facts should relate to one of the following: (1) the impact of the accused’s conduct upon the victim;⁶⁹ (2) the duration and seriousness of the accused’s course of conduct;⁷⁰ (3) the likelihood that the accused will reoffend;⁷¹ (4) the magnitude of danger to the public posed by the accused should he reoffend;⁷² and (5) factors

⁶² United States v. Glazier, 26 M.J. 268, 270 (C.M.A. 1988) (citing United States v. Kinman, 25 M.J. 99, 100 n.2 (C.M.A. 1987); United States v. Zelenski, 24 M.J. 1 (C.M.A. 1987); United States v. Jones, 23 M.J. 305 (C.M.A. 1987)).

⁶³ See, e.g., United States v. McCrimmon, 60 M.J. 145, 154 (C.A.A.F. 2004) (finding that an admission of uncharged misconduct in the stipulation supported the sufficiency of an element of a charged offense); United States v. Ross, 34 M.J. 183, 187 (C.M.A. 1992) (allowing the use of a stipulation that included uncharged misconduct to establish the full impact of the accused’s course of conduct).

⁶⁴ Courts will look for abusive prosecutorial efforts designed to coerce the accused to accept the contents of a Government-drafted stipulation. See, e.g., United States v. Davis, 50 M.J. 426, 431 (C.A.A.F. 1999) (finding no Government overreaching in obtaining a pretrial agreement and confessional stipulation because the accused “repeatedly assured the military judge that his actions were completely voluntary and were taken after receiving the advice of his defense counsel”).

⁶⁵ See, e.g., United States v. DeYoung, 29 M.J. 78, 81 (C.M.A. 1989) (“[A]ttorneys for the Government have an ethical responsibility to avoid bringing inadmissible matters before a court-martial merely for the purpose of inflicting gratuitous injury upon an accused.”).

⁶⁶ See *id.* at 80 (determining that the military judge must independently review admissibility and rule on objections even as to stipulated facts).

⁶⁷ United States v. Clark, 53 M.J. 280, 281 (C.A.A.F. 2000) (holding that RCM 707 prohibited the admission of polygraph evidence, therefore the military judge should not have considered the report, despite its inclusion in the stipulation of fact).

⁶⁸ MCM, *supra* note 5, MIL. R. EVID. 402.

⁶⁹ See *id.* R.C.M. 1001(b)(4).

⁷⁰ See *id.* This includes preparatory actions. Earlier crimes or a demonstrated course of conduct directed at the victim is permissible to show the “full impact” of the accused’s actions. United States v. Nourse, 55 M.J. 229 (C.A.A.F. 2001); see also United States v. Patterson, 54 M.J. 74 (C.A.A.F. 2000) (holding that evidence of grooming behavior was permissible aggravation evidence); United States v. Hollingsworth, 44 M.J. 688 (C.G. Ct. Crim. App. 1996) (finding that testimony from the child victim of a withdrawn specification could testify to the extent of the accused’s scheme involving charged offenses).

⁷¹ See MCM, *supra* note 5, R.C.M. 1001(b)(5). These facts can include those bearing on whether accused will make the same decisions again, also known as the accused’s potential for rehabilitation. See, e.g., United States v. George, 52 M.J. 259 (C.A.A.F. 2000) (allowing prosecution evidence regarding the accused’s poor rehabilitative potential). Effective stipulations will also include facts regarding the likelihood that the accused will encounter circumstances similar to those that originally contributed to the accused’s poor decision-making (e.g., those providing opportunity or motive).

⁷² See MCM, *supra* note 5, R.C.M. 1001(b)(5); United States v. Williams, 41 M.J. 134 (C.M.A. 1994) (finding psychiatric testimony regarding the accused’s future dangerousness to be proper evidence relevant to rehabilitative potential).

bearing on the appropriateness of specific forms of punishment or magnitude of punishment, also known as matters in aggravation.⁷³

Most mistakes and shortcomings of stipulations occur in the sentencing area. The Government can require the accused to stipulate to evidence in aggravation, as well as evidence that supports the factual predicate of the plea, as part of the pretrial agreement.⁷⁴ Often, the best source of aggravation evidence may be the accused's uncharged misconduct.⁷⁵ Significantly, parties can stipulate to the truth and permissible uses of uncharged misconduct in the same way they can for other facts that would normally be excluded from consideration, although similar limitations apply.⁷⁶ For example, there must be no overreaching by the Government, the conduct must be relevant, and the evidence must not be specifically prohibited elsewhere.⁷⁷ For the purposes of aggravation evidence, relevance is statutorily defined as those "circumstances directly relating to or resulting from the offenses of which the accused has been found guilty."⁷⁸ Such a definition implies a "higher standard" than "mere relevance."⁷⁹ This heightened scrutiny also means that uncharged misconduct, even if directly related to the charged offenses, may also need to survive an RCM 403 balancing test.⁸⁰ In practice, the decision to redact portions of the stipulation based upon an RCM 403 test should be extremely rare because the military judge must raise the issue.⁸¹

Even successful stipulations should not act as a complete substitute for the Government's sentencing case. Nothing is more persuasive than effective live testimony. Instead, a properly crafted stipulation will deny, as much as possible, the accused from making an effective sentencing case. In other words, seek out facts that pre-empt foreseeable extenuation or mitigation arguments.

V. Packaging a Persuasive Stipulation

The finest example of written advocacy will fail to influence its reader if it is not presented in a persuasive form. Counsel must follow through on their drafting efforts by proofreading, choosing which evidence best supplements the narrative, negotiating with defense counsel, and, most importantly, by remaining vigilant during the providence inquiry.

⁷³ For example, the accused's unrepentant attitude during prior statements may militate for a harsher sentence. *See, e.g.*, *United States v. Alis*, 47 M.J. 817, 825-26 (A.F. Ct. Crim. App. 1998) (finding that accused's attitude regarding the victims and his offenses was relevant and admissible for sentencing purposes).

⁷⁴ *See* MCM, *supra* note 5, R.C.M. 1001(b)(4); *see also* *United States v. Harrod*, 20 M.J. 777, 779 (A.C.M.R. 1985) ("The government is prohibited neither by law nor by public policy from requiring an accused, pursuant to the terms of a pretrial agreement, to stipulate to aggravating circumstances surrounding the offenses to which the accused will plead guilty."); *United States v. Sharper*, 17 M.J. 803, 806 (A.C.M.R. 1984) ("Such a stipulation, by its very nature, recounts the circumstances surrounding the commission of the offenses and is often, and properly, considered by the trial court not only during the *Care* inquiry but . . . are the sort which the sentencing authority may properly consider in aggravation.").

⁷⁵ *United States v. Vargas*, 29 M.J. 968, 971 (A.C.M.R. 1990) ("While in the normal context of sentencing proceedings, such consensual use of uncharged misconduct might amount to ineffective assistance of counsel, . . . appellant and his counsel [may] negotiate[] a tactical if not strategic benefit by [permitting] the sentencing authority to consider such evidence by means of stipulation.") (citations omitted).

⁷⁶ *See supra* notes 62-67 and accompanying text; *see also* *United States v. Mezzanatto*, 513 U.S. 196, 203-04 (1995) (recognizing the accused's right to waive favorable evidentiary rules).

⁷⁷ *See Harrod*, 20 M.J. at 779; *Sharper*, 17 M.J. at 806.

⁷⁸ MCM, *supra* note 5, R.C.M. 1001(b)(4).

⁷⁹ *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007) (quoting *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995)); *see also* *United States v. Lowe*, 56 M.J. 914 (N-M. Ct. Crim. App. 2002) (finding evidence of uncharged incidents of harassment was not directly related to the charged offenses because they involved different victims and were not part of a single criminal scheme).

⁸⁰ *See generally* MCM, *supra* note 5, MIL. R. EVID. 403 ("[R]elevant . . . evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ."). *See, e.g.*, *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995) (finding prejudicial error in the military judge's decision to allow admission of the victim's suicide note because it failed the RCM 403 balancing test).

⁸¹ Because the defense agreed to the truth and admissibility of the uncharged misconduct, raising an objection at trial would be tantamount to withdrawing from the stipulation, and therefore the pretrial agreement itself:

[The accused] agreed that his pretrial agreement would be "automatically . . . cancelled" if there was a "failure of agreement with the Trial Counsel on the contents of the stipulation of fact" or any "modification at any time of the agreed stipulation of fact without consent of the trial counsel." Accordingly, judicial modification of the stipulation without consent of both parties, which appellant desired . . . was not an available remedy.

United States v. DeYoung, 29 M.J. 78, 80-81 (C.M.A. 1989).

A. STEP SEVEN: Properly Use Attachments and Enclosures

Carefully select attachments and enclosures because each may dramatically affect the stipulation and, consequently, the providence inquiry. Common attachments and enclosures include confessions or admissions; documentary evidence, such as bank statements; photographs; and descriptive evidence, such as charts, maps, or diagrams. Trial counsel must then decide how to treat the evidence: Should the contents be considered unassailable fact or simply contextual information for the judge? Each piece of evidence must fall into one category or the other. A good way to distinguish the two is to use different terminology when referring to the evidence itself.

Trial counsel should consider an “attachment” a separate exhibit referenced in the stipulation solely for the purpose of memorializing the parties’ agreement that the exhibit is relevant and admissible.⁸² In other words, an attachment is not incorporated into the stipulation, and the parties can attack, contradict, or explain its contents at trial. Attachments merely supplement the judge’s understanding of the stipulated facts and the accused’s anticipated statements during the providence inquiry. Remember to move for admission of attachments on the record because they are not automatically admitted with the stipulation in the same way enclosures are. When the judge receives attachments into evidence, trial counsel should ensure that the record is clear as to the purpose and permissible uses of the attachments as expressed by the parties in the final paragraph of the narrative portion of the stipulation.⁸³

In contrast, an “enclosure” is a piece of evidence that follows the main narrative or recitation of facts within the stipulation itself.⁸⁴ Enclosures are not marked as separate exhibits, and their pages are included in the pagination of the stipulation. As part of the stipulation, parties agree enclosures are relevant, admissible, and true. Trial counsel should avoid lengthy or complex enclosures, which can spawn inconsistencies within the stipulation and threaten the viability of both the stipulation and the plea.⁸⁵ For example, an accused’s confession should never be included as an enclosure because confessions inevitably contain information that differs from, or contradicts, facts in the narrative portion of stipulations. Instead, only useful information should be extracted from the confession and recited in the narrative; the rest should be left out altogether. For similar reasons, other witness statements (except prepared victim impact statements) generally make poor attachments *or* enclosures. Be wary of using statements even as attachments unless they are both truly damning to the accused and free of explanation, extenuation, or mitigation.⁸⁶

B. STEP EIGHT: Negotiate and Adjust (Slightly)

Many of the facts in the stipulation will not be essential to establish the accused’s providency and, therefore, may be fertile ground for negotiation.⁸⁷ The more detailed the stipulation, the more room for adjustment. The ultimate aim should always be to create a stipulation that is as complete, and aggravating, as the accused will stomach without withdrawing the offer to plead guilty. As a consequence, adjustments should be kept to minor changes in language, not content.

Insist that all legitimate aggravation, background, and *res gestae* appear in the stipulation. Allow no favorable defense evidence in the stipulation. Do not consider the withdrawal of proffered defense evidence . . . as [a] defense concession[.]. The defense must not be relieved of its responsibility for placing that evidence before the court through methods by which the government can test it.⁸⁸

⁸² An attachment is a “supplementary part; an accessory . . . [including] a supplementary document that is attached to a primary document.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2004).

⁸³ See app. A-6, para. 31.

⁸⁴ To “enclose” something is to “surround on all sides,” or “to contain . . . so as to envelop . . .” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE. An enclosure is therefore dependent on the stipulation; it is a fully incorporated element.

⁸⁵ See *infra* Section V.C.; see also MCM, *supra* note 5, R.C.M. 705(d)(4)(B) (permitting the accused to withdraw from a pretrial agreement when there is a disagreement concerning the meaning or effect of a material term). Stipulations that are internally inconsistent could certainly create disagreements of this type.

⁸⁶ Safe attachments or enclosures include: victim impact statements; photographs of injuries, destroyed or stolen property; copies of checks or bank statements; and representative images in child pornography cases.

⁸⁷ During these negotiations, it may occur to trial counsel that the accused would be the best potential source of information for the stipulation. Trial counsel should avoid attempting to “fish” information from accused and defense counsel at this stage. If the military judge rejects the accused’s plea, or he withdraws from it, the Government may not use any of the information solely obtained from the accused during the negotiation. See generally MCM, *supra* note 5, MIL. R. EVID. 410.

⁸⁸ Morris, *supra* note 40, at 41.

Trial counsel should transmit their initial draft to defense counsel for review and negotiation in an inalterable format, such as hardcopy or Portable Document Format (.pdf). Defense counsel's comments and suggested changes will, therefore, be easily distinguishable, and trial counsel will be less tempted to accept defense "re-drafts" without adequate review.⁸⁹ Remember, trial counsel, not defense counsel, draft stipulations.

C. STEP NINE: Getting the Stipulation Before the Court

Draft stipulations before referral and obtain the signatures of accused and counsel at the time a pre-trial agreement is offered to the convening authority. Although this will be challenging at times, it is both essential and within the Government's power to effectuate. The Government possesses the initiative and is in the strongest bargaining position when the accused first submits an offer to plead. Once the Government commits to a deal, it "will have called off witnesses, redirected its energies, and will be unwilling to answer to the [commanding general] for the deal's failure."⁹⁰ As soon as the convening authority signs the pretrial agreement, trial counsel must send the stipulation to the military judge with the referral documents and the offer to plead guilty. Provide the military judge with the maximum amount of time to review the stipulation before trial because it shapes the providence inquiry. Likewise, send any revised versions to the judge, with changes conspicuously noted, as soon as possible.

At trial, be on the lookout for issues that may threaten the stipulation and the plea. If the accused contradicts information in the stipulation, the military judge must inquire into the inconsistency.⁹¹ Failure to do so may render the plea legally insufficient upon appellate review. If, after the judge has sought clarification, the accused insists upon contradicting a sentence in the stipulation, that sentence must be redacted.⁹² If the redacted sentence relates to an element of an offense, the judge will consider the contradiction a "matter inconsistent with the plea" or a failure to plead within the meaning of Article 45(a).⁹³

Is the stipulation "dead" at this point? Perhaps not. Generally, the military judge may not consider anything presented during an unsuccessful attempt to plead guilty.⁹⁴ The accused may, however, agree to submit the previous stipulation, another stipulation, or even a confessional stipulation to the judge for consideration.⁹⁵ Such an agreement may obligate the convening authority to apply the sentence limitations imposed in the defunct pretrial agreement.⁹⁶ In other words, if the Government benefits from the stipulation, the accused may continue to benefit from the sentence limitation originally contemplated by the parties.

VI. Conclusion

Supervising attorneys who "take the long view"⁹⁷ will require trial counsel to draft stipulations of fact in every case. Ultimately, the majority of cases will be resolved, partially or completely, by guilty pleas. Ignoring this fact will increase the likelihood of a last-minute rush to produce a stipulation of fact before the staff judge advocate's meeting with the convening

⁸⁹ Sending a draft stipulation to defense counsel in a digitally modifiable format, especially unfamiliar counsel, is inadvisable. Unless trial counsel desire to review and compare every word in every sentence each time they receive a return copy, they should rely on .pdf or hardcopy formats.

⁹⁰ Morris, *supra* note 40, at 41 ("Additionally, a judge may be reluctant to permit such a withdrawal, further enabling the defense to drive a difficult bargain over the contents.").

⁹¹ See *United States v. Epps*, 25 M.J. 319, 321 (C.M.A. 1987) ("Therefore, when, as in this case, a stipulation of fact clearly demonstrates guilt but the accused's testimony is inconsistent therewith, the military judge has a duty to note the inconsistency and seek explicit clarification from the accused.").

⁹² See *United States v. Enlow*, 26 M.J. 940, 945 (A.C.M.R. 1988); *United States v. Cozine*, 21 M.J. 581, 584 (A.C.M.R. 1985).

⁹³ See UCMJ art. 45(a) (2008) ("If an accused . . . after a plea of guilty sets up matter inconsistent with the plea, . . . or if he fails or refuses to plead, a plea of not guilty shall be entered in the record . . .").

⁹⁴ See MCM, *supra* note 5, MIL. R. EVID. 410; *United States v. Grijalva*, 55 M.J. 223, 227 (C.A.A.F. 2001) ("If a plea of guilty is rejected, any statement made by an accused during the plea inquiry is inadmissible.").

⁹⁵ If the stipulation amounts to a confessional stipulation (i.e., it admits all facts necessary for a finding of guilty on a contested charge), the military judge must determine that the accused made a knowing and intelligent waiver of his rights with regard to each offense covered by the stipulation. See *United States v. Craig*, 48 M.J. 77 (C.A.A.F. 1998); *United States v. Matlock*, 35 M.J. 895 (A.C.M.R. 1992); see also *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977) (detailing the necessary elements of the judge's inquiry into the accused's consent).

⁹⁶ See *United States v. Cunningham*, 36 M.J. 1011 (A.C.M.R. 1993).

⁹⁷ Morris, *supra* note 40, at 19 ("Take the Long View: Think of Pleas, PTAs, and the Theory of Your Case").

authority. In addition to being shortsighted, the reactionary drafting of stipulations as an incidental requirement of each particular case will yield hurried, cut-and-paste solutions rife with poor logic, bad syntax, and inexcusable typos. Calculated, well-reasoned written advocacy can only be achieved by scrupulously marshaling facts and law and then funneling them into a single, cohesive, and compelling theory with recurring themes and persuasive devices. Crafting an effective stipulation of fact requires more than creative storytelling or properly employing English grammar—it requires, time, effort, and most of all, *practice*.

5. Unless otherwise noted, the accused's chain of command at the time of the offenses was as follows: SGT Richard J. Brown was his squad leader, SFC Donald A. Granger was his platoon sergeant, 1SG Maxwell K. Bonnaker was his first sergeant, and CPT Keith M. Muller was his company commander.

Dereliction of Duty (Charge I and its Specification)

6. [Chronological listing often makes the most persuasive story; however, trial counsel should also flag the particular specification or specifications to which particular facts relate.] A few days before the Sandistan national elections on 15 October 2008, the accused's platoon was tasked to patrol for weapons caches near their patrol base (PB), Razorback. For ten days prior to receiving this mission, the accused's platoon had been in "refit cycle," which means that their duties had been limited to resting, repairing equipment, and preparing for future combat missions.

7. The accused attended a formation at the beginning of his platoon's refit cycle. At that formation the platoon sergeant, SFC Granger, instructed each of the Soldiers to sleep at least seven hours per night. He also told the platoon, including the accused, that the unit would receive a combat mission before ten days had passed.

8. When afforded personal time during those ten days, the accused chose to play video games and watch movies in his tent instead of sleep. His squad leader, SGT Brown, observed the accused acting disoriented and exhausted during daily maintenance operations. When he asked the accused whether he was sick, the accused said that he had been playing a game, Command and Conquer, "till my eyes was red." SGT Brown instructed him to stop playing games and get more sleep.

9. On 11 October 2008, the accused's platoon received a mission brief informing them of their task to conduct sweeps for weapons caches. Immediately following that briefing, SGT Brown told the accused that he would be a member of that patrol.

10. Once out in sector, SFC Granger directed the accused to pull security for the dismounted patrol: specifically, he instructed the accused to face a certain direction and observe the area for suspicious activity while they walked down the street. As he exited the tactical vehicle, the accused staggered and dropped his weapon, an M-4 carbine, into the dirt at the side of the road. The accused then stated, "I'm so tired I can't see straight," and "I can't remember the last time I slept." He could not bear the thought of walking on patrol for seven or eight hours, as was the expected length of the patrol.

11. Knowing his duties, he refused to perform them. He begged the platoon sergeant to let him sleep in one of the vehicles instead of patrol with his squad. Unable to rely upon the accused to be alert, SFC Granger knew that forcing the accused to patrol might endanger him or his squad-mates. Accordingly, he told the accused to ride in one of the platoon's vehicles.

12. The accused's daily choice to forsake sleep in favor of video games or movies caused him to be unwilling and unable to perform his duties safely. The accused's conscious decisions to neglect his own physical wellbeing made him derelict in the performance of his duties.

13. This caused a shortage of manpower within the squad during the remainder of that mission. The accused's squad contained only eight Soldiers, and the accused's last-minute removal from the patrol forced significant changes to the patrol plan. The platoon sergeant was forced to reallocate Soldiers from different vehicles and squads in order to provide adequate security for the rest of his men while the accused simply rested in his vehicle.

14. This disruption and resulting loss of manpower endangered the platoon on Route Scotsman, a route that has repeatedly been sown with improvised explosive devices (IEDs). From 1 July to 11 October 2008, A Company Soldiers encountered 126 IEDs on this route, only 74 of which were discovered before they had detonated and killed or injured personnel. In the two weeks before 11 October 2008, four Soldiers from A Company died on Route Scotsman.

Misbehavior of a Sentinel/Lookout (Charge II and its Specification)

15. On 18 November 2008, the accused's squad leader, SGT Brown, posted him as a sentinel at a blocking position on Route Cowboy. SGT Brown told the accused that his squad's mission was to deny enemy access to an area of the local neighborhood known to be a common "point of origin" for indirect fire attacks on the nearby U.S. forward operating base (FOB), FOB Crazyhorse. The accused knew from previous threat briefings that insurgents would also routinely infiltrate this area, climb to the top of some of the larger buildings, and fire at Soldiers on the FOB with sniper rifles.

16. Sergeant Brown told the accused that his specific duty was to scan his assigned sector for suspicious persons and vehicles that may pose a threat to the platoon. If he saw persons moving into or out of the area, he would radio his observations to the squad leader of the standby patrol or reaction force, depending on the perceived level of threat. He also told the accused that he was to guard his sector for four hours, between 0400 and 0800.

17. At approximately 0530 hours on 18 November 2008, 1SG Bonnaker began checking on the Soldiers assigned as sentinels for FOB Crazyhorse. He discovered the accused sleeping at his guard position. The accused was seated on the sand bags at the front of the fortification, snoring loudly. When 1SG Bonnaker awakened the accused, the accused could not say how long he had been sleeping, or whether anyone had passed his position or through his assigned sector of fire. When asked, the accused simply answered, "Duh, I was asleep," and "You got me," and "Who cares?"

18. Fearing that the accused may have had a physical or mental injury that contributed to the accused's failure to remain awake, 1SG Bonnaker took the accused to the physician's assistant on FOB Crazyhorse for a physical exam. The physician's assistant concluded that the accused suffered from no injuries, ailments, or disabilities that would make him physically unable to remain awake and alert, or that might reasonably justify his failure to do so.

19. The accused placed himself in danger by sitting down and falling asleep in front of and on top of the sandbags provided for his protection from enemy observation and direct fire attacks. A Company had fortified this position in late September 2008, approximately five weeks before the accused was found sleeping in front of them. The company leadership ensured there was a fortified fighting position at that location because a Soldier had been shot by a sniper in August. When asked why he chose to sleep outside and in front of the fortification, the accused simply stated that he could not find a comfortable position inside.

20. Additionally, the accused's unwillingness to remain awake, alert, and vigilant against threats to his platoon placed all of his fellow Soldiers in danger. Insurgents attacked FOB Crazyhorse 26 times between 1 July 2008 and 18 November 2008. These included 14 indirect fire attacks, nine of which employed 81mm mortars and five of which employed 105mm rockets. All 14 attacks originated from the neighborhood whose main ingress was within the accused's sector of fire on 18 November. The remaining attacks were sniper fire whose points of origin were never precisely identified; however, one of those attacks occurred in the early morning hours of 18 November 2008 while the accused was sleeping at his guard position.

Disorderly Conduct (Charge IV and its Specification)

21. On 14 February 2009, the accused returned to Fort Outoftheway, Utah, for rest and recuperative (R&R) leave. That very night, he went to the Hooters Restaurant in Smalltown, Utah. He spent much of the evening drinking alcohol and socializing with SPC Rusty D. Carpenter, PFC William R. Downey, and PFC Donald F. Barber. At about 1900 hours, the accused worked up the courage to ask their waitress, Cindy, if she would like to have dinner and see a movie the following weekend. She accepted.

22. The following afternoon, Thursday 15 February 2009, the accused called his friends to ask them whether they wanted to go to the Hooters Restaurant again. SPC Carpenter and PFC Barber agreed, while PFC Downey said he "had other things to do." That night, the accused, SPC Carpenter, and PFC Barber went to the Smalltown Hooters. After consuming several alcoholic drinks, the accused was surprised to notice Cindy talking to PFC Downey, who was seated at the bar. The accused imagined that he saw PFC Downey flirting with Cindy and believed that she was returning his affection. The accused loudly confronted PFC Downey, screaming profanity and knocking over a table. Restaurant staff then escorted him out of the building.

23. Several customers witnessing the violent confrontation were so disturbed that they paid their checks and immediately left. One customer loudly exclaimed: "Go back to Sandistan and tear up their restaurants, will you!" The restaurant later paid \$186.30 to repair the table, and \$43.65 to replace the broken dishes and glassware. At a local "town hall" meeting between members of the community and the Fort Outoftheway garrison commander, the restaurant manager, Mr. Gean H. Carson, presented the commander with a bill for the damage and asked him to "get his troops under control."

24. The accused's violent behavior and profane language was so reprehensible that members of the public who witnessed it were disturbed and resentful. It is foreseeable that these witnesses, and those to whom they spoke, would attribute the violent and disorderly acts of the accused to others in uniform, the result of a false impression that the U.S. military culture encourages aggression to solve disagreements.

Assault (Charge III and its Specification)

25. The accused waited in the parking lot for SPC Carpenter and PFC Barber to come out of the restaurant. After twenty minutes, the accused realized the other Soldiers were not going to leave until they finished their dinner. As the accused stood in the cold, he became angry with all three of his friends. He felt betrayed by PFC Downey, who he believed had deliberately tried to "get with his girl." He also felt abandoned by SPC Carpenter and PFC Barber, who obviously thought their food was more important than his friendship. He began to fantasize about beating PFC Downey when he came out of the restaurant. In a statement he later gave to police, the accused said: "I knew that I was gonna give Billy the beatin' of his life. See if she were gonna like his face after I was done wid it."

26. The accused strolled to the back of the parking lot, where two of the security lights had burned out. He waited in the darkness for two hours before he saw PFC Downey going to his car. He ran toward PFC Downey and violently struck him in the face. When he struck PFC Downey, he felt his knuckles sink into PFC Downey's flesh and he heard a loud "snap." PFC Downey fell onto the ground. With his fist tightly closed, the accused struck PFC Downey several more times. SPC Carpenter and PFC Barber pulled the accused off of PFC Downey and held him until police arrived. While they waited, the accused screamed profanity at them until spittle dribbled down his chin.

27. When the accused struck PFC Downey, he did so while he was angry. He struck PFC Downey in the face intending to inflict pain and injury upon him because he wanted to "learn 'em a lesson," as he later told police. PFC Downey had not threatened the accused, nor had he even seen the accused approach him from behind. Although the accused had voluntarily consumed alcohol, he was able to decide that he wanted to attack PFC Downey, lurk in the parking lot, and successfully ambush him.

28. The accused broke PFC Downey's cheekbone, requiring a lengthy surgical procedure to reconstruct its shape. As a result of his injuries, PFC Downey suffered significant pain for several weeks. The accused inflicted such grievous injuries that PFC Downey could not return to duty for four weeks after he had been scheduled to return to Sandistan.

Matters in Aggravation

29. *[Include matters in aggravation throughout the body of the stipulation, in context with the accused's actions. On occasion, there will be some aggravating matters that must be set off from the main body because they do not relate directly to the charged offenses; for example, trial counsel would list a qualifying prior conviction here.]* On 16 March 2009, the State of Utah found the accused guilty of public drunkenness, battery, and petty larceny during another altercation.

Disclaimer of Defenses

30. *[Avoid using a separate "disclaimer of defenses." The facts which foreclose all relevant defenses should be stated in context with the facts supporting each specification. On occasion, there will be possible defenses that apply to all charged offenses; in that case, trial counsel may use a separate section such as this one.]* Behavioral health professionals from Outoftheway Army Medical Center evaluated the accused in March 2009. A psychiatrist, LTC Jim S. Blalock, interviewed the accused on three occasions, and administered two psychiatric tests. He concluded that the accused suffered from a mild anxiety disorder, but nothing indicated that the accused suffered from a severe mental disease or defect, or that he would have been unable to appreciate the wrongfulness of his actions when he was derelict in his duties, fell asleep on guard duty, behaved disorderly in public, or when he attacked PFC Downey.

Admissibility of Evidence

31. The government and defense stipulate that the following attachments are admissible at trial and that they may be considered by the military judge and on appeal for all purposes described in paragraph 1 above. The accused expressly waives any objection he may have to the admission of these exhibits into evidence at trial:

- PE 1 Photograph depicting PFC Downey's face – front (1948 hrs., 15 Feb 09)
- PE 2 Photograph depicting PFC Downey's face – profile (1950 hrs., 15 Feb 09)
- PE 3 Excerpt from A Company SIGACT report (18 Nov 08)
- PE 4 Stipulation of expected testimony from Mr. Carson (2 Apr 09)

Signed this ____ day of April, 2009.

KURT R. SALVATO
SPC, U.S. Army
Accused

GUY S. ATTORNEY
CPT, JA
Defense Counsel

DAGOV S. LAWYER
CPT, JA
Trial Counsel

[A short note about style: Writing styles are as diverse as writers; however, subtlety is often the key to creating a powerful narrative. Serious cases with shocking facts do not benefit from overloaded description; a heavy-handed treatment makes the stipulation look clumsy, distracting, and unpersuasive at best, while downright offensive at worst. Similarly, less serious cases with simple facts appear comical when semantically loaded.]

Appendix B

Article	Element	Fact	Evidence
Negligent Dereliction of Duty			
92	(1)	SPC Salvato had certain duties; namely, providing security during a dismounted patrol searching for enemy weapon caches;	
	(2)	He knew of the duties; and	
	(3)	SPC Salvato was unable to perform his duties as a result of his own negligence.	
Misbehavior of Sentinel or Lookout			
113	(1)	SPC Salvato was posted as a sentinel or lookout;	
	(2)	He was found sleeping while on post; and	
	(3)	SPC Salvato committed the offense while receiving special pay under 37 U.S.C. § 310.	
Assault Consummated by a Battery			
128	(1)	SPC Salvato did bodily harm to PFC W.R.D.; and	
	(2)	The bodily harm was done with unlawful force or violence.	
Disorderly Conduct			
134	(1)	SPC Salvato was drunk and disorderly in public; namely, Hooters Restaurant in Smalltown, Utah; and	
	(2)	Under the circumstances, his conduct was of a nature to bring discredit upon the armed forces.	

Unloading the “Aide Bag”: An Overview of the Legal and Ethical Concerns Carried by General Officer Aides

Major Nate G. Hummel*

I. Introduction

Who is that officer carrying a backpack and cup of coffee behind the general? Who are those Soldiers scheduling conference calls, enforcing standards of protocol, coordinating transportation, and preparing formal dinner meetings at the general’s quarters? They are the select few who are charged with providing direct support and assistance to the Army’s highest ranking officials—officer and enlisted personnel assigned as general officer aides. From the outside looking in, rank certainly appears to have its privileges.¹ But these privileges are significantly offset by the time, toil, and effort general officers expend exercising the incredible level of responsibility vested in them by the Army.² To accommodate the increased responsibility and workload, the Army provides its general officers with specialized staffs and aides to assist them in accomplishing mission requirements.³

Perhaps the most inconspicuous members of the general’s staff are the aides. Aides handle the wide-ranging administrative and logistical details of a general’s daily schedule, thereby enabling the general officer to focus on the big picture with minimal distraction.⁴ While generals spearhead strategic operations and missions, aides are behind the scenes, dutifully executing many of the more minor, mundane, or routine tasks. By its very nature, duty as a general officer aide is littered with its own unique challenges. These challenges are exacerbated by the paucity of regulations and formal written guidance articulating the aide’s specific role and responsibilities.⁵ Aides often find themselves overwhelmed by a myriad of tasks, many of which depend upon the broad discretion and varying needs of the generals they serve. While the mechanics of managing a general officer’s schedule are daunting, a closer look inside an aide’s bag⁶ reveals less obvious legal and ethical challenges, concerns, and areas for potential abuse. Itineraries, airline tickets, coins, gifts, and the general’s personal monies all add incredible weight to the aide bag. Understanding the aide’s role and the legal and ethical considerations involved is critical to unloading the burdens carried by general officer aides. The purpose of this primer is to (1) survey and explain the role of general officer aides, (2) identify and examine common legal and ethical concerns inherent to the position, and (3) provide suggested best practices to protect against actual or perceived misconduct.

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¹ See Major Timothy M. Tuckey, TJAGSA Practice Notes, *Ethics Note, The General Officer Aide and the Potential for Misuse*, ARMY LAW., Aug. 2002, at 36, 36 (discussing how “[r]ank has its privileges” and that “[a]long with respect and responsibility, promotion [to general officer] provides perks that are not available to lower ranking officers”).

² See *id.* at 42 (noting that “[r]ank may indeed have its privileges, but it also has significant responsibilities”).

³ See, e.g., 10 U.S.C. § 3543 (2006) (establishing the detail of general officer aides and number authorized); *id.* § 981 (providing the congressionally-established formula limiting the number of enlisted aides assigned to personal staffs of general officers).

⁴ See U.S. DEP’T OF ARMY, REG. 614-100, OFFICER ASSIGNMENT POLICIES, DETAILS, AND TRANSFERS (10 Jan. 2006) [hereinafter AR 614-100]; U.S. DEP’T OF ARMY, REG. 614-200, ENLISTED ASSIGNMENTS AND UTILIZATION MANAGEMENT (27 June 2007) [hereinafter AR 614-200]; OFFICER/ENLISTED AIDE HANDBOOK, GENERAL OFFICER MANAGEMENT OFFICE (July 2006) (unpublished, on file with General Office Management Office (GOMO) and with author) [hereinafter GOMO AIDE HANDBOOK].

⁵ Tuckey, *supra* note 1, at 37.

⁶ Aide-de-camps are often identified by the backpacks they carry in close proximity to the general officers they serve. These backpacks are commonly referred to as “aide bags” and are typically used to store the general officers’ essential personal and official items to support any number of aide-related tasks.

II. The Role of General Officer Aides

General officer aides⁷ often find themselves balancing a multitude of essential tasks under the broad discretion and direction of the generals they serve. At the same time, aides are dealing with the unique dynamics of the position, the relationship it engenders with the general and senior staff members, and the heightened public scrutiny inherent to high-ranking military officers. With little official guidance or written publications specifying roles and responsibilities, aides are left with the vague advice to “remain flexible” and execute duties dependent upon the “personality of the general” for whom they work.⁸ The *Officer/Enlisted Aide Handbook*, prepared by the General Office Management Office (GOMO), articulates this variance among aide duties.

An aide has to be a secretary, companion, diplomat, bartender, caterer, author, and map reader as well as mind reader. He or she must be able to produce at a minutes [sic] notice – timetables, itineraries, the speeds and seating capacity of various aircraft, trains, surface transportation, know seating arrangements at all occasions and all settings. He or she must know the right type of wine for a meal, how many miles it is to Timbuktu, where to get the right information, and occasionally, how the boss’s steak or roast beef ought to be cooked . . . always look fresh, always know what uniform to wear, know what is happening a week from today, have the latest weather report and, in their spare time, study to maintain military proficiency.⁹

Although aides may understand their basic function of assisting general officers, the absence of clear guidelines and the broad sweep of regulatory duty descriptions present real issues for aides trying to identify the left and right limits of their jobs.

The Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct)¹⁰ and Joint Ethics Regulation (JER)¹¹ provide the general framework for lawful employment of aides. In particular, the JER directs that a subordinate should not be encouraged, directed, coerced, or requested to “use official time to perform activities other than those required in the performance of official duties.”¹² The Standards of Conduct also provide corresponding ethical principles applicable to all government employees, including a prohibition against use of “public office for private gain.”¹³ A contemporaneous look at statutes and regulations promulgated specifically for enlisted personnel provides further insight on the role and responsibilities of aides.¹⁴ Army Regulation (AR) 214-200 states that an aide’s job is to relieve “general and flag officers of those minor tasks and details, which, if performed by the officers, would be at the expense of the officer’s primary

⁷ Selection to an aide position is generally considered an honor and privilege. Tuckey, *supra* note 1, at 37; Dana Priest, *A Male Prototype for Generals’ Protégés: In Choosing Aides de Camp, Army’s Leaders Nearly Always Exclude Female Officers*, WASH. POST, 29 Dec. 1997, at A1 (stating that “[t]here are few more subjective honors in the Army than being chosen as aide de camp”). Generals often personally interview and select the brightest officers from within their respective commands to serve as aides-de-camp, which professionally distinguishes them from peers. Tuckey, *supra* note 1, at 37; see AR 614-100, *supra* note 4, para. 3-4c. Selection of enlisted aides is similar, but candidates are subject to additional eligibility considerations and procedural steps required under the General Officer Enlisted Aide Program of Human Resources Command (HRC). Tuckey, *supra* note 1, at 37. Although enlisted aides volunteer for the duty, are managed under the Enlisted Aide Program, and receive specialized schooling, a general officer nonetheless retains the discretion to personally select his or her enlisted aide. General Officer Enlisted Aide Program, U.S. Army Human Resources Command, <https://www.hrc.army.mil/site/protect/Active/epqm/enlistedaideprogram.htm> (last visited Nov. 17, 2008) [hereinafter Enlisted Aide Program Website]; see Jamey Ryan, *Army Enlisted Aides: Service, Support, Sustainment*, http://www.quartermaster.army.mil/aces/programs/enlisted_adi/aide_program.html (last visited Sept. 2, 2008). In fact, enlisted aides are frequently hand-picked by generals themselves or are otherwise selected from lists of qualified candidates generated by HRC. Tuckey, *supra* note 1, at 37. Regardless of the process, there is little dispute that selection as an aide indicates success. *Id.*

⁸ Tuckey, *supra* note 1, at 37 (quoting General Officer Policies, General Officer Management Office (GOMO), Oct. 1995, at 10, 33 (unpublished, on file with GOMO)).

⁹ GOMO AIDE HANDBOOK, *supra* note 4, at 2. The *GOMO Handbook*’s explanation of an aide’s role directly correlates to the broad duty description provided in Army Regulation (AR) 614-100. *Compare id.* at 1 (stressing that aides must remain flexible and that “actual duties depend upon the personality of the general”), with AR 614-100, *supra* note 4, para. 3-4b (explaining that duties are variable and change with requirements of the assignment). In particular, AR 614-100 states that “[a]ides-de-camp perform many duties that include a combination of administrative tasks that change with the needs of the Army and the requirements of the assignment.” AR 614-100, *supra* note 4, para. 3-4b. This regulation further adds that “[a] description of the duties of one aide-de-camp would normally require modification to apply to another.” *Id.*

¹⁰ Standards for Ethical Conduct for the Executive Branch, 5 C.F.R. § 2635 (2008).

¹¹ U.S. DEP’T OF DEF., DIR. 5500.07-R, JOINT ETHICS REGULATION (29 Nov. 2007) [hereinafter JER].

¹² *Id.* para. 2-100; 5 C.F.R. § 2635.705(b).

¹³ 5 C.F.R. §§ 2635.101(b)(7), 2635.702.

¹⁴ Note that officer aides-de-camp essentially have no formal guidance explaining their roles and responsibilities and, therefore, must analogize to the more specific guidelines articulated in statutes and regulations for enlisted aides. See *supra* notes 8–9 and accompanying text.

military and official duties.”¹⁵ However, general officers are strictly precluded under statute from using “an enlisted member of the Army as a servant,”¹⁶ and AR 214-200 specifically provides that “aide duties must . . . serve a necessary military purpose.”¹⁷ Therefore, aides are to perform only official military duties, rather than “duties that inure solely to the personal benefit” of the general officer.¹⁸

The greatest challenge is determining where the line exists between lawfully employing an aide and situations presenting actual or perceived misuse of an aide.¹⁹ In most scenarios, the general officer will ensure that duties or tasks assigned to the aide are reasonably connected to an official military purpose.²⁰ But the minutia—the minor administrative tasks and coordination efforts that often go unnoticed—place aides in the precarious position of making tough decisions while also safeguarding their generals’ legal and ethical obligations.²¹ As a practical matter, aides must remember that public perception is a benchmark for the ethical performance of duty.²² Therefore, aides should always consider how their actions and service to general officers could be perceived by the casual observer.²³ Promptly addressing concerns and clarifying the aide’s roles and responsibilities are critical for protecting both the general and the aide from allegations of unethical conduct. The

¹⁵ AR 614-200, *supra* note 4, para. 8-11b.

¹⁶ 10 U.S.C. § 3639 (2006); Tuckey, *supra* note 1, at 38 (quoting 10 U.S.C. § 3639 (2000)). See *United States v. Robinson*, 20 C.M.R. 63 (C.M.A. 1955) (stating that 10 U.S.C. § 3639 was intended to “prevent the use of enlisted men in assignments that contributed only to the convenience and personal benefit of individual officers which had no reasonable connection with the efficient employment of the armed services as a fighting force”).

¹⁷ AR 614-200, *supra* note 4, para. 8-11b (stating that the propriety of an aide’s duties will be primarily determined upon its official purpose rather than the nature of the duties themselves). To assist in further defining roles and responsibilities, AR 214-200 and Department of Defense Instruction (DODI) 1315.09 include a reference point for some of the “official functions and duties” of enlisted aides. See U.S. DEP’T OF DEF., INSTR. 1315.09, UTILIZATION OF ENLISTED PERSONNEL ON PERSONAL STAFFS OF GENERAL AND FLAG OFFICERS para. 5.2 (2 Oct. 2007) [hereinafter DoDI 1315.09]; see also AR 614-200, *supra* note 4, para. 8-11b(1)–(5). Army Regulation 614-200 essentially mirrors the DOD Instruction, and provides the following reference point for permissible enlisted aide duties:

- (1) Assist with care, cleanliness, and order of assigned quarters, uniforms, and military personal equipment.
- (2) Perform as point of contact (POC) in the GO’s quarters. Receive and maintain records of telephone calls, make appointments, and receive guests and visitors.
- (3) Help to plan, prepare, arrange, and conduct official social functions and activities, such as receptions, parties and dinners.
- (4) Help to purchase, prepare, and serve food and beverages in the GO’s quarters.
- (5) Perform tasks that aid the officer in accomplishing military and official responsibilities, including performing errands for the officer, providing security for the quarters, and providing administrative assistance.

AR 614-200, *supra* note 4, para. 8-11b(1)–(5). Indeed, enlisted aides perform a number of duties, to include “planning social events, providing administrative assistance, purchasing and preparing food, running errands and providing security for the officer’s quarters.” T. Anthony Bell, *Enlisted Aides Support Mission Behind Scenes*, ARMY NEWS SERVS. (Mar. 13, 2008), available at <http://www.army.mil/news/2008/03/13/7917-enlisted-aides-support-mission-behind-scenes>. All of these tasks or actions are permitted by regulations under the auspice of supporting a general’s official military responsibilities. Yet some of these “official functions” also appear purely personal in nature. Ostensibly, a nexus exists between almost any function and a general’s official military duties. See Tuckey, *supra* note 1, at 41. However, such broad application will inevitably present circumstances for intense public scrutiny, if not outright abuse under current statutes and ethics regulations. Even in the absence of a clear abuse of authority, perception can be enough to ethically derail a general officer.

¹⁸ Tuckey, *supra* note 1, at 41. For example, issues with unethical employment of an aide often arise when a general’s family is involved. *Id.* at 40. First and foremost, an aide’s service statutorily belongs to the general officer—to assist and enhance the general officer’s official military duties. *Id.* Therefore, “use of the general officer’s aide[] to assist the general’s spouse with organizational chores,” or for other personal, familial tasks or errands is wholly inappropriate. *Id.* at 40–41. An aide performing “unofficial” duties or “favors” for a general’s spouse, friends, or family members not only runs afoul of ethical rules and principles, but also presents the clear appearance of misuse. *Id.* at 41. A general officer should “take care to avoid requesting [personal] favors.” *Id.* at 39. As a practical matter, favors may include “chores reasonably related to the officer’s military duties,” but still present an appearance of a personal request, rather than an official task. *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 39.

²¹ See *id.* Often, aides will execute assigned tasks without question or hesitation. This is particularly true for less experienced, younger aides who diligently carry out all tasks to please their superiors. Many of these same tasks are left for the aide to accomplish with little oversight or guidance. As a result, the personal or official nature of such routine or implied tasks may be overlooked or simply become an afterthought. Moreover, the aide’s close relationship and loyalty to a general officer may compound the matter. Even in the midst of clear ethical derogations, aides may feel too intimidated or proud to raise or address concerns.

²² *Id.* at 42.

²³ *Id.* (noting that “if a reasonable person would believe that an action violates the law or the standards of conduct, then most likely the action violates the Standards for Ethical Conduct”).

remainder of this paper will discuss some of the more common legal and ethical issues aides may encounter in their role as personal assistants and representatives of general officers.

III. Travel Arrangements and Transportation Considerations

One of the most common ethical pitfalls for general officers involves transportation. As administrative coordinators, aides are often responsible for booking flights, filling gas tanks, and shuffling generals between various engagements.²⁴ Aides truly face great stress getting general officers from point A to point B. Many generals get frustrated when transportation is at issue, particularly when it interferes with smooth, efficient transitions between meetings and other work-related functions or tasks.²⁵ Even more troublesome is when general officers inadvertently direct violations of statutes and regulations involving ground and air transportation. Aides must be well-versed in the current transportation rules, while also being skilled, courteous, and knowledgeable travel agents for their general officers. Understanding the inner workings of the Defense Travel System (DTS)²⁶ and knowing the key players, specific rules, and procedures, will keep both aides and generals above the fray.

A. Use of Government Non-Tactical Vehicles

General officers will typically have access to assigned, government-owned, or government-leased vehicles in support of day-to-day operational requirements. Non-tactical vehicles (NTVs) are frequently used to transport generals to ceremonies, meetings or other training events in the garrison environment. The current rules for NTV use remain relatively clear—NTVs must be used for official purposes only.²⁷ Official purposes are those uses that “support . . . authorized DOD functions, activities, or operations.”²⁸ However, “[p]roviding a Government vehicle solely or even principally to enhance the comfort or convenience of a Government officer or employee is not permissible.”²⁹ Thus, NTVs generally may not be used to support activities involving the purely personal business or activities of the general officer.³⁰

Determining whether an official purpose exists is a matter of both discretion and judgment.³¹ Aides should consider whether use of an NTV is essential to successful completion of their general’s mission requirements and whether the NTV is being used consistent with the purpose for which it was acquired.³² In most cases, NTV transportation will be authorized to support generals in their day-to-day business. Current regulations specifically permit NTV transportation when the general is

²⁴ See GOMO AIDE HANDBOOK, *supra* note 4, at 2–12 (discussing general duties, including travel).

²⁵ See generally Aaron Rosencrans, *A Day in the Life of a CG’s Aide*, MULTI-NATIONAL DIVISION—BAGHDAD MEDIA RELEASE NO. 20080524-06 (May 24, 2008), available at <http://pao.hood.army.mil/4id/news/Articles/08may/may183.pdf> (discussing the importance of the aide’s role in getting generals to appointments “without any delays and with minimal effort”).

²⁶ E-mail from Major Ellen S. Jennings, Chief of Administrative Law, 10th Mountain Division & Fort Drum, to Major Nate G. Hummel, Student, 57th Graduate Course, The Judge Advocate Gen.’s Legal Ctr. & Sch. (Oct. 7, 2008, 7:49 EST) (stressing the importance that aides understand the inner workings of DTS) (on file with author).

²⁷ U.S. DEP’T OF DEF., REG. 4500.36-R, MANAGEMENT, ACQUISITION, AND USE OF MOTOR VEHICLES para. C2.5 (16 Mar. 2007) [hereinafter DoD REG. 4500.36-R]; U.S. DEP’T OF ARMY, REG. 58-1, MANAGEMENT, ACQUISITION, AND USE OF MOTOR VEHICLES para. 2-3 (10 Aug. 2004) [hereinafter AR 58-1].

²⁸ AR 58-1, *supra* note 27, at 54; see H.R. REP. NO. 451, at 6 (1986).

²⁹ H.R. REP. NO. 451, at 6; see AR 58-1, *supra* note 27, para. 2-3b (stating that “[v]ehicles will not be provided when the justification is based solely on reasons of rank, position, prestige, or personal convenience”).

³⁰ See DoD REG. 4500.36-R, *supra* note 27, para. C2.5.3. Note that some otherwise personal uses may be authorized during temporary duty status while away from a general’s permanent duty station. Army Regulation 58-1, states:

When a NTV is authorized for use while on TDY, the NTV may be operated between places where the person’s presence is required for official business, or between such places and temporary lodgings. In the absence of regularly scheduled public transportation, or its use is impractical, a NTV may be operated between places of business or lodging and eating establishments, drugstores, barber shops, places of worship, and similar places required for the comfort or health of the member, and which foster the continued efficient performance of Army business. Using a NTV to travel to or from commercial entertainment facilities (that is professional sports, concerts, and so forth) is not authorized.

AR 58-1, *supra* note 27, para. 2-3i(3).

³¹ DoD REG. 4500.36-R, *supra* note 27, para. C2.5.1.

³² *Id.*

participating in public ceremonies, training exercises, or other programs directly related to official duties.³³ This also extends to situations where general officers are not directly participating, but are nonetheless attending as a command or organizational representative.³⁴

While general rules regarding NTV use are quite simple, its application often presents recurring issues with transportation among a general officer's home, place-of-duty, and commercial or military air terminal. Transportation between a personal residence and place-of-duty is generally prohibited by regulation.³⁵ Only in exceptional circumstances, with high-level authorization, may general officers use NTVs for home-to-work transportation.³⁶ Transportation between a general's home and an air terminal presents similar restrictions, but may be an option if certain conditions are met.³⁷ For instance, a NTV may be used to transport a general between quarters and an air terminal if it is "[n]ecessary because of emergency situations or to meet security requirements."³⁸ Non-tactical vehicle transportation may also be provided if the particular terminal is located in an area "where other methods of transportation cannot meet mission requirements in a responsive manner."³⁹ Under this particular exception, use of an NTV between home and a terminal may be permissible if transportation is "determined to be essential to the performance of official business"⁴⁰ and scheduled DOD bus services or public transportation is unavailable.⁴¹ Regardless of whether a general personally believes special circumstances exist authorizing NTV travel from home, aides must exercise caution by ensuring that such practices first receive appropriate legal review and approval. In fact, absent a written ethics opinion, the best practice is to follow the general principle that NTV transportation should always "begin and end at the transported individual's normal place of duty, . . . not a personal residence/domicile."⁴²

B. Considerations for Commercial Air Travel

Department of the Army policy⁴³ and the Joint Federal Travel Regulation (JFTR)⁴⁴ provide the basic guidelines and highlight the key issues for aides to consider in coordinating air travel. Under current policy, servicemembers—including general officers—are required to use coach-class accommodations on commercial air carriers during travel on official

³³ AR 58-1, *supra* note 27, para. 2-3a; *see* DoD REG. 4500.36-R, *supra* note 27, para. C2.5.

³⁴ *See* AR 58-1, *supra* note 27, para. 2-3a(2) (stating that "official ceremonies (for example, changes of command, promotions, retirements, unit activations/deactivations) . . . are considered official business internal to the Army community"). Spouse use of the NTV is yet another attendant concern. Army Regulation 58-1 makes it clear that spouses of government employees "may be transported in [a NTV] only when accompanying the military member . . . in the Government vehicle." *Id.* para. 2-3b. The regulation further explains that this privilege only applies on a space available basis. *Id.* Therefore, spouses may travel in NTVs under the auspice of similar official duty requirements, so long as space is available and they accompany the servicemember. *Id.*

³⁵ *Id.* ch. 4.

³⁶ *See id.* para. 4-3. Pursuant to AR 58-1, only the Secretary of the Army and the Army Chief of Staff are authorized domicile-to-duty (D-T-D) transportation. *Id.* para. 4-2(c); 31 U.S.C. § 1344 (2006); *see* 26 U.S.C. §§ 61, 132 (2006). However,

[t]he Secretary of the Army may authorize, in writing, on a nondelegable basis, D-T-D transportation for other personnel under conditions that are considered essential in response to highly unusual circumstances that present a clear and present danger, and public or private transportation cannot be used; an emergency exists; other compelling operational considerations make such transportation essential to the conduct of business; considered essential for the safe and efficient performance of intelligence, counterintelligence, protective services, and criminal law enforcement duties.

AR 58-1, *supra* note 27, para. 4-3a.

³⁷ *Id.* paras. 2-3i(1), 4-6.

³⁸ DoD REG. 4500.36-R, *supra* note 27, para. C2.5.3.2.2.

³⁹ *Id.* para. C2.5.3.2.3.

⁴⁰ *Id.* para. C2.8.

⁴¹ *See id.* paras. C2.5.3.2, C2.8; *see also* AR 58-1, *supra* note 27, para. 2-3i(1) (providing for NTV use if "[t]erminals are located where other means of transportation are not available or cannot meet mission requirements"). For example, general officers assigned to the District of Columbia (National Capital Region) do not have a claim for NTV support from home to commercial air terminals due to the viability of public and commercial transportation systems. U.S. DEP'T OF DEF., INSTR. 4515.7, USE OF MOTOR TRANSPORTATION AND SCHEDULED DOD BUS SERVICE IN THE NATIONAL CAPITAL REGION para. 4.2 (31 July 1985).

⁴² AR 58-1, *supra* note 27, para. 2-3a(3).

⁴³ U.S. DEP'T OF ARMY, DIR. 2007-01, POLICY FOR TRAVEL BY DEPARTMENT OF THE ARMY OFFICIALS (25 Jan. 2007) [hereinafter DA DIR. 2007-01].

⁴⁴ U.S. DEP'T OF DEF., JOINT FEDERAL TRAVEL REGULATIONS (1 Jan. 09) [hereinafter JFTR].

business, unless justifying circumstances exist.⁴⁵ Even where such special circumstances exist, premium or first-class travel funded by the Government may only be authorized by certain high-level authorities.⁴⁶ Therefore, aides must book only coach-level accommodations through the Defense Travel System, unless the aide or general receives advanced written authorization.⁴⁷

Upgrades from coach-class to business, premium, or first-class on commercial flights may be allowed without prior authorization in limited instances. Commercial airline promotional programs—those available on standard terms to the public at large—are lawful for retention and use.⁴⁸ Therefore, an aide may upgrade a general officer's seating accommodations using the general's personal frequent flyer miles, or under other, equivalent promotional programs.⁴⁹ Generals may also upgrade seating accommodations with personal monies while on official travel.⁵⁰ Finally, there may be circumstances where airlines provide on-the-spot upgrades due to space availability. Generals may accept on-the-spot upgrades provided the upgrades are not offered on the basis of the general's military rank or position.⁵¹ However, general officers and aides must be cognizant of the Army travel policy's specific prohibition against travelling in premium class while in uniform.⁵² The only exception to this policy does permit first-class travel in uniform when an airline provides an unsolicited, on-the-spot upgrade without cost to the Government.⁵³ Even this situation presents an ethical dilemma for the general officer, who wants to avoid the perception that an upgrade was offered based upon military rank or purchased with Government funds. Although otherwise lawful, a general officer should consider declining on-the-spot upgrades while in uniform. If an airline will not accept return of a ticket, the best practice is to offer the upgrade to a junior Soldier or private citizen in order to avoid the perception of impropriety.

During official travel, airlines may also involuntarily bump a general officer from a scheduled flight due to overbooking. In such situations, any compensation a servicemember receives for an involuntary bump belongs to the Government,⁵⁴ and must be documented and returned to the servicing military travel agency for government accounting.⁵⁵ Conversely, if a general officer volunteers to be bumped, he or she may accept any and all airline compensation, so long as the delay does not interfere with the general's official duties or accrue additional expense to the Government.⁵⁶

Gifted travel is yet another important consideration for aides. Gifts of travel, whereby private organizations or non-federal entities (NFEs) offer to fund the transportation costs associated with attendance at their respective meetings, functions, or other similar events, are among the most prevalent forms of gifts offered to general officers.⁵⁷ A general officer

⁴⁵ DA DIR, 2007-01, *supra* note 43, para. 3.b. Current exceptions that may permit premium-class accommodations include situations when: (1) the flight only provides premium-class seating; (2) there is no space available in coach and "travel is so urgent it cannot be postponed"; (3) a "traveler's disability or other physical impairment substantiated in writing by a competent medical authority" mandates accommodation; or (4) "[o]verall savings to the Government result by avoiding additional subsistence costs, overtime, or lost productive time that would be incurred while waiting for available coach seats." *Id.* para. 3.c.

⁴⁶ *See generally id.* para. 3.d (providing the schedule of premium-class (less than first-class) authorizing and approving officials). Note that all "first-class travel paid by government funds or by a non-federal source pursuant to 31 U.S.C. § 1353" must be authorized and approved by the Secretary of the Army. *Id.* para. 3.e.

⁴⁷ *See id.* para. 3.

⁴⁸ *Id.* para. 4.

⁴⁹ *See id.*

⁵⁰ *See id.*; *see also* JFTR, *supra* note 44, para. U2010 (stating that any "excess costs or luxury accommodations that are unnecessary or unjustified are the member's financial responsibility").

⁵¹ JER, *supra* note 11, para. 4-202.

⁵² DA DIR, 2007-01, *supra* note 43, para. 4 (expressly stating that general officers "are prohibited from wearing uniforms and/or publicly discussing their position with the government while in [premium-class] accommodations, unless highly unusual circumstances exist where travel in uniform cannot be avoided").

⁵³ *Id.*

⁵⁴ *See* JER, *supra* note 11, paras. 4-201, 4-202. Airline compensation for a bumped flight may include additional frequent flier miles, travel vouchers, or other promotional items. If the bump is involuntary, these forms of compensation contractually belong to the government. *Id.*

⁵⁵ *See id.* para. 4-200. As a practical matter, general officers and aides must ensure that any compensation received as a result of an involuntary bump is attached to the recipient's travel voucher upon return to home station.

⁵⁶ JFTR, *supra* note 44, para. U1200.

⁵⁷ *See* JER, *supra* note 11, para. 4-101.

may accept such travel only if all the following conditions are met: (1) the privately-funded travel is sufficiently related to official duties; (2) the event will take place away from the general's permanent duty station; (3) the event is determined to be in the interest of the Government; (4) there are no appurtenant conflicts of interest with the private entity in question;⁵⁸ and (5) prior authorization is received before acceptance.⁵⁹ Since gifts of travel are a highly visible matter, aides are strongly advised to consult with their respective ethics advisor for appropriate review and processing prior to acceptance.

Finally, the ethical and legal implications of an accompanying Family member during official travel should never be overlooked. Current rules generally prohibit family members from accompanying general officers on official business at Government expense.⁶⁰ Dependent travel may only be authorized if an independent basis exists as a specific exception to Army policy and the JFTR.⁶¹ Even then, appropriate invitational travel orders, official duty itinerary, and legal opinion should be obtained from the ethics counselor prior to scheduling travel for dependents.⁶² As a practical matter, many of the same ethical pitfalls that exist for general officers often translate to spouses and dependents in some form or fashion. In fact, the acts or omissions of a Family member can be imputed to a servicemember—this is most true in instances of gifts.⁶³

IV. Gifts

The prestige and public stature of a general officer frequently raise concerns regarding gifts.⁶⁴ Subordinates, private organizations, associations, businesses, and foreign governments all have varying interests or motives for giving gifts to a general officer. Many times these gestures are sincere displays of gratitude or appreciation. Other times, gifts are intended to induce personal favor, influence critical decisions, or otherwise promote career advancement. Whatever the intent behind the giving of a gift, general officers are held to the same ethical standard as all Government employees with regard to gift acceptance.

Employees shall not . . . solicit or accept a gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interest may be substantially affected by the performance or non performance of the employee's duties.⁶⁵

The Standards of Conduct explain that Government employees hold a position of public trust, and should therefore, never use their position or rank for private gain.⁶⁶ This is particularly true for general officers and, by extension, their Family members.⁶⁷ Moreover, the same ethical principles and obligations that apply to general officers also apply to their aides.⁶⁸ Consequently, aides must be aware of the basic rules and the appropriate disposition of gifts for both the generals and

⁵⁸ Payment of Travel Expenses from a Non-Federal Source, 41 C.F.R. § 304-5.1 (2006); *see* discussion *infra* Part VI.

⁵⁹ JER, *supra* note 11, para. 4-101c.

⁶⁰ U.S. DEP'T OF DEF., DIR. 4500.56, DOD POLICY ON THE USE OF GOVERNMENT AIRCRAFT AND AIR TRAVEL para. E2.5.1 (2 Mar. 1997).

⁶¹ *Id.*; *see generally* DA DIR. 2007-01, *supra* note 43, para. 10 (providing the general rule, exceptions, and approval authorities for accompanying spouse travel).

⁶² *See* DA DIR. 2007-01, *supra* note 43, para. 10.b.

⁶³ *See, e.g.*, 5 C.F.R. § 2635.203(f)(1) (providing a definition of an "indirect gift" for purposes of rules governing gifts from outside sources: Gifts "[g]iven with the employee's knowledge and acquiescence to his parent, sibling, spouse, child, or dependent relative because of that person's relationship to the employee").

⁶⁴ Gifts are generally defined as "any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value." *Id.* § 2635.203(b).

⁶⁵ *Id.* § 2635.101(b)(4).

⁶⁶ *Id.* § 2635.101.

⁶⁷ The gift rules are analogous to other ethics areas, whereby a gift to a spouse or family member may be imputed to the general officer. *E.g., id.* § 2635.203(f)(1).

⁶⁸ Aides, who are also subject to the same ethics rules and regulations, are also vulnerable to receiving improper gifts by virtue of their close relationship with general officers. Due to the aides' interaction with senior staff members, high-ranking officers, and other associates of the general officers they work for, aides must understand the gift acceptance rules as they apply to them, as well as to the general officers and their dependents.

themselves.⁶⁹ Aides also need to assist general officers in accounting for gifts in order to adequately address and protect against potential ethical violations or the appearance of such impropriety.⁷⁰

A. Gifts from Subordinates

The military culture fosters an environment where gift-giving is a tradition of service. When general officers retire, change duty stations, or complete command tenure, peers and subordinates rush to get plaques, trophies or other commemorative items to mark the occasion. General officers are often flooded with multiple gifts from individuals, subordinate commands, or larger, more ornate gifts from pooled donating groups. Although such gestures may be well-intentioned and heartfelt, the end result may prove ethically disastrous. The Standards of Conduct prohibit Government employees from directly, or indirectly, giving gifts to superiors.⁷¹ General officers are also prohibited from accepting gifts from subordinates⁷² unless (1) the gift is appropriate for a special, infrequent occasion;⁷³ or (2) the gift is unsolicited and given on an occasional basis.⁷⁴ Group gifts on special infrequent occasions, such as those terminating the superior-subordinate relationship, create the greatest issue. Although this exception often permits ornate and expensive gifts, aides face various challenges with valuation, contribution, and other ethical concerns. The JER specifically limits the acceptance of such group gifts to \$300 or less (per donating group), if the general “knows or has reason to know that any member of the donating group is his subordinate.”⁷⁵ Furthermore, aggregation is required in situations where subordinates contribute to multiple donating groups.⁷⁶ If donating groups fail to remain distinct in terms of contributions, the value of each donating group’s gift will be considered in aggregate for purposes of the \$300 limit.⁷⁷

⁶⁹ See ARMY ETHICS, LEGIS., & GOV’T INFO. PRAC. BRANCH, OFFICE OF THE JUDGE ADVOCATE GEN., ETHICS GUIDE FOR SENIOR OFFICIALS (Aug. 2008) [hereinafter ETHICS GUIDE]. Many individuals or organizations offering gifts to general officers are unfamiliar with the Joint Ethics Regulation and restrictive rules regarding gifts. *Id.* at 7. Therefore, aides “must constantly be on the alert for gift problems.” *Id.*

⁷⁰ Attached to Appendix A is a recommended form to assist the aide in tracking gifts received by the general officer. Aides should keep track of the following information at a minimum: (1) description of gift received; (2) date of receipt; (3) circumstances of receipt; (4) estimated retail value of gift; (5) description or identification of the gift-giver (the “person making the presentation and the organization or Government entity he/she represents”); and (6) disposition of the gift. *Id.* at 13. As a practical matter, “[e]ven small items, such as pens, baseball hats, and coffee cups should be accounted for.” *Id.* Aides are also strongly encouraged to consult with the ethics counselor on all gifts. *Id.*

⁷¹ 5 C.F.R. § 2635.302(a).

⁷² *Id.* § 2635.302(b).

⁷³ *Id.* § 2635.304(b) (including “occasions of personal significance such as marriage, illness, or the birth or adoption of a child” or on “occasions that terminate a subordinate-official superior relationship, such as retirement, resignation, or transfer”).

⁷⁴ *Id.* § 2635.304(a). This necessarily includes gifts given on traditional gift-giving occasions. See *id.* Traditional gift-giving occasions that may permit acceptance include non-cash items with an aggregate value of \$10 or less, for birthdays, holidays, or personal hospitality. *Id.*

⁷⁵ JER, *supra* note 11, para. 2-203(a). Note that a recent Standards of Conduct Office (SOCO) Advisory specifically precludes the application of an exception to the \$300 limit for gifts to superiors. SOCO Advisory No. 09-03 (23 Mar. 2009) [hereinafter SOC DESKBOOK], available at http://www.dod.mil/dodge/defense_ethics/2009_Advisories/ADV_0903.htm.

As a reminder and clarification, please note the rule regarding a \$300 limit on gifts to superiors from subordinates has been routinely interpreted to mean that the gift could exceed the \$300 limit - only if the gift was appropriate for the occasion that terminated the superior-subordinate relationship, and was uniquely linked to the employee’s position or tour of duty and commemorated the same. The exception was often referred to as the “Perry Exception” as it was once used by the subordinates of the former Secretary of Defense to provide him the gift of his government chair upon his departure from office. Because the cited reference to Joint Ethics Regulation (JER) 2-203(a)(3) on which the exception was premised has never been formally approved by OGE, and therefore was never officially enacted, the Perry Exception should no longer be invoked as an exception to the \$300 limit.

Id.

⁷⁶ JER, *supra* note 11, para. 2-203(a)(2).

⁷⁷ *Id.* For example, if two separate donating groups (i.e., two battalions) each provide a gift to a general officer, and each gift has a value under \$300, then no violation occurs. See *id.* However, if one Soldier contributes to both donating groups, the value must be aggregated for purposes of the rule. *Id.* In such a scenario, if the combined total exceeds \$300, the general officer would be forced to use appropriate remedial measures consistent with the gift rules. *Id.*; see *infra* notes 88–89 and accompanying text. As a practical matter, it may be in the general’s best interest to inform subordinates that he or she will accept a gift from only one donating group in order to avoid exceeding the \$300 threshold. This would protect against the inadvertent mixing of donating groups, and also minimize the number of expensive gifts. Aides could further assist by directly communicating with subordinate commands to ensure pooled gift efforts do not run contrary to ethics rules.

Improper solicitation of gift contributions is another pitfall aides may encounter. Solicitation of individuals for contribution to a supervisor's gift must not exceed \$10, and any contribution must be voluntary.⁷⁸ Keeping a by-name list of contributors and money received may appear prudent but is highly discouraged. The appearance of keeping a list cuts against the voluntariness requirement for contributions.⁷⁹ Knowledge that an aide or another Soldier is keeping such a list may pressure an individual who would otherwise not contribute to contribute out of a sense of obligation. The best practice in this scenario is to have a lower-ranking Soldier or even the office secretary collect contributions.⁸⁰ A by-name list is not necessary as long as the collecting agent maintains a simple accounting so as not to exceed the statutory limitation of \$300. Doing so will avoid instances of pressured contribution or the appearance of coercion,⁸¹ while also giving the aide a point of contact to determine whether a gift complies with respective monetary value limitations.

Aside from larger gifts for special, infrequent occasions, generals may also face ethical issues with the smaller, more routine gifts given on an occasional basis. These gifts may include cards or smaller items of nominal value given on birthdays, holidays, or other traditional gift-giving occasions.⁸² Gifts of this kind are generally permitted, so long as the item—not cash—is valued at \$10 or less.⁸³ This rule is also particularly relevant for an aide, who may mistakenly commingle personal money with the general officer's petty-cash fund.⁸⁴ A petty-cash fund is typically comprised of the general's personal monies for an aide to "purchase small items such as stamps, uniform accessories, cigarettes," or other similar expenses.⁸⁵ However, if an aide uses his or her own money to "subsidize[] either the general's personal or official expenses," the aide is essentially making an improper gift.⁸⁶ Therefore, aides must be methodical in tracking all petty-cash expenditures and receipts, not only for income tax purposes, but also to avoid an inadvertent violation of the aforementioned gift rules.⁸⁷

Whenever a questionable gift is offered or received, aides should immediately contact the servicing staff judge advocate or ethics counselor. Upon review, if the gift is deemed improper, the general officer must take certain remedial or disposition actions. In most instances, the general officer will be able to retain the gift by paying its fair market value, or otherwise donating, sharing, or destroying the gift.⁸⁸ Other options may include outright refusal of the gift, or simply returning the gift to the donor.⁸⁹

B. Gifts from Foreign Governments

The U.S. Constitution provides, in part, that "no person holding any Office of Profit or Trust . . . shall, without the consent of Congress, accept any present, Emolument, Office or title from a King, Prince or *foreign state*."⁹⁰ Nonetheless, statutory

⁷⁸ *Id.* para. 2-203(b).

⁷⁹ See ETHICS GUIDE, *supra* note 69, at 11.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² 5 C.F.R. § 2635.304(a); see SOC DESKBOOK, *supra* note 75, at B-18.

⁸³ 5 C.F.R. § 2635.304(a)(1).

⁸⁴ Tuckey, *supra* note 1, at 40 (suggesting that "[i]t is not unthinkable that an aide may 'absorb' expenses for which a receipt was lost"); see GOMO AIDE HANDBOOK, *supra* note 4, at 11.

⁸⁵ GOMO AIDE HANDBOOK, *supra* note 4, at 11.

⁸⁶ Tuckey, *supra* note 1, at 40 (if an aide uses personal funds to subsidize the general's petty-cash fund, the aide is essentially gifting the money to the general officer—such a situation bears directly upon the ethics rules relating to gift acceptance).

⁸⁷ *Id.* Attached to Appendix B is a recommended ledger to assist the aide in tracking the general officer petty-cash fund. Aides should use the ledger much like they would when balancing a check-book. Additionally, aides should retain all receipts and keep petty-cash monies secured separate and apart from the aide's personal funds.

⁸⁸ Note that a general officer could not pay the difference between the fair market value and the \$300 threshold; no "buy-down" provision exists under the rules. SOC DESKBOOK, *supra* note 75, at B-19 (stating that "[a]lthough not specifically mentioned in JER 2-203, the \$300 limited in JER-203 is also subject to the no "buy-down" provisions"). For example, if a general officer receives a gift exceeding the \$300 threshold, he or she may not pay the difference, but instead, would have to either return the gift or pay its fair market price. With any situation involving gifts, aides and general officers should consult with the ethics advisor and supervisor for approval of a proposed disposition.

⁸⁹ *Cf.* 5 C.F.R. § 2635.304(a) (2006) (outlining options for disposing of prohibited gifts from outside sources).

⁹⁰ U.S. CONST. art. I, § 9, cl. 8 (emphasis added).

rules permit acceptance of gifts from foreign governments if they are of “minimal value.”⁹¹ Gifts exceeding the current minimum value threshold may be accepted “when such gift is in the nature of an educational scholarship or medical treatment or when it appears that to refuse the gift would likely cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States.”⁹² However, such foreign gifts exceeding the minimal value threshold may only be accepted on behalf of the United States and, therefore, become property of the United States.⁹³

The rules for foreign gifts require specific attention to detail because of particular reporting and depository requirements.⁹⁴ The foreign gift rules also contain certain nuances that differ materially from rules governing gifts from other sources.⁹⁵ Accordingly, aides should consult with their ethics counselor regarding the appropriate disposal or disposition of all foreign gifts, even when the value of the item is not at issue.⁹⁶ Maintaining detailed information on the presentation of foreign gifts will greatly assist the aide’s role in protecting the general officer against allegations of actual or perceived ethical impropriety.⁹⁷

C. Gifts from Outside Sources

The rules for gifts from outside sources precipitate from the basic rule that Government employees may not solicit or accept a gift “[f]rom a prohibited source” or “given because of the employee’s official position.”⁹⁸ In most instances, gifts from outside sources will categorically fall within the definition of a “prohibited source.” However, there are several exceptions permitting acceptance of gifts from “prohibited” outside sources.⁹⁹ The most frequent exception involves gifts valued at \$20 or less.¹⁰⁰ Under this exception a general officer may accept unsolicited gifts of \$20 or less per source, per occasion, so long as the general officer does not accept gifts of an aggregate value of more than \$50 per calendar year from that same source.¹⁰¹ As with gifts from subordinates, general officers may not “buy down” such gifts to meet threshold

⁹¹ 5 U.S.C. § 7342(c)(1)(A) (2006). This minimal value threshold adjusts every three years based upon the Consumer Price Index, and currently applies to foreign gifts having a United States retail value of \$335 or less at the time of acceptance. *Id.* § 7342(a)(5) (providing definition of “minimal value” and requirement for GSA review every three years under the consumer price index); Utilization, Donation, and Disposal of Foreign Gifts and Decorations, 41 C.F.R. § 102-42.10 (2006) (providing the current “minimum value” of \$335). Because the minimal value threshold adjusts every three years, aides and general officers are strongly encouraged to communicate directly with the ethics counselor or servicing judge advocate on all matters related to acceptance of foreign gifts.

⁹² 5 U.S.C. § 7342(c)(1)(B).

⁹³ *Id.* § 7342(c)(1)(B).

⁹⁴ See ETHICS GUIDE, *supra* note 69, at 12; see generally U.S. DEP’T OF DEF., DIR. 1005.13, GIFTS AND DECORATIONS FROM FOREIGN GOVERNMENTS E3 (19 Feb. 2002) [hereinafter DoDD 1005.13] (detailing the procedures for the receipt and disposition of foreign gifts and decorations).

⁹⁵ See, e.g., DoDD 1005.13, *supra* note 94, para. 4.6 (detailing the aggregation rules for foreign gifts). Although “[t]here are special DoD rules governing gifts from foreign governments,” many of the same principles regarding aggregation and gifts to spouses may apply. JER, *supra* note 11, para. 2-300(b). However, the JER provides the following additional interpretations for purposes of the foreign gift rules:

(1) The values of gifts from different officials of the same foreign government during the same presentation shall be aggregated and such gifts are considered to be from that foreign government. A gift from the spouse of a representative or official of a foreign government is deemed a gift from the representative or official. A gift given to the spouse of the DoD employee is deemed a gift to the DoD employee. Conditions and exceptions regarding gifts to and from spouses in 5 U.S.C. 7342 . . . may apply.

(2) Gifts received at separate presentations, even on the same day or from the same official, are separate gifts and their values are not aggregated. When more than one gift is included in a single presentation, only those gifts with an aggregate of less than the minimum allowed may be retained by the DoD employee, the remainder to be disposed of in accordance with enclosure 2 of DoD Directive 1005.13.

Id.

⁹⁶ See ETHICS GUIDE, *supra* note 69, at 13.

⁹⁷ *Id.*

⁹⁸ 5 C.F.R. § 2635.202(a). The Standards for Ethical Conduct defines “prohibited sources” to include both individuals and entities that generally: (1) seek official action from the general officer; (2) conduct business with, or are regulated by, the general officer’s service agency; (3) have interdependent interests with the general officer; or (4) involve an organization primarily comprised of conflicted members. *Id.* § 2635.203(d).

⁹⁹ See generally *id.* § 2635.204 (outlining each specific exception dealing with gifts from outside sources).

¹⁰⁰ *Id.* § 2635.204(a).

¹⁰¹ *Id.*

requirements.¹⁰² However, if the aide accurately accounts for the gifts in question, a general may be able to take appropriate measures to maintain the aggregate value below the \$20 and \$50 thresholds.¹⁰³

Other common exceptions to the general rule regarding gifts from outside sources include (1) gifts based on an existing personal relationship,¹⁰⁴ (2) discounts or other similar benefits available to the general public,¹⁰⁵ and (3) awards and honorary degrees.¹⁰⁶ Although these exceptions and others would permit the acceptance of gifts from outside sources, aides should always consider how the situation may appear to the public.¹⁰⁷ Aides should ask whether accepting a gift would otherwise undermine or appear to undermine Government integrity.¹⁰⁸ One strategy to avoid the appearance of impropriety is simply not to accept gifts from a single source “so frequently that anyone would question whether the [general officer] is using . . . public office for private gain.”¹⁰⁹ More importantly, aides should always keep a gift log with detailed notes and immediately seek the appropriate legal review from an ethics counselor.¹¹⁰

V. Procurement and Presentation of General Officer Coins

The proper treatment of general officer coins¹¹¹ is one of the most frequent issues presented to ethics counselors and judge advocates.¹¹² Senior officers realize that coins are potentially “powerful and versatile tools which can instill unit pride, enhance esprit de corps, and reward outstanding performance.”¹¹³ Many senior officers view the presentation of coins as a way to show “appreciation for a job well done,” “build rapport, say thank you, [or] buy goodwill for the command.”¹¹⁴ Although these intentions may be admirable and purely altruistic, it is easy for generals and commanders to unwittingly violate fiscal laws and ethics related to coin procurement and presentation.¹¹⁵ As a result, aides frequently encounter issues, especially when many regularly carry bundles of coins in their bags while trudging alongside general officers.

¹⁰² See *id.*; see *supra* notes 88–89 and accompanying text (discussing plausible recourses for receipt of an improper gift and the prohibition against buy downs).

¹⁰³ See 5 C.F.R. § 2635.204(a). For instance, if a gift exceeds \$20 on a particular occasion, or the aggregate of all gifts will exceed \$50 for that calendar year from that particular outside organization, the gift may be refused or returned to stay under the statutory threshold and avoid an ethical violation. The general officer would also have the option of retaining the gift if he or she pays its fair market value.

¹⁰⁴ *Id.* § 2635.204(b). This exception permits the acceptance of a gift “under circumstances which make it clear that the gift is motivated by a family relationship or personal friendship rather than the [general’s] position Relevant factors in making such a determination include the history of the relationship and whether the family member or friend personally pays for the gift.” *Id.*

¹⁰⁵ *Id.* § 2635.204(c).

¹⁰⁶ *Id.* § 2635.204(d).

¹⁰⁷ See, e.g., *id.* § 2635.202(c)(3).

¹⁰⁸ See *id.* § 2635.101(a).

¹⁰⁹ *Id.* § 2635.202(c)(3).

¹¹⁰ The ethics counselor or servicing staff judge advocate will be a critical partner in objectively evaluating the circumstances surrounding a gift issue. If a gift cannot be accepted, the ethics counselor may advise the general officer to refuse or return the gift, or otherwise dispose of it. See *generally id.* § 2635.205 (providing information regarding the proper disposition of prohibited gifts). Alternatively, the item received may not even qualify as a “gift” for purposes of the rules. See *id.* § 2635.203(b). Gifts are generally defined as “any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value.” *Id.* This does not include light refreshments; items of little intrinsic value; or awards, prizes, or other promotional items available to the general public. *Id.* § 2635.203(b)(1)–(9). Ultimately, the respective facts and circumstances will assist the ethics advisor in determining whether a gift limitation should be imposed. The aide, on the other hand, must simply act as the honest broker.

¹¹¹ A “general officer coin,” “commander’s coin,” or “HQDA coin” are synonymous for purposes of this primer. These terms refer to a “custom minted and emblazoned coin about the size of a U.S. half dollar, or silver dollar coin, typically with an insignia on the front side (obverse) and inscription on the reverse side.” U.S. DEP’T OF ARMY, MEMO 600-70, PROCUREMENT AND PRESENTATION OF COINS BY HEADQUARTERS DEPARTMENT OF THE ARMY PRINCIPAL OFFICIALS para. 3.b (11 Feb. 2004) [hereinafter DA MEMO 600-70]; see Major Kathryn R. Sommerkamp, *Commanders’ Coins: Worth Their Weight in Gold?*, ARMY LAW., Nov. 1997, at 6, 6.

¹¹² See Sommerkamp, *supra* note 111, at 6 (discussing how over the course of several years, procurement and presentation of coins increased dramatically, presenting numerous ethical questions and issues).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 14. This is particularly true because no single, specific regulation exists to articulate the appropriate guidelines and parameters for all coins. See, e.g., U.S. DEP’T OF ARMY, REG. 600-8-22, MILITARY AWARDS para. 11-1 (11 Dec. 2006) [hereinafter AR 600-8-22]. Army Regulation 600-8-22 is the primary authority commonly cited for coins, but it does not provide specific information, procedures, or implementing instructions regarding all types of coins.

Generals may acquire coins through a variety of fiscal sources, including: operation and maintenance funds (O&M); private organization funds; nonappropriated funds (NAF); official representation funds (ORF); and personal funds.¹¹⁶ The most frequent funding source for coin procurement is O&M appropriated funds, which consistently cause issues for general officers attempting to build unit morale and effective awards programs.¹¹⁷ Current Army policy establishes relatively clear guidelines for coins procured with O&M appropriated funds. First, aides and general officers must understand that O&M coins are only authorized for Soldiers and Department of Defense (DoD) personnel, including DoD civilian employees.¹¹⁸ Such coins should never be presented to contractor personnel,¹¹⁹ unaffiliated individuals (civilians), or nonfederal agencies.¹²⁰ Second, generals should avoid presenting multiple coins for the same service or achievement.¹²¹ Third, aides must ensure accurate accounting of all coins. Additionally, each coin awarded should not exceed \$75 per individual or \$250 per group.¹²² This monetary limitation is further capped by DA Memo 600-70, which requires DA-level approval for coin acquisitions in excess of \$5,000 for each fiscal year.¹²³ Finally, coins minted or manufactured with the presenter's name are generally prohibited.¹²⁴ Aides may, however, have individual coins engraved on a case-by-case basis.¹²⁵

Beyond the basic rules cited above, DA Memo 600-70 articulates a relatively subjective standard for the presentation of coins.¹²⁶ Pursuant to DA Memo 600-70, coins may only be presented in recognition of (1) "excellence in an Army competition or similar activity" or (2) "a *unique accomplishment* that furthers the efficiency and effectiveness of the Army's mission."¹²⁷ Whether coins are presented in accordance with this stated purpose is a difficult question at best.¹²⁸ Generals and aides must carefully evaluate whether certain conduct or actions are truly unique before presentation.¹²⁹ If situations involve close-calls or questionable justification, the best practice would be to consult an ethics advisor.

In practice, aides must be aware of the underlying reasons for awarding a coin to determine whether presentation would run afoul of the regulatory standard and gift prohibition.¹³⁰ As one commentator explains,

To steer clear of problems, [individuals] should ask themselves the following questions: Am I giving the coin to say "thank you" or "remember me?" Am I giving the coin to build esprit de corps or to instill unit pride? Am I giving the coin to say "job well done?" Only in the last instance, when the commander's

¹¹⁶ Sommerkamp, *supra* note 111, at 6–7. The source of funds used to procure a coin generally dictates the permissible recipient of a coin. *See id.* For example, a foreign dignitary could receive a coin procured with ORF but not a coin procured with O&M appropriated funds. *See id.* This primer is limited to a discussion of the most common funding sources that general officer aides encounter while procuring coins: O&M appropriated funds and a general officer's personal funds.

¹¹⁷ *See id.* at 8–11. Department of the Army Memorandum (DA Memo) 600-70 provides the most pertinent information regarding coins procured with appropriated funds (O&M). DA MEMO 600-70, *supra* note 111. The memorandum does not, however, tread new ground—much of DA Memo 600-70 reiterates basic rules promulgated under fiscal principles and the Army's military awards regulation. *Compare id.* (establishing standard for which HQDA coins may be presented), with AR 600-8-22, *supra* note 115, para. 11-1 (proving standard for which "[t]ropies and similar devices may be presented to military members, units, or Department of the Army agencies"), and 31 U.S.C. § 1301(a) (2006) (providing the "Purpose Statute," which restricts the types of items that may be procured with appropriated funds).

¹¹⁸ *See* DA MEMO 600-70, *supra* note 111, para. 5(a) (stating the general policy that "[c]oins are intended for . . . recognition to HQDA and other DOD personnel").

¹¹⁹ *Id.* para. 5(d)(2).

¹²⁰ *See* Sommerkamp, *supra* note 111, at 8–13.

¹²¹ AR 600-8-22, *supra* note 115, paras. 1-19(a), 11-2(b).

¹²² *Id.* para. 11-13.

¹²³ DA MEMO 600-70, *supra* note 111, para. 5(c)(3).

¹²⁴ *Id.* para. 5(c)(2).

¹²⁵ *See id.*

¹²⁶ Pursuant to DA Memo 600-70, "[c]oins are intended for use as a tool by HQDA principals to provide tangible, honorary recognition to HQDA and other DOD personnel for acts of exceptional service, achievement, or special recognition." *Id.* para. 5(a). This necessarily prohibits generals from gifting coins procured with appropriated funds. Sommerkamp, *supra* note 111, at 8–9. In fact, numerous opinions from the Government Accountability Office (GAO) "repeatedly emphasize that [appropriated funds such as O&M] cannot be used for personal gifts." *Id.* at 10.

¹²⁷ DA MEMO 600-70, *supra* note 111, para. 5(d)(1) (emphasis added).

¹²⁸ Sommerkamp, *supra* note 111, at 9–10.

¹²⁹ *Id.* at 10.

¹³⁰ *Id.*

intent is to reward outstanding duty performance, can the coin properly be purchased with appropriate appropriated funds.¹³¹

Because of the prohibition against giving coins procured with appropriated funds, aides are left in the precarious position of monitoring their generals' underlying intent. This task is particularly harrowing in situations where coins are simply traded among general officers or otherwise presented for no apparent reason at all.¹³² The aide can remedy these bad habits by communicating these concerns to the general officer and ethics counselor. Early involvement of the ethics counselor and recurrent ethics training are both essential to correct routine and improper appropriation of Government funds for personal benefit.¹³³

Coins funded with personal monies or other sources implicate separate requirements and additional concerns.¹³⁴ For example, general officers may use their own personal funds to procure an unlimited amount of coins for any number of purposes.¹³⁵ Coins acquired with a general's personal funds will not be limited by regulation, the gift prohibition, or fiscal constraints beyond the size of his or her own pocketbook.¹³⁶ However, aides must be mindful of appearances and potential problems associated with the commingling of coins. Even an innocent gift of a personal coin to an outside agency or unaffiliated individual may create the perception of improper endorsement, preferential treatment, or conflict of interest.¹³⁷

In order to avoid issues related to general officer coins, aides should maintain accurate records of coin procurement expenditures, including the source of funds used, date of receipt or issuance, and the circumstances under which the coin was awarded.¹³⁸ Aides should also physically separate coins funded by different sources, maintaining distinct tracking documents for each group. Finally, aides must consistently consult with the designated ethics counselor or staff judge advocate on all coin-related issues. Frequent interaction with the legal community will assist aides in keeping abreast of current policies¹³⁹ and trends in the relevant area of operations.

VI. Conflict Management

A constant thread among the issues and concerns carried by general officer aides involves management of perceived or actual conflicts of interest. Pursuant to the JER, generals are prohibited from engaging in outside activities that conflict with the official performance of military duties.¹⁴⁰ Additionally, general officers and aides must always consider the appearance

¹³¹ *Id.*

¹³² *See, e.g., id.* at 11 (stating that “[c]ommanders’ displays of their own extensive collections of [coins] suggest that these items may have become more [like gifts or] collectors’ items than awards”).

¹³³ General officers or aides may have little concern over coins—how they are acquired or presented. However, “minor infractions” of giving coins as “personal gifts, tokens of appreciation, . . . recognition of the contribution of unaffiliated parties, and . . . recognition of volunteers” implicate certain statutory and regulatory limitations. *Id.* at 14. Therefore, “[t]he unfettered purchase and distribution of these coins is certainly not worth jeopardizing a [general’s] career or reputation.” *Id.*

¹³⁴ *See id.* at 7.

¹³⁵ *Id.*

¹³⁶ *See id.*

¹³⁷ For example, a general officer may present a personally-funded coin to a local civilian business as a token of appreciation for its support to Soldiers. That same business may subsequently use the same coin in advertisements or promotions implying official endorsement by the general officer or Army. Although unintended, an improper implied endorsement will necessarily implicate the general officer in a violation of the JER. JER, *supra* note 11, para. 3-209; 5 C.F.R. § 2635.702(b) (2006). Therefore, general officers should consider not presenting personally-funded coins to unaffiliated individuals or entities when such a scenario exists.

¹³⁸ As a practical matter, DA 600-70 mandates that general officers “establish a method for maintaining a record of fiscal year expenditures for coins purchased.” DA MEMO 600-70, *supra* note 111, para. 5(d). Attached to Appendix C is a recommended form to assist the aide in tracking general officer coins. Aides should maintain an accurate record of the following information at a minimum: (1) amount of coins on hand; (2) date of receipt or presentation; (3) name, unit and position of awardee; and (4) a description of the awardee’s unique accomplishment. Note that a separate coin tracker should be used for each funding source (i.e., a separate tracker for O&M, NAF, personal, etc.).

¹³⁹ Major Army commands (MACOMS) and various installations will often maintain their own policies that further supplement or restrict coin procurement and presentation. *See, e.g.,* Policy Memorandum CG-99-22, Headquarters, FORSCOM, subject: Commander’s Coin Medallion Awards Program (1 Dec. 1999) (on file with author); Policy Memorandum 04-54, Headquarters, Third U.S. Army/USARCENT/CFLCC, subject: Unit Coin Policy (1 July 2004) (on file with author).

¹⁴⁰ JER, *supra* note 11, para. 2-100; 5 C.F.R. § 2635.802.

of dealings with outside agencies or instrumentalities, to include those involving spouses and Family members.¹⁴¹ Several of the more predominant conflicting scenarios include: (1) improper receipt of compensation (including unauthorized gifts) for teaching, speaking, or writing;¹⁴² (2) official endorsement of personal activities or NFEs;¹⁴³ (3) logistical support for outside organizations;¹⁴⁴ (4) involvement in fundraising activities;¹⁴⁵ and (5) other specific statutory conflicts with a general's personal financial interests.¹⁴⁶

Mandatory annual public financial disclosure reports serve as the primary tool for identifying many of the potential conflicts between a general's official duties and outside financial interests.¹⁴⁷ Pursuant to 18 U.S.C. § 208, general officers are prohibited from "participating personally and substantially in an official capacity in any particular matter in which . . . they have a financial interest, if the particular matter will have a direct and predictable effect on that interest."¹⁴⁸ This criminal statute¹⁴⁹ further explains that personal honesty is irrelevant as to whether a conflict exists and that the financial interests of spouses and dependants may be imputed to the general officer.¹⁵⁰ There are regulatory exemptions to this statutory prohibition against conflicting financial interests,¹⁵¹ but aides should focus primarily on the procedural aspects of the mandated filing requirements.

Standard Form (SF) 278 is the public financial disclosure form general officers are required to file no later than 15 May each calendar year.¹⁵² Early filing of the SF 278 is critical—late filing may lead to a \$200 fine.¹⁵³ Aides can assist in completing the form by collecting and organizing financial documentation for the SF 278, and scheduling the necessary appointments with the ethics counselor or servicing staff judge advocate to review the pertinent forms. As a practical matter, meeting the submission deadline can be extremely burdensome, particularly when unit operational tempo is high and generals are engaged in other pressing matters. In such instances, generals should consider utilizing the ethics counselor to serve as the SF 278 filing assistant, thereby alleviating either the aide or the general of this cumbersome task.¹⁵⁴

With all instances of potential conflict—whether related to finances, gifts, or other relationships—aides must always express concerns directly to the general officer and coordinate with the ethics counselor at the earliest opportunity. Often, the nature of the general's interaction with an outside organization will dictate whether a conflict exists and will provide insight as to the appropriate remedial measures.¹⁵⁵ In some cases, a substantiated conflict may be cause for disciplinary action or disqualification.¹⁵⁶ In other cases, a general may be required to divest a conflicting interest, change duty positions, or otherwise receive specific limitations on duties.¹⁵⁷ Regardless, identifying and eliminating conflicts must be of paramount

¹⁴¹ See, e.g., 5 C.F.R. § 2635.801(c).

¹⁴² See *id.*

¹⁴³ See *id.* § 2635.702.

¹⁴⁴ See JER, *supra* note 11, para. 3-211.

¹⁴⁵ See 5 C.F.R. § 2635.808.

¹⁴⁶ *Id.* §§ 2635.401–2635.403.

¹⁴⁷ ETHICS GUIDE, *supra* note 69, at 43.

¹⁴⁸ SOC DESKBOOK, *supra* note 75, at F-4 (paraphrasing the prohibition against conflicting financial interests codified in 18 U.S.C. § 208 (2006)).

¹⁴⁹ 18 U.S.C. § 208(a) (2006).

¹⁵⁰ See *id.*

¹⁵¹ See *id.* § 208(b)(5); see also 5 C.F.R. § 2640.201.

¹⁵² JER, *supra* note 11, para. 7-203(c). Generals must file electronically with the Army's Financial Disclosure Management (FDM) program. ETHICS GUIDE, *supra* note 69, at 43 (explaining that the secure Army-managed website—<https://fdm.army.mil/FDM>—will store "data from each [SF 278] so filing successive reports is essentially a matter noting changes from a previous year"). The FDM Website is an excellent resource for aides, general officers, and judge advocates, as it provides detailed information, guidance, and references for reporting and filing financial disclosures. See Financial Disclosure Management Website, <https://www.fdm.army.mil> (last visited 28 Feb. 2009).

¹⁵³ JER, *supra* note 11, para. 7-203(g)(1).

¹⁵⁴ E-mail from Mr. George L. Hancock, Associate Deputy General Counsel, Office of the General Counsel, Department of the Army, to Major Nate G. Hummel, Student, 57th Graduate Course, The Judge Advocate Gen.'s Sch. (Mar. 10, 2009, 16:23 EST) (on file with author).

¹⁵⁵ See ETHICS GUIDE, *supra* note 69, at 24–36.

¹⁵⁶ See 5 C.F.R. §§ 2635.401–2635.403; see also 18 U.S.C. § 216 (2006) (providing criminal penalties for violations of 18 U.S.C. § 208).

¹⁵⁷ See generally SOC DESKBOOK, *supra* note 75, at F-8–14 (outlining the remedies for conflicts of interest).

concern to both general officers and aides. Preservation of Government integrity hinges upon the integral role the aide plays in protecting the general officer's reputation and credibility in instances of actual or perceived conflict.

VII. Conclusion

A myriad of complex legal issues and ethical concerns fill the aide bag. The burdens and stress that accompany the aide position increase exponentially with the absence of clear guidance. The many inherent risks and pitfalls require attention to detail, knowledge of rules and regulations, and keen insight. Violation of the rules, republished and proscribed by the JER, include administrative, civil, or criminal sanctions, including potential punishment under the Uniform Code of Military Justice.¹⁵⁸ In order to support these ethical burdens, aides must utilize their respective ethics counselors and staff judge advocates by asking tough questions, seeking out training opportunities, and promptly requesting legal guidance on difficult issues. The advice or opinion of the ethics counselor may not always be welcome or what the general wants to hear, but taking a hard stance in favor of caution is often the most prudent course, particularly when a general's reputation and career are at stake.

¹⁵⁸ U.S. DEP'T OF DEF., DIR. 5500.07, STANDARDS OF CONDUCT para. 2.2.6 (29 Nov. 2007) (stating that many provisions of the JER "constitute lawful general orders or regulations within the meaning of Article 92 . . . of the UCMJ, are punitive, and apply without further implementation"). *Id.*

Don't Worry, We'll Take Care of You: Immigration of Local Nationals Assisting the United States in Overseas Contingency Operations

Major Kenneth Bacso*

I. Introduction

War and refugees often share a similar history. Imagine the history of World War II in Europe without a discussion of the millions of Jewish, German, and Eastern European refugees that scattered from their homelands as a result of war.¹ Today, in conflicts such as Iraq and Afghanistan, war continues to drive persecution, displacement, and immigration.²

In overseas contingency operations, Americans often work closely with local nationals. These foreign counterparts sometimes risk great danger by associating themselves with the United States.³ In such circumstances, it is only natural to want to provide these comrades with assistance. In some cases, a Soldier or the command may decide that local nationals are in such danger that the optimal solution is for them to seek immigration to the United States.

A typical case might involve a local national police officer who has developed a close relationship with U.S. forces operating in his town. The local national routinely provides information about militia activities to U.S. forces. In several instances, he arrested powerful individuals who were working against the United States. One day, members of the militia kill his son and wife in retaliation for his cooperation with U.S. forces. They warn his neighbors that they would come after him next. In fear for his life, the police officer calls the local commander of U.S. forces and explains his dire situation. The commander, who has come to trust the police officer, is in the process of moving his forces out of the area and turning over security to the host nation. Realizing that the police officer faces imminent harm as soon as U.S. forces withdraw, the commander asks his judge advocate for options to help the local national police officer. The judge advocate in such a situation may be directed to assist the local national on behalf of the command. Scenarios such as this may become even more common as the United States scales back its presence in Iraq.⁴

This primer provides guidance on the most common solutions for assisting local nationals associated with the United States during contingency operations. Although intended to have applicability in any deployed environment, this primer will focus on the situation in Iraq as a model. First, the primer will examine the nature of refugee status and will outline the difficult asylum process a refugee faces in the United States. Second, the primer will examine the authority to parole individuals into the United States under the theories of humanitarian urgency and significant public benefit. Finally, the primer will discuss two special visa programs available to certain individuals associated with the United States in Iraq and Afghanistan.

This primer is neutral on the issue of whether immigration is beneficial both to the United States and to the host nation. Certainly, the United States should have stringent procedures and checks in place to ensure that only those individuals with good intentions cross our borders. Additionally, when true heroes leave their homelands, they create a vacuum of courage and talent that their home country could surely use. Nevertheless, there inevitably will be circumstances in which

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¹ See, e.g., Bernard Wasserstein, *European Refugee Movements After World War Two*, BBC, Apr. 28, 2005, http://www.bbc.co.uk/history/worldwars/wwtwo/refugees_print.html.

² See Kevin Walsh, Note, *Victims of a Growing Crisis: A Call for Reform of the United States Immigration Law and Policy Pertaining to Refugees of the Iraq War*, 53 VILL. L. REV. 421 (2008); RHONDA MARGESSON ET AL., CONG. RESEARCH SERV. REPORT, IRAQI REFUGEES AND INTERNALLY DISPLACED PERSONS: A DEEPENING HUMANITARIAN CRISIS?, RL33936, at CRS-2 (2008).

³ See generally George Packer, *Betrayed: The Iraqis who Trusted America the Most*, NEW YORKER, Mar. 26, 2007, at 54 (providing a detailed account of the plight of several Iraqi translators who have worked for the United States in Iraq).

⁴ See generally Anne E. Kornblut & Ann Scott Tyson, *Obama Lays Out Iraq Plans at N.C. Base; Combat Troops to Be Withdrawn By Aug. 31, 2010*, WASH. POST, Feb. 28, 2009, at A10 (outlining plans for drawdown in Iraq). In Iraq, for example, as U.S. forces withdraw, individuals such as this hypothetical police officer would no longer have the umbrella of protection previously provided by U.S. forces. Similarly, those local nationals who worked for the United States directly or as contractors may no longer have a job and may face retaliation for their past association with the United States.

immigration to the United States is the most appropriate solution. Although no path to immigration to the United States is easy, there are options available to those who stood with the United States during a time of conflict. Familiarity with these issues will assist the judge advocate who may be called upon by the command to provide advice and assistance to local nationals seeking immigration to the United States.

II. Refugee Status and Asylum Application Process

The term “refugee” will certainly arise when dealing with local national immigration in an overseas contingency operation. A refugee is defined in the Immigration and Nationality Act as “any person who is outside any country of such person’s nationality . . . who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁵ Simply put, a refugee is a person who has fled his country of nationality because he fears persecution there.⁶ Significantly, a refugee is not eligible to apply for asylum in the United States unless he is physically present in the United States or in a safe third country.⁷ This section will discuss how individuals obtain refugee status. It will then survey the asylum application process that occurs once a potential refugee has fled his own nation.

Before thinking in terms of refugee status, judge advocates should first consider whether an individual qualifies for immigration to the United States under a special program.⁸ In many cases, these special programs are preferable to simply seeking refugee status. Applying for refugee status can be burdensome, and refugees fortunate enough to arrive in the United States still face a complex asylum application process. Nevertheless, judge advocates can assist refugees by gathering the documentation necessary to support their applications.

A. Refugee Status

An individual may only apply for refugee status once he is physically located outside his country of nationality.⁹ Consequently, many Iraqi citizens seeking refugee status are forced to “make the difficult decision about whether or not to remain in Iraq or seek asylum or temporary protection in another country.”¹⁰ This is not an easy choice. On the one hand, Iraq remains dangerous for many of its citizens.¹¹ For example, according to a U.S. Agency for International Development official, approximately three hundred Iraqi interpreters working with the United States have been killed since 2003.¹² On the other hand, most Iraqis have a limited ability to travel outside Iraq to apply for refugee status, and recent restrictions imposed by neighboring countries have made travel even more difficult. For example, Syria closed its border to nearly all Iraqis in late 2007 despite serving as one of the primary outlets for approximately 1.5 million Iraqi refugees since 2003.¹³ The Kingdom of Jordan, the temporary home for approximately 500,000 to 700,000 Iraqi refugees, tightened its admission requirements in 2006.¹⁴

⁵ 8 U.S.C. § 1101(a)(42) (2006).

⁶ *Id.*

⁷ 8 U.S.C. § 1158(a) (2006). For example, it is not uncommon to hear of foreign athletes in the United States for an event seeking asylum once they arrive. *See, e.g.,* Katie Thomas, *Cuban Players Fled Their Team for an Uncertain Future*, N.Y. TIMES, Mar. 5, 2008, at D1 (reporting on five Cuban soccer players who sought asylum in the United States while in Florida for a tournament). In addition, the Supreme Court has held that it is permissible for the Coast Guard to interdict refugees at sea to prevent them from becoming physically present in the United States. *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 164 (1993).

⁸ *See infra* pt. IV.

⁹ 8 U.S.C. § 1158(a)(1). There are two exceptions, neither of which has broad applicability. The first is if the person has “no nationality” and is “outside any country in which such person last habitually resided.” *Id.* Second, the President may designate “special circumstances” where refugees may be recognized while still living in their own country. *Id.* There is a limited exception with respect to Iraqis associated with the United States that may allow them to remain in Iraq while seeking refugee status. *See infra* notes 19–24 and accompanying text.

¹⁰ Frequently Asked Questions, U.S. Dep’t of State, U.S. Refugee Admissions Program (USRAP) Frequently Asked Questions—Iraq Processing, <http://damascus.usembassy.gov/media/pdf/cons-pdf/faq-iraqi-processing-en.pdf> (last visited Sept. 21, 2009) [hereinafter Refugee Admissions FAQ].

¹¹ *See* Ernesto Londono, *Mask Ban Upsets Iraqis Hired as U.S. Interpreters*, WASH. POST, Nov. 17, 2008, at A01.

¹² *Id.*

¹³ Thanassis Cambanis, *Syria Shuts Main Exit from War for Iraqis*, N.Y. TIMES, Oct. 20, 2007, at A18.

¹⁴ *Id.*

Refugees who flee to a third country, such as Syria or the Kingdom of Jordan, must register with the United Nations High Commissioner for Refugees (UNHCR).¹⁵ The UNHCR “is mandated by the United Nations to lead and coordinate international action for the worldwide protection of refugees and the resolution of refugee problems.”¹⁶ In furtherance of this mission, the UNHCR administers refugee camps throughout the world.¹⁷ More significantly, it also conducts refugee status determinations.¹⁸ In some cases, the UNHCR will refer the individual refugees to a third country, such as the United States, for resettlement.¹⁹

The United States Refugee Admissions Program (USRAP) provides an exception to the general rule requiring individuals to be outside their countries of nationality when applying for refugee status.²⁰ In limited circumstances, Iraqis facing persecution because of an affiliation with the United States may apply for refugee status while in Iraq.²¹ Most Iraqis applying for refugee status through the USRAP, however, must file their paperwork in Jordan or Egypt.²² Those eligible for direct access through USRAP include full time employees of the U.S. Government, employees of an organization “closely associated” with the United States, and Iraqi employees of a “media organization or non-governmental organization” that is based in the United States.²³ In addition, family members of those otherwise eligible and family members of United States citizens or permanent residents are also eligible for in-country refugee status processing.²⁴

Despite offering certain benefits to refugee applicants in Iraq, the USRAP still has limitations. For example, the program is limited to Iraqis and “does not guarantee access to the [refugee] program or an interview for resettlement in the United States.”²⁵ In addition, the application process and resettlement can take many months, even with assistance, exposing refugee applicants to continued violence and persecution in the interim.²⁶

Ultimately, resettlement in the United States is rare. Resettlement in the United States was limited to 80,000 refugees for fiscal year 2009.²⁷ The United States allocated 37,000 of those openings to refugees from the Near East and South Asia and, of that 37,000, “a minimum of 17,000 of the most vulnerable Iraqis” were expected to be admitted “for resettlement in the U.S. through the U.S. Refugee Admissions Program.”²⁸ Although this is a significant sum, there are already 90,000 identified Iraqi refugees in countries such as Syria and the Kingdom of Jordan that are seeking resettlement.²⁹ There are an estimated two million Iraqi refugees outside of Iraq in total.³⁰ Therefore, it would be difficult to advise a local national who has been associated with the United States to become one of millions of refugees unless there truly were no other options available. There simply is too much uncertainty, and the odds are not favorable for eventual resettlement in the United States.

¹⁵ Refugee Admissions FAQ, *supra* note 10.

¹⁶ UNHCR, Mission Statement, <http://www.unhcr.org/publ/PUBL/4565a5742.pdf> (last visited Sept. 21, 2009).

¹⁷ Mark Pallis, *The Operation of UNHCR's Accountability Mechanisms*, 37 N.Y.U. J. INT'L L. & POL. 869, 883 (2005).

¹⁸ *Id.* at 877.

¹⁹ Refugee Admissions FAQ, *supra* note 10.

²⁰ Fact Sheet, Bureau of Population, Refugees, and Migration, Refugee Resettlement Program for Iraqis in Jordan, Egypt, and Iraq with U.S. Affiliations (Feb. 3, 2009), <http://www.state.gov/g/prm/rls/115888.htm>.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ See, e.g., Jennifer Utz, *From Baghdad to Brooklyn: My Journey with an Iraqi Refugee*, ALTERNET, Nov. 15, 2008, <http://www.alternet.org/story/106919/> (discussing the case of an Iraqi refugee whose case took multiple years despite a journalist providing significant assistance to him at every stage of the process).

²⁷ Presidential Determination No. 2008-29 (Sept. 30, 2008), 73 Fed. Reg. 58,865 (Oct. 7, 2008). Of the 80,000, there is an additional 5000 that is not allocated by geographic location. *Id.*

²⁸ Press Release, U.S. Dep't of State, U.S. Government Reaches Record for Iraqi Refugee Admissions and Humanitarian Assistance in Fiscal Year 2008 (Oct. 2, 2008), http://iraq.usembassy.gov/pr_dos_10022008.html. The United States met its fiscal year 2008 goal of admitting a minimum of 12,000 Iraqi refugees. *Id.* Of the Iraqi refugees admitted in fiscal year 2008, approximately three quarters of them came through Syria or the Kingdom of Jordan. *Id.*

²⁹ Walter Pincus, *U.S. to Admit 17,000 Iraqi Exiles; 5,000 More Refugees to Receive Special Visas Next Fiscal Year*, WASH. POST, Sept. 13, 2008, at A12.

³⁰ *Id.* Of course, not all of the two million Iraqi refugees even want to go somewhere other than back to their homeland. *Id.*

Individuals selected for resettlement receive assistance coordinated by the Office of Refugee Resettlement at the Department of Health and Human Services.³¹ “The Office of Refugee Resettlement is authorized to make grants to public and private nonprofit agencies for initial resettlement, training, medical services and support of refugees.”³² Although these refugees receive some benefits once in the United States, they still face the challenging prospect of applying for asylum.

B. Asylum Application Process

Asylum “provides a haven in the United States for people who have been persecuted in their countries of origin” and may be granted to those who have gained resettlement through the UNHCR, as well as others who have managed to become physically present in the United States by other means.³³ In general, “[a]ny noncitizen in the United States can apply for asylum, even if he or she is here illegally, temporarily or on parole.”³⁴ An asylum applicant must prove he meets the definition of “refugee”³⁵—that is, he has a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion” in his home country.³⁶

Showing actual persecution in the past is not a requirement;³⁷ however, past persecution creates a rebuttable presumption of a well-founded fear of future persecution.³⁸ The presumption may be rebutted when conditions in the asylum applicant’s country of nationality have changed.³⁹ In a notable example, one court found that “conditions in Iraq [had] changed so fundamentally” upon the “fall of Saddam Hussein’s regime and the institution of an interim Iraqi government” that there was no longer a rebuttable presumption that an Iraqi Christian had a well-founded fear of prosecution.⁴⁰

An extensive body of law defines such key terms as persecution, social groups, and political opinion.⁴¹ Although each asylum case is fact specific, mere flight from war or violence is generally not a sufficient basis for asylum.⁴² The asylum applicant must also establish a nexus between his fear of persecution and one of the protected grounds, such as race or religion, enumerated in the Immigration and Nationality Act.⁴³ Consequently, many local nationals who have assisted the United States may not qualify for asylum because their fear of persecution is due to their association with the United States, which is not a protected ground such as race or religion.

Judge advocates can often provide the most help to individual asylum applicants by obtaining the evidence necessary to support their applications. “Genuine asylum seekers often have great difficulty obtaining evidence to support their claims. They usually have neither the foresight, the time, nor the ability to collect corroborating evidence before fleeing their homes.”⁴⁴ Judge advocates assisting asylum applicants can provide this foresight and begin the process of collecting statements or documents that may be helpful to them.

³¹ CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 33.03(5) (2008).

³² *Id.*

³³ *Id.*

³⁴ *Id.* § 33.05(3)(a)(i).

³⁵ *Id.*

³⁶ 8 U.S.C. § 1101(a)(42) (2006).

³⁷ GORDON ET AL., *supra* note 31, § 33.04(2)(b)(i).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Aoraha v. Gonzales*, 209 F. App’x 473 (6th Cir. 2006).

⁴¹ See GORDON ET AL., *supra* note 31, § 33.04 (providing an extensive discussion on the many issues facing an asylum applicant).

⁴² *Al-Fara v. Gonzales*, 404 F.3d 733, 740 (3d Cir. 2005) (“Harm from country-wide civil strife is not persecution”); *Ambartsumian v. Ashcroft*, 388 F.3d 85, 93 (3d Cir. 2004) (“[T]he facts that life in Georgia was difficult due to a civil war, and that [the asylum applicant] was conscripted to fight in that war, do not in themselves establish past persecution.”).

⁴³ See *Al-Fara*, 404 F.3d at 740.

⁴⁴ GORDON ET AL., *supra* note 31, § 34.02(9)(a).

Even with substantial assistance, individuals seeking refugee status and applying for asylum in the United States should expect uncertainty and difficulties. Those assisting these individuals should first consider other avenues for immigration, including special programs designed to aid individuals associated with the United States.⁴⁵

III. Parole

While refugee resettlement and asylum are relatively common in the context of immigration, parole is a relatively unfamiliar concept. Nevertheless, parole can be a useful tool for judge advocates assisting local nationals in imminent danger because it can allow individuals to gain physical presence in the United States very quickly.⁴⁶

A. Parole Generally

Parole is the discretionary authority of the Attorney General to allow an individual to enter the United States.⁴⁷ Although parole may enable an individual to enter the United States, parole does not confer any immigration status on the individual.⁴⁸ Parole simply provides physical entry into the United States for a fixed period of time.⁴⁹ When parole is no longer necessary or when the fixed period of time has expired, the parolee is expected to return to his home country.⁵⁰ Furthermore, parole is expressly not intended to serve as a way to bypass the normal refugee resettlement process. An alien cannot be paroled into the United States unless “compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee.”⁵¹

Parole is a short-term solution with potentially serious long-term drawbacks. Parole can transfer an individual to the safety of the United States relatively quickly, but it is temporary and parolees may lack adequate support once they reach the United States.⁵² Prudent planning with a long-term view is essential.

Two discretionary theories support admission by parole.⁵³ Humanitarian parole may be warranted when an “urgent humanitarian reason” exists to support a foreign national’s entry into the United States. Alternatively, significant public benefit parole may be warranted when a “significant public benefit” may be achieved by bringing an individual to the United States. Judge advocates may draw on both theories when assisting local nationals in an overseas contingency operation.

B. Humanitarian Parole

When an “urgent humanitarian reason” exists to justify allowing a foreign national into the United States, the Department of Homeland Security may authorize the foreign national’s entry by humanitarian parole.⁵⁴ For example, aliens

⁴⁵ See *infra* pt. IV.

⁴⁶ The author has assisted approximately five individuals and several of their family members who eventually received parole to the United States from Iraq. Unless otherwise noted, the information presented here is the personal knowledge of the author gained through personal experiences while working on parole cases in Iraq.

⁴⁷ 8 U.S.C. § 1182(d)(5)(A) (2006). As a practical matter, this authority is exercised by officials within the Department of Homeland Security. 8 C.F.R. § 212.5(a) (2008).

⁴⁸ 8 U.S.C. § 1182(d)(5)(A) (“[P]arole of such alien shall not be regarded as an admission.”). In fact, with respect to due process rights, the parolee is not entitled to the full spectrum rights that other aliens in the United States may have under the fiction that they are not actually in the United States. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958).

⁴⁹ 8 U.S.C. § 1182(d)(5)(A).

⁵⁰ *Id.* The period of parole is terminated “upon accomplishment of the purpose for which the parole was authorized” or when “neither humanitarian reasons nor public benefit warrants the continued presence of the alien in the United States.” 8 C.F.R. § 212.5(e)(2)(ii). For parolees of the Department of Defense, the maximum length of parole is one year. U.S. DEP’T OF DEF., DOD SIGNIFICANT PUBLIC BENEFIT PROGRAM (SPBP) RULES OF ENGAGEMENT (May 2007) [hereinafter SPBP RULES OF ENGAGEMENT] (on file with author).

⁵¹ 8 U.S.C. § 1182(d)(5)(B).

⁵² In the author’s experience, a non-controversial parole application with strong support from the chain of command can take as little as twenty days for approval. However, because procedures often change, it is essential to verify a timeline in each individual case.

⁵³ The two theories, although distinct, are sometimes incorrectly used interchangeably.

⁵⁴ 8 C.F.R. § 212.5(e)(2)(ii).

with serious medical conditions facing deportation may be released from detention and granted entry into the United States under the theory of humanitarian parole.⁵⁵ Similarly, juveniles in detention may be released to an adult relative for humanitarian reasons.⁵⁶

A typical humanitarian parole in an overseas contingency operation may involve a local national in need of acute medical care he cannot receive in his own country.⁵⁷ Allowing him entry into the United States for medical attention can be strategically advantageous to deployed units because it may build good will among the local population or generate positive media coverage.⁵⁸

C. Significant Public Benefit Parole

Another basis for parole exists when a local national has provided or will provide a significant public benefit to the United States.⁵⁹ For example, law enforcement may arrange parole for key witnesses, necessary for trial, who would not otherwise be able to enter the United States.⁶⁰ In these cases, the sponsoring agency is responsible for all needs of the parolee while he is physically present in the United States, including his security, travel, food, and lodging.⁶¹

The Department of Defense (DoD) maintains “a small program to process and staff carefully selected applicants eligible for” significant public benefit parole.⁶² Once identified, the cases of selected applicants are forwarded to the Department of Homeland Security for approval or disapproval.⁶³

The Firas al-Qaisi case is a typical example of significant public benefit parole involving the DoD where the parolee has provided a prior benefit to the United States.⁶⁴ Al-Qaisi had developed a reputation as a tough prosecutor in Iraq and was known to have a close relationship with the United States. Subsequently, al-Qaisi was arrested and tortured by sectarian Iraqi police.⁶⁵ The United States intervened to secure his release from Iraqi custody, and he was initially sent to Baghdad’s International Zone for protection.⁶⁶ However, the danger to al-Qaisi was so great he could not return home or even remain in Iraq.⁶⁷ With the support of the Commander of the Multi-National Force–Iraq, General David Petraeus, Firas al-Qaisi and his pregnant wife were granted significant public benefit parole to the United States.⁶⁸ In this case, significant public benefit parole was used to provide temporary and urgent security to an individual who had provided significant assistance to the United States in the past.

⁵⁵ *Id.* § 212.5(b)(1). This type of parole into the United States is granted for humanitarian reasons. *Id.* A distinct authority for the conditional parole from detention independent of any humanitarian basis exists. 8 U.S.C. § 1226; Ortega-Cervantes v. Gonzales, 501 F.3d 1111, 1114 (9th Cir. 2007) (discussing the difference between the two authorities for parole).

⁵⁶ 8 C.F.R. § 212.5(b)(3).

⁵⁷ See, e.g., Gina Barton, *Mission: Adoption; Soldier Finds a Purpose Beyond Serving His Country While in Iraq*, MILWAUKEE J. SENTINEL, Feb. 27, 2005, at A1.

⁵⁸ U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 1-153 (15 Dec. 2006) (“Some of the Best Weapons for Counterinsurgents Do Not Shoot.”).

⁵⁹ 8 C.F.R. § 212.5(e)(2)(ii).

⁶⁰ *Id.* § 212.5(1). In fact, Significant Public Benefit Parole can be used for certain “[w]itnesses [and] threatened family members . . . to enable them to enter or remain in the United States temporarily” when other means of entry to the United States do not exist. United States Dep’t of Justice, Attorney General Guidelines for Victim and Witness Assistance, May 2005, para. 5(d), at 71.

⁶¹ 8 C.F.R. § 212.5(1).

⁶² SPBP RULES OF ENGAGEMENT, *supra* note 50. After obtaining chain of command approval, judge advocates in the field should contact the Director, Significant Public Benefit Parole Program at the Office of the Deputy Assistant Secretary of Defense (Middle East) for the latest procedures.

⁶³ *Id.*

⁶⁴ Kevin Whitelaw, *When Helping America Is a Death Sentence*, U.S. NEWS & WORLD REP., Oct. 1, 2007, at 33.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* It is not clear whether the Department of Defense or another agency actually sponsored the parole or not, but the U.S. military had an existing relationship with Firas al-Qaisi, and he traveled to the United States using military aircraft, arriving at Andrews Air Force Base. *Id.*

The actual process and procedures for DoD's use of parole are subject to the discretion of the officials processing the application. Nevertheless, as a general matter, all parole applications require approval "from the nominator's chain of command."⁶⁹ Applications also require evidence of the significant public benefit the individual provided.⁷⁰ In many cases, the evidence will include records of the individual's association with the United States and the "imminent, documented danger" that resulted from that individual's association.⁷¹

Most significantly, when acting as a sponsor, DoD must appoint an individual located in the United States, affiliated with the DoD, to host the parolee.⁷² This person will be responsible for monitoring the parolee and ensuring that the parolee has a support network in place to provide basic needs, such as shelter, food, and health care.⁷³ Identifying an individual willing to assume this responsibility can be one of the most difficult and time-consuming tasks associated with the parole process.

Nevertheless, when the chain of command is supportive, when there is a documented and imminent threat, and when there is a host in the United States willing to sponsor a parolee, the significant public benefit parole program can be a robust mechanism for protecting local nationals who have been of assistance to the United States. It is important, however, for the judge advocate to keep in mind that parole is temporary.⁷⁴ Parole may quickly get an individual to safety, but it is not a long-term solution.

D. Criticism of Parole

Very few Iraqi nationals relative to the total number of Iraqi refugees from the war have been granted parole.⁷⁵ Moreover, the "obscure program that bypasses the State Department's normal immigration procedures" has been subject to criticism.⁷⁶ First, parolees are spared the difficult "multimonth waiting period in a third country like Jordan or Syria" that is typical of the "estimated 2 million Iraqi refugees" who have fled their country.⁷⁷ Bypassing the queue benefits the parolees themselves, but it creates a disparity and an appearance of unfairness to those not fortunate enough to receive parole. Second, the public benefit to the United States that the parolees provided may not be clear to the media or the general public.⁷⁸ Third, it is arguably counterproductive to remove Iraqis that are beneficial to the public from their home nation. Their country could use some heroes.

In response to the criticisms, the significant public benefit parole program has been characterized as "an extraordinary measure that is sparingly used to bring an otherwise inadmissible alien into the United States for a temporary period due to a compelling emergency."⁷⁹ Those granted parole are carefully screened, and only a small percentage of them eventually seek permanent residence in the United States.⁸⁰ "Applicants with the intent of paroling into the US to seek asylum are not good candidates" for parole.⁸¹

⁶⁹ SPBP RULES OF ENGAGEMENT, *supra* note 50. In the author's experience, the concurrence of a general or flag officer is necessary.

⁷⁰ *Id.*

⁷¹ *Id.* There are other possibilities such as "[w]itnesses at DOD sponsored legal proceedings" and "[s]enior, high value personnel needing to attend DOD sponsored meetings associated with US Coalition programs." *Id.*

⁷² *Id.*

⁷³ In the author's experience, these hosts are typically referred to as case agents, control agents, or sponsors. They can be active duty, civilian employees, reservists, or retirees. There is no database or list of potential agents or sponsors to host parolees. It is the responsibility of the command nominating a parolee to find a host. There is no source of funding available to compensate hosts for expenses.

⁷⁴ 8 U.S.C. § 1182(d)(5)(A) (2006).

⁷⁵ Whitelaw, *supra* note 64, at 33. About one tenth of a percent of the approximately two million Iraqi refugees have obtained significant public benefit parole to the United States. *Id.*

⁷⁶ James Glanz & Thom Shanker, *U.S. Opens a Sheltered Path to Asylum for Some Iraqis*, N.Y. TIMES, May 25, 2007, at A6.

⁷⁷ Whitelaw, *supra* note 64, at 33.

⁷⁸ See Glanz & Shanker, *supra* note 76, at A6 (discussing the case of Dr. Ali al-Shammari, the former Iraqi Minister of Health).

⁷⁹ *Id.* (quoting Michael Keegan, a spokesman for Immigration and Customs Enforcement).

⁸⁰ *Id.*

⁸¹ SPBP RULES OF ENGAGEMENT, *supra* note 50.

Perhaps the most serious criticism of the DoD's use of parole is that it could create a humanitarian disaster for parolees in the United States with no plans for their long-term support or safety upon termination of the parole. Judge advocates involved in nominating individuals for parole must ask whether the parolee's basic needs will be met while in the United States and must consider what will happen to the parolee once the period of parole expires.

IV. Special Programs Unique to Iraq and Afghanistan

Two special programs created in response to the wars in Iraq and Afghanistan provide alternate avenues to immigration for select individuals. Other than their limited applicability, these special programs feature few drawbacks compared to both the asylum process and the parole program. The first program assists translators from Iraq and Afghanistan, and the second supports employees and contractors of the United States in Iraq. For those who qualify, these are attractive programs.

A. Translators in Iraq and Afghanistan

Iraqi and Afghan translators who have worked for the United States for at least twelve months may be eligible for "special immigrant" status,⁸² which entitles them to immigrate to the United States and basic assistance.⁸³ "They have Legal Permanent Resident Status (LPR) upon entry into the United States" and may seek citizenship after five years.⁸⁴ Their immediate family members are also eligible for LPR.⁸⁵ Significantly, the law does not require translators to be in any danger in order to qualify, but as a practical matter, some degree of danger may be a factor in determining whether the chain of command will support a bid for immigration under this program.

This special program includes certain eligibility restrictions, including a numerical quota limiting it to fifty persons per fiscal year.⁸⁶ For fiscal year 2008, the limit was five hundred individuals, but even that increased limit was met in fiscal year 2008.⁸⁷ Additionally, since the special program is limited to translators,⁸⁸ other groups, including contractors, other employees of the United States, and local nationals who have been associated with the United States, would not qualify for special immigrant status under the program.⁸⁹

Applying for immigrant status under the special program for translators involves significant coordination and documentation. Both the translator and the chain of command should be prepared to become involved in the process.⁹⁰ First, "a General or Flag Officer in the chain of command of the unit supported by the translator" must provide a recommendation supporting the translator's immigrant application.⁹¹ The applicant must also have a passport⁹² and either a United States or APO address to which the visa processing center can send replies; the processing center cannot send replies to a foreign address.⁹³ Finally, the translator must arrange an interview with U.S. State Department personnel.⁹⁴ Inexplicably, interviews are generally not possible in Baghdad and not possible at all in Kabul,⁹⁵ and most applicants must travel to a third country,

⁸² National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 1059, 119 Stat. 313. The statute itself only references translators who have worked for the armed forces. *Id.* However, this has been interpreted in practice to include translators who worked under Chief of Mission authority. See Frequently Asked Questions, U.S. Dep't of State, Special Immigrant Visas for Iraqi and Afghan Translators/Interpreters, http://travel.state.gov/visa/immigrants/info/info_3738.html (last visited Sept. 21, 2009) [hereinafter Translators FAQ].

⁸³ Translators FAQ, *supra* note 82.

⁸⁴ *Id.*

⁸⁵ *Id.* The immediate family includes "spouses and minor unmarried children." *Id.*

⁸⁶ National Defense Authorization Act for Fiscal Year 2006 § 1059.

⁸⁷ Translators FAQ, *supra* note 82.

⁸⁸ National Defense Authorization Act for Fiscal Year 2006 § 1059.

⁸⁹ Potential examples include informants, local law enforcement personnel, witnesses, and even local nationals who have had a business relationship with the United States by providing supplies or services.

⁹⁰ Translators FAQ, *supra* note 82.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

such as Pakistan or Jordan, for the interview.⁹⁶ Judge advocates may become involved in the process, which may include coordination with the local U.S. embassy with chain of command approval.

B. Employees and Contractors in Iraq

Congress created another special immigration program in 2008⁹⁷ for Iraqi employees and U.S. contractors who had “provided faithful and valuable service to the United States” for at least one year.⁹⁸ Unlike the special program for translators, the special program for Iraqi employees and contractors requires that the applicant “has experienced or is experiencing an ongoing serious threat as a consequence of the alien’s employment by the United States Government.”⁹⁹ Special immigrant status is authorized for up to five thousand individuals each fiscal year under this program.¹⁰⁰ Significantly, the program applies only to Iraq and not Afghanistan or other areas of contingency operations. The program also excludes individuals associated with the United States in non-employment contexts, such as informants.

Unlike the special program for translators, this program does not require the recommendation of a General Officer; however, a United States citizen for whom the employee worked must provide a letter of recommendation.¹⁰¹ The U. S. Department of State Chief of Mission in Baghdad screens the application, including the recommendation letter and material documenting the threat faced by the employee, before forwarding the application for processing.¹⁰²

Once the Chief of Mission has screened and forwarded the application, it undergoes a review process very similar to the process for translators’ applications. The applicant must arrange a visa interview,¹⁰³ which can be held in Baghdad but is often conducted in Jordan or another third country.¹⁰⁴ Special immigration status under this program confers “Lawful Permanent Resident (LPR) status upon admission to the United States” and the option to apply for citizenship after five years of residence in the United States.¹⁰⁵ Immediate family members are eligible to accompany the employee to the United States.¹⁰⁶

V. Conclusion

Local nationals who have put themselves and their families in danger by associating with U.S. forces have various avenues for immigration to the United States. Three options, discussed in the primer, include refugee resettlement and asylum, parole, and two special programs created for specific categories of Iraqis and Afghans.

The refugee resettlement process is demanding and should be the option of last resort. Once in the United States, refugees fortunate enough to gain entry into the United States may avail themselves of the asylum application process. Parole represents a second option. Parole differs significantly from the other options discussed in this primer because it is not intended to be a method of immigration at all; rather, it serves as temporary authorization for an individual to enter the United States for a fixed period of time. Humanitarian parole may justify helping local nationals with serious medical needs that cannot be addressed in their home country, while significant public benefit parole may be invoked to assist local nationals in immediate danger and in need of evacuation from their country of nationality.

⁹⁶ *Id.*

⁹⁷ National Defense Authorization Act for Fiscal Year 2008, 110 Pub. L. No. 181 § 1244, 122 Stat. 3, *amended by* Act of June 3, 2008, 110 Pub. L. No. 242, 122 Stat. 1567 (2008).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* The authorization for this special immigration status is currently set for five fiscal years. *Id.*

¹⁰¹ Frequently Asked Questions, U.S. Dep’t of State, Special Immigrant Visas for Iraqis—Who Worked for/on Behalf of the U.S. Government, http://travel.state.gov/visa/immigrants/info/info_4172.html (last visited Sept. 21, 2009).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* Immediate family members are “spouses and minor unmarried children.” *Id.*

Finally, special programs for certain translators, employees, and contractors are often the best option for those who qualify. Although these programs are strictly limited, they also offer significant benefits including legal permanent resident status and the possibility of citizenship after five years.

All of these options, with the exception of refugee resettlement, require the support of higher headquarters. Judge advocates involved in the process, therefore, must ensure early coordination with the chain of command and must be careful not to make promises to local nationals. Judge advocates should also bear in mind that entry into the United States is often just the beginning for new immigrants.¹⁰⁷ New immigrants must adjust to a new culture and will require assistance with shelter, food, employment, health care, education and transportation. Those who assist local nationals to immigrate have a moral obligation to ensure that there is a plan in place to ensure they succeed in their new environment. Anything less means simply removing them from one bad situation into another.

With determination, hard work, and support from the chain of command, brave men and women who have stood with the United States have hope for safety and a new life in the United States. Upon arriving in the United States after enduring kidnapping and other harsh treatment in Iraq, one Iraqi citizen told the author he was “a new man” and “everything that happened to me before never happened.”¹⁰⁸ Judge advocates responsible for assisting these local nationals have a unique opportunity to make a direct and positive impact on their lives.

¹⁰⁷ One organization that specifically helps Iraqi and Afghan citizens who have been of assistance to the United States is the Checkpoint One Foundation. Their website is <http://www.cponefoundation.org/home>.

¹⁰⁸ Statement to the author on Apr. 26, 2008. This individual's name is omitted to protect his privacy.

Future Concepts Directorate
The Judge Advocate General's Legal Center and School

Doctrine Practice Note

Publication of Field Manual 1-04
*Major Joseph N. Orenstein*¹

Introduction

Field Manual (FM) 1-04, *Legal Support to the Operational Army*, revises keystone doctrine for The Judge Advocate General's Corps (JAGC).² Field Manual 1-04 replaces FM 27-100, *Legal Support to Operations*, and reflects the evolving role judge advocates, legal administrators, and paralegal Soldiers play in providing legal support to the modular force.³ Lessons learned from recent contingency operations and the ongoing transformation process have resulted in significant changes across the Army in the doctrine, organization, training, material, leadership and education, personnel, and facilities (DOTMLPF)⁴ spectrum. Field Manual 1-04 provides the framework for how the JAGC will be organized and how the Corps will provide support to clients across all core disciplines during operations.⁵ This note provides a basic overview of how FM 1-04 is organized and the significant changes it makes to the provision of legal support.

The Importance of Doctrine

Joint Publication 1-02 defines doctrine as the “[f]undamental principles by which the military forces or elements thereof guide their actions in support of national objectives. It is authoritative but requires judgment in application.”⁶ Doctrine serves to describe how organizational elements “are intended to work in pursuit of a larger idea.”⁷ Field Manual 3-0, *Operations*, contains a helpful appendix designed to provide perspective for how doctrine should be read and how it may influence decision-making in all aspects of military operations.⁸

Doctrine is comprised of multiple elements. It blends historical information, including lessons learned or best practices, with force structure and situational understanding of current operations and policies. Doctrine is an intellectual tool which is meant to “foster initiative and creative thinking.”⁹ In short, doctrine is developed from the vast array of resources available to an organization and serves as a helpful tool to understanding “how to think—not what to think.”¹⁰

Legal Support Doctrine

Before the release of FM 1-04, the primary source of Army legal doctrine was FM 27-100, which was last published on 1 March 2000. Field Manual 27-100 reflected a JAGC organizational structure that pre-dated both Operation Enduring Freedom and Operation Iraqi Freedom, as well as the Army's transformation to a more flexible and responsive modular force

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² U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY (15 Apr. 2009) [hereinafter FM 1-04].

³ Under the modular force concept, brigade combat teams (BCTs)—as opposed to larger units such as divisions or corps—serve as “the building block[s] of land combat power.” *Id.* para. 3-5. Each BCT may serve as a “self-contained task force or it may fall in on a higher headquarters element” in a “plug and play system” designed to provide greater flexibility. *Id.* para. 3-6.

⁴ Doctrine, Organization, Training, Materiel, Leadership and Education, Personnel and Facilities. See JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS A-44 (19 Aug. 2009) [hereinafter JP 1-02].

⁵ Lieutenant General Scott C. Black, *Army Field Manual (FM) 1-04, Legal Support to the Operational Army*, TJAG SENDS, A MESSAGE FROM THE JUDGE ADVOCATE GENERAL, vol. 37, no. 21 (May 2009) [hereinafter TJAG SENDS].

⁶ JOINT PUB. 1-02, *supra* note 4, at 171.

⁷ TJAG SENDS, *supra* note 5.

⁸ See U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS app. D (27 Feb. 2008) [hereinafter FM 3-0].

⁹ *Id.* para. D-2.

¹⁰ *Id.* para. D-1.

design based around the brigade combat team (BCT). Field Manual 27-100 was intended to provide guidance on how judge advocates should perform in light of the Army's strategic analysis plan, known as Joint Vision 2010.¹¹ Joint Vision 2010, however, did not anticipate protracted conflicts in irregular warfare environments, such as counterinsurgency or stability operations.¹² Instead, Joint Vision 2010 was designed to encourage the development of Army capabilities in joint environments with a focus on continuing technical and information superiority over traditional foes.¹³

Organizational restructuring (i.e., transformation) significantly altered certain organizational relationships within the Army. The designation of the BCT as the primary unit of action in military operations necessitated a review of the methodology behind legal support operations at all echelons, particularly at the modular BCT and division levels. Acknowledging the organizational realities of transformation, The Judge Advocate General (TJAG), U.S. Army, established a policy in early 2006 regarding the assignment of judge advocates to BCTs.¹⁴

The new doctrine in FM 1-04 makes some significant changes to JAGC operations and structure. It also includes minor revisions that may not have an immediate impact on legal support, but will, over time, impact the development of force structure and training methodologies for judge advocates, paralegal Soldiers, and legal administrators. The following sections discuss the primary changes implemented in the initial edition of FM 1-04.

Core Disciplines

Field Manual 1-04 significantly alters the formal alignment of core legal disciplines across the JAGC. Six official core disciplines now form the basis for operations, training, and education: international and operational law, administrative and civil law, contract and fiscal law, military justice, claims, and legal assistance.¹⁵ This doctrinal restructuring was designed to emphasize particular aspects of military legal practice and to highlight the relationships between functional areas. Defining the core disciplines in this way should facilitate training and help in the acquisition of resources to meet mission requirements.

Transformation

Field Manual 1-04 focuses primarily on the evolving relationship of legal personnel at the BCT. The organic assignment of judge advocates to BCTs, rather than to division-level legal offices that support the BCTs, sets the stage for dramatic changes in operations. As a result of transformation, brigade commanders are provided dedicated legal counsel and are no longer completely reliant on division-level legal offices. Assigning judge advocates to BCTs essentially provided BCT commanders with legal advisors capable of directly advising them across all six legal core disciplines. This change also created a new dynamic between division-level staff judge advocates (SJAs) and brigade judge advocates (BJAs), who had previously served within the division-level offices of the staff judge advocate (OSJAs).

Brigade combat teams also benefitted from the change in other ways. By incorporating BJAs into the operational planning processes, brigade attorneys are able to gain insight into the BCTs' mission and requirements. Brigade combat team commanders can also more readily develop a rapport with a judge advocate that may help strengthen the level of trust between the commander and legal adviser. The presence of judge advocates at the BCT level also allows for far greater flexibility in analyzing and completing missions in non-standard environments, including circumstances where a modular brigade is task organized to a separate organization (e.g., a division other than its "parent").

As the primary legal advisers to brigade commanders, BJAs serve as officers-in-charge (OIC) of brigade legal sections (BLS). The BLS evolved from the brigade operational law team (BOLT), which defined the personnel and mission structure of brigade-level legal support. The term "brigade operational law team" encouraged a perception of more limited types of

¹¹ JOINT CHIEFS OF STAFF, JOINT VISION 2010 (1996), available at <http://www.dtic.mil/jv2010/jv2010.pdf>.

¹² See *id.*

¹³ *Id.*

¹⁴ Policy Memorandum 06-7, The Judge Advocate General, subject: Location, Supervision, Evaluation, and Assignment of Judge Advocates in Modular Force Brigade Combat Teams (10 Jan. 2006) [hereinafter TJAG Policy 06-7].

¹⁵ FM 1-04, *supra* note 2, ch. 5.

legal support. The reflagging of a BOLT as a BLS was designed to enhance the provision of support across all six core legal disciplines while eliminating the perception that the offices were narrowly focused.

Rating Relationships

Prior to the establishment of the BJA position, division trial counsel were assigned specific jurisdictions and maintained working relationships with particular units, including units at brigades. Typically, trial counsel were not assigned or attached to supported units, and administrative responsibility for personnel actions, such as awards and evaluations were completed by the division OSJA, with input from the brigade. This relationship would often persist during deployments.

The relationship of BJAs to the brigades is different. Initially, BJAs at BCTs were placed under a rating scheme similar to the rating chain of other brigade-level staff officers. Brigade judge advocates were rated by the brigade executive officer, who served as their first-line supervisor, and were senior-rated by the brigade commander. Between the brigade executive officer and the brigade commander, the division SJA served as an intermediate rater ensuring that the BJA was properly mentored by another lawyer familiar with the military legal profession. Unfortunately, this rating system created a perception of potential for friction between a BJA, who was no longer assigned to a division staff, and an SJA who may have felt that opinions and advice were being disregarded by a former subordinate.

In order to address this possible friction, TJAG published Policy Memo 08-1, which defined the standard rating relationships for BJAs and brigade trial counsel, specified duty locations, and addressed BCT assignment considerations.¹⁶ In addition, he directed the drafting and publication of FM 1-04 to give the JAGC clear guidance on working relationships. Chapter 4 of FM 1-04 addresses the “Roles, Responsibilities and Working Relationships” of JAGC personnel. The basic rating chain for attorneys assigned to BCTs is as follows: BJAs are rated by the SJA and senior-rated by the brigade commander; trial counsel are rated by the BJA and senior rated by the SJA. Both attorneys may receive intermediate ratings from the brigade executive officer, if the situation requires.¹⁷ The rating system and directives issued regarding duty locations and assignments are designed to provide a structure that allows a BLS to operate in support of its brigade while ensuring coordinated support from higher echelon legal offices.

Planning

Chapter 6 of FM 1-04 focuses on the involvement of judge advocates in planning for operations and the basics of the military decision-making process (MDMP).¹⁸ As discussed above, judge advocates at the BCT level are more involved in planning for military operations now than ever before;¹⁹ However, judge advocate education and training has historically lacked focus on MDMP.²⁰ Since the Combined Arms and Services Staff School (CAS³) was eliminated in 2004, newer BJAs have found themselves a step behind other staff officers, particularly at BCTs.²¹ Consequently, FM 1-04 stresses the importance of the planning process and emphasizes the importance of being involved in decision-making before the actual execution of missions. The update to FM 1-04, the implementation of the Judge Advocate Tactical Staff Officer Course (JATSOC), and the recently developed pre-deployment training program (PDP) demonstrate the Corps’ emphasis on training lawyers to understand the purpose and function of MDMP and to enable them to inject legal analysis into pre-decisional staff advice to commanders.²²

¹⁶ Policy Memorandum 08-1, The Judge Advocate General, subject: Location, Supervision, Evaluation, and Assignment of Judge Advocates in Modular Force Brigade Combat Teams (17 Apr. 2008) [hereinafter TJAG Policy 08-1].

¹⁷ FM 1-04, *supra* note 2, para. 4-10.

¹⁸ U.S. DEP’T OF ARMY, FIELD MANUAL 5-0, ARMY PLANNING AND ORDERS PRODUCTION (20 Jan. 2005) [hereinafter FM 5-0].

¹⁹ TJAG SENDS, *supra* note 5.

²⁰ Lieutenant Colonel Mike Ryan, *Creating Legal Pentathletes: An Argument in Favor of an Operations Training Course for Judge Advocates (JAs)*, ARMY LAW., Apr. 2007, at 22–23.

²¹ *Id.*

²² The Judge Advocate Tactical Staff Officer Course (JATSOC) is accessible from The Judge Advocate General’s University website (password required), available at <https://jag.learn.army.mil>.

Appendices

Field Manual 1-04 contains appendices that address areas not previously covered in FM 27-100. These new appendices discuss detention operations, stability operations, and rule of law.²³ While the remaining appendices²⁴ contain updated information, this note focuses on the three new appendices and examines the significant changes in these practice areas since the last revision of FM 27-100.

Appendix B addresses detainee operations and begins with a brief discussion of the foundational requirements of detainee operations. Judge advocates are the subject matter experts concerning detainee operations on issues bearing on detainees' fates. Legal personnel have primary responsibility for training commanders and Soldiers on the international legal standards associated with detention and detainee case file processing. Judge advocates are also responsible for providing training on the Geneva Conventions, the legal bases for detention, and the procedures required to ensure a detainee's legal status is properly characterized and respected. Judge advocates must be familiar with the Detainee Treatment Act of 2005²⁵ and the Military Commissions Act of 2006, which affect the treatment of detainees.²⁶

Appendix C addresses the emerging concept of stability operations and discusses the blending of traditional JAGC tasks with stability operations requirements. In general, "stability operations" is "an overarching term encompassing various military missions, tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief."²⁷ Field Manual 1-04 incorporates the newly defined status of stability operations, which are now considered on equal footing with offensive and defensive operations.²⁸ Stability operations, however, present significant challenges for judge advocates. Stability operations are typically complex and may be conducted at the same time as offensive and defensive operations. Training legal personnel to understand their functions within stability operations and training units to incorporate legal capabilities into their planning and military decision making processes represents one step towards ensuring the success of stability operations.

Appendix D discusses the evolving concept of rule of law. Field Manual 1-04 defines rule of law as "a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles."²⁹ Rule of law activities generally involve a variety of different organizations, both civilian and military. In addition, rule of law activities are situation-dependent and vary considerably based on factors ranging from international cultural considerations to the rapport between the various personnel.³⁰ Appendix D does not seek to provide any specific task guidance. Rather, it tries to provide a basic foundation for JAGC personnel upon which they can build a plan to suit their mission.

Conclusion

Since the last version of JAGC doctrine was published in 2000, substantial changes have occurred in the overall landscape of legal operations. Transformation to the modular force and the advent of less conventional military operations, such as stability operations and counterinsurgency, have fundamentally impacted commanders' requirements for legal support. Judge advocates, serving at the BCT level, are increasingly involved in the tactical planning process. The core legal disciplines have evolved and expanded. New types of operations have emerged. The JAGC, which continually

²³ Detainee Operations is Appendix B; Stability Operations is Appendix C; and Rule of Law is Appendix C.

²⁴ Appendix A is Rules of Engagement, Rules for the Use of Force, and Targeting; Appendix E covers Legal Support in civil affairs units; Appendix G discusses financial management and deployment contracting; Appendix H relates the updated format for JAGC lessons learned.

²⁵ Pub. L. No. 109-148, 119 Stat. 2680.

²⁶ Pub. L. No. 109-366, 120 Stat. 2600.

²⁷ FM 1-04, *supra* note 2, para. C-1 (citing to JP 3-0).

²⁸ U.S. DEP'T OF DEF., DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS 2 (28 Nov 2005) [hereinafter DoDI 3000.05].

²⁹ *Id.* para. D-4 (citing to FM 3-07).

³⁰ See also CENTER FOR LAW AND MILITARY OPERATIONS, RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES (Kate Gorove & Captain Thomas B. Nachbar, eds., 2008).

examines its organization and methodology to ensure it can meet its obligations in current operational environments, promulgated FM 1-04 to reflect the most current guidance on legal support to the modular force.

Book Reviews

THE GREAT DECISION¹

REVIEWED BY MAJOR KEVIN W. LANDTROOP²

*It is emphatically the province and duty of the Judicial Department to say what the law is.*³

A political party, following the retirement of an iconic, unifying leader, is losing its grip on power at the national level. Its recent exercise of the country's Executive and Legislative power has been marked by overreaching, political prosecutions, and questionable National Security policy. The Presidency, firmly held for the past twelve years, is slipping; the party's majority in Congress is threatened as well. Political combatants vilify one another in the press with little regard for truth or objectivity during a vicious national election season. Party strategists use all means available to win the campaign, to include exploiting the incumbent party's majority status to rewrite election rules for the benefit of its members. In the wake of defeat, the lame-duck party plays its trump card, using its final weeks in power to seat a wave of political appointments, hoping to secure the party's influence before handing over the reins of government to its democratically-elected successors. The year is 1800, and Thomas Jefferson has just defeated John Adams for the presidency.

The Great Decision is a story of how the seminal Supreme Court case *Marbury v. Madison* defined the American judicial system by assigning the Judicial branch the power of judicial review, elevating the courts to the level of the Executive and Legislative branches, and defining what we now understand as the American rule of law, the concept that the law is above any man or institution. Cliff Sloan and David McKean's historical drama does more than just retell the story of the 200-year-old Supreme Court opinion that established the foundation of American Constitutional Law; they make a strong argument for the Great Chief Justice's status as a key founding father, as important to the new Republic's survival as Adams, Jefferson, and Washington were to its founding.

In the opening four chapters of *The Great Decision*, Sloan and McKean describe the political climate surrounding the 1800 election, which pitted incumbent Federalist President John Adams against Thomas Jefferson, leader of the newly emerging Democratic Republican Party. Jefferson, taking office as the third President of the United States, benefitted from the first peaceful and lawful transfer of power between competing political factions. However, the election process described by Sloan and McKean was anything but peaceful: like modern-day political warfare, the attacks were personal, the stakes were real, and the combatants were fully committed to winning, often irrespective of the cost.

In setting the stage for the *Marbury* decision, the authors narrate a series of overlapping vignettes that support the book's three major story lines: the transfer of power between Federalists and Republicans following the 1800 election, the key political players and their relationships with one another, and the state of the federal judiciary between the passage of the Judiciary Act of 1789 and the issuance of the *Marbury* opinion. The authors deftly place *Marbury* into a vivid historical and political context, which allows the reader to truly understand both the significance and improbability of the ultimate outcome.

Key to understanding the story behind *Marbury* is knowing the identities of and relationships between the various players, and the authors spend a great deal of time developing the characters. The book portrays the founding fathers as, on the whole, able and courageous men during uncertain times, though their less admirable character traits are emphasized for their effect on the tense political state of affairs. John Adams, the second President, is revealed as the dejected loser of the most hotly contested election in the nation's short history. The authors portray the supremely opinionated and ambitious Adams as the Captain of the Titanic, bitterly trying to save what he can of the Federalist party's twelve-year monopoly on federal power while doling out patronage appointments to political loyalists.⁴ Thomas Jefferson, Adams's Vice President and successor as chief executive, is shown to be a flawed character as well. The authors depict Jefferson as a savvy politician who won the Presidency through back-room bargaining⁵ and, after promising reconciliation at his inaugural address, worked to nullify nearly every Federalist action from Adams's term of office.

¹ CLIFF SLOAN & DAVID MCKEAN, *THE GREAT DECISION* (2009).

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³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), reprinted in SLOAN & MCKEAN, *supra* note 1, at 216.

⁴ President Adams made 217 judicial, legal, and military appointments from 1 February to 3 March 1801, even though Adams had been defeated by the Republicans the preceding December. SLOAN & MCKEAN, *supra* note 1, ch. 4.

⁵ *Id.* at 51.

The introduction of John Marshall adds a layer of complexity to the story. John Marshall and Thomas Jefferson were cousins, though they had neither personal affection nor professional respect for each other.⁶ Jefferson had been engaged to Marshall's mother-in-law and had broken the engagement, had been critical of George Washington immediately following Washington's presidency, and had been criticized for cowardly inaction during the British campaign through Virginia. Furthermore, the two were political rivals: Marshall, a Federalist, had been George Washington's aide during the Revolutionary War, Secretary of State and personal confidant to President Adams, and Adams's appointee as Chief Justice during his final weeks in office. On the day of Jefferson's inauguration, Marshall commented in a personal letter that Jefferson's party was composed of "speculative theorists and absolute terrorists," and if Jefferson turned out to be a terrorist then it would not be "difficult to see that much calamity is in store for our country."⁷ When he penned the letter, John Marshall held both the offices of Chief Justice and Secretary of State.

William Marbury also provides an interesting angle to the story. Marbury had never held significant political office, but he was a political operative for the Federalist party in his home state of Maryland.⁸ When it became clear that the party's chances for electoral victory in 1800 were in trouble, the Federalists attempted to change the rules for awarding Maryland's electoral votes: By convincing Maryland's legislature to award electoral votes on a "winner take all" basis, they hoped to leverage their thin Federalist majority into a significant victory in the Electoral College. The Federalists enlisted William Marbury to lobby the Maryland legislature, and even though Marbury failed, President Adams rewarded Marbury with an appointment as Justice of the Peace for the District of Columbia.⁹ When James Madison assumed duties as Secretary of State in March 1801, Marbury's commission lay undelivered on what had previously been John Marshall's desk.¹⁰

While America's leadership seemed engrossed in petty disputes, the United States of America faced real and immediate threats to its continued existence. Issues such as debt from the Revolution, the national bank, and slavery divided states and individual Americans. Inextricably intertwined in these divisive issues was the fundamental question of whether the States or the central Government should have primacy. Our relationships with France and Britain were dominant and divisive foreign policy issues. Federalists wanted a standing Army and Navy; Republicans were adamant in opposition. John Adams, a former ambassador to Britain, favored relations with the British; Thomas Jefferson, a former ambassador to France, favored relations with the French, who had seized numerous American merchant ships during Adams's tenure as Vice President.¹¹

The authors do a good, though not a great, job of describing how all of these issues came to a head in the election of 1800. The various splinter issues are addressed, in turn, throughout the book, but the reader must be well-versed in the history of the period to truly understand the stakes. The Presidential election of 1800 was a referendum on how the United States would be governed and, as a battle between political polar opposites, how the new nation would resolve these key issues. This political reality underscores not only why the election campaign was so bitter, but also why, when the Federalists lost both the Presidency and control of Congress, they sought refuge in the courts.

The stage was now set for the battle over the Judicial Branch, which is the focal point of Sloan and McKean's historical account. During the twelve years following ratification of the Constitution, the Supreme Court was anything but a co-equal branch. The country's most talented lawyers would not accept appointments to the Supreme Court; in its first twelve years, the Court had eleven different members and three Chief Justices.¹² John Jay, the first Chief Justice, deemed the Court "defective" and declined a second appointment.¹³ Justices were in the habit of leaving the Court for extended periods of time to attend to other government business. In designing the new national capital in Washington, D.C., no one had bothered to create a chamber for the Supreme Court—the Justices had to meet in an unallocated room in the Capitol building¹⁴ and, at times, met in the parlor of a local hotel.¹⁵

⁶ *Id.* at 42.

⁷ *Id.* at 66.

⁸ *Id.* at 19–20.

⁹ *Id.* at 62.

¹⁰ *Id.* at 63.

¹¹ *Id.* at 23.

¹² Members of the Supreme Court of the United States, <http://www.supremecourtus.gov/about/members.pdf> (last visited Sept. 29, 2009).

¹³ SLOAN & MCKEAN, *supra* note 1, at xvi.

¹⁴ *Id.*

¹⁵ *Id.* at 143–44.

The Federalists set out to correct what they perceived to be the weakness of the third branch. Through the Judiciary Act of 1801, they reorganized the judiciary into six appellate courts, one in each circuit, and eliminated the practice of circuit riding, which required Supreme Court Justices to travel to various circuits to hear cases.¹⁶ Though it was designed to strengthen the judiciary and make it more independent,¹⁷ the Act also had the added perk of creating dozens of new jobs for federal judges, all of whom could be appointed by the departing Federalist-controlled Government.

Regardless of whether the Act was intended to entrench Federalist power in the judiciary, Republicans saw it as just that and unanimously opposed it.¹⁸ A timeline of the passage and implementation of the Judiciary Act of 1801 helps illustrate the Republican point of view. John Adams officially lost his bid for reelection in early December of 1800.¹⁹ The Judiciary Act was introduced into Congress in January 1801 and was signed into law by President Adams on February 13, 1801.²⁰ Four days later, on February 17th, Thomas Jefferson defeated Aaron Burr in a runoff election to become the third President.²¹ John Adams appointed, and the Senate confirmed, each of the newly authorized judges between February 18th and March 3rd, Adams's final day in office.²² In addition, Adams appointed various officials related to the new act organizing the District of Columbia, most of them loyal Federalists.

The rapid implementation of the Judiciary Act during the lame-duck administration elucidates Republican opposition to the entire scheme. Further, as Republicans were ideologically opposed to any expansion of federal government, they saw Adams's actions as a direct affront to the popular will as expressed in the recent election. It follows *a fortiori* that upon taking office in March, Jefferson would set out to undo the damage. Jefferson's subsequent actions set up the ensuing litigation. Jefferson directed Secretary of State James Madison to withhold commissions, including Marbury's appointment as Justice of the Peace, which had not yet been delivered.²³

Sloan and McKean tell the remainder of the story, which is familiar to any lawyer, but the battle leading up to the lawsuit provides the story's true climax. Marbury sued Madison for delivery of his commission, and the authors reveal entertaining facts which add interest to an otherwise dry and academic judicial proceeding. Jefferson directed his Attorney General to take no part in the case; as a result, Marbury's attorney appeared unopposed before the Supreme Court bar.²⁴ Furthermore, key fact witnesses from James Madison's office claimed executive privilege on the stand and demanded the right to review and edit the questions during an overnight break.²⁵ Finally, John Marshall was intimately involved in the facts of the case:²⁶ Secretary of State John Marshall had prepared the commissions, presented them to the President for signature, and affixed the Seal of the United States certifying their completeness. He had also been the Secretary of State who had failed to deliver the commissions. Chief Justice John Marshall, writing the opinion of the Court, seized on these facts as conclusive proof that the appointment had been made. Delivery (or lack thereof), according to the opinion, was a "ministerial act" that had no bearing on the fact of appointment.²⁷

In the first two-thirds of the book, the authors lay out the challenges facing the Chief Justice when deciding *Marbury*—the meat of the story. The climax turns out to be rather anticlimactic, possibly because the Court's ruling is familiar to every first-year law student in the country. But, in understanding the historical context of the case, the lawyer-reader can gain a new appreciation for the genius of Marshall's opinion. Had Marshall chosen to order mandamus—in effect telling President Jefferson that he had to honor Adams's lame-duck appointments—the President could very well have refused, sparking a separation of powers Constitutional crisis that could have forever weakened the Judicial Branch. Marshall, however, ordered no action, thereby ensuring that his order could not be disobeyed. Marshall also, in a deft move of logical irony, expanded

¹⁶ *Id.* at 54–55.

¹⁷ *Id.* at xvi.

¹⁸ *Id.* at 55.

¹⁹ *Id.* at 31.

²⁰ *Id.* at 55.

²¹ *Id.*

²² *Id.* at 56, 76.

²³ *Id.* at 76.

²⁴ *Id.* at 132–33.

²⁵ *Id.* at 132–38.

²⁶ *Id.* at 170.

²⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 158 (1803), reprinted in SLOAN & MCKEAN, *supra* note 1, at 196.

the Court's Constitutional power by declaring that it lacked the Constitutional power to act. He secured for the Court the power of judicial review in a way that could be neither challenged by defiance nor scorned as a partisan power-grab by the mouthpiece for the deposed Federalists.

It is this aspect of Marbury, seen best in the full historical context, which secures John Marshall's place in the pantheon of American founding fathers and makes *The Great Decision* a very worthwhile read for any lawyer or history buff. By empowering the Judicial Branch with the duty of ensuring we are a government of laws and not men, John Marshall defined what we now refer to as rule of law. By putting the interests of the country ahead of politics, passions, and prejudices, he embodied what we would now refer to as political courage.

But perhaps the most interesting aspect of the book is its relevance to contemporary issues and politics. The political battle lines described by Sloan and McKean could have been drawn for the Presidential elections of 2004 or 2008, where intense partisanship resulted in bitter campaigns and personal attacks through every conceivable medium. Judge advocates in combat today find themselves trying to inspire adherence to the rule of law within their areas of responsibility, possibly without truly understanding how and when American rule of law was born. For these reasons, *The Great Decision* has relevance to any judge advocate and is a recommended read.

THE LIMITS OF POWER: THE END OF AMERICAN EXCEPTIONALISM¹

REVIEWED BY LIEUTENANT PAIGE J. ORMISTON²

*“The United States may still remain the mightiest power the world has ever seen, but the fact is that Americans are no longer masters of their own fate.”*³

I. Introduction

Now beginning its eighth year of war in Afghanistan, sixth year of war in Iraq, and second year of global financial meltdown, the United States is under pressure as never before both at home and abroad. Due largely to the methods it has employed in the Global War on Terrorism (GWOT), the nation’s reputation is diminished in the international community.⁴ Retired generals fill book shelves and airwaves with critiques of the conflicts in Iraq and Afghanistan.⁵ In *The Limits of Power: The End of American Exceptionalism*, Andrew Bacevich provides a fresh perspective on how all of those problems relate to the American belief that the United States is a nation different from any other.

Bacevich contends that our culture of consumption has perverted the nation’s foreign policy to such an extent that it will be our undoing.⁶ In less than two hundred pages, he makes it clear that both Republicans and Democrats share the blame for the misuse of American power abroad.⁷ Worse, neither party is willing to make the difficult choices necessary to enact the fundamental changes in American policy and lifestyle necessary to prevent our decline.⁸ He begins with the Biblical admonition to “set thine house in order”⁹ before explaining why our house is in disarray and why no one is willing to face that fact.

According to Bacevich, the quest of the United States to assert itself in the international community in the immediate post–World War II era gradually morphed over the course of the Cold War period into a crusade for global hegemony and an attempt to re-make the rest of the world in our image.¹⁰ Depending on the point of view, that crusade has reached either its zenith or nadir in the current conflicts in Iraq and Afghanistan. He states that the common American feeling that we are an exceptional nation, with the ability to bend history to our whims, has led to an increased willingness to use military force to preserve our profligate consumer culture.¹¹

II. Author, Use of Sources, and Organization

As a retired Army officer and current academic historian, Andrew Bacevich is well-qualified to deliver this critique of American foreign policy. Bacevich is a West Point graduate who served in Vietnam and the first Gulf War, earned a Ph.D. in history from Princeton after retiring from active duty, and is now a professor in Boston University’s International Relations Department.¹² He describes his political philosophy as traditional conservatism¹³ to distinguish himself from the neo-

¹ ANDREW J. BACEVICH, *THE LIMITS OF POWER: THE END OF AMERICAN EXCEPTIONALISM* (2008).

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³ BACEVICH, *supra* note 1, at 16–17.

⁴ R. Jeffrey Smith, *U.S. Tried to Soften Treaty on Detainees*, WASH. POST, Sept. 8, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/07/AR2009090702225.html>.

⁵ See, e.g., TOMMY FRANKS, *AMERICAN SOLDIER* (2005), RICARDO SANCHEZ, *WISER IN BATTLE: A SOLDIER’S STORY* (2008).

⁶ BACEVICH, *supra* note 1, at 6.

⁷ *Id.*

⁸ *Id.* at 66.

⁹ 2 *Kings* 20:1.

¹⁰ BACEVICH, *supra* note 1, at 54.

¹¹ *Id.* at 13.

¹² Andrew Bacevich—Curriculum Vitae, <http://www.bu.edu/ir/faculty/CV%27s/bacevich.pdf> (last visited Oct. 1, 2009).

conservatives, whose philosophy couldn't be more different than his own. Bacevich preaches restraint, both military and fiscal, as the bedrock of American values, whereas neo-conservatives use American military force as a diplomatic tool and are willing to engage in deficit spending to pay for it.

Bacevich's education and professional accomplishments don't fully explain the vehemence of his arguments. Even before the text of the book begins, the dedication page brings gravity and resonance to the ideas that follow. This is not only the distillation of nearly ten years of professional study and publication on the author's part; it is also intensely personal. The book is dedicated to the memory of the author's son, First Lieutenant Andrew Bacevich, U.S. Army, who was killed in a bombing near Samarra on 13 May 2007.¹⁴ The elder Bacevich had already authored three books and dozens of op-ed pieces critical of American foreign policy at the time of his son's death.

Despite losing his son in a war which he opposes, the book is not an angry rant. It is a well-reasoned, well-supported description of what is wrong with American foreign policy. The sheer variety of sources the author skillfully weaves together to make his point is impressive. He employs official Government statistics, memoirs, interviews, congressional testimony, and the writings of other academics in impressive fashion. Bacevich's look back at how we went so wrong relies heavily on the writings of Reinhold Niebuhr, the influential American theologian and philosopher. He quotes from Niebuhr over a dozen times, far more than any other source. Bacevich holds him up as a modern-day prophet who predicted the factors that would lead to the decline of the United States long before anyone else.¹⁵ Years ago, Niebuhr warned, "what he called 'our dreams of managing history'—born of a peculiar combination of arrogance and narcissism—posed a mortal threat to the United States. Today, we ignore that warning at our peril."¹⁶

III. Current Economic, Political, and Military Crises

Bacevich splits his argument into three sections: the crisis of profligacy, the political crisis, and the military crisis.

Bacevich first examines the crisis of profligacy, which he describes as the source of all of other problems. In his eyes, freedom, as practiced today by most Americans, means having something more to buy. "The ethic of self gratification has firmly entrenched itself as the defining feature of the American way of life."¹⁷ For the first half of the twentieth century, expansion and abundance were good for most Americans. In the immediate post-World War II era, the United States reached its exports peak. It was a net creditor to nations around the world, and, for the first time, the international monetary system was based on the dollar, not the British pound sterling.¹⁸

Prior to 1950, the United States had already begun to import foreign oil. This would prove to be "the canary in the economic mineshaft. Yet for two decades, no one paid it much attention."¹⁹ That economic canary nearly expired during the oil crisis of the 1970s, which prompted President Carter to deliver the infamous "malaise" speech urging Americans to curb their dependence on foreign oil and accept short term sacrifices to achieve that goal.²⁰ Instead of heeding the warning, the country elected Ronald Reagan, who "added to America's civic religion two crucial beliefs: credit has no limits, and the bills will never come due."²¹

Over the next three presidencies, only Bill Clinton managed to occasionally balance the budget. Increased oil use accompanied the idea that the United States could secure its interests using military might in the Persian Gulf and our

¹³ Amy Goodman, Conservative Historian Andrew Bacevich Warns Against Obama's Escalation of War in Afghanistan and Intensifying Use of Air Power in Region, available at http://www.democracynow.org/2009/5/11/conservative_historian_andrew_bacevich_warns_against.

¹⁴ Brian MacQuarrie, *Son of Professor Opposed to War Is Killed in Iraq*, BOSTON GLOBE, May 15, 2007, available at http://www.boston.com/news/local/articles/2007/05/15/son_of_professor_opposed_to_war_is_killed_in_iraq/.

¹⁵ BACEVICH, *supra* note 1, at 12.

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 16.

¹⁸ *Id.* at 24.

¹⁹ *Id.* at 28.

²⁰ *Id.* at 35.

²¹ *Id.* at 34.

interests in the area. September 11th provided the opportunity to finally invade Iraq and spread democracy.²² Had Iraq not come apart at the seams, the consequences of American profligacy might have stayed hidden awhile longer.²³

The second crisis Bacevich describes is the political crisis. No one has stated more succinctly the view of American exceptionalism and empire than Donald Rumsfeld shortly after September 11th: “We have a choice either to change the way we live, which is unacceptable, or to change the way that they live, and we chose the latter.”²⁴ Since the birth of the nation, politicians have claimed that the United States has a special role as moral guidepost for the rest of the world. The concept goes back at least as far as John Winthrop’s “City on a Hill” sermon.²⁵ Politicians of both parties allowed the public to believe that, while asking less and less of them. “The horrors of September 11th notwithstanding, most Americans subscribed to a limited-liability version of patriotism, one that emphasized the display of bumper stickers in preference to shouldering a rucksack.”²⁶ According to Bacevich, Washington, especially Congress, has been unable to manage its own affairs; consequently, over the past half century, Congress has continually ceded ever greater power to the Executive Branch, allowing what he refers to as the “imperial presidency” to develop.²⁷

Additionally, since 1940, a series of “national security emergencies, real and imagined” have allowed the Executive Branch to build a national security apparatus so vast and unwieldy, presidents prefer to circumvent it with their own advisors.²⁸ According to Bacevich, those advisors, or “wise men,” have a terrible track record. If Niebuhr is his prophet, then Paul Nitze is his bogeyman, responsible for hyping threats to national security in order to perpetuate a militarized mindset, which started in the early 1950s.²⁹ Although the United States acts as if it gets a fresh start every four to eight years, when a new president arrives in the White House, little actually changes. In Bacevich’s estimation, Democrats and Republicans differ, not in actual foreign policy philosophy, but by the degree to which they are willing to wield military might to accomplish the nation’s goals. Robert McNamara and Donald Rumsfeld both dangerously underestimated the consequences of the use of force and ceded responsibility for the aftermath to their military commanders.³⁰ According to Bacevich, “a Pentagon file clerk who misplaces a classified document faces stiffer penalties than a defense secretary whose arrogant recklessness consumes thousands of lives.”³¹

Finally, Bacevich addresses the military crisis. He is concerned that the nation and its armed forces will learn the wrong lessons from Iraq and Afghanistan. “Reconfigure the armed services to fight ‘small wars’; empower the generals; reconnect soldiering to citizenship—on the surface, each of these has a certain appeal.”³² However, in Bacevich’s opinion, those are the wrong lessons to learn. Rather than fighting small wars of empire, the United States should pursue a non-imperial foreign policy.³³ Bacevich is especially critical of the generals and admirals who have conducted Americans’ small wars since the end of the Cold War. He singles out numerous commanders for their military failures in Iraq and Kuwait, Kosovo, and Iraq again. In his eyes, no senior officer in the past fifteen years has done anything more than mediocre work even though granted remarkable strategic autonomy by the Commander in Chief.³⁴ “A great army is one that accomplishes its mission,”³⁵ and, according to Bacevich, poor generalship coupled with bad foreign policy has left the U.S. Army unable to do so. Our civilian

²² *Id.* at 62.

²³ *Id.* at 63.

²⁴ Donald Rumsfeld, Sec’y of Def., Dep’t. of Def., Address to the Men and Women of Whiteman Air Force Base (Oct. 19, 2001).

²⁵ Rev. John Winthrop, Governor of Massachusetts Bay Colony, City on a Hill Sermon (circa 1630).

²⁶ BACEVICH, *supra* note 1, at 63.

²⁷ *Id.* at 69.

²⁸ *Id.* at 78, 101.

²⁹ *Id.* at 107–08.

³⁰ *Id.* at 120, 128.

³¹ *Id.* at 88.

³² *Id.* at 141.

³³ *Id.* at 143.

³⁴ *Id.* at 147.

³⁵ *Id.* at 124.

leaders have failed to understand that the use of force is a gamble, both in lives and outcomes.³⁶ The author urges all citizens to insist on a more modest foreign policy in line with our actual military capabilities.³⁷ That requires reigning in the imperial presidency and truly supporting our troops by relieving them of the burden of imperial ambitions.³⁸

IV. Critiques

Although it is difficult to criticize the book's underlying themes and the reasoning behind them, the book is not without flaws. For all of his tearing down, Bacevich does little building up. His recommendations for changing the system are limited at best. Even within the limits of his terse and focused prose, he provides barely more than a to-do list for the country. He suggests Americans should live within their means, which would entail ending the nation's dependence on foreign oil;³⁹ however, he offers no plan for ending that dependence. His silence on alternatives to oil dependence is especially glaring given his proposal to fix the system by focusing on arresting or reversing climate change.⁴⁰ Since fossil fuel emissions are a fundamental cause of climate change, Bacevich should explain how cleaning up the environment would benefit national security. Instead, he makes the usual suggestions that we stop ordering our allies around,⁴¹ start negotiating with them in the common interest,⁴² and contain Islamic extremism through cultural and educational exchanges.⁴³ Bacevich contends that the United States should also work toward the eradication of nuclear weapons.⁴⁴ Unfortunately, he devotes less than ten pages to these suggestions and fails to explain how to accomplish any of them.

Meanwhile, the American abundance he discusses so frequently has clearly eluded many citizens, especially African Americans and Native Americans. Although he mentions the movement to increase certain freedoms during the 1950s and 1960s,⁴⁵ Bacevich pays short shrift to the country's oppression of both groups. He attempts to find a causal link between increased power projection overseas in the 1950s to the civil rights and feminism movements of the 1960s and 1970s,⁴⁶ but his arguments are poorly reasoned and weakly supported. Spending less than two pages of discussion and using a throwaway reference to General Curtis LeMay's relationship to Betty Friedan and *The Feminine Mystique* does the argument no favors.

Additionally, Bacevich's argument that both the wars in Iraq and Afghanistan should be ended quickly appears to contradict other observations in the book. For example, he states the American withdrawal from Somalia after the "Blackhawk Down" incident emboldened al Qaeda and led to the September 11th attacks,⁴⁷ yet he concludes a speedy withdrawal from both Iraq and Afghanistan is necessary, despite ongoing insurgencies in both countries. He advocates withdrawal with no accompanying analysis and without examining the possible consequences of doing so.

³⁶ *Id.* at 156–57.

³⁷ *Id.* at 169.

³⁸ *Id.*

³⁹ *Id.* at 174–75.

⁴⁰ *Id.* at 180.

⁴¹ *Id.* at 175.

⁴² *Id.*

⁴³ *Id.* at 176.

⁴⁴ *Id.* at 178–79.

⁴⁵ *Id.* at 26–27.

⁴⁶ *Id.* at 27.

⁴⁷ *Id.* at 148–49.

V. Conclusion

Bacevich is certain the American system is bankrupt and that the only people footing the bills are members of the armed forces. He predicted that a possible outcome of American profligacy would be an “economic collapse comparable in magnitude to the Great Depression.”⁴⁸ Unfortunately, he was right. The book’s updated afterward gives a brief sketch of the economic upheaval of 2008 and the author’s opinions about what caused it. He manages not to say “I told you so” but clearly believes that the current recession is evidence that he is right about American profligate spending habits.

First and foremost, this book is a critique of the American lifestyle and the foreign policy strategy needed to maintain the nation’s fundamental dependence on foreign oil and cheap consumer products. What is freedom? Who should pay for it? Is the price ever too high? These are uncomfortable questions that few on the national stage seem willing to ask. Before voting to deploy troops in harm’s way, all politicians and the citizens who voted for them should read this book and ask themselves those questions. Voters who consider themselves informed must be able to recognize the long term price, in blood and treasure, of military action and deficit spending. Those voters must be willing to make the personal sacrifices they have been willing to push off on members of the military and their families. They must also be willing to pay the monetary price they have been deferring to their children and grandchildren. That responsibility should not be pushed off on others; it should rest with each citizen if there is to be any hope for change.

⁴⁸ *Id.* at 65.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at (800) 552-3978, extension 3307.

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

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

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

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

2. TJAGLCS CLE Course Schedule (2009—September 2010) (<http://www.jagenet.army.mil/JAGCNETINTER/NET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
GENERAL		
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C22	59th Judge Advocate Officer Graduate Course	16 Aug 10 – 26 May 11
5-27-C20	180th JAOBC/BOLC III (Ph 2)	6 Nov 09 – 3 Feb 10
5-27-C20	181st JAOBC/BOLC III (Ph 2)	19 Feb – 5 May 10
5-27-C20	182d JAOBC/BOLC III (Ph 2)	16 Jul – 29 Sep 10
5F-F1	209th Senior Officer Legal Orientation Course	19 – 23 Oct 09
5F-F1	210th Senior Officer Legal Orientation Course	25 – 29 Jan 10
5F-F1	211th Senior Officer Legal Orientation Course	22 – 26 Mar 10
5F-F1	212th Senior Officer Legal Orientation Course	14 – 18 Jun 10
5F-F1	213th Senior Officer Legal Orientation Course	30 Aug – 3 Sep 10
5F-F55	2010 JAOAC	4 – 15 Jan 10

5F-F5	Congressional Staff Legal Orientation (COLO)	18 – 19 Feb 10
5F-F3	16th RC General Officer Legal Orientation Course	10 – 12 Mar 10
5F-F52S	13th SJA Team Leadership Course	7 – 9 Jun 10
5F-F52	40th Staff Judge Advocate Course	7 – 11 Jun 10
JARC-181	Judge Advocate Recruiting Conference	21 – 23 Jul 10
5F-F70	Methods of Instruction	22 – 23 Jul 10
NCO ACADEMY COURSES		
5F-F301	27D Command Paralegal Course	1 – 5 Feb 10
512-27D30	1st Paralegal Specialist BNCOC (Ph 2)	19 Oct – 24 Nov 09
512-27D30	2d Paralegal Specialist BNCOC (Ph 2)	4 Jan – 9 Feb 10
512-27D30	3d Paralegal Specialist BNCOC (Ph 2)	4 Jan – 9 Feb 10
512-27D30	4th Paralegal Specialist BNCOC (Ph 2)	8 Mar 10 Apr 10
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	17 May – 22 Jun 10
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	12 Jul – 17 Aug 10
512-27D40	1st Paralegal Specialist ANCOC (Ph 2)	19 Oct – 24 Nov 09
512-27D40	2d Paralegal Specialist ANCOC (Ph 2)	8 Mar – 13 Apr 10
512-27D40	3d Paralegal Specialist ANCOC (Ph 2)	17 May – 22 Jun 10
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	12 Jul – 17 Aug 10
WARRANT OFFICER COURSES		
7A-270A3	10th Senior Warrant Officer Symposium	1 – 5 Feb 10
7A-270A0	17th JA Warrant Officer Basic Course	24 May – 18 Jun 10
7A-270A1	21st Legal Administrators Course	14 – 18 Jun 10
7A-270A2	11th JA Warrant Officer Advanced Course	5 – 30 Jul 10
ENLISTED COURSES		
512-27D/20/30	21st Law for Paralegal NCO Course	22 – 26 Mar 10
512-27D-BCT	12th 27D BCT NCOIC/Chief Paralegal NCO Course	19 – 23 Apr 10
512-27DC5	31st Court Reporter Course	25 Jan – 26 Mar 10
512-27DC5	32d Court Reporter Course	19 Apr – 18 Jun 10
512-27DC5	33d Court Reporter Course	26 Jul – 24 Sep 10
512-27DC6	10th Senior Court Reporter Course	12 – 16 Jul 10
512-27DC7	12th Redictation Course	4 – 15 Jan 10
512-27DC7	13th Redictation Course	29 Mar – 9 Apr 10

ADMINISTRATIVE AND CIVIL LAW		
5F-F23	65th Legal Assistance Course	26 – 30 Oct 09
5F-F23E	2009 USAREUR Client Services CLE Course	2 – 6 Nov 09
5F-F28E	2009 USAREUR Tax CLE Course	30 Nov – 4 Dec 09
5F-F28	2009 Income Tax Law Course	7 – 11 Dec 09
5F-F28P	2010 PACOM Income Tax CLE Course	4 – 7 Jan 10
5F-F28H	2010 Hawaii Income Tax CLE Course	11 – 14 Jan 10
5F-F24	34th Administrative Law for Military Organizations	15 – 19 Mar 10
5F-F202	8th Ethics Counselors Course	12 – 16 Apr 10
5F-F29	28th Federal Litigation Course	2 – 6 Aug 10
5F-F22	63d Law of Federal Employment Course	23 – 27 Aug 10
5F-F24E	2010 USAREUR Administrative Law CLE	13 – 17 Sep 10
CONTRACT AND FISCAL LAW		
5F-F11	2009 Government Contract Law Symposium	17 – 20 Nov 09
5F-F14	28th Comptrollers Accreditation Fiscal Law Course	7 – 11 Dec 09
5F-F12	81st Fiscal Law Course	14 – 18 Dec 09
5F-F101	9th Procurement Fraud Advisors Course	10 – 14 May 10
5F-F10	163d Contract Attorneys Course	19 – 30 July 10
CRIMINAL LAW		
5F-F301	13th Advanced Advocacy Training Course	1 – 4 Jun 10
5F-F31	16th Military Justice Managers Course	23 – 27 Aug 10
5F-F33	53d Military Judge Course	19 Apr – 7 May 10
5F-F34	32d Criminal Law Advocacy Course	14 – 25 Sep 09
5F-F34	33d Criminal Law Advocacy Course	1 – 12 Feb 10
5F-F34	34th Criminal Law Advocacy Course	13 – 24 Sep 10
5F-F35	33d Criminal Law New Developments Course	2 – 5 Nov 09
5F-F35E	2010 USAREUR Criminal Law CLE	11 – 15 Jan 10

INTERNATIONAL AND OPERATIONAL LAW		
5F-F45	9th Domestic Operational Law Course	19 – 23 Oct 09
5F-F47	53d Operational Law of War Course	22 Feb – 5 Mar 10
5F-F47	54th Operational Law of War Course	26 Jul – 6 Aug 10
5F-F47E	2010 USAREUR Operational Law CLE	9 – 13 Aug 10
5F-F48	3d Rule of Law	16 – 20 Aug 10

3. Naval Justice School and FY 2009-2010 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	Course Title	Dates
0257	Lawyer Course (010) Lawyer Course (020) Lawyer Course (030)	13 Oct – 18 Dec 10 25 Jan – 2 Apr 10 2 Aug – 9 Oct 10
0258	Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	8 – 12 Mar 10 (Newport) 12 – 16 Apr 10 (Newport) 24 – 28 May 10 (Newport) 12 – 16 Jul 10 (Newport) 23 – 27 Aug 10 (Newport) 27 Sep – 1 Oct 10 (Newport)
2622	Senior Officer (Fleet) (010) Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050)	16 – 20 Nov 09 (Pensacola) 14 – 18 Dec 10 (Hawaii) 10 – 14 May 10 (Naples, Italy) 19 – 23 Jul 10 (Quantico, VA) 26 – 30 Jul 10 (Camp Lejeune, NC)
03RF	Legalman Accession Course (010) Legalman Accession Course (020) Legalman Accession Course (030)	9 Oct – 18 Dec 09 15 Jan – 2 Apr 10 10 May 23 Jul 10
049N	Reserve Legalman Course (010) (Ph I)	29 Mar – 9 Apr 10
056L	Reserve Legalman Course (010) (Ph II)	12 – 23 Apr 10
03TP	Trial Refresher Enhancement Training (010) Trial Refresher Enhancement Training (020)	1 – 5 Feb 10 2 – 6 Aug 10
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020)	1 – 12 Feb 10 (San Diego) 19 – 30 Apr 10 (Norfolk)
4046	Mid Level Legalman Course (010) Mid Level Legalman Course (020)	22 Feb – 5 Mar 10 (San Diego) 14 – 25 Jun 10 (Norfolk)

4048	Legal Assistance Course (010)	19 – 23 Apr 10
3938	Computer Crimes (010)	21 – 25 Jun 10
525N	Prosecuting Complex Cases (010)	19 – 23 Jul 10
627S	Senior Enlisted Leadership Course (Fleet) (020) Senior Enlisted Leadership Course (Fleet) (030) Senior Enlisted Leadership Course (Fleet) (040) Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	9 – 10 Nov 10 (San Diego) 16 – 20 Nov 10 (Norfolk) 11 – 15 Jan 10 (Jacksonville) 25 – 29 Jan 10 (Yokosuka) 1 – 5 Feb 10 (Okinawa) 16 – 20 Feb 10 (Norfolk) 16 – 18 Mar 10 (San Diego) 19 – 23 Apr 10 (Bremerton) 10 – 14 May 10 (Naples) 1 – 3 Jun 10 (San Diego) 2 – 4 Jun 09 (Norfolk) 29 Jun – 1 Jul 10 (San Diego) 9 – 13 Aug 10 (Great Lakes) 13 – 17 Sep 10 (Pendleton) 13 – 17 Sep 10 (Hawaii) 22 – 24 Sep 10 (Norfolk)
7485	Classified Info Litigation Course (010)	3 – 7 May 10
748A	Law of Naval Operations (010)	13 – 17 Sep 10
748B	Naval Legal Service Command Senior Officer Leadership (010)	26 Jul – 6 Aug 10
786R	Advanced SJA/Ethics (010)	26 – 30 Jul 10
7878	Legal Assistance Paralegal Course (010)	30 Aug – 3 Sep 10
846L	Senior Legalman Leadership Course (010)	26 – 30 Jul 10
846M	Reserve Legalman Course (010) (Ph III)	26 Apr – 7 May 10
850T	Staff Judge Advocate Course (010) Staff Judge Advocate Course (020)	19 – 30 Apr 10 (Norfolk) 5 – 16 Jul 10 (San Diego)
850V	Law of Military Operations (010)	7 – 18 Jun 10
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	14 – 18 Jun 10 20 – 24 Sep 10
932V	Coast Guard Legal Technician Course (010) Coast Guard Legal Technician Course (010)	3 – 14 Aug 09 2 – 13 Aug 10
961A (PACOM)	Continuing Legal Education (010) Continuing Legal Education (020) Continuing Legal Education (030)	14 – 15 Dec 09 (Hawaii) 25 – 26 Jan 10 (Yokosuka) 10 – 11 May 10 (Naples)
961J	Defending Complex Cases (010)	12 – 16 Jul 10
961M	Effective Courtroom Communications (010) Effective Courtroom Communications (020)	19 – 23 Oct 09 (Norfolk) 12 – 16 Apr 10 (San Diego)

NA	Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (030) Iraq Pre-Deployment Training (040)	5 – 8 Jan 10 6 – 9 Apr 10 6 – 9 Jul 10
NA	Speech Recognition Court Reporter (030)	25 Aug – 31 Oct 09
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	19 Oct – 6 Nov 09 30 Nov – 18 Dec 09 25 Jan – 12 Feb 10 22 Feb – 12 Mar 10 29 Mar – 16 Apr 10 3 – 21 May 10 14 Jun – 2 Jul 10 12 – 30 Jul 10 16 Aug – 3 Sep 10
0379	Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070)	26 Oct – 6 Nov 09 7 – 18 Dec 09 1 – 12 Feb 10 1 – 12 Mar 10 5 – 16 Apr 10 19 – 30 Jul 10 23 Aug – 3 Sep 10
3760	Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	16 – 20 Nov 09 11 – 15 Jan 10 22 – 26 Mar 10 24 – 28 May 10 9 – 13 Aug 10 13 – 17 Sep 10
Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	19 Oct – 6 Nov 09 30 Nov – 18 Dec 09 4 – 22 Jan 10 22 Feb – 12 Mar 10 3 – 21 May 10 7 – 25 Jun 10 19 Jul – 6 Aug 10 16 Aug – 3 Sep 10
947J	Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	13 – 23 Oct 09 30 Nov – 11 Dec 09 4 – 15 Jan 10 29 Mar – 9 Apr 10 3 – 14 May 10 7 – 18 Jun 10 26 Jul – 6 Aug 10 16 – 27 Aug 10

3759	Senior Officer Course (020)	25 – 29 Jan 10 (Yokosuka)
	Senior Officer Course (030)	1 – 5 Feb 10 (Okinawa)
	Senior Officer Course (040)	8 – 12 Feb 10 (San Diego)
	Senior Officer Course (050)	29 Mar – 2 Apr 10 (San Diego)
	Senior Officer Course (060)	19 – 23 Apr 10 (Bremerton)
	Senior Officer Course (070)	26 – 30 Apr 10 (San Diego)
	Senior Officer Course (080)	24 – 28 May 10 (San Diego)
	Senior Officer Course (090)	13 – 17 Sep 10 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2010 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	Dates
Paralegal Apprentice Course, Class 10-01	6 Oct – 20 Nov 09
Judge Advocate Staff Officer Course, Class 10-A	13 Oct – 17 Dec 09
Paralegal Craftsman Course, Class 10-01	13 Oct – 19 Nov 09
Reserve Forces Judge Advocate Course, Class 10-A	17 – 18 Oct 09
Advanced Environmental Law Course, Class 10-A (off-site Wash., DC)	20 – 21 Oct 09
Pacific Trial Advocacy Course, Class 10-A (off-site Japan)	7 – 11 Dec 09
Deployed Fiscal Law & Contingency Contracting Course, Class 10-A	14 – 17 Dec 09
Trial & Defense Advocacy Course, Class 10-A	4 – 15 Jan 10
Paralegal Apprentice Course, Class 10-02	5 Jan – 19 Feb 10
Judge Advocate Mid-Level Officer Course, Class 10-A	11 – 29 Jan 10
Air National Guard Annual Survey of the Law, Class 10-A (off-site)	22 – 23 Jan 10
Air Force Reserve Annual Survey of the Law, Class 10-A (off-site)	22 – 23 Jan 10
Homeland Defense/Homeland Security Course, Class 10-A	1 – 5 Feb 10

CONUS Trial Advocacy Course, Class 10-A (off-site, Charleston, SC)	1 – 5 Feb 10
Legal & Administrative Investigations Course, Class 10-A	8 – 12 Feb 10
European Trial Advocacy Course, Class 10-A (off-site, Kapaun AS Germany)	16 – 19 Feb 10
Judge Advocate Staff Officer Course, Class 10-B	16 Feb – 16 Apr 10
Paralegal Craftsman Course, Class 10-02	16 Feb – 24 Mar 10
Paralegal Apprentice Course, Class 10-03	2 Mar – 14 Apr 10
Area Defense Counsel Orientation Course, Class 10-B	29 Mar – 2 Apr 10
Defense Paralegal Orientation Course, Class 10-B	29 Mar – 2 Apr 10
Military Justice Administration Course, Class 10-A	26 – 30 Apr 10
Advanced Labor & Employment Law Course, Class 10-A (off-site, Rosslyn, VA)	27 – 29 Apr 10
Paralegal Apprentice Course, Class 10-04	27 Apr – 10 Jun 10
Reserve Forces Judge Advocate Course, Class 10-B	1 – 2 May 10
Advanced Trial Advocacy Course, Class 10-A	3 – 7 May 10
Environmental Law Update Course (DL), Class 10-A	4 – 6 May 10
Operations Law Course, Class 10-A	10 – 20 May 10
Negotiation & Appropriate Dispute Resolution, Class 10-A	17 – 21 May 10
Reserve Forces Paralegal Course, Class 10-A	7 – 11 Jun 10
Staff Judge Advocate Course, Class 10-A	14 – 25 Jun 10
Law Office Management Course, Class 10-A	14 – 25 Jun 10
Paralegal Apprentice Course, Class 10-05	22 Jun – 5 Aug 10
Judge Advocate Staff Officer Course, Class 10-C	12 Jul – 10 Sep 10
Paralegal Craftsman Course, Class 10-03	12 Jul – 17 Aug 10
Paralegal Apprentice Course, Class 10-06	10 Aug – 23 Sep 10
Environmental Law Course, Class 10-A	23 – 27 Aug 10
Trial & Defense Advocacy Course, Class 10-B	13 – 24 Sep 10
Accident Investigation Course, Class 10-A	20 – 24 Sep 10

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

- AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225
- ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600
- APRI: American Prosecutors Research Institute
99 Canal Center Plaza, Suite 510
Alexandria, VA 22313
(703) 549-9222
- ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990
- CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973
- CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747
- CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University
National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of South Carolina
1600 Hampton Street, Suite 414
Columbia, SC 29208
(803) 705-5095

NDAA: National District Attorneys Association
National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(703) 549-9222

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

6. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAIBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of JAIBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2010 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2009 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@us.army.mil.

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE

administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

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

Current Materials of Interest

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

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

b. Access to the JAGCNet:

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

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

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

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

(d) FLEP students;

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

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

c. How to log on to JAGCNet:

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

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

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

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

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

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

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

2. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact

LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

3. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General’s Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.