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Lore of the Corps

Legal Aid for the Soldier: The History of the Army Legal Assistance Program

Fred L. Borch III
Regimental Historian & Archivist

While Army lawyers have undoubtedly helped Soldiers and their families with their personal legal problems from the earliest days of the Republic, such assistance was both *ad hoc* and unofficial for many years. In fact, prior to World War II, Soldiers who had personal legal questions or who wanted to execute a will or obtain a power of attorney had to retain a civilian lawyer at their own expense. When, how, and why that changed—and how it resulted in the establishment of an Army Legal Assistance Program that continues to this day—is a history worth telling.

After the Japanese attack on Pearl Harbor and America's entry into World War II, millions of young men either enlisted or were drafted into the Armed Forces. Many of these citizen-Soldiers quickly deployed overseas for an extended period of time and, consequently, had little time to arrange their personal affairs. In 1940, Congress passed the Soldiers' and Sailors' Civil Relief Act (SSCRA),[1] which provided men and women in uniform with much needed legal protections. However, the Army soon realized that Soldiers needed access to legal help in order to protect their interests under the SSCRA and other laws.

At first, Army lawyers worked with the American Bar Association (ABA) to help Soldiers "resolve unsettled legal problems and unsatisfied legal needs" at the time of their induction.[2] Judge advocates (JAs) worked with state and local bar associations to assist Soldiers with subsequent legal problems by referring them to civilian lawyers in their local areas. This cooperative, and successful, arrangement continued until 16 March 1943, when the Army published War Department Circular No. 74, *Legal Advice and Assistance for Military Personnel*.[3] This circular announced that, for the first time in history, the Army was creating "an official, uniform, and comprehensive system for making legal advice and assistance available to military personnel and their dependents in regard to their personal legal affairs."[4]

On 22 March 1943, a "Legal Assistance Branch" was organized in the Office of The Judge Advocate General to supervise the newly instituted legal aid system throughout the Army.[5] By the end of 1943, there were six hundred legal assistance offices in the Army, and by the end of World War II, that number had grown to sixteen hundred.[6] Each office was issued a "basic legal assistance library" or "field kit" containing reference materials of various kinds, including pamphlets or "compendiums" on marriage *in absentia*, wills, and divorce.[7]

While the workload varied from office to office, legal assistance officers were busy; in the first year of the official program, JAs handled a total of 298,825 cases. Of these, 35% were taxation issues; 21% concerned powers of attorney; 20% dealt with wills; 5% involved domestic relations; and the remaining 19% concerned affidavits, citizenship, estates, insurance, real and personal property, and torts.[8] By the end of World War II, Army legal assistance officers had handled five and a half million cases—a tremendous amount considering the program had not started until March 1943.

After World War II, Army legal assistance continued as a permanent program, but in the 1950s and early 1960s it was "little more than a referral program in which Army lawyers provided general legal counseling, but referred most of the actual legal work, including wills and powers of attorney, to civilian lawyers."[9]

During the Vietnam era, many of the restrictions on providing legal assistance fell away, and JAs looked for new ways to help their Soldier-clients and their families. A wide range of legal services became the norm, from drafting and executing wills and powers of attorney, to preparing tax returns and negotiating with landlords and creditors. Army lawyers also did limited in-court representation—they appeared in civilian court on behalf of junior enlisted Soldiers on routine legal matters—and helped Soldiers who wished to proceed *pro se*.

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[1] Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, 50 U.S.C. app. 501.

[2] Colonel Alfred F. Arquilla, *The New Army Legal Assistance Regulation*, ARMY LAW., May 1993, at 4.

[3] WAR DEP'T, CIRCULAR NO. 74, LEGAL ADVICE AND ASSISTANCE FOR MILITARY PERSONNEL (16 Mar. 1943).

[4] MILTON J. BLAKE, LEGAL ASSISTANCE FOR SERVICEMEN: A REPORT OF THE SURVEY OF THE LEGAL PROFESSION 9 (1951).

[5] OFFICE OF THE JUDGE ADVOCATE GENERAL, LEGAL WORK OF THE DEPARTMENT 1 JULY 1940 – 31 MARCH 1945, at 13 (1945).

[6] *Id*. at 214.

[7] *Id*. at 207.

[8] *Id*. at 215–16.

[9] Arquilla, *supra* note 2, at 5.

A major turning point in the evolution of the legal assistance program occurred on 12 December 1985 when a civilian airliner carrying 248 Soldiers crashed on takeoff in Gander, Newfoundland. All the Soldiers aboard, who were returning from a six-month deployment to the Sinai, were killed, and their tragic deaths became a catalyst for change. For the first time, Army JAs realized that there must be a model for mass casualty legal support. Additionally, legal assistance officers now understood that it was critical for them to ensure the legal preparedness of Soldiers; that it was harmful to elect the "by-law" designation on Servicemen's Group Life Insurance forms; that Reserve Component JAs were critical in situations requiring a surge in legal assistance; and that legal assistance services must be available to the next-of-kin to resolve estate issues of deceased Soldiers.[10]

The Gander air crash tragedy also showed Army commanders that a robust legal assistance program was critical to the health and welfare of Soldiers—and good for the command. As a result, in 1986, Army Chief of Staff, General John Wickham, instituted the first Chief of Staff Award for Excellence in Legal Assistance. Its intent was to recognize those active Army legal assistance offices that consistently demonstrated excellence in providing legal support. In 1996, a separate award category was created to recognize Reserve Component legal assistance offices.

The role of information technology in the Army Legal Assistance Program also has increased in importance over the last twenty-five years. In the 1980s, the Judge Advocate General's Corps developed simple will preparation software, including the Minuteman and Patriot Will Programs. In 1999, the Army ceased developing its own software and began purchasing commercially prepared software for wills. In 2001, however, the Legal Assistance Policy Division in the Pentagon did create its own software for the preparation of powers of attorney, separation agreements, and SSCRA (now called the Servicemembers Civil Relief Act) letters. These in-house created software programs continue to be used.

Today's Army Legal Assistance Program[11] provides top quality legal aid to Soldiers and their families for personal legal problems. While wills and estate planning remain the largest area of legal assistance practice (about 30%), in recent years, family law—marriage, legal separation and divorce, paternity, non-support, child custody and the like—has grown to almost the same level.

Addendum to "Tried for Treason: The Court-Martial of Private First Class Dale Maple" (The Army Lawyer, November 2010)

What happened to Dale Maple after his trial by court-martial?

According to an article by Allen Best in *Colorado Central Magazine* (February 2004), while incarcerated at Leavenworth, Maple taught classes in trigonometry, public speaking, and other subjects. He also worked in the prison bakery, trained a prizefighter, and led the church choir. Still fascinated by languages, Maple also researched Old Bulgarian before being paroled in February 1951 at age 30.

According to the Harvard University Archives, the 1996 reunion report for the Class of 1941 listed Maple as a resident of El Cajon, California (a suburb of San Diego). As Maple had grown up in southern California, his return to that geographic area after his release from prison makes sense. But what Maple did after his release from prison is still a mystery. The 2005 Harvard Alumni Directory indicates that Maple died in El Cajon on May 28, 2001.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

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

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

[10] Memorandum for The Judge Advocate General, subject: Gander After-Action Report, Legal Assistance (8 Apr. 1987) (on file with Legal Assistance Policy Division, Office of The Judge Advocate General).

[11] U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM (21 Feb. 1996).

Holding the Line: Understanding the Role of Independent Legal Counsel in Command Decision-Making

Major Scott A. DiRocco[*]

I. Introduction

Captain (CPT) Mark Smith is the judge advocate (JA) for a detention facility in Afghanistan. One wing of the detention facility is run by Central Intelligence Agency (CIA) operatives under Executive authority outside the Department of Defense (DoD); this wing is off-limits to DoD personnel.

The commander of the detention facility comes to CPT Smith for advice. The person in charge of the CIA operation instructed CPT Smith's commander to turn over three detainees to the CIA team for interrogation. He also handed CPT Smith's commander an order from the executive, approved by the Secretary of Defense, to hold ten other detainees in the DoD section of the detention facility for the CIA team. The order further instructs CPT Smith's commander to hold them in a manner inconsistent with Army regulations and applicable operational orders regarding detainee operations. Along with the order are legal opinions from the Office of Legal Counsel (OLC) and DoD General Counsel (DoD/GC) stating that the ordered detention procedure is legal under both domestic and international law. The commander doesn't like being told what to do by a CIA operative and wants to know if this order is legal. He has the CIA operative standing by for 90 minutes while he gets advice from his staff.

Captain Smith's research establishes that the ordered detention procedure is illegal and could subject his commander to personal criminal liability. Yet OLC and DoD/GC have both opined that it is legal. Office of Legal Counsel opinions are generally held to be binding on all executive agencies and DoD/GC is in CPT Smith's "technical" chain of command.[1] Captain Smith assumes that, if DoD/GC has approved these procedures in writing, a few higher-ranking JAs have also reviewed the opinion, with apparently no objections, before it reached him. Is he allowed to give an opinion that differs from OLC, DoD/GC, or senior JAs in his technical chain of command?

This is a time-sensitive issue and his commander needs an answer. Captain Smith has no idea what to do. As an attorney, who is his client? Is it his commander? The Army? The Department of Defense ? The President? The public? What do his state bar rules of professional conduct say? What about the Army's?

Captain Smith joined the military after the terrorist attacks of 9/11. He wants to support the War on Terror. He's proud to be a commissioned officer in the U.S. Army as well as an attorney. Would he be undercutting civilian control of the military if he disagreed with OLC and DoD/GC? How could he be correct when all of those senior lawyers found otherwise? Captain Smith knows the safe bet would be to go along with everyone else. But what if CPT Smith left his commander subject to criminal liability? Is this even legally permissible conduct for an attorney?

As CPT Smith discovered, the role of the Federal Government attorney advisor, as opposed to a private attorney, is complicated by a series of fundamental and surprisingly difficult questions: Who is the client? Is it the public? The agency? The agency head? The immediate supervisor? If it is the public, who determines what is the public's interest? What duties does the government attorney owe his client?

Judge advocates are unique among government attorneys in the number of ethical, professional, and legal responsibilities they have. Judge advocates have duties to the Constitution, Congress, the President, their respective branch of service and its rules of professional conduct, and the individual JA's state bar rules of professional conduct. In addition to these legal responsibilities, JAs also have operational and technical chain of command concerns. The interrelationships between these responsibilities and concerns are often undefined. In some situations, they are patently contradictory.

The challenges these responsibilities create have become readily apparent since the terrorist attacks on 9/11. It would be an understatement to say that 9/11 and the ensuing War on Terror changed the way our government operated. The U.S. Army is at the forefront of that change.[2]

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[*] Judge Advocate, U.S. Army. Presently assigned as Deputy Staff Judge Advocate, National Training Center & Fort Irwin, Fort Irwin, California. The author thanks the following individuals for their time, advice, and assistance: Visiting Adjunct Professor Eric Jensen, Fordham University; Professor Victor Hansen, New England School of Law; Lieutenant Colonel Jonathan Howard, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia; and Major John Merriam, U.S. Army. The author owes special thanks to Lieutenant Colonel Oren "Hank" McKnelly for his countless hours, guidance, and direction during the drafting of this article. This article was submitted in partial completion of the Master of Laws requirements of the 58th Judge Advocate Officer Graduate Course.

[1] George C. Harris, *Symposium Lawyers' Roles and the War on Terror: The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT'L SECURITY L. & POL'Y 409, 423 (2005). *See also* Randolph D. Moss, *Recent Developments Federal Agency Focus: The Department of Justice: Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1308 (2000); Tung Yin, *Presidential Power in the 21st Century Symposium: Article: Great Minds Think Alike: "The Torture Memo," Office of Legal Counsel, and Sharing the Boss's Mindset*, 45 WILLAMETTE L. REV. 473, 5013 (2009).

[2] *See* General Peter Schoomaker, then Chief of Staff U.S. Army, Address Before the Commission on National Guard and Reserves (Dec. 14, 2006), *available at* http://www.army.mil/-speeches/2006/12/14/989-statement-by-

The conflicts in Iraq and Afghanistan forced the Army to adapt to the nonlinear and persistent nature of combat in those areas of operation.[3] The Army responded by shifting the emphasis from the division to the brigade combat team (BCT) as the primary unit of action.[4] The Army Judge Advocate General's Corps (JAGC) kept pace with the rest of the Army, moving the emphasis on legal services from the division to the brigade and enhancing training on deployment and operational law.[5]

The JAGC's changes, while necessary to continue to provide quality legal support to the Army, have also raised collateral issues. One such issue is that these changes have shifted who is providing advice and where that advice is being provided. Prior to the War on Terror, situations such as that in which CPT Smith found himself were usually made at larger headquarters, where tough legal issues could be "round-tabled" or staffed. Now, these situations routinely occur at the brigade level with one or two JAs. Many times, due to location, logistics, or operational tempo, coordination with other JAs is not possible.

Another collateral effect is the location and frequency of the interactions with operatives and agents from executive branch agencies such as State Department, CIA, FBI, and Drug Enforcement Administration. These interactions consistently happen in deployed environments at the brigade level.

These types of issues did not historically confront the brigade judge advocate (BJA), who usually hasten to fifteen years less experience than the division staff judge advocate and a much smaller compliment of subordinates. Now, however, they are routinely resolved at the brigade level. Moreover, these issues were enhanced by the ideological climate and issue entrepreneurship of the Bush administration's legal organizations.[6]

These changes in policy, organization, and mission have helped the legal community supporting the national security infrastructure define their jobs, their roles, and their responsibilities. Sometimes, they were defined before action was taken. Many times, they were defined through lessons learned. While these changes are positive and beneficial, JAs must pause to address the fundamental questions before facing them in a deployed environment: Who are you? Who is your client? Where do you fit in the national security apparatus? And what duties do you owe your client?

Part II of this article will provide background regarding JAs and their history within the U.S. Armed Forces. Part III will define the JA's client and the correct model of representation that should be employed by JAs. Part IV will discuss the JA's place in the national security apparatus by discussing the other legal organizations that advise the United States on national security and military matters. Part V will then explore the JA's duties and responsibilities that he owes to his client, define "independent and candid advice,"[7] and explain why it must include independence from the Executive Branch legal organizations discussed in Part IV.

The purpose of this article is not to criticize past administration practices. Nor is it to suggest that the relationships between the legal organizations that advise the executive on national security and military matters and the respective JAGCs are strained. To the contrary, these relationships are healthy and functional. Rather, the purpose of this article is to assist the JA in defining his roles and responsibilities. The transformation of the Army and the JAGC requires JAs to critically examine their roles as both

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general-peter-schoomaker-chief-of-staff-united-states-army-before-the-commission-on-national-guard-and-reserves/.

> As you know, the Army is steadfast in its determination to transform the total force from a Cold War structured organization into one best prepared to operate across the full spectrum of conflict; from full-scale combat to stability and reconstruction operations, including the irregular war that we face today. This effort includes modernization, modular conversion, rebalancing our forces across the active and reserve components, and a force generation model that provides for continuous operations.

[3] *Id*.

[4] In general, a brigade is a subordinate and smaller unit to the division. Divisions have roughly 15,000 to 25,000 Soldiers. A brigade combat team has 3500 to 5000. There are three to five brigade-size elements within a division. *See generally* U.S. DEP'T OF ARMY, FIELD MANUAL 3-90.6, BRIGADE COMBAT TEAM (4 Aug. 2006) (updated 14 Sept. 2010); U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (27 Feb. 2008); *see also* U.S. DEP'T OF ARMY, FIELD MANUAL, 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 3-3 (15 Apr. 2009) [hereinafter FM 1-04].

[5] *See* FM 1-04, *supra* note 4; Christopher M. Ford, *The Practice of Law at the Brigade Combat Team (BCT): Boneyards, Hitting the Cycle, and All Aspects of a Full-Spectrum Practice*, ARMY LAW., Dec. 2004, at 22; Policy Memorandum 08-1, Headquarters, Office of The Judge Advocate Gen., subject: Location, Supervision, Evaluation, and Assignment of Judge Advocates in Modular Force Brigade Combat Teams (17 Apr. 2008); Policy Memorandum 09-1, Office of The Judge Advocate Gen., subject: Pre-Deployment Preparation Program (3 Feb. 2009).

[6] Peter Margulies, *True Believers at Law: National Security Agendas, The Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 9, 22 (2008) ("Issue entrepreneurs assert their own identity through their ideas, seeking to establish the primacy of their analysis over perspectives from the past or competing perspectives from the present."). *See also* Harris, *supra* note 1, at 422.

[7] MODEL RULES OF PROF'L CONDUCT R. 2.1 (2009) [hereinafter MODEL RULES]. *See also* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS r. 2.1 (1 May 1992) [hereinafter AR 27-26]; U.S. DEP'T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL INSTR. 5803.1c, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL r. 2.1 (9 Nov. 2004) [hereinafter USN RPC]; AIR FORCE RULES OF PROFESSIONAL CONDUCT r. 21 (17 Aug. 2005) [hereinafter USAF RPC], *available at* http://www.caaflog.com/wp-content/uploads/AirForceRulesofProfessionalConduct.pdf.

military officers and attorneys and understand why the need for independent legal judgment and advice is so important to the military.[8]

II. The Judge Advocate

Judge advocates have a long history within our military dating back to the Revolutionary War.[9] After being commissioned as the Judge Advocate of the Continental Army in 1775, William Tudor became the first Army Judge Advocate General on 10 August 1776.[10] While the Navy had legal counsel intermittently from the time of its creation, Colonel William Butler Remey, U.S. Marine Corps (USMC), became the first uniformed Chief Legal Officer for the Navy in 1878.[11]

From the Revolutionary War through the end of World War II, there was no requirement that a JA be a trained attorney. After World War II, and in response to problems with the military justice system,[12] Congress adopted the Uniform Code of Military Justice (UCMJ).[13] Among the many changes to the system, the UCMJ required JAs to be trained lawyers and members of a state bar.[14]

Statutorily, JAs are charged with overseeing the military justice system.[15] This includes assignments in both prosecution and defense. In addition to military justice, JAs practice in over twenty other areas of law including fiscal, administrative, environmental, legal assistance, contracts, international, and operational.[16]

Over the last half century, the role of the JA in military operations has steadily increased.[17] While some scholars question the wisdom of this trend,[18] there is no denying that JAs are routinely put into situations such as that faced by CPT Smith in the introductory hypothetical. The nature of current operations has challenged the Army JAGC to keep pace and find organizational solutions in order to give its client the best advice possible.[19]

III. The Judge Advocate's Client

"Identifying the client is of great significance to the lawyer because of the ramifications it has on the carrying out of legal and ethical obligations."[20] For the private attorney, this identification is usually easily determined. For the Government attorney, however, this question is much more complicated. What seems like an easy question at first glance is actually a nuanced area of discussion that requires critical analysis.

For the JA, just as for his civilian counterpart, the question of who is your client initially seems quite easy: the military, or maybe more specifically, your respective branch of service, whether it is the Army, Navy, Air Force or Marines.[21] But from this recognition comes another fundamental question that must be answered before a true understanding of the JA's client can be reached. To truly understand the JA's client, the very nature of the military must be defined, for the military is unique in its position within the federal government.

This section discusses the two most popular models of client representation noting their strengths and weaknesses, both in general and as applied to the military. It will then discuss the unique nature of the military itself, detailing the history of civil-military relations.

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[8] This article focuses on the U.S. Army Judge Advocate. While there are organizational differences between the respective services' Judge Advocate Corps (JAGC), the positions of this article generally apply to all judge advocates (JAs). The other services will be discussed when differences add to the discussion.

[9] The Army TJAG position was created on 29 July 1775. U.S. Army Judge Advocate Gen.'s Corps-History (last visited 9 Mar. 2011) [hereinafter Judge Advocate Gen's Corps History], http://www.goarmy.com/jag/history.jsp; *see also* Lisa L. Turner, *The Detainee Interrogation Debate and the Legal Policy Process*, JOINT FORCES Q., 3d Quarter, 2009, at 40, 40.

[10] Judge Advocate Gen's Corps History, *supra* note 9.

[11] U.S. Navy Judge Advocate Gen.'s Corps-Navy JAG History, http://www.jag.navy.mil/history.htm; Colonel (Col) Reginald Harmon was selected as the first Air Force Judge Advocate General and promoted to the rank of major general on 8 September 1948. PATRICIA A. KERNS, THE FIRST 50 YEARS: U.S. AIR FORCE JUDGE ADVOCATE GENERAL'S DEPARTMENT 13 (2004). While Marine Corps JAs are a subdivision of the Navy JAGC, Col Charles B. Sevier became the first Staff Judge Advocate to the Commandant to the Marine Corps in 1966. GARY D. SOLIS, MARINES AND MILITARY LAW IN VIETNAM 120 (1989).

[12] *See* Major Mynda G. Ohman, *Integrating Title 18 War Crimes Into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F. L. REV. 1, 8–10 (2005).

[13] UCMJ, 64 Stat. 109, 10 U.S.C. ch. 47 (2008). The UCMJ was passed by Congress on 5 May 1950 and became effective on 31 May 1951. *See* Ohman, *supra* note 12, at 8–10.

[14] 10 U.S.C. § 3065(e) (2006). *Id.* § 827.

[15] *Id.* § 806.

[16] U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 4-2 (30 Sept. 1996) [hereinafter AR 27-1].

[17] FM 1-04, *supra* note 4, paras. 1-5 to -11; David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981, 1999 (2008); Glen Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1838–842 (2007); *see generally* FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001).

[18] *See generally* Sulmasy & Yoo, *supra* note 17.

[19] *See supra* note 4.

[20] AR 27-26, *supra* note 7, r. 1.13 cmt.

[21] The U.S. Coast Guard has JAs as well; however, they are excluded from this discussion because they are not a Title 10 entity.

A. Agency Versus Public Interest Model of Client Representation

The matter of properly identifying the government attorney's client has been well covered and hotly debated.[22] Two major models have emerged: the agency model and the public interest model.[23]

Under the agency model, the government attorney should treat the department or agency that he works for as his client.[24] The attorney owes his duty of loyalty, zeal, and confidentiality to the agency, just as if the agency was his private client.[25] He is, thus, the agent of the agency or department and responsible for carrying out the will of his client.

The agency model is also known as the "dominant" model, as it attempts to protect clients from being dominated by their attorney by placing the client's interests first.[26] It is based on the premise that "all client interests that are not illegal are legitimate, and that clients are entitled to legal representation to pursue those interests."[27] If it were otherwise, the attorney would wield great power over his client's affairs, whether a private citizen or the government, by placing his personal beliefs and interests above those of his client.[28]

In contrast, the public interest theory states that the government attorney's client is greater than one particular agency or agency head; it is the public at large. Thus, the attorney's loyalty should be to the public interest. Since the government itself is just a small representation of the public and serves the public interest (in theory), the government attorney owes his allegiance to the public interest. Under this model, serving the public interest is the government lawyer's primary duty. Therefore, the government attorney values the interests of his agency or department "only to the extent that those interests coincide with the public interest."[29]

Critics of the public interest model say that the public interest is a vague abstract and unworkable in reality. Professor Geoffrey Miller summed it up best when he said, "[i]t is commonplace that there are as many ideas of the 'public interest' as there are people who think about the subject."[30] Critics also note that it is impossible to define what the public interest is when the public is always divided.[31]

Professor Miller's fear, as with other critics of this model, is that a "renegade attorney" can supplant his beliefs of the public interest, which may be vastly different, for those held by his elected or appointed supervisor.[32] The public interest model "empowers government lawyers to substitute their individual conceptions of the good for the priorities and objectives established through [representative] governmental procedures."[33]

Yet it is the agency heads that are politically appointed and carry out the policies and intent of the executive. The chief executive is publicly elected and carries with him the support of the public through election. Ultimately, the policies and actions of the elected officials can be undermined by the government attorney who thinks he has a better understanding of what is in the public's best interest.[34] It was in part this reasoning that led the Supreme Court in *Myers vs. United States* to aver, "[t]he discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it."[35]

Supporters of the public interest model assert that there are "sufficient existing definitions of the public interest to guide government attorneys so they do not become 'loose cannons.'"[36] Moreover, unhindered loyalty "to the client's interests risks allowing lawyers to support manifest social injustice."[37]

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[22] *See generally* Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987); Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269 (1999); Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 111 HARV. L. REV. 1170 (2002); Harris, *supra* note 6.

[23] A third model, the "critical model," holds "the government lawyer's primary responsibility is to help the agency develop its position in a way that is consistent with democratic values." *See* Harris, *supra* note 1, at 422; *see also* Note, *supra* note 22, at 1173.

[24] *See* Neil M. Peretz, *The Limits of Outsourcing: Ethical Responsibilities of Federal Government Attorneys Advising Executive Branch Officials*, 6 CONN. PUB. INT. L.J. 23, 27 (2007); Miller, *supra* note 22, at 1294; Note, *supra* note 22, at 1173.

[25] *See* Peretz, *supra* note 24, at 27; Miller, *supra* note 22, at 1294; Note, *supra* note 22, at 1173.

[26] *See generally* Harris, *supra* note 1; Note, *supra* note 22, at 1171.

[27] Note, *supra* note 22, at 1171.

[28] *See generally id.* at 1294; Harris, *supra* note 1, at 422; Note, *supra* note 22, at 1171.

[29] Note, *supra* note 22, at 1173.

[30] Miller, *supra* note 22, at 1294–95.

[31] Peretz, *supra* note 24, at 27 (quoting William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOW. L.J. 539, 564 (1986)).

[32] Miller, *supra* note 22, at 1295; *see also* Peretz, *supra* note 24, at 28 ("[I]f an attorney is a 'loose cannon' with a vastly different perception of the public interest than his superiors and colleagues, he may be difficult to manage within his own workplace, and his agency will behave inconsistently and unpredictably as a result.").

[33] Miller, *supra* note 22, at 1295.

[34] *See generally* Miller, *supra* note 22; Peretz, *supra* note 24.

[35] 272 U.S. 52, 117 (1926). *See also* Yin, *supra* note 1, at 493.

[36] Peretz, *supra* note 24.

[37] Note, *supra* note 22, at 1171.

The applicable rules of professional responsibility that guide attorneys do not offer a definitive answer to this foundational question, either.[38] The American Bar Association (ABA) *Model Rules of Professional Conduct* do not offer any definitive guidance on identifying the Governmental client. Rule 1.13 addresses the organization as a client.[39] While the ABA states that Rule 1.13 "applies to governmental organizations," it goes on to state that,

> [A] different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statute or regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context.[40]

This guidance leaves much to be desired, as we saw from CPT Smith's conundrum.[41]

Professor George Harris points out that the American Law Institute's *Restatement of the Law Governing Lawyers* (*Restatement*) concludes that "no universal definition of the client of a governmental lawyer is possible" and that each model has its benefits.[42] Specifically, in certain situations, "the preferable approach . . . is to regard the respective agencies as the clients and to regard the lawyers working for the agencies as subject to the direction of those officers authorized to act in the manner involved in the representation."[43]

B. Army's Model of Client Representation

The Army concurs with the *Restatement* and follows the agency model. Rule 1.13 of its Rules of Professional Conduct for Lawyers states in pertinent part, "[e]xcept when representing an individual client [in a criminal defense or civil legal assistance capacity], an Army lawyer represents the Department of the Army acting through its authorized officials."[44] Rule 1.13 defines "authorized officials" as "the heads of organizational elements within the Army, such as the commanders of armies, corps and divisions, and the heads of other Army agencies or activities."[45] The JA's attorney-client relationship with the authorized official (usually a military commander) exists "with respect to matters within the scope of the official business of the organization."[46]

The Army is correct in deeming that the agency model is the more appropriate model for the military. While the notion of representing the public interest sounds good in theory, and may even be the appropriate model for other governmental organizations, it fails to account for the unique nature of the military lawyer and his place within the constitutionally mandated civil-military relationship.

One of the basic tenets of our country's constitutional structure is civilian control of the military.[47] In this regard, the public interest is defined for the military by the two publicly elected branches of government that control it: the legislature and the executive.[48]

The JA, unlike his private practice counterparts, is sworn to uphold this constitutional system. As commissioned officers in the military, an appointment of "honor or trust under the Government of the United States," JAs are required to take and subscribe to the oath of office.[49] As part of this oath, the JA swears that he will support and defend the Constitution against all enemies, foreign and domestic.[50]

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[38] Harris, *supra* note 1, at 418–19. *See also* Note, *supra* note 22, at 1175 ("the Model Rules offer little guidance to lawyers for organizational clients when the organization's interests diverge from those of its representatives and no guidance at all in situations that are unique to government lawyering.").

[39] MODEL RULES, *supra* note 7, R. 1.13.

[40] *Id.* cmt. 9.

[41] *See supra* Part I.

[42] Harris, *supra* note 1, at 422 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS 97 cmt. C (2000)).

[43] *Id.*

[44] AR 27-26, *supra* note 7, r. 1.13(a).

[45] *Id.*

[46] *Id.*

[47] *See generally* U.S. CONST. arts. I & II; Victor Hansen, *Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations*, 50 S. TEX. L. REV. 617 (2009); Eric Talbot Jensen & Geoffrey Corn, *The Political Balance of Power Over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress*, 44 HOUS. L. REV. 553 (2007); SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 76 (1985) (1957); Sulmasy & Yoo, *supra* note 17, at 1816.

[48] *See generally* U.S. CONST.

[49] 5 U.S.C. § 3331 (2006); *see also* U.S. Dep't of Army, DA Form 71, Oath of Office-Military Personnel (July 1999) [hereinafter DA Form 71]. The oath for commissioned officers is as follows:

> I, _____ (SSAN), having been appointed an officer in the Army of the United States, as indicated above in the grade of _____ do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign or domestic, that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservations or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter; SO HELP ME GOD.

[50] 5 U.S.C. § 3331; *see also* DA Form 71, *supra* note 49.

Unlike his civilian governmental lawyer counterparts, the JA has the additional duty of military obedience. Military obedience has been called the supreme military virtue.[51] As Section C(1)(a) below will discuss in greater detail, one of the greatest fears of the original framers of our Constitution was a standing army. Thus, they subordinated the military to civilian control. Civilian control is nothing, however, unless those serving in the military respect and honor that control. Military obedience to civilian control, therefore, is paramount to our constitutionally mandated system.

The duty of military obedience adds yet another layer of responsibility onto the JA's decision-making process. Attempts by judge advocate to determine what the public interest is can interfere with civilian control of the military. In other words, JAs cannot go "rogue" and supplant their beliefs regarding what is good for the public for those of their civilian leadership. This would violate the Constitution, which JAs have sworn to defend.[52]

Judge advocate dalliance into policy decisions is a very real fear, one that has been at the forefront of discussion since President G. W. Bush took office in 2000.[53] It is for this reason that JAs cannot represent the public interest in the very broad definition of that term. Their duty of military obedience prevents them from making this determination. This is not to say that JAs, or military officers in general, are mindless automatons at the beck and call of the chief executive; their professional conduct, as both attorneys and military officers, is restricted by the law. But it does mean that JAs, unlike their civilian governmental lawyer counterparts, are further limited by their duty of military obedience.

C. Defining the Military

In order to understand who the JA's client is, the true nature of the military must first be articulated. The Army, as previously discussed, maintains that the JA's client is the Department of the Army through its authorized officials. The Department of the Army by statute is an executive branch agency.[54] This article will articulate, however, that the JA's client can only be the Army defined as the uniformed military. The JA's client cannot be politically appointed officials such as the Secretary of the Army. The line must be drawn between the uniformed military and the civilian members of the respective service departments.

1. History of Civil–Military Relations

a. Civil–Military Relations in the Constitution

Concerns about controlling the military predate the drafting of our Constitution. "Among other fears, the Framers were concerned about the existence of a large standing army, the danger of a military coup d'état, and the risks of military adventurism."[55] To address these fears, the framers decided upon a constitutional system in which the military would be controlled by the civilian population. The President was made the "Commander in Chief" of the armed services.[56] Under this arrangement, the military would always be subjected to the control of a single, publicly elected civilian official.

In our system of checks and balances, the original framers wisely subordinated the military to civilian control.[57] Even wiser still, the framers split that control between the two branches.[58] The framer's fear of a large standing army was matched by the fear of a chief executive that could wage war purely on executive authority. As James Madison aptly warned the constitutional convention, "[c]onstant apprehension of War, has the same tendency to render the head too large for the body. A standing military force, with an overgrown Executive, will not long be safe companions to liberty. The means of defense against foreign danger, have been always the instruments of tyranny at home."[59]

While it is a necessity to have the military under the command and control of an executive rather than a large body of elected officials,[60] there is always the risk of placing too much power in the hands of one person.[61] Having the military controlled by a single civilian despot differs little from it being controlled by a single military one.[62] Thus, civilian control of the military is not just exerted by the executive, it is exerted by the legislature as well.[63]

To offset the President's power as Commander in Chief, Article I vests Congress with multiple powers, including the

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[51] HUNTINGTON, *supra* note 47, at 76.

[52] *See supra* note 49.

[53] *See* Sulmasy & Yoo, *supra* note 17. For critical responses to Sulmasy's & Yoo's claims of Judge Advocate interference with executive branch policy decision-making, see Hansen, *supra* note 47; Michael L. Kraemer & Michael L. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407 (2008).

[54] *See* 10 U.S.C. § 111 ("The Department of Defense is an Executive Department . . . composed of the following . . . (6) Department of Army. (7) Department of the Navy. (8) Department of the Air Force . . .").

[55] Hansen, *supra* note 47, at 625.

[56] U.S. CONST. art. II, § 2, cl. 1.

[57] *Id.* arts. I & II. *See also infra* Part III.B.1.a.

[58] U.S. CONST. arts. I & II.

[59] 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 465 (Yale University Press 1911).

[60] Sulmasy & Yoo, *supra* note 17.

[61] THE FEDERALIST NO. 4 (John Jay).

[62] *See* Hansen, *supra* note 47, at 626.

[63] *Id.*; *see also* Jensen & Corn, *supra* note 47, at 561–62.

power to provide for the common defense;[64] define and punish piracy and offenses of international law;[65] declare war;[66] make rules concerning captures on land and water;[67] raise and support armies;[68] provide and maintain a navy;[69] make "Rules for the Government and Regulation of the land and naval Forces;"[70] ". . . provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;"[71] and ". . . provide for organizing, arming, and disciplining, the Militia, and for governing such part of them as may be employed in the Service of the United States."[72] In addition to these specific enumerated powers, Congress also has the power to "make all Laws which shall be necessary and proper for carrying into power" the powers listed above.[73]

The bifurcated control of the military found in the Constitution not only protects the people from the military becoming too powerful, it also protects the people against one branch of Government exerting too much control over the military.[74] While our country has been exceedingly successful at preventing a military coup d'état throughout its 240-year history, the fact remains that the military has control of the great majority of the country's hard power.[75] Because we have managed that risk does not mean that there is no risk at all or that the risk is not significant.[76] Thus, the constitutional framework devised by the original framers not only mandates civilian control of the military but also reinforces the beliefs in its government officials that civilian control is essential to maintain our self-governing, republican ideals.

b. Modern U.S. Civil–Military Relations: World War II to 1986

In 1986, Congress passed the Goldwater-Nichols DoD Reorganization Act of 1986.[77] Goldwater-Nichols was the culminating response to years of defense organizational problems, leading back to the end of World War II, which hindered the performance of our military and threatened civilian control of the military.[78]

During WWII, the military consisted of two departments: one for the Army (War Department) and one for the Navy (Navy Department).[79] Infighting between the services hampered our overall war effort.[80] In 1943, the Army, convinced that separate War and Navy Departments were inefficient, proposed that they be replaced with a single unified military department.[81] The Navy and Marine Corps opposed unifying the military for various reasons, including longstanding traditions of independent command at sea.[82]

President Truman supported the Army's position[83] and, following the end of the war, moved to reorganize the military. The Navy, fearing loss of aviation and land missions, struck a compromise with their supporters in Congress.[84] The result was the National Security Act of 1947.[85] It created the "National Military Establishment" which was placed over the War and Navy Departments. It also created the Secretary of Defense to head the Establishment. However, the Secretary was given little power. The secretaries of the separate service departments kept their power and retained their cabinet seats.[86] They were even made members of the newly formed National Security Council and, thus, were not truly subordinated to the Secretary of Defense.[87] In the end, instead of unifying

[64] U.S. CONST. art. I, § 8, cl. 1.

[65] *Id.* art. I, § 8, cl. 10.

[66] *Id.* art. I, § 8, cl. 11.

[67] *Id.*

[68] *Id.* art. I, § 8, cl. 12.

[69] *Id.* art. I, § 8, cl. 13.

[70] *Id.* art. I, § 8, cl. 14.

[71] *Id.* art. I, § 8, cl. 15.

[72] *Id.* art. I, § 8, cl. 16.

[73] *Id.* art. I, § 8, cl. 18.

[74] THE FEDERALIST NO. 24 (Alexander Hamilton).

[75] KURT CAMPBELL & MICHAEL E O'HANLON, HARD POWER: THE NEW POLITICS OF NATIONAL SECURITY 7 (2006) (defining traditional hard power as "the application of military power to meet national ends.").

[76] This success in preventing coup d'états led Samuel Huntington to say in 1957, "[t]he problem in the modern state is not armed revolt but the relation of the expert to the politician." HUNTINGTON, *supra* note 47, at 20.

[77] Goldwater-Nichols Defense Reorganization Act of 1986, Pub. L. No. 99-43, 100 Stat. 992 [hereinafter Goldwater-Nichols Act].

[78] James R. Locher, III, *Taking Stock of Goldwater-Nichols*, JOINT FORCES Q., Autumn 1996, at 10.

[79] James R. Locher, III, *Has it Worked? The Goldwater-Nichols Reorganization Act*, 14 NAVAL WAR C. REV. 96 (2001).

[80] Locher, *supra* note 79, at 97.

[81] *Id.*; Dr. Charles A. Stevenson, *Underlying Assumptions of the National Security Act of 1947*, 48 JOINT FORCES Q. 129, 130 (2008).

[82] JAMES R. LOCHER III, VICTORY ON THE POTOMAC: THE GOLDWATER-NICHOLS ACT UNIFIES THE PENTAGON 20–21, 24–25 (3d prtg. 2007); *see also* Stevenson, *supra* note 81, at 130; Locher, *supra* note 79, at 98.

[83] Locher, *supra* note 79, at 97–98.

[84] *Id.* at 100.

[85] National Security Act of 1947, Pub. L. No. 80-53, § 101, 61 Stat. 496 (amended 2007) [hereinafter National Security Act of 1947]. *See also* Stevenson, *supra* note 81, at 130.

[86] National Security Act of 1947, *supra* note 85.

[87] *Id.*

the military departments, the National Military Establishment merely added another layer of bureaucracy.[88]

In 1949, Congress passed legislation that created the DoD and the position of Chairman of the Joint Chiefs of Staff (JCS).[89] President Truman envisioned a principal military advisor to thwart JCS operation by consensus.[90] In addition, the separate military departments were subordinated to the DoD.[91] Their respective secretaries lost their cabinet seats and were removed from the National Security Council.[92]

In 1958, President Dwight D. Eisenhower revisited the organizational issues that he experienced while serving as the Supreme Allied Commander during WWII. Although the 1958 legislation moved the operational chain of command from the service secretaries to the unified commanders, "the organizational changes were not effectively implemented."[93]

The status remained essentially the same between 1958 and 1983. Multiple military failures during that period were blamed on these organizational problems, including Vietnam, Desert One, Beirut, and Grenada.[94] Two main concerns arose. First, the President, the Secretary of Defense, and Congress were not receiving informed and timely advice on defense matters from the military.[95] Second, the separate services were not organized properly to conduct successful joint operations.[96]

Prior to Goldwater-Nichols, the four services had tremendous power to shape defense operations and even national foreign policy.[97] If the President or the Secretary of Defense wanted to implement policy and organizational changes that the separate services did not agree with, the separate services would take various actions to frustrate and even thwart the executive intent.[98] Senior military officers would contact their allies in Congress to create legislative hurdles to the new proposals.[99] The services would also delay implementation of the executive proposals at every step of the process.[100] Thus, there was an imbalance of power between the three parties: the executive was weak to the point that it was having trouble operating as the constitution prescribed; the military had grown too powerful as a result of personal alliances to individual members of Congress; and Congress had increased its power by forming individual relationships with senior military officials.

Goldwater-Nichols addressed this imbalance between the military and civilian control of the military. Ultimately, Congress organized the military in such a way as to give the Secretary of Defense greater control over the four services under a more unified military. The Act also ensured that both Congress and the executive received timelier and higher quality advice from the military.[101]

c. The Goldwater-Nichols Defense Reorganization Act of 1986.[102]

In 1986, after four years of effort, Congress passed the Goldwater-Nichols Act of 1986. Congress's stated intent with the Goldwater-Nichols Act was:

> (1) To reorganize the Department of Defense and strengthen civilian authority in the Department;
>
> (2) To improve the military advice provided to the President, National Security Council, and the Secretary of Defense;

[88] Stevenson, *supra* note 81, at 130; *see also* Locher, *supra* note 79, at 98.

[89] Locher, *supra* note 79, at 98.

[90] *Id.* at 101.

[91] *Id.*

[92] *Id.*

[93] According to James Locher,

> The 1958 legislation removed the service secretaries and chiefs from the operational chain of command, in order to strengthen civilian control, as Eisenhower wished. It also gave the unified commanders full operational command of assigned forces. However, those provisions were not effectively implemented. The military departments retained a de facto role in the operational chain of command and never complied with the provision strengthening the unified commanders.

Id. at 101.

[94] LOCHER, *supra* note 82, at 218, 45–46, and 127–29 (discussing Vietnam, Desert One, Beirut, and Grenada, respectively); Locher, *supra* note 79, at 99.

[95] LOCHER, *supra* note 82, at 79–80, 325.

[96] *Id.* at 325.

[97] Locher, *supra* note 79, at 103.

[98] *Id.*; *see also* LOCHER, *supra* note 82, at 15.

[99] Locher, *supra* note 79, at 106; *see also* LOCHER, *supra* note 82, at 15–16.

[100] Locher, *supra* note 79, at 99, 103; *see generally* LOCHER, *supra* note 82, at 15–31.

[101] Goldwater-Nichols Act, *supra* note 77; *see also* Locher, *supra* note 79, at 99.

[102] This is an extremely abbreviated synopsis of one of the most important pieces of defense legislation in our country's history. The purpose of this article is not to review the Goldwater-Nichols Act, however. I cover it only to address the balance (or imbalance) of power issues between the legislature, executive, and the military. Throughout this section, I refer simply to "Congress." This is a colossal generalization that does not do justice to the principles, such as Senators Goldwater and Nunn and Congressman Nichols who initiated, worked on, debated, and ultimately moved the Act through Congress. Nor does it do justice to those who opposed the Act every step of the way, such as Secretary John Warner, in such a professional manner as to make this Act one of the most thoroughly and professionally debated Acts in our country. For an extremely detailed account of the creation of the Goldwater-Nichols Act, see LOCHER, *supra* note 82.

(3) To place clear responsibility on the commanders of the unified and specified combatant commands for the accomplishment of missions assigned to those commands;

(4) To ensure that the authority of the commanders of the unified and specified combatant commands is fully commensurate with his responsibility of those commanders for the accomplishment of missions assigned to those commands;

(5) To increase attention to the formulation of strategy and contingency planning;

(6) To provide for more efficient use of defense resources;

(7) To improve joint officer management policies; and

(8) Otherwise to enhance the effectiveness of military operations and improve the management and administration of the Department of Defense.[103]

In strengthening the Executive's control over the military, Congress ultimately forfeited much of the power it had gained and exerted since 1947. Congress realized the military was too powerful and independent and that the Executive could not effectively control it.[104] This independence, from the Executive and between the separate services, detrimentally affected military operations and detracted from the advice given to Congress and the executive.

The Goldwater-Nichols Act has seen mixed success. With regard to the areas that were most pressing to its namesake, the stature of the Secretary of Defense,[105] the quality of advice to the President and Secretary of Defense,[106] joint officer management,[107] and, most importantly, military effectiveness,[108] the act has been a success as these areas have seen marked improvements. However, strategy formulation,[109] efficient use of resources,[110] and defense management and administration[111] remain troubled and little improved, if at all.

[103] Goldwater-Nichols Act, *supra* note 77.

[104] *Id.*; Locher, *supra* note 79, 101.

[105] Locher, *supra* note 79, at 109.

[106] *Id.* at 109–10.

[107] *Id.* at 112.

[108] *Id.* at 111.

[109] *Id.*

[110] *Id.*

[111] *Id*. at 112.

D. Summation—The Judge Advocate's Client

The unitary executive theory has gained prominence of late with its proponents in the second Bush administration.[112] According to Professor Miller and other proponents of this theory,[113] the Government attorney is situated within a constitutional framework in which the executive branch as a whole is treated as a single department. Proponents of the unified executive theory believe that all of the executive power derived from the Constitution rests in the President.[114] Under this theory, an agency attorney, as an officer and employee of an executive department, reports ultimately to the President. Accordingly, "the attorney's obligation is most reasonably seen as running to the executive branch as a whole and to the President as its head."[115]

However, the unified executive theory does not take into account the bifurcated structure of civil-military relations as mandated by the Constitution. Because of this constitutional "balance of power over the military," some scholars have argued the military is "more properly understood as a national agency with controls explicitly divided between the executive and legislative branches."[116] They assert that "the military is not under the control of the executive branch in the same way as other executive agencies"[117] and that "[m]aintaining this deliberate and carefully crafted balance of authority is vital to the effective functioning of the military and, more importantly, to the security of the nation.[118] In short, the President does not have exclusive control over matters related to the military.[119]

The purpose of this article is not to enter the debate on the executive power and civil-military relations and propose a definitive solution. An understanding of the nature of the military is essential, however, for the JA to understand what his role and responsibilities are and with whom his loyalties lie.

No matter how you classify the military, it is unique among federal entities. No executive agency is mentioned in the Constitution, and understandably so; their existence

[112] *See* Dana Milbank, *In Cheney's Shadow, Counsel Pushes the Conservative Cause*, WASH. POST, Oct. 11, 2004, at A21, *available at* http://www.washingtonpost.com/wp-dyn/articles/A22665-2004Oct10.html; *Frontline: Cheney's Law* (PBS television broadcast Oct. 16, 2007), transcripts and video *available at* http://www.pbs.org/wgbh/pages/front line/cheney/etc/script. html. *See also* Sulmasy & Yoo, *supra* note 17.

[113] *See generally* Evan Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 U. KAN. L. REV. 1075, 1077 (1997); Sulmasy & Yoo, *supra* note 17.

[114] U.S. CONST. art II, § 1.

[115] Miller, *supra* note 22, at 1298.

[116] Jensen & Corn, *supra* note 47, at 560.

[117] *Id.* at 559.

[118] *Id.* at 560.

[119] *See* Hansen, *supra* note 47, at 627.

doesn't present a threat to a republican nation like that of the military. Nor are they as vital to preserving it. This is the client of the JA.

As a result of the civilian controls, the JA must always understand that, along with his duties and responsibilities as an attorney, he also has the duty of military obedience. It is for this reason that the agency model is the most appropriate model for client representation in the military.

IV. The Judge Advocate's Place in the National Security Legal Apparatus

Along with JAs, there are multiple other legal organizations that provide legal advice to our country relating to military and national security matters.

A. Office of Legal Counsel

The Office of Legal Counsel (OLC) is a subdivision of the U.S. Justice Department comprised of twenty-four attorneys that "provides authoritative legal advice to the President and all the Executive Branch agencies."[120] The Attorney General was created by The Judiciary Act of 1789 and is statutorily required to give his advice and opinions on questions of law when required by the President.[121] The Attorney General must also render his legal opinion when required by a head of an executive department.[122]

The Attorney General has delegated much of his authority to render legal opinions to OLC.[123] The Office of Legal Counsel "drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and offices within the Department."[124] The Office of Legal Counsel opinions are published as opinions of the Attorney General.[125]

The President and the various agencies of the Executive Branch rely on OLC opinions when creating policy decisions.[126] With respect to the military, subsection (3) of 28 C.F.R. § 25 specifically gives OLC the responsibility of "advising with respect to the legal aspects of treaties and other international agreements."[127]

The OLC is headed by an Assistant Attorney General. Both the Attorney General and Assistant Attorney General in charge of OLC are appointed by the President and confirmed by the Senate.[128] The "[Office of Legal Counsel] lawyers are generally elite lawyers who have completed prestigious clerkships and have experience in federal statutory and constitutional analysis."[129] The Office of Legal Counsel opinions are treated as binding throughout the Executive Branch and can only be overturned by the President or the Attorney General."[130]

The OLC's unique mission puts it in somewhat of an ethical dilemma. There is a need for it to be balanced and objective in its opinions, sometimes quasi-judicial. Scholars have differing views on the degree to which OLC should be quasi-judicial, on the one hand, or an advocate for the President's position(s), on the other.[131] Recent writings on the topic by prior OLC attorneys indicate that there is an institutional norm in favor of independence and accuracy.[132] As Tung Yin points out, though, these are internal norms, not constitutional directives.[133]

B. Department of Defense General Counsel

The position of the General Counsel (GC) of the DoD was established in 1953 by the Reorganization Plan No. 6 of 1953 and by Defense Directive 5145.1.[134] The DoD/GC is statutorily DoD's "chief legal officer."[135] Among other

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[120] U.S. Dep't of Justice, Office of Legal Counsel, About OLC (n.d.), *at* http://www.justice;.gov/olc/.

[121] 28 U.S.C. § 511 (2006); *see also* An Act Created to Establish the Judicial Branch of the United States § 35, 1 Stat. 73 (1789) (also known as "The Judiciary Act of 1789") ("And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to . . . give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.")

[122] 28 U.S.C. § 512 (2006).

[123] 28 C.F.R. § 0.25 (2006).

[124] U.S. Dep't of Justice, Office of Legal Counsel, About OLC (n.d.), at http://www.justice.gov/olc/.

[125] 28 C.F.R. § 0.25 (2008). *See also* Yin, *supra* note 1, at 476.

[126] Turner, *supra* note 9, at 41.

[127] 28 C.F.R. § 25(3) (2006).

[128] 10 U.S.C. §§ 503, 506 (2006).

[129] Yin, *supra* note 1, at 500.

[130] Harris, *supra* note 1, at 423. *See also* Randolph D. Moss, *Recent Developments Federal Agency Focus: The Department of Justice: Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1308 (2000); Yin, *supra* note 1, at 501.

[131] For a comprehensive discussion on OLC attorneys, see Harris, *supra* note 1, at 423.

[132] *See* Memorandum from the U.S. Department of Justice, Office of Legal Counsel to Attorneys of the Office (16 May 2005) (providing the best practices for Office of Legal Counsel Opinions). *See also* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 33 (2007); Yin, *supra* note 1, at 487.

[133] Yin, *supra* note 1, at 487.

[134] U.S. Dep't of Def., Office of the General Counsel, http://www.dod.mil/dodgc/.

[135] 10 U.S.C. § 140 (2006).

duties, DoD/GC is responsible for "provid[ing] advice to the Secretary and Deputy Secretary of Defense regarding all legal matters and services performed within, or involving, the Department of Defense" and "establish[ing] DoD policy on general legal issues, determin[ing] the DoD positions on specific legal problems, and resolv[ing] disagreements within the DoD on such matters."[136]

Department of Defense regulations assign primacy to the DoD/GC opinions when there is a conflict with another DoD attorney.[137] This primacy does not include executive authority over the respective services' Judge Advocates General or their JAGC.[138] The DoD/GC is a presidentially-appointed position.[139]

C. Military Department General Counsel

The respective military departments all have general counsel as well.[140] The Department of the Army General Counsel (DA/GC) is the "chief lawyer of the Army ultimately responsible for determining the Army's position on any legal question."[141] The DA/GC serves as legal counsel to the Secretary of the Army, Under Secretary, five Assistant Secretaries, and other members of the Army Secretariat.[142] According to DA, the General Counsel also exercises technical supervision over the Office of The Judge Advocate General, the Office of the Command Counsel, Army Materiel Command, and the Office of the Chief Counsel, Corps of Engineers.[143] The military departments' GC are presidentially-appointed positions.[144]

Along with the JAGC of the respective services, these executive branch legal organizations help to advise the President and DoD on military and national security matters. They serve complimentary roles and generally maintain excellent relations with one another. These relationships were stressed in the aftermath of the terrorist attacks of 9/11.[145] A re-examination of the basic foundations of the JA's role, and his relationships to the aforementioned executive branch legal organizations, is now in order.

V. The Judge Advocate's Duties to his Client

Now cognizant of who JAs are, the other executive legal organizations that advise the executive on national security and military issues, and the unique nature of the U.S. military as a federal entity, we must understand what the JA's duties are to his client, the Army.

Judge advocates, like all attorneys, must conform their practice of law to their individual state bar's standards of professional conduct.[146] Unlike private attorneys, however, JAs must conduct themselves within the parameters of the professional rules of conduct of their respective branch of service as well.[147] Most of the time, these rules are the same; the respective services have modeled their rules of professional conduct after the ABA's *Model Rules*. A legal analytical framework can be derived from these sources.

The American Bar Association first promulgated its *Model Rules of Professional Conduct* in 1983 in its pursuit of assuring the highest standards of professional competence and ethical conduct.[148] Rule 1.2 addresses the scope of an attorney's representation. While encouraging candor when advising a client, Rule 1.2(d) also imposes limits on the advice that an attorney may provide.

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal and moral consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.[149]

Thus, while the attorney should be frank and honest with the client, he cannot be so candid as to advise the client how to break the law.[150]

Model Rule 2.1 addresses an attorney's role as an advisor to a client.[151] It provides, "[i]n representing a client,

[136] U.S. Dep't of Def., Office of the General Counsel, http://www.dod.mil/dodgc/. *See also* Peretz, *supra* note 24, at 51.

[137] *See* U.S. DEP'T OF DEF., DIR. 5145.01, GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE (2 May 2001).

[138] Turner, *supra* note 9, at 41.

[139] 10 U.S.C. § 140 (2006).

[140] *See generally id.* § 3019 (Army); *id.* § 5019 (Navy); and *id.* § 8019 (Air Force).

[141] *Id.* § 3019. Office of the Army General Counsel, http://www.hqda.army.mil/ogc/.

[142] Office of the Army General Counsel, http://www.hqda.army.mil/ogc/.

[143] *Id.*

[144] 10 U.S.C. §§ 3019, 5019, 8019 (2006).

[145] *See supra* Part I & note 4.

[146] AR 27-26, *supra* note 7, r. 8.5(e) & (f).

[147] *Id.*

[148] *Preface to* MODEL RULES, *supra* note 7.

[149] *Id.* at R. 1.2.

[150] *Id.*

[151] *See id.* Of note, forty-four state bars, including that of the District of Columbia, have adopted Model Rule 2.1 verbatim. Of the states that did not: Georgia and Texas have a slightly modified version of Rule 2.1; California has a rule regarding an attorney's advisory capacity which uses entirely different language; and Maine, Minnesota, New York, and North Dakota do not have a discernable rule in place regarding an attorneys advisory capacity. This does not mean, however, that these seven state bars do not interpret or regulate the conduct of their attorneys in the same substantive way as the other forty-four states. *See generally* Cornell

a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but other considerations such as moral, economic, social, and political factors, which may be relevant to the client's situation."[152]

The comments to Rule 2.1 are equally instructive. They stress the need for honest advice and, "[a]lthough a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."[153]

The respective services have regulations that guide the professional conduct of their JAs.[154] Their rules of professional conduct have been modeled after the ABA *Model Rules*.[155] All of the services have adopted Rule 2.1. Of interest, the Navy has slightly changed the emphasis on the attorneys conduct by stating that, "[in] rendering advice, a lawyer *should* refer not only to law but other considerations . . . " The Army and Air Force kept the model language, " . . . a lawyer *may* refer to . . . "[156] While not making it a mandatory duty, the Navy has gone a step further in guiding its attorneys by making it the default position to advise its clients about other considerations instead of it being an option as it is under Rule 2.1 of the ABA, Army, and Air Force's rules of professional conduct.[157]

These rules seem straightforward enough, but what do "independent professional judgment" and "candid advice" really mean?

A. Independent Professional Judgment and Candid Advice

"Candid" advice is self-explanatory: "[a] client is entitled to straight forward advice expressing the lawyer's honest assessment."[158] A JA should not be "deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."[159] This duty is limited only by the JA's endeavor to "sustain the client's morale" and phrase the advice in as "acceptable form as honesty permits."[160]

Independent professional judgment, however, is more nuanced. Independent means independence at multiple levels: independent from the executive branch and independent from each level of the technical chain of command. For the JA, independence from the executive branch must include the ability to independently interpret all legal matters for the commander and not be bound by any executive branch interpretations.

The executive by its very nature is a political entity. The President is elected by the populace. He has the authority to nominate[161] his agency heads and fire them at will.[162] The Attorney General, DoD/GC, and DA/GC are all politically appointed positions and serve at the pleasure of the President.[163] The Office of Legal Counsel, while traditionally thought to be an objective arbiter of the law, is headed by a presidentially-selected attorney and can be politicized.[164]

The military's legal advice, on the other hand, must be free from political bias. Advice based on politicized opinions will ultimately affect the military's ability to give quality advice and information to Congress and the executive. If the military is bound by executive legal opinions (such as from OLC, DoD/GC, or DA/GC), Congress' ability to be well informed by the military will be hampered.[165]

This in no way suggests that the military has the authority to question the executive's foreign policy decisions, as those decisions are strictly under the sole purview of the executive.[166] If the executive's orders confine themselves to the law, the military must execute those orders, and the underlying policies, without question.[167] This military obedience is central to civilian

University Law School-Legal Information Institute, American Legal Ethics Library, http://www.law.cornell.edu/ethics/ listing.html.

[152] *Id.*

[153] MODEL RULES, *supra* note 7, R. 2.1 (2009).

[154] *See* AR 27-26, *supra* note 7, r. 1.13; USN RPC, *supra* note 7, r. 1.13; USAF RPC, *supra* note 7, r. 1.13.

[155] Slight changes were made where necessary due to the unique nature of military service. *See generally* RULES OF PROFESSIONAL CONDUCT, *supra* note 7 (providing references to the respective services' Rules of Professional Conduct).

[156] *See* USN RPC, *supra* note 7, r. 2.1; USAF RPC, *supra* note 7, r. 2.1; AR 27-26, *supra* note 7, r. 2.1; MODEL RULES, *supra* note 7, R. 2.1.

[157] *See* USN RPC, *supra* note 7, r. 2.1; USAF RPC, *supra* note 7, r. 2.1; AR 27-26, *supra* note 7, r. 2.1; MODEL RULES, *supra* note 7, R. 2.1.

[158] AR 27-26, *supra* note 7, r. 2.1 cmt.

[159] *Id.*

[160] *Id.*

[161] While the President can nominate people he chooses for office, he can appoint officers of the United States only with the "Advice and Consent of the Senate." U.S. CONST. art. II, § 2, cl. 2.

[162] 3 U.S.C. § 301 (2006). *See also* Myers v. United States, 272 U.S. 52, 119 (1926).

[163] *See supra* notes 128, 137, 142, and accompanying text.

[164] As we've seen with post 9/11 opinions by Yoo and Bybee. *See generally* Harris, *supra* note 1; Op. Off. Legal Counsel, *Best Practices for OLC* Opinions (May 16, 2005); Memorandum for the Files, Office of Legal Counsel, Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001 (Jan. 15, 2009).

[165] Jensen & Corn, *supra* note 47, at 571–76.

[166] United States v. Curtiss-Wright Exp. Corp. et al., 299 U.S. 304, 319–21 (1936).

[167] However, an executive's policy may be collaterally affected to the extent that it translates into unlawful orders given to the military, orders that cannot be followed.

control over the military and the democratic ideals we cherish.

1. Independent Advice Supported by Congressional Action

Over the past twenty-five years, the executive has tried on numerous occasions to subordinate the uniformed JAGC to civilian legal offices in the executive. Congress has explicitly stopped those attempts each time.

During the debates that ultimately led to the Goldwater-Nichols Act, Congress considered combining the General Counsels and the JAGC but expressly rejected the idea.[168] Congress noted with regard to the Navy that it saw a distinct role of the Navy General Counsel, "as a key assistant to the Secretary of the Navy particularly on matters directly related to civilian control of the military."[169]

On 3 March 1992, the Deputy Secretary of Defense designated the DoD/GC as the "Chief Legal Officer" of the respective military departments and placed the DoD/GC in a hierarchal position superior to the uniformed JAs.[170] During the Senate confirmation hearings of David Addington as the nominee for the DoD/GC, Congress showed its concern about this arrangement and asked pointed questions about the wisdom of the 3 March designation.[171] In response to Congress's inquiries (and implied warning), DoD halted its attempt at consolidation.[172]

The executive again attempted to subordinate the JAGC to their respective military department GCs during the post 9/11 debates regarding detainees and interrogation techniques.[173] In response, Congress added subsection (e) to 10 U.S.C. § 3037 which statutorily guaranteed JA independence from DoD interference.[174] Subsection (e) states that no officer or employee of the DoD may interfere with

> (1) the ability of the Judge Advocate General to give independent legal advice to the Secretary of the Army or the Chief of Staff of the Army; or
>
> (2) the ability of judge advocates of the Army assigned or attached to, or performing duty with, military units to give independent legal advice to commanders.[175]

Absent from this section are officers and employees of other executive agencies. This would include OLC.

2. Independent from the Executive Branch

A JA's ability to give candid advice independent from executive branch attorneys is a sensitive subject that strikes to the core of civil-military relations. For the JA's duty to give independent advice, free from executive interference, stems from the military's relationship with the executive and legislative branches of government. Thus, the JA's need for independence in professional (i.e. legal) matters must be critically reviewed and analyzed, paying particular attention to his military duty of obedience to civilian controls. The two are compatible but must be understood by the JA and executive attorneys alike to better facilitate relations and advice to the government on national security and military matters.

Any discussion on the topic of civil-military relations should start with the influential scholar, Samuel Huntington.[176] According to Huntington, "the principal focus of civil-military relations is the relation of the officer corps to the state"[177] for it is at this relationship where the functional and social pressures of national defense come to a head. Thus, Huntington states the "supreme military virtue is military obedience."[178]

Military obedience, however, conflicts with nonmilitary values at certain points.[179] These conflicts define the

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[168] Turner, *supra* note 9, at 41; *see generally* Kurt A. Johnson, *Military Department General Counsel as "Chief Legal Officers": Impact on Delivery of Impartial Legal Advice at Headquarters and in the Field*, 139 MIL. L. REV. 1 (1993).

[169] Johnson, *supra* note 168, at 2 (quoting S. REP. No. 280, 99th Cong., 2d Sess. 63 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2168, 2231).

[170] *Id.*

[171] *Id.* at 3; Turner, *supra* note 9, at 41.

[172] Johnson, *supra* note 168, at 3; Turner, *supra* note 9, at 41.

[173] Turner, *supra* note 9, at 40.

[174] 10 U.S.C. § 3037(e) (2006). An identical provision was added to the Navy, Air Force, and Marine Corps TJAG authorizing statutes as well. *See id.* §§ 5148(e), 8037(f) and 5046(c).

[175] *Id.* § 3037(e).

[176] Samuel Huntington is generally held to be one of the preeminent minds on modern civil-military relations. His 1957 book, *The Soldier and the State: The Theory and Politics of Civil-Military Relations, supra* note 47, along with Samuel E. Finer's *The Man on Horseback: The Role of the Military in Politics* (New York: Praeger 1962) and Morris Janowitz's *The Professional Soldier: A Social and Political Portrait* (New York: Free Press 1971), are considered to be the seminal works on modern civil-military relations. *See* Peter D. Feaver, *An American Crisis in Civilian Control and Civil-Military Relations?*, 17 THE TOCQUEVILLE REV. 1, 159 (1996). MICHAEL C. DESCH, CIVILIAN CONTROL OF THE MILITARY: THE CHANGING SECURITY ENVIRONMENT (Johns Hopkins University Press 1999).

[177] HUNTINGTON, *supra* note 47, at 3.

[178] *Id.* at 76. *See supra* Part III.B (discussing military obedience).

[179] HUNTINGTON, *supra* note 47, at 72–79.

parameters of military obedience. According to Huntington, there are four conflicts.[180]

The first conflict is between military obedience and political wisdom.[181] In this conflict, a military commander may question the political wisdom of an order to use military force given by the statesman. The military commander is the expert of military action, planning, training, and equipping and in the use and movement of those forces engaged in combat. The statesman, on the other hand, is the expert in politics. In this situation, the military commander must defer to the statesman or politician and his realm of expertise.[182]

The second conflict Huntington describes is between military obedience and military competence.[183] In this conflict, actions by the statesman interfere with the military's ability to succeed in their mission.[184] Unlike the conflict with political wisdom, the expert in this conflict is the military commander.[185] The politician must yield to the commander's expertise in the realm of military competence.[186]

The third conflict is between military obedience and law.[187] When dealing with this conflict, the decision-making process becomes complicated. An example would be when the statesman gives an order to the military commander to invade Iran and to kill all the women and children in three towns near the invasion point. This order in fact contains two directives. First, there is the order to invade Iran. This decision to use armed forces is purely a political decision. Therefore, the military commander does not have the discretion to review or question it. He must follow this order.

The second order is the order to kill all women and children in three towns near the invasion point. This order is not a political decision; it involves military competence, i.e. how to implement the first order to invade Iran. In this realm, the military commander is the expert.[188] If the statesman gives this order knowing full well that it is illegal, the military commander does not have to follow that order as it is outside the constitutional authority given the statesman to command the military.

What happens however, when the statesman feels that the order is legal and the military commander questions the legality of the order? In this situation neither the statesman nor the military commander is the expert.[189] If there is no third party to settle the dispute, such as a judiciary, Huntington states that the military commander "can only study the law and arrive at his own decision."[190]

The final conflict is between military obedience and basic morality.[191] In this conflict, the statesman gives orders to the military commander that bring into question issues of human rights and basic morality.[192] In this realm, neither the statesman nor the military commander has expertise over one another.[193] Huntington points out that the statesman may disregard his own conscience for raison d'état, but questions whether that gives the statesman the right to make that choice for the military commander by subordinating him to his decision. If the order is clearly illegal, as with the order to kill the innocent women and children used above, it is outside the statesman's authority to issue. What happens when the order's legality is not clearly discernible?[194]

In this situation, the military commander has the same decision to make as the statesman: his conscience versus the good of the state. Thus, the military commander must decide whether his duty of military obedience as a Soldier must make him do something that he considers contrary to human morality.[195] Ultimately, Huntington reasons that the military commander must rely on his own judgment, and those he asks for counsel, to figure out whether these orders violate basic ideas of morality.[196]

It is the third and fourth conflicts, those dealing with legality and morality, which require independent professional judgment from the JA. The military commander must determine, from his review of the applicable law, whether the statesman's order is legal. As discussed earlier, the JA's client is the Army through its authorized officials; its military commanders. Thus, the JA has an attorney-client relationship with his respective military commander so long as their dealings are official business. If the military commander has a question about the legality of an order, he must be able to ask his attorney and trust that his JA will not only act in his best interests but give him honest, candid advice.

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[180] *Id.* at 74–79.

[181] *Id.* at 76.

[182] *Id.*

[183] *Id.*

[184] *Id.* at 77.

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *See id.* at 76.

[189] *Id.* at 78.

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.*

Another example for analysis would be a period of civil unrest in the United States. A disagreement between the President and Congress has created a national security crisis. The President, wanting to protect the country, asks OLC for an opinion on his possible legal options to restore normalcy. The Office of Legal Counsel issues an opinion that says, among other things, that the President can legally order the military to disband Congress. Relying on OLC's legal opinion, the President orders the Secretary of Defense to order the military to disband Congress. After receiving this unprecedented order from the Secretary of Defense, the Army Chief of Staff turns to the Judge Advocate General and asks if it's legal. What is the Judge Advocate General's response?

Obviously, this is an unconstitutional use of executive power. As a military officer sworn to protect the Constitution against all enemies, foreign and domestic, the Chief of Staff could not follow this order and maintain his oath of office.[197]

But, practically, how should the Judge Advocate General respond? If JAs are not allowed to provide independent advice, what is the correct response? Can, "illegal order–do not follow," be the legal answer? Will the answer be in the best interest of the client? Will the Judge Advocate General be forced to violate the professional rules of conduct of both his state bar and Army Regulation?

Proponents of the Unitary Executive theory say that there is only one executive power and that the JA's advice must ultimately represent the President's interest.[198] Thus, as an attorney for the executive, the Judge Advocate General would have to follow the opinion of OLC because OLC interprets the law for the executive branch and is generally held to be binding on all executive branch agencies.[199] The OLC has specifically opined that the military can legally disband Congress. Therefore, the orders from the Secretary of Defense would be legal. The Judge Advocate General could advise the Chief of Staff on other considerations in accordance with Rule 2.1[200] but his legal opinion would ultimately be in conflict with his duty to his client.

This hypothetical is extreme, and purposely so, to facilitate the discussion, but there are situations in which this type of issue can challenge a JA in the field today. And, as previously discussed, these situations are now routinely happening in deployed environments at the brigade level.

As the following sections will show, following illegal or immoral orders from the executive, or even interpreting them to facilitate the immoral policy, can result in personal criminal liability for both the military commander and the JA.

3. Independent Because Military Commander Is Personally Liable for his Actions

A JA's advice must also be independent to assist the individual commanders he advises. Military commanders can be found personally liable for committing illegal acts under international law. It is not a defense that they were following executive orders or acting in furthering of their official position.[201] Thus, military commanders should know if they are being ordered to do something illegal. More specifically, it is the JA's duty to tell his client, the commander, that he is about to do something illegal.

Following the conclusion of World War II, the Allies met in London[202] to agree on a course of action "for the just and prompt trial and punishment of the major war criminals of the European Axis."[203] From those meetings, the Allies created the Constitution of the International Military Tribunal.[204] Article 7 of the London Charter stated that a Defendant was personally liable for his conduct regardless if he was acting on behalf of the state at the time.[205] In addition, Article 8 specifically states that, "[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility."[206] The subsequent judicial decisions at Nuremburg followed Article 8 of the London charter.

Take our hypothetical again where the statesman, in this case the President, ordered the military commander to invade Iran and kill all the women and children in three towns near the invasion point. If the commander follows this order and kills all of the women and children in the identified towns, he could be personally tried and found criminally liable for his actions. Moreover, under the precedent set at Nuremburg, the military commander could not use as a defense the fact that he was given the orders to

[197] *See* 10 U.S.C. § 3331 (2006).

[198] *See* Miller, *supra* note 22, at 1298.

[199] While OLC's binding nature is established within the executive branch, it has never been addressed by the federal courts.

[200] *See supra* note 7.

[201] *See infra* note 206 and accompanying text.

[202] Nuremburg London Agreement, Aug. 8, 1945. Agreement made by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics.

[203] The Constitution of the International Military Tribunal art. 1, Aug. 8 1945 [hereinafter The London Charter] (also known as the London Charter of the International Military Tribunals.).

[204] *Id.*

[205] *Id.* art. 7 ("Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.").

[206] *Id.* art. 1 (" . . . but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.")

kill the women and children by the statesman, his superior in the chain of command.

4. Independent Because the Judge Advocate Is Personally Liable for His Professional Conduct

A JA's advice must also be independent because he is personally subject to criminal liability for his own professional conduct, both internationally and domestically.

a. Under International Law

Internationally, there are multiple examples of attorneys being convicted of crimes stemming from their legal duties. Precedents from the post World War II prosecutions of Nazis shows that attorneys can be held liable as accomplices when their actions directly impacted "how their clients' crimes were perpetrated."[207]

Franz Schlegelberger, for example, was tried by the allies in post World War II for his role as the German acting Minister of Justice. Herr Schlegelberger was found "guilty of instituting and supporting procedures for the wholesale persecution of the Jews and the Poles."[208] The military tribunal further recorded that his "attitude towards atrocities committed by the police must be inferred from his conduct," noting he quashed the proceedings of at least one policemen convicted of brutality even after the post trial proceedings held that revision proceedings were unfounded.[209] Even though Herr Schlegelberger ultimately resigned from his position, the tribunal found that, "Schlegelberger . . . took over the dirty work which the leaders of the state demanded, and employed the Ministry of Justice as a means for exterminating the Jewish and Polish populations, terrorizing the inhabitants of the occupied countries, and wiping out political opposition at home."[210]

Herbert Klemm was another Nazi attorney convicted by the military tribunal. Among other things, as a prosecutor in the Ministry of Justice dealing with acts against the state and Nazi party, Herr Klemm ordered that criminal procedures dealing with more severe interrogations by the Gestapo were to be sent to him directly instead of being adjudicated in the normal criminal forums.[211] The result was that the state convicted many people based upon confessions illegally obtained through severe torture by the Gestapo that most likely would have been at least questioned by the Ministry of Justice. Regarding this action, the military tribunal stated:

> Certainly it can hardly be assumed that the defendant Klemm was unaware of the practice of the Gestapo with regard to obtaining confessions. He had dealt with this matter during his early period with the department of justice. It is hardly credible that he believed that the police methods which at an earlier time were subject to some scrutiny by the Ministry of Justice, had become less harsh because the Gestapo, in October of 1940, was placed beyond the jurisdiction of law.[212]

Von Ammon, another German attorney convicted after the war, became a Nazi in 1937 and worked in the Ministry of Justice.[213] In 1942, working as a Ministerial Counselor in the Ministry of Justice, Von Ammon was in charge of the Ministry section that handled Nacht und Nebl cases from the occupied territories.[214] In 1944, Von Ammon made a report which stated that the death sentence averaged one in three days for the entire period that the Nacht und Nebl laws were in existence in the occupied territories.[215] While he did not enact any of the legislation, Von Ammon knowingly worked within the system and was directly responsible for the death sentences of numerous Jews and Poles. Von Ammon was found guilty of war crimes and crimes against humanity.[216]

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[207] *See* Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347, 359 (2007). *See also* 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1083 (1951) [hereinafter NUERNBERG MILITARY TRIBUNALS] (record of ten German attorneys tried by military tribunal).

[208] NUERNBERG MILITARY TRIBUNALS, *supra* note 207, at 1083. *See also* Markovic, *supra* note 207, at 359.

[209] NUERNBERG MILITARY TRIBUNALS, *supra* note 207, at 1085–86. In other words, Herr Schlegelberger waived convictions of brutality against policemen even though the convictions stood up to appellate scrutiny.

[210] *Id.* at 1086.

[211] *Id.* at 1088.

[212] *Id.* at 1093.

[213] *Id.* at 1033.

[214] "Nacht und Nebl" translates from German into "Night and Fog," referring to prisoners from occupied German territories disappearing into the night and fog. On 7 December 1941, Germany introduced the Nacht und Nebl laws for the Occupied German territories in order to fight those resisting Nazi rule and keep the local populace subdued. On 12 December 1941, Keitel issued a directive which explained Hitler's orders: "Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminals do not know the fate of the criminal." He further expanded on this principle in a February 1942 letter stating that any prisoners not executed within eight days were "to be transported to Germany secretly, and further treatment of the offenders will take place here; these measures will have a deterrent effect because—A. The prisoners will vanish without a trace. B. No information may be given as to their whereabouts or their fate." The History Place—The Night and Fog Decree,

http://www.historyplace.com/worldwar2/timeline/nacht.htm (last visited Mar. 9, 2011).

[215] NUERNBERG MILITARY TRIBUNALS, *supra* note 207, at 1033.

[216] *Id.* at 1034.

Joseph Alstoetter was another attorney convicted during the Nuernberg[217] tribunals. Joseph Alstoetter joined the Nazi party and Schutzstaffel (SS) in 1937. Alstoetter had no hand in the enacting of the Nazi's discriminatory laws; he mainly interpreted the laws and procedures passed by the Nazi party. The tribunal noted that Alstoetter was not aware of the ultimate mass murder but that he knew the policies of the SS and, in part, its crimes. Nevertheless he accepted its insignia, its rank, its honors, and its contacts with the high figures of the Nazi regime . . . For that price he gave his name as a soldier and a jurist of note and so helped to cloak the shameful deeds of that organization from the eyes of the German people.[218]

Because of his work and general membership in the SS, Alstoetter was convicted by the tribunal.[219]

The above examples are reason for pause for all attorneys as the precedents set at Nuernberg make no distinction between civilian or uniformed attorneys.[220] While some of the German attorneys played major roles in the Nazi war crimes, such as drafting discriminatory laws and supervising Government agencies in the implementation of criminal policies, others, such as Alstoetter, essentially followed and interpreted domestic law.[221] Under this precedent, a JA would most assuredly subject himself to criminal liability for advising a military commander that an order was legal because OLC, or any executive legal organization for that matter, had previously opined that it was legal.

b. Under Domestic Law

Unlike his civilian counterpart, a JA is also criminally liable for his professional conduct under domestic law. As a military officer, a JA is subject to the UCMJ.[222] Under Article 92 of the UCMJ, a JA can be charged with dereliction of duty if he had certain duties; knew or reasonably should have known of those duties; and was willfully, or through neglect or culpable inefficiency derelict in the performance of those duties.[223]

Judge advocates have been court-martialed in the past for taking money from clients in a legal assistance capacity.[224] Recently, Captain (CPT) Randy W. Stone, a U.S. Marine JA, was charged with multiple specifications of dereliction of duty in violation of Article 92, UCMJ[225] for his conduct relating to the Haditha incident.[226] At the time of the incident, CPT Stone was the battalion JA of the unit that purportedly committed the alleged acts. When the reports came in about the shooting, CPT Stone failed to act in his legal capacity or otherwise. The command contended that CPT Stone, as the battalion JA, had a duty to report any alleged law of war violation to his higher headquarters[227] and had a duty to ensure that a thorough investigation was initiated into the alleged law of war violation.[228]

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[217] Also referred to as "Nuremberg" or "Nürnberg." Nürnberg is the German spelling. Nuremberg is the Americanized spelling. I use "Nuernberg," the least used out of the three, in order to be parallel with the title on the record of the military tribunals.

[218] NUERNBERG MILITARY TRIBUNALS, *supra* note 207, at 1176–77. *See also* Markovic, *supra* note 207, at 360.

[219] NUERNBERG MILITARY TRIBUNALS, *supra* note 207, at 1177.

[220] *See* Markovic, *supra* note 207, at 359. Markovic makes a persuasive case how John Yoo and Jay S. Bybee could be held criminally liable under international law for writing the memorandum entitled, *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340(A)*, commonly referred to as the "Torture Memo." Both were civilian attorneys in the Office of Legal Counsel at the time they drafted the memo. On 29 July 2009, the Office of Professional Responsibility (OPR) issued its final report stemming from its five-year investigation into Mr. Yoo's and Bybee's professional conduct. The OPR concluded that Mr. Yoo and Bybee engaged in professional misconduct by failing to provide "thorough, candid, and objective" analysis in their memoranda related to interrogation techniques. Consistent with OPR procedures, OPR indicated its intent to refer to finding of misconduct to the disciplinary authorities of Mr. Yoo's and Bybee's state bars. On 5 January 2010, the U.S. Associate Deputy Attorney General office decided not to adopt OPR's finding of misconduct, finding rather that Yoo and Bybee did not commit unprofessional conduct, only exercised poor judgment. *See* U.S. House of Representatives, Committee on the Judiciary—DOJ Report on Bush Administration Interrogation Memos and Related Documents, http://judiciary.house.gov/ issues_OPRReport.html.

[221] *See generally* NUERNBERG MILITARY TRIBUNALS, *supra* note 207.

[222] UCMJ art. 2 (2008).

[223] *Id.*

[224] *See, e.g.*, United States v. Martin, 56 M.J. 97 (C.A.A.F. 2001). Appellant generally told his legal clients that he was not permitted to perform the needed legal service himself, but that he had a friend or relative who could provide the service. Appellant then usually obtained a retainer check for the friend or relative, which was to be returned after the legal work was completed. He would then forge the payee's signature and cash the check. Appellant sometimes asked for payment in cash and made numerous excuses to avoid giving a receipt.

[225] In December 2006, CPT Stone was charged with three specifications of violation of Article 92: one specification of violation of a general order and two specifications of dereliction of duty. U.S. Dep't of Def., DD Form 457, Investigating Officer's Report (Aug. 1984) [hereinafter DD Form 457] (on file with author).

[226] On 10 November 2005, U.S. Marines allegedly killed twenty-four Iraqi civilians living in three housing in Haditha, Iraq. The incident began when an IED struck a supply convoy. The explosion killed Lance Corporal Miguel Terrazas. In response, the Marines allegedly went from house to house, killing the civilians inside. The Marines originally reported that fifteen civilians died in the IED blast. Further investigation questioned the Marines original account. Ultimately, eight Marines were charged in connection with the incident. To date, six have had their charges dropped and one was acquitted. The sole Marine left facing charges is going to trial on 11 April 2011. *See* Tim McGirk, *Collateral Damage or Civilian Massacre in Haditha?*, TIME, Mar. 19, 2006, *available at* http://www.time.com/ time/world/article/0,8599,1174649-2,00.html; Gillian Flaccus, *Conflicting Portraits Emerge of Accused Marine*, ASSOCIATED PRESS, Dec. 4, 2009, *available at* http://www.fox12idaho.com/Global/ story.asp?S=11604248&nav=menu439_2; *see also* www,frankwuterich .com.

[227] All Marines have a duty to report possible law of war violations to their higher headquarters. *See* U.S. MARINE CORPS, ORDER 3300.4, LAW OF WAR PROGRAM (23 Oct. 2003).

[228] DD Form 457, *supra* note 225.

Ultimately, CPT Stone was not court-martialed. The Government dropped the charges against him after a pretrial investigation recommended that there were no reasonable grounds to believe that CPT Stone committed the charged offenses.[229] The charges, however, were essentially dismissed for a lack of evidence, not because there was a foundational or jurisdictional issue with charging an attorney for negligent or reckless professional conduct. Regardless of the outcome, the fact remains that a JA may be held criminally liable for his professional conduct under the UCMJ.

5. Independent from Technical Chain of Command

A JA's advice must also be independent from other JAs in his technical chain of command. While the constitutional reasons for independence are removed when dealing with a superior JA within the same service, the professional and ethical responsibilities remain the same. Whether the superior attorney is wearing a uniform or not is immaterial.

A commander's personal criminal liability under international law is not relieved just because the JA is receiving a legal opinion or review from a civilian executive attorney or a superior JA. Nor is the JA's own personal criminal liability under both international and domestic law changed.

This aspect of independent judgment is difficult for subordinate JAs as the superior JAs in their technical chain of command can have considerable influence over their professional career. The JAGC understands this dilemma and provides guidance for its attorneys. According to the Army's *Rules of Professional Conduct*, "[t]he supervisory JA is . . . primarily a staff officer, responsible to his or her commander, and is subject to his or her command just as any other command member. Technical guidance is designed only to make the supervisory JA a more effective staff officer."[230]

In April 2009, the JAGC updated its keystone doctrinal publication, Field Manual (FM) 1-04, *Legal Support to the Operational Army*.[231] In the updates, the JAGC emphasizes the increasingly independent operation of JAs and acknowledges independence between JAs at different levels of command.[232] Paragraph 4-34 states that while "providing legal support to all levels of the command remains the chief mission of all JAGC personnel, . . . personnel at the [division and above] and the brigade level legal section may identify different ways and means to accomplish this mission."[233] Furthermore, technical guidance from the division level JA to the brigade JA is warranted where ". . . the BJA is contemplating issuing a legal opinion contrary to a legal opinion or interpretation issued by the [division level Judge Advocate]."[234] This paragraph is an implicit acknowledgement that JA at different levels of command must provide independent judgment and advice.

While recognizing the "increased decentralization inherent in the modular force" and the independence required from its JAs at different levels of command, FM 1-04 also provides useful guidance on the relationship between the brigade and division level JA.[235] As will be discussed, the importance of coordinating with other JAs and maintaining positive working relationships with all JAGC personnel is essential to mission accomplishment.

B. Duty to Communicate with Technical Chain of Command

As previously discussed, the JA owes his duty to his commander (or authorized official) and, thus, from a legal perspective, his professional conduct must be independent from superior JAs in his technical chain of command. With that said, independent from the technical chain of command must be distinguished from coordination.

"The supervisory JA of any command may communicate directly with the supervisory JA of a superior or subordinate command . . . He or she may receive and give technical guidance through these channels."[236] While the JA is ultimately responsible for his own professional conduct, only the unsuccessful JA operates in a vacuum. Coordination within the technical chain of command is essential to the JA for multiple reasons.[237]

First, and most obvious, senior JAs have more experience as both attorneys and JAs. They will be correct in their application of the law in the majority of situations. Moreover, they can provide the subordinate JA with useful and sound advice on other considerations beyond the law, just as they do with their commanders.[238]

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[229] Josh White, *Charges Dropped Against 2 Marines in Haditha Killings*, WASH. POST (Aug. 10, 2007), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/08/09/AR2007 080900696.html.

[230] AR 27-26, *supra* note 7, r. 5-2*b*.

[231] FM 1-04, *supra* note 4.

[232] *Id.* paras. 4-34 to -39.

[233] *Id.* para. 4-34.

[234] *Id.* para. 4-37.

[235] *Id.* paras. 4-34 to -39.

[236] AR 27-26, *supra* note 7, r. 5-2*b*.

[237] Policy Memorandum 06-02, Headquarters, Office of The Judge Advocate General, subject: Use of Technical Channel of Communications (10 Jan. 2006). The challenges caused by the War on Terror and resulting transformation of the Army stressed technical chain of command communications. Whether because of logistical or other interpersonal reasons, The Judge Advocate General of the U.S. Army addressed the need for communication and coordination with the technical chain of command.

[238] *See generally* AR 27-6, *supra* note 7, r. 2.1; USN RPC, *supra* note 7, r. 2.1; USAF RPC, *supra* note 7, r. 2.1.

Second, superior JAs have a greater compliment of both JAs and paralegals in their office to assist in their mission.

Third, higher level commands are generally better staffed and equipped. A division or corps Staff JA will have access to a greater number of staff officers in a wider variety of specialties to consult than the Brigade JA. As with senior JAs, these staff officers will also have more experience in their respective areas of expertise. Along these lines, division, corps, and echelons above corps routinely have joint missions and officers from different services. This intra-service staffing also enhances the resources the senior JA has at his disposal.

Fourth, and of greater importance in deployed environments, division and higher level headquarters are generally located on more robust operating bases. These bases usually have both greater connectivity and better facilities to store resources in hard copy form. Many times the brigade JA will simply not have access to the resources needed to adequately respond to a legal issue. Coordination in these situations is essential.

Lastly, coordination is also essential to help the JAGC improve itself. As Major General Scott Black, then The Judge Advocate General of the U.S. Army, pointed out in 2006, "[g]ood stewardship of our Army and [JAGC] is a shared responsibility at all levels. Do not hesitate to use our channels of communications when you see a policy or practice within the [JAGC], at whatever level, that can be improved, or when you need help. Leaders must talk with one another."[239]

Coordination must be done carefully, however, and with respect to both the superior and subordinate JAs. Poorly handled communications within the technical chain of command can have a detrimental effect on the relationship each JA has with his commander. Ultimately, operations are the responsibility of the command. It is the commander's responsibility to brief his superior commander on situations and events deemed worthy of notification. As The Judge Advocate General of the U.S. Army has recognized, "[w]hile the use of technical channels is required in [sensitive or unusual matters with legal implications], it is not a substitute for briefing appropriate information through command channels."[240]

Problems may arise when a subordinate JA discusses a sensitive situation with his superior JA and the superior JA notifies his commander before the subordinate commander has notified him. In this situation, the relationship between the subordinate commander and his JA can suffer if the commander feels that his JA has loyalties outside his unit.

C. Independence in Action—Lieutenant Colonel V. Stuart Couch

Lieutenant Colonel (LtCol) V. Stuart Couch's experience while serving as a prosecutor in the Office of Military Commissions (OMC) has been well covered in the media.[241] Those accounts thoroughly covered the moral issues that confronted LtCol Couch but only touched on the legal ones from a general point of view. For the purpose of this article, it is worth it to review his experience here and explore the legal and ethical dilemmas he faced as both an attorney and military officer.

Lieutenant Colonel Couch was raised in North Carolina. He attended Duke University as an undergraduate and commanded his Navy ROTC battalion.[242] In 1987, LtCol Couch joined the U.S. Marine Corps and became a naval aviator.[243] After attending law school, LtCol Couch continued to serve in the Marine Corps as a JA. In 1998, LtCol Couch was on the team that prosecuted the high profile case against the flight team of a Marine Corps jet that clipped a gondola in Aviano, Italy, killing twenty civilians.[244]

Lieutenant Colonel Couch left active duty shortly after the Aviano trial but volunteered to return to active duty in the days after the terrorist attacks of 9/11. "I did that to get a crack at the guys who attacked the United States . . . I wanted to do what I could with the skill set that I had."[245] Lieutenant Colonel had personal reasons as well; one of his friends, and former squadron mate, was the co-pilot of United Flight 175, the second plane to hit the World Trade Center.[246]

After being assessed back onto active duty, LtCol Couch was assigned to the office of DoD/GC, who had operational control of the OMC. He arrived at OMC in August 2003 and, shortly thereafter, began working on files on Guantanamo Bay (GITMO) prisoners. One file, detainee Mohamedou Ould Slahi, stood out as one of the most culpable.[247]

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[239] Policy Memorandum 06-02, Headquarters, Office of The Judge Advocate General, subject: Use of Technical Channel of Communications (10 Jan. 2006).

[240] *Id.*

[241] Jess Bravin, *The Conscience of the Colonel*, WALL ST. J., March 31, 2007, *available at* http://www.meckbar.org/newsevent/CouchWSJarticle.pdf; *Torturing Democracy* (PBS television broadcast Oct. 9, 2007), transcript and video available at http://www.torturingdemocracy.org/.

[242] Bravin, *supra* note 241.

[243] *Torturing Democracy*, *supra* note 241; Bravin, *supra* note 241.

[244] Jeffrey E. Stern, *For God and Country*, DUKE MAG., Sept.–Oct. 2007, http://www.Duke magazine.duke.edu/issues/091007/god1.html.

[245] Bravin, *supra* note 241.

[246] *Id.*

[247] *Torturing Democracy*, *supra* note 241.

In October 2003, LtCol Couch traveled to GITMO on a familiarization trip. Once there, he had the opportunity to witness an interview of a detainee. While preparing to watch the interview, LtCol Couch was distracted by heavy metal music coming from down the hall. Escorted down the hall by a reserve Air Force JA, LtCol Couch saw a detainee "shackled to a cell floor, rocking back and forth, mumbling as strobe lights flashed."[248] Lieutenant Colonel Couch recognized these tactics from his experience going through SERE school.[249] "These tactics were right out of the SERE School playbook."[250] Lieutenant Colonel Couch asked his escort, "[d]id you see that? You know, I have a problem with that," LtCol Couch said to his Air Force JA escort. "Well, that's approved,"[251] the escort responded.

Lieutenant Colonel Couch was still troubled by what he saw at GITMO when he returned to OMC. He contacted a senior U.S. Marine Corps JA and explained what he had seen. The senior JA told him, "You're shirking your duties if you've got issues and you're not willing to do something about it."[252] Shortly thereafter, LtCol Couch discussed with the chief prosecutor what he had seen during his initial trip to GITMO, and how it might affect the prosecution of the detainees.[253]

In late 2003, Mr. Slahi finally started cooperating with his interrogators, providing information not only about himself but about Al Qaeda in Germany and Europe.[254] A colleague told LtCol Couch that Slahi had begun the "varsity program"—"an informal name for the Special Interrogation Plan authorized by Defense Secretary Donald Rumsfeld for the most recalcitrant [GITMO] prisoners."[255] The reports LtCol Couch was receiving made no mention of how the information was obtained.[256] Lieutenant Colonel Couch, along with a Navy Criminal Investigation Service (NCIS) agent detailed to the case, started looking into how the information was obtained from Mr. Slahi. After his initial experience at GITMO and the comments from his colleague, LtCol Couch was suspicious about Slahi's "sudden change, and felt he needed to know all the circumstances before bringing the case to trial."[257]

In the Spring of 2004, the NCIS agent showed LtCol Couch Government documents and other evidence that both he and LtCol Couch believed established that Slahi's information was obtained through the use of torture.[258]

At this point, LtCol Couch discussed the issue with an Air Force JA who was also working in the OMC. After a little research, LtCol Couch's colleague pointed out Article 15 of the *Convention Against Torture* (CAT) which excluded the use of any evidence obtained through torture.[259] The United States ratified the CAT in 1994 and it had been in force since November 1994.[260]

Lieutenant Colonel Couch now faced his dilemma. He volunteered for this assignment and thought Slahi was culpable, yet he was deeply troubled by what he learned. Legally, could he prosecute Slahi when there was evidence that Slahi's statements were obtained through torture and that international and U.S. law prohibited the use of any evidence obtained through torture? Ethically, was he obligated to provide this information to Slahi or any future defense attorney that represented Slahi? Morally, were the techniques employed against Slahi acceptable? Did his duty of military obedience require him to move forward with the prosecutions despite his misgivings?

Lieutenant Colonel Couch reviewed his state's professional rules of conduct to determine what his ethical obligations were in this situation. He reviewed the ABA's *Model Rules* and the Navy's *Rules of Professional Conduct* as well. Lastly, he turned to friends, colleagues, and a theologian to assist him with his moral concerns.[261]

In April 2004, a new chief prosecutor arrived at OMC. Shortly after his arrival, LtCol Couch again raised his

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[248] Bravin, *supra* note 241.

[249] SERE stands for Survival, Evasion, Resistance, and Escape. In general, SERE school is a military school created to help servicemembers avoid capture or exploitation by the enemy and to familiarize them with the tactics and techniques that might be used against them if captured. It is a three-week course for those with a high risk of capture, such as pilots, aviators, special forces, and rangers. *See* U.S. DEP'T OF ARMY REG. 350-30, CODE OF CONDUCT, SURVIVAL, EVASION, RESISTANCE, AND ESCAPE (SERE) TRAINING (15 Dec. 1985) [hereinafter AR 350-50].

[250] *Torturing Democracy*, *supra* note 241.

[251] *Id*.

[252] Bravin, *supra* note 241.

[253] Telephone Interview Lieutenant Colonel V. Stuart Couch (ret.), Of Counsel, Poyner Spruill LLP (Feb. 25, 2010) [hereinafter Couch Telephone Interview].

[254] Bravin, *supra* note 241.

[255] *Id.*

[256] Under the structure set up at the time, "[LtCol] Couch had no direct contact with his potential defendants, but received summaries of their statements." *Id.*

[257] *Id.*

[258] *Torturing Democracy*, *supra* note 241.

[259] Specifically, "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 15 (entered into force June 26, 1987 in accordance with Art. 27(1)) [hereinafter CAT], *available at* http://www2.ohchr.org/english/law/cat.htm.

[260] On 18 April 1988, the United States became the sixty-third signatory of the CAT. It was ratified in October 1994 and entered into force on 20 November 1994. Congress has also passed legislation to implement the requirements of the CAT. *See* 18 U.S.C. §§ 2340–40B (2006).

[261] Because of the classified nature of the situation, LtCol Couch spoke in generalities. Couch Telephone Interview Lieutenant, *supra* note 253; Bravin, *supra* note 241.

concerns. Lieutenant Colonel Couch was told that "we are going to stay in our lane" and "not question where the evidence was coming from."[262] After LtCol Couch raised the subject again on a separate occasion, the chief prosecutor told him that he "didn't want to hear about international law again."[263]

In May 2004, after much deliberation and soul-searching, LtCol Couch informed the chief prosecutor that he refused to prosecute Slahi.[264] The chief prosecutor responded by questioning LtCol Couch's loyalties, asking "What makes you think you're so much better than the rest of us around here?"[265]

Frustrated but still resolved, LtCol Couch put his objections about prosecuting Slahi into a written memorandum.[266] He separated his objections into three categories: legal objections, ethical objections, and moral objections.[267] Legally, he felt Article 15 of the CAT prohibited him from using the statements that Slahi made because they were obtained through torture.[268] Ethically, he felt that he had a duty to disclose what he had learned about the circumstances surrounding the statements to any future counsel who might represent Slahi.[269] Morally, he felt that what had been done to Slahi was reprehensible and, for that reason alone, refused to have any further participation in Slahi's case. Lieutenant Colonel Couch's moral reservations were based upon the Christian ethic of respect for the dignity of every human being and, while he wanted to prosecute Slahi, he couldn't forfeit his conscience and faith in the process.[270]

VI. Conclusion

Lieutenant Colonel Couch's conduct regarding the Slahi file has generally been well regarded. Those who praised his actions because of their political objections to the Bush Administration's prosecution of the War on Terror, however, missed the true complexity of his predicament. Lieutenant Colonel Couch had served in the military for twenty years, supported the United States' War on Terror, volunteered for duty with the OMC, and thought Slahi was culpable. This was not a man with a political agenda or a proverbial axe to grind; this was a team player confronting two of the conflicts with military obedience that Huntington had so eloquently described forty-seven years earlier.[271]

As challenging as LtCol Couch's situation was, he was in a good position to face it. He had the benefit of almost twenty years experience; trusted colleagues available to discuss concerns and work out problems; he was in a well-funded department with access to all required resources; and he was morally grounded by his Christian faith.[272]

Even with his experience and resources, LtCol Couch struggled with the situation he faced working on the Slahi case. Compare his situation with that of CPT Smith from the introduction. These legal, ethical, and moral challenges are routinely occurring with JAs that do not have LtCol Couch's experience and in locations where the resources he possessed are not readily available.

The legal, ethical, and moral challenges faced by JAs in the War on Terror are unique among attorneys. The JAGC transformed to meet the needs of the Army. Just as it emphasized training and understanding of deployment and operational issues, the JAGC must make sure that its JAs know their client, its unique nature within the Federal Government, and their own duties and responsibilities.

The role of the JA is ethically challenging. Difficult decisions are commonplace and sometimes a JA must put himself on the line, both personally and professionally. But it is the job. Knowing the job, both ethically and legally, will allow the JA to focus on the client and mission accomplishment.

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[262] Couch Telephone Interview, *supra* note 253.

[263] *Id.*

[264] *Torturing Democracy*, *supra* note 241; Bravin, *supra* note 241; Couch Telephone Interview, *supra* note 253.

[265] Bravin, *supra* note 241.

[266] *Id.*; Couch Telephone Interview, *supra* note 253.

[267] Couch Telephone Interview, *supra* note 253.

[268] *Id.*

[269] *Id.*

[270] *Id.*; *Torturing Democracy*, *supra* note 241; Bravin, *supra* note 241.

[271] *See* HUNTINGTON, *supra* note 47, at 76–79.

[272] Couch Telephone Interview, *supra* note 253; *Torturing Democracy*, *supra* note 241.

Sharpening the Quill and Sword: Maximizing Experience in Military Justice

Major Derrick W. Grace[*]

"Military justice is our statutory mission and at the core of a disciplined fighting force. We must do it right and we must do it well."

—Lieutenant General Scott C. Black[1]

I. Introduction

The Army's military justice (MJ) system suffers from a lack of experienced practitioners. While senior leaders have initiated some programs to solve this problem, the programs are inadequate to completely address the dilemma.[3] The future health and success of the Army's MJ system depends on placing it in the hands of intelligent, experienced, and knowledgeable personnel. In performing its statutory mission of MJ,[4] the Army Judge Advocate General's Corps (JAG Corps) faces many challenges. Senior leaders must weigh the importance of all JAG Corps supported missions in deciding how to deploy resources and personnel. This article discusses whether the Army JAG Corps is poised for MJ success and recommends systemic changes to provide improved military justice to the Army and its Soldiers.

The Army's modularization and the recurring deployments since 2002 present new problems and exacerbate old ones with the administration of MJ, to include a lack of experienced judge advocates (JA) in MJ positions.[5] Beginning in 2008, the JAG Corps made major changes to address some perceived deficiencies in the administration of justice.[6] Other services have also recognized the need for more experienced JAs in MJ positions and addressed this problem. For example, both the Navy and Air Force decided to implement a MJ career track.[7] To fortify its MJ system, the Army hired special victims prosecutors (SVP) and highly qualified experts (HQE), as well as implementing additional skill identifiers (ASI). This article will look at these programs and will propose some minor changes to the current system that will help it continue to meet and exceed the JAG Corps' statutory mission. Among these proposals are changes to the ASI program to better capture the MJ experience of JAs for use in the assignments process, coding of MJ positions, changes to post-trial administration, and adding a regional military justice practitioner.

II. A Lack of Experience in Military Justice

"The only source of knowledge is experience."[8]

—Albert Einstein

The biggest problem the MJ system faces is a lack of experience across the spectrum of MJ positions.[9] The best way for advocates to excel in MJ is to spend time in court prosecuting or defending cases.[10] Army JAs do not possess the experience required to be good litigators.[11] They simply

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[1] Major General Scott C. Black, *Changes in Military Justice*, TJAG SENDS, Apr. 2008 [hereinafter MJ Message]. Major General Black retired as a lieutenant general.

[3] For this article, the author surveyed personnel then-occupying military justice (MJ) positions by sending the survey attached to the article as an appendix to all Senior Defense Counsel and Chiefs of Justice and asked them to complete the survey and supply it to their JAs as well. The survey provides a snapshot of personnel practicing military law in the positions of trial counsel, defense counsel, senior trial counsel, senior defense counsel, and chiefs of MJ. The survey intended to identify the experience level of these personnel as well as their interest in MJ. The survey also requested comments on the MJ system. The 107 anonymous responses were only identified by an assigned survey number. Major Derrick W. Grace, Criminal Law Survey (2009) [hereinafter Criminal Law Survey] (on file with author). Survey Respondent Number 22 states, "[a]lthough the JAG Corps of late seems to want to emphasize improvement in the quality of MJ product, I've seen no perceptible change in the quality. I have been a trial litigator as a CPT for nearly 5 years, and the quality of work product has declined over that period of time."

[4] 10 U.S.C. § 827 (2006).

[5] *See* discussion, *infra* Part II. Criminal Law Survey, *supra* note 2, Survey No. 45. ("Our MJ system has gone through quite a lot of changes over the past few years with modularization of brigade combat teams (BCTs) and the quality of work by trial counsel's has plummeted.")

[6] *See* U.S. DEP'T OF NAVY, JAG INSTR. 1150.2, MILITARY JUSTICE LITIGATION CAREER TRACK (3 May 2007) [hereinafter JAGINSTR 1150.2]. JAGINSTR 1150.2 has been superseded by U.S. Dep't of Navy, JAG Instr. 1150.2A, *Military Justice Litigation Career Track*. U.S. DEP'T OF NAVY, JAG INSTR. 1150.2A, MILITARY JUSTICE LITIGATION CAREER TRACK (17 June 2009) [hereinafter JAGINSTR 1150.2A].

[7] *See* JAGINSTR 1150.2, *supra* note 5. The Navy implemented its program in 2007. The Air Force did not initiate its MJ track as of November 2010. While this article does not address the efficacy of a MJ career track in the Army, the Navy JAG career plan is informative and is discussed in detail in Part III.

[8] http://km.nasa.gov/whatis/KM_Quotes.html (Feb. 3, 2011).

[9] *See generally* Criminal Law Survey, *supra* note 2.

[10] *See generally id.* Survey respondent number 67 states, "I believe litigation is an art which must be practiced in order to be improved. It often takes years to become a truly great litigator." *Id.*

[11] *See generally id.* Survey respondent number 88 reveals, "[Trial counsel] are not getting a great deal of trial experience and therefore end up promoting out of a job without having become well versed in MJ." *Id.*

do not have enough time in the courtroom; therefore MJ is lacking and is having difficulty achieving fundamental success in its mission.[12] While part of the problem is caused by deployments, much of the problem is systemic.

The Army is an "up or out" organization.[13] The JAG Corps leadership, including promotion boards, expects JAs to have a certain range of experience prior to promotion to the next level.[14] Specifically, they expect JAs experience to be broad and not necessarily deep.[15] They are to be generalists instead of specialists. Unfortunately for the junior litigator (and the MJ system), this often means that once the trial counsel (TC) obtains a minimum level of experience and proficiency, the Army assigns them to another position so they can begin to obtain a base knowledge of another area of the law.[16] Also, it means that JAs without MJ experience are at times placed in senior litigation positions in order to obtain their "MJ time."[17] There is no substitute for experience when it comes to litigating cases, but the current system is not set up for that purpose.[18] The survey conducted for this paper of current MJ practitioners substantiates that military TC and defense counsel (DC) suffer from a lack of experience.[19] Of the survey respondents, 53% of TCs tried less than ten total cases; 78% prosecuted less than five contested courts-martial.[20]

Deployments exacerbate this lack of experience.[21] For the past eight years, deployments in support of Operation Enduring Freedom and Operation Iraqi Freedom have lasted between twelve to fifteen months. Prior to the deployment, the brigade TC must attend field training as the operational law attorney, a time when cases are either neglected, given highly-favorable deals, otherwise disposed of, or passed off to another trial counsel.[22] Traditionally, the training and leave takes the TC away from their cases for more than two months in approximately a four month period.[23] Upon redeployment, almost a month is taken up with reintegration

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[12] *See generally id.* Survey respondent number 95 admits, "I find that the JAG Corps does all it can to train us as litigators, but you can't substitute training for courtroom experience." *Id.*

[13] Colonel Chris Robertson & Lieutenant Colonel Sophie Gainey, *Getting Off the Treadmill of Time*, MIL. REV., Nov.–Dec. 2009, 104 105.

[14] Criminal Law Survey, *supra* note 2, Survey No. 94 ("I have worked almost exclusively in MJ. I have been told numerous times by O-6 assignment officers and SJAs, that I am limiting my promotion chances because I have "too much" MJ experience. I have made a personal choice to take the risk. I would rather retire as an O-4 than work in other areas of military law.").

[15] *See generally id.* Many respondents revealed that senior JAs told them that they needed to take assignments outside MJ in order to become a well-rounded JA instead of a specialist. *See also id.* Survey respondent number 83 states, "[c]urrently many JAs are responsible to be a mile wide and an inch deep on legal knowledge covering all legal disciplines."). Department of the Army Memorandum 600-2 does address this issue stating that

> specialists are required in such areas as acquisition law, international law, labor law, criminal law, medical law, environmental law, or claims. It is vital to the Army that the JAGC have these specialists as well as generalists. In order to develop JAGC officers with the requisite experience to assume senior positions advising the executive leadership of the Army and DOD in specialized areas of the law, it is not unusual for the JAGC to assign officers to successive assignments in the same or similar specialty.

U.S. DEP'T OF ARMY, MEMORANDUM 600-2, POLICIES AND PROCEDURES FOR ACTIVE-DUTY LIST OFFICER SELECTION BOARDS app. H-4 (25 Sept. 2006).

[16] Telephone Interview with Lieutenant Colonel Mark D. Maxwell, Chief, Active Component Career Mgmt. Branch, Pers., Pol'y, & Training Org. (Jan. 12, 2010) [hereinafter Maxwell Interview]. *See also* Criminal Law Survey, *supra* note 2, Survey No. 24 ("I've been through 17 TCs in my first year and a half as Chief (of MJ). . . . Yet, I have 2 potential capital cases and another homicide. . . . Some of my most talented folks spent 6 months in the office, got up to speed, and then deployed."). *See also* Criminal Law Survey, *supra* note 2, Survey No. 41 ("The JAG Corps places a lot of emphasis on getting experience in broad areas. Almost every other lawyer outside the Army specializes in certain areas. This is because specialization and experience generally equates to better results for clients. The Army's focus on generalization seems to me more likely to result in the opposite.").

[17] *See generally* Criminal Law Survey, *supra* note 2. Survey respondent number 57 states, "[i]n the field we are seeing COJ, DSJA, SJA, RDC and SDC with insufficient experience to train and mentor counsel." *Id.*

[18] *See generally id*. Survey respondent number 3 states:

> [i]t is frustrating for an STC to constantly have a revolving door of TCs. It takes nearly two years for the average TC to get a sufficient number of CMs under his belt to even call himself proficient, let alone an "expert." Our CMs are very visible to the public . . . and we routinely throw the young and inexperienced into the fire and hope it all works out.

See also id. Survey respondent number 68 states, "The Army's emphasis on young attorneys also creates a system where everyone is always in the initial learning process. This is extremely inefficient and unfair to the public." *Id.* When asked about the Special Victim Prosecutor Program, Lieutenant General Scott Black stated that "[u]ntil now Army JAG Corps lawyers have been generalists not specialists. . . . 'We train everybody to a baseline level for prosecution purposes, and that includes sexual assault cases.'" Stars and Stripes.com, Army names special prosecutors for assault cases, http://www.stripes.com/articleprint.asp?section=104&article=60280 (last visited Jan. 27, 2011).

[19] *See generally* Criminal Law Survey, *supra* note 1. More than sixty-two percent of trial counsel surveyed have less than one year in MJ. Only six percent have more than two years.

[20] *See id.*

[21] *See infra*. *See also* Criminal Law Survey, *supra* note 2, Survey No. 1 ("Constant deployments lessen court room time which should be a concern."); Survey No. 38 (stating that because he deployed while a trial counsel, "I'm now in TDS and playing catch-up. I'm miles behind where I could have been if I had been able to 'track' in Criminal Law and not been shifted around so much.").

[22] Interview with Major John J. Merriam, Student, The Judge Advocate Legal Ctr. & Sch., in Charlottesville, Va. (18 Feb. 2010). [hereinafter Merriam Interview]. Major Merriam deployed for twelve months to Iraq as a brigade trial counsel from 2003–2004. He was also the Officer in Charge of the Ansbach, Germany Law Center from 2007–2009.

[23] *Id.*

and leave. The Judge Advocate General (TJAG) stated that JAs normally will serve in a TC position for eighteen to twenty-four months.[24] If that is the case, then a TC who deploys will only serve approximately three to nine months as a full-time TC outside of a deployed environment.

Deployments affect the litigation experience of a TC.[25] The JA's primary duty is no longer that of prosecutor.[26] The number of jobs the JA takes on are increased exponentially including international law, operational law, claims, and legal assistance.[27] Of the survey respondents (government and defense), 42% stated that while deployed in a MJ position they tried three or fewer cases; 75% tried less than six.[28] This is far less than the average litigator would try in garrison.[29]

It is not just trial counsels who lack experience. Defense counsels are also green. Forty-three percent of defense counsels responding to the survey have less than one year of MJ experience; 39% have tried fewer than five total courts-martial; and 62% have less than five contested cases (81% have less than 10).[30]

Senior trial counsels (STC), senior defense counsels (SDC), and chiefs of military justice (COJ) possess much more experience, on average, than the TC and DC, but even their statistical data is troublesome. Seventy percent of STCs have less than ten contested courts-martial and 30% have less than two years MJ experience; 22% have less than five contested cases; and 44% have less than ten contested cases. Eleven percent of SDCs have less than one year total MJ experience; 11% have less than five contested cases; and 55% have less than ten contested courts-martial.[31]

The numbers on the high-end are encouraging. Sixty percent of STCs and 55% of both SDCs and COJs have more than three years of MJ experience.[32] However, experienced MJ practitioners in one place cannot make up for a shortfall elsewhere. The fact that a STC at one post has prosecuted more than thirty cases does not assist the TC at a different post whose STC has little experience and whose COJ is at Intermediate Level Education/Advanced Operations and Warfighting Course (ILE/AOWC) for three months.

This demonstrated lack of experience leads to many problems: the same mistakes are made in the courtroom over and over; there is inadequate supervision of the trial and defense counsel; and there is inadequate training at the installation level.[33] There is no substitute for time in the courtroom and the current practitioners are not receiving this needed experience. One possible solution is to implement a MJ track similar to the Navy.

III. Navy Military Justice Career Track

The U.S. Navy recognized the need to develop a core group of individuals practiced in litigation. In September 2006, the Navy JAG Corps published its strategic vision for the next fifteen years stating:

> To fulfill the *JAG Corps 2020* vision, the JAG Corps will create a career track enabling selected judge advocates to specialize in military justice litigation. This will improve the quality of military justice litigation by keeping experienced and effective counsel in the courtroom, providing expert supervision and mentoring for new counsel, and creating a cadre of qualified judge advocates to fill selected billets in the military justice system. Greater courtroom and appellate expertise will increase the efficiency with which courts-martial are conducted and reviewed. A robust community of military justice trial and appellate litigators will provide reach-back capability for both trial practitioners and staff judge advocates worldwide.[34]

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[24] Policy Memorandum 08-1, Office of The Judge Advocate General, U.S. Dep't of Army, subject: Location, Supervision, Evaluation, and Assignment of Judge Advocates in Brigade Combat Teams—POLICY MEMORANDUM 08-1 para. 7 (21 July 2008) [hereinafter BCT Policy Memo].

[25] Criminal Law Survey, *supra* note 2, Survey No. 33 ("[W]ith so few cases being tried by TCs while deployed, serving 12 months as a TC in a deployed environment is not producing enough litigation experience to justify the job title. So while these individuals may, on paper, look like an experienced MJ practitioner, the fact is something else entirely."). *See also id.* Survey No. 8. "Of the eight TCs I deployed this year, only one of them is actually trying cases."

[26] Merriam Interview, *supra* note 21

[27] *See id.*

[28] *See generally* Criminal Law Survey, *supra* note 2. This number includes guilty pleas as well as contested courts-martial.

[29] *See id.*

[30] *See id.*

[31] *See id.* Six percent of COJs have less than six months MJ experience

[32] *See id.*

[33] *See id.* Survey respondent number 57 states, "[t]he Government has lost what were otherwise good cases by employing the "jack of all trades" track of growth for its officers and, even more profound, we're seeing cases that lack credibility going forward because of a lack of experience in the justice shop."); *see also id.* Survey respondent number 94 states, "[a]s an experienced DC, I routinely exploit the Government's inexperience both in court and pretrial. This problem is only going to get worse." *Id.*

[34] U.S. NAVY JUDGE ADVOCATE GENERAL'S CORPS, JAG CORPS 2020: NAVY JAG CORPS STRATEGIC PLAN 11 (Sept. 2006).

In May 2007, the Navy implemented this career track for its JAs and the Navy Judge Advocate General (Navy JAG) signed JAG Instruction 1150.2 "[t]o establish procedures for recruiting, identifying, selecting, retaining and promoting military justice litigation specialists and experts in the Navy Judge Advocate General's (JAG) Corps."[35]

The Navy JAG stated that part of the "personnel strategy is to identify and cultivate critical skill sets" and that "[o]ne such skill set involves the litigation of complex criminal cases."[36] He recognized that though "the number of courts-martial has decreased in recent years; the complexity of the cases has dramatically increased. The JAG Corps must identify those judge advocates with the requisite education, training, and aptitude to litigate complex cases and to continue to cultivate their development."[37] Although the cases were becoming more difficult to try, both prosecution and defense, the skill level of the JAs on the cases were not increasing at the same pace.

The Navy leadership intended the MJ career track to increase "the litigation experience of a select number of military justice litigators."[38] Increasing the MJ practitioner's skill level would "maximize productivity" and allow the Navy to "realign resources to meet other Fleet legal requirements."[39] People who know their jobs are able to do them quickly and expertly. This means that in theory the Navy requires fewer JAs to perform more and better quality work, which frees JAs, who would otherwise be working in MJ, to carry out other critical missions for the commands.

The first task in implementing the policy is to populate it. The Navy decided on a graduated, two-tiered qualification regime: specialist military justice litigation qualification (MJLQ) and expert MJLQ.[40] The specialist MJLQ is given to a judge advocate who has demonstrated acceptable quantitative and qualitative experience in MJ litigation and requires involvement in at least five contested courts-martial.[41] Once a JA receives the Specialist MJLQ she may apply for the EXPERT MJLQ after completing three-years in one or more required positions and at least 20 contested courts-martial."[42]

Once the officers are identified and properly classified, the next step is to detail the qualified officers into the appropriate billets. JAG Instruction 1150.2A lists "billets requiring significant military justice litigation experience [and] are designated by the JAG as requiring assignment of a judge advocate holding the MJLQ."[43] There are more than fifty MJLQ required positions, all of which are in the grade of O-4 or higher.[44] Among these billets, originally eleven were for O-5 DC or TC billets and three O-6 DC billets.[45] The instruction recognizes that MJLQ qualified officers may need to serve in positions not requiring MJLQ and that non-MJLQ qualified officers may serve in required billets depending on "availability of MJLQ judge advocates, the needs of the Navy or the professional development of the individual judge advocate."[46]

JAG Instruction 1150.2A sets out a sample litigation career path.[47] This path recognizes the need for officers who are litigators to work primarily in litigation positions. "Developing and maintaining highly technical and perishable litigation skills requires progressive assignment to trial litigation billets and may limit the opportunity for assignment to sea duty or operational billets or reduce the variety of non-litigation billet assignments in a career."[48]

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[35] JAGINSTR 1150.2, *supra* note 5, para. 1, at 1.

[36] *Id.* para. 3.a, at 1.

[37] JAGINST 1150.2, *supra* note 6, para. 2.a, at 1.

[38] JAGINSTR 1150.2, *supra* note 6, para. 3b, at 1.

[39] *Id.* para. 3.b, at 1. Survey respondent number 30 equated this with civilian district attorney's offices saying:

> While working as a DA we had a course of action for every single type of case, if you have a drug suppression hearing, here are the baseline questions you have to ask to be successful. We are never instructed about how to build a case. It is really a sink or swim environment, which is okay, but you never get comfortable doing your job and you don't ever truly master your job without wasting plenty of man hours.

See also Criminal Law Survey, *supra* note 2.

[40] *See id.* para. 3.d, at 2. This is similar to the Army's four-tier Additional Skill Identifier Program discussed *infra* Part IV.

[41] *Id.*.

[42] *Id.* para. 4.a.(2)(a), at 4. At the time the Navy instituted the MJLQ, the Navy already had what it called Advanced Military Law (TriAd) Officers. These officers received a MJ litigation subspecialty code based on their completion of a Master of Laws (LL.M.) in Trial Advocacy. The Navy sent the TriAd Officers to a one-year, full-time civilian LL.M. Program accredited by the American Bar Association (ABA) to receive this degree. These officers received their Expert MJLQ automatically. The LL.M. Program in trial advocacy is still available to Navy JAs. Unlike the Navy system, no Army JAs are sent for an LL.M. in trial advocacy. E-mail from Yvonne Caron, Office of the Judge Advocate Gen., to Major Derrick Grace (25 Nov. 2009, 12:28 EST)

[43] JAGINSTR 1150.2A, *supra* note 5, para. 5.b, at 6. (list of required billets are in Enclosure 2).

[44] *See* JAGINSTR 1150.2, *supra* note 5, enclosure 2.

[45] *See* JAGINSTR 1150.2A, *supra* note 5, enclosure 2. JAGINSTR 1150.2A changed the title of these billets to Executive Officers of the Regional Legal Services Office (RLSO) and Naval Legal Services Office (NLSO), which are, essentially, the government and defense counsel offices for criminal litigation.

[46] *Id.* para. 5.b, at 6.

[47] *See id.* enclosure 4.

[48] *Id.* para.6, at 6. The Instruction again recognizes that the assignment of these officers in litigation billets may not always be for the good of the Navy or the officer. "All MJLQ judge advocates should occasionally be

In detailing officers to assignments, the effect that the assignment will have on promotion is a concern. Many Navy JAG Officers were concerned that the track would hurt their chances for promotion.[49] The JAG Instruction addresses these concerns by stating that "[t]he JAG will determine the anticipated needs for promotion of MJLQ judge advocates to fill primary military justice litigation billets and recommend language for inclusion in Secretary of the Navy selection board precepts."[50] In the precept for Fiscal Year 2010 Lieutenant Commander Promotion Board, the Secretary of the Navy instructed that

> In determining which officers are best and fully qualified, you shall favorably consider the Navy's need for Litigation Experts and Specialists, giving equal weight to their contributions in military justice litigation that ordinarily would be given to other members of the JAG Corps community who have followed more traditional career paths. At this time, the needs of the Navy reflect a shortage of officers for senior leadership assignment in this area of expertise. In determining which officers are best and fully qualified for promotion, you shall favorably consider the Navy's need for senior officers with proven expertise in this field.[51]

It is hard to imagine a stronger vote of confidence for the program than this language from the Secretary of the Navy. The next obvious question is: did this language in the Navy precept work, thereby alleviating the fear of some JAs that a career in MJ will harm their chances at promotion? Three MJLQ qualified individuals were in the zone for O-6; all were selected for promotion. Five MJLQ qualified individuals were in the zone for O-5; four of the five were selected for promotion.[52]

IV. Steps Taken to Strengthen the Army Military Justice System

The Army JAG Corps leadership also recognizes that stronger litigation skills and experience are vital to the practice of MJ. The JAG Corps Vision is "[o]ne team of proven professionals committed to justice, grounded in values, and dedicated to providing proactive legal support to the Army and the Joint Force."[53] The June 2007 JAG Corps Strategic Plan identifies goals for officers to achieve proficiency in the core competencies.[54] One of the goals is to "[e]nsure that Military Justice practitioners adhere to the highest standards of professional excellence, and promote discipline and fairness."[55]

Following the 2007 Strategic Plan, the Army executed multiple changes to the MJ system. These changes include rescinding previous guidance which had placed the brigade "trial counsel" at the brigade instead of a consolidated MJ shop, instituting a MJ additional skill identifier and also initiated SVP/HQE positions.

A. Brigade Trial Counsel

The Army harmed its TCs when it sent them to the brigades as part of the Army transformation to a brigade-centric modular Army – an injury from which the JAGC is still trying to recover.[56] In January 2006, in an effort to support and adapt to the modular Army, TJAG signed Policy Memorandum 06-7, stating that the "BCT will include a Brigade Judge Advocate (BJA), normally a Major, and an Operational Law Judge Advocate (OPLAW JA), a Captain who assists with issues across all legal disciplines."[57] The memorandum physically located both of these JAs at the brigade headquarters. Co-locating the JAs with the brigade promoted a close relationship between the JAs and the brigade staff; however, the staff judge advocate (SJA) and the COJ located away from the brigade lost oversight of these JAs. Shortly thereafter, the Personnel, Plans and

detailed to billets outside the litigation career path to ensure a depth of experience beneficial to both the officer and the Navy."

[49] Telephone Interview with Lieutenant Commander Jonathan Stephens, U.S. Navy Criminal Justice Pol'y Div. (Nov. 20, 2009) [hereinafter Stephens Interview]. Lieutenant Commander Stephens relayed that in numerous conversations with colleagues, they expressed reservations entering the career track because of a fear that they would not be promoted.

[50] JAGINSTR 1150.2A, *supra* note 5, at 7. A precept is the selection criteria that the Secretary of the Navy provides to the promotion board.

[51] Memorandum, Sec'y of the Navy, to President, FY-10 Active-Duty Navy Lieutenant Commander Judge Advocate General's Corps Promotion Selection Board para. 3c (8 May 2009).

[52] Stephens Interview, *supra* note 48.

[53] *See* U.S. ARMY JUDGE ADVOCATE GENERAL'S CORPS, STRATEGIC PLAN 1 (June 2007) [hereinafter ARMY JAG CORPS STRATEGIC PLAN].

[54] *Id.* at 8 ("Our six core legal disciplines are Military Justice, International and Operational Law, Administrative and Civil Law, Contract and Fiscal Law, Legal Assistance, and Claims.").

[55] *Id.*

[56] *See* Criminal Law Survey, *supra* note 2, Survey No. 45 ("This separation from the main MJ office takes a new TC away from a more watchful eye of an STC or COJ where ideas can be shared, progress monitored. Now, the TC is under only the supervision of the BJA and it is hit or miss as to how much MJ (sic) experience that individual has or time to properly mentor and guide."); *see also id.* Survey respondent number 106 states, "having the Brigade Commander as the Senior Rater for a Trial Counsel poses some conflict of interest. It is okay for a Trial Counsel to be primarily responsible for the military justice of a particular Brigade, but the Trial Counsel should answer directly to the Division SJA."

[57] BCT Policy Memo, *supra* note 23, para. 2c.

Training Office (PP&TO) renamed the OPLAW JA the "OPLAW/TRIAL COUNSEL" on his/her officer evaluation report (OER). "The addition of TRIAL COUNSEL to the title OPLAW JA recognizes that a significant portion of the subordinate JA's duties encompass traditional Trial Counsel duties and that the OPLAW/TRIAL COUNSEL position satisfies a developmental assignment in the core competencies of military justice."[58]

In 2008, TJAG determined that physically locating the OPLAW/TRIAL COUNSEL at the brigade adversely affected the practice of MJ and implemented guidance withdrawing the physical location of that position from the brigade and placing it back with the local SJA office.[59] Despite this change, the brigade TCs continue to spend the vast majority of time at the brigade.[60] Further, PP&TO renamed the OPLAW JA/TRIAL COUNSEL position, this time to "Trial Counsel," which "name change we will pursue in manning documents in order to emphasize the *primary mission of the BCT legal team*."[61] "These changes are directed at providing increased training and mentoring in MJ for BCT 'Trial Counsel' to secure the foundation of our practice of MJ and preserve the integrity of our statutory mission."[62] The BCT Trial Counsel's main duty is once again MJ.[63] The Judge Advocate General recognized that the decentralization and vastly expanded role of the BCT TCs impaired their ability to perform in the MJ core competency. By renaming the BCT captains and pulling them back to a consolidated office where they can be mentored by more experienced MJ practitioners, TJAG attempted to improve the quality of MJ practice.

B. Additional Skill Identifier in Military Justice

In July 2008, the Army took another step to revamp and improve the administration of MJ by initiating a system to identify JAs with military justice experience with "a graduated set of additional skill identifiers (ASI) in military justice."[64] "The ASI program for military justice encourages Judge Advocates to set goals to achieve greater skill in litigation and expertise in military justice. It also allows our Corps to better train and challenge Judge Advocates throughout their careers to improve their military justice proficiency."[65]

The requirements necessary to qualify for an ASI are based on both MJ experience and education. In general, this "includes time spent in attorney positions substantially devoted to the investigation, prosecution, or defense of potential violations of the UCMJ, or the management, supervision, or appellate review thereof, i.e., trial counsel, defense counsel, chief of justice, senior defense counsel, military judge."[66] While there are four ASI levels, this paper will only discuss the two affecting the JAs with the least amount of MJ experience.

The basic MJ practitioner (BMJP) ASI requires:

> (1) completion of the JA Officer Basic Course; (2) eighteen months as a trial or defense counsel *or* served as a trial or defense counsel in fifteen courts-martial (three of which must have been contested cases); (3) attendance at the TJAGLCS Criminal Law Advocacy Course . . .within six months of assuming duty as a trial or defense counsel; and (4) attendance at the TJAGLCS new developments course or TC or DC Assistance Program (TCAP, DCAP) training . . . within twelve months of assuming duty as a trial counsel.[67]

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[58] E-mail from Colonel Robert Burrell, Chief, Pers., Plans & Training Office (PP&TO), Policy Guidance on BCT Duty Title, to all Active Component, Reserve, and Nat'l Guard Members of The Judge Advocate General's Corps (n.d.), https://www.jagcnet2.army.mil/8525743C0053913C/0/E7EC0CA9F62C5DA0852573610046DC32/$file/BCT%20Duty%20Title%20Guidance.pdf (last visited 20 Jan. 11) [hereinafter BCT Duty Title Policy]; and on file with author.

[59] *See* BCT Policy Memo, *supra* note 23, para. 3.

[60] Telephone Interview with Major Matthew Calarco, Special Victim Prosecutor, Fort Campbell, Ky. (13 Jan. 2010); *see also* Telephone Interview with Captain Dan Kicza, Special Victim Prosecutor, Fort Carson, Colo. (8 Jan. 2010).

[61] MJ Message, *supra* note 1 (emphasis added).

[62] *Id.*

[63] *See* BCT Policy Memo, *supra* note 23, para. 2c.

[64] Major General Scott C. Black, *Additional Skill Identifiers in Military Justice*, TJAG SENDS, July 2008 [hereinafter ASI Message]. An additional skill identifier (ASI) is a code attached to the military occupational specialty (MOS) which "is used to identify additional skills possessed by personnel or required by a position." The ASI program is similar to the Navy's MJ Qualification; however,

> it was different . . . in three important respects: (1) it does not include precept language designed to highlight the need for such qualified officers at promotion boards, and (2) there seemed to be less emphasis on the assignment of qualified officers into litigation billets as there is in the Navy, and (3) there are four levels instead of two."

Posting of Jason Grover to CAAFlog, http://caaflog.blogspot.com/2008/11/new-developments-course.html (Nov. 8, 2008, 03:26 EST).

[65] Policy Memorandum 08-2, Office of The Judge Advocate Gen., U.S. Dep't of Army, subject: Military Justice Additional Skill Identifiers—POLICY MEMORANDUM 08-2 (21 July 2008) [hereinafter ASI Policy Memo] (establishing four MJ ASIs: *Basic, Senior, Expert,* and *Master Military Justice Practitioners*).

[66] *Id.* para. 3. Upon request, "[d]uty as a Staff Judge Advocate, Brigade Judge Advocate, Command Judge Advocate, Officer in Charge, or Special Assistant United States Attorney may qualify." *Id.*

[67] *See id.* para. 4a. *See generally* Criminal Law Survey, *supra* note 2 (demonstrating collective concern over the time requirement because of

The senior MJ practitioner (SMJP) ASI requires:

> (1) BMJP ASI; (2) completion of the TJAGLCS Graduate Course with three elective hours in criminal law…; and (3) a total of twenty-four months MJ experience. . ., *or* served as a trial or defense counsel in thirty courts-martial (seven of which must have been contested cases). . . . This experience level would be typical of JA serving as a chief of MJ, a SDC, a branch chief at GAD or DAD, attorneys serving in the Trial Defense Service headquarters (TDS-HQ) or OTJAG-CLD, or a TJAGLCS Criminal Law Department Professor.[68]

The ASIs are meant to "require progressive experience in MJ and litigation assignments and are designed to encourage counsel to seek out litigation-related assignments to deepen their level of MJ training and experience" and are structured to capture that experience and training.[69] They are built to "assist the Personnel, Plans, and Training Office (PP&TO) in recommending qualified officers for certain jobs" but are not "prerequisites for any duty assignment."[70] The emphasis on placing ASI qualified individuals in higher positions in MJ is much weaker than the Navy's guidance to place MJLQ JAs in required positions.[71] Whether the ASI program as it currently stands meets its purpose or the needs of the Army is discussed in Section V of this article.

C. The Special Victim Prosecutor and Highly Qualified Expert Program

The SVP Program is another Army JAG Corps initiative aimed at placing experienced JAs in litigation positions with a special emphasis on training young JAs.[72] The implementation of this program is recognition that the average trial counsel does not have the skill level, resources, and experience to, adequately, approach and prosecute more complex cases. Sexual assault cases may not normally have complex fact patterns, but the nature of the crime, the sensitivity and history of the victim, and the preconceptions of the panel among other issues, make them difficult and more intricate to prosecute and defend.[73]

This program created fifteen SVP authorizations as well as seven HQE.[74] The SVP positions are intended to be staffed by JA personnel ranging in rank from captain to lieutenant colonel "who will focus exclusively on litigation and training during three-year tours—with an emphasis on sexual assault."[75] The HQE positions are to be staffed by civilian subject matter experts in the "fields of special victim and sexual assault prosecution and defense to augment our training base within TCAP, DCAP, and TJAGLCS."[76]

The SVPs operate in an interesting paradigm. They are stationed for a period of three years at major installations, but have geographic areas of responsibility, usually encompassing several posts.[77] While the SVP is an "important asset to the Office of the Staff Judge Advocate (OSJA) where they are located, SVP responsibilities transcend any one SJA or installation;" as such, the SVP is assigned to the U.S. Army Legal Services Agency (USALSA) and rated by a combination of local SJA offices and USALSA.[78] Meanwhile, the local SJA is charged with providing logistical support to the SVP "including but not limited to: paralegal, trial counsel, office space, and equipment."[79]

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deployments and class availability). If an ASI applicant can provide adequate evidence of deployment requirements, waivers are routinely granted for this requirement. *See* E-mail from Chief Warrant Officer Three William C. Woodward, Operations Officer, Office of the Judge Advocate Gen., Criminal Law Div., to Major Derrick W. Grace (Jan. 12, 2010, 12:19 EST) (on file with the author).

[68] *See* ASI Policy Memo, *supra* note 64, para. 4b.

[69] *Id.* para. 2c.

[70] *Id.*

[71] *See* JAGINSTR 1150.2A, *supra* note 5. "Availability of MJLQ judge advocates, the needs of the Navy or the professional development of the individual judge advocate."

[72] *See* LIEUTENANT GENERAL SCOTT C. BLACK, THE JUDGE ADVOCATE GEN. OF THE ARMY, TJAG SENDS, SUBJECT: SPECIAL VICTIM PROSECUTORS AND HIGHLY QUALIFIED EXPERTS IN MJ (Jan. 2009) [hereinafter SVP Message].

> To capitalize on these initiatives and resources, we will provide SJAs and RDCs a long-term training model, built around military and civilian training courses that will challenge not only our most junior, but also our most experience practitioners—on both sides of the bar. Led by our TJAGLCS faculty, in concert with TCAP, DCAP and permanent training relationships with premier civilian training venues, we will devote considerable resources to MJ training.

Id.

[73] Trial Counsel Assistance Program Conference, Garmisch, Germany, June 2006. *See also* Criminal Law Survey, *supra* note 1 (noting in multiple responses that the SVP program is geared solely toward the Government).

[74] *See* SVP Message, *supra* note 72.

[75] *Id.* The Fort Bragg SVP was removed from his SVP duties and assigned to assist in the prosecution of a capital case scheduled to last eight weeks. Telephone Interview with Major Robert Stelle, Fort Bragg Special Victim Prosecutor (Feb. 26, 2010).

[76] SVP Message, *supra* note 72. The Defense Counsel Assistant Program was to receive assistance from the Highly Qualified Expert Program.

[77] Policy Memorandum 09-3, Office of the Judge Advocate General, U.S. Dep't of Army, subject: Special Victim Prosecutors—POLICY MEMORANDUM 09-3, para. 3 (29 May 2009) [hereinafter SVP Policy Memo]. These areas of responsibility are identified by PP&TO in conjunction with the Office of the Judge Advocate General, Criminal Law Division.

[78] *Id.* para. 5.

[79] *Id.* para. 9a.

The SVP mission is three-fold. The first and primary mission of the SVP is litigation.[80] "The SVP will be detailed to every sexual assault . . . case within their area of responsibility. The SVP, in coordination with the Chief of Military Justice, will determine whether additional trial counsel should be detailed to a particular case and which counsel will sit first chair on the case."[81] "Secondary to their primary mission, SVPs will develop a sexual assault and family violence training program for the investigators and trial counsel in the area of responsibility."[82] The third area of emphasis is establishing "Special Victims Units (SVUs) at the installations in their area of responsibility, if practicable."[83] Many civilian jurisdictions have a self-contained unit for sexual assault investigation and prosecution.[84] While the SVP program addresses the need for experienced JAs in sexual assault cases, it does not address the fact that seasoned JAs are needed across the board.

V. Suggested Changes

A. Training

The Judge Advocate General identified training and leader development as crucial to a JA's ability to provide legal support to the Army.[85] Trial work offers the best training and development opportunity in military justice; there is no substitute for real work on real cases.[86] The Army must "[t]rain smart."[87] Often, young, untested counsel in the Army are assigned cases with little or no supervision or their superiors lack the time and experience to provide mentorship.[88] While this practice may give junior JAs trial experience, it does not make them better litigators. The JAG Corps must provide TCs with sufficient mentorship to ensure they do not spend unnecessary time learning and preparing for cases and to ensure that their output is not substandard.[89]

In order to avoid poor or improper training, the Army needs to place experienced litigators on all contested courts-martial. Such a proactive stance provides junior TCs with quality supervision sitting right next to them in court. To effectuate this course of action and maximize the courtroom training of its people, the Army must do two things. First, as discussed previously, simply because a JA has been in a TC duty position for eighteen to twenty-four months, does not necessarily indicate that he possesses a basic knowledge of MJ; therefore, if a JA is deployed during his stint as TC or his litigation experience is minimized for another reason, the length of time he is in the TC position should be extended.[90] Second, the Army must ensure that the personnel assigned to STC, SDC, and COJ positions have the requisite qualifications for that position using the ASI.

B. Additional Skill Identifier

The ASI is a great start in ensuring qualified practitioners are in positions that require at least a minimal amount of experience; however, to be effective, the Army must right-size the program. The qualifications for the SMJP must be changed to adequately account for pre-graduate course JAs with significant litigation experience. The ASI has the potential to identify those JAs with both experience and interest in MJ. It goes beyond the JA's duty title and looks at their experience level in an effort to recognize these individuals. According to one survey respondent "[r]ight now, individuals nearing 100 courts-martial are considered 'basic' because they have not gone to the graduate course, where an officer with half [that amount] is considered more of an expert after acquiring 3 credit hours of criminal law in the graduate course."[91] The system fails to address one of

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[80] *See id.* para. 7.

[81] *Id.* para. 9b.

[82] *Id.* para. 7b.

[83] *Id.* para. 9c.

[84] Fifth Nat'l Sexual Assault Response Team Training Conf. at Seattle, Wash. (May 27–29, 2009).

[85] *See* Memorandum from Major General Scott C. Black, The Judge Advocate Gen., to Judge Advocate Senior Leaders, subject: Training Guidance FY 2009, para. 4 (30 Oct. 2008) [hereinafter 2009 Training Memo].

[86] *See generally* Criminal Law Survey, *supra* note 2, Survey No. 24 ("Regardless of the amount of training, nothing, I repeat, nothing, can substitute live in-court experience. In order to get better at trying cases, you must try cases, period. The best way to sharpen the Corps trial litigation skills is to keep counsel in their positions for extended periods of time so they can actually try cases.").

[87] 2009 Training Memo, *supra* note 85, para. 3b.

[88] Criminal Law Survey, *supra* note 2, Survey No. 94 ("The JAGC is failing the Army, commanders, and Soldiers. TC, DC and most Field Grade JAs are shamefully inexperienced in MJ. Right now, I know of several RDCs and SDCs who HAVE NEVER TRIED A CASE, but are expected to train and advise brand new counsel."); *id.* Survey No. 17 ("[t]here is a lack of available, experienced trial lawyers to mentor junior trial lawyers.").

[89] *See also id.* Survey No. 30; *id.* Survey 68 ("The Army's system of allowing people fresh out of law school to operate as the primary felony litigators, who are led by Senior Trial Counsels 3 years out of law school, is ridiculous.").

[90] *Id.* Survey No. 24 ("the best way to sharpen the Corps litigation skills is to keep counsel in their positions for extended periods of time so they can actually try cases.").

[91] *Id.* Survey No. 57 (The Graduate Course has more than three credit hours devoted to criminal law. The SMJP requires three additional elective credits above the plenary instruction on MJ.). At the time of the survey, only eight JAs out of 107 possessed an approved ASI above Basic Military Justice Practitioner; 67% possessed no current ASI. Many ASI requests were pending and multiple respondents expressed doubt that the ASI would be useful in its current format.

the main difficulties the Army faces in manning its MJ positions: a shortfall in majors.

The Army, like many organizations, relies on its senior officers to train and mentor subordinates. In MJ, the STC, SDC, and COJ are considered to be the training positions; therefore, the Army must place experienced people in these positions. While PP&TO does have this as a goal, it sometimes fails to meet its own standard.[92] The ASI program presently has no way of identifying pre-graduate course officers with sufficient experience to fill these training positions. A JA's Officer Record Brief lists positions that the JA filled, but not the level of experience she received in those positions or her abilities. The JAG Corps is at approximately 69% strength for majors.[93] The supply of postgraduate majors is inadequate to fill positions requiring experienced MJ practitioners; therefore PP&TO must plug senior captains into these positions, but the current ASI system is unable to assist in identifying these JAs.

Even if a sufficient number of majors existed to fill these positions, the ASI would be inadequate. The time between the graduate course and the first look for lieutenant colonel (LTC) is approximately five years.[94] An officer completes only two or three post graduate course assignments in this period. A JA is ineligible to apply for the senior ASI until after the graduate course, so PP&TO cannot use the ASI for the first post-graduate course assignment. Since LTCs are not traditionally in litigation positions, this means that the ASI is only useful for one assignment in a JA's career. Since the ASI fails to adequately capture senior captains' experience and can only be used for one assignment as a major, it is nearly useless in its stated goal as a PP&TO manning tool. To be useful, a JA must qualify for a SMJP ASI prior to attendance at the graduate course.

C. Coding Senior Military Justice Positions

Senior MJ positions are not the place to learn justice. Junior officers depend on the JAs in these positions to answer questions quickly, knowledgably, and helpfully; which does not always occur in practice.[95] Once the ASI is right-sized, it can be used in manning "coded" positions.[96] There are currently no "coded" billets for MJ, while there are for other specialties including contract law and language.[97] The STC positions should require at least a BMJP ASI; SDC and COJ positions should be "coded" for a SMJP ASI. While this may lock out JAs who have no MJ experience earlier in their careers through no fault of their own, these positions are not ones that should be used to gain experience. Placement of inexperienced JAs in these senior litigation positions harms junior litigators in particular and the MJ system as a whole.

D. Post-Trial

Junior JAs need experienced senior JAs to serve on cases with them. Since there are no real STC billets, often the STC has other duties including BJA or Special Assistant U.S. Attorney.[98] These can be and often are full time positions in their own right; therefore the STC cannot be in charge of all the training, the COJ must be free to assist. The STC should be used to second chair cases with junior officers to ensure they properly learn how to prosecute a case and to first chair more difficult or time consuming cases. In busy jurisdictions COJs are frequently so overwhelmed with post-trial and other commanding general (CG) actions; they rarely have time for training.[99] A system must be put into place that frees the STC to sit on cases with new TCs and handle the more complex cases and the COJs to train their junior JAs as well as preparing and reviewing all MJ CG actions.[100] One way to accomplish this is to move the responsibility of post-trial.

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[92] Maxwell Interview, *supra* note 15. The author provided the Criminal Law Survey to all 2009–2010 Graduate Course attendees who were slated to take jobs in criminal law. Fifty percent had less than two years experience in criminal law; 25% had less than one year. Thirty percent had tried fewer than five contested cases.

[93] *Id. See also* Pers., Plans, & Training Office, AC 27 A/B Strength Report, Power Point Slide (2009) (on file with author).

[94] *See* Pers., Plans, and Training Office, JAGC FY10 0-5 Prom Plan, https://www.jagcnet.army.mil/852574980060D3A9/0/AEA976677C9CD9C2852576BF0075F5FA/$file/O5%20Promotion%20Plan.pdf; OFFICE OF THE JUDGE ADVOCATE GENERAL, U.S. ARMY, JAG PUB 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY (2009–2010).

[95] Criminal Law Survey, *supra* note 2, Survey No. 33 ("If nothing else, it (a criminal law career track) would stem the flow of people being placed in STC/CoJ positions that don't actually have any MJ experience (or at best, minimal experience). When TCs have to mentor Senior TCs or CoJs, there is a problem.").

[96] A coded position is one in which a JA must meet certain prerequisites before filling the position.

[97] Maxwell Interview, *supra* note 15.

[98] Chief Warrant Officer Three Rob T. Stone, The Judge Advocate Gen. Legal Ctr. & School, Address to the Military Operations Class of the 58th Graduate Course at The Judge Advocate Gen.'s Legal Ctr. & Sch. (Jan. 5, 2010). *See also generally* Criminal Law Survey, *supra* note 1 (Many STCs expressed that other duties interfered with their ability to adequately concentrate on training.).

[99] *See* Criminal Law Survey, *supra* note 2, Survey No. 94 ("We not only need a military justice career track, we also need to delineate between military justice managers and litigators—these are related but require different skill sets. Field grade officers should LEAD litigation teams, not just serve as an administrator ie chief of justice.").

[100] *See id.* Survey No. 99. One survey respondent commented:

> One thing that goes unmentioned is the huge onus on the more experienced folks to train the less experienced folks. I have a staff of 5 attorneys . . . only one came with trial experience . . . all of which are first term captains. That is a HUGE training

In the Navy and Marine Corps, once a case is prosecuted, the responsibility for post-trial is moved to the civil law section.[101] Most post-trial processing has little to do with criminal law. It is more of an administrative and systemic function. For the benefit of the SJA, the accused, and the CG, the section reviewing the record for any alleged legal error should be unbiased. While this would create more work for the military and civil law division (MCD), the MCD would receive a post-trial paralegal and/or a civilian in most jurisdictions.

In an effort to alleviate some of the strain that moving post-trial would place on the MCD, warrant officers should be placed in charge of processing post-trial. Historically, legal administrator core functions included preparation of convening orders, promulgation orders, and records of trial.[102] The Chief Warrant Officer of the Corps is pushing for a "renewed focus" on warrant officers' traditional role in military justice.[103] This focus includes both training and workplace application.[104] Furthermore, the warrant officer normally controls the budget of the office, so he or she should be more active in the production of witnesses at trial. The prosecution of Hassan Akbar had a dedicated warrant officer to handle these types of issues.[105] Also, the Army is fielding two warrant officers at the large installations, which is precisely where they are most needed to take over the post-trial processing mission.[106]

E. Regional Military Justice Practitioners

The SVP program recognizes the problem with the prosecution (and to some extent the defense) of complex cases, but sexual assault is not the only type of complex case.[107] The Army should form a regional military justice practitioner (RMJP) position at major installations with area jurisdictions, similar to the SVPs.[108] In this position, an experienced JA litigator would try complex cases which would alleviate current personnel and resource strains.[109] In the case against Major Malik N. Hasan, there is no RMJP as described above and no coded MJ billet. As a result, the Fort Hood COJ was placed on the case; the Deputy SJA of Fort Sill was moved from his assignment to Fort Hood; and a colonel who was in Iraq serving as the Executive Officer for the deputy commander for Multinational Forces – Iraq, was pulled out of his deployment.[110] One case disrupted a deployment and three offices. [111] This is not an isolated incident in high profile cases.[112]

> burden on me and I spend a lot [of] time doing it. They lack basic fundamental knowledge of how to move a case to conclusion. Once I get them trained up . . . they PCS or more to another assignment.

Id.

[101] Interview with Major Winston McMillan, U.S. Marine Corps, in Charlottesville, Va. (Jan. 8, 2010).

[102] Interview with Chief Warrant Officer Three Rob T. Stone, Combat Developer, The Judge Advocate Gen.'s Legal Ctr. & Sch., in Charlottesville, Va. (Jan. 14, 2010) [hereinafter Stone Interview].

[103] Chief Warrant Officer Five Richard Johnson, *From the Desk of the Warrant Officer of the Corps*, QUILL & SWORD, Jan. 2011, at 2 [hereinafter QUILL & SWORD.

[104] *See id.*

> The foundation of an effective military justice office is a reliable system that manages timelines and processes, and ensures the generation of quality products. Legal Administrators, as managers of JAG Corps systems, should be involved. In addition, we are making adjustments to the Warrant Officer Basic and Advanced Courses to increase training of military justice.

[105] Interview with Chief Warrant Officer Three Philip Kraemer, in Grafenwoehr, Ger. (2007).

[106] Stone Interview, *supra* note 102.

[107] *See* Dwight Sullivan, *Top 10 military justice stories of 2008*, CAAFlog, (Dec. 24, 2008), http://www.caaflog.com/2008/12/24/top-10-military-justice-stories-of-2008-10-the-armys-adoption-of-military-justice-additional-skills-identifiers. Sullivan postures:

> But while the military justice system does an excellent job with run-of-the-mill cases, I've noticed over my roughly 21 years in the MJ system that it tends to do a poor job in the big cases. Consider, for example, that in 2 of the 10 military death penalty cases that have completed direct appeal under the current system, the death sentence was set aside because apparently no one in the courtroom knew – or could figure out – the proper instruction for voting on the sentence in a capital cases (sic). Or that another 4 of those 10 death sentences were reversed at least in part on IAC grounds. In all, 8 of the 10 have been reversed; the military justice system is batting the *Mendoza* line in capital cases on appeal.

Id.

[108] This is similar to the Air Force Senior Trial Counsel. The Army SVPs are also sometimes used in this manner. Telephonic interview with Major Robert Stelle, Fort Lewis Special Victim Prosecutor, Wash. (Feb. 2, 2011) [hereinafter Stelle interview].

[109] *See* Criminal Law Survey, *supra* note 2, Survey No. 2 ("We (the JAGC) most often do not leave attorneys in CL long enough to develop an expertise. Then, when we have a capital case or other complex litigation, we don't have counsel in the office with the experience to handle them.").

[110] *See* Maxwell Interview, *supra* note 15.

[111] In the capital case against Staff Sergeant Alberto B. Martinez, two captains were moved from their duty assignments and a lieutenant colonel was TDY for approximately eight months in order to prosecute the case. Interview with Captain Evan Seamone, Editor, Military Law Review, in Charlottesville, Va. (Mar. 2, 2010).

[112] Some installations have formed complex or capital litigation cells to address complex cases. Stelle interview, *supra* note 108.

VI. Conclusion

It is true that Army JAs perform incredibly across the spectrum of missions they are asked to accomplish including military justice; however, it is military justice, which is the JAG Corps' only statutory mission. The JAG Corps has a duty to ensure that it provides the best service possible to the Army. It must maintain a core of seasoned MJ practitioners as well as training new JAs in litigation. Perhaps the best way to ensure that the JAG Corps is providing quality military justice counsel is to implement a military justice career track similar to the Navy's. Short of a MJ career track, implementation of the relatively minor changes proposed in this article would improve greatly the quality of litigation by ensuring an identifiable stable of JAs experienced in MJ and placing these experienced and competent JAs in senior litigation positions. Moving post-trial responsibilities from the MJ shop and incorporating the warrant officer relieves some of the administrative burden from the senior JAs. This will, in turn, improve the training of junior JAs and the status of military justice in the eyes of the public, Soldiers, and combatant commanders.

Appendix

Please take a few minutes to fill out the survey below. My Graduate Course paper will discuss whether there should be a criminal law track in the Army. This survey is to gather data regarding the experiences of our Army criminal law personnel. Information provided, including any comments, will not be linked to any particular individual. You may send the completed questionnaire directly to me at derrick.grace@us.army.mil. Please complete the survey no later than 4 December 2009.

1. What is your current position?
   _____ Trial Counsel
   _____ Defense Counsel
   _____ Senior Trial Counsel
   _____ Senior Defense Counsel
   _____ Chief, Military Justice

2. How long have you been in this position
   _____ Less than 6 months
   _____ 6 months – 1 year
   _____ 1 year – 2 years
   _____ 2 years – 3 years
   _____ More than 3 years

3. What previous Military Justice positions have you held and how long were you in that position? (Please use the time periods from question 2)
   _____ Trial Counsel
   _____ Defense Counsel
   _____ Senior Trial Counsel
   _____ Senior Defense Counsel
   _____ Chief, Military Justice

4. Senior Trial Counsels or those who have been STCs – Is/was STC your only duty?

5. If not what is/was you other position or responsibility?

6. What is your current Army Skill Identifier level for Military Justice?

7. How many cases have you tried as a government counsel?
   _____ Less than 5
   _____ 5-10
   _____ 10-15
   _____ 15-20
   _____ 20-30
   _____ More than 30 (approximately how many _____)

8. How many cases have you tried as a defense counsel?
   _____ Less than 5
   _____ 5-10
   _____ 10-15
   _____ 15-20
   _____ 20-30
   _____ More than 30 (approximately how many _____)

9. Of the cases you tried how many were contested?
   _____ Less than 5
   _____ 5-10
   _____ 10-15
   _____ 15-20
   _____ More than 20 (approximately how many? _____)

10. Of the following types of crime, how many have you tried (contested only)?
    a. 1-3
    b. 3-6
    c. 6-10
    d. More than 10

Contested Only	Government	Defense
Child pornography		
Robbery		
Sexual assault/rape		
Aggravated Assault		
Manslaughter		
Murder		

11. Have you deployed in a criminal law position?

12. If so, how many cases did you try?
    _____ 0-3
    _____ 3-6
    _____ 6-10
    _____ More than 10

13. Please rank the following areas of military law from most interested (1) to least interested (5)
    _____ Military Justice
    _____ Administrative Law
    _____ Legal Assistance
    _____ International and Operational Law
    _____ Contract and Fiscal Law

14. Please use the scale below in answering the following questions.

    1 = strongly agree; 2 = agree; 3 = neutral; 4 disagree 5 = strongly disagree.

    a. My primary interest is military justice.

    b. One of the reasons I joined the Army was to work in criminal law.

    c. I would be interested in a military justice career track.

    d. If possible, I would prosecute/defend as a Field Grade Officer.

e. If there were more opportunities in criminal litigation at higher ranks, I would be more likely to stay in the Army.

f. It has been my experience that good litigators are leaving the Army because of the lack of litigation opportunities at senior ranks.

15. Please make any comments below regarding your experiences or observations regarding military justice. This is a blind study. No comments will be attributed to any individuals.

Servicemember Education Benefits: Using Government Sponsored Programs to Help Lower or Eliminate Higher Education Costs

Lieutenant Colonel Samuel W. Kan[*]

[A]s an investment, education provides excellent returns, both for individuals and for society. . . . But the benefits of education are more than economic. A substantial body of evidence demonstrates that more-highly educated individuals are happier on average, make better personal financial decisions, suffer fewer spells of unemployment, and enjoy better health . . . . One great challenge in higher education lies in making sure our high-school graduates have access to it . . . .[1]

I. Introduction

Students, in an effort to achieve the American dream by attending their dream school and securing their dream job, are graduating college with an excessive amount of student loan debt. Unfortunately, these dreams may quickly turn into nightmares as students attend their dream school at any cost, graduate with a burden of debt, and subsequently enter a challenging employment environment.[2]

Fortunately, numerous laws, programs, and benefits exist to help servicemembers, veterans, and their dependents pursue higher education at reasonable cost. This article addresses some of the most relevant issues servicemembers may encounter in their efforts to minimize the cost of higher education. Part II of this article addresses how to obtain in-state tuition at public schools. Part III discusses strategies for minimizing educational costs. Part IV provides ways to eliminate paying tuition altogether. By learning about and taking advantage of these benefits, servicemembers, veterans, and their dependents can achieve the American dream without graduating under a burden of year's of debt.

II. Federal Law Enables Servicemembers and Their Dependents to Pay In-State Tuition

Federal law[3] mandates that states receiving federal assistance under Title 4 of the Higher Education Act[4] charge members of the Armed Forces[5] and their dependents in-state tuition for attendance at public institutions of higher education.[6] Specifically, federal law states

> In the case of a member of the armed forces who is on active duty for a period of more than 30 days and whose domicile or permanent duty station is in a State that receives assistance under this chapter, such State shall not charge such member (or the spouse or dependent child of such

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[1] Ben S. Bernanke, Chairman, Fed. Reserve Sys., Education and Economic Competitiveness, Address at the U.S. Chamber Education and Workforce Summit (Sep. 24, 2007), *available at* http://www.federalreserve.gov/news events/speech/bernanke20070924a.htm.

[2] *See, e.g.*, Douglas W. Elmendorf, Dir., Cong. Budget Office, The Budget and Economic Outlook Fiscal Years 2011 to 2021, Address before the Committee on The Budget, United States Senate (Jan. 27, 2011), *available at* http://budget.senate.gov/republic/hearingarchive/testimonies/2010/2011-01-27Elmendorf.pdf (explaining that almost nine million workers who wanted full-time work in 2009 and 2010 have been employed only part time; predicting that the recovery in employment will be slow with an unemployment rate of 9.2% in the fourth quarter of 2011, 8.2% in the fourth quarter of 2012, and eventually a natural rate of unemployment around 5.3% in 2016). *See also* Anne Marie Chaker, *Students Borrow More Than Ever for College*, WALL S. J., *available at* http://articles.moneycentral.msn. com/CollegeAndFamily/CutCollegeCosts/students-borrow-more-than-ever-for-college.aspx (last visited Jan. 31, 2011) (explaining that students borrowed approximately $75 billion in the 2008-2009 academic year which was up 25% from the previous year; highlighting that in a 2006 survey of college graduates under the age of 35, 39% expected that it would take them more than ten years to pay off their household's education-related debt). *But see* 20 U.S.C. § 1078 (2006) (capping the interest rates of federally insured student loan debt incurred by servicemembers before they entered the military). As a result, servicemembers with pre-service student loan obligations, either federally or non-federally insured, may be able to pay off their debt sooner due to a potentially lower interest rate cap of 6% provided by the Servicemembers Civil Relief Act, 50 U.S.C. App. 527.

[3] Higher Education Opportunity Act, 20 U.S.C.A. § 1015d (2008) (reauthorizing the Higher Education Act of 1965).

[4] Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended in 20 U.S.C. §§ 1001–1161aa-1); *see, e.g.*, *Federal Financial Aid Return of Title IV Funds Policy*, CENT. OR. COMMUNITY C., http://finaid.cocc.edu/Policies/Repayment/default.aspx (last visited Feb. 1, 2011) (providing that Title IV financial aid programs include Federal Pell Grant, Academic Competitiveness Grant, Federal Supplemental Educational Opportunity Grant, Federal Work-Study, and Federal Stafford Loans). *See generally Title IV Programs*, FED. STUDENT AID, http://federalstudentaid.ed .gov/about/title4_programs.html (last visited Feb. 1, 2011) (discussing the numerous Title IV programs available; explaining that due to the Health Care and Education Reconciliation Act, beginning 1 July 2010, that federal student loans will no longer be made by private lenders and that all loans will now come directly from the U.S. Department of Education under the Direct Loan Program).

[5] Armed Forces is defined as "the Army, Navy, Air Force, Marine Corps, and Coast Guard." 10 U.S.C. § 101(a)(4) (2006).

[6] *See* 20 U.S.C.A. § 1015d (2008) (mandating that public institutions of higher education receiving assistance under 20 U.S.C. Chapter 28 charge servicemembers on active duty, as well as their spouses and dependent children, in-state tuition rates for the first period of enrollment beginning after 1 July 2009).

> member) tuition for attendance at a public institution of higher education in the State at a rate that is greater than the rate charged for residents of the State.[7]

This language specifies that servicemembers need only be stationed in the state to qualify for in-state tuition; servicemembers do not need to be domiciled[8] in the state to receive in-state tuition.

A. The Significance of Domicile

The distinction between being stationed and being domiciled in a specific state is extremely important because establishing and maintaining a state as one's domicile means a servicemember must meet certain requirements. Specifically, these requirements include establishing physical presence in the state and forming the intent to make the state the servicemember's permanent home.[9] A servicemember can demonstrate this intent by taking specific steps, such as registering to vote in the state, purchasing real property in the state, obtaining professional and driver's licenses in the state, and telling others about an intent to make the state a permanent home.[10] More importantly, establishing domicile in a state has significant consequences, including submission to the state's jurisdiction for taxation purposes.

In short, due to federal law, servicemembers can obtain in-state tuition privileges without exposing themselves to the many disadvantages of becoming a domiciliary in a particular state.[11] Furthermore, in addition to mandating that public universities charge in-state tuition to servicemembers and their dependents domiciled or stationed in the state, federal law also requires public universities to continue charging in-state tuition rates even when a servicemember is subsequently stationed elsewhere, as long as the student is continually enrolled at the institution.[12]

B. Steps to Paying In-State Tuition

Servicemembers interested in taking advantage of the opportunities created by federal law should take three steps. First, they should research applicable state policies and practices, which may be helpful in understanding how specific states are implementing federal law with regard to paying in-state tuition.[13] By educating oneself about various

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[7] *Id.* § 1015d(a). Active duty for a period of more than thirty days is defined as "active duty under a call or order that does not specify a period of 30 days or less." 10 U.S.C. § 101(d)(2). Active duty is defined as

> full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty.

Id. § 101(d)(1); *see also* U.S. DEP'T OF EDUC., FEDERAL STUDENT AID HANDBOOK 2-35, *available at* http://www.ifap.ed.gov/ifap/byAwardYear.jsp?type=fsahandbook&awardyear=2009-2010 (discussing the definitions of armed forces, active duty, and active duty for a period of more than thirty days).

[8] Domicile is defined as "[t]he place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." BLACK'S LAW DICTIONARY 558 (9th ed. 2009).

[9] *See generally* Major Wendy P. Daknis, *Home Sweet Home: A Practical Approach to Domicile*, 177 MIL. L. REV. 49, 52 (2003) (explaining the requirements of establishing domicile).

[10] *See* Major Samuel W. Kan, *Setting Servicemembers Up for More Success: Building and Transferring Wealth in a Challenging Economic Environment—A Tax and Estate Planning Analysis*, ARMY LAW., Jan. 2010, at 57 (discussing domicile in terms of taxation and estate planning).

[11] For example, Virginia domiciliaries are subject to paying licensing fees and personal property taxes on their personally owned vehicles. However, servicemembers who are stationed in Virginia but are not domiciled in Virginia can contact their local state revenue office, provide them appropriate documentation, and exempt themselves from paying personal property taxes on their vehicles. Servicemembers should be aware that they may still need to pay appropriate licensing fees for their vehicles. For example, servicemembers stationed in Charlottesville, Virginia, could visit the City of Charlottesville Treasurer's Office and provide the office with a copy of the servicemember's military orders and leave and earnings statement. By providing this documentation, servicemembers can exempt their personally owned vehicles from Virginia personal property tax. *See generally Comm'r of Revenue*, CITY OF CHARLOTTESVILLE, http://www.charlottesville.org/Index.aspx?page=22 (last visited Feb. 1, 2011). Similarly, servicemembers stationed but not domiciled in Georgia can follow comparable procedures to accomplish similar objectives. For example, servicemembers can file an affidavit for exemption of *ad valorem* taxes on motor vehicles, Form PT 471, with the Georgia Department of Revenue. *See* Service Member's Affidavit for Exemption of Ad Valorem Taxes for Motor Vehicles, GA. DEP'T OF REVENUE, *available at* http://motor.etax.dor.ga.gov/forms/pdf/motor/ MVService_Members_Affidavit_PT471.pdf (last visited Feb. 1, 2011). By filing this affidavit, servicemembers can exempt not only their personally owned vehicle, but also a vehicle jointly owned with a non-resident civilian spouse. *See* GA. DEP'T OF REVENUE 2009 GEORGIA MOTOR VEHICLE AD VALOREM ASSESSMENT MANUAL, at ix, *available at* http://motor.etax.dor.ga.gov/forms/pdf/motor/MV_2009_MV_Assessment_ Man_Mar_Ed.pdf (last visited Feb. 1, 2011).

[12] 20 U.S.C.A. § 1015d (2008). The Act states,

> If a member of the armed forces (or the spouse or dependent child of a member) pays tuition at a public institution of higher education in a State at a rate determined by subsection (a), the provisions of subsection (a) shall continue to apply to such member, spouse, or dependent while continuously enrolled at that institution, notwithstanding a subsequent change in the permanent duty station of the member to a location outside the State.

Id.

[13] *See, e.g.*, In-State Tuition Rates for Armed Forces Members, Spouses, and Dependent Children at Public Institutions: Public Law 110-315, Sec. 135, U.S. ARMY HUM. RES. COMMAND, https://www.hrc.army.mil/site/education/index.html (last visited Feb. 1, 2011). This website posted a state-by-state summary of how the states were implementing federal law. Unfortunately, at the time this article was published, the state-by-state summary was not available.

state policies and practices, a servicemember can determine what states are good candidates for future military assignments in terms of available educational opportunities. Second, after researching a state's policies, the servicemember should contact the Registrar's Office at the specific educational institutions of interest to the servicemember for additional guidance. Registrars' offices at many schools, such as the University of California[14] and the State University of New York,[15] may forward servicemembers to a separate residency determination office to answer in-state tuition qualification questions. Third, once the servicemember has determined the specific requirements for in-state tuition at a particular educational institution, the servicemember should gather the appropriate documentation and submit it in a timely fashion.

The following example illustrates how a servicemember can obtain in-state tuition. A servicemember domiciled or stationed in Virginia, who is interested in sending a dependent to the University of Virginia at the in-state tuition rate, should call the university's Registrar's Office or visit the school's website.[16] Applicants from military families are directed to contact the Committee on Student Status.[17] Military dependents are instructed to fill out an Application for Virginia In-State Educational Privileges form, and the rest of the application process is relatively straightforward. Dependents can qualify for in-state tuition simply by providing appropriate documentation, such as a copy of the servicemember's military orders, a leave and earnings statement, or a lease showing physical residence[18] in Virginia.

Some schools may require additional documentation. For example, prior to registration each semester, the University of Texas at Austin requires submission of a letter from the servicemember's commander on military letterhead stating that the servicemember is on active duty.[19] Similarly, the University of North Carolina requires an affidavit attesting to the servicemember's "duty status, PCS [Permanent Change of Station] orders, and location."[20]

While many states limit the in-state tuition benefit to active duty servicemembers and their families, some states define active duty military quite broadly. For example, servicemembers interested in attending schools in Texas will discover that active duty military includes active Reserve and National Guard members of units in Texas.[21] The importance of this distinction becomes clear when considering the consequences of not being on active duty and having to establish residency in Texas under the general rules. Individuals who are not on active duty military status and who want to establish residency for purposes of qualifying for in-state tuition must live in Texas for "12 consecutive months and establish a domicile in Texas prior to enrollment."[22] In other words, active duty military members and their dependents can move to Texas, enroll in school, and qualify for in-state tuition immediately, while a person with no military affiliation, or a military member not on active duty, must move to Texas and live in Texas for a year before qualifying for in-state tuition. Enrollment in school prior to satisfying the twelve-consecutive-month residency requirement would result in paying out-of-state tuition for these non-military or non-active duty individuals.

III. One Step Beyond Paying In-State Tuition: Strategies for Minimizing Educational Costs

Servicemembers can minimize educational costs by pursuing additional cost-saving strategies while paying in-state tuition. For example, students who have weaker high school academic credentials or who need to save as much money as possible may find that attending a local community college may be their best choice. For instance, rather than applying directly to the University of Virginia, a

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[14] For example, the University of California at Berkeley will forward applicants to the Residence Affairs Office at (510) 642-5990. *See generally* Office of the Registrar, *Military Waiver of Nonresident Tuition*, BERKELEY, http://registrar.berkeley.edu/military.html (last visited Feb. 1, 2011) (providing that students will need to provide a statement from their commanding officer or personnel officer indicating the specific date of their assignment in California); Office of the Registrar, *Exemptions from Nonresident Tuition (Proof of Eligibility Is Required)*, U.C. BERKELEY, http://registrar.berkeley.edu/current_students/exemptions.html (last visited Feb. 1, 2011) (listing the numerous ways students may qualify for exemptions from paying nonresident tuition).

[15] For example, the State University of New York at Binghamton will forward applicants to the Student Accounts Office. The Student Accounts Office will inform military applicants that they need to provide a copy of the servicemember's military orders and a letter from the commander verifying that the servicemember is stationed in New York. *See generally* Student Accounts Office, *Establishing New York Residency*, BINGHAMTON U., http://www2.binghamton.edu/student-accounts/residency.html (last visited Feb. 1, 2011).

[16] *See generally* Office of Undergraduate Admission, *Virginia Domicile*, UNIV. OF VA., http://www.virginia.edu/undergradadmission/status.html (last visited Feb. 1, 2011).

[17] The Committee on Student Status can be reached at (434) 982-3391. *See id.*

[18] Residence is defined as,

> The act or fact of living in a given place for some time. . . . The place where one actually lives, as distinguished from a domicile… Residence usu. just means bodily presence as an inhabitant in a given place; domicile usu. requires bodily presence plus an intention to make the place one's home. A person thus may have more than one residence at a time but only one domicile.

BLACK'S LAW DICTIONARY, *supra* note 8, at 1423.

[19] *See* Office of Admissions, *Texas Residency—Frequently Asked Questions*, UNIV. OF TEX. AT AUSTIN, http://bealonghorn.utexas.edu/residency/faq/ (last visited Feb. 1, 2011) [hereinafter Texas FAQ].

[20] *See* Office of the Registrar, *Military Tuition Benefits*, UNIV. OF N.C. AT CHAPEL HILL, http://regweb.unc.edu/ residency/military_benefits.php (last visited Feb. 1, 2011).

[21] *See, e.g.*, Texas FAQ, *supra* note 19.

[22] *Id.*

student from a military family could attend Piedmont Virginia Community College (PVCC) or another school in the Virginia Community College System (VCCS).[23] By doing so, the student[24] would not only be eligible for extremely inexpensive in-state tuition rates,[25] but also would qualify for guaranteed admission to numerous four-year universities, including the University of Virginia. Under a guaranteed admission agreement between the University of Virginia and schools in the VCCS, students who complete an associate's degree achieving "a cumulative grade point average in VCCS coursework of 3.4 or better on a 4.0 scale" and who meet certain other minor criteria, such as completion of specified courses, are guaranteed admission to the University of Virginia.[26] Attending a local community college and then transferring to a larger university is just one example of how military families can save additional costs on education.

IV. Two Steps Beyond Paying In-State Tuition: Tuition Elimination Possibilities

A. Federal Programs

Before relishing the possibility of paying only in-state tuition, servicemembers and their families should be aware of educational opportunities that do not require paying any tuition at all. For example, students who apply and are accepted to attend the nation's service academies, such as the U.S. Military Academy at West Point, not only receive a free education,[27] but also draw a salary while in school and are guaranteed a job upon graduation.[28] Similarly, military officers who apply and are accepted to the Funded Legal Education Program[29] or numerous Master of Laws (LL.M.) programs[30] at civilian law schools not only do not have to pay tuition, but they also receive their full salary throughout their attendance in school. Furthermore, the military[31] provides other opportunities to earn a graduate degree through the Advanced Civil Schooling program for those interested in attending other types of full-time, fully-funded graduate programs, such as business school.[32]

In addition to these traditional programs, which have existed for some time, many relatively new programs have been created to assist servicemembers. For example, the Post-9/11 GI Bill will pay for undergraduate or graduate school education.[33] Eligible servicemembers on active duty may currently receive the total amount of a school's tuition and fees.[34]

In contrast, those not on active duty (e.g., eligible veterans who have been discharged) may currently only receive an amount limited to the highest in-state tuition[35]

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[23] *See generally* PIEDMONT VA. COMMUNITY C., http://www.pvcc.edu/ (last visited Feb. 1, 2011) (providing general information about PVCC).

[24] Students from military families with questions regarding in-state tuition should contact the Welcome Center in room 144 of PVCC's Main Building or call (434) 961-6551. *See* Piedmont Va. Cmty. Coll., Admissions: Am I Eligible for In-State Tuition Rates, *available at* http://www.pvcc.edu/admissions/am_i_eligible.php (last visited Feb. 1, 2011).

[25] For example, Virginia in-state tuition at PVCC is approximately $110.65 per credit hour. *See* Piedmont Va. Cmty. Coll., Tuition & Fees, *available at* http://www.pvcc.edu/tuition_fees/ (last visited Feb. 1, 2011). Taking twelve credits in a semester in 2011, students at PVCC would have to pay approximately $1328 for in-state tuition. A similar undergraduate student taking twelve credits at the University of Virginia would have to pay approximately $10,836 for in-state tuition. *See* Univ. of Va., Tuition, Fees & Estimated Costs of Attendance, *available at* http://www.virginia.edu/Facts/Glance_Tuition.html (last visited Feb. 1, 2011).

[26] *See* Guaranteed Admission Agreement: University of Virginia and Virginia Community College System, *available at* https://www.vccs.edu/Portals/0/ContentAreas/Transfer/uva.pdf (last visited Feb. 1, 2011).

[27] The U.S. Military Academy at West Point was ranked as America's Best College by Forbes in 2009. *See* Forbes, America's Best Colleges, *available at* http://www.forbes.com/2009/08/02/best-colleges-ratings-opinions-ranking-2009_land.html (last visited Feb. 1, 2011).

[28] *See* West Point Admissions, *Overview of the Academy*, U.S. MIL. ACAD., http://admissions.usma.edu/overview.cfm (last visited Feb. 1, 2011) (explaining that cadets receive free tuition, room, board, and medical care, as well as an annual salary of more than $6,500).

[29] *See* U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 14-1 (30 Sept. 1996), *available at* http://armypubs.army.mil/epubs/pdf/r27_1.pdf (last visited Feb. 1, 2011) (explaining the process to obtain a law degree at government expense at approved civilian law schools). *See also* JAGCNet.army.mil, Funded Legal Education Program, *available at* https://www.jagcnet.army.mil_8525769A00495E0D.nsf/0/D88CC9A221321F27852577680059F095?Open (last visited Feb. 1, 2011) (describing the selection criteria, including average undergraduate GPA and LSAT score, and providing Ms. Yvonne Caron as a point of contact at (703) 588-6774).

[30] *See* JAG PUB. 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES para. 7-9 (1 Nov. 2010), *available at* https://www.jagcnet2.army.mil/852573690045CE9E/0/F96A7D8D811B0691852577F2006DDDFC/$file/The%20Directory%202010-11.pdf (explaining the process to obtain advanced LL.M. degrees at government expense in specialized areas including international law, criminal law, contract law, information technology law, environmental law, labor and employment law, and tax law).

[31] *See, e.g.*, *About Us*, U.S. ARMY STUDENT DETACHMENT, http://www.jackson.army.mil/sites/usasd/pages/222 (last visited Dec. 21, 2010) (providing information such as the unit's mission and policies).

[32] *See generally* Advanced Civil Schooling (ACS), MYARMYBENEFITS, http://myarmybenefits.us.army.mil/Home/Benefit_Library/Federal_Benefits_Page/Advanced_Civil_Schooling_(ACS).html?serv=147 (last visited Feb. 1, 2011) (providing an information paper on the requirements, application procedures, and benefits of Advanced Civil Schooling). *See also* U.S. DEP'T OF ARMY, REG. 621-1, TRAINING OF MILITARY PERSONNEL AT CIVILIAN INSTITUTIONS para. 1-1 (28 Aug. 2007) (explaining the scope and goals of numerous educational programs).

[33] *See The Post-9/11 GI Bill*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.gibill.va.gov/post-911/post-911-gi-bill-summary/ (last visited Feb. 1, 2011) (providing information on Post-9/11 GI Bill benefits).

[34] *See Post-9/11 GI Bill: General Information*, U.S. DEP'T OF VETERANS AFFAIRS [hereinafter *Post-9/11 GI Bill: General Information*], http://www.gibill.va.gov/documents/Post-911_General_Info.pdf (last visited Feb. 1, 2011) (explaining that individuals on active duty may currently receive the total amount of tuition and fees); *see also infra* note 59 and accompanying text.

[35] *See, e.g.*, *2010-2011 Maximum In-State Tuition & Fees*, U.S. DEP'T OF VETERANS AFFAIRS [hereinafter *Maximum Tuition*], *available at* http://

charged by a public educational institution in the state where the school is located.[36] Although they may not qualify for the same amount of tuition and fees available to active duty servicemembers, they may qualify for a monthly housing allowance as well as an annual book and supply stipend.[37] For those attending schools with higher tuition than what the Post-9/11 GI Bill will cover, the Yellow Ribbon Program[38] allows schools to voluntarily contribute funds to help close the tuition gap.[39] Schools can contribute up to 50% of the expenses and the Department of Veterans Affairs will match the amount.[40]

Depending on the situation, other benefits may also be available. Some of these benefits may include a one-time rural relocation benefit, a one-time reimbursement for a certification or licensing exam, and college fund or "kicker" payments.[41]

Furthermore, additional Post-9/11 GI Bill educational benefits will soon be available.[42] First, starting on 1 October 2011, servicemembers and their spouses enrolled in school while on active duty will receive book allowances.[43] Second, National Guard members performing active service "for the purpose of organizing, administering, recruiting, instructing, or training the National Guard" or "under section 502(f) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency" will be entitled to benefits.[44] Third, starting 1 October 2011, students will be able to attend vocational and other types of non-degree training.[45] Fourth, also starting on 1 October 2011, non-active duty distance learners on more than a half-time basis will receive housing allowances.[46] Fifth, beginning 1 August 2011, students will be able to obtain reimbursement of fees for multiple licensure and certification tests (previously only a single reimbursement was authorized), and can now also obtain reimbursement for national tests required for admission, such as the Standard Aptitude Test (SAT).[47]

However, with these additional benefits also comes the possibility of losing certain benefits. First, effective 1 August 2011, active duty members, veterans, and transferees attending private and foreign school will have a national annual maximum of $17,500 to cover tuition and fees.[48] Second, housing allowances will be prorated so that a student taking fewer credits would receive a smaller housing allowance than a student taking the credits required for full-time pursuit of the program.[49] Additionally, students will

www.gibill.va.gov/gi_bill_info/ch33/tuition_and_fees.htm (last visited Feb. 1, 2011) (providing a state-by-state list of the maximum tuition and fees applicable for the 2010–2011 school year).

[36] *See Post-9/11 GI Bill: General Information*, *supra* note 34.

[37] *Id.*

[38] *See Yellow Ribbon Program Information 2010–2011 School Year*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.gibill.va.gov/GIBill_Info/CH33/YRP/YRP_List_2010.htm (last visited Feb. 1, 2011) (providing a list of the participating schools by state such as the Massachusetts Institute of Technology in Cambridge, Massachusetts). The Yellow Ribbon Program, which is officially known as the Yellow Ribbon GI Education Enhancement Program, allows institutions of higher learning "to voluntarily enter into an agreement with the VA to fund tuition expenses that exceed the highest public in-state undergraduate tuition rate." *Yellow Ribbon Program*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.gibill.va.gov/gi_bill_info/ch33/yellow_ribbon.htm (last visited Feb. 1, 2011). In general, to be eligible for the Yellow Ribbon Program, individuals must: (1) have served an aggregate period of active duty after 10 September 2001, of at least thirty-six months; (2) have been honorably discharged from active duty for a service connected disability, and served thirty continuous days after 10 September 2001; or (3) be a dependent eligible for transfer of entitlement under the Post-9/11 GI Bill based on a veteran's service under the eligibility criteria listed above. *See id*.

[39] *See generally Benefits of The Yellow Ribbon Program*, U.S. DEP'T OF VETERANS AFFAIRS, *available at* http://www.gibill.va.gov/post-911/post-911-gi-bill-summary/yellow-ribbon-program.html (last visited Feb. 1, 2011) (providing examples of how much money students can receive through the Yellow Ribbon Program).

[40] *See Post-9/11 GI Bill: General Information*, *supra* note 34.

[41] *See id.*; *see also* MILITARY.COM, UNDERSTANDING THE POST-9/11 GI BILL (2009), *available at* http://images.military.com/media/education/pdf/post-911-gi-bill.pdf. *See generally* MILITARY.COM, YOUR MILITARY EDUCATION BENEFITS HANDBOOK (2009), *available at* http://images.military.com/media/education/pdf/education-benefits.pdf (providing information concerning the numerous types of educational benefits including the Post-9/11 GI Bill). *See generally* MILITARY.COM, SPOUSE BENEFITS OF THE POST-9/11 GI BILL (2009), *available at* http://images.military.com/education/Spouse_GIBill_Benefits.pdf (providing information concerning spousal education benefits).

[42] Post-9/11 Veterans Educational Assistance Improvement Act of 2010, Pub. L. No. 111-377, 124 Stat. 4016 (amending 38 U.S.C. §§ 101–3680). *See also Major Changes to GI Bill in 2011*, U.S. DEP'T OF VETERANS AFFAIRS [hereinafter *2011 GI Bill Changes*], *available at* https://www.gibill2.va.gov/cgi-bin/vba.cfg/php/enduser/std_adp.php?p_faqid=1417&p_created=1292942163&p_sid=pGCp5tlk&p_accessibility=0&p_redirect=&p_lva=&p_sp=cF9zcmNoPSZwX3NvcnRfYnk9JnBfZ3JpZHNvcnQ9JnBfcm93X2NudD00MzUsNDM1JnBfcHJvZHM9JnBfY2F0cz0mcF9wdj1_YW55fiZwX2N2PX5hbnl_JnBfc2VhcmNoX3R5cGU9YW5zd2Vycy5zZWFyY2hfbmwmcF9wYWdlPTE*&p_li=&p_topview=1 (last visited Jan. 31, 2011) (outlining the changes to the GI Bill in 2011).

[43] Pub. L. No. 111-377 § 103, 124 Stat. 4016. *See also 2011 GI Bill Changes*, *supra* note 42.

[44] Pub. L. No. 111-337 § 101, 124 Stat. 4016 (providing that although Post-9/11 GI Bill benefits for national guard members on active duty become effective on Aug. 1, 2009, no benefits will actually be paid before Oct. 1, 2011).

[45] *Id.* § 105.

[46] *Id.* § 102(c)(2). "The housing allowance payable is equal to ½ the national average BAH for an E-5 with dependents. The full-time rate for an individual eligible at the 100% eligibility tier would be $673.50 for 2011." *2011 GI Bill Changes*, *supra* note 42.

[47] Pub. L. No. 111-377 §§ 107, 108, 124 Stat. 4016. *See also 2011 GI Bill Changes*, *supra* note 42.

[48] Pub. L. No. 111-377 §§ 102(a), 103(a), 124 Stat. 4016. *See also id* § 103. *See also* Upcoming Changes to the Post-9/11 GI-Bill, U.S. Dep't of Veterans Affairs, *available at* http://www.gibill.va.gov/post-911/post-911-gi-bill-summary/Post911_changes.html (last visited Feb. 25, 2011) (providing that effective 5 Mar. 2011, the benefits of active duty servicemembers will be prorated based on eligibility tiers previously established for veterans).

[49] *Id.* § 102(b).

not receive housing allowances during breaks in school such as breaks between semesters.[50]

Despite the potential loss of some benefits, the Post-9/11 GI Bill still offers a great deal of flexibility. For example, servicemembers can use their Post-9/11 GI Bill educational benefits themselves or choose to transfer their benefits to their dependent family members.[51] Furthermore, if the active duty servicemember dies in the line of duty after 11 September 2001, all of the servicemember's children may[52] be able to take advantage of Post-9/11 Educational Assistance under the Marine Gunnery Sergeant John David Fry Scholarship.[53] This program provides children of deceased servicemembers "up to the highest public, in-state undergraduate tuition and fees, plus a monthly living stipend and book allowance."[54] The Department of Veterans Affairs began accepting applications for this benefit on 1 May 2010.[55] Applicants enrolled in school from 1 August 2009 through 31 July 2010 "may receive retroactive payments for that time."[56]

Using this information, servicemembers can strategically structure their educational pursuits as well as their dependents' educational pursuits based on the applicable benefits available. For example, a servicemember could personally pay his or her dependents' tuition and fees to attend an inexpensive public undergraduate school in Washington, D.C., while saving the Post-9/11 GI Bill benefits to pay for the servicemember's own tuition and fees at a more expensive private school in Washington, D.C., such as Georgetown Law. Following this strategy, rather than allowing the dependents to receive a capped benefit of approximately $3,500 per semester for twelve credits,[57] the active duty servicemember could use the benefit to attend Georgetown Law and receive a benefit of $22,553 per semester[58] since tuition and fees would not be limited to the highest in-state tuition charged by a public educational institution.[59] However, the effectiveness of this strategy will be of limited duration, because starting 1 August 2011, the servicemember would begin being capped at $17,500 for tuition and fees since the servicemember attended a private school.

Another strategy to maximize benefits might include having a dependent attend school on slightly more than a half-time basis. For example, by taking seven credits in a semester rather than twelve credits, the dependent would still qualify for the full monthly housing allowance.[60] In this manner, although it would take longer to complete school, the dependent would receive more benefits due to the longer period of time the dependent would qualify for and receive a housing allowance. However, this strategy would also be of limited duration, because starting 1 August 2011, housing allowances will be prorated based on the number of credits taken. At that time, students will have to take a full load of credits to get the full monthly housing allowance.

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[50] *2011 GI Bill Changes*, *supra* note 42.

[51] *See Transfer of Education Benefits*, DEF. MANPOWER DATA CTR, https://www.dmdc.osd.mil/appj/agentsso/LoginSelect.jsp?gotourl=%2FTEB%2Findex.jsp&modules=DFAS,FAM,CAC (last visited Feb. 1, 2011) (providing a secure means to transfer Post-9/11 GI Bill benefits). Applicants may check the status of their applications and verify their acceptance and approval on the website.

[52] *See* Pub. L. No. 111-377 § 111, 124 Stat. 4016. It is important to note that due to the Post-9/11 Veterans Educational Assistance Improvement Act of 2010, individuals who take advantage of educational assistance under the Fry Scholarship under 38 U.S.C. § 3311(b)(9) will not be able to receive other possible entitlements such as dependent indemnity compensation under 38 U.S.C. §§ 1301–1323 and transferred education benefits under 38 U.S.C. § 3319. *Id*.

[53] *See* 38 U.S.C. § 3311 (2006). *See also Information About the Fry Scholarship*, U.S. DEP'T OF VETERANS AFFAIRS, *available at* https://www.gibill2.va.gov/cgi-bin/vba.cfg/php/enduser/std_adp.php?p_faqid=1411&p_created=1273158744&p_sid=TLEyitlk&p_accessibility=0&p_redirect=&p_lva=&p_sp=cF9zcmNoPSZwX3NvcnRfYnk9JnBfZ3JpZHNvcnQ9JnBfcm93X2NudD00MzUsNDM1JnBfcHJvZHM9JnBfY2F0cz0mcF9wdj1_YW55fiZwX2N2PX5hbnl_JnBfc2VhcmNoX3R5cGU9YW5zd2Vycy5zZWFyY2hfbmwmcF9wYWdlPTE*&p_li=&p_topview=1 (last visited Jan. 31, 2011) (providing information about eligibility (e.g., students may use the benefit between their 18th and 33d birthday), when benefits will be paid, how long the benefits will last (i.e., 36 months of benefits at the 100% level), and how to apply online for benefits (i.e., VA Form 22-5490 Dependent Application for VA Education Benefits)).

[54] U.S. Dep't of Veterans Affairs, Post-9/11 GI Bill: Marine Gunnery Sergeant John David Fry Scholarship, *available at* http://www.gibill.va.gov/documents/Fry_Scholarship.pdf (last visited Feb. 1, 2011).

[55] *Id*.

[56] *Id*.

[57] *See, e.g.*, *Maximum Tuition*, *supra* note 35 (establishing a maximum charge per credit hour of $265.83 and a maximum total fees per term of $310 in the District of Columbia).

[58] *See* Office of Student Affairs, *Tuition and Fees Per Semester*, GEORGETOWN LAW, http://www.law.georgetown.edu/finaff/studaccts/tuition.html (last visited Dec. 17, 2010) (establishing that full time J.D. and LL.M. students would be charged $22,553 per semester for tuition and fees in the 2010–2011 school year).

[59] *See Chapter 33 Benefit Estimator*, U.S. DEP'T OF VETERANS AFFAIRS, http://gibill.va.gov/CH33Estimator/ (last visited Feb. 1, 2011) (providing a calculator to calculate benefits). For example, an active duty servicemember who enters Georgetown's zip code of 20001 and clicks the "estimate benefit" tab will be informed that "Active duty individuals are not subject to in-state maximums. Active duty individuals will receive 100% of tuition and fees certified by the school (excluding any amount paid using tuition assistance)." *Id*.

[60] *See Frequently Asked Questions*, U.S. DEP'T OF VETERANS AFFAIRS, *available at* https://www.gibill2.va.gov/cgi-bin/vba.cfg/php/enduser/std_alp.php (last visited Feb. 1, 2011) (providing information on how much money students may receive under the Post-9/11 GI Bill and explaining that students receive a housing allowance equal to the housing allowance payable to an E-5 (i.e., sergeant) with dependents, based on the zip code of the school). For example, in 2011, a student attending school in Washington, D.C., in the zip code 20001, would receive a housing allowance of $1,881 per month. *See* Basic Allowance for Housing Query Results for Zip Code 20001, DEF. TRAVEL MGMT. OFF., http://www/defensetravel.dod.mil/site/bahCalc.cfm (last visited Feb. 1, 2011).

B. State Programs

In addition to these federal programs, servicemembers and veterans can benefit from significant educational opportunities offered by many states. For example, prospective students who want to attend state colleges or universities in New Hampshire may qualify for tuition waivers as a member of the New Hampshire National Guard.[61] Similarly, veterans and their dependents interested in attending schools in Texas, including the University of Texas at Austin, may take advantage of state educational programs, such as the Hazelwood Exemption.[62] The Hazelwood Exemption allows eligible veterans, their children, and their spouses to receive "an exemption from the payment of all tuition, dues, fees, and other required charges."[63] To find out more about individual eligibility for state tuition assistance, applicants can contact the veterans education office or financial aid office of the school to which they wish to apply. Interested applicants will generally be required to provide documentation, such as a Department of Defense Form 214 (DD Form 214) or an education benefits letter from the Veteran's Administration, to prove their eligibility.[64]

Although these benefits are tremendous, some states go even further. For example, Georgia's HOPE Scholarship funds "the full cost of tuition, certain HOPE-approved mandatory fees, and a book allowance of up to $100 per quarter or $150 per semester."[65] An applicant does not even have to be from a military family to apply. To qualify for the HOPE Scholarship, an applicant must be a U.S. citizen and a Georgia resident who graduated from "an Eligible High School with a minimum of a 3.00 cumulative grade point average on a 4.00 scale."[66] Significantly, dependent children of active duty servicemembers who are stationed in Georgia qualify as Georgia residents for purposes of HOPE Scholarship eligibility.[67] Meanwhile, applicants with a cumulative grade point average below a 3.0 may qualify for Georgia's HOPE Grant Program.[68] Similar to Georgia's HOPE Scholarship, Georgia's HOPE Grant Program provides for tuition, HOPE Grant-approved fees, and a book allowance.[69] However, while Georgia's HOPE Scholarship allows for students to attend degree-granting programs at colleges or universities, Georgia's HOPE Grant Program only allows students to attend technical colleges to earn certificates or diplomas.[70]

V. Conclusion

Although the high price of tuition may appear to be a significant barrier to attending and completing college, members of military families can easily avoid paying out-of-state tuition and benefit from in-state tuition rates at public institutions of higher education due to federal law. Those who think strategically and plan ahead can request an assignment in their preferred state and can begin working in the state before their family members begin school. In addition, applicants who want to minimize educational costs can take advantage of tuition-free programs provided by the Federal Government and many states. In short, students from military families can attend college without accumulating excessive educational debt, which can be extremely beneficial, especially in an ever-changing economic environment.

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[61] *See* NEW HAMPSHIRE REV. STAT. § 110-B: 63-c Educational Assistance Authorized (West 2010) (establishing the minimum requirements to take courses tuition-free on a space-available basis, such as being an active member of the New Hampshire national guard, enrolling in a degree-enhancing curriculum, and first utilizing federally funded military tuition assistance programs); *see also* Educational Resources, N.H. NAT'L GUARD, https://www.nh.ngb.army.mil/members/education (last visited Feb. 1, 2011).

[62] *See* TEX. ED. CODE ANN. § 54.203 (Vernon 2010) (establishing the Hazelwood Legacy Act and the numerous requirements, such as Texas residency, to qualify for the Hazelwood Exemption).

[63] *Exemptions for Texas Veterans*, COLLEGE FOR ALL TEXANS, http://www.collegeforalltexans.com/index.cfm?ObjectID=6D1D574C-EC9F-C46E-831E6865C9C6F882 (last visited Feb. 1, 2011). In general, to qualify for the Hazelwood Exemption, veterans seeking the exemption must have entered the service in Texas, served at least 181 days of active military duty, and received an honorable discharge. *See id*. Children and spouses of veterans who died as a result of service-related injuries or illness can also qualify for these benefits. *See id*. Veterans can also transfer their benefits to their dependents under certain conditions. *See id*.

[64] *Id*. Applicants can find out more information by visiting the U.S. Department of Veterans Affairs' website at www.gibill.va.gov or by calling the VA office in Muskogee, Oklahoma, at (888) 442-4551. *See id*.

[65] Ga. Student Fin. Comm'n, HOPE Scholarship Program at Public Institutions: Regulation–100, at 21, *available at* http://www.gsfc.org/main/publishing/pdf/2009/hope_public_regs.pdf (last visited Feb. 1, 2011).

[66] *See id*.

[67] *Id*.

[68] *See* Georgia's HOPE Grant Program, GACOLLEGE411, *available at* http://www.gacollege411.org/Financial_Aid_Planning/HOPE_Program/Georgia_s_HOPE_Grant_Program.aspx (last visited Feb. 1, 2011).

[69] *See id*.

[70] *See HOPE*, TECH. C. SYS. OF GA., *available at* http://www.dtae.org/hope.html (last visited Feb. 1, 2011). *See generally* Ga. Student Fin. Comm'n, HOPE Grant Program: Regulations–300, http://www.gsfc.org/main/publishing/pdf/2009/hope_grant_regs.pdf (last visited Feb. 1, 2011) (providing detailed information about the HOPE Grant Program).

Heather Enderle
Electronic Services Librarian

New Federal Digital System Provides Improved GPO Access

In June 1994, the Government Printing Office (GPO) launched the website GPO Access as part of its mission to provide federal electronic information to the public and make access to government publications easier.[1] Since then, advancements in information technology necessitated the creation of a new system to gather, authenticate, and preserve Government documents. As of 20 December 2010, GPO officially replaced GPO Access with Federal Digital System (FDsys), a new digital content management system for disseminating electronic information from all three branches of the Federal Government.[2] Searching government publications on FDsys is easier, and search results are more relevant, than searching on GPO Access.

The FDsys website, which is available at http://www.gpo.gov/fdsys/, provides not only comprehensive content for free to the public, it also serves as a preservation repository and advanced search engine for federal documents.[3] Users may perform quick searches across all collections, filter results, browse collections, and search for government material by citation. The system's "advanced search" feature allows searches of selected collections focused by date and specified fields. Conducting a search within a search is also possible, and results may be bookmarked for later viewing. Users may also download bulk data, such as an annual edition of the *Code of Federal Regulations*, search for agency notices and rules across multiple years of the *Federal Register*, and locate and retrieve legislative information from Congressional Committee Prints and the *Congressional Record*. The budgets for the Federal Government for Fiscal Years 1996 through 2011 are also available, as are Government Accountability Office reports and Comptroller General Decisions from 1994 through 2008.[4]

One of the greatest changes from GPO Access is the availability of multiple document formats and metadata. Documents in FDsys are available in .html, .pdf, .txt, and .xml, and content is now accessible through major Internet search engines. The expanded use of metadata now includes the use of descriptive data relevant to the publication.[5] For instance, users can now access metadata for the *Federal Register* such as agencies, title, action, dates and contact information.[6]

The new FDsys site has also improved the way documents are authenticated, which enhances the reliability of information available to users. Official sources now approve content uploaded to the site, and GPO verifies that the content is unaltered. The GPO uses a digital signature and a GPO seal of authenticity to certify the authenticity of documents. The authentication process ensures that content as specific as a speech within a Congressional Record section has been approved and has remained unaltered,[7] which can be especially useful in an age where information is readily available from numerous websites, many of which are nonofficial sources.

The introduction of FDsys has improved access to authentic, digital government publications over the Internet. Searching government publications just got a little bit easier.

For more information, contact the Electronic Services Librarian at TJAGLCS-Digital-Librarian@conus.army.mil.

[1] U.S. GOV'T PRINTING OFFICE, STATUS REPORT: GPO ACCESS (1994).

[2] Enchanting Devil, *FDsys Out of Beta*, FDSYS BLOG (Dec. 22, 2010, 11:54 PM), http://fdsys.blogspot.com/2010/12/fdsys-out-of-beta.html.

[3] Selene Dalecky, Carrie Gibb & Lisa LaPlant, GPO's Federal Digital System (Apr. 21, 2009) (PowerPoint presentation).

[4] The GPO maintains more recent reports and decisions on the Government Accountability Office website at http://www.gao.gov/.

[5] Ashley Dahlen, Outreach Librarian, U.S. Government Printing Office, "The FDsys": The New GPO Access, (Nov. 4, 2010) (PowerPoint presentation).

[6] Deng Wu, Paul Nelson & Johnny Gee, GPO Federal Digital System: Architecture and Design (Oct. 21, 2008) (PowerPoint presentation).

[7] Dahlen, *supra* note 5.

Book Reviews

Counterinsurgency[1]

Reviewed by *Major Andrea K. R-Ferrulli*[*]

There are no universal answers, and insurgents are among the most adaptive opponents you will ever face. Countering them will demand every ounce of your intellect.[2]

I. Introduction

Drawing on his military experience, research, and defense consultant work, David Kilcullen describes how to understand, distinguish, and defeat both a traditional and global insurgency in his book, *Counterinsurgency*. He proposes that our knowledge of counterinsurgency (COIN) is always evolving, and in order to be effective, we must understand the conflict and respect the local people.[3] The timing of his work is perfect as Kilcullen claims that today's war on terrorism is actually a global insurgency that must be countered with a new strategy.

Kilcullen's extensive background in the counterinsurgency arena includes combat time as an infantry officer in the Australian Army and various government positions, such as Senior Counterinsurgency Advisor in Iraq and Chief Counterterrorism Strategist at the U.S. State Department.[4] While his book features a wealth of information on COIN, some of its impact is lost due to a lack of organization and a failure to develop his global insurgency theory. Nevertheless, the overall work provides useful and informative insights for Department of Defense (DoD) members, politicians, and anyone interested in today's conflict environment.

II. Summary

Recapturing one of his earlier works,[5] Kilcullen uses the first part of his book as a technical handbook for troops on the ground, especially in Iraq and Afghanistan. He provides a series of twenty-eight "how-to" guides ranging from learning about one's deployed environment to recognizing talent in the unit and keeping the initiative.[6] Kilcullen then widens his target audience to higher-level decision-makers by delving into strategy and effective methods of measuring progress in war. He finally expands his audience to those interested in the current terror threat as he describes personal experiences and explains global insurgency and its relationship to the War on Terrorism.

III. Counterinsurgency School from Within

In the first part of his book, Kilcullen quickly pulls the reader to the ground level of an insurgency by defining it. The definition he adopts comes from Field Manual (FM) 3-24, which identifies an insurgency as an "organized movement aimed at overthrow of a constituted government through use of subversion and armed conflict . . . ."[7] His twenty-eight "how to" guides, however, go beyond the manual's tenets and provide a down-to-earth guide for young deploying officers. While the articles speak mainly to those in operational roles, Kilcullen's key nuggets of advice are also useful to those in advisory positions, such as judge advocates.

For example, he gives pre-deployment advice in his first article, "Know Your Turf," which emphasizes the importance of learning about the people, religion, and culture of a region before deploying.[8] While this advice parallels guidance provided in the leadership section of FM 3-24,[9] Kilcullen shies away from the doctrinal level to directly address deployers, essentially commanding them to become world experts on their deployed location.[10] He takes a similar approach in the twenty-third article in which he characterizes civil affairs as "armed social work."[11] Kilcullen argues that "civil affairs is central to the mission, not an afterthought."[12] This observation powerfully puts the military's role in COIN into perspective and shifts the main focus from killing insurgents to attacking the insurgency. Kilcullen's position on civil affairs again matches FM 3-

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[1] DAVID KILCULLEN, COUNTERINSURGENCY (2010).

[2] *Id.* at 29.

[3] *Id*. at 3–4.

[4] Biography of David Kilcullen, CTR. FOR A NEW AMERICAN SECURITY, http://www.cnas.org/node/539 (last visited Sept. 8, 2010).

[5] David Kilcullen, "*Twenty-Eight Articles": Fundamentals of Company-Level Counterinsurgency*, MILITARY REV., May—June 2006, at 103–08.

[6] KILCULLEN, *supra* note 1, at 30–48.

[7] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 1-2 (15 Dec. 2006) [hereinafter FM 3-24].

[8] KILCULLEN, *supra* note 1, at 30.

[9] FM 3-24, *supra* note 7, paras. 7-7, 7-8.

[10] KILCULLEN, *supra* note 1, at 30.

[11] *Id*. at 43.

[12] *Id*.

24,[13] but he goes beyond the "what" to explain the "how," advising deployers to build consensus with local nationals and nongovernmental organizations (NGOs) when pursuing projects. His explanations are simple and written in layman's terms, but the importance of his message cannot be overstated.

Kilcullen's twenty-eight articles offer excellent and succinct advice for deploying servicemembers, and it is no surprise that they were later appended to FM 3-24.[14] However, by placing these technical guides at the beginning of the book, Killcullen may alienate general readers with no military background. Even readers with a military background may feel overwhelmed by such an extensive list of lessons presented so early in the book. This section might have been easier to process at the middle or end of the book when the reader has had more time to become comfortable with the terms and broad issues of COIN.

IV. Deny Sanctuary

Kilcullen uses a first person, story-like approach to educate readers on the basics of insurgency and COIN strategy, and, for the most part, he summarizes principles found in FM 3-24, with a few exceptions. For example, he proposes that there are four, instead of five, elements of an insurgency and leaves out the "movement leader" element found in the field manual model.[15] He also arranges the elements in a hierarchy by placing them in a pyramid format.[16] The center of gravity or source of power for an insurgency, he argues, is its connection to the local population, or "mass base" element, which is at the bottom of his pyramid.[17] He claims, "[i]nsurgents need the people to act in certain ways (sympathy, acquiescence, silence, reaction to provocation, or fully active support) in order to survive"[18] or in order to have freedom of movement within the population.[19] Therefore, cutting the insurgency off from the population, denying the insurgents sanctuary, and forcing them to become marginalized or to come into the open and be killed, represents a critical task.[20]

Although his strategy is not new to the COIN world, Kilcullen concisely conveys his lessons in an easy-to-understand form. By doing so, he effectively reaches that part of the audience he calls the "general reader interested in understanding today's conflict environment."[21] Educating the reader on the basics of insurgency is an important stepping stone for Kilcullen's later development of a global insurgency.

V. A New Approach

After examining the elements of insurgency and the strategy for defeating it, Kilcullen suddenly and surprisingly argues that the model he described is not adequate to deal with, what he calls, a global insurgency or the War on Terrorism.[22] He explains that the global insurgency operates in "cybersanctuaries" and ungoverned borders, and, because it is not contained to one country, defeating it must involve attacking its system elements rather than using the traditional denial of sanctuary approach.[23] Unfortunately, Kilcullen fails to fully develop key concepts of his argument, and the last part of the book feels rushed and incomplete as a consequence. Even though he writes in his preface that the book "is far from a definitive study" and is "merely an incomplete selection of tentative, still-developing thoughts"[24] some areas should be developed further in order to fully appreciate his argument.

Initially, Kilcullen claims that there is an ongoing global jihad that can be characterized as an Islamist global insurgency,[25] but he doesn't fully explain the relationships and cooperation among the jihadists. He proposes that the jihad is made up of various Islamist groups, to include al Qaeda, attached to an Islamist jihad network, and its aim is to overthrow the world order.[26] To support his theory, he points to Islamist theaters of operation throughout the world where Islamist terrorism is occurring.[27] He claims that the "theatres are regions where operatives from one country cooperate with operatives from neighboring countries or conduct activities in neighboring countries."[28] However, he does not fully explain how cooperation between these regions is occurring.

Kilcullen acknowledges that three of the regions do not have ongoing active insurgencies and claims that the other six do. Yet, in several of the active regions such as East Africa, the Iberian Peninsula, and Maghreb, he points to the presence of radical Islamist activity, al Qaeda, or both but

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[13] FM 3-24, *supra* note 7, para. 1-153.

[14] *Id.*, app. A.

[15] *Id*. paras. 1-51, 1-59–1-67. Field Manual 3-24 lists the five elements of an insurgency: leadership, combatants, political cadre, auxiliaries, and mass base. *Id.*

[16] KILCULLEN, *supra* note 1, at 8.

[17] *Id*.

[18] *Id*.

[19] *Id*. at 10.

[20] *Id*.

[21] *Id*. at ix.

[22] *Id*. at 190.

[23] *Id*. at 191–92.

[24] *Id*. at x.

[25] *Id*. at 184.

[26] *Id*.

[27] *Id*. at 169.

[28] *Id*.

does not demonstrate any cooperation between insurgent groups in the regions.[29] He mentions that "there is a greater than 85 percent correlation between the presence of Islamist insurgency . . . and terrorist activity or Al Qaeda presence" in the area,[30] but he does not cite a source for this statistic. Even so, a correlation between Islamist insurgency and terrorist activity or an al Qaeda presence would not necessarily prove cooperation among the groups or regions. Similarly, the mere existence of terrorist groups that operate all over the world is not enough to establish the existence of a global jihad. Moreover, since the idea of a global jihad is central to his global insurgency strategy, elaborating on the concept with more up-to-date examples would have given greater weight to an otherwise fascinating argument.

VI. Caliphate?

Kilcullen could have strengthened his global insurgency theory by exploring a major goal of global jihad: the reestablishment of a caliphate, or worldwide Islamic government. He writes, "The jihad, therefore, can be described as a form of globalized insurgency."[31] Unlike traditional insurgencies, "this insurgency seeks to transform the entire Islamic world . . . seeking to reestablish a caliphate throughout the Muslim world and, ultimately, expand the realm of Islam (Dar al Islam) to all human society."[32] The idea of global insurgency, or at least its growth, seems to flow from a desire to reestablish a caliphate, which Kilcullen mentions several times throughout his work. Yet, he does not explain who the caliph might be, how he might come to power, or the likelihood of a caliphate emerging at all. Readers, therefore, are left to wonder what the caliphate really means to the global insurgency.

Various definitions for "caliphate" exist, but the common theme among them is that a caliphate represents a united system of governance for all Muslims.[33] Terrorists have publicly claimed that they want to restore the caliphate, and other, non-violent Muslim groups have done the same, though condemning the use of violence as forbidden by Shari'ah law.[34] While Kilcullen provides an in-depth picture of the globalized insurgent network and how to attack it, he fails to explore the meaning of the caliphate or explain how the movement to reestablish the caliphate could or should be addressed.

Readers might guess that he means the worse type of caliphate—one that emerges from violence and is headed by a violent ruler who intends to use terrorism to take over the Western world. How the caliphate emerges and who ultimately serves as the caliph will be critical in determining whether Muslims across the world recognize the legitimacy of the caliphate and whether the world ends up with an established system of Muslim governance or continued global insurgency. Because Kilcullen's recommendations for defeating a global insurgency would certainly be affected by the emergence of a caliphate, his failure to explore the issues surrounding the caliphate may leave readers wondering about its effects on his proposed strategy. The global jihad and caliphate are significant to Kilcullen's global insurgency theory, and developing the concepts further would have strengthened his arguments.

VII. Setting the Stage

Kilcullen's presentation would also have benefited from greater development of his terminology. Though he repeatedly uses terms such as "Islamist" and "global insurgency," he does not clearly define the terms other than describing their activities. This lack of clarification leaves readers guessing or choosing from the many controversial definitions that exist today. Clearly defining the terms would avoid uncertainty and would help clarify Kilcullen's position.

The word "Islamist" in particular could have various meanings to include one who practices the Islamic religion,[35] one who believes Islam is a political ideology,[36] or some other variation. When Kilcullen uses the term in the context of insurgency, it is unclear whether he's referring to an insurgency by a religious group, political group, religious or political extremists, or all of the above. Similarly, when Kilcullen introduces the term "global insurgency," he argues that the Islamist jihad is best understood as a global insurgency that uses terrorism as a key tactic, but he does not explain what he means by a global insurgency. Is he referring to a single, unified insurgency of global proportions? A coalition of individual insurgencies with varying ideologies spread around the world? Separate and distinct insurgencies with no ties to one another, located in different countries? He discusses tools of globalization and reminds us of the definition of insurgency, but again, he leaves readers guessing at his terminology. Defining these, and other, specialized terms would have helped established a stronger foundation for his arguments.

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[29] *Id*. at 171–73.

[30] *Id*. at 175.

[31] *Id*. at 185.

[32] *Id*.

[33] *See* Caliphate (Islamic History), BRITANNICA ONLINE ENCYCLOPEDIA, http://www.britannica.com/EBchecked/topic/89739/Caliphate (last visited Sept.13 2010); *see also* Caliph—Definition, MERRIAM–WEBSTER DICTIONARY ONLINE, www.merriam-webster.com/dictionary/caliph?show=0&t=1283777456 (last visited Sept. 8, 2010).

[34] KILCULLEN, *supra* note 1, at 168; *see also* The Media Office, HIZB UT-TAHRIR, http://web.archive.org/ web/20070927200032/www.hizb-ut-tahrir.info/english/about.htm (last visited Sept. 12, 2010).

[35] *See* 1 SHORTER OXFORD ENGLISH DICTIONARY 1429 (5th ed. 2002).

[36] *See* Sheri Berman, *Islamism, Revolution, and Civil Society*, 1 PERSPECTIVES ON POL. 257 (2003).

VIII. Conclusion

Overall, *Counterinsurgency* is recommended reading for general readers, planners, and deployers alike, despite its lack of development in a few areas. Kilcullen does a good job of outlining the current state of COIN thinking for those not familiar with the insurgency world or the various strategies used to fight insurgencies. It provides insight on how traditional COIN principles can influence today's insurgency environment, which is no longer tied to one country. It also serves as a good pocket reminder to deploying servicemembers of how to be effective in the deployed environment.

David Kilcullen's expertise is evident as he explains how both a traditional and global insurgency may be defeated. His use of down-to-earth characterizations, such as "cybersanctuaries"[37] and "armed social work,"[38] help illustrate the material he covers. With better placement of his twenty-eight "how to" guides and further development of concepts in Part VI, his keen insights and intriguing strategies would more effectively reach a wider audience.

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[37] KILCULLEN, *supra* note 1, at 192.

[38] *Id*. at 43.

Restrepo[1]

Captain M. Patrick Gordon[*]

I. Introduction

Many judge advocates have deployed to a combat theater one or more times. Substantially fewer, however, have had the opportunity to spend lengthy periods of time in a truly austere location, far from the mega-Forward Operating Bases (FOBs) provisioned with steak and lobster, air-conditioned trailers, and laundry service. *Restrepo* provides a window into how the other half lives, following an infantry platoon through a harrowing deployment, where these men lived and died near a small outpost they scratched out of the side of a mountain in the middle of the night.

Restrepo provides more than just empathy, however. Judge advocates will draw important professional lessons and perspective from the film. As the viewer follows the platoon through their deployment, he or she will develop a greater awareness for the effects that fear, exhaustion, and confusion can have on a Soldier's decision-making process. This awareness—of what life is like for the Soldier at the tip of the spear—is invaluable to the judge advocate who seeks to provide legal services that are relevant and realistic under combat conditions. This movie review will examine that premise in detail, focusing on some of the key functional areas in which the deployed judge advocate commonly practices.

II. Background

In May 2007, the 2d Battalion (Airborne), 503d Infantry Regiment deployed from its post at Caserma Ederle, Vicenza, Italy, to Afghanistan.[3] This battalion, known as "Task Force Rock" or "The Rock," would serve the next fifteen months in the "remote, austere, undeveloped, and contested Kunar Province . . . adjacent to Pakistan in the Hindu Kush mountains,"[4] which includes the Korengal Valley. During the long deployment, the task force conducted approximately 9500 combat patrols and scores of named combat operations, ultimately sustaining twenty-six killed in action and 143 wounded in action.[5] Indeed, the deployment turned out to be one of the most arduous in recent memory, marked by numerous ferocious combat engagements and incredible heroism. By the end of the deployment, the paratroopers of "The Rock" had been nominated for three Medals of Honor (one of which was recently awarded to Staff Sergeant Salvatore Guiunta,[6] one is pending, and one was awarded as a Distinguished Service Cross).[7] Additionally, during this deployment, paratroopers of The Rock were awarded two Distinguished Service Crosses, twenty-seven Silver Stars, ninety-one Bronze Stars with "V" device, and over 300 Army Commendation Medals with "V" device.[8]

Restrepo focuses upon Second Platoon of B (Battle) Company of Task Force Rock. As the film opens, Battle Company takes over their sector from the outgoing unit at a company-sized FOB called Korengal Outpost (the KOP), which is located on the west side of the valley, surrounded by high peaks and ridges. Immediately upon arrival, the company takes enemy fire from the high ground and the new arrivals scramble to take cover behind HESCO barriers[9] as the KOP is raked with fire from the surrounding high ground. Battle Company is in frequent enemy contact thereafter and, only six hours after their transfer of authority (TOA), Battle Company's youngest paratrooper, Private First Class Timothy R. Vimoto, is killed in action.[10] Within seventy days another Soldier is killed and nine more are wounded—one loses an arm.[11] The company commander, Captain (CPT) Kearney, therefore decides to drastically change the dynamic of the fight in the Korengal Valley by seizing a key piece of enemy-held terrain overlooking the KOP.[12] Given the volume of enemy fire and activity,

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[1] RESTREPO (Outpost Films 2009). The filmmaker, Sebastian Junger, also wrote a book about the same deployment, which goes into far greater detail about the events depicted in the film, as well as the science and psychology behind human behavior and interaction under combat conditions. *See* SEBASTIAN JUNGER, WAR (2010).

[3] Colonel William B. Ostlund, *Tactical Leader Lessons Learned in Afghanistan: Operation Enduring Freedom VII*, MIL. REV. July-Aug. 2009, at 2–3.

[4] *Id.* at 3.

[5] *Id.* at 9.

[6] Craig Whitlock & Greg Jaffe, *Obama Awards Living Soldier Salvatore Guiunta the Medal of Honor*, WASH. POST, Sept. 10, 2010, www.washingtonpost.com/wp-dyn/content/article/2010/09/10/AR2010091002712.html.

[7] Ostlund, *supra* note 2, at 9; E-mail from Colonel William B. Ostlund, U.S. Army, to author (Jan. 10, 2011, 9:29 EST) (on file with author) [hereinafter Ostlund e-mail].

[8] Ostlund e-mail, *supra* note 6.

[9] "Hescos are wire baskets with a moleskin lining that the U.S. military uses to build bases in remote areas. They measure eight feet cubed and can contain roughly twenty-five tons of rock and sand." *See* JUNGER, *supra* note 1, at 63.

[10] Private First Class Vimoto is also the son of the Brigade Command Sergeant Major. Ostlund e-mail, *supra* note 6.

[11] *Id.*

[12] Captain Kearney describes the outpost as "a huge middle finger pointed at the Taliban fighters in the valley." *Id.* at 62.

Second and Third Platoons infiltrate the site in the middle of the night and begin to dig into the side of the mountain under the cover of darkness. Over the next couple of weeks, the Soldiers take turns working in an exhausting cycle of building up their position and fighting off the enemy. Third Platoon later returns to the KOP, leaving Second Platoon to occupy the position alone. Ultimately, Second Platoon names the outpost Restrepo, in honor of Juan "Doc" Restrepo, the second Soldier killed in the valley. The film follows Second Platoon through the remainder of their deployment, providing an first-hand view of the life of a front-line combat Soldier under extremely difficult conditions.

III. Analysis

Restrepo is primarily a real-life examination of how Soldiers in a small unit cope with hardship, combat, and loss over a long deployment. Beyond that, however, *Restrepo* is instructive to judge advocates because it provides a window into how core legal disciplines translate into the real world. Indeed, practically all judge advocates can teach a rule of engagement (ROE) class or legally review an investigation into a lost piece of equipment. Even so, a judge advocate that has a realistic understanding of what front-line Soldiers experience can provide a more relevant ROE class and produce a more substantively thorough legal review. The following paragraphs examine how the film provides greater insight into core judge advocate competencies.

A. Claims

One of the film's more lighthearted scenes involves a visit to Outpost (OP) Restrepo by local elders, who are demanding payment for a cow that was caught in the concertina wire surrounding the outpost and then killed by the Soldiers. Of course, after the Soldiers killed the cow, they butchered and barbequed it to supplement their ordinary rations of Meals-Ready to Eat, so the necessity of shooting the cow is somewhat questionable.[13] In any event, the platoon sergeant flatly refuses to pay for the cow, much to the aggravation of the locals.[14] Consequently, in a war where the winning of "human terrain"[15] is essential, the United States probably took a couple of steps back when this apparently meritorious claim was summarily denied.

This scene underscores the importance of ensuring that all Soldiers—particularly those regularly interacting with local nationals—are thoroughly trained in how to address local nationals presenting claims. Judge advocates must ensure not only that Soldiers are trained, but that there are realistic and effective systems in place for adjudication and payment, since a claim that is not promptly adjudicated is almost as bad as one that is never even taken. Here, the leadership of Second Platoon was apparently unaware of the claims process and that failure may have had a negative impact on the local population. It has often been said that in a counterinsurgency fight, that money is a "weapons system,"[16] and there are few places where the United States gets more bang for its buck than in the prompt payment of meritorious claims.[17] Judge advocates should therefore be mindful that a well-developed claims operation can greatly contribute to mission success. Indeed, this practice area should be proactively developed, and not merely considered as an afterthought.

B. Investigations

Restrepo graphically details the extremely rough conditions under which many combat Soldiers live, as well as the incredibly harsh terrain where they fight. Several scenes illustrate the extreme confusion that ensues during firefights. Soldiers must often move quickly from one position to another, during daylight or darkness, in order to counter a threat. All of these factors contribute to a greater likelihood of equipment being lost, damaged or destroyed. Indeed, one of the most gripping scenes in the film occurs when a Soldier is killed during a combat operation, and the enemy uses his body as a fighting position and subsequently steals his weapon and other equipment.[18] The camera later cuts to CPT Kearney, who works feverishly to coordinate his forces to recover the stolen equipment.

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[13] *See* JUNGER, *supra* note 1, at 199–202. In his book, Junger goes into greater detail regarding how the cow came to its unfortunate end.

[14] The platoon sergeant instead offers to compensate the villagers with "HA" or humanitarian aid, in an amount equal to the weight of the cow. The villagers are not satisfied with this offer and continue to demand cash compensation. *Id.* at 201.

[15] "Human terrain" is a term used in counterinsurgency (COIN) operations to express the idea that the military objectives are usually not hilltops or population centers but, rather, "the path to victory in a counterinsurgency (COIN) runs through the indigenous population." Lieutenant Colonel Jack Marr, Major John Cushing, Major Brandon Garner & Captain Richard Thompson, *Human Terrain Mapping, A Critical First Step to Winning the COIN Fight*, MIL. REV., Mar.-Apr. 2008, at 18.

[16] Warfighters at brigade, battalion, and company level in a COIN environment employ money as a weapons system to win the hearts and minds of the indigenous population to facilitate defeating the insurgents. Money is one of the primary weapons used by warfighters to achieve successful mission results in COIN and humanitarian operations. CTR. FOR ARMY LESSONS LEARNED, U.S. ARMY COMBINED ARMS CTR., HANDBOOK 09-27, COMMANDER'S GUIDE TO MONEY AS A WEAPONS SYSTEM HANDBOOK intro. (Apr. 2009).

[17] Even so, judge advocates must safeguard against the payment of meritless claims, as this too can negatively impact the mission. Indeed, the battalion commander observed that "gratuitous and unfounded claims create an unrealistic expectation, a welfare mentality, and potentially fund the insurgency." Ostlund e-mail, *supra* note 6.

[18] *See also* JUNGER, *supra* note 1, at 110 (providing a detailed recounting of the equipment the enemy managed to strip off dead and wounded Soldiers during the firefight); Ostlund e-mail, *supra* note 6.

While the scene previously described is an extreme example caused by enemy action, *Restrepo* nevertheless underscores the premise that in order to fairly decide what action to take in response to a loss or some other incident, the decision maker must fully understand the circumstances under which the triggering event occurred. The investigation is the vehicle by which this information is captured and transmitted. Judge advocates must therefore ensure that every investigation provides a well-developed description of the circumstances. While combat does not excuse all negligence or lapses in discipline, excusal or mitigation of responsibility is sometimes appropriate. The conditions portrayed in *Restrepo* repeatedly illustrate that point.

C. ROE Development and Training

Second Platoon encounters the enemy in a remarkable variety of circumstances, from extremely long-range firefights across mountain valleys, to near ambushes where the enemy is literally close enough to touch. By far the most challenging scenarios, however, are the ambiguous encounters where the Soldiers enter villages that may be either friendly or hostile, and every civilian that approaches must be instantaneously assessed to determine whether he or she presents a threat. Also common are circumstances where a lone military-aged male is spotted on the side of a mountain and the Soldiers must decide whether to attack. For example, can the Soldiers engage an unarmed man carrying a hand-held radio? What about a man observing the outpost with binoculars? These are the type of questions that the Soldiers in Second Platoon must answer in the film, and where the consequences for making the wrong choice can be dire.

Judge advocates can greatly assist Soldiers like those in Second Platoon by developing ROE training that gives them the confidence to make quick and correct decisions about when to employ deadly force. In order for the ROE training to be fully effective, however, judge advocates must have a realistic understanding of the likely scenarios that Soldiers will encounter. This understanding allows the judge advocate to make the training realistic and relevant to the conditions. After viewing *Restrepo*, judge advocates will quickly grasp that a canned "off the shelf" ROE class is only a starting point. For example, ROE training tailored to forces assigned to man traffic control points in a built-up area will probably not be particularly helpful to a unit patrolling the mountains of Afghanistan. It follows that the thoughtful development of relevant and realistic ROE training is an area where a judge advocate can greatly contribute to the goals of limiting civilian casualties while ensuring Soldiers confidently engage the enemy where they find him.

D. Targeting

A particularly sad scene in *Restrepo* involves Second Platoon searching a partially-destroyed house after CPT Kearney ordered it attacked in an air strike. When the Soldiers enter the house, they discover that the air strike killed not only several local national men, but also badly wounded several women and small children. The footage of the children's blackened faces and burned flesh literally shows the face of collateral damage, and the heavy burden a Soldier must shoulder when ordering fires that may kill or injure civilians.[19] The raw footage in *Restrepo* certainly strikes a much more visceral chord than viewing the aftermath of an air strike on a grainy unmanned aerial vehicle feed or reading about it in a report. Ultimately, this scene provides judge advocates with a sober perspective from which to operate when participating in future targeting involving possible civilian casualties.

IV. Conclusion

Restrepo offers a stark view of what war is like for the Soldier at the very tip of the spear. Beyond that, it shows how these men cope with incredible hardship and loss under combat conditions. For judge advocates, *Restrepo* also illustrates a more subtle point. While most judge advocates are far removed from platoon-level combat operations on a daily basis, their work can have a significant impact—either good or bad—at that level. After viewing *Restrepo*, judge advocates should take a fresh look at the services they provide to their commands. Are legal services canned and "off the shelf," or have they been tailored to the real-world situation? Are there realistic and efficient systems in place to process claims and investigations? Are Soldiers trained and equipped to access them? Does every Soldier receive thorough and realistic ROE training? The judge advocate who carefully addresses these questions can greatly contribute to the mission accomplishment of Soldiers like those in Second Platoon, even from hundreds of miles away, in the Land of Steak and Lobster.[20]

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[19] Captain Kearney's remorseful reaction demonstrates how seriously he took his responsibility to limit civilian casualties. *See* Ostlund e-mail, *supra* note 6.

[20] The battalion commander confirmed that "Task Force Rock was well supported . . . and training, not only pre-deployment but while deployed, was enhanced by their brigade judge advocate." *Id.*

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

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).

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

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

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

2. TJAGLCS CLE Course Schedule (August 2009–September 2010) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C20	184th JAOBC/BOLC III (Ph 2)	18 Feb. – 4 May 11
5-27-C20	185th JAOBC/BOLC III (Ph 2)	15 Jul – 28 Sep 11
5-27-C22	59th Judge Advocate Officer Graduate Course	16 Aug 10 – 26 May 11
5-27-C22	60th Judge Advocate Officer Graduate Course	15 Aug – 25 May 12
5F-F1	216th Senior Officer Legal Orientation Course	21 – 25 Mar 11
5F-F1	217th Senior Officer Legal Orientation Course	20 – 24 Jun 11
5F-F1	218th Senior Officer Legal Orientation Course	29 Aug – 2 Sep 11
5F-F3	17th RC General Officer Legal Orientation Course	1 – 3 Jun 11
5F-F52	41st Staff Judge Advocate Course	6 – 10 Jun 11
5F-F52-S	14th SJA Team Leadership Course	6 – 8 Jun 11
JARC 181	Judge Advocate Recruiting Conference	20 – 22 Jul 11

NCO ACADEMY COURSES		
512-27D30	4th Advanced Leaders Course (Ph 2)	14 Mar – 19 Apr 11
512-27D30	5th Advanced Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D30	6th Advanced Leaders Course (Ph 2)	1 Aug – 6 Sep 11
512-27D40	2d Senior Leaders Course (Ph 2)	14 Mar – 19 Apr 11
512-27D40	3d Senior Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D40	4th Senior Leaders Course (Ph 2)	1 Aug – 6 Sep 11

WARRANT OFFICER COURSES		
7A-270A0	JA Warrant Officer Basic Course	23 May – 17 Jun 11
7A-270A1	22d Legal Administrators Course	13 – 17 Jun 11
7A-270A2	12th JA Warrant Officer Advanced Course	28 Mar – 22 Apr 11

ENLISTED COURSES		
512-27D-BCT	13th BCT NCOIC Course	9 – 13 May 11
512-27D/20/30	22d Law for Paralegal NCO Course	21 – 25 Mar 11
512-27D/DCSP	20th Senior Paralegal Course	20 – 24 Jun 11
512-27DC5	34th Court Reporter Course	24 Jan – 25 Mar 11
512-27DC5	35th Court Reporter Course	18 Apr – 17 Jun 11
512-27DC5	36th Court Reporter Course	25 Jul – 23 Sep 11
512-27DC6	11th Senior Court Reporter Course	11 – 15 Jul 11
512-27DC7	15th Redictation Course	28 Mar – 1 Apr 11

ADMINISTRATIVE AND CIVIL LAW		
5F-F24	35th Administrative Law for Military Installations and Operations	14 – 18 Mar 11
5F-F22	64th Law of Federal Employment Course	22 – 26 Aug 11
5F-F24E	2011USAREUR Administrative Law CLE	12 – 16 Sep 11
5F-F202	9th Ethics Counselors Course	11 – 15 Apr 11

CONTRACT AND FISCAL LAW		
5F-F10	164th Contract Attorneys Course	18 – 29 Jul 11
5F-F103	11th Advanced Contract Course	31 Aug – 2 Sep 11

CRIMINAL LAW		
5F-F31	17th Military Justice Managers Course	22 – 26 Aug 11
5F-F33	54th Military Judge Course	18 Apr – 6 May 11
5F-F34	38th Criminal Law Advocacy Course	12 – 16 Sep 11
5F-F34	39th Criminal Law Advocacy Course	19 – 23 Sep 11

INTERNATIONAL AND OPERATIONAL LAW		
5F-F40	2011 Brigade Judge Advocate Symposium	9 – 13 May 11
5F-F41	7th Intelligence Law Course	15 – 19 Aug 11
5F-F47	56th Operational Law of War Course	1 – 12 Aug 11
5F-F48	4th Rule of Law Course	11 -15 Jul 11

3. Naval Justice School and FY 2010–2011 Course Schedule

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

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (020) Lawyer Course (030)	24 Jan – 1 Apr 11 1 Aug – 7 Oct 11
0258 (Newport)	Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070) Senior Officer (080)	14 – 18 Mar 11 (Newport) 25 – 29 Apr 11 (Newport) 23 – 27 May 11 (Newport) 13 – 17 Jun 11 (Newport) 6 – 9 Sep 11 (Newport)

2622 (Fleet)	Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110) Senior Officer (Fleet) (120) Senior Officer (Fleet) (130)	4 – 8 Apr 11 (Pensacola) 9 – 13 May 11 (Pensacola) 16 – 20 May 11 (Naples, Italy) 27 Jun – 1 Jun 11 (Pensacola) 1 – 5 Aug 11 (Pensacola) 1 – 5 Aug 11 (Camp Lejeune) 8 – 12 Aug 11 (Quantico)
03RF	Continuing Legal Education (020) Continuing Legal Education (030)	7 Mar – 20 May 11 13 Jun – 28 Aug 11
07HN	Legalman Paralegal Core (010) Legalman Paralegal Core (020) Legalman Paralegal Core (030)	26 Jan – 18 May 11 24 May – 9 Aug 11 31 Aug – 20 Dec 11
NA	Intermediate Trial Advocacy (010)	16 – 20 May 11
525N	Prosecuting Complex Cases (010)	11 – 15 Jul 11
627S	Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	22 – 24 Mar 11 (San Diego) 25 – 27 Apr 11 (Bremerton) 16 – 20 May 11(Naples) 1 – 3 Jun 11 (San Diego) 1 – 3 Jun 11 (Norfolk) 6 – 8 Jul 11 (San Diego) 8 – 10 Aug 11 (Millington) 20 – 22 Sep ((Pendleton) 21 – 23 Sep 11 (Norfolk)
748A	Law of Naval Operations (020)	19 – 23 Sep 11 (Norfolk)
748B	Naval Legal Service Command Senior Officer Leadership (010)	25 Jul – 5 Aug 11
748K	Trial Advocacy CLE (040)	14 – 15 Apr 11 (San Diego)
786R	Advanced SJA/Ethics (010)	25 – 29 Jul 11
7485	Classified Information Litigation Course (010)	2 – 6 May 11 (Andrews AFB)
7487	Family Law/Consumer Law (010)	Cancelled
7878	Legal Assistance Paralegal Course (010)	18 – 22 Apr 11
846L	Senior Legalman Leadership Course (010)	25 – 29 Jul 11
850T	Staff Judge Advocate Course (010) Staff Judge Advocate Course (020)	25 Apr – 6 May 11 (Norfolk) 11 – 22 Jul 11 (San Diego)

850V	Law of Military Operations (010)	6 – 17 Jun 11
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	20 – 24 Jun 11 26 – 30 Sep 11
932V	Coast Guard Legal Technician Course (010)	8 – 19 Aug 11
961A (PACOM)	Continuing Legal Education (030)	16 – 20 May 11 (Naples)
961D	Military Law Update Workshop (010) Military Law Update Workshop (020)	TBD TBD
961G	Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted) (020)	TBD TBD
961J	Defending Complex Cases (010)	18 – 22 Jul 11
3938	Computer Crimes (010)	6 – 10 Jun 11 (Newport)
3759	Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	28 Mar – 1 Apr 11 (San Diego) 4 – 8 Apr 11 (San Diego) 25 – 29 Apr 11 (Bremerton) 2 – 6 May 11 (San Diego) 6 – 10 Jun 11 (San Diego) 19 – 23 Sep 11 (Pendleton)
4040	Paralegal Research & Writing (020) Paralegal Research & Writing (030)	7 – 20 Apr 11 18 – 29 Jul 11
4044	Joint Operational Law Training (010)	TBD
4048	Legal Assistance Course (010)	18 – 22 Apr 11
NA	Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (020)	16 – 18 Feb 11 12 – 14 Jul 11
NA	Legal Specialist Course (020) Legal Specialist Course (030)	28 Jan – 1 Apr 11 29 Apr – 1 Jul 11
NA	Paralegal Ethics Course (030)	13 – 17 Jun 11
NA	Legal Service Court Reporter (020) Legal Service Court Reporter (030)	14 Jan – 1 Apr 11 22 July – 7 Oct 11
NA	Senior Trial Counsel/Senior Defense Counsel Leadership (010)	4 – 8 Apr 11

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	28 Feb – 18 Mar 11 4 – 22 Apr 11 9 – 27 May 11 13 Jun – 1 Jul 11 11 – 29 Jul 11 15 Aug – 2 Sep 11
0379	Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	7 – 18 Mar 11 11 – 22 Apr 11 16 – 27 May 11 18 – 29 Jul 1 22 Aug – 2 Sep 11
3760	Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	28 Mar – 1 Apr 11 6 – 10 Jun 11 8 – 12 Aug 11 (Millington) 12 – 16 Sep 11

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	28 Feb – 18 Mar 11 9 – 27 May 11 13 Jun – 1 Jul 11 25 Jul – 12 Aug 11 22 Aug – 9 Sep 11

947J	Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080) Legal Clerk Course (090)	28 Mar – 8 Apr 11 9 – 20 May 11 13 – 24 Jun 11 1 – 12 Aug 11 22 Aug – 2 Sep 11

4. Air Force Judge Advocate General School Fiscal Year 2010–2011 Course Schedule

For information about attending the following cou Legal Clerk Course (070)rses, 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**
Judge Advocate Staff Officer Course, Class 11-B	14 Feb – 15 Apr 11
Paralegal Craftsman Course, Class 11-02	14 Feb – 30 Mar 11
Paralegal Apprentice Course, Class 11-03	28 Feb – 12 Apr 11

Environmental Law Update Course (SAT-DL), Class 11-A	22 – 24 Mar 1
Defense Orientation Course, Class 11-B	4 – 8 Apr 11
Advanced Labor & Employment Law Course, Class 11-A (Off-Site, Rosslyn, VA location)	12 – 14 Apr 11
Military Justice Administration Course, Class 11-A	18 – 22 Apr 11
Paralegal Apprentice Course, Class 11-04	25 Apr – 8 Jun 11
Cyber Law Course, Class 11-A	26 – 28 Apr 11
Total Air Force Operations Law Course, Class 11-A	29 Apr – 1 May 11
Advanced Trial Advocacy Course, Class 11-A	9 – 13 May 11
Operations Law Course, Class 11-A	16 – 27 May 11
Negotiation and Appropriate Dispute Resolution Course, 11-A	23 – 27 May 11
Reserve Forces Paralegal Course, Class 11-A	6 – 10 Jun 11
Staff Judge Advocate Course, Class 11-A	13 – 24 Jun 11
Law Office Management Course, Class 11-A	13 – 24 Jun 11
Paralegal Apprentice Course, Class 11-05	20 Jun – 3 Aug 11
Judge Advocate Staff Officer Course, Class 11-C	11 Jul – 9 Sep 11
Paralegal Craftsman Course, Class 11-03	11 Jul – 23 Aug 11
Paralegal Apprentice Course, Class 11-06	15 Aug – 21 Sep 11
Environmental Law Course, Class 11-A	22 – 26 Aug 11
Trial & Defense Advocacy Course, Class 11-B	12 – 23 Sep 11
Accident Investigation Course, Class 11-A	12 – 16 Sep 11

5. Civilian-Sponsored CLE Courses

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

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL:	Association of Government Attorneys in Capital Litigation Arizona Attorney General's Office ATTN: Jan Dyer 1275 West Washington Phoenix, AZ 85007 (602) 542-8552
ALIABA:	American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS or (215) 243-1600
ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1220 North Fillmore Street, Suite 444 Arlington, VA 22201 (571) 481-9100
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250

GWU:	Government Contracts Program The George Washington University Law School 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
MC Law:	Mississippi College School of Law 151 East Griffith Street Jackson, MS 39201 (601) 925-7107, fax (601) 925-7115
NAC	National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (803) 705-5000
NDAA:	National District Attorneys Association 44 Canal Center Plaza, Suite 110 Alexandria, VA 22314 (703) 549-9222
NDAED:	National District Attorneys Education Division 1600 Hampton Street Columbia, SC 29208 (803) 705-5095
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 (in MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557

NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

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

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

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

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

d. Regarding the January 2012 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2011 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact Ms. Donna Pugh, commercial telephone (434) 971-3350, or e-mail donna.pugh@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. Training Year (TY) 2011 RC On-Sites, Functional Exercises and Senior Leader Courses

Date	Region	Location	Units	ATRRS Number	POCs
25 – 27 Mar 2011	Western On-Site FOCUS: Military Justice & Advocacy / Legal Administrators	Salt Lake City, UT	87th LSO 6th LSO 75th LSO 78th LSO	003	MAJ Timothy Taylor Timothy.l.taylor@us.army.mil SFC Brenda Hallows Brenda.hallows@usar.army.mil 801.656.3600
30 Apr – 6 May 2011	Trial Defense Service Functional Excercise	San Antonio, TX	22d LSO 154th LSO	NA	CPT DuShane Eubanks d.eubanks@us.army.mil 972.343.3143 Mr. Anthony McCullough Anthony.mccullough@us.army.mil 972.343.4263
14 – 21 May 2011	Nationwide	Fort McCoy, WI	8 Soldiers from each LSO	NA	SSG Keisha Parks keisha.williams@usar.army.mil 301.944.3708
2 – 5 Jun 2011	Yearly Training Brief and Senior Leadership Course	Gaithersburg, MD	Each LSO Cdr, Sr Paralegal NCO, plus one designated by LSO Cdr	NA	LTC Dave Barrett David.barrett1@us.army.mil SSG Keisha Parks keisha.williams@usar.army.mil 301.944.3708
15 – 17 Jul 2011	Northeast On-Site FOCUS: Rule of Law	New York City, NY	4th LSO 3d LSO 7th LSO 153d LSO	004	CPT Scott Horton Scott.g.horton@us.army.mil CW2 Deborah Rivera Deborah.rivera1@us.army.mil 718.325.7077
12 – 14 Aug 2011	Midwest On-Site FOCUS: Rule of Law	Chicago, IL	91st LSO 9th LSO 8th LSO 214th LSO	005	MAJ Brad Olson Bradley.olson@us.army.mil SFC Treva Mazique treva.mazique@usar.army.mil 708.209.2600, ext. 229

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

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

b. Access to the JAGCNet:

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

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

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

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

(d) FLEP students;

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

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

c. How to log on to JAGCNet:

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

(2) Follow the link that reads "Enter JAGCNet."

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

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

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

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

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

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

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

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

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

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

4. 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.

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