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Judge Advocate General's Corps Bulletin 27-50-507

August 2015

Editor, Captain Michelle E. Borgnino
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The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities.

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Lore of the Corps

Marine was First Navy Judge Advocate General[1]

Fred L. Borch
Regimental Historian and Archivist

As strange as it may seem, the first *uniformed* Judge Advocate General of the Navy was a Marine colonel.

Marine Colonel William Butler Remey was the first Judge Advocate General of the Navy. He served from 1880 to 1892. Photo credit: U.S. Marine Corps

When Congress authorized a Judge Advocate General (JAG) for the Army in July 1862, it provided that this position would have the rank and pay of a colonel.[2] But Congress created no such counterpart for the Navy and it was not until the month prior to the end of hostilities in the Civil War, in March 1865, that Congress finally got around to creating the office of "Solicitor and Naval Judge Advocate General" for the Navy. Even then, however, the job was filled by a civilian lawyer who earned a yearly salary of $3,500. Ultimately, this position disappeared in 1870, when Congress abolished it.[3]

In July 1878, Secretary of the Navy Richard W. Thompson "administratively created" the position of "acting Judge Advocate."[4] As Jay M. Siegel explains in his authoritative *Origins of the United States Navy Judge Advocate General's Corps*, Thompson's idea was to appoint a uniformed lawyer as acting Judge Advocate and task that individual with providing legal advice on "all matters submitted to the Secretary of the Navy involving questions of law or regulations." This acting Judge Advocate was also responsible for reviewing records of summary and general courts-martial, and making recommendations on their disposition to the Secretary of the Navy.[5]

To fill this new position of acting Judge Advocate, Secretary Thompson selected thirty-six year old William Butler Remey, a captain in the U.S. Marine Corps. This was a logical choice, in that Marine Corps officers in the Navy of the 1870s "handled the lion's share of court-martial prosecutorial duties" and consequently were far more experienced than their naval counterparts in court-martial procedure.[6]

Born in 1842, Remey was commissioned as a second lieutenant in 1861 at the age of 19. He almost certainly tried enlisted Sailors and Marines at courts-martial during the Civil War and, after hostilities ended, prosecuted courts-martial at California's Mare Island Naval Shipyard and at the Washington Navy Yard. Lieutenant Remey so impressed his superiors he was appointed acting Judge Advocate of the Marine Corps in 1870 and, after a tour of duty embarked upon the USS *Colorado*, was made Judge Advocate of the Marine Corps in 1875.[7]

After assuming duties as the Navy's acting Judge Advocate in 1878, Captain Remey focused exclusively on disciplinary questions. He reviewed the records of courts of inquiry and courts-martial for evidentiary, jurisdictional, and procedural errors. (Other legal issues—involving contracts,

[1] A slightly different version of this article was published by the author in *The Judge Advocate* (the Journal of the Judge Advocate Association) in February 2012.

[2] Act of 17 July 1862, 12 Stat. 597, 598; JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER 49-50 (1975).

[3] JAY M. SIEGEL, ORIGINS OF THE NAVY JUDGE ADVOCATE GENERAL'S CORPS 119-20, 151 (1997).

[4] *Id*. at 173.

[5] *Id*. at 174.

[6] *Id*. at n 5-4.

[7] *Id*. at 175-76, n 5-6.

claims, personnel, real estate, and admiralty—were handled by the U.S. Attorney General).[8]

Remey worked hard in his new duty assignment and apparently made valuable political and social connections in the Washington, D.C. establishment. According to his nephew, "Uncle Will . . . was very popular socially. . . . He drove a snappy one horse high trap in the late afternoons and was quite a figure about town."[9] This social prominence no doubt helped when Remey lobbied for his temporary position to be made permanent, on the theory that naval law was now so complex that it required a *uniformed* officer—familiar with sea service customs and culture—to oversee naval discipline. Congress agreed with Remey (and the Secretary of the Navy) and, on June 8, 1880, enacted legislation authorizing the president "to appoint, for the term of four years . . . from the officers of the Navy or the Marine Corps, a judge-advocate-general of the Navy, with the rank, pay and allowances of a captain in the Navy or colonel in the Marine Corps, as the case may be."[10]

The next day, on June 9, President Rutherford B. Hayes appointed Remey to be the first uniformed Judge Advocate General of the Navy and, after the Senate confirmed this appointment, now Colonel Remey (he exchanged his captain's bars for a colonel's eagle) began what would be a twelve year assignment.[11]

Between 1880 and 1892, when Colonel Remey retired from active duty, he received and examined all records involving courts-martial, courts of inquiry, and "boards for the examination of officers for retirement and promotion in the naval service." He also investigated complaints by his fellow officers of alleged violations of naval regulations; these complaints were typically accompanied by a request from the complainer that the Secretary of the Navy convene a general court-martial to try the offender. Colonel Remey also reviewed pay and promotion questions, retirement and other personnel matters. He examined claims from civilians who wanted to be paid for work or travel they had done for the Navy, or who wanted to be reimbursed for damage to their property caused by the Navy. For example, a Navy lieutenant commander filed a claim asking to be reimbursed for his clothing and bedding, both of which had been destroyed to prevent the spread of yellow fever: Remey recommended that the Navy pay the claim.[12]

Remey offered legal advice on a breach of contract question and also provided legal analysis on a patent infringement claim. It seems that he was willing—and able—to answer even those inquiries that more properly should go to the U.S. Attorney General. When the commanding officer of the naval station located at Beaufort, South Carolina, asked the Secretary of the Navy if state civil authorities had the legal authority to board a naval vessel and arrest and take from the ship a sailor wanted for a crime, Remey drafted the telegram that replied: "In the case cited in your letter . . . they have. See Statutes South Carolina."[13]

But not all of Remey's legal issues were of great importance: the Secretary tasked Remey with determining whether a midshipman third rate was entitled to his choice of bunks on the starboard side of starboard steerage quarters because of his seniority.[14]

In early 1891, Remey fell ill. His doctors determined it was the result of too much hard work. They prescribed rest, so Remey left Washington and spent the summer in the mountains of Maryland. He returned to work in the fall but, in early 1892, began showing signs of mental illness. He subsequently had a complete physical and mental breakdown. Not surprisingly, when his third four-year term as Navy Judge Advocate General ended in June 1892, Remey voluntarily retired from active duty. Sadly, he died of pneumonia less than three years later, in January 1895, in a sanatorium in Sommerville, Massachusetts.[15]

Colonel Remey's place in naval legal history remains unique: the first uniformed lawyer to serve as Navy Judge Advocate General and also—at least to date—the only Marine to serve as the top uniformed lawyer in the Navy.[16]

More historical information can be found at

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

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

[8] *Id*. at 177.

[9] *Id*. at 178, n 5-13; CHARLES M. REMEY, REMINISCENCES OF COLONEL WILLIAM BUTLER REMEY, UNITED STATES MARINE CORPS, 1842-1894, AND LIEUTENANT EDWARD WALLACE REMEY, UNITED STATES NAVY, 14-28 (1955).

[10] *Id*. at 178-79.

[11] *Id*. at 180.

[12] *Id*. at 195.

[13] *Id*. at 195-96.

[14] *Id*. at 195.

[15] *Id*. at 211-13.

[16] Under Title 10, United States Code 5148, a Marine may serve as the top uniformed lawyer in the Navy. 10 U.S.C. § 5148 (2012).

Green on Blue: Government Searches of Military Defense Counsel

Captain Gregg F. Curley[*]

[T]here is an enhanced privacy interest underlying the attorney-client relationship which warrants a heightened degree of judicial protection and supervision when law offices are the subject of a search for client files or documents.[1]

I. Introduction[2]

The mission: to secure a cell phone. On order, the Marines leave the assembly area, cross the line of departure, and stack up outside the door of the target building.[3] Armed personnel quickly secure the exits, the occupants are detained, and site exploitation starts. A phone matching the description of the target cell phone is quickly found. Unable to confirm with certainty that the correct phone was seized,[4] an exhaustive search continues for two hours, including "all case files, folders, books, drawers, clothes, ceiling tiles, trash bags, food, and furniture."[5] This search did not take place in Iraq, Afghanistan, or the Horn of Africa; this was a command authorized search of military defense counsel offices conducted at Marine Corps Base Camp Pendleton, California, on May 2, 2014.[6]

The Military Rules of Evidence (MRE) should be amended specifically to address searches of military defense counsel. Government searches of military defense counsel spaces involve nuanced attorney-client privilege issues, are ripe for abuse, and have the potential to undermine military justice. This article will analyze the aforementioned search, as well as *United States v. Calhoun*,[7] an Air Force case involving a search of a military defense counsel's office, to provide real-world examples of government searches of military defense counsel office spaces and the ensuing fallout. This article then flushes out the legal issues implicated in searches of military defense counsel offices and assesses the current regulatory scheme governing them. Last, the conclusion proposes to modify MRE 315 to address searches involving military defense counsel.

II. Background

While searches of military defense counsel spaces are rare, they are not unprecedented. The two cases below illustrate circumstances in which military defense counsel office spaces were searched and the messy aftermath of those searches. The potential collateral damage from searches of defense counsel offices can vary widely. *Calhoun*[8] involved a narrow search of one case file in one attorney's office. *United States v. Betancourt* involved approximately one hundred cases and twelve defense attorneys.[9] An analysis of the legal issues created by searches of military defense counsel offices adequately demonstrates the need to modify the MRE to address these searches.

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[1] Law Offices of Bernard D. Morley v. MacFarlane, 647 P.2d 1215, 1222 (Colo. 1982).

[2] The assertions in the introduction are based on the author's recent professional experience as a defense attorney at Camp Pendleton from November 2012 to June 2014, as well as the actual search conducted on May 2, 2014 [hereinafter Professional Experience] (The author was not detailed to Sergeant (Sgt) Rico J. Betancourt's case; however, the author was detained and his office was searched.).

[3] Transcript of Record at 34, United States v. Salinas (May 22, 2014) (Article 39a session opened at 0916, May 22, 2014) (on file with author) [hereinafter Transcript]. ("[DC] Q. I want to talk about how, essentially, when you crossed the line of departure here. When you leave from downstairs to where you come upstairs and started the search; could you please walk through that? [STC] A. Sure. So the camera had arrived. Everybody was clear on what was about to happen. We walked up the front ladder well to the defense spaces.").

[4] *Id*. at 36. ("[Assistant Defense Counsel] Q. Once you found the phone up in the office . . . was there anybody else consulted . . . ? [Agent] A. I don't believe that anybody was called. I think we just continued on and made that decision ourselves to continue on.").

[5] United States v. Miramontes, General Court-Martial Abbreviated Court Ruling (Unlawful Command Influence—Search of DSO offices), June 10, 2014 (on file with author) [hereinafter Ruling].

[6] Phil Cave, *Unclassified-breaking story*, CAAFLOG, (May 2, 2014), http://www.caaflog.com/2014/05/02/unclassified-breaking-story/.

[7] United States v. Calhoun, 49 M.J. 485 (C.A.A.F 1998).

[8] *Id*.

[9] Professional Experience, *supra* note 2.

A. *United States v. Calhoun*[10]

Air Force Technical Sergeant (TSgt) Clinton Calhoun was tried by a special court-martial on October 12–14, 1995, for driving on base with revoked privileges and disobeying the order of a policeman.[11] Technical Sergeant Calhoun's witnesses committed perjury to corroborate his alibi defense.[12] The prosecution caught TSgt Calhoun in the lie; he switched his plea to guilty and was convicted.[13] The focus turned to whether TSgt Calhoun's military defense attorney, Captain (Capt) K, had aided or abetted TSgt Calhoun's perjury.[14] During the government's investigation, agents came into possession of a letter between Capt K and TSgt Calhoun's civilian defense counsel.[15]

This letter provided probable cause to search Capt K's office and TSgt Calhoun's case file for evidence of subornation of perjury.[16] Recognizing the sensitivity of the search, the Air Force took several precautionary steps prior to its execution.[17] First, a neutral and detached military magistrate issued the authorization.[18] Second, the search authorization limited the scope of the search to documents pertaining to the representation of TSgt Calhoun within Capt K's office.[19] Third, an Air Force Office of Special Investigations agent and a field grade judge advocate, both of whom were from a different base, conducted the search.[20] Last, a military judge examined the seized items to determine what was privileged.[21]

Captain K was cleared of any wrongdoing; however, (now) Airman Basic (AB) Calhoun was charged and convicted of obstruction of justice, subornation of perjury, and conspiracy to commit perjury.[22] Prior to AB Calhoun's second trial, he refused to form an attorney-client relationship with his new Air Force defense counsel and filed a motion to compel the government to pay for a civilian defense counsel.[23] The court denied the motion; AB Calhoun elected to continue pro se and was convicted.[24]

On appeal, AB Calhoun's assignment of error asserted the government denied him effective assistance of counsel.[25] Airman Basic Calhoun's petition for extraordinary relief read in part:

> Because of the outrageous Government invasion of his relationship with his former ADC [Area Defense Counsel], Petitioner understandably finds the entire Air Force defense program untrustworthy. More specifically, he fears that the Air Force might well again intrude upon an ADC workspace to steal his confidences. In short, he reasonably views the entire ADC program as vulnerable to continuing Government intrusions. . . . As a result, petitioner insists that an inherent conflict exists between himself and the Air Force ADC entity. It has proved powerless to resist Air Force intrusions; ergo, he cannot entrust it with his confidences.[26]

The Air Force Court of Criminal Appeals found that the government's search had denied AB Calhoun effective assistance of counsel.[27] The government appealed to the Court of Appeals for the Armed Forces (CAAF) which reversed the decision, holding AB Calhoun would have had to demonstrate that all counsel from all bases were tainted by the government search before the government would be required to pay for a civilian counsel.[28] In the opinion, the CAAF reluctantly endorsed the procedural safeguards enacted by the Air Force.[29]

The acting Judge Advocate General of the Air Force subsequently issued guidance on the conduct of searches of defense counsel spaces.[30] The Air Force guidance adopted the

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[10] United States v. Calhoun, 49 M.J. 485 (C.A.A.F 1998).

[11] United States v. Calhoun, 47 M.J. 520 (A.F. Ct. Crim. App. 1997).

[12] *Id.* at 522.

[13] *Id.* (Technical Sergeant Calhoun received a dishonorable discharge and confinement for 30 months).

[14] *Id.*

[15] *Id.*

[16] United States v. Calhoun, 49 M.J. 485, 488 (C.A.A.F. 1998).

[17] *See id.*

[18] *Id.*

[19] *Id.*

[20] United States v. Calhoun, 47 M.J. 520 (A.F. Ct. Crim. App. 1997).

[21] *Id.* at 522.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at 524.

[27] United States v. Calhoun, 49 M.J. 485, 488 (C.A.A.F. 1998).

[28] *Id.*

[29] *Id.* The court indicated that these searches are generally frowned upon. However, if they are going to be conducted, the manner in which the Air Force searched in *Calhoun* serves as the model. *Id.*

[30] Policy Memorandum, Military Justice – 2, The Judge Advocate General, U.S. Air Force, subject: Searches and Seizures Involving Air Force Defense Personnel (17 Aug. 2005) [hereinafter AF TJAG Memo].

safeguards that had been highlighted by the CAAF.[31] The fallout from the *Calhoun* search was ugly, but limited in scope to one case. As the case below demonstrates, searches of military defense counsel offices are capable of affecting many more clients and case files.

B. Camp Pendleton Search (*United States v. Sergeant Rico J. Betancourt*)[32]

The government preferred a number of charges against Sergeant (Sgt) Rico J. Betancourt, including sexual assault, drug use, and affiliation with an outlaw biker gang.[33] Sergeant Betancourt provided his cell phone to his military defense counsel before he was placed in pretrial confinement.[34] Aware that the cell phone existed and was not in the possession of the government, the Senior Trial Counsel (STC) escalated efforts to obtain it during the Article 32 pretrial investigation.[35] Discussions between trial counsel, defense counsel, and their respective chains of command did not reach an amicable resolution.[36] The defense asserted that state bar rules prohibited them from turning over the phone absent a judicial order.[37]

The Marine Corps Criminal Investigation Division (CID) sought a command authorized search and seizure (CASS) from the area commander.[38] After consulting with two attorneys, the officer in charge of the Legal Services Support Section West,[39] and the STC,[40] the area commander issued the CASS. When the STC presented the defense with the CASS, the phone was not voluntarily relinquished.[41] Once again, the defense cited the lack of a judicial order and an opposing view of state bar requirements as the basis for refusal.[42] The CID agents then executed the CASS by securing the building and commencing a search of the detailed defense counsels' offices.[43] After finding a phone in the office of a detailed defense counsel that matched the description on the CASS, CID requested verbal confirmation that the phone was in fact the one they were seeking.[44] The detailed defense counsel asserted privilege and refused to confirm the phone was the one sought.[45] The search party then proceeded to search the office of every defense counsel in the building.[46] The non-detailed defense attorneys remained detained for two hours as CID searched their files and personal belongings.[47]

Marines from CID handled every case file stored within the building during the search.[48] The search in *Betancourt* led to ongoing litigation on apparent unlawful command influence and prosecutorial misconduct,[49] as well as reassignment of senior personnel,[50] disqualification of counsel,[51] requests for severance,[52] and an inquiry directed by the Staff Judge Advocate to the Commandant

[31] *Id.*

[32] In April of 2015 Sergeant Betancourt was convicted and received 5 years confinement, a dishonorable discharge, total forfeitures, and reduction to E-1.

[33] Telephone interview with Captain Thomas Fricton, Defense Counsel, U.S. Marine Corps (Nov. 5, 2014).

[34] *See* Professional Experience, *supra* note 2.

[35] *See id.*

[36] Transcript, *supra* note 3, at 23-24.

[37] This article does not address the ethics of accepting or holding potential evidence as a defense attorney.

[38] Affidavit, [Area Commander] (June 3, 2014) (on file with author) [hereinafter Affidavit].

[39] 10 U.S.C. §§801(4) "'Officer in Charge' [OIC] means a member of the Navy, the Marine Corps or the Coast Guard designated as such by appropriate authority."; U.S. MARINE CORPS ORDER P5800.16A, Legal ADMINISTRATION MANUAL, subsec. 1103(3) (26 Sept. 2011) "The [Legal Services Support Sections (LSSS)] . . . provide services, including military justice services, to supported commands within their Legal Services Support Area. The LSSS OIC is ultimately responsible to the regional installation commander for the provision of trial services within the LSSA." The LSSS OIC is a colonel.

[40] Affidavit, *supra* note 39 (by nature of their billets, the two attorneys consulted have a professional interest in the prosecution of the case.).

[41] *See* Professional Experience, *supra* note 2.

[42] *See id.*

[43] *See id.*

[44] *See id.*

[45] *See id.*

[46] *See id.* The CASS was issued for the entire second floor of the building. While continuing the search was not incorrect per the CASS, judges subsequently ruled that the search was overbroad as applied to the disinterested attorneys' offices. *Id.*

[47] It is objectively reasonable to discern elements of harassment and intimidation in an unrestrained search of all defense attorneys and files after locating the object of the search authorization.

[48] *See* Professional Experience, *supra* note 2. The agents asserted that while the files were physically handled and sifted through, nothing was read. *Id.*

[49] *See id.*

[50] Letter from the OIC of the LSSS West to Senior Trial Counsel Legal Services Support Team (STC LSST) Camp Pendleton, TEMPORARY REASSIGNMENT OF DIRECT SUPERVISORY RESPONSIBILITIES FOR THE LIMITED PURPOSE OF LITIGATING MOTIONS RELATED TO THE SEARCH OF CAMP PENDLETON DEFENSE COUNSEL SPACES THAT OCCURRED ON 2 MAY 2014 (May 13, 2014) (on file with the author); Mike "No Man" Navarre, *Developing Story—Marine Corps Prosecutor Sacked Over Defense Office Raid*, CAAFLOG, June 13, 2014, http://www.caaflog.com/2014/06/ 13/ developing-story-marine-corps-prosecutor-sacked-over-defense-office-raid/.

[51] E-mail from Lieutenant Colonel Elizabeth Harvey, Judge, United States v. Salinas abbreviated ruling, to author, (June 2, 2014 15:53:35 PST) (on file with author) [hereinafter Abbreviated Ruling].

[52] *See* Professional Experience, *supra* note 2.

of the Marine Corps.[53] This unfortunate situation could have been avoided, had a well crafted MRE clearly defined procedural safeguards and provided appropriate consequences for violations of those safeguards.[54]

III. Legal Issues Involved in Searches of Military Defense Counsel Offices

Government searches of military defense counsel office spaces are a thorny issue. During these searches, opportunities abound to violate the Fourth, Fifth, and Sixth Amendment rights of defendants and for attorneys to run afoul of Rules of Professional Conduct.[55]

In the military context, the thorns are even sharper. Consider the optics: military defense attorneys are paid by the same entity as the prosecutors and command, wear the same uniform as the prosecutors and the command, utilize the same phone, computer, and e-mail systems, and are located on the same installation.[56] Attorneys from across the aisle participate in the same physical, military, and legal training, and are cordial with each other.[57] Military attorneys also switch between prosecution and defense over the course of a career. It is entirely possible that a defense attorney was a prosecutor in a previous assignment. Whereas the indicators in the civilian sector reinforce the concept of an independent defense bar, the military justice system blurs context clues that assure clients a line of demarcation exists between military defense attorneys and the prosecuting authorities. A client relies on assurances provided by the detailed military defense attorney that they will act in his best interests,[58] a concept that is wholly incongruent with a government "invasion of the defense camp."[59] Searches of military defense counsel reinforce a perception of dominion and control by the government. This perception gives rise to the additional military-specific issue of unlawful command influence. When unpacking the issues involved in a search of military defense counsel offices, it is best to start with the genesis of all search and seizure law, the Fourth Amendment.

A. Fourth Amendment Search Authorizations

The Fourth Amendment to the United States Constitution states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . ."[60] A servicemember does not forfeit constitutional protections upon enlistment;[61] however, the Supreme Court "has long recognized that the military is, by necessity, a specialized society separate from civilian society."[62] Differences in application of the Constitution between the military and civilian communities can be attributed to the recognition that "the primary business of armies and navies [is] to fight or be ready to fight . . . ."[63] Issued under civilian authority, an authorization to search is termed a "warrant," under military authority, a "search authorization."[64] "The change in terminology reflects the unique nature of the armed forces and of the role played by commanders."[65] "[Military Rule of Evidence] 315 defines

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[53] *See*, Letter from the Staff Judge Advocate to the Commandant of the Marine Corps, INQUIRY INTO SEARCH OF DEFENSE COUNSEL OFFICES (May 13, 2014) [hereinafter Inquiry Order] (on file with author); Letter from [Inquiry Officer] to Staff Judge Advocate to the Commandant of the Marine Corps, INQUIRY INTO SEARCH OF DEFENSE COUNSEL OFFICES (June 11, 2014) [hereinafter Inquiry] (on file with author); Letter from the Staff Judge Advocate to the Commandant of the Marine Corps, FIRST ENDORSEMENT OF INQUIRY INTO SEARCH OF DEFENSE COUNSEL OFFICES (June 19, 2014) [hereinafter Inquiry Endorsement] (on file with author).

[54] Inconsistent and varying service policies would lead to arbitrary results. A Department of Defense service regulation is an inappropriate forum in which to make a sweeping modification to the Uniform Code of Military Justice. A change to Military Rule of Evidence (MRE) 315 that protects the constitutional rights of defendants while providing the government with a process to search defense counsel offices when required will protect all stakeholders and ensure the swift administration of justice. *Infra* Appendix A.

[55] U.S. DEP'T OF NAVY, 5803.1D, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL, SEC 3, R. 3.8, (MAY 1, 2012), [hereinafter JAGINST 5803.1D]. (While Model Rule of Professional Conduct 3.8 may be implicated in government searches of military defense counsel, JAGINST 5803.1D, R. 3.8, is specifically implicated by those searches. Without a uniform governing policy or MRE, military attorneys are unnecessarily subjected to direct ethical jeopardy when these searches are conducted.)

[56] *See* Professional Experience, *supra* note 2.

[57] *See id.*

[58] Basic tenets of professional responsibility require a defense attorney to act in the best interests of his clients. JAGINST 5903.1D, R. 1.3. However, it is more likely that a Lance Corporal rely on perceptions generated from personal observation than on the reality of a professional regulatory scheme when assessing his attorney's independence.

[59] *See* Inquiry, *supra* note 53, at 5.

[60] U.S. Const. Amend. IV.

[61] *See* United States v. McGraner, 13 MJ 408, 414 (C.M.A. 1982) "In defining the rights of military personnel, Congress was not limited to the minimum requirements established by the Constitution, and in many instances, it has provided safeguards unparalleled in the civilian sector." *See, e.g.,* Francis A. Gilligan, *The Bill of Rights and Service Members*, Army Law., Dec. 1987 (servicemembers' rights broader than constitutionally required). "The broad constitutional rights that the servicemembers enjoy spring from the fundamental principal that they do not lay aside the citizen when they assume the soldier." United States v. Manuel, 43 M.J. 282, 286 C.A.A.F. (1995).

[62] United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).

[63] *Id.*

[64] Stephen A. Salzburg, Lee D. Schinasi & David A. Schlueter, MILITARY RULES OF EVIDENCE MANUAL, §315.03[2][a-b], at 3-502 (7th Ed., Matthew Bender & Co. 2011).

[65] *Id.*

'authorization to search' as an express permission to search issued by proper military authority, whether commander or judge."[66] Under current military law, a commander, with minimal understanding of the legal issues involved, can authorize a search of military defense counsel offices.[67] The military setting presents the only contemporary circumstance in which a non-lawyer can authorize a probable cause search—authority that exists even when such a search involves areas containing materials subject to a claim of privilege.[68]

For a government search to be unlawful under the Fourth Amendment, there must be a reasonable expectation of privacy in the area searched.[69] "[T]he court will ask whether the person exhibited a subjective expectation of privacy in the place or object, and second, whether objectively it can be said that that expectation, if any, was one that society would accept as being reasonable."[70] "The military courts have recognized "a reasonable expectation of privacy in his or her person, electronic communications, personal property, living quarters, office or work area and vehicles."'[71] The military courts have not specifically addressed the expectation of privacy in attorneys' files, but the United States Court of Appeals for the Ninth Circuit has. "[E]xpectation of privacy in an attorney's client files thus has roots in federal and state statutory and common law and in the United States Constitution, among other sources. Indeed, there is no body of law or recognized source of professional ethics in which this 'source' or 'understanding' is lacking."[72] Normally, "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."[73] However, the Ninth Circuit Court of Appeals authorized vicarious assertion of Fourth Amendment rights stemming from a search of defense counsel files.[74] A reasonable expectation of privacy exists in files kept in an attorney's office; therefore, an unlawful government search of a client's file in an attorney's office may entitle a defendant to relief.[75]

B. Attorney-Client Privilege

While the Fourth Amendment implications of government searches of military defense counsel are fairly apparent, government intrusion on the attorney-client privilege also has constitutional ramifications under the self-incrimination and due process clauses of the Fifth Amendment[76] as well as the Sixth Amendment right to counsel.[77] The attorney-client privilege is "the client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney."[78] Cases upholding the attorney-client privilege appear as early as 1577,[79] with one court going so far as to state, "The first duty of an attorney is to keep the secrets of his clients."[80] The policy behind this privilege is logical:

> [T]he purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.[81]

For the same policy reasons, the military justice system requires the privilege to operate effectively. State bar rules and service regulations impute the requirement to ensure client confidences onto military attorneys.[82] This

[66] *Id.* at 3-501-2.

[67] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315 (d)(1-2) (2012) [hereinafter MCM].

[68] *See* Fed. R. Crim. P. 41(b).

[69] United States v. Katz, 389 U.S. 347, 361 (1967) (Harlan, J. concurring) (requiring the expectation of privacy be both objectively and subjectively reasonable).

[70] SALZBURG, SCHINASI, & SCHLEUTER, *supra* note 64, at 3-295.

[71] *Id.* at 3-295-6 (citations omitted).

[72] Demassa v. Nunez, 770 F.2d 1505, 1506 (9th Cir. 1985).

[73] *Id.* at 1507 (citations omitted).

[74] *Id.* at 1506.

[75] *See Demassa*, 770 F.2d 1505 at 1506; Mapp v. Ohio, 367 U.S. 643 (1961).

[76] U.S. Const. Amend. V ("No personal shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .")

[77] U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.").

[78] BLACK'S LAW DICTIONARY 1317 (9th ed. 2009).

[79] *See* Berd v. Lovelace, 21 Eng. Rep. 33 (1577); Dennis v. Codrington, 21 Eng. Rep. 53 (1580).

[80] Taylor v. Blacklow, 132 Eng. Rep. 401, 406 (C.P. 1836).

[81] Upjohn Co. v. United States, 449 U. S. 383, 389 (1981).

[82] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6, U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, APP. B, R 1.6 (MAY 1, 1992) [hereinafter AR 27-26], JAGINST 5803.1D, *supra* note 55, U.S. AIR FORCE, RULES OF PROFESSIONAL CONDUCT, CH. 1, R. 1.6, (AUG. 17, 2005) [hereinafter AFRPC], U.S. COAST GUARD, COMMANDANT INSTR. M5800.1, COAST GUARD LEGAL PROFESSIONAL RESPONSIBILITY PROGRAM, ENCL 1, R. 1.6 (JUNE 1, 2005) [hereinafter CGCI M5800.1] ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).")

privilege is so sacrosanct in American jurisprudence that government interference with it may have constitutional implications.

1. Fifth Amendment

a. Self-Incrimination Clause

The government, in execution of a search authorization of defense counsel spaces, could come across incriminating information disclosed to an attorney. The potential for such a search renders the attorney-client privilege a bait-and-switch.[83] Published safeguards must be in place prior to any search of defense counsel offices to maintain faith and transparency in the judicial process; subsequent remedial measures designed to "cure" the ills of these searches cannot undo damage already caused.

b. Due Process Clause

Due process is "such an exertion of the powers of government as the settled maxims of law sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."[84] The settled maxims of criminal law do recognize the need to potentially search defense counsel office spaces[85] because "the Sixth Amendment does not provide sanctuary for criminal wrongdoing, nor may a client house his criminal enterprises in his lawyer's office."[86]

The Article III courts balance the due process requirements of the Fifth Amendment with the government's need to investigate in two ways. The first is the requirement that a magistrate judge make a probable cause determination,[87] and the second is implementation of statutes and rules to govern these searches.[88] These two layers of protection do not exist in concert within any branch of the military under current law or policy.

The rights to due process also intersect with the Sixth Amendment right to counsel. "When the government interferes in a defendant's relationship with his attorney to the degree that counsel's assistance is rendered ineffective, the government's misconduct may violate the defendant's Fifth Amendment right to due process as well as his Sixth Amendment right to counsel."[89]

2. Sixth Amendment Right to Counsel

To provide effective assistance, a lawyer and client must be able to communicate freely without fear that advice and legal strategy will be seized and used against the client in a criminal proceeding.[90] At a minimum, searches of defense counsel office spaces will have a chilling effect on communications between the client and attorney. This chilling effect could render defense counsel services ineffective, thereby depriving the servicemember of his Sixth Amendment right to counsel.

C. Professional Responsibility

Under the current regulatory scheme, government attorneys conducting searches of military defense counsel, either personally or through their representatives, are unnecessarily exposed to ethical liability in the conduct of their duties. The spirit of Model Rule of Professional Responsibility 3.8 is implicated by the conduct of defense counsel searches:

> The prosecutor in a criminal case . . . (e) shall not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
>
> (1) the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and,

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[83] A bait-and-switch is created when the government provides a defense attorney for an accused, assures them of confidentiality, and then breaches those confidences; *but see* United States v. Tanksley, 54 M.J. 169, at 172 (2000) ("While privileged communication with counsel may be the essence of the Sixth Amendment guarantee of effective assistance of counsel, the Supreme Court has rejected any *per se* rule that finds a Sixth Amendment violation when otherwise privileged, confidential information is overheard or read."(internal citations omitted)).

[84] BLACK'S LAW DICTIONARY, *supra* note 78, at 575 (quoting Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 356 (1868)).

[85] *See* Andresen v. Maryland, 427 U.S. 463 (neither Fourth nor Fifth Amendment per se prohibits search of real estate attorney's office); *see also* U.S. Attorneys Manual [hereinafter USAM] R. 9-13.420 (Searches of Premises of Subject Attorneys).

[86] United States v. Calhoun, 47 M.J. 520, 526, (A.F. Ct. Crim. App. 1997).

[87] Fed. R. Crim. P. 41(b).

[88] *See* 42 U.S.C. §§ 2000aa-11(a)(3) (Attorney General must recognize "special concern for privacy interests in cases in which a search or seizure for such documents would intrude upon a known confidential relationship such as that which may exist between . . . lawyer and client."); 28 CFR 59.4(b) (provisions governing the use of search warrants that may intrude upon professional, confidential relationships); USAM R. 9-13.410 (Guidelines for Issuing Grand Jury or Trial Subpoena to Attorneys for Information Relating to the Representation of Clients); USAM R. 9-13.420 (Searches of Premises of Subject Attorneys); USAM R. 9-19.221 (Request for Authorization to a Deputy Assistant Attorney General).

[89] United States v. Marshank, 777 F. Supp. 1507, 1519 (N.D. Cal. 1991) (citing United States v. Irwin, 612 F.2d 1182, 1185 (9th Cir. 1980)).

[90] *See* United States v. Levy, 577 F.2d 200, 209 (3rd Cir. 1978).

> (3) there is no other feasible alternative to obtain the information.[91]

While not directly relating to searches of defense counsel offices, Model Rule 3.8 is an informative lens through which to view professional responsibility implications in searches of defense counsel. Applying the logic of the rule to searches involving attorney-client privilege: professional duties of an attorney require showing that the item sought is not protected from disclosure, that it is essential to the completion of an ongoing investigation or prosecution, and that there are no other alternatives to obtaining the information.

The Army, Air Force, and Coast Guard's rules of professional conduct are not specifically implicated by searches of military defense counsel. However, the Department of the Navy's Rules of Professional Conduct specifically contemplates searches that may implicate attorney-client privilege.[92] The Judge Advocate General's Instruction 5803.1D (JAGINST), rule 3.8(b) reads:

> Trial counsel and other government counsel shall exercise reasonable care to avoid intercepting, seizing, copying, viewing, or listening to communications protected by the attorney-client privilege during investigation of a suspected offense (particularly when conducting government-sanctioned searches where attorney-client privileged communications may be present), as well as in the preparation or prosecution of a case. . . . Trial counsel and other government counsel must not infringe upon the confidential nature of attorney–client privileged communications and are responsible for the actions of their agents or representatives when they induce or assist them in intercepting, seizing, copying, viewing, or listening to such privileged communications.[93]

Theoretically, a Department of the Navy attorney could be subject to an ethics complaint for improperly conducted searches of military defense counsel whether conducted personally or through agents. However, the lack of guidance on the correct manner in which to search military defense counsel, absence of case-specific remedies, and the opportunity for many parties (not all of whom are subject to the JAGINST) to play a role in any such search render the JAGINST wholly inadequate to deal with government searches of military defense counsel. The Army, Air Force, and Coast Guard do not have a similar modification to Model Rule 3.8.[94]

D. Unlawful Command Influence

Military-specific legal implications arise from the concept of unlawful command influence. Rule for Courts-Martial 104 (2) states: "No person subject to the code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . in reaching the findings or sentence in any case . . . ."[95] Rule for Courts-Martial 104 leaves the courts to determine what constitutes unauthorized influence of a court-martial.[96] The courts have established three types of unlawful command influence: actual, apparent, and perceived/implied.[97] Since "unlawful influence on the military justice system can be a problem at virtually every level [of the process]," timing of the influence is moot.[98]

1. Actual Unlawful Command Influence

"Actual unlawful command influence occurs when, under the totality of the circumstances, the evidence would lead a reasonable person to conclude that command influence affected the disposition of a case and prejudiced the accused."[99] A search conducted with the intent to pressure an attorney or a client to pursue or abandon a particular course of action is unlawful command influence.[100] Obtaining privileged information beyond the scope of a narrowly tailored search authorization would also amount to actual unlawful command influence. When actual unlawful command influence and prejudice can be demonstrated, application of the exclusionary rule, case-specific remedies (to include dismissal), and 18 U.S.C. §241 are sufficient remedies to ensure protection of servicemembers' rights.[101] Established law is reasonably well-equipped to handle actual unlawful command

[91] MODEL RULES OF PROF'L CONDUCT, R. 3.8 (2013).

[92] *See* JAGINST 5803.1D, *supra* note 55, R. 3.8.

[93] *Id.*

[94] *See* AR 27-26 R. 3.8, AFRPC R. 3.8, CGCI. M5800.1 R. 3.8, *supra* note 83.

[95] MCM, *supra* note 67, R.C.M. 104 (2012).

[96] *See id.* (silent on the issue).

[97] David A. Schlueter, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE, §6-3[D], at 391 (Matthew Bender & Co. 2012).

[98] *Id.* at 392

[99] *Id.* at 390.

[100] *See* United States v. Fisher, 45 M.J. 159 (C.A.A.F. 1996).

[101] 18 U.S.C. §241 ("If two or more persons conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . . . They shall be fined under this title or imprisoned not more than ten years, or both . . . .").

influence resulting from the search of an attorney's office. Effective remedies are more elusive when apparent unlawful command influence is at issue.

2. Apparent and Perceived Unlawful Command Influence

"Actual unlawful command influence affects the actual fairness of a trial, while the appearance of unlawful command influence merely affects the level of 'public' confidence in the military justice system."[102] "Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an 'intolerable strain on public perception of the military justice system.'"[103] The optics of government intrusion into attorneys' files are bad.[104] The optics of unfettered intrusion are worse.[105] "'[A]ppearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial. '"[106] "Congress and this court are concerned not only with eliminating actual unlawful command influence, but also with 'eliminating even the appearance of unlawful command influence at courts-martial.'"[107]

Perceived unlawful command influence can be actual or apparent.[108] Perceived unlawful command influence "focuses on how the recipient of command influence perceives that influence."[109] "If the recipient is a sufficiently large group of servicemembers, and members of that group perceive that the command influence affects the overall fairness of the system, then apparent unlawful command influence has occurred."[110] The perception by the recipient must be reasonable in light of the circumstances.[111]

The extraordinary writ filed in *Calhoun* asserted that AB Calhoun was unable to receive adequate representation by a military attorney as a result of the government intrusion into his attorney-client relationship.[112] *Calhoun* was a narrow search of Capt K's case file. At the other end of the collateral damage spectrum is the search in *Betancourt*. "Camp Pendleton attorneys estimate the searched offices contained paperwork related to scores of cases, including that of Marine Sgt. Lawrence Hutchins III, who faces retrial in his high-profile war crimes case . . . ."[113] In litigation resulting from the *Betancourt* search, a trial judge ruled, "Undoubtedly, such a heavy-handed and overly intrusive raid by CID sponsored by the STC would further exacerbate concerns about the fairness of these proceedings."[114] As a group, Marine Corps defendants represented by defense attorneys in the searched offices perceived that the command influence affected the overall fairness of the system.[115] As demonstrated by the *Betancourt* rulings, the trial courts believed this perception to be reasonable.[116]

IV. Current Regulatory Scheme

There are two procedural safeguards that will protect all stakeholders in searches of military defense counsel as well as bring the practice of military law in line with the practice of civilian criminal law. First, the approval authority for a search authorization should be a judge or a magistrate.[117] Second, the protections enumerated in

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[102] Schlueter, *supra* note 97, at 391 (citing United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985)).

[103] United States v. Simpson, 58 M.J. 368, 374 (C.A.A.F. 2003).

[104] Calhoun, *supra* note 7, at 532 (Pearson, dissenting) ("This case leaves a bad taste in my mouth, from its outset with the government's search of a military defense counsel's office to appellant's self representation at trial.").

[105] Cave, *supra* note 6; Sam Adams, *Hitting the Fan. . .*, CAAFLOG (May 9, 2014), http://www.caaflog.com/2014/05/09/hitting-the-fan/.

[106] *Simpson*, 58 M.J. at 374 (quoting United States v. Stoneman, 57 M.J. at 42-43 (C.A.A.F. 2002)).

[107] United States v. Lewis, 63 M.J. 405, 415 (C.A.A.F. 2006) (quoting United States v. Rosser, 6 M.J. 267, 271 (C.M.A. 1979)).

[108] Schlueter, *supra* note 97, at 391.

[109] *Id.* (citing Bower, "Unlawful Command Influence: Preserving the Delicate Balance," 28 A.F. L. Rev. 65, 81 (1988)).

[110] *Id.* (citing Gaydos & Warren, "What Commanders Need to Know about Unlawful Command Control," ARMY LAW., Oct. 1986, at 9-10); *cf.* United States v. Lowery, 18 M.J. 695 (A.F.C.M.R. 1984) (admonishing witness for one trial likely to have a "chilling effect" on judicial system).

[111] *Id.* (citing United States v. Johnson, 34 C.M.R. 328 (C.M.A. 1964)).

[112] United States v. Calhoun, 47 M.J. 520, 524 (A.F. Ct. Crim. App. 1997).

[113] Hope H. Seck, *Senior Marine Prosecutor Reassigned After Judge Rules 'Apparent UCI' On Pendleton Office Raid*, THE MARINE CORPS TIMES, June 12, 2014.

[114] Ruling, *supra* note 6.

[115] Professional Experience, *supra* note 2 (This inference is drawn from a totality of the circumstances and based on the number of motions filed, the press received, and the notification letters provided to all defense clients.).

[116] Ruling, *supra* note 5; Abbreviated Ruling, *supra* note 51; Professional Experience, *supra* note 2.

[117] Such a magistrate should be qualified and certified under Article 27(b) and sworn under Article 42(a) of the UCMJ. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 8-1f (3 Oct. 2011). This requirement will ensure that any probable cause determination is made by an attorney. *Id.* There are wide variances in the magistrate programs and qualifications of magistrates among the services. *See* U.S. DEP'T OF THE AIR FORCE INSTR. 51-201, *Administration of Military Justice*, at 3.1 (Sept 25, 2014) (Air Force magistrates issue search authorizations but are not attorneys); MARINE CORPS BASE CAMP PENDLETON, ORDER 5000.2K, BASE REGULATIONS, sec. 3, (Jun. 30, 2010) (Marine Corps magistrates administer base traffic and service of process but are not attorneys and do not issue search authorizations); UNITED STATES ARMY TRIAL

Calhoun should be made applicable to all branches of the service.[118] To illustrate the current difference between the military and civilian landscape in this realm, comparing the U.S. Attorneys' regulatory framework with each service's current policy is both informative and sobering.

A. U.S. Attorneys

The U.S. Attorney's office operates under the traditional Fourth Amendment construct whereby every search warrant is issued by a magistrate judge.[119] In addition to this systemic guarantee of judicial oversight in probable cause searches, the Department of Justice has recognized that searches of attorney office spaces require a heightened sensitivity.[120] The U.S. Attorneys' Office Rule 9-13.420 states in pertinent part,

> Because of the potential effects of this type of search on legitimate attorney–client relationships and because of the possibility that, during such a search, the government may encounter material protected by a legitimate claim of privilege, it is important that close control be exercised over this type of search.[121]

The U.S. Attorneys' Manual requires that any searches of attorney work spaces be approved by a U.S. Attorney or Assistant Attorney General in coordination with their Criminal Division, and only then as an action of last resort.[122] In these searches, the U.S. Attorneys' rules also require that the search warrant be narrowly tailored, that a "taint team" execute the search, and that specific review procedures are in place to screen out privileged material before it is compromised.[123]

B. Navy

The Navy Judge Advocate General's Ethics Instruction does contemplate searches of attorneys in Rule 3.8 which cautions attorneys conducting searches to protect privileged material.[124] Such contemplation is also evident in that the Navy ethics instruction is the only service ethics instruction that deviated from Model Rule 3.8.[125] Aside from potential implications of Rule 3.8 of the Navy ethics instruction, the Department of the Navy is silent as to when a search of military defense counsel offices is appropriate and the procedures to utilize while conducting one.[126]

C. Army

Army Regulation 27-26 has not expanded Model Rule 3.8 in the same manner as the Navy. The Army also has no published guidance on the conduct of searches of military defense counsel office spaces.[127] However, the Army does provide a modicum of protection via its magistrate program,[128] under which most (but not all) search authorizations will be issued by an attorney.[129]

D. Marine Corps

No Marine Corps-specific guidance exists on how to conduct searches of military defense counsel offices.[130] While Rule 3.8 of the Navy ethics instruction is also applicable to Marine Corps attorneys, the absence of appropriate circumstances and procedures for searches of military defense counsel within the Department of the Navy and the Marine Corps set the conditions for the *Betancourt* search.[131]

In the aftermath of the Camp Pendleton search, the Staff Judge Advocate to the Commandant of the Marine Corps ordered an inquiry.[132] The purpose of the inquiry was to determine, in part, "(1) whether there are adequate procedures and training programs in place to guide such searches . . . ."[133] The Staff Judge Advocate to the Commandant of the Marine Corps noted in his endorsement of the inquiry that "there is an absence of

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JUDICIARY, STANDARD OPERATING PROCEDURES FOR MILITARY MAGISTRATES, (1 Sept. 2013) [hereinafter Army Magistrate SOP] The Army has an attorney magistrate program but has not abrogated the right of a commander to issue search authorizations. *Id.*

[118] United States v. Calhoun, 49 M.J. 485, 488 (C.A.A.F. 1998).

[119] Fed. R. Crim. P. 41(b).

[120] USAM R. 9-13.420 (Searches of Premises of Subject Attorneys).

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] JAGINST 5803.1D, *supra* note 55, R. 3.8.

[125] *See* AR 27-26, JAGINST 5803.1D; AFRPC, CGCI M5800.1, *supra* note 82.

[126] Inquiry Endorsement, *supra* note 53 ("I note that there is an absence of policies or procedures in the Manual of the Judge Advocate General . . . or in the military justice directives of the other Services, with the exception of the Air Force, to cover the search of defense counsel or their spaces.").

[127] *Id.*

[128] *See* Army Magistrate SOP, *supra* note 117.

[129] *Id.*

[130] Inquiry Endorsement, *supra* note 53, at 8.

[131] JAGINST 5803.1D, *supra* note 55.

[132] Inquiry Order, *supra* note 53.

[133] *Id.*

policies or procedures in the Manual of the Judge Advocate General . . . or in the military justice directives of the other Services, with the exception of the Air Force, to cover the search of defense counsel or their spaces."[134]

The officer conducting the inquiry made several recommendations to the Staff Judge Advocate to the Commandant of the Marine Corps, to include establishing a protocol for obtaining a CASS for an area containing materials subject to a claim of privilege.[135] This protocol would require consideration of alternatives, consultation with the prosecutorial chain of command, notification of Judge Advocate Division, a narrowly tailored CASS, and use of a "taint team."[136] The Staff Judge Advocate to the Commandant of the Marine Corps approved the recommendation with modification,[137] and tasked the Deputy Director of Community Development Strategy and Plans to recommend a Marine Corps-wide policy for the conduct of searches subject to a claim of privilege.[138]

E. Air Force

Calhoun forced the Air Force to address government searches of military defense counsel. The mess created by the *Calhoun* search directly led to the Air Force Judge Advocate General providing guidance for the future conduct of similar searches.[139] The guidance promulgated by the Air Force requires these types of searches be an option of last resort, and even then, requires notification of the chain of command and implementation of "taint team" procedures.[140] Despite these protections, the approval authority for a search of military defense counsel within the Air Force remains a non-lawyer.[141] With differing and inadequate regulatory schemes, all branches of the service are unprepared to handle searches of military defense counsel offices, and implementation of varied programs yields arbitrary results.

V. Recommendation[142]

To preserve the balance between the rights of an accused and the rare need for the government to search military defense counsel office spaces, MRE 315(d) should be modified to withhold search authorization authority from commanders when a search involves military defense counsel office spaces. Next, subsection (h) to MRE 315 should be added to codify the safeguards utilized in *Calhoun* and promulgated in the Air Force Judge Advocate General Instruction to ensure the protection of privileged material.[143] Last, a modified rule needs to make clear the enforcement mechanism for violations. The primary remedy for violations of MRE 315 is exclusion.[144] The discussion portion of MRE 315(h) should explicitly state that vicarious assertion of 4th Amendment rights and application of the exclusionary rule apply to searches of military defense counsel offices. The application of vicarious rights assertion and exclusionary rule to searches involving military defense counsel offices ensures that the government has an incentive to minimize collateral damage: expand the scope of a search of defense counsel offices; the exclusionary rule expands in kind. These three modifications to MRE 315 will not significantly erode the authority of a commander to issue search authorizations in the vast majority of circumstances, would only apply to probable cause searches, and would serve as an appropriate deterrent to government overreach.[145]

A modified MRE 315 will protect all stakeholders; investigators, judges, and prosecutors, as well as military defense counsel and the Soldiers, Sailors, Marines, and Airmen they represent. Uniform and explicit procedures for government searches of military defense counsel are needed to keep the fairness of the military justice system beyond reproach.

VI. Conclusion

Currently, every service is ill-equipped to conduct searches of military defense counsel. These searches can easily undermine the military defense bar and the entire military justice system. No fair system can place a defendant "dependent for the preservation of his rights upon the integrity and good faith of the prosecuting

[134] *Id.* at 8.

[135] Inquiry, *supra* note 53, at 5 (applying to all searches involving a claim of privilege).

[136] *Id.*

[137] *Id.* at 9.

[138] Inquiry Endorsement, *supra* note 53.

[139] Policy Memorandum, Military Justice – 2, The Judge Advocate General, U.S. Air Force, subject: Searches and Seizures Involving Air Force Defense Personnel (17 Aug. 2005).

[140] *Id.*

[141] *See* AFI 51-201, *supra* note 117, at 28 (requiring an Air Force magistrate possess "judicial temperament," not that they are a judge advocate).

[142] While outside the scope of this article, it may be beneficial to apply this recommendation to all searches of areas known to contain materials subject to any claim of privilege.

[143] AF TJAG Memo, *supra* note 30.

[144] Exclusion is a sufficient remedy to address searches such as *Calhoun* that are limited to one case and are narrow in scope. In cases such as *Betancourt*, traditional exclusion does not address the government intrusion into the attorney-client privilege of every other client served by the office.

[145] Draft language of a modified MRE 315 is included *infra* Appendix A.

authorities."[146] Service-specific, piecemeal policies add some protections for defendants and attorneys, but fall short of a comprehensive solution.[147]

Even with service-specific policies, many issues will likely remain unresolved. Attorneys may still remain at odds with the Model Rule 1.6 duty of confidentiality.[148] Defendants will continue to perceive that preservation of their rights is dependent on the integrity and good faith of the prosecuting authorities.[149] Last, a hodge-podge of service regulations will force judges to carve out ad hoc procedures and remedies as they attempt to reconcile service policies with constitutional rights, established judicial norms, and MRE 315. *Calhoun* and *Betancourt* highlight the issues inherent in these searches and the need for an updated rule to govern.[150] The President should provide uniform guidance to the services in the form of a modified MRE 315.[151] If nothing else, a servicemember is entitled to a fair process: "A man who is good enough to shed his blood for his country is good enough to be given a square deal afterwards. More than that no man is entitled to, and less than that no man shall have."[152]

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[146] United States v. Boyd, 27 MJ 82, 85 (C.M.A. 1998) (citing Kastigar v. United States, 406 U.S. 442, 460 (1972)).

[147] *See* AF TJAG Memo, *supra* note 30. The existence of this memo did not prevent a similar issue within the Marine Corps.

[148] MODEL RULES OF PROF'L CONDUCT R. 1.6. A presidential rule passed pursuant to statute would carry more weight with a state bar than a service policy citing a military need for an exception despite the absence of any clear exigency. *Id.*

[149] Kastigar v. United States, 406 U.S. 442,460 (1972).

[150] *See* United States v. Calhoun, 47 M.J. 520, 524 (A.F. Ct. Crim. App. 1997); Professional Experience, s*upra* note 2.

[151] 10 U.S.C. § 836 (b) ("All rules and regulations made under this article *shall be uniform* insofar as practicable.") [emphasis added]. *Id.*

[152] President Theodore Roosevelt, Speech at Springfield, Illinois (4 July 1903), *available at* http://www.toinspire.com/author.asp?author=Theodore+Roosevelt (last visited June 11, 2015).

Appendix A. **Proposed Military Rule of Evidence 315 Language**

The below draft only addresses excerpts of MRE 315 that would require a change to ensure searches of military defense counsel office spaces do not abrogate the attorney-client privilege and have an appropriate degree of deterrence and judicial oversight. Proposed language is in **bold**. As discussed above, it may be beneficial to extend these protections to every probable cause search involving an area known to contain materials subject to a claim of privilege. Sample language for this course of action is also provided.

Rule 315. Probable cause searches

. . . (d) Who May Authorize. A search authorization under this rule is valid only if issued by an impartial individual in one of the categories set forth in subdivisions (d)(1) and (d)(2) **with the exception of searches conducted pursuant to paragraph (h) of this rule.**

. . . (h) Searches involving (military defense counsel) (a claim of privilege).

(1) Searches of (military defense counsel)(areas known to contain materials subject to a claim of privilege) may only be authorized by a judge or magistrate qualified and certified under Article 27(b) and sworn under Article 42(a) of the Uniform Code of Military Justice.

(2) Searches conducted pursuant to a search authorization obtained under subsection (h) (1) will be narrowly tailored and supervised by a disinterested attorney. All seized materials will be sealed for an in camera privilege review by a military judge prior to being turned over to the government.

(3) A military judge that conducts an in camera review pursuant to (h) (2) of this rule shall not sit as military judge in the case that is the subject of the search or any subsequent case involving screened materials.

The discussion section of MRE 315 should be amended as follows:

. . . *(d) Who May Authorize.* **Unless limited by section (h) of this rule,** Rule 315(d) grants power to authorize searches to impartial individuals of the included classifications. **The limitation in section (h) has been placed on the power to grant searches in recognition of the enhanced privacy interest underlying the (attorney-client relationship)(privileges) which warrants a heightened degree of judicial protection and supervision when (law offices)(areas subject to a claim of privilege) are the subject of a search for client files or documents.** The closing portion of the subdivision clarifies the decision of the Court of Military Appeals in *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979), by stating that the mere presence of an authorizing officer at a search does not deprive the individual of an otherwise neutral character. This is in conformity with the decision of the United States Supreme Court in *Lo-Ji Sales v. New York*, 442 U.S. 319 (1979), from which the first portion of the language has been taken. The subdivision also recognizes the propriety of a commander granting a search authorization after taking a pretrial action equivalent to that which may be taken by a federal district judge. For example, a commander might authorize use of a drug detector dog, an action arguably similar to the granting of wiretap order by a federal judge, without necessarily depriving himself or herself of the ability to later issue a search authorization. The question would be whether the commander has acted in the first instance in an impartial judicial capacity. . . .

. . . (h) ***Searches of (military defense counsel)(areas known to be subject to a claim of privilege).*** **This section was added to address government searches of (military attorney office spaces) (areas known to be subject to a claim of privilege).** ***See*** **United States v. Calhoun, 49 M.J. 485 (C.A.A.F. 1998); United States v. Calhoun, 47 M.J. 520 (A.F. Ct. Crim App. 1997). All individuals with privileged information present in the area to be searched have standing to raise a motion for unlawful search. Violations of this section may render a search unlawful and evidence encountered during the conduct of the search inadmissible.** ***See Demassa v. Nunez,*** **770 F.2d 1505 (9th Cir. 1985).**

Two Worlds Colliding: Silence Evidence and Article 31(b), Uniform Code of Military Justice (UCMJ)

Major Scott A. Wilson[*]

If I speak, I am condemned. If I stay silent, I am damned.[1]

I. Introduction

Genovevo Salinas probably believed he had the right to remain silent. He also probably believed that if he did make a statement, it could be used against him later in court. After all, "virtually every schoolboy is familiar with the concept, if not the language of the Fifth Amendment." [1] So when investigators inquired whether shell casings found at a murder crime scene would match to his shotgun, he did not answer. [2] He fell silent. When prosecutors later argued this fact in court, Salinas objected, contending that using his silence against him violated his Fifth Amendment rights.[3] His petition was unsuccessful, and evidence of his silence contributed to his conviction and 20-year sentence.[4] In this instance the lesson appears to be anything you say, *or don't say*, can be used against you in a court of law.

Such was the holding of the Supreme Court in *Salinas v. Texas*. The decision, issued in 2013, was relatively unnoticed, overshadowed by other cases dealing with politically charged issues like the Defense of Marriage Act and Proposition 8. [5] Some commentators claimed the decision "profoundly changed the law of self-incrimination,"[6] because it proclaimed silence in response to police questioning occurring *before* advisement of *Miranda* rights can be used against a defendant later in court.[7] The Supreme Court in *Salinas* pointed out that "popular misconceptions notwithstanding, the Fifth Amendment . . . does not establish an unqualified 'right to remain silent.'"[8] The amendment states that one cannot "be compelled in any criminal case to be a witness against himself,"[9] but it does not say that you have the right to remain silent. So for criminal law practitioners, *Salinas* drives the point home that to invoke Fifth Amendment rights, you had better open your mouth and say so.

While civilian practitioners wrestle with the implications of *Salinas*, there are also many lessons to be drawn from the decision for military practitioners. Much like those involved in the *Salinas* case, those involved in military justice practice must understand the interaction between self-incrimination law and evidence regarding the invocation of the right to remain silent derived from such scenarios.[10] Granted, the *Salinas* decision may not directly apply to the military setting, because the threshold for rights advisement in the military (being suspected of an offense) is fundamentally different than it is for civilian cases (custodial interrogation).[11] Nevertheless, *Salinas* provides military justice practitioners some valuable takeaways regarding self-incrimination and the ability of the government to present evidence surrounding the invocation of the right to remain silent. First, self-incrimination law and the triggers for Article 31(b) rights advisement are constantly evolving,[12] and situations where Article 31(b) rights are required are not

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[1] LES MISERABLES, 10TH ANNIVERSARY CONCERT, Track 9 (First Night/Red Ink Records 2009).

[1] Michigan v. Tucker, 417 U.S. 433, 439 (1974).

[2] Genovevo Salinas v. Texas, 133 S.Ct. 2174, 2178 (2013).

[3] *Id.*

[4] *Id.*

[5] Steven R. Shapiro, *ACLU Summary of the 2012 Supreme Court Term*, https://www.aclu.org/sites/default/files /field_document/summ-12-mem.pdf (last visited May 12, 2015).

[6] Neal Davis & Dick DeGuerin, *Cover Story: Silence Is No Longer Golden: How Lawyers Must Now Advise Suspects in Light of* Salinas v. Texas, 38 CHAMPION 16, Jan/Feb 2014.

[7] *Salinas*, 133 S. Ct. at 2174.

[8] *Id.* at 2188 (quoting Minnesota v. Murphy, 465 U.S. 420, 427-28 (1984)).

[9] U.S. CONST. amend. V.

[10] In discussing evidence derived from scenarios where the accused is invoking the right to remain silent, this article will mainly focus on two resulting types of evidence: first, evidence that the accused remained silent in response to questioning; second, evidence that the accused invoked that right in the first place. While these may be used interchangeably, the point is to address the ability of government counsel to introduce evidence or comment on the accused's silence or invocation of the right to remain silent.

[11] *Compare* UCMJ art. 31(b) (2012) (rights advisement required when suspected of an offense), *with* Miranda v. Arizona, 384 U.S. 436 (1966) (rights advisement usually triggered during custodial interrogation).

[12] *See, e.g.*, United States v. Jones, 73 M.J. 357 (C.A.A.F. 2014) ("We now expressly reject the second, subjective prong of that test [that triggered Article 31, UCMJ warnings], which has been eroded by more recent cases articulating an objective test."); Major Ralph H. Kohlmann, *Tales from the CAAF: The Continuing Burial of Article 31(b) and the Brooding Omnipresence of the Voluntariness Doctrine*, 3 ARMY LAW., May 1997 ("The words in the statute are the same. The Constitution upon which the statute is based is the same. But the scope and applicability of Article 31(b) continues to change before our very eyes.").

as clear as the statutory language might suggest. Second, the right to remain silent is not self-executing; it must be affirmatively invoked to claim its protections.[13] Third, while evidence of the accused's invocation of rights and subsequent silence is generally protected, it is not untouchable and may be used by the government in certain scenarios. It is important for practitioners to understand how a *Salinas*-like scenario could present itself in the military, and how evidence derived from such circumstances may or may not be used in courts-martial.

II. Salinas v. Texas

A. Facts of the Case

In early 1993, a police investigation regarding the murder of two brothers in their Houston residence led investigators to Genovevo Salinas's home.[14] During the course of questioning, he agreed to hand over his shotgun and voluntarily accompany the investigators to the police station for additional questioning.[15] While at the station, Salinas was cooperative and answered a number of questions. But at one point during the interview the police asked him whether the shotgun he had given to the police would match the shell casings recovered at the crime scene.[16] Salinas did not answer.[17] Instead, he "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, [and] began to tighten up."[18] After a period of silence, the investigators continued asking questions related to other issues, which Salinas answered.[19]

At trial, Salinas elected not to testify and objected to the government's use of his silence in response to the officer's questions.[20] To obtain a conviction, prosecutors used his silence in response to the question about his shotgun as substantive evidence of his guilt.[21] Both of the Texas appellate courts affirmed the conviction, after which the Supreme Court granted certiorari in order to resolve a dispute over "whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as a part of [the government's] case in chief."[22] Ultimately, the Supreme Court never addressed this question, finding instead that Salinas never properly invoked the privilege during his interview with investigators.[23] The Court emphasized that it "has long held that a witness who 'desires the protection of the privilege . . . must claim it' at the time he relies on it."[24]

B. Lessons from the Decision for Military Justice

While there are many interesting aspects of the Supreme Court's decision that would benefit judge advocates, three bear mentioning. They involve (1) the circumstances of Salinas's interview with police, (2) whether he properly invoked or exercised his right to remain silent, and (3) whether the government could later use his silence against him at trial. An understanding of how the Supreme Court handled these issues informs the analysis of how the principles can be applied to similar situations in the military.

The first issue that warrants discussion is whether the circumstances of the police interview required rights advisement.[25] The Court pointed out that it was not custodial, stating that "it is undisputed that his interview with police was voluntary."[26] Because Salinas willingly participated in the interview at the police station, this "place[d] petitioner's situation outside the scope of *Miranda* . . . [where] governmental coercion prevented defendants from voluntarily invoking the privilege."[27] This determination is significant, because had the interrogation been custodial, *Miranda* rights would have been required and Salinas would not have needed to expressly invoke the privilege.[28]

While the question was a simple one here, what if the parties had not agreed the interview was voluntary? The dissent highlighted some important facts, stating that investigators took Salinas to the police station as a potential suspect in a criminal investigation, placed him in an interview room, and asked him questions.[29] In the dissent's eyes, these facts give rise to a "reasonable inference that Salinas's silence [in response to certain questions] derived from an exercise of his Fifth Amendment rights."[30] In

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[13] United States v. Traum, 60 M.J. 226, 230 (C.A.A.F. 2004).

[14] *Salinas*, 133 S. Ct. at 2178 (2013).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* at 2179.

[23] *Id.*

[24] *Id.* at 2179 (quoting Minnesota v. Murphy, 465 U.S. 420, 427 (1984)).

[25] *Id.* at 2180.

[26] *Id.*

[27] *Id.* The Court here explained that custodial interrogations are inherently coercive, such that even if he did not expressly invoke his rights, Salinas still did not voluntarily forgo his privilege against self-incrimination. *Id.*

[28] *Id.*

[29] *Id.* at 2185.

[30] *Id.* at 2189. The dissent's point here is not to suggest that this was a custodial interrogation. The parties to the case agreed it was not. Their point was that the circumstances of the interview should factor into the

highlighting such facts, the dissent highlights the fact that the triggers for rights advisement under the Fifth Amendment are not always clear.

Second, the Court highlighted the idea that in noncustodial interrogations, suspects must properly invoke their Fifth Amendment rights.[31] The Court, citing precedent, stated that "a suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege."[32] The right to remain silent is not unqualified, said the Court, and "a witness' constitutional right to refuse to answer questions depends on his reasons for doing so, and courts need to know those reasons."[33] The dissent countered by claiming that circumstances can give rise to an inference that an accused's silence rests upon his claim of Fifth Amendment privilege.[34] It argued "[T]his Court, more than half a century ago, explained that 'no ritualistic formula is necessary in order to invoke the privilege'" and that "[c]ircumstances, not a defendant's statement, tie the defendant's silence to the right."[35] Although the majority carried the day, four justices in the dissent emphasized an important interplay between invocation of Fifth Amendment rights and the admissibility of silence evidence that may flow from that decision.[36]

Finally, one of the principal questions presented to the Court was whether the government could use Salinas's silence against him.[37] The Court initially granted certiorari because of a disagreement in the circuits regarding the ability of the prosecution to introduce evidence of the defendant's pre-arrest or pre-rights advisement silence.[38] With its Fifth Amendment implications, the parties to the case agreed this was an "extremely important" and "frequently recurring" question.[39] Ultimately, the Court did not address this question in its opinion, determining the right against self-incrimination was never properly invoked in the first place.[40] Nonetheless, *Salinas* highlights an important principle regarding the admissibility of silence evidence in certain pre-trial situations, both before and after rights advisement.

Each of the above lessons from the *Salinas* case corresponds to an area of military justice practice ripe for examination. A closer look at each area shows that, as in *Salinas*, when rights advisement is required, what constitutes invocation of the right to remain silent, and whether one's silence is admissible as evidence are often subject to debate. Thus, it is incumbent upon military justice practitioners to understand some basic principles of the law so that evidence of the accused's silence or invocation of rights can be handled appropriately.

III. Lesson One: Article 31(b) Rights Advisement

One lesson from the *Salinas* decision is that situations requiring rights advisement are not always clear. This is certainly the case in the military, where the law on Article 31(b), Uniform Code of Military Justice (UCMJ) and self-incrimination is constantly changing.[41] While the statutory language appears clear on its face, the purpose of Article 31(b), together with court interpretation of the statute, demonstrates the decision to administer Article 31(b) rights is often difficult.

A. Statutory Language

Article 31(b) provides:

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.[42]

A plain reading of the rule seems to offer clarity about when rights must be administered. The language demonstrates that no person subject to the UCMJ may question an accused or suspect without first informing them of their rights under

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analysis of whether the accused's silence constituted an invocation of the right to remain silent. In other words, the circumstances may give rise to an inference that Salinas's silence amounted to an invocation of his constitutional rights. *Id.*

[31] *Id.* at 2178.

[32] *Id.* at 2182.

[33] *Id.* at 2183.

[34] *Id.* at 2190.

[35] *Id.* at 2186 (quoting Quinn v. United States, 349 U.S. 155, 164 (1955)).

[36] *Id.* at 2185.

[37] *Id.* at 2179.

[38] *Id. See, e.g.*, United States v. Moore, 104 F. 3d 377 (D.C. Cir. 1997) (finding prosecution could not use the defendant's post-arrest, pre-*Miranda* silence as evidence of guilt, as a defendant who remains silent after arrest but before interrogation "must be treated as having asserted" his Fifth Amendment rights); United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991) (stating that the government is allowed to comment on a defendant's pre- or post-arrest silence that occurs prior to being issued *Miranda* warnings).

[39] Reply Brief for Petitioner at 5, Salinas v. Texas, 133 S. Ct. 2174 (2013) (No. 12-246). While the case here dealt with pre-*Miranda* silence, the point is that it raises questions about the use of silence evidence both before and after rights advisement.

[40] *Salinas*, 133 S. Ct. at 2178.

[41] *Supra* note 12.

[42] UCMJ art. 31(b).

Article 31(b). This reading suggests if there is a suspect or an accused, and someone in the military is going to question that person, rights notification is required.

Further analysis of the rule demonstrates that application of Article 31(b) is not as straightforward as the text suggests. First, the purpose of the rule was not to apply to all situations where one military member questions another.[43] Even though Congress intentionally provided members of the military with a broader warning requirement than what is required in a civilian setting, Congress did not intend a "literal application of [this] provision."[44] Instead, the phrase "interrogate, or request any statement" places a restrictive element on the "person subject to the code" that might be doing the questioning.[45] As a result, Article 31(b) is applicable to those individuals who question suspects or conduct interrogations as part of their official duties.[46]

Second, the administration of justice and discipline in the military is often a blend of judicial as well as administrative measures.[47] Consequently, Article 31(b) is not intended to apply to all such scenarios. The case of *United States v. Swift* hinged upon this very question, as the court had to determine whether a Master Sergeant was involved in an administrative or disciplinary function in his questioning of a junior Soldier.[48] The court in *Swift* highlighted the idea that leaders in the military have unique responsibilities not only for the good order and discipline of the unit, but also for the "health, welfare, and morale" of subordinates and their families.[49] Thus, any interpretation of Article 31(b) needs to recognize such differences. This also means part of the analysis about when to administer Article 31(b) rights includes asking if the questioner is acting in an administrative or disciplinary capacity.[50] Not all situations will require rights advisement.

Third, application of Article 31(b) is not straightforward because it operates in a unique environment that demands a liberal reading of the rule. Such a reading is consistent with the special environment in which military investigations take place. Because of the importance of rank, discipline, and obedience to orders, "the mere asking of a question under certain circumstances is the equivalent of a command."[51] A command or order in the military demands immediate action, or at least an immediate response, a reality often at odds with the constitutional right to silence. So Article 31(b) is intended to provide members of the armed forces with the assurance that the requirement to obey and respond "does not apply in a situation when the privilege against self-incrimination may be invoked."[52]

While servicemembers need special protection in situations where they are subjected to questioning, it is evident a strict interpretation of Article 31(b) is not intended. Case law has confirmed this, and demonstrated that the triggers for Article 31(b) rights are subject to interpretation. This determination will have a significant impact on the accused's exercise of those rights, and potentially on the use of any silence evidence that might result from questioning. Two examples illustrate this point.

B. *United States v. Loukas*

In *United States v. Loukas*, the accused was on temporary duty from his base in North Carolina, assisting as loadmaster on a flight from Florida to Bolivia.[53] The accused showed up two hours late for departure, and several hours into the flight, he began hallucinating and behaving in an irrational manner.[54] His behavior was reported to the crew chief, Staff Sergeant (SSgt) Dryer, who went to the back of the plane and questioned the accused about his behavior and whether he had ingested any drugs.[55] Staff Sergeant Dryer testified that he questioned the accused out of concern for the safety of the aircraft and flight crew.[56] The accused eventually relented, and answered he had used cocaine the night before.[57]

The initial reaction to the scenario presented in *Loukas* would make one think Article 31(b) rights should have been administered. After all, a person subject to the UCMJ (the crew chief) questioned a fellow servicemember (the accused) about potential misconduct. Staff Sergeant Dryer's questions about what the accused ingested suggest he "suspected" Loukas of some wrongdoing.[58] The lower courts agreed with this interpretation, finding SSgt Dryer should have administered Article 31(b) rights prior to

[43] United States v. Duga, 10 M.J. 206, 209 (C.M.R. 1981).

[44] *Id.*

[45] *Id.* (quoting United States v. Gibson, 14 C.M.R. 164, 170 (1954)).

[46] *Id.* at 208.

[47] United States v. Swift, 53 M.J. 439, 445 (C.A.A.F. 2000).

[48] *Id.* at 447. ("These circumstances underscore that this was more than simply visiting the legal office to discuss an administrative matter. Master Sergeant Vernoski and Captain Myatt had good reason to suspect appellant . . . at that time.")

[49] *Id.* at 446.

[50] *Id.* ("In some circumstances there is likely to be a mixed purpose, and the matter must be resolved on a case-by-case basis.").

[51] *Duga*, 10 M.J. at 209.

[52] *Swift*, 53 M.J. at 445.

[53] United States v. Loukas, 29 M.J. 385, 386 (C.M.A. 1990).

[54] *Id.*

[55] *Id.*

[56] *Id.* at 387.

[57] *Id.* at 386.

[58] *Id.*

questioning.[59] The Court of Military Appeals, however, disagreed, finding SSgt Dryer's questioning "was limited to that required to fulfill his operational responsibilities."[60] Essentially, the court found that SSgt Dryer's questions were not part of "a law enforcement or disciplinary investigation," a prerequisite for the administration of Article 31(b) rights.[61]

The dissent argued this interpretation unnecessarily narrowed the standard for administration of Article 31(b).[62] The dissent reasoned the standard set forth in *United States v. Duga* was whether the questioner was acting in an official or a personal capacity.[63] The standard used by the court in *Loukas* is even narrower, based on whether the questioning is performed as part of an official or disciplinary inquiry. The difference is subtle, yet significant, as one focuses on the *status* of the questioner while the other on the *purpose* behind the questions posed. This distinction clearly demonstrates some of the disagreement surrounding the trigger for Article 31(b) rights advisement.[64] While the courts may feel they have articulated a standard, such clarity has not existed in practice.[65]

C. *United States v. Jones*

The trigger for Article 31(b) was also at issue in a case recently decided by the Court of Appeals for the Armed Forces (CAAF) in *United States v. Jones.* In *Jones*, Specialist (SPC) Ellis, an infantryman by trade, was serving as a military police (MP) augmentee.[66] He was given on-the-job training, informed he could only perform MP functions with his partner present, and specifically told he was not an MP while off-duty.[67] One day while on duty, SPC Ellis and his partner responded to the scene of an armed robbery.[68] When provided with a description of the assailants, SPC Ellis immediately suspected his colleagues, because ten days earlier, they had solicited his participation in the same crime.[69] Later, while again off-duty, SPC Ellis confronted and questioned his colleagues, who admitted to perpetrating the crime.[70] Specialist Ellis immediately reported this news, and made a sworn statement to investigators two days later.[71]

Defense counsel sought to suppress appellant's statement, claiming that SPC Ellis failed to administer Article 31(b) rights.[72] The military judge admitted the statement over defense objection, and the United States Army Court of Criminal Appeals (ACCA) found no error.[73] In affirming the ACCA decision, the CAAF focused on whether SPC Ellis "interrogated or requested any statement from" the appellant.[74] The appellant argued that SPC Ellis was involved in the investigation and his questioning was part of his official duties as a MP augmentee.[75] While such facts seemed to favor the appellant, the court conducted a two-part analysis to determine that SPC Ellis *did not* interrogate the appellant.[76] First, the court found Ellis was in an off-duty status, was not with his MP partner, was not allowed to perform MP functions, was not acting in a law enforcement capacity, and had no disciplinary relationship with the appellant.[77] Second, the court determined a "reasonable person in appellant's position could not consider SPC Ellis to be acting in an official law enforcement or disciplinary capacity."[78] Thus, the test articulated by the court was (1) whether the person doing the questioning was acting in an official capacity or out of personal motivation;

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[59] *Id.* at 387.

[60] *Id.* at 388.

[61] *Id.* at 387.

[62] *Id.* at 394.

[63] *Id.*

[64] *Id.* The dissent here also pointed out that the approach adopted by the court in *Loukas*, with the focus on the purpose behind the questions, may not be in line with the intent of Article 31(b). After all, 31(b) was intended to protect military members from the inherently coercive and intimidating structure that exists in the military. With the focus taken away from the person doing the questioning, what does this do to "the subtle pressure[s] on a suspect to respond" to questions? *Id.* (citing United States v. Duga, 10 M.J. 206, 210 (C.M.A. 1981)).

[65] Some may argue that the case of *United States v. Jones*, which reiterated the two-part test for Article 31, UCMJ rights advisement includes whether questioner was acting in official capacity and whether a reasonable person would believe the questioner to be acting in an official capacity clarified the standard. 73 M.J. 357 (C.A.A.F. 2014). This is debatable, as *Jones* memorialized a trend toward the objective standard that was already appearing in case law. Ultimately, whether or not *Jones* clarified the standard remains to be seen, and the larger point remains that Article 31(b) law remains fluid and evolving.

[66] *Jones*, 73 M.J. at 359.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 360.

[72] *Id.*

[73] United States v. Jones, No. Army 20110679, slip at 1 (Army Ct. Crim. App. July 31, 2013).

[74] *Jones*, 73 M.J. at 362. The court acknowledged that this was really the only question at issue, as Specialist (SPC) Ellis clearly was subject to the code, suspected appellant of a crime, and asked him questions related to the crime at issue.

[75] *Id.* at 362.

[76] *Id.*

[77] *Id.*

[78] *Id.* Appellant and his associate in this case were both Military Police (MP) and understood the limited authority associated with being an augmentee. Furthermore, the court noted the appellant locked the door when SPC Ellis, in an off-duty status, questioned him about the crime.

and (2) whether a reasonable person would consider the questioner to be acting in an official law enforcement or disciplinary capacity.[79]

In articulating this two-part test, the court changed the Article 31(b) analysis. In *United States v. Duga*, the court stated that the second prong was "whether the person questioned perceived that the inquiry involved more than a casual conversation."[80] Now after *Jones*, the subjective belief of the person questioned no longer controls. In determining whether Article 31(b) rights are required, the second element is now an objective one. Strict application of the language of Article 31(b) arguably would have led to the suppression of the statement in *Jones*. But one can see from *Jones* and *Loukas* that strict interpretation is not the standard, and scenarios challenging the application of Article 31(b) continue to arise.

IV. Lesson Two: Invocation of the Right to Remain Silent

Another lesson from the *Salinas* decision is that one must unequivocally invoke the right to remain silent in order to benefit from its constitutional protections. This was a significant aspect of the case, as it precluded the Court from deciding whether the interrogation was custodial and whether Salinas's silence could be used in court.[81] With the custodial interrogation question conceded, one of the focal points became whether Salinas's silence in response to questioning constituted an "exercise" of his right to remain silent.[82] For the military practitioner, this aspect of the case raises two potential issues. First, what is necessary to "invoke" the right to remain silent in the military? Second, what about selective invocation, where an accused answers some questions, but refuses to answer others?[83]

A. Exercising the Right to Remain Silent

The Military Rules of Evidence (MREs) offer little guidance on what it means to "exercise" or "invoke" the right to remain silent. Military Rule of Evidence 305 discusses rights warnings, and defines "interrogation," "custodial interrogation," and "person subject to the code," but offers no guidance on what it means to "exercise" one's rights.[84] This is true both in the context of the right to remain silent and the right to counsel.[85] The rules do explain that "if a person chooses to exercise the privilege against self-incrimination, questioning must cease immediately."[86] Thus, what "exercise" means becomes a critical determination.

With the absence of guidance in the language of Article 31, the courts have been left to interpret what is required to exercise one's right against self-incrimination. Courts have determined that in order to invoke the protections of the Fifth Amendment, one's invocation must be unequivocal.[87] The Supreme Court discussed this standard in the case of *Berghuis v. Thompkins*, finding that three hours of silence in the face of police questioning did not constitute an invocation of the right to silence.[88] In this 2010 case, the Court discussed what is required to "exercise" one's right, pointing out that "the Court has not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal."[89] But the Court concluded there is no reason exercising one's Fifth Amendment right to silence should differ from the long-established requirement to unambiguously and unequivocally invoke one's Sixth Amendment right to counsel.[90]

This requirement does not demand particular words or actions. It simply requires the unequivocal invocation of the right. In the military case of *United States v. Traum*, the appellant was brought in for questioning by Air Force investigators regarding her infant daughter's death.[91] When asked to take a polygraph examination, the appellant initially declined, but later agreed to talk with investigators and subsequently confessed to the killing.[92] Prior to trial, the appellant claimed her initial response to investigators constituted an unequivocal "exercise" of her Fifth Amendment right to remain silent, and should have been honored.[93] The court disagreed, finding her response did not "foreclose the possibility" that she was willing to discuss other aspects of the case or submit to a polygraph exam.[94]

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[79] *Id.* at 361-62.

[80] *Duga*, 10 M.J. at 210.

[81] *Salinas*, 133 S. Ct. at 2178. Both parties conceded that Salinas was not subjected to custodial interrogation. *Id.*

[82] *Id.* at 2179.

[83] Stephen Rushin, *Rethinking Miranda: The Post-Arrest Right to Silence*, 99 CAL. L. REV. 151 (2011) (defining selective invocation "as the ability of a suspect to exercise her right to silence on a question-to-question basis after an earlier waiver of *Miranda* rights").

[84] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL R. EVID. 305(b)(1)-(3)(2012) [hereinafter MCM].

[85] MCM, *supra* note 84, MIL R. EVID. 305(c)(4).

[86] *Id.*

[87] United States v. Traum, 60 M.J. 226 (C.A.A.F. 2004).

[88] Berghuis v. Thompkins, 560 U.S. 370 (2010).

[89] *Id.* at 381.

[90] *Id.* at 380-81 ("There is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel.").

[91] *Traum*, 60 M.J. at 227.

[92] *Id.* at 228. Specifically, Appellant stated "she did not want to talk about the details of the night of 20/21 December 1998." *Id.*

[93] *Id.* at 229. Appellant claimed that her initial refusal to participate in the polygraph and not wanting to discuss the details of that night were an invocation of her right to remain silent. *Id.*

[94] *Id.* at 230.

Even though invocation of the right can be done "in any manner," the court found that "invocation must be unequivocal before all questioning must stop."[95]

While the courts in both *Thompkins* and *Traum* state that invocation of the right must be unequivocal, the door is left open as to the manner in which the right may be exercised. According to *Thompkins*, as well as *Salinas*, silence in the face of questioning by authorities is an equivocal response. Consequently, silence alone is insufficient to indicate one's intention to exercise the right to remain silent. As a result, in both cases, evidence derived from official questioning was admissible against the accused. It is clear that what it means to "exercise" the right is a critical determination, and the facts and circumstances surrounding invocation of the right to remain silent are frequently ripe for litigation.

B. Selective Invocation

In addition to the question of what it means to exercise one's right to remain silent, there is also the issue of selective invocation, where an accused or suspect affirmatively chooses to answer some questions, but not answer others.[96] This particular scenario was at issue in the *Salinas* decision, as Salinas began answering questions posed by police, remained silent in response to some questions, and then proceeded to answer others.[97] The federal circuits are currently divided about how to handle selective invocation, and the issue has not been definitively addressed in the military court system. Nonetheless, this scenario should be easier to handle in military practice, as the MREs seem to contemplate a situation where an accused will answer some questions and not others. Even so, selective invocation presents another area where silence evidence could become an issue later at trial.

While selective invocation has proven to be a divisive issue in the federal circuits, it is really selective invocation *after* a valid rights waiver that is the decisive issue.[98] For selective invocation, there is a fundamental difference between situations where rights have not yet been administered and those where rights have been administered, and then affirmatively waived. Before the administration of rights under *Miranda* or Article 31(b), the issue is whether rights notification is even required, and whether Fifth Amendment rights have been invoked at all. Such was the case in *Salinas*. If rights have not been administered or exercised, then there is really no right to selectively invoke.

Where rights notifications have been administered, and voluntarily waived, the question then becomes whether, and how, one can re-invoke the constitutional right to silence. Many federal and state courts are currently divided about this very issue.[99] Generally, the Fifth, Seventh, and Eighth Circuits have held that once a suspect waives the Fifth Amendment right to silence, subsequent invocations of the right can be used as substantive evidence later at trial.[100] In *United States v. Burns*, the Eighth Circuit stated that "where the accused initially waives his or her right to remain silent and agrees to questioning, but 'subsequently refuses to answer further questions, the prosecution may note the refusal because it now constitutes part of an otherwise admissible conversation.'"[101] In these circuits, suspects may re-invoke their right to silence, but such re-invocation is not constitutionally protected.[102]

Other jurisdictions have recognized a constitutionally protected right to selectively invoke the right to remain silent.[103] The First, Fourth, Ninth, and Tenth Circuits all determined that suspects may invoke their right to remain silent after a rights waiver without having that decision be used against them later at trial.[104] These courts find that *Miranda* warnings inform suspects who have the right not to answer questions posed to them.[105] Because knowledge of that right comes from the government, one cannot be punished later for the decision to exercise that right.[106] It

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[95] *Id.*

[96] *See* Rushin, *supra* note 83 (offering one definition of selective invocation). *See also* Gerardo Schiano, *"You Have the Right to Remain Selectively Silent": The Impractical Effect of Selective Invocation of the Right to Remain Silent*, 38 N.E. J. ON CRIM. & CIV. CON. 177 (Winter 2012) (calling same practice "selective silence").

[97] *Salinas*, 133 S. Ct. at 2178. While the facts raise the question of selective invocation, this was not an issue discussed in the decision itself because (1) both parties to the case agreed that Salinas was not subjected to custodial interrogation, and (2) the court determined that Salinas never properly invoked his right to remain silent. *Id.*

[98] *See, e.g.*, United States v. Caruto, 532 F.3d 822 (9th Cir. 2008) (discussing invocation of *Miranda* rights in a situation where person being questioned has received and waived their rights, begins answering questions, and then re-invokes his rights).

[99] *See* Rushin, *supra* note 83, at 163-67.

[100] *Id.* at 163-65.

[101] United States v. Burns, 276 F.3d 439, 442 (8th Cir. 2002) (quoting United States v. Harris, 956 F.2d 177, 181 (8th Cir. 1992)).

[102] Rushin, *supra* note 83, at 163-67. *Rushin* explained that even where there is general agreement that an accused has no constitutionally protected right to selective invocation, there is still disagreement on how an unprotected right to re-invoke can be exercised. For example, some courts find that a suspect may completely invoke the right to silence after waiver and end all questioning, but may not selectively invoke on a question-by-question basis. *Id.*

[103] *Id.* at 166.

[104] *Id.*

[105] United States v. Ghiz, 491 F.2d 599, 600 (4th Cir. 1974).

[106] *Id. See also* United States v. Canterbury, 985 F.2d 483 (10th Cir. 1993) (discussing the unfairness of informing defendant of right to remain silent and then asking for negative inference to be drawn from that silence); United States v. Lorenzo, 570 F.2d 294 (9th Cir. 1978) (discussing selective invocation in terms of whether waiver of one's rights under *Miranda* is revocable); Egger v. United States, 509 F.2d 745 (9th Cir. 1975)

bears mentioning that where courts have allowed this constitutionally protected right to selective invocation, the requirement to unambiguously invoke the right has been stringently enforced.[107]

The debate over whether there is a constitutionally recognized right to selective invocation has yet to resolve itself in the military court system. Nonetheless, the MREs provide guidance that is without an equivalent in the Federal Rules. This additional guidance contemplates protection for those servicemembers who choose to answer some questions, and not answer others.

Military Rule of Evidence 301(f)(2), entitled *Pretrial Invocation Not Admissible*, states:

> The fact that an accused during official questioning and in exercise of rights under the Fifth Amendment to the United States Constitution or Article 31 remained silent, refused to answer a certain question, requested counsel, or requested that the questioning be terminated, is not admissible against the accused.[108]

A reading of the rule suggests that the military emerges on the same side as the First, Fourth, Ninth, and Tenth Circuits; an accused has the ability to selectively invoke Fifth Amendment rights without fear of that decision being used against him later. The rule states that during questioning *and* in reliance on either the Constitution or Article 31, an accused can decide which questions he does and does not want to answer. And since the rule states this can occur during official questioning, it is likely that this scenario will arise after the notification of rights.[109] Furthermore, the "refused to answer a certain question" language suggests this can be done on a question-by-question basis. This is similar to what federal courts have held, that when suspects rely upon the government's assertion that they have a certain right, a decision to exercise that right cannot be used against them later.[110] Allowing for selective invocation also squares with the rationale behind Article 31(b): protection from the coercive nature of an authoritarian military environment. Article 31(b) was intended to provide military personnel with the assurance that the duty to obey and follow orders is not applicable to official questioning where incriminating responses may result.[111] To state that military personnel cannot re-invoke their right to remain silent after a valid waiver would seem to be at odds with that intent.

There is a strong argument that the Military Rules of Evidence ensure that an accused has the right to selectively invoke his rights under the Fifth Amendment. However, the issue has not been litigated in the military court system. Given the split in the federal courts and the compelling arguments on both sides,[112] selective invocation is an issue judge advocates should be prepared to address in the future.

V. Lesson Three: Use of Silence Evidence at Trial

Having addressed the state of self-incrimination law in the military, as well as uncertainties surrounding the exercise of the right to remain silent, it is evident that there are many scenarios where silence evidence could potentially become an issue at trial. An understanding of this area of the law can be a valuable tool for trial and defense counsel alike, especially considering the general conception that evidence of the accused's silence is untouchable.[113] The accused's silence is often constitutionally protected, but the *Salinas* decision demonstrated this is not always the case. A closer analysis shows there are circumstances where evidence of the accused's silence is probably inadmissible, and other scenarios where evidence of the accused's silence is likely admissible.

A. Silence Evidence Generally

Evidence of an accused's silence is generally protected because it is tied to the exercise of a constitutional right. The right of an accused to decide to invoke constitutional rights, without later consequences, was one of the clear lessons drawn from the Supreme Court's decision in *Miranda v. Arizona*.[114] The Court in *Miranda* stated, "[I]t is impermissible to penalize an individual for exercising his

(recognizing a right of selective waiver of Fifth Amendment right to silence).

[107] *See, e.g.*, *Lorenzo*, 570 F.2d at 298 (discussing intermittent silences after waiver of *Miranda* rights).

[108] MCM *supra* note 84, MIL R. EVID. 301(f)(2).

[109] It is difficult to imagine scenarios where one would be subjected to official questioning without having been notified of one's rights under Article 31(b). This is the thrust of the cases mentioned in section IV, *supra*. While the case law addressing Article 31(b) may be constantly developing, it is clear that official questioning requires advisement of rights under 31(b), and thus the language of the rule here suggests the accused can selectively invoke after that rights advisement has occurred. *See supra* Section IV.

[110] *See supra* note 106. Arguably, this was also the reasoning of the Supreme Court in *Miranda v. Arizona*, where the court stated, "[T]he warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it." 384 U.S. at 468.

[111] *Swift*, 53 M.J. at 445.

[112] Although the MREs language seems clear, MRE 301(f)(2) also states that an accused must "exercise" the right. Mere silence in the face of questioning will not be sufficient to selectively invoke the right to remain silent. If an accused does wish to selectively invoke, this must be done unambiguously or the individual being questioned runs the risk his or her silence may be admissible in court. *See Traum*, 60 M.J. at 227-30.

[113] *See generally* United States v. Hale, 422 U.S. 171, 180 (1975) ("Not only is evidence of silence at the time of arrest generally not very probative . . . but it also has a significant potential for prejudice.").

[114] *Miranda*, 384 U.S. at 467-68.

Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."[115] This point was highlighted later by the Supreme Court in *Doyle v. Ohio*, where the Court stated, "[W]hile it is true *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings."[116] To allow the government to use the resulting silence places the accused in an impossible situation,[117] and violates due process.[118] Military courts have followed this reasoning, finding it impermissible for the government to comment on the defendant's invocation of his Fifth Amendment rights. Most recently in *United States v. Carrasquillo*, the CAAF highlighted a long line of cases holding that "an accused's pretrial reliance upon his rights under . . . Article 31, when interrogated concerning an offense of which he is suspected, may not be paraded before a court-martial."[119]

B. Silence Evidence Likely Inadmissible

Given these constitutional protections, clearly there are certain situations where evidence of the accused's silence is inadmissible. One such circumstance is during custodial interrogations or similar scenarios. Custodial interrogations are inherently coercive, and a suspect involved in such a circumstance need not expressly invoke Fifth Amendment rights.[120] Even when the suspect is not in custody, it may still amount to a situation where his or her "will was overborne and . . . capacity for self-determination was critically impaired."[121] Statements in such scenarios are involuntary, and evidence derived from them (with or without rights advisement) are inadmissible.[122]

The same is true where rights should have been administered, but were not. This happened in *United States v. Noel*, where appellant was stopped at an airport in Thailand when a drug-sniffing dog alerted on a wooden elephant he was carrying.[123] The elephant was seized, and Air Force personnel drilled a hole in the side, revealing a green, leafy substance that tested positive for marijuana.[124] At his trial, the prosecutor and panel members asked questions of the appellant regarding why he chose not to say anything (1) when the elephant was being examined; or (2) after notification of Article 31(b) rights.[125] The court found error, stating that appellant's silence "flowed from his rights under Article 31, UCMJ and the Fifth Amendment.[126]

Second, after rights are properly administered, it is unlikely in the military that the accused's subsequent silence can be used against him in court. This is most likely the case even where there has been a valid waiver of rights. Such a situation would fall under the purview of MRE 301(f)(2).[127] In *United States v. Whitney*, the military court system addressed the use of silence evidence that arose from a waiver of Article 31(b) rights.[128] In *Whitney*, the appellant was accused of numerous sexual offenses, and during the investigation waived his Article 31(b) rights and participated in an interview with an agent from the Air Force Office of Special Investigations (AFOSI).[129] That agent later testified at trial, commenting on the accused's silence in response to an accusation he had been less than truthful.[130] The court commented that such evidence is a "violation of Rule 301(f)(3) and . . . an error of constitutional proportion."[131]

C. Silence Evidence Likely Admissible

There are scenarios where evidence of the accused's silence will likely be admissible. Even though *Doyle v. Ohio* established the constitutionally protected nature of the right to remain silent, as is often the case there are

[115] *Id.* at 468, n. 37.

[116] Doyle v. Ohio, 426 U.S. 610, 618 (1976).

[117] *Salinas*, 133 S. Ct. at 2186 (explaining that to permit a prosecutor to comment on the defendant's silence would force him to choose between making a statement that may reveal prejudicial information, or remaining silent, which a prosecutor may then use to show consciousness of guilt).

[118] *Salinas*, 133 S. Ct. at 2182, n. 3.

[119] U.S. v. Carasquillo, 72 M.J. 850, 855 (2013) (citing U.S. v. Brooks, 12 U.S.C.M.A. 423, 425-26 (C.M.A. 1961)).

[120] *Salinas*, 133 S. Ct. at 2180.

[121] *See* United States v. Chatfield, 67 M.J. 432 (C.A.A.F. 2009) (quoting United States v. Bubonics, 45 M.J. 93, 95 (C.A.A.F. 1996).).

[122] MCM, *supra* note 84, MIL R. EVID. 304(a)-(b). In stating that "an involuntary statement from the accused, or any evidence derived therefrom, is inadmissible at trial," the MRE precludes the admission of silence evidence in circumstances where a statement would be involuntary. *Id.*

[123] United States v. Noel, 3 M.J. 328, 329 (C.M.A. 1977). The court said he was a "suspect" at this point, and should have been administered Article 31 rights. *Id.*

[124] *Id.* The court opined that appellant should have had his rights read to him before this happened. *Id.*

[125] *Id.*

[126] *Id.* at 330-31. The court in *Noel* also refused to allow evidence of the appellant's silence *prior* to rights advisement, when he stood mute while Air Force personnel inspected the elephant. It reasoned Air Force investigators failed to administer Article 31 rights at the proper time, when appellant was initially stopped. *Id.*

[127] *See* MCM, *supra* note 84, Pt. IV.

[128] United States v. Whitney, 55 M.J. 413 (C.A.A.F. 2001).

[129] *Id.* at 414.

[130] *Id.* at 415.

[131] *Id.* at 416. The rule referenced here 301(f)(3) is the same as 301(f)(2) in the current edition of the Military Rules of Evidence. The court in this case, while finding error, found no prejudice because of a timely objection by defense counsel and curative instruction by the military judge.

exceptions.[132] The first is in a *Salinas*-type scenario where the accused is not in a situation that amounts to custodial interrogation, has yet to be issued 31(b) warnings, and has not unequivocally invoked his Fifth Amendment rights. Admittedly, this could be rare in the military, as Article 31(b) seems to err on the side of rights advisement and because of the presumption that questioning by a superior in the chain of command constitutes official questioning.[133] However, as the *Swift* case noted, the military discipline is often a blend of law enforcement, operational, and administrative functions.[134] Conceivably situations may arise where the questioning is administrative, a servicemember remains silent, and the case later converts from an administrative to judicial matter. Or consider a *Loukas*-type fact pattern, where the questioning arose from "operational responsibilities."[135] What if the Air Force personnel in *Noel* immediately asked about the elephant, prior to the dog alerting? It appears the most likely scenario for silence being admissible would be evidence resulting from questioning where Article 31(b) rights were not required, which as has been shown, is often not an easy determination to make.

Secondly, evidence of the accused's silence is admissible where the defense team or the accused opens the door. The Supreme Court stated in *Walder v. United States* that "the availability of an objection to the affirmative use of improper evidence does not provide the defendant "with a shield against contradiction of his untruths."[136] Thus, where a defendant "testifies to an exculpatory version of events and claims to have told the police the same version upon arrest," the government is allowed to raise his or her silence or invocation of constitutional rights on cross-examination. This is only fair, as the government needs to "vigorously cross-examine a defendant . . . to ensure that defendants do not frustrate the truth seeking function of a trial."[137] In *United States v. Robinson*, the Supreme Court addressed a scenario where the defense attorney made invocation of rights an integral part of the trial strategy.[138] Responding to a claim that the accused was never given a chance to tell his story, the government was allowed to comment on the defendant's invocation of the right to silence as a "fair response" to the defense argument.[139] This was also the case in *United States v. Gilley*, where the accused's invocation of his Sixth Amendment right to counsel was repeatedly referenced during trial and closing arguments.[140] The court found that defense counsel employed a strategy that elicited testimony regarding his client's invocation of his constitutional rights, thus opening the door for silence evidence and comment by the government.[141] In addition to these cases, there are certain other scenarios where evidence of the accused's silence resulting from an invocation of constitutional rights is admissible. Understanding such circumstances will help military counsel more comfortably handle evidence that is usually heavily shrouded in constitutional protection.

VI. Conclusion

So what if the defendant in *Salinas* had been Private First Class (PFC) Salinas, and the investigators members of the Army Criminal Investigation Command (CID)? If this were the case, the outcome likely would have been different, because once CID personnel began questioning PFC Salinas, he would have been entitled to notification of his rights under Article 31(b). If PFC Salinas decided to remain silent in answering certain questions, his silence would likely have been covered by MRE 301(f)(2), which provides him the right to refuse "to answer a certain question."[142]

Despite the likelihood of a different outcome in the military, *Salinas v. Texas* is still a valuable case for judge advocates. The decision helps military lawyers think about important aspects of military criminal law, especially when rights advisement is required under Article 31(b) and how an accused or suspect can properly exercise both Article 31(b) and Fifth Amendment rights. As is evident from the case law, each of these areas is a constant source of litigation, presenting both pitfalls and opportunities for trial and defense counsel.

Perhaps more importantly, *Salinas v. Texas* serves as a primer for judge advocates on how the advisement and invocation of Article 31(b) rights bears on the admissibility of silence evidence. In *Salinas*, the interplay between the

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[132] *See Carrasquillo*, 72 M.J at 854-55 (discussing exceptions to general rule against prosecutorial comment on the accused's silence).

[133] *Swift*, 53 M.J. at 446 ("Questioning by a military superior in the chain of command will 'normally be presumed to be for disciplinary purposes.'" (quoting U.S. v. Good, 32 M.J. 105 (C.M.A. 1991))). *See also supra* discussion Part V.B., United States v. Noel, 3 M.J. 328 (C.M.A. 1977). In *Noel*, the court addressed the use of pre-arrest silence and post-arrest silence. *Id.* The case is an example of how rare it may be to have a situation where questions are asked, but rights advisement is not required.

[134] *Id.* at 445.

[135] *Loukas*, 29 M.J. at 389. In this case the questioning was from a person superior in rank, but was conducted out of concern for the well-being of the aircraft and crew on board.

[136] Walder v. United States, 347 U.S. 62, 65 (1954).

[137] *Id.*

[138] United States v. Robinson, 485 U.S. 25, 28 (1988). Several times during closing argument, defense counsel argued that the government did not allow the accused, who did not testify, to explain his side of the story.

[139] *Id.* at 32. The Supreme Court agreed with the basic rationale of the trial court, which found that while "the Fifth Amendment ties the [g]overnment's hands . . . [it] is not putting you into a boxing match with your hands tied behind your back and allowing [the defendant] to punch you in the face." *Id.* at 28.

[140] United States v. Gilley, 56 M.J. 113, 116-18 (C.A.A.F. 2001).

[141] *Id.* at 122-23.

[142] MCM, *supra* note 84, MIL R. EVID. 301(f)(2).

invocation (or lack thereof) of one's right to silence, and the silence that flowed from the invocation had significant consequences. For judge advocates, the decision raised important questions about the reach of the Fifth Amendment, Article 31(b), selective invocation,[143] and ultimately the availability of silence evidence later at trial. The discussion of these aspects of the law can help military justice practitioners realize that evidence of the accused's silence is not untouchable, as is often believed to be the case. So it is evident from *Salinas v. Texas* that a suspect's decision to speak or stay silent still has major consequences, consequences that may or may not condemn that person later at trial. It is incumbent upon the military justice practitioner to know when and how that can happen.

[143] This remains a question ripe for examination in a military justice context. For example, what would result if an accused waives his Article 31(b) rights, agrees to answer questions, and then remains silent in response to a particular question *without* unambiguously invoking his right to remain silent? Does the initial waiver cover the entire conversation, of which the silence is merely a part? Or is silence in response to official questioning *per se* covered by MRE 301(f)(2)?

Discretion and Discontent: A Discourse on Prosecutorial Merit Under the Uniform Code of Military Justice

Major Keaton H. Harrell[*]

The magnitude of the charging decision does not dictate that it be made timidly, but it does dictate that it should be made wisely with the exercise of sound professional judgment.[1]

I. Introduction

You are a trial counsel who has just been assigned a new case. You review the investigation and learn that Corporal Jones is accused of slapping the buttocks of a female subordinate. During an interview with law enforcement, he denied the allegation, but volunteered that he recently smoked marijuana as a result of stress the allegation has caused. A subsequent probable cause urinalysis is negative. During a search of Corporal Jones's vehicle, an agent discovered within the glove compartment a small bag of a substance later confirmed to be cocaine. Charges have already been preferred for abusive sexual contact, wrongful use of marijuana, and wrongful possession of cocaine.

After discussing the case with the investigating agent and interviewing the relevant witnesses, you conclude your review and correctly identify that there is no evidence to corroborate Corporal Jones's confession of using marijuana. Also, you believe the defense would prevail on a motion to suppress the seized cocaine as the fruit of an illegal search. You are confident that with the alleged victim's testimony you have evidence supporting the elements of abusive sexual contact. However, as you glance at the stack of pending rape and sexual assault cases on the corner of your desk, you decide that a court-martial is not the appropriate forum to address an alleged over-the-clothes buttocks slap. Based on your experience, this does not rise to the level of conduct warranting the time and expense of a court-martial or deserving of possible sex offender registration.

You convey your concerns with the preferred charges to the staff judge advocate and convening authority. You recommend administrative action rather than a court-martial. Emphasizing "good order and discipline" and "setting an example," the convening authority disagrees and refers the charges to a special court-martial. Dejectedly, you return to your office to begin preparing for trial—or to ponder your next move.

This scenario raises significant issues not only about the proper weighing of prosecutorial merit, but also the implications when trial counsel disagree with convening authorities' referral decisions. Recent efforts to strip convening authorities of the discretion to take action on certain alleged offenses under the Uniform Code of Military Justice (UCMJ) and vest it with independent, experienced trial counsel have thus far fallen short.[2] The merits and pitfalls of the existing system have been the topic of extensive debate and inquiry[3] and will not be explored here. Instead, this article examines the reality of a system in which different governmental players, governed by different standards, may come to different conclusions regarding the merits and appropriate disposition of a case.

Significant scrutiny has been directed toward the exercise of discretion by convening authorities when such discretion results in action short of referral of charges to a

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[1] NAT'L DISTRICT ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS, Standard 4-2.4 cmt. (3d ed. 2009) [hereinafter NATIONAL PROSECUTION STANDARDS].

[2] *See* Military Justice Improvement Act of 2013, S. 1752, 113th Cong. (2013). Introduced by Senator Kirsten Gillibrand, the Military Justice Improvement Act of 2013 would give discretion to prosecute certain offenses to commissioned officers in the pay grade of O-6 or above, who have significant experience as trial counsel, and are outside of the accused's chain of command. On March 6, 2014, the Senate rejected a cloture motion on the bill by a vote of 55-45. *U.S. Senate: Roll Call Vote*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=2&vote=00059 (last visited July 6, 2015) (providing a roll call vote on S. 1752, the Military Justice Improvement Act of 2013). Senator Gillibrand's renewed push for a vote on the bill, reintroduced as S. 2992, was blocked on December 11, 2014. Rob Groce, *Sen. Lindsey Graham: Bill Addressing Military Rape Only a 'Political Cause'*, EXAMINER (Dec. 11, 2014, 8:55 PM), http://www.examiner.com/article/sen-lindsey-graham-bill-addressing-military-rape-only-a-political-cause. The Act failed a Senate vote again on June 16, 2015 as an amendment to H.R. 1375, the National Defense Authorization Act for Fiscal Year 2016. *U.S. Senate: Roll Call Vote*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=2&vote=00059 (last visited July 6, 2015) (providing a roll call vote on S.Amdt. No. 1578, the Military Justice Improvement Act of 2015).

[3] *See, e.g.*, REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, ANNEX B: REPORT OF THE ROLE OF THE COMMANDER SUBCOMMITTEE (May 2014) [hereinafter RSP REPORT]; Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129 (2014).

court-martial, particularly if taken against the recommendation of a staff judge advocate.[4] Less scrutinized is the opposite situation in which a convening authority refers charges to a court-martial against the recommendation of the staff judge advocate or assigned trial counsel.[5] This article focuses on the legal and ethical considerations of such a situation.

The convening authority retains ultimate discretion, but his disposition decision is informed by the assessments and recommendations of others, to include subordinate commanders,[6] the staff judge advocate,[7] and trial counsel.[8] In "an overwhelming majority of cases," there will be a meeting of the minds between the staff judge advocate and the convening authority on the appropriate disposition.[9] The same is likely true with the assessments of trial counsel, but disagreements arise periodically as convening authorities and trial counsel consider different factors—and consider factors differently—while weighing prosecutorial merit. This may implicate additional considerations on the part of trial counsel; they have legal and ethical obligations beyond that of simply advising the convening authority, and, in some instances, they may not be relieved of responsibility when their advice is not heeded.

This article discusses the concept of prosecutorial merit as it relates to the considerations of both trial counsel and convening authorities while weighing the appropriate action to be taken in cases. Those considerations often overlap, but not always. First, the mandatory components of prosecutorial merit—the minimum standards for preferral, referral, and the beginning of trial—must be considered. Each standard is different, and the quantum and quality of evidence to support one may not necessarily support the next. Then, this article examines numerous discretionary considerations for prosecutorial merit. Lastly, this article explores the legal and ethical implications when trial counsel disagree with the decision of convening authorities to refer charges to a court-martial.

II. The Components of Prosecutorial Merit

Prosecutorial merit is an amorphous concept with no formal definition, but it can be viewed simply as a determination that the ends of military justice will be served by exercising prosecutorial discretion to refer charges to a court-martial following the consideration of various legal and equitable factors.[10] Whatever other permissive characteristics a case meriting prosecution under the UCMJ possesses, there are a few legal imperatives. Most importantly, determinations of prosecutorial merit and the exercise of prosecutorial discretion should be guided by the purpose of military law: "[T]o promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[11]

A. The Bare Minimum: Mandatory Considerations for Prosecutorial Merit

1. Requisites for Preferral and Referral

Preferral of charges requires an accuser to swear that she "has personal knowledge of or has investigated the matters set forth in the charges and specifications and that they are true in fact to the best of that person's knowledge and belief."[12] If a general court-martial is contemplated, a preliminary hearing must be conducted pursuant to Article 32, UCMJ.[13] The preliminary hearing officer must submit a report addressing, among other things, "whether there is probable cause to believe an offense has been committed and the accused committed the offense," and "[r]ecommending the disposition that should be made of the case."[14]

The convening authority may refer charges if he "finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense triable by a court-martial

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[4] *See, e.g.*, National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1744(c)–(d) (2013) (requiring that decisions of convening authorities not to refer charges for certain sexual offenses be reviewed by the relevant department secretary if such decision is made against the advice of a staff judge advocate, or by the next superior general court-martial convening authority if made in concurrence with the advice of a staff judge advocate); Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 541 (2014) (requiring that decisions of convening authorities not to refer charges for certain sexual offenses be reviewed by the relevant department secretary if requested by the department's "chief prosecutor").

[5] *But see* RSP REPORT, *supra* note 3, at 23 (recommending repeal of section 1744 of the 2014 NDAA out of concern that the heightened scrutiny on non-referral decisions creates "real or perceived undue pressure . . . on convening authorities to refer, in situations where referral does not serve the interests of victims or justice").

[6] Exec. Order No. 13,669, 79 Fed. Reg. 34,999, 35,013 (June 18, 2014) [hereinafter EO 13,669] (amending Rule for Court-Martial 306(b) discussion); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 401(c)(2)(A) (2012) [hereinafter MCM].

[7] UCMJ, art. 34 (2012); MCM, *supra* note 6, R.C.M. 406.

[8] MCM, *supra* note 6, R.C.M. 502(d)(5) discussion (B).

[9] RSP REPORT, *supra* note 3, at 129.

[10] *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-4.3(a) (4th ed. 2015) [hereinafter ABA STANDARDS FOR CRIMINAL JUSTICE] ("A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the best interests of justice.").

[11] MCM, *supra* note 6, pmbl.

[12] *Id.* R.C.M. 307(b)(2).

[13] UCMJ, art. 32 (2014).

[14] *Id.*

has been committed and that the accused committed it, and that the specification alleges an offense . . . ."[15] Notably—and sometimes problematically—"[t]he convening authority or judge advocate may consider information from any source," and the finding of reasonable grounds "may be based on hearsay in whole or in part."[16] Furthermore, "[t]he convening authority is not required to screen the evidence to ensure its admissibility. In fact, the decision to prosecute may be premised on evidence which is incompetent, inadmissible, or even tainted by illegality."[17]

2. Requisites for Beginning Trial

The expediencies of military justice often prevent evidentiary infirmities from being truly realized until well after referral, perhaps even as late as the eve of trial. This is particularly true in light of guidance to military justice practitioners to "try all known offenses at once,"[18] and to "[e]rr on the side of liberal charging and be prepared to withdraw as the case develops."[19] When prosecutorial discretion is exercised liberally, trial counsel must tread conservatively; the above standards for preferral and referral may be satisfied despite lacking a legally sound basis for beginning trial.[20]

A number of cases have highlighted the distinction between probable cause to refer charges and the quantum and quality of evidence sufficient to begin trial—and the danger of conflating the two. This issue arises on appeal in cases in which an accused is tried on multiple charges or specifications, only some of which are supported by admissible evidence. In one of the earliest military appellate court opinions on the subject, the U.S. Coast Guard Board of Review framed the issue as follows:

> As a matter of basic fairness in a criminal trial, if a charge preferred against an accused can not be substantiated by competent legal evidence, it should not be brought to the notice of the court which is trying him on other charges. The accused is entitled to be protected against the risk of having a mere accusation influence a determination of guilty.[21]

The U.S. Court of Military Appeals first addressed the issue in the oft-cited opinion in *United States v. Phare*,[22] which "stands for the proposition that it is error for the Government to present specifications and charges to the members of a court knowing that it has no evidence on such specifications and charges."[23] Subsequent cases have flushed out the due process implications of proceeding to trial on unsupported charges or specifications. For example, the U.S. Army Court of Military Review (ACMR) explained in a scathing opinion on the subject:

> [J]ust as misjoinder and multiplicity in charging may result in a denial of due process, so may the prosecution of unwarranted charges result in a denial of due process. The due process hazards inherent in such charging are clear: the mere allegation of a baseless charge can influence the finder of fact by suggesting that the accused is a bad character worthy of punishment. Likewise, it may induce cumulative consideration of the evidence of separate offenses and result in a finding of guilty which would not have resulted had the fact-finder considered the evidence separately. In short, the sheer number of accusations may influence the fact-finder.[24]

This line of cases demonstrates that trial counsel must continue to evaluate the state of the government's case at each stage leading up to trial. Developments, rulings, and

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[15] MCM, *supra* note 6, R.C.M. 601(d)(1). Advice from a staff judge advocate that "the specification is warranted by the evidence" is required prior to referral to a general court-martial. UCMJ, art. 34(a) (2012). The Army requires such advice by policy for special courts-martial as well. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-28.b. (3 Oct. 2011) [hereinafter AR 27-10].

[16] MCM, *supra* note 6, R.C.M. 601(d)(1). However, along with pretrial advice to the convening authority, the staff judge advocate *should* provide a "brief summary of the evidence," to include evidentiary infirmities, but "there is no legal requirement" to do so, "and failure to do so is not error." *Id.* R.C.M. 406(b) discussion; *see also* United States v. Pastor, No. 88-2618, 1990 C.M.R. LEXIS 281, at *10–11 (N.M.C.M.R. Mar. 30, 1990) ("[W]e do not believe the staff judge advocate had a legal responsibility to advise the convening authority as to the evidentiary problems surrounding the need for corroboration of appellant's admissions, although he would do well to at least identify the problem in advance for the convening authority . . . .").

[17] United States v. Howe, 37 M.J. 1062, 1064 (N.M.C.M.R. 1993), *overruled on other grounds by* United States v. Driver, 57 M.J. 760 (N-M. Ct. Crim. App. 2002) (citing Lawn v. United States, 355 U.S. 339, 349 (1958)); *see also* MCM, *supra* note 6, R.C.M. 601(d)(1) ("The convening authority or judge advocate shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.").

[18] DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 6-1 (8th ed. 2012); *see also* U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE attachment 3, Standard 3-3.9 discussion (6 June 2013) [hereinafter AFI 51-201] ("Judicial economy would suggest that an accused should be charged with all known offenses and tried once; however, this is not required.").

[19] CRIM. LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, PRACTICING MILITARY JUSTICE, at 7-2 (Apr. 2013).

[20] *See* United States v. Asfeld, 30 M.J. 917, 929 (A.C.M.R. 1990) ("The [probable cause] standard is so slight and prosecutorial discretion so broad that there is no constitutional requirement for an independent judicial determination of probable cause in the absence of pretrial restraint. However, as the case proceeds to prosecution, the Government must make a good-faith assessment of its case and withdraw any charge which it cannot substantiate by competent, legal evidence." (citations omitted)).

[21] United States v. Bird, 30 C.M.R. 752, 755 (C.G.B.R. 1961).

[22] United States v. Phare, 45 C.M.R. 18 (C.M.A. 1972).

[23] United States v. Duncan, 46 C.M.R. 1031, 1033 (N.C.M.R. 1972).

[24] *Asfeld*, 30 M.J. at 929 (citations omitted).

simple realizations along the way may affect the ability of trial counsel to legally and ethically proceed. Common blunders include proceeding to trial on offenses premised only upon uncorroborated confession,[25] suppressed evidence,[26] or the testimony of unavailable witnesses.[27] Blatant overcharging has also drawn the ire of courts in this regard.[28]

Whether these errors result in prejudice to the accused depends on the specific facts of a case.[29] "Where such error occurs the court must determine its prejudicial effect by thorough examination of all of the evidence relating to any charge and specification on which the accused has been found guilty."[30] Courts must determine if the findings or sentence related to the viable charges or specifications were influenced in some manner by the mere appearance of the unviable ones on the charge sheet.[31] Courts are more likely to find prejudice when the military judge fails to give the members a cautionary instruction to not consider the unsupported charges or specifications for any reason when reaching findings or a sentence.[32] Further, courts are likely to find prejudice when they are unconvinced that the strength of the evidence is so great that the members or military judge would have reached its findings or sentence despite being aware of the unsupported charges or specifications.[33] When courts find error and prejudice, remedial action ranges from reassessing the sentence[34] to dismissing the charges outright.[35]

Courts-martial before a military judge alone are not immune from these issues. Some courts have found error when the military judge, as the fact-finder and sentencing authority, is made aware of charges or specifications that the government cannot or does not offer any evidence to support.[36] Rarely is prejudice found.[37]

As will be discussed in the next section, the "availability and admissibility of evidence" is among numerous permissive considerations in the exercise of prosecutorial discretion,[38] but practically, as demonstrated by the legal principles of these cases, it must be viewed as a mandatory component of prosecutorial merit. Instructively, the American Bar Association views it as such: "A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes the charges are supported by probable

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[25] *Bird*, 30 C.M.R. 752; United States v. Howe, 37 M.J. 1062 (N.M.C.M.R. 1993), *overruled on other grounds by* United States v. Driver, 57 M.J. 760 (N-M. Ct. Crim. App. 2002); United States v. Pastor, No. 88-2618, 1990 C.M.R. LEXIS 281 (N.M.C.M.R. March 30, 1990).

[26] *Phare*, 45 C.M.R. 18; United States v. Whittington, 36 C.M.R. 691 (A.B.R. 1966).

[27] United States v. Hall, 29 M.J. 786 (A.C.M.R. 1989); United States v. Showers, 48 C.M.R. 837 (A.C.M.R. 1974); *Pastor*, 1990 C.M.R. LEXIS 281. *Pastor* further serves as a cautionary tale against the government placing its hope for supporting a charge on the testimony of a co-accused without first obtaining a proffer, describing such as "serendipity at best and border[ing] on the reckless." *Id.* at *12.

[28] *Asfeld*, 30 M.J. 917; United States v. Henderson, No. 200101076, 2002 C.C.A. LEXIS 133 (N-M Ct. Crim. App. June 14, 2002) (Finnie, S.J., concurring).

[29] *See* UCMJ, art. 59(a) (2012) ("A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.").

[30] United States v. Duncan, 46 C.M.R. 1031, 1033 (N.C.M.R. 1972).

[31] *See Asfeld*, 30 M.J. at 929 ("When the court finds a lack of sufficient admissible evidence to warrant prosecution, this court must consider the effect, if any, on the legality and fairness of the proceedings and findings even though the charge may have been supported by probable cause.").

[32] *See* United States v. Phare, 45 C.M.R. 18, 22 (C.M.A. 1972) (finding error and prejudice, stating that "prejudice might have been avoided had the military judge instructed the court not to consider [the unsupported charges and specifications], for any purpose"); *Hall*, 29 M.J. at 792 (finding error, but no prejudice, when "the military judge gave appropriate cautionary instructions"); *Pastor*, 1990 C.M.R. LEXIS 281, at *15 (finding error, but no prejudice, when "the military judge did instruct the members that they could not consider in any way . . . those specifications upon which not guilty findings had been entered"). *But see* United States v. Whittington, 36 C.M.R. 691 (A.B.R. 1966) (finding error and prejudice "notwithstanding the cautionary instruction given the court"); United States v. Young, 12 M.J. 991 (A.F.C.M.R. 1982) (finding error, but no prejudice, even though the military judge "did not instruct the court to disregard [the unsupported] specification when voting on a sentence").

[33] *See Phare*, 45 C.M.R. at 21 (finding error and prejudice, stating, "[W]e cannot say the evidence in this case is so overwhelming that the unsubstantiated specifications did not influence the court's findings . . . ."); *Asfeld*, 30 M.J. at 930 (finding error and prejudice, stating, "Because the members returned a finding of guilty to a charge not supported by competent evidence and another finding of guilty refuted by evidence introduced by the Government itself, we find that their deliberations were influenced by the sheer weight of accusations in the case and not by the evidence—or lack thereof—adduced at trial"); United States v. Showers, 48 C.M.R. 837, 838 (A.C.M.R. 1974) (finding error, but no prejudice, stating that "the posture of the evidence adduced by the prosecution . . . does not compel our concluding . . . that the military judge would not have found the appellant guilty without regard to his knowledge of the charges that were not prosecuted"); *Young*, 12 M.J. at 993 (finding error, but no prejudice, stating that "the evidence of guilt on the contested specifications is so compelling that the presence of the unsubstantiated specification did not influence the court's findings or affect the sentence"); United States v. Bird, 30 C.M.R. 752, 755 (C.G.B.R. 1961) (finding error, but no prejudice, stating that "the error could scarcely have had any impact on the findings [as] there is no real question as to whether the accused did or did not commit the [offenses] of which he is being held guilty.").

[34] *Whittington*, 36 C.M.R. 691; United States v. McCowen, No. 72-1050 (N.C.M.R. June 23, 1972).

[35] *Asfeld*, 30 M.J. 917.

[36] *Showers*, 48 C.M.R. 837 (finding error); United States v. Howe, 37 M.J. 1062 (N.M.C.M.R. 1993) (finding error), *overruled on other grounds by* United States v. Driver, 57 M.J. 760 (N-M. Ct. Crim. App. 2002); United States v. McCowen, No. 72-1050 (N.C.M.R. June 23, 1972) (finding error); United States v. Duncan, 46 C.M.R. 1031 (N.C.M.R. 1972) (finding error). *But see* United States v. Knopick, 47 C.M.R. 201 (N.C.M.R. 1973) (finding no error); United States v. Gutierrez, 47 C.M.R. 181 (N.C.M.R. 1973) (finding no error).

[37] *See Showers*, 48 C.M.R. 837 (finding no prejudice); *Howe*, 37 M.J. 1062 (finding no prejudice); *Duncan*, 46 C.M.R. 1031 (finding no prejudice). *But see* United States v. McCowen, No. 72-1050 (N.C.M.R. June 23, 1972) (finding prejudice).

[38] EO 13,669, 79 Fed. Reg. at 35,014.

cause that *admissible evidence will be sufficient to support conviction beyond a reasonable doubt*, and that the decision to charge is in the best interests of justice."[39] Convening authorities, as advised by staff judge advocates or trial counsel, should similarly scrutinize the evidence before referring charges.

B. Permissive Considerations for Prosecutorial Merit

Beyond the minimum requirements articulated above, the exercise of prosecutorial discretion is informed by the permissive consideration of various factors and guidelines. The weighing of prosecutorial merit does not adhere to a rigid formula.[40] The broad exercise of prosecutorial discretion carries with it the broad discretion of choosing what factors to consider and the relative weight to give them.

Acknowledging that prosecutorial merit comprises determinations greater than that of mere sufficient quantum and quality of evidence, the Rule for Court-Martial (RCM) 601(d)(1) discussion states, "The convening authority is not obliged to refer all charges which the evidence might support. The convening authority should consider the options and considerations under RCM 306 in exercising the discretion to refer."[41] The discussion to RCM 306(b) in turn provides:

> Many factors must be taken into consideration and balanced, including, to the extent practicable, the nature of the offenses, any mitigating or extenuating circumstances, the views of the victim as to disposition, any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair.
>
> In deciding how an offense should be disposed of, factors the commander should consider, to the extent they are known, include:
>
> (A) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline;
>
> (B) when applicable, the views of the victim as to disposition;
>
> (C) existence of jurisdiction over the accused and the offense;
>
> (D) availability and admissibility of evidence;
>
> (E) the willingness of the victim or others to testify;
>
> (F) cooperation of the accused in the apprehension or conviction of others;
>
> (G) possible improper motives or biases of the person(s) making the allegation(s);
>
> (H) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction;
>
> (I) appropriateness of the authorized punishment to the particular accused or offense.[42]

Use of the word "include" to introduce the list of factors indicates that it is non-exclusive.[43] Convening authorities retain discretion to consider other factors they deem pertinent.

The analysis to RCM 306 explains that the factors are "based [in part] on *ABA Standards, Prosecution Function* [Standard] 3-3.9(b) (1979),"[44] which states, "The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction."[45] It then provides a list of "factors which the prosecutor may properly consider in exercising his or her discretion,"[46] which are largely mirrored in the RCM 306(b) discussion.

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[39] ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 10, Standard 3-4.3(a) (emphasis added); *see also* NATIONAL PROSECUTION STANDARDS, *supra* note 1, Standard 4-2.2 ("A prosecutor should file charges that he or she believes adequately encompass the accused's criminal activity and which he or she reasonably believes can be *substantiated by admissible evidence* at trial.") (emphasis added).

[40] *See* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 10, Standard 3-3.9 cmt. (3d ed. 1993) ("By its very nature . . . the exercise of prosecutorial discretion cannot be reduced to a formula.").

[41] MCM, *supra* note 6, R.C.M. 601(d)(1) discussion.

[42] EO 13,669, 79 Fed. Reg. at 35,013–14.

[43] *See* RSP REPORT, *supra* note 3, at 126 ("The Discussion to Rule for Courts-Martial 306 provides a *non-exclusive* list of factors military commanders should consider when deciding how to dispose of an allegation, including whether to charge a Service member with an offense." (emphasis added)).

[44] MCM, *supra* note 6, R.C.M. 306 analysis, at A21-21.

[45] ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 10, Standard 3-3.9(b) (2d ed. 1979) (amended 2015).

[46] *Id.* The *ABA Standards for Criminal Justice, Prosecution Function* were updated in 2015, and the new equivalent standard contains a much broader list of factors. Notable additions include "the strength of the case"; "any improper conduct by law enforcement"; "potential collateral impact on third

Notably absent from the RCM 306 factors is the *ABA Standards* factor of "the prosecutor's reasonable doubt that the accused is in fact guilty."[47] The RCM 306 analysis states that this was omitted since it is "inconsistent with the convening authority's judicial function."[48] However, such an assessment by trial counsel should inform her recommendation to the convening authority.[49] Accordingly, this is a factor that could lead to a disagreement between trial counsel and convening authorities on the prosecutorial merit of cases.

The National Defense Authorization Act for Fiscal Year 2014 directed that "the discussion pertaining to Rule 306 of the [MCM] . . . shall be amended to strike the character and military service of the accused from the matters a commander should consider in deciding how to dispose of an offense."[50] Such amendment was made through Executive Order 13669.[51] However, since the language of the discussion remains discretionary and non-exclusive in nature, convening authorities may still permissibly consider this factor in the prosecutorial merit calculus.[52] Consistent with policy that "[a]llegations of offenses should be disposed of . . . at the lowest appropriate level of disposition,"[53] consideration of this factor would be particularly relevant—and noncontroversial—if previous action short of court-martial has failed to achieve the necessary deterrent effect upon a suspected repeat offender.

The views and desires of alleged victims weigh heavily in evaluating prosecutorial merit in some cases. "[C]onsistent with the [Department of Defense (DoD)] Victim Witness Assistance program,"[54] convening authorities should consider "the views of the victim as to disposition," as well as "the willingness of the victim . . . to testify."[55] The victim's desires are certainly not controlling on the convening authority, but the victim's decision not to participate in an investigation or prosecution may foreclose referral in some instances or at least make such action highly imprudent. The type of offense suffered by the victim dictates the level of deference that should be afforded to her decision not to participate.

Department of Defense Instruction 1030.2, pertaining to victims of *any* offenses, states, "Although the victim's views should be considered, this Instruction is not intended to limit the responsibility or authority of . . . officials to act in the interest of good order and discipline."[56] However, DoD Instruction 6495.02, pertaining only to victims of *sexual* offenses, states, "The victim's decision to decline to participate in an investigation or prosecution should be honored by all personnel charged with the investigation and prosecution of sexual assault cases . . . ."[57] Furthermore, "[a] victim of an offense under [the UCMJ] has . . . [t]he right to be treated with fairness and with respect for the dignity and privacy of the victim . . . ."[58] This certainly includes the right not to be compelled to testify against her will. Accordingly, a willingly participating victim may be a component of prosecutorial merit in some cases. If the government's case rests primarily upon the testimony of a

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parties, including witnesses or victims"; "the possible influence of any cultural, ethnic, socioeconomic or other improper biases"; and "the fair and efficient distribution of limited prosecutorial resources." *Id.* Standard 3-4.4(a) (4th ed. 2015). The National District Attorneys Association provides a similar list of factors that may be considered in determining whether filing charges is "consistent with the interests of justice," including "[t]he probability of conviction"; "[p]otential deterrent value of a prosecution to the offender and to society at large"; "[t]he status of the victim, including the victim's age or special vulnerability"; "[w]hether the accused held a position of trust at the time of the offense"; and "[e]xcessive costs of prosecution in relation to the seriousness of the offense." NATIONAL PROSECUTION STANDARDS, *supra* note 1, Standard 4-2.4.

[47] ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 10, Standard 3-3.9(b)(i) (2d ed. 1979) (amended 2015). This factor was amended in 2015 to remove the word "reasonable." *Id.* Standard 3-4.4(a)(ii) (4th ed. 2015).

[48] MCM, *supra* note 6, R.C.M. 306 analysis, at A21-21.

[49] *See* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 10, Standard 3-4.3(d) ("A prosecutor's office should not file or maintain charges if it believes the defendant is innocent, no matter what the state of the evidence.").

[50] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1708 (2013).

[51] EO 13,669, 79 Fed. Reg. 34,999.

[52] *See* RSP REPORT, *supra* note 3, at 126 ("Since the amendment does not prohibit an initial disposition authority from considering this factor . . . it is unlikely to affect charging or disposition decisions in sexual assault or other cases."). This conclusion is reinforced by contrasting the language in the 2014 NDAA and subsequent Executive Order with that in the original House bill: "[T]he Secretary of Defense shall submit to the President a proposed amendment to [Rule for Court-Martial (RCM)] 306 of the Manual for Courts-Martial . . . to eliminate the character and military service of the accused from the list of factors that may be considered by the disposition authority in disposing of a sex-related offense." H.R. 1960, 113th Cong. § 546(a) (2013). The language in the House bill is non-discretionary in nature; commanders would explicitly be prohibited from considering that factor in sex-related offense cases. Alternatively, the final language in the 2014 NDAA and Executive Order retains the discussion's discretionary nature. Further, a reading of RCM 306 that prohibits consideration of the accused's character and military service creates an incongruence in the MCM or at least exposes a need to make further amendments. RCM 306(b) states, "Allegations of offenses should be disposed of . . . at the lowest appropriate level of disposition in subsection (c) of this rule." MCM, *supra* note 6, R.C.M. 306(b). Subsection (c)(3) in turn states, "A commander may consider the matter pursuant to Article 15, nonjudicial punishment. *See* Part V." *Id.* R.C.M. 306(c)(3). Part V, paragraph 1.e. states, "Nonjudicial punishment may be imposed for acts or omissions that are minor offenses . . . . Whether an offense is minor depends on several factors," including "the offender's age, rank, duty assignment, *record and experience* . . . ." *Id.* pt. V, para. 1.e. (emphasis added).

[53] MCM, *supra* note 6, R.C.M. 306(b).

[54] *Id.* R.C.M. 306 analysis, at A21-21.

[55] EO 13,669, 79 Fed. Reg. at 35,013–14.

[56] U.S. DEP'T OF DEF., INSTR. 1030.2, VICTIM AND WITNESS ASSISTANCE PROCEDURES para. 6.3.3. (4 June 2004).

[57] U.S. DEP'T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES enclosure 4, para. 1.c.(1) (28 Mar. 2013) [hereinafter DoDI 6495.02].

[58] UCMJ, art. 6b(a)(8) (2013).

"non-participating victim,"[59] referral of charges is highly imprudent.

Lastly, since "[a]llegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition,"[60] a case may be lacking in prosecutorial merit if the ends of justice and good order and discipline can be thoroughly and effectively achieved through means other than trial by court-martial. A convening authority should consider the appropriateness of taking action short of referral of charges, such as administrative action, nonjudicial punishment, and even no action.[61] Wide-ranging administrative actions include counseling, reprimand, derogatory rating or evaluation, extra military instruction, administrative reduction, bar to reenlistment, security classification changes, and administrative separation.[62]

The courses of action available to convening authorities are as vast as the factors available to weigh in choosing the appropriate one. Given the nearly unfettered discretion in both assessing prosecutorial merit and taking action, referral decisions by convening authorities may at times be at odds with the assessments and recommendations of trial counsel. This may impose additional responsibilities upon trial counsel in some instances.

III. Trial Counsel's Dilemma

A. The Distinct and Solemn Responsibilities of Trial Counsel

Many discussions on the responsibilities of prosecutors begin with this cogent quotation from the Supreme Court:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[63]

Seamlessly substituting "United States Attorney" with "prosecutor" or "prosecuting attorney," CAAF has prefaced discussions on the responsibilities of trial counsel with the same quotation.[64] Trial counsel are measured by this standard despite not being the ones wielding prosecutorial discretion. Just as their tactics during trial can draw scrutiny for prosecutorial misconduct, so can their actions—and inactions—leading up to trial.[65]

Trial counsel's role in assessing prosecutorial merit and facilitating the proper exercise of prosecutorial discretion does not end upon referral by the convening authority. Trial counsel's interest in seeing justice done at times requires pushing back against convening authorities, and trial counsel may be taken to task for failing to do so. For example, when courts find error for the government proceeding to trial on unsupported charges or specifications, they most often lay blame, in whole or in part, at the feet of trial counsel.[66] Faulted less often are staff judge advocates[67] and, when they are aware of the deficiency and do nothing about it, military judges.[68] Rarely are errors such as these found to be the

[59] DoDI 6495.02, *supra* note 57, at 90.

[60] MCM, *supra* note 6, R.C.M. 306(b).

[61] *Id.* R.C.M. 306(b)–(c); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 10, Standard 3-4.4(f) ("The prosecutor should consider the possibility of a noncriminal disposition . . . when deciding whether to initiate or prosecute criminal charges.").

[62] MCM, *supra* note 6, R.C.M. 306(c)(2); R.C.M. 306(c)(2) discussion.

[63] Berger v. United States, 295 U.S. 78, 88 (1935).

[64] United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005); United States v. Strother, 60 M.J. 476, 478 (C.A.A.F. 2005).

[65] *See, e.g.*, United States v. Phare, 45 C.M.R. 18 (C.M.A. 1972).

[66] *Phare*, 45 C.M.R. 18; United States v. Hall, 29 M.J. 786 (A.C.M.R. 1989); United States v. Showers, 48 C.M.R. 837 (A.C.M.R. 1974); United States v. Bird, 30 C.M.R. 752 (C.G.B.R. 1961); United States v. Howe, 37 M.J. 1062 (N.M.C.M.R. 1993), *overruled on other grounds by* United States v. Driver, 57 M.J. 760 (N-M. Ct. Crim. App. 2002); United States v. Pastor, No. 88-2618, 1990 C.M.R. LEXIS 281 (N.M.C.M.R. Mar. 30, 1990); United States v. Duncan, 46 C.M.R. 1031 (N.C.M.R. 1972); United States v. McCowen, No. 72-1050 (N.C.M.R. June 23, 1972).

[67] *But see* United States v. Henderson, No. 200101076, 2002 C.C.A. LEXIS 133, at *5 (N-M Ct. Crim. App. June 14, 2002) (Finnie, S.J., concurring) ("I cannot overlook the responsibility of the Staff Judge Advocate and trial counsel in this matter. They are charged with the duty of advising the convening authority on the appropriate disposition of an offense.").

[68] *But see Phare*, 45 C.M.R. 18, 21–22 ("[T]he military judge erred in failing to exercise his discretion by conducting further inquiry when presented with the assertion of defense counsel that the Government did not intend to nor could it present any evidence with regard to Charges I and II. His failure to act made it possible for trial counsel to bring before the court members charges for which the Government knew no evidence would be presented."); United States v. Young, 12 M.J. 991, 992–93 (A.F.C.M.R. 1982) ("During an Article 39(a) session the Government stated it did not intend to present any evidence to prove that the accused [committed Specification 3]. Rather than have the trial counsel discuss the matter with the convening authority, the military judge permitted the specification to go before the members knowing that no evidence would be offered. . . . The Government concedes it was error for the military judge to allow the unsubstantiated specification to be given the members. We agree . . . .") (citation omitted).

product of the convening authority obstinately refusing to withdraw unsupported charges.[69] The logical inference from this trend is that error is largely avoided when trial counsel fulfill their responsibilities.

By nature of their different backgrounds and responsibilities, convening authorities and trial counsel weigh prosecutorial merit differently.[70] The Response Systems to Adult Sexual Assault Crimes Panel (RSP) recently cited testimony from senior military officials demonstrating the differing priorities and resulting assessments of prosecutorial merit between convening authorities and lawyers:

> Commanders have consistently shown willingness to go forward in cases where attorneys have been more risk adverse. Commanders zealously seek accountability when they hear there's a possibility that misconduct has occurred within their units, both for the victim and in the interest of military discipline . . . . Army commanders are willing to pursue difficult cases to serve the interests of both the victims and our community. . . . [C]ommanders consider factors, including responsibility for good order and discipline and accountability to the organization, which legal advisors may not.[71]

The practical effect of these dissimilar perspectives is significant, as demonstrated in at least one measurable way noted by the RSP: "[C]ommanders took recent action in roughly one hundred cases where civilian prosecutors had declined to prosecute. . . . The Judge Advocate General of the Army described seventy-nine cases where Army commanders chose to prosecute off-post offenses after civilians declined to prosecute or could not prosecute."[72]

Most disagreements between trial counsel and convening authorities are relatively inconsequential, and trial counsel may proceed with prosecution without any legal or ethical implications. However, this is not always the case, particularly when trial counsel recommend against referral due to evidentiary deficiencies. In these rare instances, further action is required of trial counsel.

B. Professional Responsibility Standards for Trial Counsel

Service ethics rules delineate the responsibilities of trial counsel in these situations,[73] but provide limited practical guidance that must be supplemented by reference to case law and other sources. The Navy-Marine Corps *Rules of Professional Conduct* states, "A trial counsel in a criminal case shall . . . recommend to the convening authority that any charge or specification not supported by probable cause be withdrawn . . . ."[74] The other services' rules provide slightly different instruction, at least semantically, stating, "A trial counsel shall . . . recommend to the convening authority that any charge or specification *not warranted by the evidence* be withdrawn . . . ."[75]

However, since more than mere probable cause is required to begin trial, trial counsel's legal and ethical responsibilities exceed simply ensuring its existence. *ABA Standards*, Standard 3-4.3(b) provides:

> After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that evidence will be sufficient to support conviction beyond a reasonable doubt.[76]

The Air Force has implemented *Standards for Criminal Justice*, adapted from the *ABA Standards*.[77] The Air Force's Standard 3-3.9(a) states:

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[69] *But see* United States v. Whittington, 36 C.M.R. 691, 694 (A.B.R. 1966) ("While we are convinced that the convening authority referred Specifications 2 and 3 of Charge I to trial in good faith we are of the opinion that his refusal to withdraw these charges, when faced with the knowledge that the law officer would, when moved for a finding of not guilty, grant such motion, constituted error.").

[70] *See* RSP REPORT, *supra* note 3, at 129 ("Staff judge advocates who testified before the Panel stressed that convening authorities weigh factors differently than lawyers when assessing whether cases should be tried by court-martial.").

[71] *Id.* (footnotes omitted) (internal quotation marks omitted).

[72] *Id.* (footnotes omitted).

[73] Trial counsel must also consult and comply with the rules of their licensing state; however, service rules supersede state rules in any instances of conflict. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 8.5(f) (1 May 1992) [hereinafter AR 27-26]; U.S. DEP'T OF AIR FORCE, INSTR. 51-110, PROFESSIONAL RESPONSIBILITY PROGRAM attachment 2, R. 8.5(b) (5 Aug. 2014) [hereinafter AFI 51-110]; U.S. DEP'T OF NAVY, JAGINST 5803.1E, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL enclosure 1, R. 8.5.a. (20 Jan. 2015) [hereinafter JAGINST 5803.1E].

[74] JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 3.8.a.

[75] AR 27-26, *supra* note 73, R. 3.8 (emphasis added); *accord* AFI 51-110, *supra* note 73, attachment 2, R. 3.8; U.S. COAST GUARD, COMMANDANT INSTR. M5800.1, COAST GUARD LEGAL PROFESSIONAL RESPONSIBILITY PROGRAM enclosure 1, R. 3.8 (1 June 2005) [hereinafter COMDTINST M5800.1]. The difference in language is likely inconsequential since the phrases "probable cause" and "warranted by the evidence" are used without distinction in other areas of military justice practice. *See* MCM, *supra* note 6, R.C.M. 406(b) ("The advice of the staff judge advocate shall include . . . that person's: . . . (2) [c]onclusion with respect to whether the allegation of each offense is *warranted by the evidence* . . . .") (emphasis added); *Id.* R.C.M. 406(b) discussion ("The standard to be applied in R.C.M. 406(b)(2) is probable cause.").

[76] ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 10, Standard 3-4.3(b) (emphasis added).

[77] AFI 51-201, *supra* note 18, attachment 3, at 288.

> It is unprofessional conduct for a trial counsel to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause. A trial counsel should not institute or permit the continued pendency of criminal charges in the absence of admissible evidence to support a conviction.[78]

Use of two separate sentences clearly establishes two separate responsibilities. Fulfilling the first does not necessarily fulfill the second.

Regardless of whether their services have specifically adopted the *ABA Standards* or some version thereof, all trial counsel may be held accountable for failing to adhere to them. Both the Army and Navy-Marine Corps appellate courts have applied the *ABA Standards* in assessing the conduct of trial counsel and evaluating for error. Quoting Standard 3-3.9(a) from a previous edition of the *ABA Standards* and directing attention to the Army's *Rules of Professional Conduct for Lawyers*, the ACMR has stated, "The Government's prosecutorial duty requires that it not 'permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction,'" prior to finding error and dismissing charges in the case then under review.[79] The U.S. Navy-Marine Corps Court of Criminal Review (NMCMR) has quoted the same language from the *ABA Standards* and further emphasized trial counsel's "ethical obligation to recommend that any charge or specification not warranted by the evidence be withdrawn."[80]

Coast Guard trial counsel must similarly be mindful of the responsibilities imposed by the *ABA Standards*.[81] Furthermore, the Coast Guard provides detailed instructions to trial counsel and places a greater onus on convening authorities in instances of disagreement regarding the merits and appropriate disposition of a case:

> a. In any case in which, after a full development and evaluation of the evidence, trial counsel is of the opinion there is a lack of merit in the case to be prosecuted, and that as a matter of ethical conscience the charge(s) and specification(s) should be reduced or dismissed, he or she shall communicate in writing such belief, together with the reasons therefor, to the convening authority together with a recommendation as to the appropriate disposition of the case.
>
> b. In the event that the convening authority is in disagreement with trial counsel and does not approve the recommendations submitted by trial counsel, the convening authority shall state such disagreement and disapproval in writing, along with the reasons therefor and provide directions to trial counsel.
>
> c. All matters submitted to the convening authority by trial counsel pursuant to this section and the decision of the convening authority shall be attached to the record of trial [ROT] as appellate exhibits.[82]

Trial counsel's duties toward convening authorities are not limited to candor relating solely to the sufficiency of the evidence. "Trial counsel should . . . bring to the attention of the convening authority any case in which trial counsel finds trial inadvisable for lack of evidence or *other reasons*."[83] Further, "[a] charge should be dismissed when it fails to state an offense, when it is unsupported by available evidence, or when there are *other sound reasons* why trial by court-martial is not appropriate."[84]

"Other reasons" contemplates the necessity of trial counsel to draw upon their expertise and experience to advise convening authorities beyond mere evidentiary issues, revealing compelling reasons to withdraw and dismiss a charge or specification, or not to refer it to begin with. Of course, trial counsel must be vigilant for abuses in prosecutorial discretion that violate the constitutional guarantee of equal protection,[85] but the role contemplated

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[78] *Id.* attachment 3, Standard 3-3.9(a).

[79] United States v. Asfeld, 30 M.J. 917, 929 (A.C.M.R. 1990) (quoting ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 10, Standard 3-3.9(a) (2d ed. 1979) (amended 2015)); *see also* AR 27-10, *supra* note 15, para. 5-8.c. ("[C]ounsel . . . will comply with the American Bar Association Standards for Criminal Justice (current edition) to the extent they are not inconsistent with the UCMJ, the MCM, directives, regulations . . . or other rules governing provision of legal services in the Army.").

[80] United States v. Howe, 37 M.J. 1062, 1064 (N.M.C.M.R. 1993), *overruled on other grounds by* United States v. Driver, 57 M.J. 760 (N-M. Ct. Crim. App. 2002) (citations omitted); *see also* JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 3.8.e.(6) ("The 'ABA Standards for Criminal Justice: The Prosecution Function,' (3d ed. 1993), has been used by appellate courts in analyzing issues concerning trial counsel conduct. To the extent consistent with these Rules, the ABA standards may be used to guide trial counsel in the prosecution of criminal cases.") (citations omitted).

[81] *See* U.S. COAST GUARD, COMMANDANT INSTR. M5810.1E, MILITARY JUSTICE MANUAL para. 6.C.1. (13 Apr. 2011) ("As far as practicable and not inconsistent with law, the MCM, and Coast Guard Regulations, COMDTINST M5000.3 (series), the following American Bar Association Standards for the Administration of Criminal Justice are also applicable to Coast Guard courts-martial: The Prosecution Function and the Defense Function . . . .").

[82] *Id.* para. 6.C.2.

[83] MCM, *supra* note 6, R.C.M. 502(d)(5) discussion (B) (emphasis added).

[84] *Id.* R.C.M. 401(c) discussion (emphasis added).

[85] *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996) ("[A] prosecutor's discretion is subject to constitutional constraints. One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, is that the decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or

here is more than that of a mere guardian against such gross abuses. In any given case, the consideration of one or several of the factors described above may provide sound reasons to make trial by court-martial inadvisable or inappropriate.

Trial counsel's responsibilities do not end upon recommending against referral or recommending withdrawal of unsupported charges if their advice is not heeded. In *United States v. Howe*, the NMCMR stated, "When he knew . . . that he could not corroborate the accused's admissions to those offenses, the trial counsel's duty was to seek to withdraw that charge or at least to inform the military judge that he did not have sufficient evidence to support it."[86] Referencing *Howe*, comment to Rule 3.8 of the Navy-Marine Corps's *Rules of Professional Conduct* states:

> Trial counsel may have the duty, in certain circumstances, to bring to the court's attention any charge that lacks sufficient evidence to support a conviction. Such action should be undertaken only after consultation with a supervisory attorney and the convening authority. Applicable law may require other measures by the trial counsel. Knowing disregard of those obligations . . . could constitute a violation of Rule 8.4.[87]

In a situation contemplated by the above rule, the U.S. Coast Guard Court of Military Review recited the following facts of a case then under review: "Following the military judge's ruling suppressing the marijuana and cocaine[,] the government conceded that the specification alleging possession of marijuana could not be proved and was subject to dismissal under the doctrine of *U.S. v. Phare* . . . . The military judge dismissed the specification . . . ."[88] Accordingly, the trial counsel effectively resolved the ripe legal and ethical issues related to an unsupported specification through candor to the court.

C. Trial Counsel's Last Resort

Trial counsel may not assist convening authorities in perpetuating an injustice and, as a last resort, may seek to withdraw from a case to avoid doing so. All services' *Rules of Professional Conduct* require or permit counsel to seek to withdraw from representation in certain situations.[89] Counsel "*shall* seek to withdraw from the representation of a client if . . . the representation will result in violation of [the] Rules of Professional Conduct or other law or regulation."[90] Further, a trial counsel *may* seek to withdraw from a case if she has a "fundamental disagreement"[91] with the convening authority's actions or considers them to be "repugnant"[92] or "imprudent."[93] However, whether mandatorily or permissibly seeking to withdraw from representation, "[w]hen ordered to do so by a tribunal or other competent authority, a lawyer shall continue representation notwithstanding good cause for terminating the representation."[94]

A convening authority obstinately insisting upon trying offenses not supported by admissible evidence to support a conviction, as described above, constitutes a violation of not only professional responsibility standards, but also the due process rights of the accused. Accordingly, such would be a situation requiring a trial counsel to attempt to distance herself from the proceedings should all other corrective measures fail. However, a trial counsel should not attempt to absolve herself of the responsibility of ensuring the justness of the proceedings by hastily seeking to withdraw at first sight of an ethical quandary. This would accomplish nothing other than "simply foist[ing] the issue on the next attorney,"[95] and placing her successor in the same dilemma.

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other arbitrary classification." (citations omitted) (internal quotation marks omitted)).

[86] United States v. Howe, 37 M.J. 1062, 1064–65 (N.M.C.M.R. 1993), *overruled on other grounds by* United States v. Driver, 57 M.J. 760 (N-M. Ct. Crim. App. 2002); s*ee also* United States v. Henderson, No. 200101076, 2002 C.C.A. LEXIS 133, at *5 (N-M Ct. Crim. App. June 14, 2002) (Finnie, S.J., concurring) ("[I]f for some reason the convening authority had refused to withdraw the charge, the trial counsel, in the spirit of candor to the tribunal, should have brought it to the attention of the military judge that the charge was not supported by the evidence.").

[87] JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 3.8.e.(1) (citations omitted). Rule 8.4.a. states, "It is professional misconduct for a covered attorney to: (1) violate or attempt to violate these Rules . . . (4) engage in conduct that is prejudicial to the administration of justice . . . ." *Id.* R. 8.4.a.

[88] United States v. Butler, 16 M.J. 789, 790 (C.G.C.M.R. 1983) (citation omitted); *see also* United States v. Garces, 32 M.J. 345, 348 (C.M.A. 1991) ("[The Government] was unable to obtain attendance of a number of civilian witnesses. On its own motion, it moved to dismiss two specifications of larceny which would have been the subject of testimony by those witnesses. Next . . . the Government disclosed that it did not intend to call [other witnesses] to testify as to their losses. As a result, the military judge dismissed the four specifications related to those entities *sua sponte*." (footnotes omitted)).

[89] AFI 51-110, *supra* note 73, attachment 2, R. 1.16; AR 27-26, *supra* note 73, R. 1.16; COMDTINST M5800.1, *supra* note 75, enclosure 1, R. 1.16; JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 1.16.

[90] AR 27-26, *supra* note 73, R. 1.16(a) (emphasis added); *accord* AFI 51-110, *supra* note 73, attachment 2, R. 1.16(a); COMDTINST M5800.1, *supra* note 75, enclosure 1, R. 1.16(a); JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 1.16.a.

[91] AFI 51-110, *supra* note 73, attachment 2, R. 1.16(b)(4); COMDTINST M5800.1, *supra* note 75, enclosure 1, R. 1.16(b)(4).

[92] AR 27-26, *supra* note 73, R. 1.16(b)(3); AFI 51-110, *supra* note 73, attachment 2, R. 1.16(b)(4); COMDTINST M5800.1, *supra* note 75, enclosure 1, R. 1.16(b)(4); JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 1.16.b.(3).

[93] AR 27-26, *supra* note 73, R. 1.16(b)(3); JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 1.16.b.(3).

[94] AR 27-26, *supra* note 73, R. 1.16(c); *accord* AFI 51-110, *supra* note 73, attachment 2, R. 1.16(c); COMDTINST M5800.1, *supra* note 75, enclosure 1, R. 1.16(c); JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 1.16.c.

[95] United States v. Baker, 58 M.J. 380, 386 (C.A.A.F. 2003).

Other corrective measures must first be exhausted. Candidly acknowledging the state of the government's case to the court following the convening authority's refusal to withdraw an unsupported charge or specification will in most instances resolve the issue and satisfy the trial counsel's legal and ethical obligations.[96]

Further, seeking to withdraw as trial counsel should not be used as a means of protest or attempted de facto usurpation of the convening authority's prosecutorial discretion. Though the potential for cases the trial counsel considers imprudent is vast, every disagreement with a convening authority's decision to refer charges does not merit seeking to withdraw as trial counsel. Such drastic action should be reserved for clear abuses of discretion or other situations that weigh heavily upon the trial counsel's conscience and impinge her duty to represent the government with commitment, dedication, and zeal.[97]

Trial counsel pondering the implications of prosecuting a case with which they disagree should seek guidance from their supervisory counsel. "A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to [the] Rules of Professional Conduct."[98] Accordingly, supervisory counsel have a personal stake in ensuring that ethically perilous situations encountered by their junior counsel are appropriately diffused. Further, each service has an ethics council, committee, or panel from which trial counsel may solicit advice.[99] Trial counsel should certainly be armed with competent advice prior to taking drastic action in any case such as seeking to withdraw from representation or advancing an interest in conflict with the convening authority's desired course of action.

IV. Conclusion

While evaluating prosecutorial merit, advising convening authorities, and in their actions before courts-martial, trial counsel must be mindful of their fundamental duty: "[A] trial counsel has the responsibility of administering justice and is not simply an advocate. This responsibility carries with it specific obligations to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[100] Convening authorities' decisions to refer charges should not be viewed simply as orders to be dutifully carried out without question. Trial counsel may not blindly prosecute a case without conducting an independent assessment of its merit in compliance with constitutional, regulatory, and ethical standards.

The myriad factors to be considered and the relative weight to give them differ between convening authorities and trial counsel in many cases. Any resulting incongruities that imperil the rights of the accused or implicate professional responsibility standards must be resolved to the maximum extent possible through candid discussions among the convening authority, staff judge advocate, and trial counsel about the realities of the case and the scenarios that could play out at trial and on appeal. As "servant[s] of the law,"[101] trial counsel may pursue the course set by convening authorities only along the path towards justice. Should the two diverge, trial counsel must advise convening authorities to correct course while being prepared to take necessary action in an attempt to do so themselves. Each case is unique, and the necessary and appropriate action by trial counsel is correspondingly so.

Returning to the pending prosecution of Corporal Jones discussed in the Introduction, it is clear that the trial counsel should recommend to the convening authority that he withdraw and dismiss the drug-related charge and specifications. The trial counsel should explain that despite properly finding reasonable grounds to refer the charges, there will be no admissible evidence to present in court to support them. Trial counsel should discuss the repercussions of the continued prosecution of these charges, to include imperiling a possible conviction and sentence for the viable abusive sexual contact charge with the taint of knowledge by the court-martial members of the other, unsupported charges. Further, the trial counsel should discuss her legal and ethical obligation to advise the court of the lack of evidence to support a conviction should the convening authority refuse to withdraw the charges.

Granted, the issue is not truly ripe unless and until the military judge suppresses the uncorroborated confession and illegally seized evidence, but there is nothing to be gained by delaying an inevitable outcome while unnecessarily

[96] *See* United States v. Howe, 37 M.J. 1062, 1064–65 (N.M.C.M.R. 1993), *overruled on other grounds by* United States v. Driver, 57 M.J. 760 (N-M. Ct. Crim. App. 2002); JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 3.8.e.(1).

[97] *See* AR 27-26, *supra* note 73, R. 1.3 cmt. ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); *accord* JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 1.3.a.(1).

[98] AR 27-26, *supra* note 73, R. 5.1(b); *accord* AFI 51-110, *supra* note 73, attachment 2, R. 5.1(b); COMDTINST M5800.1, *supra* note 75, enclosure 1, R. 5.1(b); JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 5.1.b.; *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 10, Standard 3-4.3(c) ("If a prosecutor has significant doubt about the guilt of the accused or the quality, truthfulness, or sufficiency of the evidence in any criminal case assigned to the prosecutor, the prosecutor should disclose those doubts to supervisory staff. The prosecutor's office should then determine whether it is appropriate to proceed with the case.").

[99] AFI 51-110, *supra* note 73, para. 3.4, 9; AR 27-26, *supra* note 73, R. 9.1; COMDTINST M5800.1, *supra* note 75, para. 10.b.; JAGINST 5803.1E, *supra* note 73, para. 10.

[100] JAGINST 5803.1E, *supra* note 73, enclosure 1, R. 3.8.e.(1); *accord* AR 27-26, *supra* note 73, R. 3.8 cmt.

[101] Berger v. United States, 295 U.S. 78, 88 (1935).

expending resources. If the decision is made to wait until the military judge takes such action, the issue must be readdressed with the convening authority when it does become ripe. Should the convening authority continue to refuse to budge, trial counsel must fulfill her duty of candor to the court relating to the lack of evidence to support a conviction for these offenses.

The trial counsel's disagreement with the convening authority regarding the appropriate disposition of the alleged buttocks slap is a separate, less problematic issue. Referral of a charge and specification for abusive sexual contact is a permissible exercise of prosecutorial discretion by the convening authority, supported by both probable cause and sufficient admissible evidence in the form of the alleged victim's testimony. While the convening authority gave preference to different factors than the trial counsel in the prosecutorial merit calculus, he did not abuse his discretion in doing so. The trial counsel's assessment yields to the convening authority's, and the trial counsel may ethically proceed with prosecution. If the trial counsel has a fundamental disagreement with the prosecution of this offense, she may seek to withdraw from representation after consulting with her supervisory counsel, but this is not a situation in which she would be required to do so.

On Identifying At-Risk Servicemembers:
The Life of Private Leonard "Gomer Pyle" Lawrence[1]

Reviewed by *Major David L. Brown*[*]

Individual Marines and Sailors are the heart of our Corps. Their well-being is our collective responsibility, yet despite our best efforts, Marines and Sailors continue to take their own lives, including over [forty-five] individuals this year alone. These losses do not know grade, [military occupational specialty], or unit boundaries.[2]

I. Introduction

Who, really, is Leonard Lawrence? To many watching *Full Metal Jacket* for the first time, he is the overweight, grossly out-of-shape, "worthless piece of shit"[3] Marine recruit less affectionately known as Private Gomer Pyle.[4] Needless to say, Leonard Lawrence [hereinafter Private Pyle] receives extra attention and motivation from his Senior Drill Instructor, Gunnery Sergeant Hartman.[5] The only thing Private Pyle proves he can do right over the course of eight weeks at recruit training, tragically, is that he can effectively employ his rifle.[6] Unfortunately for Private Pyle, not one of his leaders ever engaged him and asked if he were thinking of hurting himself. When confronted with warning signs, this failure to ask leads to the foreseeable end[7] when, after killing Gunnery Sergeant Hartman on graduation night, Private Pyle takes his loaded rifle, places the barrel into his mouth, and solves his "temporary problem" with "an irreversible reaction."[8]

The warning signs of suicide exhibited by Private Pyle[9] throughout *Full Metal Jacket* provide an excellent case study for military leaders charged with the challenging task of identifying at-risk servicemembers who may intend to hurt themselves. This review will first look at the problem of suicide in the U.S. military. Next, the review will briefly describe the suicide prevention programs as established by the Marine Corps and the Army. Finally, the review will identify several of the warning signs exhibited by Private Pyle and will propose appropriate responses expected of concerned leaders. First, let us turn to the suicide problem in the military.

II. The Problem

While "suicides [in the military] are slightly down in 2014 . . . [there are] still roughly five active duty military members committing suicide each week, on average."[10] One death a day is too many; five is simply a failure of leadership. The Department of Defense (DoD) confirmed the untimely loss of 268 servicemembers by suicide in 2014.[11] The Army experienced the largest loss of personnel; 237 Soldiers committed suicide in 2014.[12] In early December 2014, the Marine Corps published its "suicides, attempts, and ideations" count for the fiscal year through December 1, 2014.[13] Forty-four Marines had committed suicide and, even more concerning, 818 Marines were reported to have exhibited suicidal ideations.[14]

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[1] FULL METAL JACKET (Warner Brothers Entertainment Inc. 1987) [hereinafter FMJ].

[2] Marine Administrative Message, 648/14, 121558Z Dec 14, Commandant, Marine Corps, subject: Holiday Season Suicide Prevention "Call to Action."

[3] FMJ, *supra* note 1, at 15:26.

[4] *Id*. at 6:12.

[5] *Id*. at 1:36.

[6] *Id*. at 36:02.

[7] *Id*. at 45:08.

[8] Drs. Adam Walsh and Jessica Jagger, *Marine and Family Programs Suicide Prevention Update December 2014* at 2, MANPOWER.USMC.MIL, *available at* https://www.manpower.usmc.mil/portal/page/portal /MRA_HOME2/MF/Behavioral%20Health/Suicide%20Prevention%20and %20Response/MF%20MFC-5%20Suicide%20Prevention%20and %20Response%20Contacts%20External%20Links%20and%20Reference/U SMC%20Suicide%20Update%202014%20December%20Website%202014 1201.pdf [hereinafter Suicide Prevention Update].

[9] *Gomer Pyle: USMC* was a 1960s television show centered on the "innocence, naiveté, and low-key demeanor" of Gomer Pyle, "a sweet but not too smart Marine," who "often got [] into trouble . . . at the hands of his loud-mouthed superior." *Gomer Pyle: USMC*, IMDB.COM, http://www.imdb.com/title/tt0057752/ (last visited Dec. 14, 2014).

[10] Molly O'Toole, *Military Suicides Decline, But Continued Failures Hold Lessons for Future Wars*, DEFENSEONE.COM (Nov. 23, 2014), http://www.defenseone.com/politics/2014/11/military-suicides-decline-continued-failures-hold-lessons-future-wars/99746/.

[11] Defense Suicide Prevention Office, *Department of Defense Quarterly Suicide Report Calendar Year 2014 4th Quarter* at 2, SUICIDEOUTREACH.ORG, *available at* http://www.suicideoutreach.org/Docs/suicide-data/DoD-Quarterly-Suicide-Report-CY2014-Q4.pdf (last visited June 23, 2015). The total number of suicides by component included: 122 deaths from the active component; forty-two from the reserve component; and seventy-three from the National Guard. *Id.*

[12] *Id*. The Air Force lost eighty-three Airmen—fifty-nine on active duty; ten from the reserve component; and fourteen from the National Guard. *Id.*

[13] Suicide Prevention Update, *supra* note 6, at 4.

[14] *Id*. It is unknown whether the 818 reported suicidal ideations were discovered by engaged leaders, by Marines with the courage to step up and seek help, or by their battle buddies.

Recognizing that more must be done to "[beat the] scourge"[15] of suicide within the military, Senators Joe Donnelly and Roger Wicker recently introduced the Jacob Sexton Military Suicide Prevention Act as part of the 2015 annual defense policy bill.[16] The act requires an annual "mental health check" (a screening to determine suicidal ideations) for all members, regardless of component.[17] Further, the act calls on the DoD to report on best-practices from within the individual services, thus "allowing other branches to copy those [suicide prevention practices] that are succeeding."[18] Congress is doing its part to combat the problem of suicides within the ranks. Likewise, the Marine Corps and Army have implemented approaches to identify at-risk personnel within their services.

III. The Marine Corps's Approach to Identifying At-Risk Marines

The Marine Corps's approach to identifying and responding to at-risk Marines is found, primarily, in Marine Corps Order 1720.2, Marine Corps Suicide Prevention Program.[19] MCO 1720.2 "emphasizes the importance of leadership for the early identification and intervention for stressors that detract from personnel and unit readiness,"[20] which, if executed smartly, will "preserve mission effectiveness and war-fighting capability."[21] Identified separately, the Marine Corps lists the following risk factors—"warning signs for suicide"—on its dedicated Suicide Prevention and Combat Operational Stress website:

> Talking about dying
> Preparing to die
> Looking for ways to die
> Recent loss or humiliation
> Change in personality or emotions
> Change in behavior
> Change in sleep patterns
> Low self-esteem
> No hope for the future[22]

A key component of the Marine Corps's annual suicide training program, "Never Leave a Marine Behind," is its introduction of and reliance on the acronym "[Recognize. Ask. Care. Escort.]."[23] This concept, known as R.A.C.E., is a tool developed for Marines to utilize when encountering a fellow Marine exhibiting suicidal ideations. All commanding officers are specifically tasked with "sustain[ing] an integrated program of awareness education, early identification and referral of at-risk personnel, treatment, and follow-up services."[24] Similarly, the Army has published specific guidance to leaders and Soldiers when confronted with at-risk personnel.

IV. The Army's Approach to Identifying At-risk Soldiers

The Army's approach to identifying and responding to at-risk soldiers is found, primarily, in Department of the Army Pamphlet 600-24, Health Promotion, Risk Reduction, and Suicide Prevention.[25] As outlined in Department of the Army Pamphlet (DA Pam) 600-24, "[t]he Army Suicide Prevention Program . . . has an Army-wide commitment to provide resources for suicide intervention skills, prevention, and follow-up in an effort to reduce the occurrence of suicidal behavior across the Army enterprise."[26] The Army identifies twelve "warning signs of suicide," including:

> 1. Noticeable changes in eating/sleeping habits and personal hygiene.
> 2. Talking/hinting about suicide, expressing a strong wish to die, or a desire to kill someone else.
> 3. Obsession with death (for example: in music, poetry, artwork).
> 4. Change in mood (for example: depression, irritability, rage, anger).
> 5. Isolation and withdrawal from social situations. Increased alcohol and/or drug use or abuse.
> 6. Giving away possessions or disregard for what happens to possessions/suddenly making a will.
> 7. Feeling sad, depressed, hopeless, anxious, psychic pain or inner tension.
> 8. Finalizing personal affairs.
> 9. Themes of death in letters and notes.

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[15] Patricia Kime, *Defense Bill Mandates Yearly Mental Health Checkups for Troops*, MILITARYTIMES.COM (Dec. 11, 2014, 4:01 PM), http://www.militarytimes.com/story/military/capitol-hill/2014/12/11/defense-bill-tricare-troops-health/20147081/.

[16] Jacqueline Klimas, *Service Members to Get Annual Suicide Screenings*, WASHINGTONTIMES.COM (Dec. 10, 2014), http://www.washingtontimes.com/news/2014/dec/10/service-members-get-annual-suicide-screenings/.

[17] *Id*.

[18] *Id*.

[19] U.S. MARINE CORPS, ORDER, 1720.2, MARINE CORPS SUICIDE PREVENTION PROGRAM (10 Apr. 2012) [hereinafter MCO 1720.2].

[20] *Id*. at 2.

[21] *Id*.

[22] Community Counseling and Prevention Services, *Risk Factors*, MANPOWER.USMC.MIL, https://www.manpower.usmc.mil/portal/page/portal/M_RA_HOME/MF/Behavioral%20Health/BH_Community%20Counseling%20and%20Prevention/Resources (last visited Dec. 14, 2014).

[23] U.S. MARINE CORPS, R.A.C.E. SUICIDE PREVENTION BIFOLD, MARINES.MIL, *available at* http://www.marines.mil/News/Publications/ELECTRONICLIBRARY/ElectronicLibraryDisplay/tabid/13082/Article/127261/race-suicide-prevention-bifold.aspx (last visited Dec. 14, 2014).

[24] MCO 1720.2, *supra* note 20, at 7.

[25] U.S. DEP'T OF ARMY, PAM. 600-24, HEALTH PROMOTION, RISK REDUCTION, AND SUICIDE PREVENTION (7 Sept. 2010) [hereinafter DA PAM. 600-24].

[26] *Id*. at 1.

> 10. Problems with girlfriend/boyfriend or spouse.
> 11. Soldier experiencing financial problems or in trouble for misconduct (Article 15, UCMJ, and so on).
> 12. Sudden or impulsive purchase of a firearm or obtaining other means of killing oneself such as poisons, medications.[27]

The Army applies the "[Ask, Care, Escort][28] . . . model for peer intervention" when a Soldier encounters a fellow Soldier presenting any one or more of the above warning signs.[29] Commanders at all levels are directed to "remain sensitive and responsive to the needs of Soldiers . . . [and] [b]uild a command climate that encourages and enables Soldiers and civilians to seek help."[30] Let us now apply the key components of the Marine Corps and Army suicide prevention programs to several of the warning signs exhibited by Private Pyle.

V. The Warning Signs of Suicide As Exhibited by Private Pyle

> *Private Joker: Leonard, if Hartman comes in here and catches us, we'll both be in a world of shit.*
> *Private Pyle: I am . . . in a world . . . of shit.*[31]

A. A Poor Performer

Private Pyle is, without question, a poor performer. He is the farthest thing from a model Marine recruit. He failed miserably at physical training, drill, and basic combat skills training. As Gunnery Sergeant Hartman stated, he looked like about "150 pounds of chewed bubblegum."[32] Regardless of the attention and motivation given Private Pyle, both by Gunnery Sergeant Hartman and his fellow recruits,[33] he never improved. We are never let in as to why Private Pyle performed so poorly at recruit training.

That said, is poor performance alone a warning sign for suicide? Both MCO 1720.2. and DA Pam 600-24 are silent on this specific factor. They do, however, speak to a leader's obligation to recognize at-risk servicemembers. Should n engaged leader care less about Private Pyle's poor performance and more as to what is causing him to perform so poorly? The critical question here: is his poor performance the result of a risk factor which is interfering with his duties? Warning signs may not be readily present. Leaders must engage with and listen to their servicemembers in order to flush out any underlying factors which are causing one to perform poorly.

B. "I need help."[34]

During a nightly health and comfort inspection Private Pyle is caught possessing a "jelly donut" in his unsecured foot locker.[35] The platoon is ordered to pay for Private Pyle's misgiving; incentive training[36] commences immediately. While the remainder of the platoon cranks out countless push-ups, Private Pyle stands in the middle of the squad bay eating his jelly donut. He is visibly ashamed and humiliated.[37] The next morning, while struggling to get dressed, he speaks with his recruit squad leader, Private Joker:

> Private Pyle: Joker, everybody hates me now. Even you.
> Private Joker: Nobody hates you Leonard. You just keep making mistakes and getting everybody in trouble.
> Private Pyle: I can't do anything right. I need help.
> Private Joker: I'm trying to help you Leonard. I'm really trying.[38]

The "help" Private Pyle seeks is different from the help Private Joker has to offer. Private Pyle is exhibiting classic risk factors for suicide here. He demonstrates low self-esteem, expresses a sincere feeling of hopelessness, and presents a noticeable change in his ability to accomplish the simplest of tasks—dressing himself properly. The risk factors present demanded a hard question from Private

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[27] *Id*. at 14.

[28] The Air Force also follows the Ask, Care, Escort model for suicide prevention. *Suicide Prevention: Caring for America's Airmen*, U.S. AIR FORCE, www.af.mil/SuicidePrevention.aspx.

[29] *Id*. at 15.

[30] *Id*. at 3.

[31] FMJ, *supra* note 1, at 42:04 to 42:25.

[32] *Id*. at 14:50.

[33] *Id*. at 28:08 to 30:12. The recruits administered a "blanket party" to Private Pyle in an effort to motivate him. *Id.*

[34] *Id*. at 27:20.

[35] *Id*. at 24:52.

[36] *See* Lance Corporal Brain Kester, *DIs Instill Discipline, Motivation With Incentive Training*, MARINES.MIL (Feb. 27, 2004), http://www.tecom.marines.mil/News/NewsArticleDisplay/tabid/5055/Article/527602/dis-instill-discipline-motivation-with-incentive-training.aspx. The article's author defines incentive training as a "very effective [tool], utilized by all drill instructors to instill discipline and motivation, and correct minor disciplinary infractions." *Id.*

[37] FMJ, *supra* note 1, at 26:20.

[38] *Id*. at 26:50 to 27:32.

Joker—"Are you thinking of hurting yourself, Leonard?" Instead, Private Joker concludes the scene stating simply, "Tuck your shirt in."[39]

C. "Leonard talks to his rifle."[40]

> *Private Pyle: It's been swabbed and brushed. Everything is clean. Beautiful. So that it slides perfectly. Nice. Everything clean. Oiled. So that your action is beautiful. Smooth shining.*[41]

The scene is eerie and disturbing. While cleaning and reassembling his rifle, Private Pyle speaks tenderly, yet disturbingly, to his "Charlene."[42] His words are precise and collected. His demeanor is confident. His words cause Private Joker, sitting adjacent to him, to pause and gaze concernedly at his fellow recruit. No words are exchanged between the two; no questions asked. Private Joker later surmises, based on what he observed, that Private Pyle is a clear "section eight."[43]

Firearms, both government-issued and personally owned, are everywhere in the military. A servicemember's access to a firearm could not be any easier. Low self-esteem and total hopelessness, coupled with a firearm, could be a deadly combination. It is fair to conclude that Private Pyle's conversation with "Charlene" foreshadowed the actions he would eventually take. Any leader overhearing a similar conversation with a Marine or Soldier and their firearm should become concerned. An engaged leader, however, would act on that concern—that clear "warning sign"—and ask that servicemember if he intends to hurt himself.

VI. Conclusion

So who, really, is Leonard Lawrence? Well, the answer may be quite simple: he could be that servicemember standing directly in front of you as you lift your eyes from this review. He may be a poor performer or a problem-child, like Private Pyle; she may be a water-walker or he may be someone your fellow Marine or Soldier tells you about—someone you do not even know personally. Regardless, one or more of the warning signs of suicide exhibited by Private Pyle may be present in that Marine or Soldier. Have the courage to ask that servicemember one of the hardest questions ever asked of another human being: are you thinking of hurting yourself? Have the courage to save a life. Engaged, compassionate leaders are the solution to temporary problems, not irreversible reactions.

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[39] *Id*. at 27:35.

[40] *Id*. at 35:00.

[41] *Id*. at 33:56 to 34:36.

[42] *Id*. at 36:56. Private Pyle affectionately named his rifle "Charlene."

[43] *Id*. at 35:18. A "section eight" was a type of military discharge "based on military assessment of psychological unfitness." Terrance L. Trezvant, *Section 8*, UD.COM (Nov. 8, 2004), http://www.urbandictionary.com/define.php?term=Section%208.

The GAMe: Unraveling a Military Sex Scandal[1]

Reviewed by *Major John P. Norman*[*]

I. Introduction

Recently, there has been no shortage of focus on the U.S. military with regard to its handling of sexual assault and sexual harassment cases within the ranks.[2] As much as this may feel like a new issue, it is not. Just as the U.S. Navy dealt with scrutiny following the infamous Tailhook Scandal of 1991,[3] the U.S. Army faced the same intense pressure in 1996 and 1997 over its handling of multiple sexual misconduct allegations in what has become known as the "Aberdeen Sex Scandal."[4] At the center of this scandal was Major General Robert D. Shadley, U.S. Army (Retired).[5] In *The GAMe: Unraveling a Military Sex Scandal*, Major General Shadley provides the reader with a detailed account of his oversight and investigation of this scandal, and some lessons learned during his "most stressful [time] in the military."[6] Major General Shadley's "personal notes and unclassified documents" are generally referenced as the source materials for his book.[7] However, there are no specific citations to these or any other sources, so the book reads more as a personal memoir compiled from memory rather than a scholarly analysis of the situation.

On August 11, 1995, Major General Shadley took command of the U.S. Army Ordnance Center and School (USAOC&S),[8] headquartered at Aberdeen Proving Ground (APG) in Aberdeen, Maryland.[9] In *The GAMe*, Major General Shadley recounts how his first year as the Commanding General (CG) was relatively normal and uneventful.[10] However, that all changed in September of 1996 when, through multiple sources and investigations, it became apparent to the APG leadership that there was a widespread problem with drill sergeants (DS) and members of the instructor cadre who were having both consensual and non-consensual sexual encounters with junior enlisted recruits and trainees.[11] Ultimately, these allegations of sexual misconduct led to twenty-six separate legal or

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[1] ROBERT D. SHADLEY, THE GAME: UNRAVELING A MILITARY SEX SCANDAL (2013). The title of the book comes from the acronym "GAM" standing for Game `a la Military. "GAM was the name for a deeply embedded system of sexual harassment and assault going on in the Army for many years." *Id.* at 1.

[2] *See, e.g.*, THE INVISIBLE WAR (Chain Camera Pictures 2012) (an investigative documentary about the problem of sexual assault in the U.S. military); Helene Cooper, *Pentagon Study Finds 50% Increase in Reports of Military Sexual Assaults*, N.Y. TIMES, May 2, 2014, at A14, *available at* 2014 WLNR 11769980; Ashley Parker, *Lawsuit Says the Military Is Rife with Sexual Abuse*, N.Y. TIMES, Feb. 16, 2011, at A18, *available at* 2011 WLNR 3032370; Quil Lawrence & Marisa Penaloza, *Sexual Violence Victims Say Military Justice System is 'Broken,'* NAT'L PUB. RADIO (Mar. 21, 2013, 3:05 AM), http://www.npr.org/2013/03/21/174840895/sexual-violence-victims-say-military-justice-system-is-broken; Craig Whitlock, *General's Promotion Blocked Over Her Dismissal of Sex-Assault Verdict*, WASH. POST (May 6, 2013), http://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/ef853f8c-b64c-11e2-bd07-b6e0e6152528_story.html.

[3] *See generally* GREGORY L. VISTICA, FALL FROM GLORY: THE MEN WHO SANK THE U.S. NAVY (Touchstone Books 1997) (1995). This book, written by the reporter for *Newsweek* who broke the story, covers many issues of corruption and scandal in the U.S. Navy, but there is a significant portion dedicated to the Tailhook Convention of 1991 held in Las Vegas, Nevada that became infamous for the sexual misconduct that took place there. Major General Shadley cites this book as a resource, which helped him deal with his command's sexual misconduct crisis at Aberdeen Proving Ground. SHADLEY, *supra* note 1, at 60.

[4] SHADLEY, *supra* note 1, at ix. This is the term that Major General Shadley uses to refer to the entire sexual misconduct scandal at Aberdeen Proving Ground. Others have also used this same term to generalize the situation. *See also Drill Sergeant Raped Us, 2 Trainees Testify: Army Sex Scandal Reaches Trial*, CHI. TRIB., Apr. 15, 1997, at 10, *available at* 1997 WLNR 5824241 (using this exact same term when contemporaneously reporting on situation at Aberdeen Proving Ground).

[5] The author retired from the U.S. Army in 2000 after thirty-three years of distinguished service. SHADLEY, *supra* note 1, at 315. He "serv[ed] in key . . . assignments, to include combat tours in Viet Nam and OPERATION DESERT SHIELD/STORM." *Id.* After his retirement, Major General Shadley "served as a senior mentor providing logistics and leadership . . . expertise to Army units prior to deployment to Afghanistan and Iraq." *Id.*

[6] *Id.* at 2.

[7] *Id.* at ix.

[8] *Id.* at 5.

[9] Aberdeen Proving Ground (APG) is a U.S. Army installation that was established in 1917 to provide a site where Army materiel could be tested. It is currently home to eleven major commands and over 100 other tenant units and activities. Aberdeen Proving Ground "provides facilities to perform research, development, testing, and evaluation of Army materiel." U.S. Army, *About APG—Facts*, TEAM APG: OFFICIAL HOMEPAGE OF ABERDEEN PROVING GROUND, http://www.apg.army.mil/AboutAPG/Facts (last visited June 25, 2015).

[10] SHADLEY, *supra* note 1, at 5–11. Major General Shadley describes how he developed a command climate assessment when he took command of the U.S. Army Ordnance Center and School (USAOC&S). He writes that all of his "actions constituted what is referred to as the incoming commander doing a command climate assessment . . . . In 1995, there was no requirement . . . for a new commander to do such an assessment. As a result, there was no format or guide for a new commander to follow." *Id.* at 9. This is an early example in the book of the author posturing himself against criticism which is easily picked up on by the reader. Whether a thorough command climate assessment was done or not becomes important later in the book because Major General Shadley reveals that he was reprimanded, in part, for "fail[ing] to conduct an accurate assessment of the command climate . . . at Aberdeen when [he] assumed command." *Id.* at 227.

[11] *Id.* at 13–33. The author does not explain how the sexual misconduct at APG was discovered. It appears that commanders heard rumors from their troops and this led to command investigations, which eventually morphed into law enforcement investigations. *Id.*

disciplinary actions being taken against individual U.S. Army officers and noncommissioned officers (NCOs).[12]

Over the course of his book, Major General Shadley does not explain the facts of individual cases.[13] He instead focuses on his role in managing the crisis and providing leadership to his command team.[14] Ostensibly, Major General Shadley wrote *The GAMe* to provide some lessons that he learned through crisis—lessons in leadership. He writes, "The events that occurred affected my thoughts on leadership and helped me shape and communicate those thoughts to several hundred [others] since leaving Aberdeen and the Army. The lessons I learned are applicable to today's leaders both in and out of the military."[15] However, Major General Shadley is only partially successful in delivering these lessons because the reader has to painstakingly pull them out of a work that is confusing, lacks a unifying theme, and is more of a defense against criticism than a guide for leaders. As a result of the "Aberdeen Sex Scandal," Major General Shadley received a memorandum of reprimand (MOR) for failing in his "command responsibility to exercise proper[] oversight" of USAOC&S.[16] Unfortunately, almost a third of *The GAMe* is devoted to Major General Shadley's belief that he was made a scapegoat by the Army and his attempts to get the MOR removed from his official military personnel file (OMPF).[17]

Major General Shadley's work is a thorough recounting of a significant time in his career and provides insight on the scope of what a general officer deals with on a daily basis during a political crisis for his command. However, it is difficult to glean true conclusions or lessons learned from this book because of the many distractions embedded in it. A reader looking for a roadmap for the way ahead in the area of military sexual assault will be disappointed. This review will first point out some of the main distractions, then attempt to cull out some of the positive, concrete lessons in order to allow the reader to make an informed choice about whether to embark on this work or not.

II. Distractions for the Reader to Overcome

The biggest distraction from the lessons on leadership in *The GAMe* is certainly the day-by-day, event-by-event style that is used by the author without a unifying theme. For the first two-thirds of the book—pages 1 through 212 of 315—Major General Shadley records everything he did while dealing with the sex scandal on a daily basis from September 1996 to July 1997. Events are not linked causally or topically. Furthermore, random and unrelated events are sometimes inserted into the chronological chain, which further distracts the reader.

As an illustration of this writing style, in one passage, the author remarks about his frustration with the Department of the Army (DA) for not providing convenient healthcare to Reserve Component Soldiers, then he notes that his dog, Remington enjoyed his new Christmas toys, and, finally, he states that he received an e-mail from a subordinate about coordinating a joint press release with the National Association for the Advancement of Colored People (NAACP).[18] In another example, Major General Shadley discusses a *New York Times* article about how the U.S. Marine Corps does not integrate men and women in basic training, then goes on to discuss his attendance at a Martin Luther King, Jr. Commemorative Prayer Breakfast, next discussing the preferral of charges in one of the DS cases, and finally discusses how there was only one female trainee at Aberdeen who had allegedly lied about her allegations.[19] These examples are just samples of what the reader faces throughout *The GAMe*. It is often difficult to understand what the author's overall point is or why a certain fact has been included. The author's style severely detracts from the effectiveness of the work.

The next distraction in this book is its dual nature as both an explanatory rebuttal to criticism and also a commentary on the problem of sexual assault in the military. The duality of the book is seen up front in the introduction. Alongside the previously quoted passage about leadership lessons gained from his experience,[20] Major General Shadley indicates his true purpose behind the book:

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[12] The author is not very clear on the exact legal actions taken in each case, but the reader is able to glean from references throughout the entire book that the disciplinary forums included general, special, and summary courts-martial, Article 15 Uniform Code of Military Justice (UCMJ) nonjudicial punishment, and administrative separations from the Army. *See, e.g.*, *id.* at 210. Of the twenty-six individual cases, nineteen Soldiers were found guilty of some offense, but not necessarily sexual assault; seven Soldiers were found not guilty of any offense. *Id.*

[13] *See, e.g.*, *supra* notes 11–12. Because the underlying misconduct is never explained, it is very difficult for the reader to understand the context of the problem faced by the commander. In fact, the title of the book is misleading because the book has little to do with "unraveling" the scandal and more to do with the various reactions to it.

[14] *See infra* notes 28–30 and accompanying text.

[15] SHADLEY, *supra* note 1, at 2.

[16] *Id.* at 226.

[17] *Id.* at 213–90. This section is the final third of the book and it describes the author's legal battle, through defense counsel, to remove the Memorandum of Record (MOR) from his official military personnel file. Major General Shadley is ultimately successful in getting the MOR pulled from his record and is allowed to retire as a Major General. The fact that the author is ultimately successful in cleaning up his record, and thus not punished in any tangible way, adds to the reader's sense that this portion of the book is unnecessary for the book's better purpose.

[18] *Id.* at 96. This example is found literally paragraph-by-paragraph on one page of the book with no alteration by the reviewer for effect.

[19] *Id.* at 104–05. Again, these events are listed paragraph-by-paragraph over two pages of the book. These events are not related to each other in any way and are not causally linked together. There is no explanation given for why certain events are described in series with other unrelated events.

[20] *See supra* note 15 and accompanying text.

> I never imagined my efforts to correct these serious abuses would expose me to criticism and reprimand from the very Army I have loved and served for more than 30 years. I would be labeled a racist by some organizations and vilified by others in the press. My actions and those of my team were scrutinized by the media, private organizations, members of Congress, the Office of the Secretary of the Army, and the Office of the Secretary of Defense. Some had praise. Others had criticism.[21]

At this point, the reader knows that he is in for a defense of the author's actions and an attempt to favorably reframe what the author did or did not do. Major General Shadley goes on to later write:

> My problem with a few folks who worked agendas such as race and women in the military was that in too many instances, the agenda took precedent over the individual. Some people would not hesitate to throw someone under a bus if they thought it would further their agenda. I would eventually get a view from under more than one bus.[22]

Aside from defending against race-and-gender based agendas, Major General Shadley spends most of his effort proclaiming that the DA used him personally[23] and APG generally as the focus of the problem in order to deflect attention from a wider sexual assault crisis in the Army. He says that he and his staff were "being set up" and were "doomed to be the scapegoat[s]."[24] Major General Shadley summed up his feelings when he said, "I [was] amazed that senior Army leaders . . . failed to acknowledge that sexual misconduct was not isolated to APG,"[25] and that "the image of the Army was the overriding, number one agenda for the Army senior leadership."[26] Apparently, Major General Shadley's rebuttal to being a scapegoat for the "Aberdeen Sex Scandal" is his listing of chronological facts showing all that he tried to do during this crisis. However, as it has already been pointed out, this style is confusing and does not advance the more important points about leadership or preventing military sexual assault.

Major General Shadley's defense of himself and his team may be warranted, but he should not have tried to take on this task and also intersperse lessons learned and broader points about military sexual assault in one book. Military readers—especially commanders—could have benefited from Major General Shadley's thoughts on victim behavior, offender behavior, useful training ideas that may prevent sexual assault, or the preconditions in a military unit that may lead to sexual misconduct, to name a few. The dual nature of the book distracts from potential helpfulness. Further, if the author truly wanted the book to be about justifying and defending his own actions, he should have stated that plainly from the outset and framed the whole story that way. That would have been a more persuasive theme and an understandable approach. As it is, the reader is left confused, as the book moves back and forth between its two themes: (1) a defense-based explanation and (2) a commentary on the problem of sexual assault.

III. Lessons Gleaned by the Careful Reader

Up to this point, this review has admittedly been critical. However, there are positive attributes to Major General Shadley's work. Major General Shadley found himself trying to fix a major problem that he did not create and he seems to have done it with true care for his Soldiers and for the U.S. Army; all the while, he was under intense political and media scrutiny. As a result, there are certainly lessons to be gleaned from Major General Shadley's experience for a reader who is willing to dig in.

The first place where Major General Shadley shows the reader a strong leadership lesson is when he describes setting up a multi-disciplined crisis action team (CAT) and then giving the team clear strategic guidance.[27] Major General Shadley clearly communicated three objectives to his team: "(1) identify potential victims and ensure we provide all necessary support to them; (2) identify alleged perpetrators and allow the judicial system to work its due process; and (3) identify systematic causes for the problem and initiate

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[21] SHADLEY, *supra* note 1, at 1.

[22] *Id.* at 80. Major General Shadley also states sarcastically, "No matter how this all turned out, it would be our fault that someone didn't get their desired outcome." *Id.* at 105.

[23] *See supra* note 17 and accompanying text.

[24] SHADLEY, *supra* note 1, at 187.

[25] *Id.* at 214–15.

[26] *Id.* at 215.

[27] *Id.* at 18. Strategic guidance during crisis is critical. It allows subordinates to carry out the commander's intent with flexibility as the crisis unfolds. The U.S. Marine Corps, in its seminal doctrinal publication puts it like this: "The first requirement [in warfare or other crisis] is to establish what we want to accomplish, why, and how. Without a clearly identified concept and intent, the necessary unity of effort is inconceivable." U.S. MARINE CORPS, MARINE CORPS DOCTRINAL PUB. 1, WARFIGHTING 82 (20 June 1997) [hereinafter MCDP 1]. The doctrinal publication goes on to say this about commander's intent: "The purpose of providing [commander's] intent is to allow subordinates to exercise judgment and initiative—to depart from the original plan when the unforeseen occurs—in a way that is consistent with higher commanders' aims." *Id.* at 89.

corrective actions to preclude recurrence."[28] These "vectors"[29] are referenced over and over in *The GAMe* and it is easy to see how Major General Shadley's guidance affected the actions of his team going forward.

A good example of Major General Shadley's positive strategic influence is found in the decision by the Criminal Investigation Command (CID) to go back and interview all former trainees who had passed through USAOC&S while the alleged perpetrators had been assigned there.[30] This was a step that other Army commands who were dealing with sexual misconduct did not take at the time, but it led to APG being able to self-identify more victims and thus root out the problem more thoroughly. As Major General Shadley writes, "It was consistent with our objective of identifying potential victims and ensuring we provided all necessary support."[31] The importance of strategic vision to guide people through crisis cannot be understated.

Another valuable lesson that can be gleaned from *The GAMe* is how large and unexpected the scope of a crisis can become for a leader. Although, Major General Shadley's day-by-day accounting of events can be hard to follow, by the end of the book, the reader is certainly impressed with the breadth of issues that he had to deal with. Throughout the book, Major General Shadley discusses dealing with politicians,[32] the media,[33] racial special interest groups,[34] and those concerned about gender equality in the armed forces.[35] It is imperative for commanders and those who practice in the area of military sexual assault—judge advocates, law enforcement personnel, and victim advocates—to realize that the issue is not simply about sexual assault as a stand-alone criminal act. The issue of sexual assault has many components and can often be used by special interest groups to advance their agendas. Without recognizing this early in the process, a commander or practitioner could easily be thrown off-balance when those special interest groups come calling.

The ultimate lesson from Major General Shadley's work is twofold: (1) leverage your personnel with distinct areas of expertise to handle pressure from multiple fronts,[36] and (2) always strive to "[do] the right thing" without regard to outside influences or pressures.[37]

IV. Conclusion

While it is possible to glean some leadership lessons and strategies for dealing with military sexual assault from *The GAMe*, the book ultimately disappoints the reader looking for a way forward in this area due to the lack of a unifying theme. The reader instead finds a day-by-day account of a certain time period in Major General Shadley's command followed by an explanation of why the personal consequences for the author were unjustified. Major General Shadley does eventually present some concrete suggestions over about one page of his epilogue;[38] however, it is too late at this point in the work to tie these suggestions back to the mass of information that has just been presented. If the author wanted to write a memoir-style history of his time dealing with the Aberdeen Sex Scandal, he could have done that. If he wanted to focus on lessons learned and suggestions for the future while using his experiences as context for those lessons and suggestions, he could have done that. Unfortunately, *The GAMe* tries to do both, but is not fully successful at either. The reader looking for more than a critique of the late-1990s Army leadership and a cataloging of facts surrounding a certain historical event will ultimately be disappointed.

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[28] SHADLEY, *supra* note 1, at 19–20.

[29] *Id.* at 20.

[30] *Id.* at 34.

[31] *Id.*

[32] *See, e.g.*, *id.* at 77-78 (describing a visit by Senator Barbara Mikulski); *id.* at 84-85 (describing a visit by a congressional delegation); *id.* at 100-02 (describing a visit by Congressman John Murtha); *id.* at 132-35 (describing a visit by the Congressional Black Caucus).

[33] *See, e.g.*, *id.* at 49–52 (describing the author's first press conference about the sexual misconduct scandal); *id.* at 55-67 (chapter 6, "A Media Spotlight Shines on Aberdeen"); *id.* at 204 (describing that the author directed forty-one press releases be issued during the sexual misconduct scandal).

[34] *See, e.g.*, *id.* at 81–130 (four chapters of the book detailing the author's interactions with the NAACP).

[35] *See, e.g.*, *id.* at 105 (outlining the author's response to an article written by a law professor about gender issues in the military).

[36] *See supra* note 27 and accompanying text. Major General Shadley consistently praises his subordinates and their efforts during the sexual misconduct scandal. *Id.*

[37] SHADLEY, *supra* note 1, at 285.

[38] *Id.* at 288-89.

The Tipping Point: How Little Things Can Make a Big Difference[1]

Reviewed by *Major Russell R. Henry*[*]

I. Introduction

What do Paul Revere, Hush Puppies, teenage smoking, *Sesame Street*, violent crime in New York City, syphilis in Baltimore, *The Divine Secrets of the Ya-Ya Sisterhood*, and teenage suicide in Micronesia have in common? They are all social epidemics covered in Malcolm Gladwell's first book, which essentially performs an autopsy of seemingly diverse occurrences to explain a common blueprint. The term "tipping point" comes from epidemiology, the study of epidemics, and is defined as "that magic moment when an idea, trend, or social behavior crosses a threshold, tips, and spreads like wildfire."[2] Gladwell, writer for *The New Yorker* and best-selling author of several books[3], breaks down these events, and many more, in an effort to prove "that ideas and behavior and messages and products sometimes behave just like outbreaks of infectious disease. They are social epidemics."[4] In doing so, he finds three rules that are common to these social fads, behaviors, and ideas that tip: the Law of the Few, the Stickiness Factor, and the Power of Context.

II. Father of a Subgenre

It is no surprise that each of Gladwell's books has spent many weeks on best seller lists, and that he has become an "all-out phenomenon."[5] A gifted story-teller, he displays an uncanny ability to take seemingly unrelated events and demonstrate commonality in a way that is entertaining and easy to understand. "I have two parallel things I'm interested in," Gladwell said. "One is, I'm interested in collecting interesting stories, and the other is I'm interested in collecting interesting research. What I'm looking for is cases where they overlap."[6] When this book debuted in 2000, it was one of a kind. Today, bookshelves at libraries and bookstores are filled with this "highly contagious hybrid genre of nonfiction, one that takes a nonthreatening and counterintuitive look at pop culture and the mysteries of the everyday."[7]

III. The Law of the Few: Connectors, Mavens, and Salesmen

On the same night that Paul Revere made his famous ride, William Dawes set out on an almost identical task. Both men covered roughly an equal distance including approximately the same number of towns with the identical urgent message of an imminent British attach, but they had vastly different results. Revere was wildly successful and is still thought of as an American icon, while Dawes failed to get the message out and is virtually unknown. The difference, according to Gladwell, is simple. Revere was a Connector and a Maven; Dawes was neither.[8]

"The success of any kind of social epidemic is heavily dependent on the involvement of people with a particular and rare set of circumstances."[9] In order for an idea or social epidemic to take flight, it takes a special group of people to get it off the ground. Gladwell identifies these people as Connectors, Mavens, and Salesmen[10]. Connectors, since they know loads of people and run in many different circles, have a special gift for uniting. While Connectors are in the people business, Mavens are information brokers. Mavens are not only obsessed with accumulating all known information about a product, they also actively seek to share that valuable knowledge with others.[11] Salesmen, the third and final member of the group that controls word-of-mouth epidemics, are fervently committed to a product or idea and have an innate ability to persuade others of its necessity.

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[1] MALCOLM GLADWELL, THE TIPPING POINT (2000)

[2] THE TIPPING POINT, http://gladwell.com/the-tipping-point (last visited July 7, 2015).

[3] MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005); OUTLIERS: THE STORY OF SUCCESS (2008); MALCOLM GLADWELL, WHAT THE DOG SAW: AND OTHER ADVENTURES (2009); MALCOLM GLADWELL, DAVID AND GOLIATH: UNDERDOGS, MISFITS, AND THE ART OF BATTLING GIANTS (2013).

[4] *Q&A with Malcolm*, THE TIPPING POINT, http://gladwell.com/the-tipping-point/the-tipping-point-q-and-a/ (last visited July 7, 2015).

[5] Rachel Donado, *The Gladwell Effect*, N.Y. TIMES (Feb. 5, 2006), http://www.nytimes.com/2006/02/05/books/review/05donadio.html?pagewanted=all&_r=0.

[6] Eric Jaffe, *Malcolm in the Middle*, AFP OBSERVER, vol 19, no. 3, Mar. 2006, http://www.psychologicalscience.org/index.php/publications/observer/2006/march-06/malcolm-in-the-middle.html.

[7] Donado, *supra* note 4.

[8] GLADWELL, *supra* note 1, at 30–34, 56–62.

[9] *Id*. at 33.

[10] Ori Brafman also identifies certain sets of people who are important to change in an organization and attempts to define attributes belonging to these individuals. *See* ORI BRAFMAN, THE STARFISH AND THE SPIDER: THE UNSTOPPABLE POWER OF LEADERLESS ORGANIZATIONS (2006).

[11] *Id*.

The U. S. military, and the judge advocate community in particular, is filled with bright and talented people. As a leader, peer, or follower, it can be extremely beneficial to know the people around you and be able to identify any special skills they possess. One need not look too far to discover the Connectors, Mavens, and Salespeople in your unit or section. The Salesmen cannot wait to present their case to members or judges. The Connectors seem to know someone in every geographic location with each specialty and are happy to get you in touch with just the right person with the information you are seeking. The Mavens can be found devouring each blog with a military law nexus or exploring the distant digital corners of Westlaw. Once identified, these special people can be utilized to spread key messages and institute positive social epidemics within the two professions of arms and law.

IV. The Stickiness Factor[12]

In the digital world, we are bombarded with information from a variety of sources on an assortment of platforms. Most information simply goes in one ear and out the other. Only a few things truly grab our attention and stay with us. Those messages have the highly sought after Stickiness Factor, the second of the rules. "The Stickiness Factor says that there are specific ways of making a contagious message memorable; there are relatively simple changes in the presentation and structuring of information that can make a big difference in how much of an impact it makes."[13] Simply including basic facts (e.g., a map of the campus with the health building circled, plus hours when the vaccination was given) in a tetanus booklet distributed to students at Yale University increased the vaccination rate from three percent to twenty-eight percent.[14] The key to stickiness in an extremely effective advertising campaign for the Columbia Record Club in the 1970s was a little gold treasure box tucked into each advertisement.[15] *Sesame Street*, the groundbreaking children's educational television show, would have likely tanked without tweaks following initial test-marketing. By continually testing concepts and using the results to make small but crucial modifications, the creators of *Sesame Street* have been able to make their brand of educational television programming sticky for over forty years.[16]

During a court-martial, members get bombarded with facts and arguments; successful trial attorneys are able to get their themes stuck in the heads of members. A sticky rules of engagement or law of armed conflict brief[17] will promote understanding, which can increase adherence to the laws, orders, and regulations by Soldiers, Sailors, Airmen, and Marines. The key is to be like the creators of *Sesame Street* and continuously analyze and test the structure and format of your material. Find attention getters that work (like the gold box) and include information that turns easily forgettable, clinical information into something that is practical and personal (such as health clinic map and hours of operation). The key is to hold the attention of the audience and provide them with memorable information that invokes action. "There is a simple way to package information that, under the right circumstances, can make it irresistible. All you have to do is find it."[18]

V. The Power of Context

"Epidemics are sensitive to the conditions and circumstances of the times and places in which they occur."[19] The "Power of Context" is equally as important to epidemics as the "Law of the Few" and the "Stickiness" Factor since seemingly insignificant alterations in context can lead to massive changes. Cleaning up the graffiti on the subway and repairing broken windows led to a plummeting crime rate in New York City in the 1990s.[20] During a psychology experiment in Palo Alto, California, during the 1970s, "normal and healthy" people rapidly transformed into sadistic guards in a mock prison setting.[21] In another experiment at Princeton University, only ten percent of seminary students who were told that they were late for a presentation stopped to help an actor feigning illness ("slumped in an alley, head down, eyes closed, coughing and groaning.")[22] The presentation these seminarians were in such a hurry to get to, that they literally stepped over a man crying for help, was about the story of the Good Samaritan.[23] A simple change in context can have a profound effect on expected behavior.

Groups also play a major role in social epidemics. *Divine Secrets of the Ya-Ya Sisterhood* went from selling 15,000 hardcover books to becoming a runaway best-seller paperback (which later became a major motion picture) largely because it became the darling of book discussion

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[12] *See* CHIP HEATH & DAN HEATH, MADE TO STICK (2008) (offering an entire book on their concept of "stickiness").

[13] GLADWELL, *supra* note 1, at 25.

[14] *Id.* at 95–97.

[15] *Id.* at 93–95.

[16] *Id.* at 99–110.

[17] *See also Teaching That Sticks*, HEATH BROTHERS, http://heathbrothers.com/download/mts-teaching-that-sticks.pdf

[18] *Id.* at 132.

[19] *Id.* at 139.

[20] *Id.* at 135–51.

[21] *Id.* at 152–55.

[22] *Id.* at 164.

[23] *See Luke* 10:25-37 (story of the Good Samaritan).

groups.[24] John Wesley successfully used the power of community to grow Methodism in England and North America from 20,000 to 90,000 followers in the 1780s.[25] "The lesson of *Ya-Ya* and John Wesley is that small, close-knit groups have the power to magnify the epidemic potential of a message or idea."[26]

Understanding the group dynamic and how context can influence behavior is vital to successfully executing the responsibilities of being a judge advocate. This knowledge can explain what happens in the members' deliberation room, or how a previously law-abiding small unit can tip to become war criminals. Hopefully, this understanding can steer behavior in a positive direction.

VI. Criticism

Though Gladwell is a beloved best-selling author, founder of a subgenre, and speaker who commands up to $100,000 per speech, he is not without his critics. [27] Most critics claim that he overreaches on his conclusions and his research lacks sufficient scientific rigor.[28] Jonah Berger, professor of marketing at the Wharton School at the University of Pennsylvania, flatly claims that "fifty percent of *The Tipping Point* is wrong."[29] "Gladwell is great at telling stories," Berger continues, "but sometimes the stories get ahead of the facts."[30] In other words, he is a journalist writing about science and not a scientist. In a rather sheepish and disarming way, Gladwell essentially surrenders the point in 2013 when asked to comment on Berger's criticism on his initial book, offering: "I was just a journalist describing stuff. These guys [social scientists] are actually doing the work. I'm far more interested in what he [Berger] has to say about it than what I think about it."[31]

VII. Conclusion

More than anything, this book is a collection of extremely interesting and diverse stories. If nothing else, Gladwell is an exceptionally gifted author with a special talent for translating academic studies into secular understanding. However, there is nothing in the book that is life-altering. The fact that a few vital people (Connectors, Mavens, Salesmen) pushing a great idea (Stickiness Factor) at the right time or in the right place (the Power of Context) can lead to a social epidemic is far from groundbreaking. As Alan Wolffe, in his review of the book for *The New York Times*, puts it, "Gladwell's rules of epidemic behavior are common sense dressed up as science."[32] However, common sense is not always common. Moreover, it does not hurt to be reminded of relatively straight-forward concepts while being entertained by Gladwell's prose.

This book, Gladwell's initial offering, is an enjoyable read that boasts extremely entertaining and diverse stories. It is important not for groundbreaking ideas, but for demonstrating that social science can be packaged in an entertaining and thought-provoking way. This book is not likely to change lives, but it can provoke ideas and spur action. While some of Gladwell's other books have arguably more application to military matters,[33] this one is a recommended read for members of the dual profession of arms and law, if for nothing more than aiding judge advocates in recognizing the special people around them and learning how to leverage them. Additionally, it arms the reader with fascinating stories to facilitate dinner party conversations.

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[24] REBECCA WELLS, DIVINE SECRETS OF THE YA-YA SISTERHOOD: A NOVEL (2004).

[25] GLADWELL, *supra* note 1, at 172.

[26] *Id.* at 174.

[27] Danielle Sacks, *Jonah Berger Wants to be the Next Malcolm Gladwell. Welcome to the Making of a Guru, 2013 edition*, FAST COMPANY, Apr. 2013, at 104.

[28] Jason Zengerle, *Geek Pop Star*, N. Y. MAG. (Nov. 17, 2008), http://nymag.com/arts/books/features/52014/.

[29] Sacks *supra* note 24, at 102.

[30] *Id.* at 104.

[31] *Id.*

[32] Alan Wolffe, *The Next Big Thing: Malcolm Gladwell Examines What Makes Fads, Well, Faddish*. N.Y. TIMES (Mar. 5, 2000), http://www.nytimes.com/books/00/03/05/reviews/000305.05wolfet.

[33] *See* MALCOLM GLADWELL, BLINK (2005) (dedicating an entire chapter to the experiences of Lieutenant General Paul Van Riper, U.S. Marine Corps (Retired) in Vietnam); MALCOLM GLADWELL, OUTLIERS (2008) (explaining Gladwell's findings that 10,000 hours of the right kind of practice in a discipline can lead one to greatness); and MALCOLM GLADWELL, DAVID AND GOLIATH (2013) (discussing at length Philistine and Israeli tactics during the epic showdown between David and Goliath).

The Unwinding: An Inner History of The New America[1]

Reviewed *by Major Paul M. Ervasti*[*]

No one can say when the unwinding began—when the coil that held Americans together in its secure and sometimes stifling grip first gave way. Like any great change, the unwinding began at countless times, in countless ways—and at some moment the country, always the same country, crossed a line of history and became irretrievably different.[2]

I. Introduction

In *The Unwinding*, author George Packer argues that America is in decline. As structures that have been in place for decades "collapse[d] like pillars of salt," other things, "harder to see but no less vital in supporting the order of everyday life, changed beyond recognition—ways and means in Washington caucus rooms, taboos on New York trading desks, manners and morals everywhere."[3] But Packer relies on flimsy evidence to support his broad conclusion: anecdotal evidence from a handful of individuals he happened to interview while a staff writer for *The New Yorker.*[4]

The Unwinding is not so much an 'inner history,' as its title claims, as it is a compilation of unrelated articles, cobbled together into a book. As such, the book feels disjointed and unconnected: like reading a series of magazine articles rather than a book. More importantly, the stories do not support the author's main claims, which are merely a collection of progressive talking points: (1) that the repeal of Glass-Steagall[5] caused the bank failures and financial crisis of the last seven years; (2) the system is rigged against ordinary Americans; (3) Wal-Mart is evil; (4) Elizabeth Warren is good; and (5) more government regulation could save America from the greedy one-percenters that are destroying it. *The Unwinding* would be of great use to Elizabeth Warren as a piece of campaign literature. Unfortunately, it is of less use to professional military officers, whose time would probably be better spent reading Packer's other book, *The Assassins' Gate.*[6]

I. *The Unwinding's* Heroes and Villains.

Packer claims that America is changing beyond recognition, but focuses mainly on the financial crisis of the last seven years. He presents the image of a changing America by telling the stories of Americans who either caused that change or were swept away by it. His characters are easily classified as stereotypical heroes or villains.

The hero side starts with Tammy Thomas. She grew up in Youngstown, Ohio, and witnessed the town's decline over the past few decades as union jobs in the steel plants and factories either evaporated or were shipped overseas.[7] She held on longer than most. For ten years she was the sole support for her three children, earning close to twenty-five dollars an hour working on an assembly line for a company that manufactured auto parts.[8] But in 2006, after the company went through a series of mergers and "aggressive cost reduction" steps, she was forced to accept either a forty percent pay cut (to $13.50 an hour) or a buyout that would eliminate her job and cause her to lose most of her pension.[9] She chose the latter. When the money from the buyout ran out, she got a job as a community organizer for a non-profit, advocating for pro-union and other progressive causes, and participating in the group's get-out-the-vote campaign to help elect Barack Obama in 2008.[10]

Dean Price grew up in the Piedmont region of North Carolina during the golden age of tobacco farming when the best that a young man could hope for was to get a job making cigarettes at the R.J. Reynolds factory and be "set for life, with good pay and benefits plus two cartons of cigarettes a week."[11] Dean attended college, earned a degree in political science, and went to work for Johnson & Johnson selling pharmaceuticals,[12] But he hated it and soon quit.[13] "He decided to start over and do things his own way. He would become an entrepreneur."[14] After a failed attempt at

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[1] GEORGE PACKER, THE UNWINDING: AN INNER HISTORY OF THE NEW AMERICA (2013).

[2] *Id.* at 3.

[3] *Id.*

[4] *See* Dwight Garner, *A Nation, Its Seams Fraying*, N.Y. Times, May 29, 2013, at C1 (noting that *The Unwinding* began as a series of pieces in *The New Yorker*).

[5] Named after Senator Glass and Congressman Steagall, the Banking Act of 1933 banned "commercial banks from underwriting securities, forcing banks to choose between being a simple lender or an underwriter (brokerage)." *The Long Demise of Glass-Steagall*, PUBLIC BROADCASTING SERVICE, http://www.pbs.org/wgbh/pages/frontline /shows/wallstreet /weill/demise.html (last visited Sep. 3, 2014). The citation for the Glass-Steagall Act is, Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (1933).

[6] GEORGE PACKER, THE ASSASSINS' GATE: AMERICA IN IRAQ (2005).

[7] PACKER, *supra* note 1, at 37-56.

[8] *Id.* at 152.

[9] *Id.*

[10] *Id.* at 231-39.

[11] *Id.* at 14-15.

[12] *Id.* at 16-17.

[13] *Id.* at 17.

[14] *Id.*

operating a chain of truck stops and fast food restaurants, he became a spokesman for biodiesel. His vision was to create a chain of biodiesel truck stops that would use canola oil grown by local farmers and produced on site.[15] This vision later changed to include collecting waste cooking oil from local restaurants and turning it to biodiesel. Locally produced biodiesel would keep all the profits local and away from the big oil companies and foreign producers of oil.[16]

Another hero, Jeff Connaughton represents the stereotypical Washington insider. He followed Joe Biden into government and remained loyal to him over several decades.[17] He also worked as a lobbyist, where he made millions and came to see the corrupting influence of money and the power it had over elected officials.[18] He later returned to government as a staffer to Senator Ted Kaufman from 2009-2010, hoping to "go after Wall Street" and enact real financial reform, including reinstating Glass-Steagall.[19] But after he saw that lobbyists and Wall Street insiders were able to influence even Democrats like Vice President Joseph Biden, President Obama, and Senator Chris Dodd, and kill any chance of sweeping financial reform, he came to the "stunning realization that our government has been taken over by a financial elite that runs the government for the plutocracy."[20] He eventually left Washington a jaded man to write a book called *The Payoff: Why Wall Street Always Wins*.[21]

Although the stories of these three individuals comprise the majority of the book, Packer also includes narratives from many others: a man struggling to support his family earning $7.60 an hour at Wal-Mart; a small hotel owner fighting against an abusive mortgage company; a lawyer defending those facing foreclosure; an Occupy Wall Street protester; an evangelist for organic and sustainable food; a progressive Democratic congressman from Virginia; and Elizabeth Warren. Senator Warren is portrayed as a "Prairie Populist"— someone whose presence in government "made insiders uneasy because it reminded them of the cozy corruption that had become the normal way of doing business around Capitol Hill."[22] According to Packer, the banks feared her because she "knew their game."[23]

Packer's cast of villains is equally predictable—Newt Gingrich; Wall Street bankers; steel and manufacturing companies that sent American jobs overseas; Tampa housing developers who gobbled up swamps and farmland to inflate the housing bubble; the Tea Party; President Clinton (to the extent he sold out to Republicans and Wall Street when he agreed to repeal Glass-Steagall); a silicon valley billionaire; ignorant Glenn Beck fans who oppose funding for mass transit; and Sam Walton. Packer takes particular aim at the last figure, arguing that Wal-Mart destroyed every town in America by paving over trees and fields to create sprawl that killed towns' main streets, crushing unions and lowering wages and prices in the process. Packer claims that Sam Walton did not care what he was doing to the country because "[t]he hollowing out of the heartland was good for the company's bottom line."[24]

II. Packer's Weak Case for Glass-Steagall Reforms

Packer weaves all of these narratives together to form his central thesis:

> When the norms that made the old institutions useful began to unwind, and the leaders abandoned their posts, the Roosevelt Republic that had reigned for almost half a century came undone. The void was filled by the default force in American life, organized money.[25]

But when Packer talks generally about the Roosevelt Republic coming undone, what he really means is that the 1933 Glass-Steagall Act was repealed, leading to uncontrolled greed and financial ruin. In fact, *The Unwinding* reads as a political call to action for financial reform including Glass-Steagall restrictions. But unfortunately, the book adds little to the understanding of this complex financial issue.

Packer merely parrots accepted progressive dogma that runs as follows: (1) Congress created a wall between commercial and investment banking to prevent the type of greed that caused the Great Depression; (2) Wall Street lobbied the government to repeal that wall in 1997; (3) banks then made billions using Federal Deposit Insurance Corporation insured deposits to underwrite bad loans and then dump those bad loans back on their customers in the form of securities, causing the great recession; (4) therefore, a wall between commercial and investment banking must be rebuilt to prevent another financial meltdown.[26] But it makes

[15] *Id.* at 180-81.

[16] *Id.* at 422-25.

[17] *Id.* at 62- 65, 280-95, 399.

[18] *Id.* at 163-71.

[19] *Id.* at 280-81.

[20] *Id.* at 279.

[21] Id. at 399; *see also* JEFF CONNAUGHTON, THE PAYOFF: WHY WALL STREET ALWAYS WINS (2012).

[22] *Id.* at 349-50.

[23] *Id.*

[24] *Id.* at 102-05.

[25] *Id.* at 3.

[26] See James Rickards, *Repeal of Glass-Steagall Caused the Financial Crisis*, U.S. NEWS AND WORLD REP. (Aug. 27, 2012, 1:19 p.m.), http://www.usnews.com/opinion/blogs/economic-intelligence /2012/08/27/

little sense to read *The Unwinding* when Elizabeth Warren can present those same talking points in less than five minutes on *The Daily Show.*[27]

Additionally, Packer does not present any opposing viewpoints. Some economists had argued for years that the Glass-Steagall restrictions amounted to unnecessary interference in the markets.[28] Empirical data suggested that even before Glass-Steagall restrictions, commercial banks had never "succeeded in systematically fooling naïve investors into investing in low-quality securities," which was the very activity Glass-Steagall was meant to prevent.[29] Markets rationally accounted for this possibility and lowered a bank's share prices accordingly.[30]

Those who oppose new Glass-Steagall type government regulations also claim that the regulations actually harm America because they prevent banks from diversifying risk, thus making them more prone to fail.[31] They also claim that repealing Glass-Steagall did not cause the financial crisis. The law merely "prohibited commercial banks from underwriting debt and equity issues, a very safe activity; it did not prohibit banks from trading, engaging in derivatives, leveraging themselves or making bad loans."[32] This view holds that the financial crisis was caused by banks' "investments in residential mortgages and residential mortgage- backed securities—investments they had always been free to engage in."[33]

Whether Glass-Steagall restrictions ought to be brought back is debatable among economists. But Packer's book adds little to the conversation. In fact, none of the financial struggles that he outlines in the many narratives in *The Unwinding* have any connection with Glass-Steagall. Steel factories were closing in the rust-belt long before 1999.

III. Being Cheap Is Not Bad For America

The importance Packer places on Glass-Steagall is misplaced. He claims that Glass-Steagall served us well and made us prosperous for over fifty years—we need to bring back more of those regulations. But contrary to Packer's claim, it was not a piece of legislation enacted during the great depression that served this country well for decades. Rather, it was the people who came of age during the depression and were formed by that experience that made America great. That generation of Americans watched their parents lose everything during the depression and never forgot that experience.[34] As young adults, they fought a war against tyranny and were "mature beyond their years, tempered by what they had been through, disciplined by their military training and sacrifices."[35] "They stayed true to their values of personal responsibility, duty, honor, and faith."[36]

That generation of Americans worked hard, lived within their means, and never threw anything away. They would never take out home equity loans to go on vacation or rack up thousands of dollars in credit card debt going out to eat. Tom Brokaw also wrote a book on this era and it is depressing to compare the biographies in Brokaw's book with those in Packer's. For example, Packer presents Danny Hartzell as someone whose inability to make ends meet is evidence of a failing America.[37] But the facts indicate that Mr. Hartzell's troubles were largely due to his own choices: he dropped out of high school; quit a job because he did not like his boss; was fired from another when he failed to show up for work; had a welding job, but hurt his back the first day he was required to do physical labor; has a wife who is obese and does not work; and, to top things off, he often spends ten hours a day playing World of Warcraft.[38] His family does not go to church or get involved in any civic organizations. As a result, they have no support structure to help them during hard times.

The greatest generation did not live life that way. Even if some did, they never expected America to nonetheless provide them with a comfortable middle-class life. They were hard working and frugal. They shared the same values as Sam Walton. Wal-Mart is famous for the corporate culture of frugality, even among its top executives.[39] Meanwhile, lawmakers attend lavish fundraisers with lobbyists and travel on private jets at taxpayer expense.[40]

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repeal-of-glass-steagall-caused-the-financial-crisis. See also *The Long Demise of Glass-Steagall*, *supra* note 6. These two articles concisely explain the history of Glass-Steagall and the central thesis of Packer's book.

[27] PACKER, *supra* note 1, at 348.

[28] Randall Kroszner and Raghuram Rajan, *Is the Glass-Steagall Act Justified? A Study of the U.S. Experience with Universal Banking Before 1933*, 84 AM. ECON. REV., No. 4, 810-32 (1994).

[29] *Id*. at 812.

[30] *Id*. at 811-14.

[31] William Harrison, Jr., *In Defense of Big Banks*, N.Y. TIMES, Aug. 23, 2012, at A25.

[32] *Id*.

[33] Yaron Brook and Don Watkins, *Why the Glass-Steagall Myth Persists*, FORBES (Nov. 12, 2012, 10:04 a.m.), http://www.forbes.com/sites /objectivist/2012/11/12/why-the-glass-steagall-myth-persists/.

[34] TOM BROKAW, THE GREATEST GENERATION xix (1998).

[35] *Id*. at xx.

[36] *Id*.

[37] PACKER, *supra* note 1, at 334-44.

[38] *Id*.

[39] CHARLES FISHMAN, THE WAL-MART EFFECT: HOW THE WORLD'S MOST POWERFUL COMPANY REALLY WORKS—AND HOW IT'S TRANSFORMING THE AMERICAN ECONOMY 31 (2006) (noting among other things that the offices of senior executives are extremely spartan, often consisting of old mismatched furniture, and that executives would probably bring a pen from home, rather than go to the trouble of requesting one).

[40] Abby Phillip, *Senators fly high on taxpayers' dime*, POLITICO MAG. (June 11, 2009, 4:21 a.m.), http://www.politico.com/news/stories/0609 /23615.html.

But to Packer, Wal-Mart is the enemy and big government is the savior. He argues that America declined when it became more like Wal-Mart and got "cheap."[41] But perhaps he has this wrong. The problem is not that America became cheap—it is that it stopped being cheap.

IV. Conclusion

The human narratives in *The Unwinding* are entertaining as stand-alone short articles. But the whole is not greater than the sum of the individual parts. It does not present any compelling arguments for enacting more government regulations like Glass-Steagall, which was probably the reason for the book in the first place. Because the book does not support any broad conclusions or lead to a greater understanding of any issue, it is of little value for a military officer's professional development.

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[41] Packer, *supra* note 1 at 105.

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 TJAGLCS CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty servicemembers and civilian employees must obtain reservations through their directorates' training office. U.S. Army Reserve (USAR) and Army National Guard (ARNG) Soldiers must obtain reservations through their unit training offices.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department, at (800) 552-3978, extension 3172.

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

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

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

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

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

2. Continuing Legal Education (CLE)

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

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

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

b. The Naval Justice School (NJS).

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

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

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

3. Civilian-Sponsored CLE Institutions

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

AAJE:	American Academy of Judicial Education P.O. Box 728 University, MS 38677-0728 (662) 915-1225
ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200
AGACL:	Association of Government Attorneys in Capital Litigation Arizona Attorney General's Office ATTN: Jan Dyer 1275 West Washington Phoenix, AZ 85007 (602) 542-8552
ALIABA:	American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS or (215) 243-1600
ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697

	(202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University Law School 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
MC Law:	Mississippi College School of Law 151 East Griffith Street Jackson, MS 39201 (601) 925-7107, fax (601) 925-7115
NAC	National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (803) 705-5000
NDAA:	National District Attorneys Association 44 Canal Center Plaza, Suite 110 Alexandria, VA 22314 (703) 549-9222

NDAED:	National District Attorneys Education Division 1600 Hampton Street Columbia, SC 29208 (803) 705-5095
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 (in MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968

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

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

a. The JAOAC is mandatory for the career progression and promotion eligibility for all Reserve Component company grade judge advocates (JA). 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 December.

b. Phase I (nonresident online): Phase I is limited to USAR and ARNG 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, students must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC, they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrollment in Phase I, please go to JAG University at https://jagu.army.mil. At the home page, find JAOAC registration information at the "Enrollment" tab.

c. Phase II (resident): Phase II is offered each December at TJAGLCS. Students must have completed and passed all non-writing Phase I modules by 2359 (EST) 1 October in order to be eligible to attend Phase II in the same fiscal year as the 1 October deadline. Students must have submitted all Phase I writing exercises for grading by 2359 (EST) 1 October in order to be eligible to attend Phase II in the same fiscal year as the 1 October deadline.

d. Phase II includes a mandatory Army Physical Fitness Test (APFT) and height and weight screening. Failure to pass the APFT or height and weight may result in the student's disenrollment.

e. If you have additional questions regarding JAOAC, contact LTC Andrew McKee at (434) 971-3357 or andrew.m.mckee2.mil@mail.mil.

5. Mandatory Continuing Legal Education

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

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

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

d. Regardless of how course attendance is documented, it is the personal responsibility of JAs 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 JAs in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

e. Please contact the TJAGLCS CLE Administrator at (434) 971-3307 if you have questions or require additional information.

Current Materials of Interest

1. The USALSA Information Technology Division and JAGCNet

a. The USALSA Information Technology Division operates a knowledge management, and information service, called JAGCNet. Its primarily mission is dedicated to servicing the Army legal community, but alternately provides Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGLCS publications available through JAGCNet.

b. You may access the "Public" side of JAGCNet by using the following link: http://www.jagcnet.army.mil. Do not attempt to log in. The TJAGSA publications can be found using the following process once you have reached the site:

(1) Click on the "Legal Center and School" link across the top of the page. The page will drop down.

(2) If you want to view the "Army Lawyer" or "Military Law Review," click on those links as desired.

(3) If you want to view other publications, click on the "Publications" link below the "School" title. This will bring you to a long list of publications.

(4) There is also a link to the "Law Library" that will provide access to additional resources.

c. If you have access to the "Private" side of JAGCNet, you can get to the TJAGLCS publications by using the following link: http://www.jagcnet2.army.mil. Be advised that to access the "Private" side of JAGCNet, you MUST have a JAGCNet Account.

(1) Once logged into JAGCNet, find the "TJAGLCS" link across the top of the page and click on it. The page will drop down.

(2) Find the "Publications" link under the "School" title and click on it.

(3) There are several other resource links there as well. You can find links the "Army Lawyer," the "Military Law Review," and the "Law Library."

d. Access to the "Private" side of JAGCNet is restricted to registered users who have been approved by the Information Technology Division, and fall into one or more of the categories listed below.

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

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

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

(4) FLEP students;

(5) 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.

e. Requests for exceptions to the access policy should be e-mailed to: itdservicedesk@jagc-smtp.army.mil.

f. If you do not have a JAGCNet account, and meet the criteria in subparagraph d. (1) through (5) above, you can request one.

(1) Use the following link: https://www.jagcnet.army.mil/Register.

(2) Fill out the form as completely as possible. Omitting information or submitting an incomplete document will delay approval of your request.

(3) Once you have finished, click "Submit." The JAGCNet Service Desk Team will process your request within 2 business days.

g. Contact information for JAGCNet is 703-693-0000 (DSN: 223) or at itdservicedesk@jagc-smtp.army.mil

2. The Judge Advocate General's Legal Center and School (TJAGLCS)

a. Contact information for TJAGLCS faculty and staff is available through the JAGCNet webpage at https://www.jagcnet2.army.mil. Under the "TJAGLCS" tab are areas dedicated to the School and the Center which include department and faculty contact information.

b. TJAGLCS resident short courses utilize JAG University in a "blended" learning model, where face-to-face resident instruction ('on-ground') is combined with JAGU courses and resources ('on-line'), allowing TJAGLCS short course students to utilize and download materials and resources from personal wireless devices during class and after the course. Personnel attending TJAGLCS courses are encouraged to bring a personal wireless device (e.g. laptop or tablet) to connect to our free commercial network to access JAGU course information and materials in real-time. Students must have their AKO username and password to access JAGU unless the wireless device has a Common Access Card (CAC) reader. Additional details on short course operations and JAGU course access are provided in separate correspondence from a Course Manager.

c. Personnel desiring to call TJAGLCS can dial via DSN 521-3300 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 TJAGLCS Information Technology Division at (434) 971-3264 or DSN 521-3264.

3. Distributed Learning and JAG University (JAGU)

a. *JAGU:* The JAGC's primary Distributed Learning vehicle is JAG University (JAGU), which hosts the Blackboard online learning management system used by a majority of higher education institutions. Find JAGU at https://jagu.army.mil.

b. *Professional Military Education:* JAGU hosts professional military education (PME) courses that serve as prerequisites for mandatory resident courses. Featured PME courses include the Judge Advocate Officer Advanced Course (JAOAC) Phase 1, the Pre-Advanced Leaders Course and Pre-Senior Leaders Course, the Judge Advocate Tactical Staff Officer's Course (JATSOC) and the Legal Administrator Pre-Appointment Course.

c. *Blended Courses:* TJAGLCS is an industry innovator in the 'blended' learning model, where face-to-face resident instruction ('on-ground') is combined with JAGU courses and resources ('on-line'), allowing TJAGLCS short course students to utilize and download materials and resources from personal wireless devices during class and after the course. Personnel attending TJAGLCS courses are encouraged to bring a personal wireless device (e.g. laptop, iPad, tablet) to connect to our free commercial network to access JAGU course information and materials in real-time. Students must have their AKO user name and password to access JAGU unless the wireless device has a Common Access Card (CAC) reader. Additional details on short-course operations and JAGU course access are provided in separate correspondence from a Course Manager.

d. *On-demand self-enrollment courses and training materials:* Self enrollment courses can be found under the 'Enrollment' tab at the top of the JAGU home page by selecting course catalog. Popular topics include the Comptrollers Fiscal Law Course, Criminal Law Skills Course, Estate Planning, Law of the Sea, and more. Other training materials include 19 Standard Training Packages for judge advocates training Soldiers, the Commander's Legal Handbook, and specialty sites such as the SHARP (Sexual Harassment/Assault Response and Prevention) site and the Paralegal Proficiency Training and Resources site.

e. *Streaming media:* Recorded lectures from faculty and visiting guests can be found under the JAGU Resources tab at the top of the JAGU home page. Video topics include Investigations Nuts and Bolts, Advanced Contracting, Professional Responsibility, Chair Lectures and more.

f. *Contact information:* For more information about Distributed Learning/JAGU, contact the JAGU help desk at https://jagu.army.mil (go to the help desk tab on the home page), or call (434) 971-3157.

The Judge Advocate General's Legal Center & School
U.S. Army
ATTN: JAGS-ADA-P
Charlottesville, VA 22903-1781