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Lore of the Corps

“JAG Corps Couples”: A Short History of Married Lawyers in the Corps

Fred L. Borch
Regimental Historian & Archivist

For some years now, “Judge Advocate General (JAG) Corps Couples”—Army lawyers married to each other—have been a part of our Corps. Today, this is nothing unusual, since the Corps is twenty-six percent female,¹ and more than a few judge advocates are married to other current or former judge advocates. In the early 1970s, however, with a gender-segregated Army still in existence (the Women’s Army Corps was not abolished until 1978) and with fewer than ten women total in the entire Corps in mid-1972,² husband-and-wife attorneys who entered the Corps *at the same time* were both a novelty and a rarity.³

The first JAG Corps couples were members of the 65th Judge Advocate Officer Basic Course (OBC). This class, which was in session at The Judge Advocate General’s School (TJAGSA) from 21 August to 13 October 1972, had “the first two JAG husband-and-wife lawyer teams to serve together.”⁴ They were Captains (CPTs) Joyce E. and Peter K. Plaut and CPTs Joseph W. and Madge Casper. The Plauts were graduates of the University of Michigan’s law school in 1971 and 1972, respectively. The Caspers were 1971 graduates of Case Western Reserve University School of Law. When the two couples graduated the OBC, the Caspers were assigned to the Washington, D.C., area, while the Plauts went to Germany.⁵ When CPTs Joyce Plaut and Madge Casper pinned the crossed-pen-and-sword insignia on their collars in 1972, the total number of female judge advocates jumped from nine to eleven. Only one of the two

women remained in the Corps for a career: Joyce Plaut, later Joyce Peters. She retired as a colonel in 1994.⁶



Captains Joseph W. (left) and Madge Casper (right) were members of the 65th Basic Course.



Captains Peter K. (third row, first from the right) and Joyce E. Plaut (first row) (later Joyce Peters) were members of the 65th Basic Course.

¹ E-mail from Colonel Corey Bradley, Chief, Pers. Plans & Training Office, Office of the Judge Advocate Gen., The Pentagon, Wash., D.C., to author (30 May 2014, 04:52 PM).

² *Id.* By comparison, the active component Corps had 511 female judge advocates as of June 2014.

³ While there have been—and will continue to be—judge advocates married to each other, this article focuses on those who entered the Corps at the same time, and were already married to each other.

⁴ ALUMNI NEWSLETTER, THE JUDGE ADVOCATE GEN.’S SCHOOL, 1 Oct. 1972, at 4.

⁵ Two other judge advocates of note in the 65th Basic Course were Coast Guard Lieutenant Winona G. Dufford and Army Captain Fredric I. Lederer. Dufford was one of the two women lawyers then in the U.S. Coast Guard. A graduate of the University of Connecticut’s law school, she was stationed in New Orleans after graduation. Lederer, a 1971 Columbia Law School graduate, later taught criminal law at The Judge Advocate General’s School, U.S. Army and was the principal author of the Military Rules of Evidence promulgated in 1980. After leaving active duty to take a teaching position at William and Mary’s law school, Lederer remained active in the Army Reserve. He retired as a colonel and was made a Distinguished Member of the Regiment in 1998.

⁶ Colonel Joyce E. Peters was the first female judge advocate to serve as a Corps Staff Judge Advocate (I Corps, 1992–93) and the only judge advocate in history to serve as the Senior Military Advisor to the Secretary of the Army (1993–1994). She was the first female Army lawyer to be decorated with the Distinguished Service Medal, the Army’s highest award for service. Lieutenant Commander Danielle Higson, Major Mary Milne & Major Hana Rollins, Oral History of Colonel (Retired) Joyce E. Peters (May 2012).

Other JAG Corps Couples followed. Captains Nancy M. and Frank D. Giorno were members of the 71st Basic Course, which was in session from 7 January to 1 March 1974.⁷ The Giornos had both graduated from the University of Baltimore School of Law in 1973.⁸ Captains Coral C. and James H. Pietsch, both 1974 graduates of Catholic University Law School, were members of the 74th Basic Course. Captain Pietsch would later make history as the first female brigadier general in the Corps and the first Asian-American female Army officer to wear stars. She also is the first half of a JAG Corps couple to reach flag rank, as her judge advocate spouse also transferred to the Army Reserve after completing his tour of active duty. Brigadier General Pietsch was the Chief Judge (Individual Mobilization Augmentee) at the Army Court of Criminal Appeals when she retired from the Army Reserve in July 2006.⁹

History was made again on 22 October 1974, when the 75th Basic Course began and *three* husband-and-wife teams joined their fellow students in the class. They were Captains Myrna A. and Robert W. Stahman, Cherie L. and Robert R. Shelley, and Vicky and Jack J. Schmerling. When the course graduated on 18 December 1974, the Stahmans left Charlottesville for Germany, while the Shelleys went to Fort Ord, California. As for the Schmerlings, they had their initial assignments at Fort Meade, Maryland.¹⁰



The 75th Basic Course, which began on 22 October 1974 and finished on 18 December 1974, had three married couples in it: Captains Myrna A. and Robert W. Stahman (left), Cherie L. and Robert R. Shelley (center), and Vicky and Jack J. Schmerling (right).

⁷ Captain John D. Altenburg, Jr., who would later be promoted to major general and serve as The Assistant Judge Advocate General from 1997 to 2001, was also a member of this class.

⁸ THE JUDGE ADVOCATE GENERAL'S SCHOOL, 71ST BASIC CLASS DIRECTORY 15 (1974).

⁹ In May 2012, the U.S. Senate confirmed Brigadier General (Retired) Pietsch to serve as Judge, U.S. Court of Appeals for Veterans Claims.

¹⁰ THE JUDGE ADVOCATE GENERAL'S CORPS, JAGC PERSONNEL AND ACTIVITY DIRECTORY, 1 Oct. 1976, at 61–62.

Other married couples who entered the Corps in the 1970s include: Captains Albert R. and Cathy S. Cook, members of the 80th Basic Course (both of whom were 1975 graduates of the University of Florida School of Law),¹¹ and CPTs Connie S. and Sanford W. Faulkner and Michelle D. and Scott O. Murdoch, who were members of the 85th Basic Course.

Over the years, many more JAG Corps Couples have entered our ranks. One is worth mentioning in closing: First Lieutenant Flora D. Darpino and First Lieutenant Christopher J. O'Brien, who were married to each other when they entered the 112th Basic Course in January 1987. Both graduated from Gettysburg College and completed law school at the University of Rutgers-Camden. Both stayed for a full career, with Lieutenant General Darpino assuming duties as the Army's 39th Judge Advocate General in 2013. While she represents a number of historical firsts, for purposes of this article, Lieutenant General Darpino is important as the first half of a JAG Corps Couple to wear three stars in our Corps.

A final historical note: From the beginning, there was never any intentional recruiting or soliciting of married couples to join the Corps.¹² On the contrary, the entry of husband-and-wife attorney teams resulted from a combination of factors. First, the end of the all-male draft in the 1970s and a recognition that the Army could not meet its future manpower needs without female Soldiers naturally led to an increased emphasis on inviting women to don Army green—and the Corps similarly was increasingly interested in filling its ranks with women. Second, the rise of feminism in American society, and increased opportunities for women in business and the professions, resulted in many more women attorneys (today, in fact, almost fifty percent of law degrees are earned by women).¹³ Since some of these female attorneys were married to male attorneys, this inevitably led to both husband and wife signing up for a tour of duty as “JAGs” in the 1970s.

As the Corps moves through the second decade of the 21st century, the existence of JAG Corps Couples might seem like a “dog bites man” story. But it was not always so. While married couples do continue to join the Corps at the same time, a more likely scenario is the one that occurred in the 169th Basic Course. In this class, which began on 2 January 2006 and graduated on 7 April 2006, three single male and three single female judge advocates who met each other in the class were married after graduation. They were:

¹¹ Captain Andrew S. Efron, who would later serve as Chief Judge, U.S. Court of Appeals for the Armed Forces, was a classmate of the Cooks.

¹² E-mail from Major General (Retired) William K. Suter, to author (27 May 2014, 1:40PM) (on file with author). The subject of the e-mail was JAG Corps Couples.

¹³ Am. Bar Ass'n, *A Current Glance at Women in the Law*, http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_feb2013.authcheckdam.pdf (last visited June 10, 2014).

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

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

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

Correction. The last paragraph of the May 2014 "Lore of the Corps" about Major General Eugene M. Caffey discusses the last Officer Efficiency Report given him as TJAG, and quotes language from "General W. Bruce Palmer, the Vice Chief of Staff of the Army." This is wrong; the officer writing Caffey's efficiency report in fact was General Williston Birkheimer Palmer. The author mistakenly confused this officer, who graduated from West Point in 1919, with General Bruce Palmer Jr., who graduated from West Point in 1936, and was Vice Chief of Staff at a later time (1968 to 1972). The author regrets this error.

Closing the Gap in Access to Military Health Care Records: Mandating Civilian Compliance with the Military Command Exception to the HIPAA Privacy Rule

Major Dane B. Getz*

*Commanders play a critical role in the health and well-being of their Soldiers, and therefore require sufficient information to make informed decisions about fitness and duty limitations. Commanders must receive appropriate, timely information from medical personnel when health problems exist that may impair a Soldier's fitness for duty We must balance the Soldier's right to the privacy of his/her protected health information . . . with mission requirements and the commander's right to know.*¹

I. Introduction

A Reserve Component (RC) commander of a signal battalion is assigned to the 335th Signal Command (Theater), a multi-composition² Army Reserve (AR) command. The nearest military installation with a Medical Treatment Facility (MTF) is two hours away from each of his units. Although the battalion consists almost exclusively of Troop Program Unit (TPU)³ Soldiers, the commander also has a number of Active Guard Reserve (AGR)⁴ and Active Duty (AD) Soldiers. The AD Soldiers are the backbone of the unit since they are its principal full-time asset and act as the commander's eyes, ears, and hands between regularly-scheduled battle assemblies (BAs).⁵

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¹ All Army Activities Message, 282049Z May 10, U.S. Dep't of Army, subject: ALARACT Vice Chief of Staff of the Army (VCSA) Sends on Protected Health Information (PHI) para. 1 [hereinafter VCSA Sends Message] (from the former Vice Chief of Staff of the Army, General Peter W. Chiarelli).

² The Army Reserve (AR) has a number of multi-component units consisting of Troop Program Unit (TPU), Active Guard Reserve (AGR), and Active Duty (AD) Soldiers. For example, the 9th Theater Support Command at Fort Belvoir, VA. See Paul Turk, *Army Creates Multi-Compo Training Support Command*, 46 ARMY RES. MAG. 11 (2003). As of 1 May 2014, there are approximately 212 AD Soldiers serving in multi-composition Army Reserve (AR) units. E-mail from Chief Warrant Officer Three Pamela Elliott, USARC G-1 (1 May 2014) (on file with author) [hereinafter Elliott e-mail].

³ U.S. DEP'T OF ARMY, REG. 140-1, ARMY RESERVE MISSION, ORGANIZATION, AND TRAINING app. A, at 94 (20 Jan. 2004). While AR 140-1 defines a TPU as "[a] TOE or TDA unit of the USAR organization which serves as a unit on mobilization or one that is assigned a mobilization mission[.]" the Reserve Component (RC) also uses this as an adjectival term to denote all Soldiers (TPU Soldiers) assigned to RC units who do not serve under the authority of Title 10 of the U.S. Code on a full-time basis (i.e., AGR and AD Soldiers). See, e.g., *id.* para. 3-9a.

⁴ U.S. DEP'T OF ARMY, REG. 135-18, THE ACTIVE GUARD RESERVE (AGR) PROGRAM glossary, at 24 (1 Nov. 2004). Army Regulation 135-18 defines AGR Soldiers as members of "[t]he Army National Guard of the United States (ARNGUS) and Army Reserve personnel serving on AD under Title 10, U.S. Code, section 12301(d), and Army National Guard (ARNG) personnel serving on full-time National Guard duty (FTNGD) under Title 32, U.S. Code, section 502(f)." *Id.*

⁵ Battle assembly was historically known as drill. It is now the current term used to describe the AR weekend training assembly. See Rob Schuette,

The battalion is deploying in six months. In preparation for deployment, the commander works closely with Human Resources Command (HRC) to obtain a knowledgeable, experienced operations sergeant. Human Resources Command assigns a senior active duty E-8 with two previous deployments and eighteen-and-a-half years of active federal service. The closer the unit gets to deployment, however, the more the noncommissioned officer (NCO) begins to miss duty, ostensibly for medical reasons, which adversely impacts the unit's ability to adequately plan and prepare for deployment. The NCO tells the commander he is currently seeing four civilian health care providers (CHPs):⁶ a primary care physician, a neurologist, a pain management specialist, and a psychiatrist. The NCO also claims that CHPs have diagnosed him with fibromyalgia and an anxiety disorder, restricted his duties, and placed him on medication that impairs his ability to drive and stay awake during duty hours. The commander directs the NCO to sign a Department of Defense Form 2870,⁷ authorizing release of his civilian medical records (protected health information (PHI))⁸ so the command surgeon can review his records, substantiate his condition, and determine his fitness for duty.

Battle Assembly, Army Reserve Expeditionary Force New Terms, TRIAD ONLINE, May 13, 2005, <http://www.mccooy.army.mil/vnewspaper/triad/05132005/battleassembly.htm>.

⁶ For purposes of this article, civilian health care providers (CHPs) refer to the following persons/entities: (1) all licensed civilian medical doctors, including those who specialize in family medicine, internal medicine, general and specialized surgery, podiatry, anesthesiology, otolaryngology, neurology, pain management, and all other areas of physical specialization; (2) all licensed mental health care professionals to include psychologists, psychiatrists, therapists, and counselors; (3) all licensed physicians' assistants, registered nurses (emergency, operating, general, etc.), radiologists, physical therapists, pharmacists and laboratory technicians; (4) all civilian hospitals, medical clinics, and pharmacies; and (5) all dentists and dental assistants.

⁷ U.S. Dep't of Def., DD Form 2870, Authorization for Disclosure of Medical or Dental Information (Dec. 2003); see *infra* note 9 (discussing the legality of such an order).

⁸ The term protected health information (PHI) is used throughout the article to refer to both civilian and military electronic and paper PHI. See the definition provided in the Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. § 160.103 (2012). The Privacy Rule defines PHI as "health information," which includes "individually protected health information," that lists or describes an individual's past, present, and future mental and physical diagnosis, medication and treatment history and plan, demographic information, and any other information that provides a reasonable basis to identify an individual. *Id.* § 160.103.

The commander contacts Headquarters, explains the situation, and requests a replacement. Headquarters informs him that it will not replace the NCO until he obtains the NCO's PHI and has the command surgeon substantiate the NCO's diagnosis, prognosis, duty limitations, and deployability. In the meantime, the NCO begins to absent himself from duty between three to four times a week, and, on at least three occasions, faxes in cryptic notes from a local civilian Urgent Care Clinic on the signature of two different physicians' assistants stating, "Cannot perform duties—remain off work."

During the weekend BA, the NCO is overheard saying, "I'll be damned if I'm going to deploy again," and, "I have a plan to avoid deployment, get my twenty years of active federal service, and retire with a Veteran's Administration disability determination." Later that week, two of the NCO's CHPs respond to the commander's medical release requests and deny them, indicating they will only provide the NCO's PHI if he executes civilian release forms in the commander's favor, which the NCO has declined to do. To make matters worse, the Sergeant Major subsequently receives a frantic call from the NCO's wife stating her husband became extremely intoxicated while cleaning his semi-automatic pistol, got a strange look in his eye and said, "I am never going to let them deploy us again."

The commander needs the NCO's PHI as soon as possible to determine his continued fitness for duty and assess whether he may pose a danger to himself and others. In writing, he directs the NCO to do the following: (1) provide him with copies of his PHI as soon as possible; (2) sign civilian medical release forms in his favor, allowing him direct access to the NCO's PHI and authorizing CHPs to discuss the NCO's condition with the commander;⁹ and (3) bring copies of relevant portions of his PHI to an emergency mental health care appointment the commander has scheduled.

⁹ Although a reasonable reading of both U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF FITNESS (14 Dec. 2007) (RAR, 4 Aug. 2011) [hereinafter AR 40-501] and the TRICARE OPERATIONS MAN. 6010.56-M (Feb. 1, 2008) [hereinafter TOM], available at <http://www.manuals.tricare.osd.mil/DisplayManual.aspx?Series=T3TOM>, support the argument that commanders have the authority to order AGR and AD Soldiers to sign civilian medical release forms in their favor and/or turn over copies of their civilian PHI directly to commanders, the legality of these orders could be challenged. A counterargument is that the Department of Health and Human Services (DHHS) and the Department of Defense (DoD) purposely omitted such a specific requirement in the Standards for Privacy of Individually Identifiable Health Information, as well as the TRICARE regulations because neither the DHHS nor DoD wanted commanders to exercise such authority. Assuming for a moment the validity of this argument, this raises the question: what right does an O-3 commander have to invalidate the regulatory protections provided by the Secretary of the DHHS and/or the Secretary of Defense? Although the author believes such orders are valid and enforceable under current military law and regulation, the author found no case law specifically addressing the legality of such an order in this context. Consequently, the issue must be regarded as open to debate. Notwithstanding this fact, regulatory support for such orders can be found at AR 40-501, *infra*, paras. 8-3, 9-3, and the TOM, *infra*, ch. 17, sec. 2, para. 7.2.

The NCO drags his feet. First, he claims the CHPs have informed him it will take at least forty-five to sixty days to copy and forward his PHI to the unit, and even though he initially signs civilian medical release forms, he later inexplicably revokes these releases.¹⁰ Next, he misses several MTF appointments, and when he does attend, he fails to bring his civilian PHI, thus impairing the ability of Department of Defense (DoD) health care providers¹¹ to fully substantiate his claim of fibromyalgia. He then instructs CHPs not to disclose his PHI directly to DoD health care providers. Finally, he fails to cooperate with the DoD behavioral health care specialist by failing to fully answer her questions.

As the unit's judge advocate (JA), you advise the commander of his nonjudicial, adverse administrative, and medical separation options; however, none of these courses of action will provide the commander with a timely solution to the problem of how to gain immediate access to the NCO's PHI, evaluate his physical and mental condition, coordinate adequate mental health care services if and as needed, and obtain a replacement before the unit deploys in thirty days.

Frustrated, the commander calls the CHPs and asks to discuss the NCO's physical and mental condition with them directly, requesting copies of the NCO's PHI. Civilian health care providers tell the commander the Health Insurance Portability and Accountability Act's (HIPAA's)¹² Privacy Regulation (the Privacy Rule)¹³ prevents them from

¹⁰ Under current federal regulation, Soldiers are entitled to revoke civilian medical release forms at any time, for any reason, provided the revocation is in writing. Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. § 164.508(b)(5) (2012); see U.S. DEP'T OF HEALTH & HUMAN SERVS., *Frequently Asked Questions, Authorization Use and Disclosure*, <http://www.hhs.gov/ocr/privacy/hipaa/faq/authorizations/474.html>.

¹¹ For purposes of this article, "DoD health care providers" refer to the following persons/entities: all DoD military physicians, physical therapists, physicians' assistants, dentists, dental assistants, pharmacies, nurses, laboratory and radiological technicians, and their supporting medical and dental staffs that provide or assist in providing physical or mental or dental health care services to members of the Armed Forces and/or their families within fifty miles of a medical treatment facility (MTF) or military medical or dental facility. It also includes all federal civilian employees or contract employees who work for the federal government on a full- or part-time basis and who provide physical, mental, or dental health care services to members of the Armed Forces and/or their families within fifty miles of an MTF or military or civilian medical or dental facility. It does *not* include civilian health care providers or their assistants, staffs, hospitals, clinics, and pharmacies that provide medical, mental, or dental services to active duty servicemembers and/or their family members more than fifty miles from a MTF or military medical or dental facility and who are neither federal civilian employees nor full- or part-time federal health care contractors.

¹² Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996) [hereinafter HIPAA].

¹³ Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. §§ 160, 164 (2012). The entire group of HIPAA PHI Privacy Regulations is collectively known as "the Privacy Rule." U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF CIVIL RIGHTS, SUMMARY OF THE HIPAA PRIVACY RULE (2003) [hereinafter the DHHS PRIVACY RULE].

discussing the NCO's physical and mental condition with him and providing him with copies of the NCO's PHI absent a signed civilian release. You respond by informing attorneys for the CHPs of the Military Command Exception¹⁴ to HIPAA's Privacy Rule, but they counter by noting that the Military Command Exception is discretionary, not mandatory, and indicate their clients will not honor it in the absence of a signed release from the NCO out of concern for violating HIPAA's Privacy Rule.

This unfortunate scenario highlights the existing disparity in commanders' access to Soldiers' PHI under the current federal regulatory framework governing the privacy of military PHI. Under the current regulatory scheme, military command authorities¹⁵ whose commands, attachments, detachments, and schools are located within the catchment area—defined as forty to fifty miles within the radius of a MTF¹⁶—benefit from unrestricted¹⁷ access to their Soldiers'

SUMMARY], available at <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf>.

¹⁴ 45 C.F.R. § 164.512 (k)(1)(i) (2012) (Standard: Uses and Disclosure for Specialized Government Functions—Military and Veterans Activities—Armed Forces Personnel).

¹⁵ Although the Privacy Rule uses the term “*appropriate military command authorities*,” it does not define the term. *Id.* § 164.512(k)(1)(i) (emphasis added). The DoD defines the term as follows: “All Commanders who exercise authority over an individual who is a member of the Armed Forces, or other person designated by such a commander to receive protected health information in order to carry out an activity under the authority of the Commander.” U.S. DEP’T OF DEF., REG. 6025.18-R, DOD HEALTH INFORMATION PRIVACY REGULATION para. C7.11.1.2.1 (23 Jan. 2003) [hereinafter DOD 6025.18-R]. In its implementing guidance to DoD health care providers and commanders, the U.S. Army Medical Command (MEDCOM) uses the term “*unit command officials*” and defines the term as “commanders, executive officers, first sergeants, platoon leaders and platoon sergeants.” Memorandum from Office of the Surgeon Gen./MEDCOM, to Commanders, MEDCOM Major Subordinate Commands, subject: Release of Protected Health Information (PHI), to Unit Command Officials para. 5e (24 Aug. 2012) [hereinafter MEDCOM PHI Policy Memorandum 12-062]. U.S. DEP’T OF ARMY, REG. 40-66, MEDICAL RECORDS AND ADMINISTRATION AND HEALTHCARE DOCUMENTATION (17 June 2008) [hereinafter AR 40-66] (RAR, 4 Jan. 2010) uses the term “*nonmedical personnel*” and includes “inspectors general; officers, civilian attorneys, and military and civilian personnel of the Judge Advocate General’s Corps; military personnel officers; and members of the U.S. Army Criminal Investigation Command or military police performing official investigations.” *Id.* para. 5-23e. Although there is no discussion in these Regulations on the difference between the terms “*appropriate military command authorities*,” “*unit command officials*,” and “*nonmedical personnel*,” both MEDCOM PHI Policy Memorandum 12-062 and AR 40-66 make reasonable attempts to delineate the full panoply of military personnel commanders routinely authorize access to Soldiers’ PHI. To be as inclusive as possible in recognition of the wide range of personnel who routinely access Soldiers’ PHI for commanders, the term “*military command authorities*” in this article refers to commanders, executive officers, sergeants major, first sergeants, platoon leaders, platoon sergeants, medical officers and their medical staffs, judge advocates and their paralegals, DoD civilian attorneys, and military criminal authorities conducting official investigations.

¹⁶ The TOM appendix defines the catchment area as those “[g]eographic areas determined by the Assistant Secretary of Defense (Health Affairs) (ASD(HA)) that are defined by a set of five digit zip codes, usually within an approximate 40 mile radius of military inpatient treatment facility.” TOM, *supra* note 9, app. B, at 8. However, the TRICARE Prime Remote (TPR) eligibility provisions of the TOM state that for AD Soldiers to

PHI as a matter of Army policy. Conversely, military command authorities whose AD and RC Soldiers utilize CHPs under the TRICARE Prime Remote Program (TPR)¹⁸ lack the same unrestricted access to their Soldiers’ PHI as a matter of law. This is because the Military Command Exception is permissive, not compulsory.¹⁹ Consequently, while the DoD mandates DoD health care providers comply with the Military Command Exception within the catchment area,²⁰ CHPs outside the catchment area can, and regularly do, decline to honor it.²¹ Unfortunately for military command authorities outside the catchment area, there is no existing Department of Health and Human Services (DHHS) regulation or TRICARE contractual provision to compel CHPs to comply with the Military Command Exception and provide Soldiers’ PHI to military command authorities.

The problem is neither esoteric nor academic. There are approximately 77,000 AGR Soldiers in the RC.²² Over 44,000 of these Soldiers utilize TPR outside the catchment

receive health care benefits under TPR, they must have “a permanent duty assignment [and reside at a location] that is greater than 50 miles . . . or approximately [a] one-hour drive from a military medical treatment facility (MTF) or military clinic” *Id.* ch. 17, sec. 1, para. 2.2.1–2.2.2.

¹⁷ The term “unrestricted” is *not* synonymous with “unfettered.” The VCSA Sends Message recognizes two levels of access to Soldiers’ PHI—unrestricted and “excluded” (the author’s term—not used in the VCSA Sends Message). VCSA Sends Message, *supra* note 1, para. 4; see discussion *infra* Part II.D and accompanying notes.

¹⁸ TRICARE is “[t]he uniformed services health care program for active duty service members and their families, retired service members and their dependents, members of the National Guard and Reserve and their families, survivors, and others who are eligible. TRICARE’s primary objective is to deliver world-class health care benefits for all Military Health System (MHS) beneficiaries that provide the highest level of patient satisfaction.” TRICARE PROVIDER HANDBOOK, UNITED HEALTHCARE (2013) [hereinafter TPH], available at https://www.unitedhealthcareonline.com/ccmcontent/ProviderII/UHC/en-US/Assets/ProviderStaticFiles/ProviderStaticFilesPdf/Tools%20and%20Resources/Policies%20and%20Protocols/TRICARE_Provider_Handbook_2013.pdf. Tricare Prime Remote is one of the three health care plan options available to Soldiers who receive health care under the TRICARE Program (Tricare Prime, Extra, and Standard). Tricare Prime Remote is mandatory for AD servicemembers outside the catchment area. TRICARE Program, 32 C.F.R. § 99.17(b)(2) (2012).

¹⁹ 45 C.F.R. § 164.512(k)(1)(i) (2012).

²⁰ This policy is embodied in a combination of three documents: (1) the VCSA Sends Message, *supra* note 1; (2) MEDCOM PHI Policy Memorandum 12-062, *supra* note 15; and (3) U.S. DEP’T OF DEF., INSTR. 6490.08, COMMAND NOTIFICATION REQUIREMENTS TO DISPEL STIGMA IN PROVIDING MENTAL HEALTH CARE SERVICE TO SERVICE MEMBERS (17 Aug. 2011) [hereinafter DODI 6490.08]; see discussion *infra* Part II.D and Part III.

²¹ See discussion *infra* Part III.A.5 and accompanying notes.

²² E-mail from Lawrence Knapp, Ph.D., Specialist in Military Manpower Pol’y, Foreign Affairs, Def., and Trade Div., Congressional Research Serv., Library of Congress (6 May 2014) [hereinafter Knapp e-mail] (on file with author); see also LAWRENCE KAPP, CONG. RESEARCH SERV., RL30802, RESERVE COMPONENT PERSONNEL ISSUES: QUESTIONS AND ANSWERS (2013), <http://www.fas.org/sgp/crs/natsec/RL30802.pdf>. The RC consists of the Army National Guard of the United States, the Army Reserve, the Navy Reserve, the Marine Corps Reserve, the Air National Guard of the United States, the Air Force Reserve, and the Coast Guard Reserve. *Id.*

area.²³ In the AR alone, there are over 16,000 AGR Soldiers,²⁴ most of who utilize TPR,²⁵ and the inability of AR commanders to obtain unrestricted access to these Soldiers' PHI has impaired commanders' ability to fulfill their regulatory duty to ensure their Soldiers' medical readiness complies with Army Regulation (AR) 40-501, *Standards of Medical Fitness*.²⁶

While the adverse consequences from the lack of unrestricted access to Soldiers' PHI outside the catchment area are felt most acutely in the RC, the problem is neither unique nor limited to the RC. At present, there are approximately 11,528 AD Soldiers who utilize TPR outside the catchment area.²⁷ The ability to obtain unrestricted access to AD Soldiers' mental health care PHI when an AD Soldier has demonstrated behavior suggesting he may pose a danger to himself or others is just as important outside the catchment area as it is within the catchment area, and the potential adverse consequences of being unable to access and act upon this information in a timely manner are just as real.

Acknowledging Soldiers' privacy rights must be balanced with the government's interest in ensuring military medical readiness, the DoD has directed changes to the Military Healthcare System (MHS)²⁸ that will, if implemented, assist commanders and military health care providers in the early identification and treatment of suicidal behaviors by Soldiers outside the catchment area. Pursuant to Department of Defense Instruction (DoDI) 6490.08,²⁹ issued on 17 August 2011, the Under Secretary of Defense for Personnel and

Readiness (USD(P&R))³⁰ directed the Director of the Tricare Management Activity (TMA)³¹ to implement procedures whereby CHPs outside the catchment area will be required to disclose Soldiers' mental health care PHI to military command authorities under the nine specific circumstances listed in DoDI 6490.08,³² just as DoD mental health care providers are currently required to do under the DoDI. Although it remains to be seen if, how, and when TMA's successor organization, the Defense Health Agency (DHA),³³ will implement this requirement, it is doubtful this objective can be accomplished without the federal government making significant structural changes to the existing regulatory and/or contractual landscape governing the privacy of Soldiers' PHI.

Part II of this article begins by providing a brief overview of the current statutory, regulatory, and policy framework governing the privacy of Soldiers' PHI in the military. Part III explains how the current regulatory framework has created an illogical, counterintuitive system of disparate command access that is susceptible to abuse by medically non-compliant³⁴ Soldiers, disregarded by

²³ E-mail from Michael P. Griffin, Fellow of Amer. Coll. of Healthcare Execs., Deputy Chief, TRICARE Div., MEDCOM, to author (May 9, 2014) [hereinafter Griffin e-mail] (on file with author). The total number of AD Soldiers who utilize TPR is 119,803, including National Guard personnel. *Id.* In light of the large number of National Guard personnel on AD who utilize TPR, the problem of inadequate access to Soldiers' PHI outside the catchment areas is clearly not limited to the AR.

²⁴ Elliott e-mail, *supra* note 2.

²⁵ Griffin e-mail, *supra* note 23.

²⁶ AR 40-501, *supra* note 9; see discussion *infra* Part III.A.2 and accompanying notes.

²⁷ E-mail from Christin Kim, Axiom Resource Mgmt., Defense Health Agency, Health Plan Execution and Operations (May 5, 2014) [hereinafter Kim e-mail] (on file with author).

²⁸ The Military Healthcare System (MHS) is the name given to the collective group of organizations, agencies, positions, and persons within the DoD whose goal is to achieve DoD's health care mission. See generally U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE TASK FORCE ON THE FUTURE OF MILITARY HEALTH CARE, FINAL REPORT 9 (Dec. 2007). The MHS consists of the Service Surgeons General, eleven MHS component offices and programs, the Defense Centers of Excellence for Psychological Health and Traumatic Brain Injury, Forces, Health Protection and Readiness, TRICARE, the Hearing Center of Excellence, the Vision Center of Excellence, and the Office of the Chief Information Officer. U.S. DEP'T OF DEF., MILITARY HEALTH SYS., *Military Health Organizations, About the MHS*, http://www.health.mil/About_MHS/Organizations/Index.aspx (last visited Mar. 7, 2013).

²⁹ DoDI 6940.08, *supra* note 20.

³⁰ The USD(P&R) is the principal staff assistant and advisor to the Secretary of Defense for Health Affairs and develops policies, plans, and programs for health and medical affairs to provide and maintain medical readiness. U.S. DEP'T OF DEF., DIR. 5124.02, UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS (USD(P&R)) (23 June 2008) [hereinafter DoDD 5124.02].

³¹ The TRICARE Management Activity (TMA) was originally established by DoDD on 31 May 2001. U.S. DEP'T OF DEF., DIR. 5136.12, TRICARE MANAGEMENT ACTIVITY (TMA) (31 May 2001) [hereinafter DoDD 5136.12]. The TMA's mission was to manage the TRICARE health care program for active duty members and their families, retired servicemembers and their families, RC and National Guard members and their families, survivors, and all others entitled to DoD medical care. See News Release, U.S. Dep't of Def., Tricare Management Activity Established (Feb. 24, 1998), <http://www.defense.gov/Releases/Release.aspx?ReleaseID=1591> (last visited June 23, 2014). On 1 October 2013, the DoD established the "Defense Health Agency to manage the activities of the Military Health System, . . . [including those functions] . . . previously managed by the Tricare Management Activity (TMA)," and disestablished the TMA. *About DHA, DEFENSE HEALTH AGENCY*, <http://www.tricare.mil/tma/About/DHA.aspx>. This was done pursuant to the Deputy Secretary of Defense's 11 March 2013 Memorandum entitled, "Implementation of Military Health System Governance Reform." Memorandum from Deputy Sec'y of Def. to Sec'ys of the Military Dep'ts et al., subject: Implementation of Military Health System Governance Reform para. 9 (11 Mar. 2013) [hereinafter MHS Governance Reform Memorandum].

³² DoDI 6490.08, *supra* note 20, para. 4b; see *infra* notes 77-79 and accompanying text (listing the nine circumstances for disclosure).

³³ E-mail from Paul Bley, Chief, Admin. & Civil Law Branch, DHA, to author (Oct. 1, 2012) [hereinafter Bley e-mail] (on file with author).

³⁴ As used in this article, the term "medically non-compliant" refers to Soldiers who intentionally or negligently fail to cooperate in providing full and complete access to PHI to military command authorities. Medical non-compliance includes failure to provide copies of PHI relating to medical readiness, duty status, deployability, and mission capability to military command authorities; failure to execute medical release forms in favor of military command authorities when necessary to determine a Soldier's medical readiness, mission capability, deployability or duty status; and initially providing military command authorities with access to relevant portions of PHI, but subsequently intentionally or negligently impairing, impeding, delaying, or obstructing supplemental access to this information.

unknowledgeable and uncooperative CHPs, and characterized by a lack of uniformity that has adversely impacted medical readiness and ultimately, national security. Part IV of this article proposes two solutions to this problem and examines arguments for and against implementing these changes. Part V of this article describes how the DHHS and DoD could implement these proposed solutions within and across the MHS. This article concludes with the proposition that the benefits of implementing one or both of these proposed solutions clearly outweigh the potential adverse consequences of maintaining the current counterintuitive and counterproductive status quo.

II. The Statutory, Regulatory, and Policy Framework Governing the Privacy of PHI in the Military

A. HIPAA³⁵

Congress passed HIPAA in 1996 and subsequently delegated responsibility to the DHHS to promulgate regulatory standards to protect the privacy of PHI under the authority of HIPAA.³⁶ Despite its extensive size and scope, HIPAA's substance lies in its implementing regulations.³⁷ The comprehensive set of regulations governing both the security and privacy of PHI are known as the Administrative Simplification³⁸ provisions. The portion of the Administrative Simplification provisions designed to protect the security of PHI are referred to singularly as the Security Rule,³⁹ while the set of regulations designed to protect the privacy of PHI is collectively known as the Standards for

Privacy of Individuals' Identifiable Health Information,⁴⁰ and unitarily identified as the Privacy Rule.⁴¹

B. The Privacy Rule

The Privacy Rule is the centerpiece in the legal framework to protect the privacy of PHI.⁴² The Privacy Rule's goals are two-fold: to protect the privacy of individual PHI while simultaneously promoting the disclosure of PHI that is reasonably necessary "to protect the public's health and well-being."⁴³ In this way, the Privacy Rule seeks to strike a balance between individual rights and societal interests.⁴⁴

In disclosing PHI,⁴⁵ a covered entity must comply with the Minimum Necessary Rule (MNR),⁴⁶ which requires a covered entity to "make reasonable efforts"⁴⁷ to request, use, and disclose only the "minimum [amount of information] necessary"⁴⁸ to "satisfy a particular purpose or

³⁵ HIPAA, *supra* note 12. For an overview of the relevant portions of HIPAA related to PHI and additional guidance regarding HIPAA's application within the DoD and the Department of the Army, see Major Temidayo L. Anderson, *Navigating HIPAA's Hidden Minefields: A Leader's Guide to Using HIPAA Correctly to Decrease Suicide and Homicide in the Military*, ARMY LAW., Dec. 2013, at 15.

³⁶ Pursuant to its mandate, the DHHS promulgated a comprehensive set of regulatory standards addressing three primary issues: (1) the privacy rights each individual should have in PHI; (2) the procedures for exercising these privacy rights; and (3) "the uses and disclosures of such information that should be authorized or required." Standards for Privacy of Individual Health Information; Final Rule, 67 Fed. Reg. 53,182 (Aug. 14, 2002) (codified at 45 C.F.R. §§ 160, 164 (2012)); HIPAA, *supra* note 12, § 264(b)(1)–(b)(3). The DHHS enforces HIPAA's privacy regulations through a series of civil and criminal fines and imprisonment. *Id.* § 1176(a)(1)–(b)(3).

³⁷ Stephen K. Phillips, *A Legal Research Guide to HIPAA*, 3 J. HEALTH & LIFE SCI. L. 134, 144 (2010).

³⁸ HIPAA Administrative Simplification, 45 C.F.R. §§ 160, 162, 164 (2012). The DHHS Office of Civil Rights publishes the unofficial text of the combined texts of the Privacy and Security Rules. U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF CIVIL RIGHTS, ADMINISTRATIVE SIMPLIFICATION (unofficial version, as amended through Feb. 16, 2006), available at <http://www.hhs.gov/ocr/privacy/hipaa/administrative/privacyp rule/adminsimplpregtext.pdf>.

³⁹ 45 C.F.R. §§ 164.302–164.318 (2012); see OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH INFORMATION PRIVACY, *The Security Rule*, available at <http://www.hhs.gov/ocr/privacy/hipaa/administrative/securityrule/> (last visited June 23, 2014).

⁴⁰ 45 C.F.R. §§ 164, 162 (2012); DHHS PRIVACY RULE SUMMARY, *supra* note 13, at 1.

⁴¹ DHHS PRIVACY RULE SUMMARY, *supra* note 13, at 1.

⁴² See *supra* note 8 (defining PHI).

⁴³ DHHS PRIVACY RULE SUMMARY, *supra* note 13, at 1.

⁴⁴ *Id.* The Privacy Rule applies to covered entities, i.e., health plans, healthcare clearinghouses and health care providers "who transmit any health information in electronic form in connection with a transaction covered by this subchapter . . ." 45 C.F.R. § 160.103 (2012).

⁴⁵ The Privacy Rule authorizes disclosure of individual PHI under four circumstances: (1) When mandated by the Privacy Rule. Disclosure is mandated when an individual or their personal representative requests access to their own PHI or an accounting of PHI disclosure to another person or entity, and when the DHHS conducts a compliance investigation to determine whether a covered entity complied with the Privacy Rule. (2) Pursuant to an identified exception and individual authorization and the opportunity to agree or object is not required. Disclosure is permitted, but not required, without an individual's authorization and opportunity to agree or object pursuant to one of the twelve "national priority purposes" (exceptions) listed in the Privacy Rule. *Id.* § 164.502(a)(2)(i)–(ii); DHHS PRIVACY RULE SUMMARY, *supra* note 13, at 6; see *infra* note 49 and accompanying text. (3) When permitted pursuant to an exception and the individual is provided the right to consent, acquiesce, or object. A covered entity must obtain a person's written authorization to disclose PHI for any purpose other than "treatment, payment or health care operations otherwise permitted or required by the Privacy Rule," such as, before disclosing psychotherapy notes. *Id.* at 6, 9; 45 C.F.R. §§ 164.508, 164.512(i)(A) (2012). The rule relating to the disclosure of psychotherapy notes is subject to eight exceptions, one of which is to "prevent or lessen a serious and imminent threat to the health or safety of a person or the public." *Id.* (4) When permitted, but only with authorization. DHHS PRIVACY RULE SUMMARY, *supra* note 13, at 9. A covered entity must maintain a patient's written authorization on file to disclose PHI pursuant to the Privacy Rule's authorization provision, and the patient maintains the right to revoke their authorization at any time. 45 C.F.R. § 164.508, 164.508(b)(5) (2012).

⁴⁶ 45 C.F.R. §§ 164.502(b), 164.514(d).

⁴⁷ *Id.* § 164.502(b)(1).

⁴⁸ *Id.*

carry out a [particular] function”⁴⁹ under one of the twelve Privacy Rule exceptions.⁵⁰

The Privacy Rule exception for military personnel is the “essential government functions” exception,⁵¹ which encompasses the Military Command Exception.⁵² In creating the Military Command Exception, the DHHS acknowledged that the unique nature of military service requires Soldiers’ privacy rights to be balanced with the public interest in maintaining a strong national defense, a goal that is advanced by ensuring military command authorities have the ability to access their Soldiers’ PHI and evaluate their physical and mental conditions to achieve and maintain medical readiness.⁵³

⁴⁹ U.S. DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF CIVIL RIGHTS, HEALTH INFORMATION PRIVACY: *Health Information Privacy, Minimum Necessary Requirements*, <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/minimumnecessary.html> (last visited June 11, 2014).

⁵⁰ The twelve exceptions are: when required by law; for public health activities; for health oversight activities; for judicial and administrative proceedings; for law enforcement purposes; for decedents (funeral directors, coroners, or medical examiners); for cadaveric organ, eye, or tissue donations; for research purposes; regarding victims of abuse, neglect, or domestic violence; to avert serious threat to health or safety; regarding workers’ compensation (or similar) laws; and for specialized (essential) government functions, including military, intelligence and national security functions. DHHS PRIVACY RULE SUMMARY, *supra* note 13, at 6.

⁵¹ 45 C.F.R. § 164.512(k)(1)(i). These functions include “assuring proper execution of a military mission, conducting intelligence and national security activities that are authorized by law, providing protective services to the President, [and] making medical suitability determinations for U.S. State Department employees” DHHS PRIVACY RULE SUMMARY, *supra* note 13, at 8.

⁵² Information Paper, TMA Privacy and Civil Liberties Office, Military Command Exception and Disclosing PHI of Armed Forces Personnel (Mar. 2013), *available at* <http://www.tricare.mil/tma/privacy/downloads/Information%20Paper%20-%20Military%20Command%20Exception%20-%20Approved%20March%202013.pdf>. The Military Command Exception (MCE) authorizes appropriate military command authorities to use and disclose Soldiers’ PHI “for activities deemed necessary . . . to assure the proper execution of the military mission . . . ,” subject to the condition that DoD publish notice in the *Federal Register* defining the term “appropriate military command authorities” and listing the purposes for which they may use and disclose Soldiers’ PHI. 45 C.F.R. § 164.512(k)(1)(i). The DoD published required notice on 9 April 2003. DoD Health Information Privacy Program, 68 Fed. Reg. 17,357-02 (Apr. 9, 2003) (codified at 45 C.F.R. § 164.512(k)(1)(i)).

⁵³ The DHHS’s commentary succinctly articulates the MCE’s national security rationale.

This provision’s primary intent is to ensure that proper military command authorities can obtain needed medical information held by covered entities so that they can make appropriate determinations regarding the individual’s medical fitness or suitability for military service Such actions are necessary in order for the Armed Forces to have medically qualified personnel, ready to perform assigned duties. Medically unqualified personnel not only jeopardize the possible success of a mission, but also pose an unacceptable risk or danger to others. We have allowed such uses and disclosures for military activities because it is in the Nation’s interest.

C. DoD Regulations

The DoD implemented the Privacy Rule and the Military Command Exception for all DoD components on 24 January 2003 with the issuance of the Health Information Privacy Regulation, DoD 6025.18-R.⁵⁴ In addition to reiterating the general principle that military command authorities may use and disclose Soldiers’ PHI “for activities deemed necessary . . . to assure the proper execution of the military mission,”⁵⁵ DoD 6025.18-R identifies five specific purposes for which military command authorities may request and use Soldiers’ PHI:

- (1) to determine a Soldier’s fitness for duty, including compliance with other DoD regulatory programs, standards, and directives;⁵⁶
- (2) to determine a Soldier’s fitness to perform a specific order, assignment, or mission, “including compliance with any actions required as a precondition to performance of such mission, assignment, order, or duty,”⁵⁷
- (3) to carry out comprehensive medical surveillance activities;⁵⁸
- (4) to report casualties in connection with military operations or activities;⁵⁹ and
- (5) to “carry out any other activity necessary to the proper execution of the mission of the Armed Forces.”⁶⁰

Army Regulation 40-66, *Medical Records and Administration and Healthcare Documentation*,⁶¹ implements the provision of DoD 6025.18-R within the Department of the Army. The regulation clarifies which personnel qualify as military command authorities that “have

Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,705 (Dec. 28, 2000) [hereinafter DHHS Commentary on the Public Comments to the Privacy Rule] (containing the Privacy Rule and the DHHS’s commentary on the public comments elicited in response to the Privacy Rule when first published). As the Army’s *Report 2020, Generating Health & Discipline in the Force Ahead of the Strategic Reset, 2012*, states, “Ultimately, the goal is to achieve the optimum balance that permits commanders access to the necessary information to enable them to better protect and promote the safety and well-being of Soldiers under their command while at the same time maintaining Soldiers’ right to privacy.” U.S. DEP’T OF ARMY REPORT: ARMY 2020, GENERATING HEALTH & DISCIPLINE IN THE FORCE AHEAD OF THE STRATEGIC RESET, 2012, at 65 (Jan. 19, 2012), *available at* <http://usarmy.vo.llnwd.net/e2/c/downloads/235822.pdf>.

⁵⁴ DoDD 6025.18-R, *supra* note 15.

⁵⁵ *Id.* para. C7.11.1.1.

⁵⁶ *Id.* para. C7.11.1.3.1; *see, e.g.*, U.S. DEP’T OF DEF., DIR. 1308.1, DoD PHYSICAL FITNESS AND BODY FAT PROGRAM (30 June 2004); U.S. DEP’T OF DEF., DIR. 5210.42, NUCLEAR WEAPONS RELIABILITY PROGRAM (16 July 2012).

⁵⁷ DoDD 6025.18-R, *supra* note 15, para. C7.11.1.3.2.

⁵⁸ *Id.* para. C7.11.1.3.3.

⁵⁹ *Id.* para. C7.11.1.3.4.

⁶⁰ *Id.* para. C7.11.1.3.5.

⁶¹ AR 40-66, *supra* note 15.

an official need [to] access [Soldiers' PHI] in the performance of their duties"⁶² Army Regulation 40-66 also identifies nineteen specific activities "necessary to the proper execution of the [military] mission"⁶³ Lastly, and significantly, AR 40-66 also imposes an affirmative obligation on MTF commanders to contact military command authorities and disclose Soldiers' PHI *sua sponte* when they believe a "Soldier's judgment or clarity of thought might be suspect by the clinician and/or . . . [disclosure is necessary] to avert a serious and imminent threat to health or safety of a person, such as suicide, homicide, or other violent action."⁶⁴

D. The DoD Message and Instruction

Former Vice Chief of Staff of the Army (VCSA) General Peter W. Chiarelli clarified Army policy on the privacy of Soldiers' PHI in an All Army Activities (ALARACT) Message 160/2/10.⁶⁵ Acknowledging the "critical role [commanders play] in the health and well-being of their Soldiers,"⁶⁶ the VCSA stated it was essential for commanders to have access to their Soldiers' PHI in a timely manner when Soldiers' health issues adversely affect their fitness for duty.⁶⁷ The VCSA stressed the need for continuous and ongoing "collaborative communication"⁶⁸ between military command authorities and health care providers.⁶⁹ In an attempt to balance Soldiers' privacy interests in their PHI with a commander's need to access this information to maintain medical readiness, the VCSA identified two general categories of access to Soldiers' PHI: unrestricted and excluded.⁷⁰

Commanders have unrestricted access⁷¹ to Soldiers' PHI when it relates to: (1) DoD drug test results; (2) medical readiness and fitness for deployability (e.g., profile status,

medical board, immunization and allergy information, etc.); (3) line of duty investigations; (4) changes in duty status resulting from medical conditions (e.g., appointments, hospitalizations); (5) the weight control program; (6) medical conditions or treatments⁷² that limit or restrict Soldiers' abilities to perform their duties; and (7) "any perceived threat to life or health."⁷³

Commanders are excluded from accessing Soldiers' PHI⁷⁴ when it: (1) has no impact on Soldiers' medical readiness or duty fitness (e.g., the taking of routine medicines such as birth control pills, etc.); (2) relates to "the reason for [Soldiers'] medical appointments, routine medical treatments, clinical service seen, or other information that does not directly affect fitness for duty,"⁷⁵ and (3) relates to family members, except where a family member is in the exceptional family member program and the circumstances of their enrollment will limit a Soldier's duty assignment.⁷⁶

Department of Defense Instruction 6490.08 provides important additional guidance for DoD providers and military command authorities on the use and disclosure of Soldiers' mental health care PHI.⁷⁷ The DoDI establishes a rebuttable presumption of non-disclosure for Soldiers' mental health care PHI and instructs DoD mental health care providers not to disclose Soldiers' mental health care PHI to military command authorities unless a DoD health care provider first determines the information falls within one of the nine exceptions listed in the DoDI.⁷⁸ While eight exceptions are the same as those listed in DTM 09-006,⁷⁹ the ninth is a catch-all exception that permits DoD mental health care providers to disclose mental health care PHI when they determine the special circumstances of the Soldier's military

⁶² *Id.* para. 2-4a(1).

⁶³ *Id.* para. 2-4a(1)(a)1-19. Some of the grounds for disclosure include "to coordinate sick call, routine and emergency care, quarters, hospitalization, and care from civilian providers . . . ," as well as to "report the results of physical examinations and profiling according to AR 40-501," line of duty investigations, accident investigations, the Army Weight Control Program, the Family Advocacy Program, the identification and surveillance of HIV, MEB/PEBs, to conduct "Soldier Readiness Program and mobilization processing requirements according to AR 600-8-101," and when a Soldier is taking medications that "could impair the Soldier's duty performance." *Id.*

⁶⁴ *Id.* para. 2-4a(2), 2-4a(2)(a).

⁶⁵ VCSA Sends Message, *supra* note 1.

⁶⁶ *Id.* para. 1.

⁶⁷ *Id.*

⁶⁸ *Id.* para. 5.

⁶⁹ *Id.* para. 7A.

⁷⁰ *Id.* paras. 3-4; *see supra* note 17 (concerning the author's use of the term "excluded").

⁷¹ *Id.* para. 3.

⁷² *Id.* paras. 3A-3G.

⁷³ *Id.*

⁷⁴ *Id.* paras. 4A-4C.

⁷⁵ *Id.* para. 4B.

⁷⁶ *Id.* para. 4C.

⁷⁷ DoDI 6490.08, *supra* note 20.

⁷⁸ *Id.* para. 3b.

⁷⁹ The eight exceptions are: (1) pursuant to a command-directed mental health evaluation; (2) when a provider believes a Soldier poses a serious risk of harm to himself; or (3) a serious risk of harm to others; or (4) a serious risk of harm to a specific military mission; (5) the Soldier is admitted or discharged from any inpatient mental health or substance abuse treatment facility; (6) the Soldier has an acute mental health condition or is undergoing an acute mental health care treatment regimen that impairs his ability to perform his duties; (7) the Soldier has entered into a formal outpatient or inpatient treatment program for the treatment of substance abuse or dependence; (8) the Soldier is in the Personnel Reliability Program or has been identified as having responsibilities so sensitive or critical that such notification is necessitated. Memorandum from Office of the Under Sec'y of Def. to Sec'ys of the Military Dep'ts et al., subject: Revising Command Notification Requirements to Dispel Stigma in Providing Mental Health Care to Military Personnel attach. 2, para. 1a(1)-(8) (July 2, 2009), available at <http://www.nellis.af.mil/shared/media/document/AFD-110614-048.pdf>.

mission outweigh the Soldier's interests in maintaining the privacy of their PHI.⁸⁰ Lastly, and most importantly, the DoDI requires the DoD to establish procedures requiring CHPs who provide mental health care services to Soldiers outside the catchment area to comply with the same mandatory disclosure requirements applicable to DoD mental health providers within the catchment area. This provision states,

[t]he director, TRICARE Management Activity, under the authority, direction, and control of the Under Secretary of Defense for Personnel and Readiness, shall establish procedures comparable to those in Enclosure 2 for applicability to non-DoD health care providers in the context of mental health care services provided to servicemembers under the TRICARE program.⁸¹

While it is unclear whether this provision constitutes a proactive effort to close an obvious gap in uniform access to Soldiers' mental health care PHI inside and outside the catchment area, or a response to the alarming number of military suicides,⁸² it is arguably the most far-reaching action the DoD has directed to date relating to the privacy of Soldiers' PHI within and across the MHS.

E. Regulatory and Policy Goals

While the penultimate goal of the statutory, regulatory, and policy scheme governing the privacy of Soldiers' PHI is balance, the ultimate objective is national security.⁸³ In implementing these regulations, both DHHS and DoD recognized the national security interest in providing commanders access to "needed medical information held by covered entities so that they can make appropriate

⁸⁰ DoDI 6490.08, *supra* note 20, encl. 2, para. 1b(1)(2).

⁸¹ *Id.* para. 4b (emphasis added); see *supra* note 31 (discussing the disestablishment of the TMA and DHA's assumption of TMA's functions and responsibilities).

⁸² See Lolita Baldor, *Active Duty Military Suicides Dropped Last Year, But Reserves' Went Up*, STARS & STRIPES, Apr. 25, 2014, <http://www.stripes.com/news/us/active-duty-military-suicides-dropped-last-year-but-reserves-went-up-1.279834>; see also Eli Clifton, *Suicide Rate in Military Highest Level in 10 Years*, THINKPROGRESS SECURITY, June 8, 2012, <http://thinkprogress.org/security/2012/06/08/496604/military-suicide/>; Megan McCloskey, *More Soldier Suicides Than Combat Deaths in 2012*, Dec. 20, 2012, STARS & STRIPES, <http://www.stripes.com/news/more-soldier-suicides-than-combat-deaths-in-2012-1.201440>.

⁸³ General Peter W. Chiarelli recognized the link between medical readiness and national security in a speech at the National Security Symposium in Washington, D.C., when he said, Soldiers' medical [fitness] "is absolutely critical to the security of our nation." Ass'n of the U.S. Army News, *Soldier Health, Well-Being, Critical to National Security* (Apr. 1, 2011), www.ausa.org/publication/ausanews/special-reports/2011/4/Pages/Soldierhealth,well-being%E2%80%98critical%E2%80%99tonationalsecurity.aspx.

determinations regarding . . . [their Soldiers'] medical fitness or suitability for military service"⁸⁴ to achieve and maintain the overall health of the force. Given the importance of this national security objective, the DHHS rightfully made no distinction between military command authorities inside and outside the catchment area in promulgating the Military Command Exception. Unfortunately, as DHHS and DoD began to implement the Military Command Exception within and across the MHS, the problems inherent in the DHHS choice of discretionary, as opposed to compulsory language in the Military Command Exception began to surface, and the disparate and adverse impact on the MHS became apparent to Military Command Authorities outside the catchment area.

While recognizing the military imperative for commanders to access their Soldiers' PHI to achieve medical readiness and maintain national security, DHHS unfortunately stripped commanders outside the catchment area of the means necessary to accomplish this end by making the Military Command Exception *discretionary*, not mandatory. In doing so, DHHS thwarted the fundamental objective of the Military Command Exception—to allow commanders much needed access to their Soldiers' PHI in order to achieve and maintain national security.

III. The Problem: The Current Regulatory Framework Creates a Disparity in Commanders' Access to Soldiers' PHI

Despite the discretionary language of the Military Command Exception and DoD 6025.18-R, Army policy mandates DoD health care providers who provide *physical* health care services to Soldiers within the catchment area comply with the Military Command Exception and provide military command authorities unrestricted access to Soldiers' PHI when relevant to their duty status and medical readiness.⁸⁵ Moreover, DoDI 6490.08 mandates DoD behavioral health care providers comply with the Military Command Exception and provide military command authorities with Soldiers' *mental* health care PHI under the nine circumstances enumerated in the DoDI.⁸⁶

On the other hand, there is no comparable regulatory or contractual mechanism outside the catchment area to compel CHPs to comply with the Military Command Exception. Consequently, while military command authorities within the catchment area are able to rely on Army policy to ensure DoD providers provide them with unrestricted access to their Soldiers' PHI, military command authorities outside the

⁸⁴ DHHS Commentary on the Public Comments to the Privacy Rule, *supra* note 53, at 82,705.

⁸⁵ VCSA Sends Message, *supra* note 1; DoD 6025.18-R, *supra* note 15; see also discussion *supra* Part I.I.C.D.

⁸⁶ DoDI 6490.08, *supra* note 20, encl. 2, para. c1; see *supra* notes 77–79 and accompanying text (listing the nine circumstances warranting disclosure).

catchment area are wholly dependent on the unpredictable and unreliable willingness of CHPs to become familiar with, understand the purpose of, and voluntarily honor the Military Command Exception.⁸⁷

A. Examination of the Problem in the Army Reserve

The inability of RC commanders in the AR to obtain unrestricted access to their active duty Soldiers' PHI outside the catchment area has impaired their ability to fulfill their regulatory responsibilities under AR 40-501 and ensure their active duty Soldiers are medically fit for duty and deployment. An examination of this problem as it relates to AGR medical readiness in the AR illustrates this fact.⁸⁸

⁸⁷ Although RC military command authorities can try to circumvent this problem by ordering Soldiers to provide them with copies of their PHI and/or execute civilian medical release forms in their favor, as discussed above, *supra* note 9, these orders can be contested. According to AR physician Dr. (Lieutenant Colonel) (LTC) Bedemi Alaniyi-Leyimu, RC military command authorities routinely encounter problems getting medically non-compliant AGR Soldiers to comply with their orders to provide full and complete initial and supplemental access to their PHI outside the catchment area. Lieutenant Colonel Alaniyi-Leyimu has routinely seen AR and AD Soldiers impair and impede commanders' full and complete access to their PHI when undergoing medical or administrative separation board processing in order to extend their military service as long as possible and stave off potential separation, or when feigning illness. Lieutenant Colonel Alaniyi-Leyimu has served as an AD DoD military health care provider at Martin Army Community Hospital, Fort Benning, Georgia, and as a DoD CHP at Fort McPherson, Georgia. In her civilian capacity, LTC Alaniyi-Leyimu currently works as a CHP in the Piedmont Health Care System in Atlanta, Georgia. In her military capacity, LTC Alaniyi-Leyimu serves as the Command Surgeon for the 335th Signal Command (Theater) as a TPU officer in the AR. Telephone Interview with LTC Alaniyi-Leyimu, Command Surgeon, 335th Signal Command (Theater) (Nov. 23, 2012) [hereinafter Alaniyi-Leyimu Telephone Interview] (on file with author). This has also been the experience of AR physician Dr. LTC (P) Robert Butts, Individual Mobilization Augmentee (IMA), Martin Army Hospital, Fort Benning, Georgia. Telephone Interview with LTC (P) Robert Butts (17 Nov. 2012) [hereinafter Butts Telephone Interview] (on file with author). Lieutenant Colonel (P) Butts has practiced medicine extensively in both the military and civilian community. He has been a physician for eighteen years and has served in the military for twenty-seven years. Lieutenant Colonel (P) Butts' military medical assignments include company commander, 900th Surgical Hospital (mobile), Peoria, IL; flight surgeon, 244th Aviation Command, Fort Sheridan, IL; flight surgeon, 5th Special Force Group, Fort Campbell, KY; medical officer, 723d Main Support Company, Special Operations Command, Perrine, FL. In his present civilian capacity, LTC (P) Butts is the Regional Medical Director of eight hospital emergency rooms throughout Illinois and supervises forty full- and part-time CHPs. This has also been the author's professional experience as an AGR judge advocate in the AR from 2002 to 2014 [hereinafter Professional Experience]; *see also* discussion, *infra* Part III.A.3-5.

⁸⁸ While AR 40-501's medical readiness requirements apply to all Soldiers in the AR, including AD Soldiers assigned or attached to multicomponent units, this article focuses on the problem as it relates to AGRs since they are the AR's principle full-time military support. Knapp e-mail, *supra* note 22, at 6.

1. The Regulatory Framework for Medical Readiness in the AR

As in the AD, medical readiness in the AR is a shared responsibility between commanders and Soldiers.⁸⁹ Army Regulation 40-501 requires AR commanders to ensure AGR Soldiers assigned to their units "complete all medical readiness requirements"⁹⁰ and ensure their Soldiers' medical status is "properly documented . . . and . . . [that] the appropriate follow-up action is taken in regards to . . . [their] medical or readiness status."⁹¹ Like their AD counterparts, AR commanders have a right and responsibility to collect, review, and continually monitor AGR Soldiers' PHI to determine their duty restrictions; whether they are taking medications that may adversely affect or limit their duty performance; current immunization status; the need for, and the basis of, temporary or permanent profiles; and their Soldiers' general fitness for duty.⁹² Conversely, AR 40-501 requires AGR Soldiers to maintain their medical and dental readiness by "seek[ing] timely medical advice whenever they have reason to believe that a medical condition or physical defect affects, or is likely to affect, their physical or mental well-being, or readiness status."⁹³ In addition, AGR Soldiers are required to "seek medical care and report such medical care to their unit commanders"⁹⁴ . . . [and] provide[] . . . commander[s] with all medical documentation, including civilian health records, and complete[] . . . annual physical health assessment[s]."⁹⁵ The regulation requires AGR Soldiers to provide AR commanders with their PHI and to regularly supplement this documentation.⁹⁶

2. Problems with Regulatory Compliance

Unfortunately, a number of factors unique to the AR have made it difficult for AR commanders to fully comply with and enforce the requirements of AR 40-501 by actively collecting and reviewing their AGR Soldiers' PHI. First, AR 40-501 fails to fully account for the unique structure and composition of the RC and adequately address the unique challenges RC commanders face in enforcing the Regulation's medical readiness requirements outside the

⁸⁹ *See* Memorandum from Assistant Sec'y of Def. to Sec'ys of the Military Dep'ts et al., subject: Policy Guidance for Deployment-Limiting Psychiatric Conditions and Medications, attach. 1, para. 3 (7 Nov. 2006).

⁹⁰ AR 40-501, *supra* note 9, para. 8-3c.

⁹¹ *Id.* para. 8-3b.

⁹² *See id.* at i (noting the regulation's applicability to both the AD and AR), para. 8-3b, c.

⁹³ *Id.* para. 8-3a.

⁹⁴ *Id.*

⁹⁵ *Id.* para. 9-3b.

⁹⁶ *Id.* paras. 8-3 and 9-3.

catchment area. For example, while AR 40-501 requires “civilian health records documenting a change which may impact . . . readiness status [to be collected] and placed in the . . . Soldier’s military health record[s],”⁹⁷ the regulation contains no discussion of the means, methods, and regulatory and practical obstacles to enforcing compliance with this provision outside the catchment area. Second, because the AR is a part-time force, it must spend most of its limited training time preparing for its primary support mission. Consequently, AR commanders and their Soldiers have had to prioritize their training objectives based upon the limited number of hours and duty days they have each year to train, and this has left them inadequate time to devote the necessary level of focus and attention on fulfilling their joint responsibilities under AR 40-501.⁹⁸ Finally, even when AR commanders have found the time to familiarize themselves with their rights and responsibilities under AR 40-501, as a part-time force, they typically do not have the staff and funds necessary to actively enforce AR 40-501’s medical readiness requirements to ensure their AGR Soldiers provide military command authorities with initial copies of their PHI and regularly supplement these records each and every time they see CHPs.⁹⁹

3. Resistance from Medically Non-Compliant AGRs

In addition to the above factors, a disproportionate and unacceptably high number of AGR Soldiers have exploited their AR commanders’ inability to obtain unrestricted access to their PHI outside the catchment area by failing and refusing to provide military command authorities with initial and ongoing access to their civilian PHI.¹⁰⁰ Moreover, the ongoing problem of medically non-deployable¹⁰¹ AGRs has been significantly exacerbated by medically non-compliant AGR Soldiers, i.e., AGR Soldiers who “regularly and consistently”¹⁰² willfully fail to cooperate with their

⁹⁷ *Id.* para. 9-3b.

⁹⁸ Alaniyi-Leyimu Telephone Interview, *supra* note 87; Butts Telephone Interview, *supra* note 87.

⁹⁹ Alaniyi-Leyimu Telephone Interview, *supra* note 87; Butts Telephone Interview, *supra* note 87. Battalion and brigade headquarters typically only have one to ten full-time civilian and/or military personnel, depending on the level of command, to carry out the day-to-day operational and administrative functions for the entire unit. Professional Experience, *supra* note 87.

¹⁰⁰ Telephone interviews with Major Missy Delk, S3 Clinical Operations Officer for the Cent. Area Med. Support Grp. (CE-MARSG), AR MEDCOM, Fort Sheridan, IL. At the time of these interviews, MAJ Delk was the Manager of the Reserve Health Readiness Program (RHRP), Office of the Surgeon, U.S. Army Reserve Command (USARC), Fort Bragg, NC. (12 & 20 Nov. 2012) [hereinafter Delk Telephone Interviews]; *see also* Alaniyi-Leyimu Telephone Interview, *supra* note 87; Butts Telephone Interview, *supra* note 87.

¹⁰¹ *See* discussion, *infra*, Part III.A. 6 (regarding non-deployable AGRs).

¹⁰² Delk Telephone Interviews, *supra* note 100; *see* discussion *supra* note 34 (concerning the author’s definition of medical non-compliance in the context of the release of Soldiers’ PHI). While the AR has routinely

commanders’ efforts to obtain access to their PHI in accordance with AR 40-501.¹⁰³ While the number of medically non-deployable and medically non-compliant AGR Soldiers may seem small in comparison to total AR end strength,¹⁰⁴ it is highly significant when considering the disproportionate impact AGR Soldiers have on the AR since they are the AR commander’s principal full-time active duty force in charge of managing the day-to-day operations of the AR unit.¹⁰⁵

4. Frustration with Current Enforcement Tools

Army Reserve commanders have been consistently frustrated with the tools available to compel medically non-compliant AGRs to meet their obligations under AR 40-501 and provide AR military command authorities with access to their PHI.¹⁰⁶ Nonjudicial punishment and adverse administrative action are oftentimes the only means AR commanders have to compel medically non-compliant AGR Soldiers to comply with AR 40-501 and provide access to

compiled statistics on the number of medically *non-deployable* AGRs each year (*see* discussion *infra* Part III.A.6), the author’s research disclosed no analogous AR statistics documenting the number of medically *non-compliant* AGRs, i.e., Soldiers who intentionally or negligently fail to cooperate with medical command authorities in providing full and complete access to their PHI outside the catchment area. While anecdotal evidence from discussions with AGR JAG officers suggests the problem is pervasive and ongoing, the absence of easily accessible/widely available statistics concerning the number of medically non-compliant AGR Soldiers in the AR is, in this author’s opinion, attributable largely to the fact that AR units typically do not capture these metrics, and if they do, they are usually compiled under the rubric of medical non-deployability (for whatever reason), and/or adverse administrative and/or non-judicial action. Professional Experience, *supra* note 87.

¹⁰³ Delk Telephone Interviews, *supra* note 100; Professional Experience, *supra* note 87.

¹⁰⁴ As of 2013, Army Reserve end-strength was 205,000. CHIEF, ARMY RESERVE AND COMMANDING GENERAL, USARC AND COMMAND SERGEANT MAJOR, USARC, AMERICA’S ARMY RESERVE: A LIFE-SAVING AND LIFE-SUSTAINING FORCE FOR THE NATION, 2013 POSTURE STATEMENT 3 (Mar. 2013) [hereinafter AR POSTURE STATEMENT 2013], available at http://www.usar.army.mil/resources/Media/ARPS_2013_6-6-13%20%282%29.pdf.

¹⁰⁵

The . . . AGR . . . program . . . provides the bulk of full-time support at the unit level. They provide day-to-day operational support needed to ensure Army Reserve units are trained and ready to mobilize within the ARFORGEN model. The AGR program is absolutely vital to the successful transition to, and sustainment of, an operational force.

CHIEF, ARMY RESERVE AND COMMANDING GEN., USARC AND COMMAND SERGEANT MAJOR, USARC, THE UNITED STATES ARMY RESERVE 2011 POSTURE STATEMENT 11 (Mar. 2011) [hereinafter AR POSTURE STATEMENT 2011], available at http://armedservices.house.gov/index.cfm/files/serve?File_id=866fb710-2d71-44af-b67c-2629b6e6acd4 (last visited July 23, 2014).

¹⁰⁶ Alaniyi-Leyimu Telephone Interview, *supra* note 87; Butts Telephone Interview, *supra* note 87; Professional Experience, *supra* note 87.

their PHI.¹⁰⁷ Even when these disciplinary and administrative measures have achieved their desired result, many AR commanders have found them to be blunt, cumbersome, excessively time-consuming, and ultimately cost-ineffective given the part-time nature of the force.¹⁰⁸ This is because AR commanders, unlike their AD counterparts, are not on active duty approximately twenty-four to twenty-eight days a month, usually do not have full-time medical and legal staffs to assist them in working these actions, and must divert increasingly limited resources from other operational and administrative needs to compel medically non-compliant AGR Soldiers to comply with their legal obligations under AR 40-501 and provide initial and ongoing access to their PHI.

5. CHPs' Resistance to, and Disregard of, the Military Command Exception

In response, AR commanders have attempted to circumvent medically non-compliant AGR Soldiers by contacting CHPs and requesting CHPs provide them with unrestricted access to their Soldiers' PHI and discuss their Soldiers' physical and mental conditions directly.¹⁰⁹ Unfortunately, AR commanders and their medical and legal staffs have routinely found CHPs to be resistant to the Military Command Exception.¹¹⁰ Civilian health care providers are usually unfamiliar with the Military Command Exception, and when they learn of it, many of them are uncomfortable complying with it.¹¹¹ Consequently, CHPs have routinely declined to honor the Military Command Exception outside the catchment area based on an overabundance of caution for fear of violating HIPAA's Privacy Rule and concerns about potentially garnering a professional responsibility complaint.¹¹² This, in turn, has

¹⁰⁷ Professional Experience, *supra* note 87.

¹⁰⁸ Alaniyi-Leyimu Telephone Interview, *supra* note 87; Butts Telephone Interview, *supra* note 87. As discussed earlier, the contestability of these orders is another reason some AR commanders have chosen not to fight medically non-compliant AGR Soldiers for direct access to their civilian PHI. Professional Experience, *supra* note 87; *see also supra* note 9 (discussing the legality of an order to provide direct access to civilian PHI).

¹⁰⁹ Alaniyi-Leyimu Telephone Interview, *supra* note 87; Butts Telephone Interview, *supra* note 87; Professional Experience, *supra* note 87.

¹¹⁰ Alaniyi-Leyimu Telephone Interview, *supra* note 87; Butts Telephone Interview, *supra* note 87. Both LTC Alaniyi-Leyimu and LTC(P) Butts have unique and insightful perspectives on this issue because they have extensive experience in both the civilian and military medical communities. Both physicians expressed the professional opinion that it is rare to find a CHP who is aware of the MCE, and both stated that most of their professional colleagues who are familiar with the MCE are uncomfortable complying with it and often decline to honor it. This has also been the author's professional experience. Professional Experience, *supra* note 87.

¹¹¹ Alaniyi-Leyimu Telephone Interview, *supra* note 87; Butts Telephone Interview, *supra* note 87; Professional Experience, *supra* note 87.

¹¹² Alaniyi-Leyimu Telephone Interview, *supra* note 87; Butts Telephone Interview, *supra* note 87. The author has also routinely encountered resistance to the MCE from CHP and their legal counsel over the past

exacerbated the inability of AR commanders to effectively deal with the problem of medically non-compliant AGRs.¹¹³

6. Adverse Impact on AR and AD Medical Readiness

The inability of AR commanders to adequately fulfill their regulatory responsibilities under AR 40-501 as it relates to medically non-compliant AGRs has negatively impacted overall AR medical readiness.¹¹⁴ This is because AGR Soldiers are the military backbone of the AR¹¹⁵ and, *a fortiori*, problems with AGR medical readiness directly impact the entire AR and the Reserve Component. According to Major Missy Delk, former Manager of the Reserve Readiness Health Program (RHRP), Office of the Surgeon, U.S. Army Reserve Command (USARC), who participated in a seminal nationwide Lean Sigma Six Study of AR medical readiness, the number of medically non-deployable AGR Soldiers in the AR has at times posed a serious problem.¹¹⁶ The Study found that at one time, 7.5% of the extant AR AGR population was medically non-deployable.¹¹⁷ National statistics also show the AR has failed to meet overall DoD medical readiness standards.¹¹⁸ Moreover, the AR's integration in the AD's organizational structure has all but ensured that problems with AR medical

twelve years while serving as an active duty judge advocate officer in the AR. Professional Experience, *supra* note 87.

¹¹³ Delk Telephone Interviews, *supra* note 100; *see also* Marygail K. Brauner et al., *Medical Readiness of the Reserve Component* 22, Santa Monica, CA: RAND Corp. (Apr. 16, 2012), available at <http://www.rand.org.pubs.monographs/MG1105.html>.

¹¹⁴ Delk Telephone Interviews, *supra* note 100.

¹¹⁵ In recognition of this fact, the former chief of the AR, Lieutenant General James R. Helmly stated, "The AGR program is absolutely vital to the training and readiness of our units . . . [AGR Soldiers] are an essential part of our Army . . . , enabling mission accomplishment and executing important missions on behalf of the nation." Army News Serv., *Army Reserve to Open More Full-Time AGR Positions*, www.ABOUT.COM, May 4, 2004, <http://usmilitary.about.com/cs/guardandreserve/a/arreservefull.htm>; *see also* AR POSTURE STATEMENT 2011, *supra* note 104.

¹¹⁶ Delk Telephone Interviews, *supra* note 100; *see supra* note 102 (discussing statistics (or lack thereof) for medically non-compliant AGRs in the AR).

¹¹⁷ Delk Telephone Interviews, *supra* note 100.

¹¹⁸ Although progress has been made, overall medical readiness targets have consistently gone unmet. According to the AR Posture Statement 2012, over one-third of AR Soldiers (approximately thirty-seven percent) were classified as not medically ready in 2012. Chief, Army Reserve and Commanding General, USARC and Command Sergeant Major, USARC, AN ENDURING OPERATIONAL ARMY RESERVE: PROVIDING INDISPENSABLE CAPABILITIES TO THE TOTAL FORCE: 2012 POSTURE STATEMENT 9 (Mar. 2012), available at <http://www.appropriations.senate.gov/sites/default/files/hearing/ARPS%202012%20FINAL.PDF>. However, AR medical readiness improved in 2013. *See* AR POSTURE STATEMENT 2013, *supra* note 104, at v (as of May 2014 the AR had still not met its overall medical readiness goal of 82%). E-mail from MAJ Missy Delk, S3 Clinical Operations Officer for the Central Area Med. Support Grp. (CE-MARSG), AR MEDCOM, Fort Sheridan, IL (May 1, 2014) (on file with author); E-mail from LTC John Mann, AN, Chief, Clinical Branch, Office of the Surgeon, USARC, Fort Bragg, N.C. (May 2, 2014) (on file with author).

readiness have negatively impacted AD medical readiness. The RC makes up approximately twenty percent of the Army's organizational structure,¹¹⁹ provides almost half of the Army's combat support units, and supplies approximately twenty-five percent of its mobilization base expansion capability.¹²⁰ As a result, the AR has become a "fully integrated and critical part of an operational, expeditionary Army."¹²¹ The fact that AR medical readiness has negatively impacted AD medical readiness is further supported by statistical data demonstrating that the AD, like the RC, has at times also "been unable to meet [its] minimum [medical readiness] goals."¹²²

B. Broader Implications

The inability of commanders outside the catchment area to obtain unrestricted access to Soldiers' PHI is not limited to the RC. Active Duty commanders outside the catchment area face the same obstacle. At present, there are approximately 11,528 AD Soldiers enrolled in TPR outside the catchment area.¹²³ While this number is less than the RC, the need for AD commanders to obtain unrestricted access to their Soldiers' PHI to achieve and maintain medical readiness is no less important outside the catchment area than it is inside the catchment area. Army suicide statistics¹²⁴ among AD Soldiers demonstrate the military's suicide problem is unaffected by geography. Active Duty commanders need the same level of access to their Soldiers' mental health care PHI *outside* the catchment as their AD counterparts *within* the catchment possess if they are to play a meaningful and proactive role in assisting CHPs in identifying suicidal ideations and preventing Soldiers from harming themselves and others.

In implicit recognition of this fact, the DoD directed the TMA,¹²⁵ under the authority of the USD(P&R), to direct CHPs to disclose Soldiers' mental health care PHI to military command authorities outside the catchment area under the same circumstances DoD mental health care providers are required to do under DoDI 6490.08.¹²⁶ According to Paul Bley, Chief, Administrative and Civil Law Branch, Defense Health Agency, how, when, and even

if, the DHA will accomplish this goal is still unclear.¹²⁷ Two potential solutions exist to implement this mandate and solve the problem of disparate command access to PHI.

IV. The Solution: Regulatory Revision and Contractual Mandate

There are two potential ways for the DHA to comply with the USD(P&R)'s directive and eliminate the gap in commanders' access to Soldiers' PHI outside the catchment area:

(1) change the discretionary language of Military Command Exception in the Privacy Rule to mandate CHPs honor the Military Command Exception and provide military command authorities with unrestricted access to Soldiers' PHI; and/or

(2) change the TRICARE network provider contract and non-network reimbursement requirements to make compliance with the Military Command Exception a mandatory precondition to becoming a TRICARE network provider or approving reimbursement to non-network providers for providing health care services to active duty Soldiers enrolled in TPR outside the catchment area.

As the arguments below demonstrate, either of these proposed solutions—alone or in concert—would remedy the lack of uniformity in the current bifurcated regulatory framework, improve the MHS, and ultimately enhance our national security posture.

A. Arguments for Mandating Unrestricted Access to Soldiers' PHI Outside the Catchment Area

1. *The Current Regulatory Framework is Illogical and Counterintuitive*

The DHHS's decision to make the Military Command Exception discretionary is illogical and counterintuitive. While recognizing the importance of creating an exception to the Privacy Rule to ensure military command authorities have access to their Soldiers' PHI to achieve and maintain medical readiness, the DHHS thwarted this objective by allowing CHPs to disregard the Military Command Exception at will. Consequently, as written, the Military Command Exception undermines its ostensible goal of ensuring military command authorities can access their Soldiers' PHI to accomplish their military mission and maintain national security. Rather than providing military command authorities outside the catchment area with a *right* to access this information, the Military Command Exception merely gives military command authorities the right to *hope*

¹¹⁹ Stephen J. Glenz & Colonel (Retired) Gary C. Howard, *Full-Time Support for Part-Time Soldiers Is Essential for Unit Readiness*, 55 ARMY RES. MAG. at 11 (2005).

¹²⁰ *Id.*

¹²¹ AR POSTURE STATEMENT 2011, *supra* note 104, at 11.

¹²² Brauner et al., *supra* note 113, at 25.

¹²³ Kim e-mail, *supra* note 27.

¹²⁴ Baldor, *supra* note 82; Clifton, *supra* note 82; McCloskey, *supra* note 82.

¹²⁵ See *supra* note 31 (explaining how the DHA assumed the responsibilities of the TMA when the latter was disestablished).

¹²⁶ DoDI 6940.08, *supra* note 20, para. 4b.

¹²⁷ Bley e-mail, *supra* note 33; Telephone Conversation with Paul Bley (Sept. 27, 2012).

CHPs will provide them access to this information. In this way, the Military Command Exception gives military command authorities a right without a remedy.

By withholding the means necessary for military command authorities outside the catchment to ensure they can achieve and maintain medical readiness by gaining access to their Soldiers' PHI when active duty Soldiers fail or refuse to provide ready access to these records, as written, the Military Command Exception impairs, rather than advances, the ultimate goal of national security.¹²⁸ If it is a national security imperative that military command authorities *within* the catchment be provided unrestricted access to their Soldiers' PHI, then it is just as critical to national security that military command authorities *outside* the catchment area be given that same level of access. With that in mind, it is completely illogical to allow geographic location, as opposed to legitimate need, to determine whether military command authorities are provided unrestricted access to their Soldiers' PHI.

2. *The Current Regulatory Framework Lacks Essential Uniformity*

The current bifurcated regulatory system lacks the uniformity necessary and essential for an efficient and effective national MHS. Uniformity imbues the MHS with the consistency, stability, predictability, and efficiency it needs to ensure military command authorities can achieve and maintain medical readiness in order to accomplish their military missions and maintain national security. Military command authorities need to be able to rely on clear, unambiguous, uniform, and consistent standards when it comes to fulfilling their responsibilities under AR 40-501 and ensuring they have a medically ready force.

As written, the Military Command Exception is disuniform and injects an unnecessary and unacceptable degree of inconsistency and uncertainty into the MHS. This reasoning is supported by the findings of a recent RAND study on medical readiness in the RC, which found that "inconsistencies in procedures for obtaining medical readiness compliance"¹²⁹ were impediments to military medical readiness. By placing obstacles to medical readiness in the path of commanders outside the catchment area by denying them the ability to rely on uniform, standardized, medical readiness compliance procedures to achieve and maintain Soldiers' medical readiness, policymakers are unfairly impairing commanders' ability to fulfill their regulatory-mandated military medical readiness mission. In light of the solutions available to remedy this problem, this is not only unnecessary, it is unacceptable.

¹²⁸ See *supra* note 83.

¹²⁹ Brauner et al., *supra* note 113, at iv.

3. *The Current Regulatory Framework Is Vulnerable to Abuse by Medically Non-Compliant Soldiers*

As demonstrated by problems with AGR medical readiness in the AR,¹³⁰ medically non-compliant active duty Soldiers stationed outside the catchment area can, and routinely do, exploit the inability of military command authorities to obtain unrestricted access to their PHI. The absence of a regulatory or contractual mechanism to allow military command authorities to effectively counter this problem by going directly to CHPs and obtaining unrestricted access to their Soldiers' PHI places medically non-compliant Soldiers, rather than commanders, at the helm of the medical readiness compliance procedures outside the catchment area. It gives medically non-compliant Soldiers—many of whom have a disincentive to cooperate with their commanders by providing their PHI to military command authorities when facing medical separation or other adverse administrative action—the ability to control the pace and speed at which military command authorities and the MHS are able to access Soldiers' PHI, evaluate their mental and physical conditions, ensure their continued fitness for duty, get them necessary mental health care services if and when needed, and reassign and/or medically separate them if and as necessary.

The DoD does not allow Soldiers within the catchment area to exert this type and degree of control over the medical readiness compliance process, and it should not allow Soldiers outside the catchment area to do so either. Doing so allows medically non-compliant Soldiers outside the catchment the ability to weaken the MHS in a way that is unacceptable.

4. *The Current Regulatory Framework Allows CHPs to Disregard the Military Command Exception to the Detriment of RC Medical Readiness and National Security*

The current regulatory framework also gives CHPs outside the catchment area the ability to exert an unacceptable degree of influence over the military medical readiness compliance process to the detriment of RC medical readiness. As experience in the AR has demonstrated, CHPs can, and routinely do, decline to honor the Military Command Exception.¹³¹ This has impaired the ability of RC commanders to fully comply with AR 40-501 and hampered the AR's efforts to meet its medical readiness goals.¹³² Even in those instances where CHPs do honor the Military Command Exception, the Privacy Rule's Minimally

¹³⁰ See discussion *supra* Part III.C.1.–5.

¹³¹ See *supra* note 87; see also discussion *supra* Part.III.A.5 and accompanying notes.

¹³² See *supra* note 117; see also discussion *supra* Part III.A.6.

Necessary Rule¹³³ still gives CHPs outside the catchment area a *de facto* veto power over commanders' ability to review a Soldiers' PHI by giving CHPs the ability to second-guess commanders and limit their access to the information CHPs—not commanders—deem relevant to Soldiers' military duties. While this level of influence may be acceptable within the catchment area when exercised by DoD health care providers who are familiar with the military and its culture, the wisdom of leaving this authority in the hands of CHPs is highly questionable.

Department of Defense health care providers are generally familiar with the military, its mission, and their patient's military responsibilities. They are required to closely coordinate with military command authorities in making minimally necessary determinations. Civilian health care providers, on the other hand, are generally unfamiliar with the military, its culture, mission, and their military patients' working environments and occupational specialties.¹³⁴ The fact that DoD does not allow DoD health care providers within the catchment area to exert this level of influence over the military medical readiness compliance process by declining to comply with the Military Command Exception is strong evidence that CHPs outside the catchment area should also not possess this level of influence over the MHS. We cannot afford to leave this dimension of our national security to the discretion of unpredictable and potentially unsympathetic CHPs.

B. Arguments Against Mandating Unrestricted Access to Soldiers' PHI Outside the Catchment Area

1. The DHHS Does Not Possess the Constitutional Authority to Mandate CHPs Comply with the Military Command Exception Outside the Catchment Area

While neither DHHS' commentary to the Military Command Exception nor DoD public comments to the proposed Privacy Rule discuss the issue, the argument that the DHHS lacks the constitutional authority to mandate CHPs comply with the Military Command Exception outside the catchment area is a legitimate concern. It is an issue that at least one senior attorney in the MHS who played a significant role in the regulatory process of drafting and implementing the Military Command Exception believes is a potential impediment to changing the Military Command Exception.¹³⁵ However, both case law and existing

¹³³ See *supra* notes 46–50 and accompanying text (discussing the Minimally Necessary Rule).

¹³⁴ See Susan D. Hosek & Gary Cecchine, *Reorganizing the Military Health System: Should There Be a Joint Command?* 46 (2001) RAND CORP., available at http://www.rand.org/pubs/monograph_reports/MR1350.html (discussing the need for medical providers who treat Soldiers to be familiar with their mission and duty environments to provide optimal health care to Soldiers).

¹³⁵ Telephone Conversation with John Casciotti, Senior Assoc. Deputy Gen. Counsel (Health Affairs), Dep't of Def. (Nov. 8, 2012). Mr. Casciotti

regulatory language in the Privacy Rule support the argument that DHHS has the constitutional and regulatory authority to compel CHPs to comply with the Military Command Exception outside the catchment area under the Commerce Clause.¹³⁶

a. Case Law

In *Association of American Physicians v. U.S. Department of Health*,¹³⁷ plaintiffs argued that the DHHS exceeded its statutory authority under HIPAA by regulating non-electronic, as well as electronic, PHI under the Privacy Rule. In rejecting this argument, the court held that the enactment of HIPAA was within Congress's power under the Commerce Clause, and that DHHS' promulgation of the Privacy Rule was within the scope of its authority under HIPAA. More importantly, citing the Supreme Court's decision in *Thorpe v. Housing Authority of City of Durham*¹³⁸ for the proposition that a regulation is proper as long as it is "reasonably related to the purposes of the enabling legislation,"¹³⁹ the court held that the DHHS had the authority to promulgate privacy regulations under the Privacy Rule as long as they were "reasonably related to [one of the enumerated] purposes of HIPAA."¹⁴⁰ Two years later, in *Citizens For Health, et al., v. Thompson*,¹⁴¹ plaintiffs challenged the final version of the Privacy Rule on grounds that it impermissibly authorized disclosure of PHI without a patient's consent.

Dismissing the plaintiffs' contention that HIPAA only allowed the DHHS to promulgate regulations under the Privacy Rule that enhanced, not reduced, a patient's privacy, the court affirmed the principle that as long as a regulation is

is a senior attorney in the MHS and previously served as Associate General Counsel for Enforcement, DHHS.

¹³⁶ U.S. CONST. art. 1, § 8; art. 3. Although the author believes the DHHS and DoD have the constitutional and regulatory authority to compel CHP to comply with the Military Command Exception outside the catchment area, the issue as to whether the DHHS and DOD possess the legal authority to implement this change is separate and distinct from whether it may be good policy to do so. As Mr. Casciotti pointed out in his telephone conversation, he believes HIPAA and its implementing regulations were designed to protect PHI, not provide a means to compel access to this information. Notwithstanding this reasoning, the Military Command Exception does just that within the catchment area as it relates to Soldiers' PHI. Moreover, the Privacy Rule itself compels the disclosure of PHI in the context of regulatorily mandated compliance reviews. See *infra* Part B.1.b.

¹³⁷ *Ass'n of Am. Physicians & Surgeons, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 224 F. Supp. 2d 1115 (S.D. Tex. 2002), *aff'd without opinion*, 67 Fed. Appx. 253 (5th Cir. 2003).

¹³⁸ *Thorpe v. Hous. Auth. of City of Durham*, 393 U.S. 268 (1969).

¹³⁹ *Ass'n of Am. Physicians & Surgeons*, 224 F. Supp. 2d at 1127 (quoting *Thorpe v. Hous. Auth. of City of Durham*, 393 U.S. 268, 281 (1969)).

¹⁴⁰ *Id.*

¹⁴¹ *Citizens for Health v. Thompson et al.*, No. 03-2267, 2004 WL 765356 (E.D. Pa. Apr. 2, 2004), *aff'd on other grounds*, *Citizens For Health v. Leavitt*, 428 F.3d 167 (3d Cir.(Pa.) 2005).

reasonably related to a legitimate exercise of validly delegated legislative authority, it will withstand constitutional challenge. In doing so, the court stated that “[a]lthough HIPAA also required the Secretary to protect the privacy of health information, the court finds nothing . . . requiring the Secretary to maximize privacy interests over efficiency interests.”¹⁴² Based on this reasoning, the court upheld the DHHS’s action in authorizing the release of PHI without patient consent as constitutionally permissible because the DHHS’s actions were reasonably related to HIPAA’s purpose of improving the efficiency and effectiveness of the healthcare system. Read together, the holdings in *Association of American Physicians & Surgeons* and *Citizens for Health* support the argument that as long as the DHHS can demonstrate a Privacy Rule regulation is reasonably related to HIPAA’s constitutionally permissible purpose of improving the efficacy and efficiency of the health care system, there is a reasonable basis to conclude its actions will be deemed a valid exercise of its legitimately delegated authority under the Commerce Clause.

b. Existing Regulatory Authority

The Privacy Rule already grants the DHHS the ability to compel disclosure of an individual’s PHI in the context of mandatory compliance reviews,¹⁴³ and the DHHS’s right to do so in that context has not been successfully challenged on constitutional grounds. Consequently, allowing the DHHS to compel disclosure of individual PHI under a second set of circumstances—albeit for the different, but similarly legitimate reason of advancing HIPAA’s goal of maximizing the efficiency and effectiveness of the healthcare system—would simply be a logical and legitimate extension of the DHHS’s current regulatory authority to compel disclosure of PHI under HIPAA if, when, and where warranted to accomplish HIPAA’s ends.

2. The DoD Lacks Regulatory Authority to Impose a Contractual Mandate on CHPs Under TRICARE

A second argument against mandating compliance with the Military Command Exception outside the catchment area is that DoD lacks the regulatory authority to impose a contractual mandate on CHPs absent specific congressional authorization or the DHHS’s affirmative amendment of the Military Command Exception. A review of existing federal statutes and regulations granting DoD authority to promulgate rules, regulations, and contractual provisions

governing the provision of military health care to Soldiers, however, belies this argument. The statutory basis for the DoD’s authority to impose a contractual mandate on CHPs to comply with the Military Command Exception as a precondition to joining the TRICARE network or authorizing the payment of non-network CHPs for treating Soldiers outside the catchment area is Title 10, Chapter 55 of the U.S. Code.¹⁴⁴ This statute authorizes the Secretary of Defense to administer the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS/TRICARE) for the Army, Navy, Air Force, and Marine Corps.¹⁴⁵ Pursuant to this authority, the DoD has the right to “[e]stablish policies, procedures, and standards that shall govern management of DoD health and medical programs, including . . . patient rights and responsibilities, medical quality assurance, *medical records* . . . [and] *health information privacy*.”¹⁴⁶

The DHA falls under the USD(P&R)¹⁴⁷ and operates under the authority, direction, and control of the Assistant Secretary of Defense for Health Affairs (ASD(HA)).¹⁴⁸ Since the DHA assumed the TMA’s functions on 1 October 2013, it now has the authority and responsibility to administer all DoD medical and dental programs in the MHS.¹⁴⁹ Prior to its disestablishment, the DoD delegated authority to the TMA to promulgate regulations¹⁵⁰ to implement medical programs that are “necessary to achieve important Federal interests, including but not limited to the assurance of uniform national health programs for military families . . . that have a direct and substantial effect on the conduct of military affairs and national security policy of the United States.”¹⁵¹ By directive of the Deputy Secretary of Defense, the DHA now possesses this same authority.¹⁵²

This regulatory mandate includes the authority to enter into and establish the terms and conditions of agreements with CHPs to become network providers¹⁵³ through

¹⁴⁴ 10 U.S.C. §§ 1071–1110b (2006).

¹⁴⁵ Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), 32 C.F.R. § 199.1(c) (2012).

¹⁴⁶ U.S. DEP’T OF DEF., DIR. 5136.01, ASSISTANT SEC’Y OF DEF. FOR HEALTH AFF. (ASD(HA)) para. 4.1.2 (4 June 2008) [hereinafter DODD 5136.01] (emphasis added).

¹⁴⁷ DODD 5124.02, *supra* note 30.

¹⁴⁸ *Id.*

¹⁴⁹ DODD 5136.12, *supra* note 31, para. 6.1.2.

¹⁵⁰ *Id.* para. 6.2.7. TRICARE regulations are contained at 32 C.F.R. § 199.1–199.26 (2012).

¹⁵¹ 32 C.F.R. § 199.17(a)(7).

¹⁵² MHS Governance Reform Memorandum, *supra* note 31.

¹⁵³ See 32 C.F.R. § 199.17(q)(1)–(5). TPH, *supra* note 18, at 6. The three Managed Healthcare Support Contractors are HealthNet (North/Northeast), Humana Military (South/Southeast), UnitedHealthcare (West). See *Managed Health Support Contracts*, DEF. HEALTH AGENCY, http://www.tricare.mil/tma/ams/ams_msc.asp.

¹⁴² *Id.* at 14.

¹⁴³ The DHHS mandates Covered Entities disclose PHI under the Privacy Rule when the DHHS conducts an investigation to determine if a Covered Entity violated the provisions of the Privacy Rule. 45 C.F.R. § 164.502(a)(2)(ii).

TRICARE's three geographically based Managed Care Support Contractors (MCSCs). Moreover, it also includes the authority to establish reimbursement criteria for non-network CHPs who choose not to become TRICARE network providers by signing a TRICARE provider agreement, but who nevertheless choose to treat Soldiers outside the catchment area and seek subsequent reimbursement.¹⁵⁴ This grant of statutory and regulatory authority to advance the important federal interest in ensuring uniform military health care arguably encompasses the right to impose a contractual mandate on CHPs network providers, as well as to set reimbursement conditions on non-network providers as a precondition for being reimbursed for treating Soldiers. As federal courts have recognized, when Congress provides the DoD the authority to promulgate regulations to accomplish a legislatively-mandated purpose, it also grants the DoD the discretion to determine the mechanisms by which it will accomplish those ends.¹⁵⁵ Consistent with this authority, imposing a contractual condition on network CHPs and the establishment of reimbursement criteria for non-network CHPs that mandates their compliance with the Military Command Exception are legitimate means to establish and maintain a uniform MHS.

3. *Imposing a Regulatory Mandate or Contractual Precondition Would Erode the Quality of Health Care in the MHS by Reducing the Number of CHPs*

A third argument against mandating compliance with the Military Command Exception outside the catchment area is that it would discourage CHPs from becoming TRICARE providers, reduce the pool of available CHPs, and erode the quality of health care throughout the MHS. While this is a legitimate concern, it is nevertheless unlikely for three reasons. First, analogous arguments were raised in opposition to the Privacy Rule and its mandatory and discretionary disclosure requirements¹⁵⁶ when first proposed, and these fears proved unfounded.¹⁵⁷ Extending the DHHS's existing authority to compel disclosure of

individual PHI under one more set of circumstances to encompass military PHI is similarly unlikely to reduce the pool of available CHPs willing to treat Soldiers outside the catchment area.

Second, it would encourage rather than discourage CHPs from providing health care services to Soldiers outside the catchment area because it would give CHPs the confidence they need to comply with the Military Command Exception without undue fear of violating HIPAA's Privacy Rule or subjecting themselves to an unwarranted, frivolous lawsuit or charge of breach of confidentiality and professional ethics. According to AR physician Dr. (Lieutenant Colonel) (LTC) Bedemi Alaniyi-Leyimu and Dr. (LTC) (Promotable) Robert Butts, mandating compliance with the Military Command Exception would incentivize CHPs to treat Soldiers by providing CHPs with a bright-line rule granting them clear and unequivocal regulatory and/or contractual authority (protection) to disclose PHI in the absence of a Soldier's verbal consent or signed release.¹⁵⁸

Third, assuming *arguendo* that some CHPs might decline to become TRICARE network providers, or existing TRICARE network providers might decline to renew their contracts, the overall benefit of a uniform national military health care medical compliance system and the resulting benefit to national security far outweigh the possible adverse consequences of a potentially small decrease in the pool of CHPs willing to treat Soldiers outside the catchment area. Even if this did happen, Congress could effectively counter this problem by following the example of Oregon and creating an individual income tax incentive for CHPs to become and remain TRICARE providers.¹⁵⁹

V. Implementing Change

To fully understand how either or both of these proposed solutions could be implemented, it is helpful to provide an overview of the structure of the DoD's Health Program and the principal authorities, officials, agencies, programs, and processes within the MHS that would play a role in implementing these changes.

¹⁵⁴ 32 C.F.R. §§ 199.6(a)(8)(ii)(B); 199.14(j); *see also* TRICARE REIMBURSEMENT MAN. 6010.55-M, ch. 3, sec. 1 (Feb. 1, 2008).

¹⁵⁵ *Coal. for Common Sense in Gov't Procurement v. United States*, 821 F. Supp. 2d 275, 283 (D.D.C. 2011) *aff'd*, *Coal. for Common Sense in Gov't Procurement v. U.S.*, 707 F.3d 311 (D.C. Cir. Jan. 4, 2013).

¹⁵⁶ *See* the DHHS Commentary on the Public Comments to the Privacy Rule, *supra* note 53. Many of the public comments to the proposed Privacy Rule expressed analogous concerns that the Rule's disclosure requirements would have a similarly dampening effect on the healthcare industry. *Id.* (discussing the public comments elicited in response to the Privacy Rule when first proposed).

¹⁵⁷ Indeed, research has demonstrated the primary reasons CHPs decline to provide services to Soldiers is TRICARE's low reimbursement rates, not its regulatory or administrative requirements. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-500, DEFENSE HEALTH CARE: ACCESS TO CIVILIAN PROVIDERS UNDER TRICARE STANDARD AND EXTRA 14-15 (2011).

¹⁵⁸ Alaniyi-Leyimu Telephone interview, *supra* note 87; Butts Telephone Interview, *supra* note 87.

¹⁵⁹ H.B. 3201, 77th Leg. Assemb., Reg. Sess. (Or. 2007); *see* JANET. L. KAMINSKI, OLS RESEARCH REPORT 2007-R-0510, ENCOURAGING HEALTH CARE PROVIDERS TO PARTICIPATE IN TRICARE (2007), <http://www.cga.ct.gov/2007/rpt/2007-R-0510.htm>. The Oregon statute creates an individual income tax deduction of \$2,500.00 for a CHP who becomes a TRICARE provider. To incentivize CHPs to become and remain TRICARE providers, the federal government could significantly increase this amount and/or provide additional tax incentives to CHPs under the federal tax code.

A. The DoD Authorities, Principals, Agencies, Programs, and Processes

Chapter 55 of Title 10 of the U.S. Code¹⁶⁰ and 32 C.F.R. parts 199.1-199.26¹⁶¹ provide the authority for DHHS and DoD to jointly proscribe regulations for the administration of the MHS. Department of Defense principals responsible for managing the MHS are the Under Secretary of Defense for Personnel and Readiness (USD(P&R))¹⁶² and the Assistant Secretary of Defense for Health Affairs ASD(HA).¹⁶³ The USD(P&R) is the principal staff assistant and advisor to the Secretary of Defense for Health Affairs and develops policies, plans, and programs for health and medical affairs to provide and maintain medical readiness.¹⁶⁴ The ASD(HA) is the principal advisor to the Secretary of Defense (SECDEF) and the USD(P&R) for all DoD health policies and programs.¹⁶⁵ His duties include ensuring the effective execution of the DoD's medical mission, which includes "establish[ing] policies, procedures, and standards that . . . govern management of the DoD health and medical programs, including . . . medical records, health information privacy . . ." ¹⁶⁶ and exercising authority, direction, and control over the Director, TMA.¹⁶⁷

The DHA has assumed TMA's responsibilities for supervising and administering all TRICARE programs.¹⁶⁸ TRICARE manages the DoD's managed health care program for the MHS.¹⁶⁹ TRICARE contracts with three geographically based MCSCs. The MCSCs are private sector managed care companies that are delegated the overall responsibility of managing health care services provided to active duty servicemembers and their families outside the catchment area.¹⁷⁰ The rules and regulations of TRICARE are contained in the Code of Federal Regulations (CFR),¹⁷¹ the TRICARE Operations Manual (TOM),¹⁷² and the TRICARE Provider Handbook (TPH).¹⁷³ Together, these regulations establish the following hierarchy of CHPs:

(1) network CHP; (2) non-network CHP; (3) participating non-network CHP; and (4) non-participating non-network CHP.¹⁷⁴

The regulations establishes four primary categories of CHPs. First, as an initial matter, all CHPs who provide health care to Soldiers outside the catchment area must be TRICARE authorized.¹⁷⁵ TRICARE, through its MCSCs, establishes the terms and conditions for certifying that CHPs meet TRICARE's authorization requirements, which include basic licensing and medical specialization accreditation.¹⁷⁶ Civilian Health Care Providers cannot participate in TRICARE, submit claims, and/or be reimbursed for treating Soldiers outside the catchment area unless and until they obtain authorization status.¹⁷⁷

Second, network CHPs are TRICARE authorized providers who sign contractual agreements with TRICARE through its MCSCs and agree to accept TRICARE's negotiated rates as payment in full for treating Soldiers outside the catchment area, as well as abide by all the TRICARE rules and regulations contained within the TOM and the TPH.¹⁷⁸ Third, non-network CHPs are TRICARE authorized providers who do not sign contractual agreements with TRICARE.¹⁷⁹ These CHPs are further classified as either participating or non-participating, depending on whether they agree or decline to accept TRICARE's maximum allowable reimbursement rates for treating Soldiers.¹⁸⁰

Importantly, TRICARE's contractual provisions require network CHPs to maintain a Soldier's "signature on file" (SOF) authorization to release a Soldier's PHI to the MCSCs, in part to verify the Soldier's TRICARE eligibility.¹⁸¹ Although TRICARE-authorized non-network CHPs do not have contracts with TRICARE, they must still comply with TRICARE's claims processing procedures in order to submit and be reimbursed for claims, one of which is the SOF requirement.¹⁸²

¹⁶⁰ 10 U.S.C. §§ 1071-1110b (2006).

¹⁶¹ 32 C.F.R. §§ 199.1-199.26 (2012).

¹⁶² DoDD 5124.02, *supra* note 30.

¹⁶³ DoDD 5136.01, *supra* note 146.

¹⁶⁴ DoDD 5124.02, *supra* note 30.

¹⁶⁵ DoDD 5136.01, *supra* note 146.

¹⁶⁶ *Id.* para. 4.1.2.

¹⁶⁷ *Id.* para 5.1.2.1.

¹⁶⁸ DoDD 5136.12, *supra* note 31, para. 6.2.3.

¹⁶⁹ See generally KATHERINE BLAKELEY, CONG. RESEARCH SERV., RL33537, MILITARY MEDICAL CARE: QUESTIONS AND ANSWERS (2013), <http://www.fas.org/sgp/crs/misc/RL33537.pdf>.

¹⁷⁰ TPH, *supra* note 18, at 6; see *supra* note 153.

¹⁷¹ 32 C.F.R. §§ 199.1-199.26 (2012).

¹⁷² TOM, *supra* note 9.

¹⁷³ TPH, *supra* note 18.

¹⁷⁴ See *id.* at 9 (providing a helpful diagram of provider types).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 9-10.

¹⁷⁷ 32 C.F.R. § 199.6.

¹⁷⁸ TPH, *supra* note 18, at 9-10.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ TOM, *supra* note 9, ch. 8, sec. 4, paras. 6.0-6.2. This is known as the "signature on file" (SOF) requirement. Civilian health care providers must comply with this requirement in order to submit and receive reimbursement for claims. *Id.* para. 6.0.

¹⁸² *Id.* ch. 8, sec. 4, paras. 6.6-10.3. The TOM provides an exception under some circumstances if the CHP is unable to provide proof of the Soldier's SOF. *Id.* para. 8.2.

With this framework in mind, the following steps would be the most effective and efficient way to implement the proposed regulatory and contractual solutions to the problem of disparate command access to Soldiers' PHI within and across the MHS.

B. Changing the Language of the Military Command Exception to the Privacy Rule

First, ASD(HA) should conduct a formal study to document the nature and extent of the problem of CHPs' non-compliance with the Military Command Exception within and across the MHS. Second, assuming the study confirms the problem is extant, pervasive, and imposes an ongoing impediment to medical readiness and national security, ASD(HA) should draft a proposed amendment to the Military Command Exception and staff the proposal through the USD(P&R) to the SECDEF. The following additional language would accomplish this goal:

A covered entity (including a covered entity not part of or affiliated with the Department of Defense, wherever located) *shall* use and disclose the protected health information of individuals who are Armed Forces personnel for activities deemed necessary by appropriate military command authorities to assure the proper execution of the military mission¹⁸³

In conjunction with this change, the DHHS should amend the Privacy Rule's SOF authorization provision¹⁸⁴ to reflect the fact that Soldiers' SOF authorizations are no longer required to release Soldiers' PHI to military command authorities.

Consistent with their authority to prescribe joint regulations for the administration of the MHS, the DoD should work closely with the DHHS in drafting these proposed changes to facilitate the DHHS's ultimate approval of this language. Once the proposed regulatory amendment to the Military Command Exception has been staffed through the DoD, the SECDEF should submit a formal request to change the Military Command Exception to the Secretary of the DHHS. The DHHS should then staff this proposed change to the Military Command Exception and publish it for public comment in the *Federal Register* for at least sixty days.¹⁸⁵ After review and consideration of public comment, the DHHS should publish the newly revised

¹⁸³ 45 C.F.R. § 164.512(k)(1)(i) (newly recommended language in italics).

¹⁸⁴ *Id.* § 164.508 (b)(5).

¹⁸⁵ Pursuant to the Administrative Procedures Act (APA), 5 U.S.C. §§ 551–559 (2006). The Department of Health and Human Services has the discretion to publish the proposed change to the MCE for a longer period under the APA.

Military Command Exception in the CFR. Once published, the DoD should subsequently amend DoD 6025.18-R to reflect the fact that all health care providers, both the DoD and CHPs, wherever located, must comply with the Military Command Exception consistent with existing Army policy as embodied in the VCSA Sends Message. The DHA should then amend the TOM to reflect Soldiers' SOF authorizations are no longer required to release Soldiers' PHI to military command authorities.¹⁸⁶ Lastly, the DHHS, DoD, and the DHA should initiate a nationally-coordinated educational effort to ensure all CHPs, military command authorities, and Soldiers outside the catchment area are familiar with their rights and responsibilities under the new Military Command Exception.

C. Imposing a Contractual Mandate on CHPs Through TRICARE

Title 10 of the U.S. Code provides the SECDEF with the authority to enter into contracts with CHPs for the provision of health care outside the catchment area.¹⁸⁷ Pursuant to this authority, implementing TRICARE regulations¹⁸⁸ permits the DHA to establish the contractual terms and conditions for TRICARE authorized network CHPs. These contractual provisions are contained in both the CFR¹⁸⁹ and the TRICARE Policy Manual (TPM).¹⁹⁰

To impose a contractual mandate on TRICARE authorized network and non-network CHPs, the DoD should take the following steps: (1) change the TRICARE regulations;¹⁹¹ (2) change the "Participation Agreement Requirements" in the TPM;¹⁹² and (3) require its MCSC to insert language mandating CHPs comply with the Military Command Exception in its individual CHPs network contracts as a precondition to joining the network, and in its CHPs non-network claims forms as a precondition for non-network CHPs to be reimbursed for treating Soldiers.

Next, TMA should amend its TPM, Chapter 11, section 12.3, paragraph 2.0, entitled "*Participation Agreement Requirements*,"¹⁹³ which lists the basic contractual provisions that must be included in TRICARE agreements for participating network CHPs.

¹⁸⁶ See discussion *supra* note 12; see also TOM, *supra* note 9, ch. 19, sec. 3, para. 2.6.1–2.6.2.

¹⁸⁷ 10 U.S.C. §§ 1071, 1079 (2006).

¹⁸⁸ 32 C.F.R. § 199.6(a)(13)(i)–(xii) (2012).

¹⁸⁹ *Id.*

¹⁹⁰ TRICARE POL'Y MAN. 6017.57-M, ch. 11, sec. 12.3 (Feb. 1, 2008) [hereinafter TPM].

¹⁹¹ 32 C.F.R. § 199.6(a)(13)(i)–(xii).

¹⁹² TPM, *supra* note 190.

¹⁹³ *Id.* ch.11, sec. 12.3.

Lastly, to ensure TRICARE-authorized, non-network CHPs who have not contracted with TRICARE but who seek reimbursement for treating Soldiers outside the catchment area on a claim-by-claim basis comply with the MCE, similar language should be included in TRICARE's electronic or paper claims forms.¹⁹⁴

VI. Conclusion

Revisit the scenario of the medically non-compliant active duty Soldier in the introduction. This time, the Military Command Exception is compulsory for CHPs outside the catchment area as the result of the DHHS's amendment of the Military Command Exception and/or DoD's imposition of a TRICARE contractual mandate. The commander contacts the CHPs directly and asks them to discuss his NCO's physical and mental condition and provide him with relevant portions of his NCO's PHI. The

commander provides them with copies of the DHHS's newly revised Military Command Exception and/or the newly revised TPH. Civilian health care providers review the material, call the commander back, discuss the Soldier's condition with him directly and provide him with relevant portions of the NCO's PHI. Armed with this information, the commander is able to provide the NCO's PHI to the 335th Signal Command (Theater) command surgeon and, together, adequately assess the NCO's medical readiness status, get the NCO the help he needs, avoid a potential suicide, and provide HRC with the information it needs to coordinate a replacement.

This scenario demonstrates what most commanders who have faced this problem outside the catchment area already know: the benefits from remedying the existing problem of disparate command access to Soldier's PHI within and across the MHS clearly outweigh the potential adverse consequences from maintaining the current counterintuitive and counterproductive status quo. It is now time for the DHHS and DoD to reach this same conclusion and close the gap in the current bifurcated system of disparate command access to Soldiers' PHI by mandating CHPs comply with the Military Command Exception.

¹⁹⁴ TRICARE Form CMS-1500, Health Insurance Claim Form (08/05); TRICARE Form CMS 1450, UB-04 (2007); *see* TRICARE Electronic Claims Filing (Apr. 2014), <http://www.humana-military.com/library/pdf/claims.pdf>.

Congress Offends Eisenhower and Cicero by Annihilating Article 60, UCMJ

Major Brent A. Goodwin*

I. Introduction

But when it comes to the mitigating of that sentence I say it has got to be in the chain of authority, to be done by someone that has some responsibility for winning the war, and not just sitting on the outside and exercising his authority independently of the Secretary of War.

—General Dwight D. Eisenhower¹

Let us not listen to those who think we ought to be angry with our enemies, and who believe this to be great and manly. Nothing is so praiseworthy, nothing so clearly shows a great and noble soul, as clemency and readiness to forgive.

—Marcus Tullius Cicero²

General Dwight D. Eisenhower and Marcus Tullius Cicero believed strongly in the importance of clemency, the former through the spectrum of a military commander and the latter as a key component of an enlightened society. On 24 June 2014, clemency under Article 60 of the Uniform Code of Military Justice (UCMJ) changed radically. The convening authority's power to take post-trial action has long been nearly omnipotent.³ He could reverse convictions, reduce charges to lesser included offenses, and grant clemency of nearly any kind without explanation. This power has been greatly curtailed following the outcry in the wake of the Lieutenant Colonel James Wilkerson case⁴ and

The Invisible War.⁵ Due to congressional action amending Article 60, UCMJ, the days of unfettered discretion by convening authorities and limited or no involvement by victims are gone. The UCMJ now requires involvement of victims in the post-trial process; prohibits convening authorities from dismissing findings, changing convictions to lesser included offenses, or granting sentence clemency in the majority of cases; and, in most cases, requires convening authorities to give written explanations of decisions to grant clemency.⁶

Post-trial practices must now reflect these changes, and convening authorities must be made aware of the new limitations. Chiefs of military justice and staff judge advocates need to understand the changes, be able to explain the changes, and amend their post-trial practices accordingly. This article explains the amendments to Article 60 and offers practical advice on how to amend post-trial mechanics to avoid potential snags. Part II outlines the post-trial power historically vested in the convening authority and explains why Article 60 was amended. Part III summarizes the changes and gives examples of how the changes will work in practice. Finally, Part IV identifies potential consequences and dangers that may lie ahead as a result of the new law.

II. History

A. Old Law

As far back as the early 1800s, senior commanding officers of the U.S. Armed Forces were entrusted with the

from the service. But a commander overturned the verdict and dismissed the charges, saying he found Wilkerson and his wife more believable than the alleged victim.

Id.

⁵ THE INVISIBLE WAR (Chain Camera Pictures 2012). In 2012, the Sundance Film Festival summarized the film as “[a]n investigative and powerfully emotional examination of the epidemic of rape of soldiers within the U.S. military, the institutions that cover up its existence and the profound personal and social consequences that arise from it.” 2012 Sundance Film Festival Announces Awards, SUNDANCE INST., <http://www.sundance.org/press-center/release/2012-sundance-film-festival-awards/> (last visited June 5, 2014). The film was awarded the U.S. Documentary Audience Award at the Festival. *Id.* Also, the 85th Academy Awards honored the film's work by nominating it for Best Documentary Feature. ACADEMY AWARDS, <http://www.oscars.org/awards/academy-awards/legacy/ceremony/85th-winners.html> (last visited July 9, 2014). The film has become required viewing across all branches of the military, including the 62d U.S. Army Judge Advocates General's Corps Graduate Course.

⁶ S. 538, 113th Cong. (2013).

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¹ *Sundry Legislation Affecting the Naval and Military Establishments of 1947: Hearing on H.R. 2964, 3417, 3735, 1544, 2993 and H.R. 2575 Before the H. Comm. on Armed Services*, 80th Cong. 4425 (1947) (statement of General Dwight D. Eisenhower, Chief of Staff, U.S. Army).

² Marcus Tullius Cicero—Quote, http://thinkexist.com/quotation/let_us_not_listen_to_those_who_think_we_ought_to/344620.html (last visited July 4, 2014). “Marcus Tullius Cicero was a Roman Philosopher and Political Theorist (Jan. 3, 106 BC–Dec. 7, 43 BC),” and “[h]is political thought and activism is [sic] said to have inspired the figures of both the American Revolution and the French revolution.” Marcus Tullius Cicero – Biography, THE EUROPEAN GRADUATE SCH., <http://www.egs.edu/library/cicero/biography/> (last visited July 9, 2014).

³ *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003) (citing UCMJ art. 60(c)(1)–(2) (2002)).

⁴ Jacques Billeaud, *Kimberly Hanks Stunned By Reversal of Lt. Col. James Wilkerson's Conviction*, HUFFINGTON POST (Apr. 4, 2012), http://www.huffingtonpost.com/2013/04/25/kimberly-hanks-james-wilkerson_n_3156868.html.

A military jury in November convicted Wilkerson, a former inspector general at Aviano Air Base in Italy, of aggravated sexual assault and other charges. He was sentenced to one year in prison and dismissal

authority to convene courts-martial and were vested with the responsibility to ensure justice was served. Article 65 of the Articles of War provided:

Any general officer commanding an army, or Colonel commanding a separate department, may appoint general courts-martial whenever necessary. But no sentence of a courts-martial shall be carried into execution until after the whole proceedings shall have been laid before the same officer ordering the same.⁷

The role of final arbiter over a court-martial was clearly a task allocated to the convening authority by the Founding Fathers of this nation. This tradition continued in subsequent revisions to the Articles of War.⁸ Commanders continued to be solely responsible for convening courts-martial and ensuring equity and justice were served at trial.

In 1950, Congress enacted the UCMJ in an effort to modernize criminal prosecutions in the military and institute uniformity across the Department of Defense.⁹ In addition, the UCMJ was created to prevent injustices that occurred during World War II.¹⁰ A key component of the UCMJ was the convening authority's power to review and take action on courts-martial after trial. This authority was primarily memorialized in Articles 60 and 64 of the UCMJ, which required that "after every trial by court-martial the record shall be forwarded to the convening authority"¹¹ for action, and that "the convening authority shall approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and as he in

his discretion determines should be approved."¹² During the House of Representatives, Committee on Armed Services hearing on the UCMJ in 1949, the convening authority's post-trial powers were discussed at length.¹³ Felix Larkin, Assistant General Counsel for the Office of the Secretary of Defense, outlined General Eisenhower's position on what that power encompassed:

[Y]ou might have a case where a man is convicted and it is a legal conviction and it is sustainable, that man may have such unique value and may be of such importance in a certain circumstance in a war area that the commanding officer may say, "Well he did it all right and they proved it all right, but I need him and I want him and I am just going to bust this case because I want to send him on this special mission."¹⁴

Mr. Larkin and others who testified before the committee agreed with Eisenhower that post-trial decisions by commanders were judgment calls based on command prerogative, so long as they accrued to the benefit of the accused.¹⁵ In 1969, the UCMJ was revised again, but the power of the convening authority to take action on findings and sentences following trial was unchanged.¹⁶ Congress amended Article 60 in 1983, adding clarifying language: "The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority."¹⁷ In addition, Congress established with particularity a right for an accused to submit matters to the convening authority to consider in the clemency determination, mandated a timeline for submission, and required convening authorities to consider the accused's submissions.¹⁸ The changes to Article 60 combined the previous post-trial powers of the convening authority, found in Articles 60 through 64, into one Article of the UCMJ outlining all post-trial procedures.¹⁹

The 1983 version of Article 60 memorialized the long-standing power of convening authorities and clearly

⁷ Articles of War, An Act for the Establishing Rules and Articles for the Government of the Armies of the United States, 2 Stat. 359 (1806).

⁸ EUGENE WAMBAUGH, GUIDE TO THE ARTICLES OF WAR 18–19 (1917); *id.* art. 46 (Approval and Execution of Sentence); *id.* art. 47 (Powers Incident to Power to Approve); LEE S. TILLOTSON, THE ARTICLES OF WAR ANNOTATED 155–65 (1949). Article 47 combined the previous Article 46 and 47, but the substance of the duty and power of the convening authority was unchanged.

⁹ S. REP. NO. 486, at 3 (1949).

¹⁰ *Id.* Examples of injustices were a sentence of ten years' confinement for a Soldier who had been in the Army for only three weeks and refused to give a lieutenant a cigarette; a sentence of five years' confinement at hard labor and a dismissal for a one-day AWOL; life imprisonment for an AWOL. The conviction rate for general courts-martial from 1942 to 1945 for the 63,876 held in the United States (no data is available for the 25,000 to 30,000 courts-martial held overseas) was 94% compared to 79.8% during World War I. Lastly, 141 death sentences were executed during World War II, including 51 for rape and one for desertion. H. COMM. ON MILITARY AFFAIRS, 79TH CONG., INVESTIGATIONS OF THE NATIONAL WAR EFFORT 3, 40–43 (Comm. Print 1946)

¹¹ UCMJ art. 60 (1950). The 1950 version of Article 60 stated, "After every trial by court-martial the record shall be forwarded to the convening authority, and action thereon may be taken by the officer who convened the court, an officer commanding for the time being, a successor in command, or by any officer exercising general court-martial jurisdiction." *Id.*

¹² *Id.* art. 64.

¹³ *Uniform Code of Military Justice: Hearing on H.R. 2498, Before the H. S. Comm. of the Comm. on Armed Service*, 81st Cong. 1184 (1949).

¹⁴ *Id.*

¹⁵ *Id.* at 1182–85.

¹⁶ UCMJ arts. 60 & 64 (1969).

¹⁷ UCMJ art. 60(c)(1) (1983).

¹⁸ *Id.* art. 60(b)(1)–(2) and (c)(2).

¹⁹ *Id.*

established total control over the outcome of courts-martial by allowing convening authorities to overturn convictions completely and to grant clemency by reducing punishments as they saw fit.²⁰ The Court of Appeals for the Armed Forces (CAAF) synthesized the law in *United States v. Davis*, stating that “[a]s a matter of ‘command prerogative’ a convening authority ‘in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part.’”²¹ When the convening authority “is performing his post-trial duties, his role is similar to that of a judicial officer.”²² In his post-trial role, the convening authority acts as an impartial arbiter. Specifically, with regard to a sentence, “the convening authority shall approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused.”²³ Given that convening authorities’ post-trial powers vest in the form of “command prerogative,” “sole discretion,” and appropriateness of sentence, those powers have been nearly unlimited, so long as they accrued to the benefit of the accused.²⁴ This unlimited power has changed drastically in the wake of recent amendments to the UCMJ.²⁵

B. The New Law

As a result of the public concerns that surfaced following the Lieutenant Colonel James H. Wilkerson III case²⁶ and the release of the widely-acclaimed documentary film *The Invisible War*,²⁷ Congress amended the UCMJ in many ways, including limiting the power of convening authorities to take action post-trial. A grand debate over how to address the sexual assault problem in the military recently transpired on Capitol Hill.²⁸ One side argued that commanders should be removed completely from the prosecution of non-military-specific criminal cases. Senator Kirsten Gillibrand of New York proposed legislation that would “[s]trip military commanders of any involvement in determining

how rape and sexual assault cases are handled.”²⁹ Senator Gillibrand’s bill, the Military Justice Improvement Act, proposed having senior judge advocates with significant trial experience decide whether a case will go forward and to what type of court-martial.³⁰ Military commanders would retain authority over military specific offenses and offenses with maximum punishments under one year.³¹ Under this proposal, military justice would function similarly to a federal prosecutor’s office—a senior attorney making prosecutorial decisions with no command input or influence in the process.

Senator Claire McCaskill of Missouri championed an alternative approach. This approach modified the post-trial powers of convening authorities, specifically, prohibiting dismissal of and changing findings to lesser included offenses and requiring written explanations by convening authorities for modifications to sentences.³² Senator McCaskill argued in her editorial piece in *USA Today* that taking all power from the commander was not the best way forward:

An alternative plan under consideration would strip military commanders of their responsibility to decide which sexual assault cases go to criminal trials, and instead create a separate prosecutor’s office outside the chain of command to handle such matters. We view this as a risky approach for victims—one that would increase the risk of retaliation, weaken our ability to hold commanders

²⁰ *Id.*

²¹ 58 M.J. 100, 102 (C.A.A.F. 2003) (citing UCMJ art. 60(c)(1)–(2)(2002)).

²² *United States v. Fernandez*, 24 M.J. 77, 78 (C.M.A. 1987) (citing *United States v. Boatner*, 43 C.M.R. 216 (C.M.A. 1971)).

²³ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1107(d)(2) (2012).

²⁴ *Id.* R.C.M. 1107 (b)(1), (d)(2).

²⁵ Spencer Ackerman, *Senate Approves U.S. Defence Budget Plan with Sexual Assault Reforms*, THE GUARDIAN, Dec. 20, 2013, <http://www.theguardian.com/world/2013/dec/20/congress-passes-ndaa-defense-budget-sexual-assault-reform>.

²⁶ Billeaud, *supra* note 4.

²⁷ THE INVISIBLE WAR, *supra* note 5.

²⁸ Helene Cooper, *Senate Rejects Blocking Military Commanders from Sexual Assault Case*, N.Y. TIMES, Mar. 6, 2014, http://www.nytimes.com/2014/03/07/us/politics/military-sexual-assault-legislation.html?_r=0.

²⁹ Ed O’Keefe, *Work on Sexual Assault in Military Signals Sen. Kirsten Gillibrand’s Evolution*, WASH. POST, Nov. 20, 2013, http://www.washingtonpost.com/politics/work-on-sexual-assault-in-military-signals-gillibrands-evolution/2013/11/20/ee999a9c-509c-11e3-9e2c-e1d01116fd98_story.html.

³⁰ S. 1752, 113th Cong. (2013). The bill provided,

[t]he determination whether to try such charges by court-martial shall be made by a commissioned officer of the Armed Forces designated in accordance with regulations prescribed for purposes of this subsection from among commissioned officers of the Armed Forces in grade O-6 or higher who (i) are available for detail as trial counsel under section 827 of title 10, United States Code (article 27 of the Uniform Code of Military Justice); (ii) have significant experience in trials by general or special court-martial; and (iii) are outside the chain of command of the member subject to such charges.

Id.

³¹ *Id.*

³² S. 538, 113th Cong. (2013).

accountable, and lead to fewer prosecutions.³³

Senator McCaskill argued that keeping commanders involved in the prosecution of sexual assaults would ensure command emphasis and command responsibility are the causes behind a reduction in sexual assaults.³⁴ She also pointed out that several U.S. allies have stripped commanders of power in the prosecutorial process and have seen no increase in prosecutions as a result.³⁵ Ultimately, Senator McCaskill's UCMJ reformation approach won the day over the nuclear option of removing a commander from the process entirely. The UCMJ was saved, but major reforms were enacted. One such reform was to the post-trial abilities of the convening authority, mainly Article 60 of the UCMJ.

The changes to Article 60, UCMJ, are divided into three categories: limitations on the power of the convening authority, required explanations for granting clemency by the convening authority, and involvement of victims in the post-trial process. This article addresses each category separately below and offers useful tips for implementation in post-trial practice in a military justice shop.

III. Changes

A. Limitations on the Power of the Convening Authority

The 2014 National Defense Authorization Act curtailed the convening authority's powers significantly with regard to action on findings and sentences.³⁶ These changes limiting a convening authority's power to grant clemency went into effect on 24 June 2014, and apply to offenses committed on or after that date.³⁷ Therefore, the changes outlined below should begin to affect post-trial advice and actions by

³³ Senator Claire McCaskill & Congresswomen Loretta Sanchez, *Commanders Must Fight Sexual Assault in Military*, USA TODAY, Aug. 29, 2013, <http://www.usatoday.com/story/opinion/2013/08/29/women-sexual-assault-column/2725081/>.

³⁴ *Id.*

³⁵ *Id.* Senator McCaskill pointed out that other nations who removed commanders from the military justice system did so to protect the rights of the accused, and that none saw increased prosecutions. Also, she cited ninety-three cases within the last two years where civilian prosecutors declined to prosecute cases that the U.S. military brought to court. *Id.*

³⁶ National Defense Authorization Act (NDAA), Pub. L. No. 113-66, 127 Stat. 672 (2013) [hereinafter 2014 NDAA]. The full text of NDAA § 1702(b) can be found in Appendix B (National Defense Authorization Act for Fiscal Year 2014).

³⁷ *Id.* § 1702(d)(2) (providing that amendments to Article 60, UCMJ, "shall take effect 180 days after the date of the enactment of this Act and shall apply with respect to offenses committed under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), on or after that effective date"). The NDAA was enacted on 26 December 2013. 24 June 2014 is 180 days after that date.

convening authorities starting in the fall of 2014 in most jurisdictions.

1. Findings

After a court-martial has adjudged a finding of guilty, the convening authority no longer has the authority to take the following actions:

[D]ismiss any charge or specification by setting aside a finding of guilty thereto; or change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.³⁸

Under the new Article 60, the convening authority may not dismiss by setting aside findings of guilty or change findings of guilty to lesser included offenses, except for qualifying offenses, in which case he must provide "a written explanation of the reasons for such action."³⁹ Qualifying offenses are offenses in which "the maximum sentence of confinement that may be adjudged does not exceed two years," and the sentence adjudged did not include a dismissal, a bad-conduct or dishonorable discharge, or confinement for more than six months.⁴⁰ In addition, the following Articles are expressly excluded from being a "qualifying offense": Articles 120(a) and (b), 120b,

³⁸ UCMJ art. 60(c)(3) (2012).

³⁹ 2014 NDAA, *supra* note 36, § 1702(b) (Elimination of Unlimited Command Prerogative and Discretion). There is an alternative reading of § 1702(b) that interprets the statute as not prohibiting convening authorities from dismissing charges, but merely requiring a written explanation if non-qualifying offenses are dismissed. The author disagrees with this view based on macro and micro level statutory analysis. On the macro level, the title of § 1702(b) is "Elimination of Unlimited Command Prerogative and Discretion." *Id.* Also, the bulk of the congressional debate regarding the changes to Article 60, UCMJ, revolved around removing command discretion during clemency. *See supra* Part II. To read § 1702(b)(3)(B)(i) and (C) as requiring only a written explanation for non-qualifying offenses conflicts with both the title of the section and the substance of the congressional debate. Thus, at the macro level, the alternative reading is deeply flawed. At the micro level, § 1702(b)(3)(B)(i) states that the convening authority "may not dismiss any charge or specification" other than for qualifying offenses. *Id.* This is clearly a prohibition on dismissal, except for qualifying offenses. The NDAA § 1702(b)(3)(C) provides that if a convening authority dismisses a charge (other than a qualifying offense), the convening authority shall provide a written explanation. This author believes that the "other than a qualifying offense" language must be read out of the statute. If not, § 1702(b)(3)(C) would authorize convening authorities to dismiss non-qualifying offenses so long as a written explanation is provided. *Id.* This reading directly contradicts the clear prohibition outlined in § 1702(b)(3)(B)(i). Thus, on the micro level, the alternative reading creates an irrational inconsistency. Based on both macro and micro statutory analysis the alternative reading of § 1702(b) is flawed. Therefore, the author adopted the view outlined in this article.

⁴⁰ *Id.* § 1702 (b)(3)(D).

125⁴¹ and “such other offenses as the Secretary of Defense may specify by regulation.”⁴² In general, qualifying offenses are military-specific crimes and crimes typically considered misdemeanors. Below are some examples to help explain this concept and demonstrate the absolute importance of making the correct charging decision.⁴³

Example 1

Sergeant Smith is an excellent Soldier with numerous awards for valor, but missed her unit’s deployment flight to Afghanistan because of car trouble. Sergeant Smith was charged with missing movement by design, a violation of Article 87, UCMJ, with a maximum allowable period of confinement of two years.⁴⁴ She is found guilty by a general court-martial and sentenced to confinement for 180 days and no discharge. In this case, the convening authority may set aside the finding of guilty or change the finding of guilty to a lesser-included offense because the charge is a qualifying offense.

The charge of missing movement by design carries a maximum allowable confinement period of two years and the adjudged sentence did not include a discharge or confinement for a period of more than six months. Thus, the convening authority can dismiss the charge by setting aside the finding of guilty or change the finding of guilty to a finding of guilty of a lesser included offense, such as missing movement by neglect or absence without leave, but the convening authority must state in writing the reason for the decision. If Sergeant Smith had received a discharge or confinement of 181 days (or more) as part of her adjudged sentence, the convening authority would be foreclosed from taking any action on the findings beyond simply approving them.

Example 2

Same facts as Example 1, but this time Sergeant Smith called her company commander when she knew she would be late. Her company commander ordered her to arrive at the flight location at a specific time, yet Sergeant Smith still missed the flight due to car trouble. Sergeant Smith was charged with failing to obey a lawful order from her company commander to board the deployment aircraft, in

violation of Article 90, UCMJ, which carries a maximum allowable period of confinement for five years.⁴⁵ She was found guilty by a general court-martial and sentenced to no punishment. Under these facts, the convening authority could not dismiss the charge as an act of clemency because the maximum sentence of confinement that could be adjudged exceeded two years. Conversely, if the convening authority had referred the case to a special court-martial, the maximum sentence of confinement that could have been adjudged would not have exceeded two years, so the convening authority would be free to dismiss the charge post-trial.

These Sergeant Smith scenarios demonstrate the importance of the charging and referral decisions under the new Article 60 and the extreme limitations on the power of convening authorities in granting clemency by setting aside or reducing findings to lesser included offenses. Additional limitations exist on clemency powers of convening authorities regarding sentence.

2. Sentence

Although granting clemency in the form of modifying findings is generally a rare occurrence by convening authorities,⁴⁶ the same cannot be said for post-trial action on a sentence. Convening authorities have traditionally granted clemency to an accused in the form of a sentence reduction. Under the new Article 60, UCMJ, the convening authority “may not disapprove, commute, or suspend in whole or in part an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad conduct discharge,”⁴⁷ with two exceptions. First,

[u]pon the recommendation of the trial counsel, in recognition of the substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense, the convening authority . . . shall have the authority to disapprove, commute, or suspend the adjudged sentence in whole or in part, even with respect to an offense for

⁴¹ UCMJ arts. 120(a) (Rape), 120(b) (Sexual Assault), 120b (Rape and Sexual Assault of a Child), 125 (Sodomy) (2012).

⁴² *Id.*

⁴³ MAJOR MEGAN WAKEFIELD, CRIMINAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY art. 60 chart (9 Jan. 2014) (outlining the changes to Article 60, UCMJ, in a simplified form) (Appendix A).

⁴⁴ UCMJ art. 87(e) (2012).

⁴⁵ *Id.* art. 90 (e).

⁴⁶ *Sexual Assault in the Military: Hearing Before S. Armed Serv. Subcomm. on Personnel*, 113th Cong. (2013) (statement of Sen. Lindsey Graham, ranking member of subcomm.), available at <http://www.c-span.org/video/?311468-2/sexual-assault-military-part-2>. The Judge Advocate Generals of each Armed Service gave the percentage of disapproval and dismissal of all findings by convening authorities after courts-martial as follows: Marines 0.4% (0 Sexual Assault (SA) cases), Air Force 1.4% (5 SA cases), Army 1.4% (0 SA cases). The Navy did not have an adequate tracking system to determine the percentage at that time, but had zero SA cases. *Id.*

⁴⁷ 2014 NDAA, *supra* note 36, § 1702(4)(A).

which a mandatory minimum sentence exists.⁴⁸

The mandatory minimum sentence referenced in the section refers to new mandatory dishonorable discharge or dismissal for an accused found guilty of violations of rape, sexual assault, rape or sexual assault of a child, forcible sodomy, or attempts to commit said offenses.⁴⁹ While the statute uses the term “mandatory minimum sentences,” in actuality, the provision creates a mandatory discharge requirement, not a traditional mandatory minimum sentence as in other criminal statutes.⁵⁰

The second exception to the new restrictive rules prohibiting sentencing clemency is a pretrial agreement. The convening authority can still enter into a pretrial agreement with the accused and promise to limit the sentence that the convening authority will approve.⁵¹ However, unlike the provision rewarding the accused who cooperates with the government by allowing the convening authority unfettered clemency even in mandatory discharge cases, the pretrial agreement exception only allows convening authorities to commute a dishonorable discharge to a bad-conduct discharge.⁵² The convening authority cannot “disapprove, otherwise commute, or suspend the mandatory minimum sentence in whole or in part,” in accordance with a pretrial agreement, except commuting a dishonorable discharge to a bad-conduct discharge, unless the accused meets the requirements for cooperating with the government, as outlined above.⁵³ However, the convening

authority is still free to negotiate a confinement cap as part of an agreement. To illustrate the mechanics of the new Article 60 regarding sentencing clemency, several examples follow.

Example 1—Confinement Less Than Six Months and No Discharge

Private Jones was charged with violations of Articles 120a, stalking, and 120b, sexual assault of a child over the age of twelve, and his case was referred to a general court-martial. Private Jones pled not guilty to all charges. The court-martial found Private Jones guilty of stalking, but not guilty of sexual assault based on a successful defense that the accused reasonably believed the child was over sixteen years of age, and sentenced Private Jones to six months’ confinement and no discharge. There was no finding of guilty for an offense requiring a mandatory discharge, and the adjudged sentence did not include a punitive discharge or confinement for greater than six months. Therefore, the convening authority could disapprove all punishment, but must explain in writing the reasons for such action.⁵⁴

Example 2—Confinement Greater Than Six Months or Punitive Discharge

Same facts as Example 1, but the court-martial found Private Jones guilty of both stalking and sexual assault of a child. The court-martial sentenced Private Jones to seven months’ confinement, forfeiture of all pay and allowances, and the mandatory dishonorable discharge.⁵⁵ On these facts the convening authority cannot modify the adjudged sentence as to confinement or the discharge, but can act on the forfeitures. Since the adjudged sentence included confinement in excess of six months and a punitive discharge, the convening authority is foreclosed from “disapproving, commuting or suspending” any part of the confinement or discharge.⁵⁶ However, the new Article 60 does not prohibit the convening authority from disapproving, commuting, or suspending adjudged forfeitures or reductions. Thus, the convening authority is free to disapprove or suspend the forfeitures in this case, but must explain the reason for doing so in writing.

⁴⁸ *Id.* § 1702(4)(B).

⁴⁹ *Id.* § 1705(b)(1).

[A] person subject to this chapter who is found guilty of an offense specified in paragraph (2) shall be punished as a general court-martial may direct, such punishment must include, at a minimum, dismissal or dishonorable discharge, except provided for in . . . article 60. (2) Paragraph (1) applies to the following offenses:

(A) An offense in violation of subsection (a) or (b) of section 920 of this title (article 120(a) or (b)).

(B) Rape and sexual assault of a child under subsection (a) or (b) of section 920b of this title (article 120b).

(C) Forcible sodomy under section 925 of this title (article 125).

(D) An attempt to commit an offense specified in subparagraph (A), (B), or (C) that is punishable under section 880 of this title (article 80).

Id.

⁵⁰ The requirements of mandatory dishonorable discharge or dismissal are not minimum sentences, but rather an imposition of the maximum discharge allowable. There are no higher degrees of discharge from the military.

⁵¹ *Id.* § 1702(4)(c).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* §1702(b)(2)(C).

⁵⁵ There is currently a debate over whether a convening authority could take action to reduce confinement in cases were a punitive discharge was adjudged but confinement did not exceed six months. The plain language of the statute seems to allow for such action.

⁵⁶ *Id.* § 1702(b)(4)(A).

Example 3—Pretrial Agreement

Same facts as Example 1, but this time Private Jones entered into a pretrial agreement in which he promised to plead guilty to both charges in exchange for the convening authority commuting an adjudged dishonorable discharge to a bad-conduct discharge and disapproving confinement in excess of six months. Based on the pretrial agreement, the convening authority can commute the adjudged dishonorable discharge to a bad-conduct discharge and disapprove confinement in excess of six months.⁵⁷ As in the previous example, the convening authority can act on the forfeitures without limitation.

Example 4—Accused Assisting the Government With Other Cases

The same facts as Example 2, but trial counsel recommended clemency to the convening authority based on “substantial assistance by the accused in the investigation”⁵⁸ of Private Stealsalot in a barracks larceny case. Since Private Jones substantially assisted the government in another case and because trial counsel recommended clemency, the convening authority can disapprove, commute, or suspend the adjudged sentence in whole or in part, even with respect to an offense for which a mandatory minimum sentence exists. Thus, in this example, the convening authority has the discretion to disapprove the entire sentence, but must still provide a written explanation as to the rationale.

Now that the new limitation imposed by Article 60 on the powers of convening authorities to act on finding and sentence have been addressed, we turn to the requirement of written explanations of the decision to grant clemency.

B. Written Explanations by Convening Authorities

As mentioned above, when the convening authority elects to grant clemency, the new Article 60 requires a written explanation be included in the record of trial as to why the decision was made in most cases. Any time a convening authority elects to dismiss a charge or specification by setting aside a finding of guilty or changing a finding of guilty to a lesser included offense, he must explain in writing “the reasons for such action.”⁵⁹ Also,

when a convening authority elects to grant clemency in the form of a reduction to the adjudged sentence, a written explanation is required, except with regard to qualifying offenses.⁶⁰ Now that convening authorities must explain their decisions to grant clemency, the question remains how best to meet this requirement.

The best practice is to have the military justice shop draft model language for the convening authority. This language should be as simple and straight-forward as possible. For example, “the convening authority has considered the Staff Judge Advocate’s Recommendation (SJAR), the Report of Result of Trial (RROT), the matters submitted by the accused pursuant to Rule for Courts-Martial (RCM) 1105 and 1106, and the submissions of the victims in this case, and grants clemency based on the following reasons.” A menu of options should be outlined for the convening authority to choose from, or more likely, for the chief of military justice to choose from. The menu should include, “extenuation and mitigation,” “substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense,” or “in accordance with a pre-trial agreement.” This standardized approach eliminates multiple trips to the convening authority to memorialize his intent and avoids potential legal error arising from inartful wording by the convening authority.

Now that the language is clear, the question remains concerning where to include the clemency explanation in the Record of Trial. The simplest method is to add the language to the action document. This approach eliminates the convening authority signing multiple documents and reduces the risk of missing a signature during a given meeting. Alternatively, a separate document could be drafted with greater detail of the rationale for the grant of clemency or multiple options for the convening authority to choose from. Although this approach may provide greater insight as to why the decision is made by the convening authority, it may expose the convening authority to greater criticism and potentially create grounds for challenge on appeal.⁶¹ Since the new requirement for written explanations of decisions to grant clemency has been explored, the new requirement for victim input in the post-trial process will be addressed.

⁵⁷ *Id.* § 1702(b)(4)(C)(i).

⁵⁸ *Id.* § 1702(b)(4)(B).

⁵⁹ *Id.* § 1702(b)(3)(C). However, based on the plain text of the statute, there is an argument that no written explanation is required. Subsection (b)(3)(B) prohibits the dismissal of charges except for qualifying offenses, while subsection (b)(3)(C) requires a written explanation when dismissing charges, but excludes qualifying offenses from the requirement. This author believes the principles of statutory construction provide that the statute should be read to give meaning to the statute. Thus, striking the

exclusion of qualifying offenses from the written explanation requirement is most logical. Without such action, the written requirement would have no meaning.

⁶⁰ *Id.* § 1702(b)(2)(C).

⁶¹ Examples of potential legal error arising from the convening authority’s explanation include: not considering items required by Rule for Courts-Martial 1107; considering items adverse to the accused that have not been served on the accused; and using language indicating an inelastic disposition or undue command influence. MCM, *supra* note 23, R.C.M. 1107(b)(3).

C. Victim Input in the Post-Trial Process

Under the new NDAA, “the victim shall be provided an opportunity to submit matters for consideration by the convening authority” during the clemency phase of the court-martial process.⁶² The timeline for the victim’s post-trial submission is the same as an accused’s timeline for submitting RCM 1105/1106 matters—ten days from service of the authenticated record of trial and the SJAR, with a possible twenty-day extension based on good cause.⁶³ A victim is defined as “a person who has suffered a direct physical, emotional, or pecuniary loss as a result of a commission of an offense.”⁶⁴ Clearly, this definition is extremely broad and does not require that the victim be named in a specification.⁶⁵

A victim can waive the right to make a submission, but must do so in writing.⁶⁶ As a matter of practice, waiver could become the norm, since in the majority of cases the convening authority has no significant powers to grant clemency regarding dismissal of charges, reduction of the period of confinement, or disapproval of punitive discharges. As outlined above, unless the sentence does not include a discharge or confinement in excess of six months or involve a pretrial agreement or cooperation with the government in other cases, the convening authority can only grant clemency regarding reduction or forfeitures. If this reality is properly explained to victims, then many victims will likely not care to participate in the clemency process.

Who will explain the process to victims will vary depending on the type of case. In sexual assault cases, the Special Victim Counsel (SVC) will play a vital role in both assisting the victim with submissions and explaining the process, including waiver. However, trial counsel will need to address victims falling outside the scope of the SVC program. Both Special Victim Counsel and trial counsel need to fully understand the post-trial process and be able to flawlessly explain it to their clients for waiver to be used to the greatest extent possible.

Although victims can now play a role in the post-trial clemency process, the convening authority cannot consider “submitted matters that relate to the character of the victim unless such matters were presented as evidence at trial and

not excluded at trial.”⁶⁷ Given this new limitation on what can be considered by the convening authority during the clemency phase, staff judge advocates (SJAs) and chiefs of justice must read victim and defense submissions carefully to ensure character evidence regarding the victim not admitted at trial do not go before the convening authority. This can be done by redacting submissions or notifying the defense or a victim that a submission does not comply with the new law, giving defense or a victim an opportunity to bring the submission into compliance. The latter would be the preferred method, since a mistake of over-redaction could create a legal error. Also, if defense discovered evidence related to a victim’s character after the conclusion of the trial, but prior to convening authority action, the defense counsel would need to request a post-trial Article 39, UCMJ, session before the military judge.

The provisions requiring an opportunity for victim participation in the post-trial process and the limitation on submissions related to the victim’s character not admitted at trial became effective 24 June 2014.

D. Implementation of New Provisions

Now that the changes to Article 60 have been outlined, implementation in practice must be addressed. All other changes previously addressed went into effect on 24 June 2014, and apply to offenses committed on or after that date.⁶⁸ Although on its face the application seems straightforward, a few examples listed below explore the nuance of implementation in the field.

Example 1—Old Offense

Sergeant Smith commits an offense under the UCMJ on 1 May 2014, is convicted by a general court-martial, and the convening authority is set to take action on 1 September 2014. In this case, the SJAR should be based on the old Article 60 because the offense at issue occurred before the effective date of the new Article 60. Thus, the convening authority has nearly unfettered power to grant clemency.

Example 2—New Offense

Sergeant Smith commits an offense under the UCMJ on 1 July 2014, is convicted by a general court-martial, and the convening authority is due to take action on 1 September 2014. The SJAR should be based on the new Article 60 and the convening authority is subject to all the new restrictions as to his clemency powers.

⁶² 2014 NDAA, *supra* note 36, § 1706.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ The new NDAA section 1706 requires that the authenticated record of trial be served on victims in accordance with Article 54(e), UCMJ, which requires service on Article 120 victims that testify at trial. The new NDAA has an internal inconsistency. Given the congressional intent to expend victim involvement in the post-trial process, the statute should be read to strike the superfluous reference to Article 54(e).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* § 1702(d)(2).

Example 3—An Old and a New Offense

Sergeant Smith commits an offense on 1 May 2014, and a second offense on 1 July 2014, is convicted of both offenses by a general court-martial on 1 August 2014, and the convening authority is due to take action on 1 October 2014. The SJA advice to the convening authority is complicated in this scenario. Regarding the findings related to the offenses, the advice is fairly basic: the findings related to the offense committed on 1 May 2014 can be set aside by the convening authority based on the clemency powers under the old Article 60, UCMJ. However, the findings related to the offense committed on 1 July 2014 may not be dismissed, unless the offense is a qualifying offense based on the new Article 60, UCMJ.

Regarding the action on the sentence, alternative arguments exist as to which version of Article 60 apply. First, since Congress made the mandatory minimum sentence provisions effective 180 days from enactment (24 June 2014) on the date of the trial if an offense was an Article 120a offense, and since it occurred after 24 June 2014, the mandatory minimum sentence would be applicable. It is not logical for Congress to require a mandatory minimum sentence and then allow convening authorities to act to circumvent the requirement by allowing the old Article 60 to control.

Conversely, there is persuasive argument that adopting this view would allow the government to simply add a minor offense that occurred after 24 June 2014 to receive the benefit of the new restrictive Article 60 during the post-trial clemency phase with regard to sentence. This seems inherently unfair. If faced with the situation where offenses occurred before and after 24 June 2014, the SJA advice must make clear the differing clemency constructs that exist for each offense. In circumstances where the convening authority wishes to grant sentencing clemency prohibited by the new Article 60, the action must make clear that the grant of sentencing clemency is related to the offense occurring prior to 24 June 2014. This is a technical and tedious task in twilight Article 60 cases, but it is necessary.

With many changes to post-trial on the horizon, it is important to consider how actions throughout the court-martial process will affect a convening authority's ability to act at the conclusion of the process. Below are a few areas to contemplate during the court-martial process with an eye toward action.

IV. Considerations Resulting from Changes

Under the new Article 60, the charging and referral decisions in a given case set the table for what the post-trial clemency process will look like. If non-qualifying offenses are charged, then clemency will be limited; however, if non-qualifying offenses are charged, but referred to a special court-martial, those charges arguably will become qualifying

offenses, depending on the sentence adjudged. Having clemency options is not only important to the defense, but in cases where the convening authority may want to grant clemency, the choice made in charging and referral may frustrate the convening authority's intent.

Second, the practice of giving sentencing relief post-trial to account for minor legal errors in most cases will be eliminated. For example, giving an accused minor sentencing relief in situations of unreasonable delay in post-trial processing cannot happen in cases in which the adjudged sentence includes confinement greater than six months or a punitive discharge. As a result, the service courts will be required to act on more cases at the appellate level that once were remedied in the field. The accused's "best chance for post-trial [*sic*] clemency,"⁶⁹ will now rest with the appellate courts.

Given the new requirement allowing victims an opportunity to submit matters during the post-trial process, it is incumbent upon the government to properly explain the new clemency framework to victims and determine whether waiver is an option. Under the new system, the post-trial process will take more time and create more room for claims of unreasonable post-trial delay. Under the new system, matters submitted by victims will likely contain "new matter" requiring service on defense with ten days for defense to comment.⁷⁰ These additional ten days, coupled with any delay in receiving victim submissions or any delay caused by addressing impermissible submission by defense or by victims "related to the character of a victim,"⁷¹ will likely increase post-trial processing times. However, understanding and explaining to victims what the convening authority's clemency powers entail in a given case and what cannot be included in a submission will likely generate waiver of submissions by victims. Such a forward-looking approach will unencumber the post-trial process.

Lastly, sentencing arguments and, specifically, requesting sentences that will avoid qualifying offenses are increasingly important under the new Article 60 framework. Trial counsel must understand the importance of requesting and obtaining adjudged sentences that include a punitive discharge or greater than six months confinement.⁷² The mere act of requesting a sentence that will create a qualifying offense will generate substantially greater work for the government in the post-trial processing context. Gone are the days when sentencing arguments made by trial counsel at trial are generally meaningless in the post-trial

⁶⁹ United States v. Wheelus, 49 M.J. 283, 287 (C.A.A.F. 1998); see United States v. Wilson, 26 C.M.R. 3, 6 (C.M.A. 1958).

⁷⁰ MCM, *supra* note 23, R.C.M. 1106(f)(7).

⁷¹ 2014 NDAA, *supra* note 36, § 1706.

⁷² *Id.* § 1702.

processing environment. Trial counsel must be trained on this new reality.

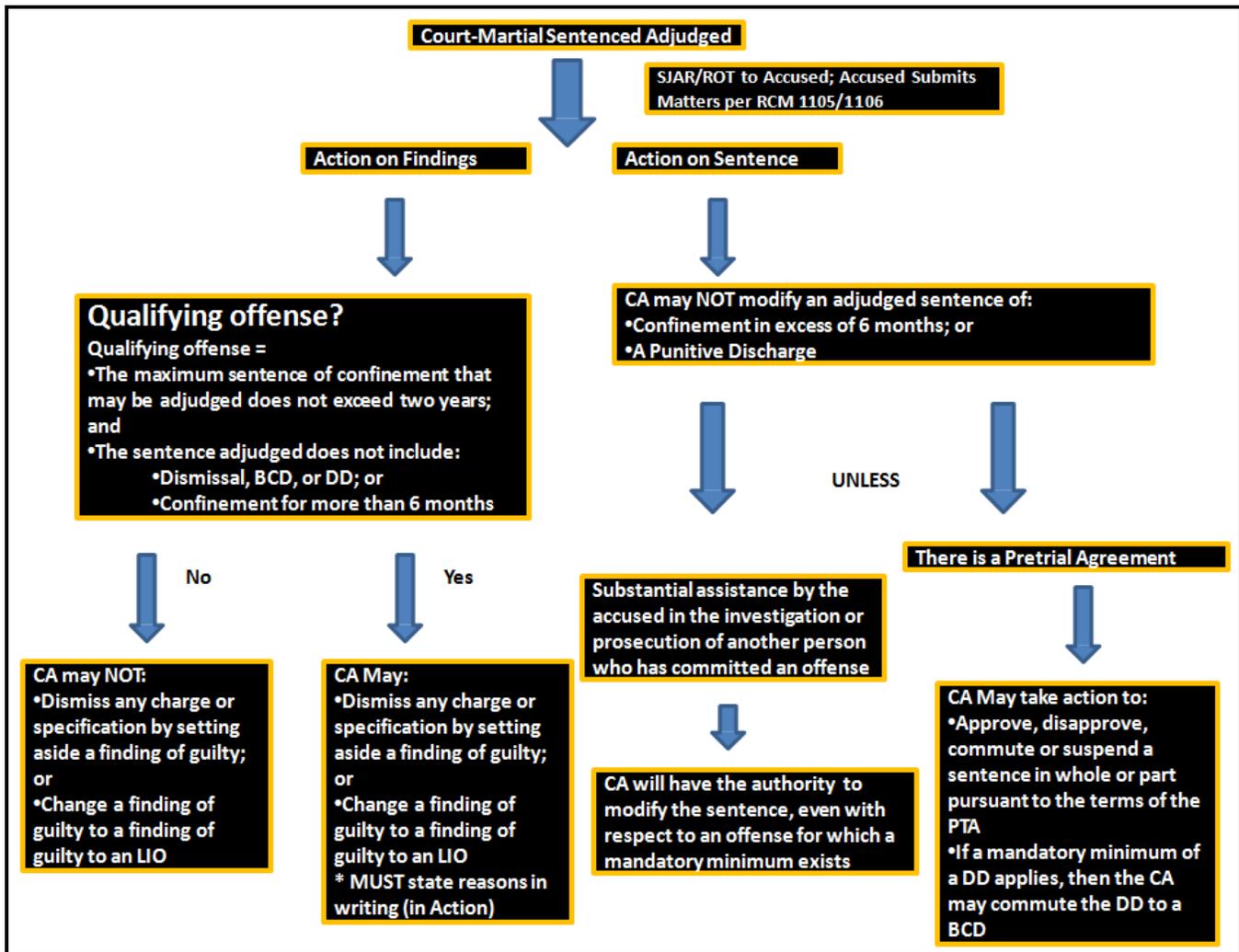
V. Conclusion

Under the new Article 60, convening authorities will no longer be able to dismiss or reduce findings to lesser included offenses or reduce adjudged sentences, except for qualifying offenses, unless a pre-trial agreement has been entered into or the accused has assisted the government in other cases. Furthermore, convening authorities must explain decisions to grant clemency on findings and sentence in all cases except for qualifying offenses. In addition, convening authorities may not be presented with

post-trial submissions that include information about a victim's character, unless that information was accepted into evidence at trial. Lastly, victims now have a right to submit matters during the post-trial process, unless they waive such right. These changes will fundamentally change post-trial processes and severely curtail the chances for an accused to receive clemency. How these changes are implemented by military justice practitioners in the field will determine the future of the military justice system and level of congressional meddling going forward. Will the UCMJ go the way of the Roman Empire as Cicero might predict? Will a future Supreme Allied Commander be hamstrung from ensuring good order and discipline as General Eisenhower feared? These questions hinge on the implementation of the new Article 60, UCMJ.

Appendix A

New Article 60 Chart⁷³



⁷³ WAKEFIELD, *supra* note 43.

Appendix B

National Defense Authorization Act for Fiscal Year 2014

SEC. 1702. REVISION OF ARTICLE 32 AND ARTICLE 60, UNIFORM CODE OF MILITARY JUSTICE.

(b) ELIMINATION OF UNLIMITED COMMAND PREROGATIVE AND DISCRETION; IMPOSITION OF ADDITIONAL

LIMITATIONS.—Subsection (c) of section 860 of title 10, United States Code (article 60 of the Uniform Code of Military Justice), is amended to read as follows:

(c)(1) Under regulations of the Secretary concerned, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

(2)(A) Action on the sentence of a court-martial shall be taken by the convening authority or by another person authorized to act under this section. Subject to regulations of the Secretary concerned, such action may be taken only after consideration of any matters submitted by the accused under subsection (b) or after the time for submitting such matters expires, whichever is earlier.

(B) Except as provided in paragraph (4), the convening authority or another person authorized to act under this section may approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part.

(C) If the convening authority or another person authorized to act under this section acts to disapprove, commute, or suspend, in whole or in part, the sentence of the court-martial for an offense (other than a qualifying offense), the convening authority or other person shall provide, at that same time, a written explanation of the reasons for such action. The written explanation shall be made a part of the record of the trial and action thereon.

(3)(A) Action on the findings of a court-martial by the convening authority or by another person authorized to act under this section is not required.

(B) If the convening authority or another person authorized to act under this section acts on the findings of a court-martial, the convening authority or other person—

(i) may not dismiss any charge or specification, other than a charge or specification for a qualifying offense, by setting aside a finding of guilty thereto; or

(ii) may not change a finding of guilty to a charge or specification, other than a charge or specification for a qualifying offense, to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.

(C) If the convening authority or another person authorized to act under this section acts on the findings to dismiss or change any charge or specification for an offense (other than a qualifying offense), the convening authority or other person shall provide, at that same time, a written explanation of the reasons for such action. The written explanation shall be made a part of the record of the trial and action thereon.

(D)(i) In this subsection, the term ‘qualifying offense’ means, except in the case of an offense excluded pursuant to clause (ii), an offense under this chapter for which—

(I) the maximum sentence of confinement that may be adjudged does not exceed two years; and

(II) the sentence adjudged does not include dismissal, a dishonorable or bad-conduct discharge, or confinement for more than six months.

(ii) Such term does not include any of the following:

(I) An offense under subsection (a) or (b) of section 920 of this title (article 120).

(II) An offense under section 920b or 925 of this title (articles 120b and 125).

(III) Such other offenses as the Secretary of Defense may specify by regulation.

(4)(A) Except as provided in subparagraph (B) or (C), the convening authority or another person authorized to act under this section may not disapprove, commute, or suspend in whole or in part an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad conduct discharge.

(B) Upon the recommendation of the trial counsel, in recognition of the substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense, the convening authority or another person authorized to act under this section shall have the authority to disapprove, commute, or suspend the adjudged sentence in whole or in part, even with respect to an offense for which a mandatory minimum sentence exists.

(C) If a pre-trial agreement has been entered into by the convening authority and the accused, as authorized by Rule for Courts-Martial 705, the convening authority or another person authorized to act under this section shall have the authority to approve, disapprove, commute, or suspend a sentence in whole or in part pursuant to the terms of the pre-trial agreement, subject to the following limitations for convictions of offenses that involve a mandatory minimum sentence:

(i) If a mandatory minimum sentence of a dishonorable discharge applies to an offense for which the accused has been convicted, the convening authority or another person authorized to act under this section may commute the dishonorable discharge to a bad conduct discharge pursuant to the terms of the pre-trial agreement.

(ii) Except as provided in clause (i), if a mandatory minimum sentence applies to an offense for which the accused has been convicted, the convening authority or another person authorized to act under this section may not disapprove, otherwise commute, or suspend the mandatory minimum sentence in whole or in part, unless authorized to do so under subparagraph (B).

Eligibility for VA Disability Compensation and Health Care Benefits for Army National Guardsmen Discharged with an Other Than Honorable Discharge

Captain Jeremy R. Bedford*

I. Introduction

While deployed to Iraq, Sergeant (SGT) Jane Smith, a Guardsman, is afflicted with post-traumatic stress disorder (PTSD). She receives an honorable discharge from this deployment. Upon returning home, SGT Smith resumes inactive duty for training (drilling) status and fails an Army National Guard (ARNG) urinalysis for marijuana use. Subsequently, the ARNG unit seeks to separate her in an ARNG administrative separation board with a service characterization of other than honorable (OTH) based on the failed urinalysis. Referencing Army Regulation (AR) 135-178, *Army National Guard and Army Reserve Enlisted Administrative Separations*, which states that a “separation characterized as under other than honorable conditions could deprive the Soldier of veterans’ benefits,”¹ defense counsel passionately argues for a general discharge so that SGT Smith can receive the necessary Veteran Affairs (VA) benefits to treat her PTSD. Concerned for SGT Smith, the board asks the legal advisor whether an ARNG OTH bars SGT Smith’s eligibility for VA disability compensation and health care benefits. How should the legal advisor to the board respond?

There is a widespread belief within the ARNG community that a Guardsman becomes ineligible for VA disability compensation and health care benefits when he receives a discharge under OTH conditions from the ARNG. Defense counsel will commonly seek a general discharge for Guardsmen at ARNG separation boards, arguing that Guardsmen will lose their VA benefits if they receive an OTH discharge. This notion, however, is incorrect. The misconception stems from AR 135-178 interpreting the applicable VA laws incorrectly by mirroring the language in AR 635-200, the active duty separation regulation, and failing to account for the difference between an active service discharge and an ARNG discharge.

This article explains how AR 135-178 incorrectly interprets the applicable VA laws, demonstrating that a Guardsman who is injured during a Title 10 deployment and receives an honorable or general discharge for that deployment remains eligible for VA disability compensation and health care benefits, even if he subsequently receives an OTH separation based on misconduct that occurred while on Title 32 status.

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¹ U.S. DEP’T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS para. 2-8(a) (13 Sept. 2011) [hereinafter AR 135-178].

II. Eligibility for VA Benefits and AR 135-178

To understand the error in AR 135-178’s interpretation of VA benefits, it is necessary to understand the current VA laws regarding disability compensation and health care benefits.

A. Eligibility for VA Benefits in General

To receive VA benefits, one must first be a veteran under Title 38 of the U.S. Code, and such veteran must be disabled as a result of an active service-related personal injury or disease. The first threshold issue of whether the individual is considered a veteran depends on whether one served in active service without receiving a dishonorable discharge. The VA law states that a veteran is a “person who served in the active military, naval, or air service and who was discharged or released under conditions other than dishonorable.”² So any servicemember who served in the active military and does not receive a dishonorable discharge may be eligible for VA benefits. In the case where a veteran receives an OTH discharge, the Department of Veteran Affairs (DVA) must make “a formal finding . . . to determine the effect of an OTH discharge on a veteran’s benefits.”³ Once one qualifies as a veteran for VA purposes, then the issue is whether the veteran is eligible for such benefits. The VA regulations state that “basic entitlement for a veteran exists if the veteran is disabled as the result of a personal injury or disease (including aggravation of a condition existing prior to service) while in active service if the injury or the disease was incurred or aggravated in the line of duty.”⁴

The application of this rule is fairly simple for active duty Soldiers as correctly reflected in its separation regulation, AR 635-200, *Active Duty Enlisted Administrative Separations*. Army Regulation 635-200 states that “[d]ischarge under other than honorable conditions may or may not deprive the Soldier of veterans’ benefits administered by the Department of Veterans Affairs; a determination by that agency is required in each case.”⁵ This is a correct statement of law as an OTH discharge with

² 38 U.S.C. § 101(2) (2012).

³ U.S. DEP’T OF VETERANS AFFAIRS, M21-1 ADJUDICATION PROCEDURES MANUAL REWRITE pt. 3, subpt. V, ch. 1, sec. B, para. 5(c) (23 Feb. 2012) [hereinafter DVA M21-1MR] (“Formal Findings Required for OTH Discharges”).

⁴ Pensions, Bonuses, and Veterans’ Relief, 38 C.F.R. § 3.4(b)(1) (2012).

⁵ U.S. DEP’T OF ARMY, REG. 635-200, ENLISTED ADMINISTRATIVE SEPARATIONS para. 3-6(b) (6 Sept. 2011) [hereinafter AR 635-200].

certain conditions does potentially bar servicemembers from VA benefits, requiring the DVA to make a formal determination of VA eligibility when one receives an OTH.⁶

B. Guardsman's Eligibility for VA Benefits

For the ARNG, however, the application is not so straightforward. Unlike active duty, Guardsmen are not eligible for VA healthcare and disability compensation benefits on the basis of their ARNG service except in three circumstances: (1) when a Guardsman is considered a veteran by the DVA; (2) when an injury or disease occurs on active duty for training; and (3) when an injury occurs during a period of inactive duty for training (or commonly referred as drill).⁷ Unless a Guardsman falls into one of these categories, he is not eligible for VA benefits on the basis of his ARNG service. The DVA does not consider ARNG service when making an eligibility determination for disability compensation and healthcare benefits. A Guardsman who served an entire six year enlistment may still not be eligible for certain veteran's benefits, such as health care, disability compensation, and veteran's preference.⁸

C. Army Regulation 135-178's Misleading Description

Despite the DVA's difference in treatment of active duty service and ARNG service, AR 135-178 uses the same verbiage as AR 635-200. Army Regulation 135-178 states that "separation characterized as under other than honorable conditions could deprive the Soldier of veterans' benefits administered by the [DVA]. A determination by that agency is required in each case."⁹ Though technically a correct statement of law as it applies to active duty Soldiers, this description is misleading in the context of an ARNG separation. It fails to distinguish between an active duty and ARNG OTH discharge and incorrectly implies that an ARNG OTH discharge may deprive a veteran's disability compensation and health care benefits. This incorrect interpretation of the VA law contributes to the misconception discussed in Part I.

To further illustrate the problem with the current wording in the AR 135-178, the next part explains why and how a Guardsman like SGT Smith is still eligible for gratuitous VA benefits, including disability compensation

⁶ See 38 U.S.C. § 5303 (2012) (listing several conditions in which discharge under other than honorable conditions bars veteran affairs benefits).

⁷ 38 C.F.R. § 3.1.

⁸ However, a Guardsman may be entitled to benefits such as the GI Bill and the VA Home Loan on the basis of his National Guard service.

⁹ AR 135-178, *supra* note 1, para. 2-8(a).

and health care for her PTSD that she incurred during her active duty deployment.¹⁰

III. Sergeant Smith's Eligibility for VA Healthcare and Disability Compensation Benefits

For SGT Smith to qualify for VA healthcare and disability compensation benefits, she must first be considered a veteran under VA laws and then be found to have a disability as a result of an active service-connected injury or disease.¹¹ As stated above, a veteran is a person who served in the active military and was discharged or released under conditions other than dishonorable.¹² Additionally, VA regulations state that "if the former servicemember did not die in service, [then] pension, compensation, or dependency and indemnity compensation is not payable unless *the period of service on which the claim is based* was terminated by discharge or release under conditions other than dishonorable."¹³ The important wording of this statute is "the period of service on which the claim is based."

Sergeant Smith's VA benefits claim for PTSD is based on her active service deployment. This period of service ended upon her release from active duty. Any subsequent ARNG service is not considered a period of service for VA benefits purposes, unless it meets one of the exceptions mentioned above (injury or disease on active duty for training or injury on inactive duty for training). Army Regulation 135-178 states that "an honorable [discharge] characterization may only be awarded to a Soldier upon *completion* of his or her service obligation, or where required under specific reasons for separation, unless an uncharacterized description is warranted."¹⁴ Since SGT Smith completed an active duty deployment, this deployment is considered a complete period of service and

¹⁰ It must be noted that the scenario below applies to *any* injury or disease incurred during a period of active service where the discharge is characterized as honorable or general under honorable conditions.

¹¹ See *supra* Part I.

¹² 38 U.S.C. § 101(3).

The term "discharge or release" includes, (A) retirement from the active military, naval, or air service, and (B) the *satisfactory completion* of the period of active military, naval, or air service for which a person was obligated at the time of entry into such service in the case of a person who, due to enlistment or reenlistment, was not awarded a discharge or release from such period of service at the time of such completion thereof and who, at such time, would otherwise have been eligible for the award of a discharge or release under conditions other than dishonorable.

Id. § 101(18) (emphasis added).

¹³ 38 C.F.R. § 3.12 (emphasis added).

¹⁴ AR 135-178, *supra* note 1, para. 2-9(1) (emphasis added).

the Army considers it separate from any subsequent ARNG service.

Furthermore, when a Soldier is discharged under AR 135-178, “[t]he type of discharge and character of service will be determined solely by the military record during the current enlistment or period of service, plus any extension thereof, from which the Soldier is being separated.”¹⁵ Therefore, the Army considers SGT Smith’s deployment a separate period of service from the ARNG time period. By completing a period of active service with an honorable discharge, SGT Smith established her veteran status under VA regulations and is eligible for VA disability compensation and health care benefits without her subsequent ARNG service.

IV. Impact of a Subsequent ARNG OTH Discharge on SGT Smith

As established above, SGT Smith is eligible for VA disability compensation and health care benefits on the basis of her *completed* active duty deployment for which she received an honorable discharge. Her subsequent OTH from the ARNG has no effect on the collection of VA benefits related to her previous honorable service.

According to the DVA General Counsel’s precedential opinion in 1991, the “DVA long ago adopted an administrative interpretation that a discharge under dishonorable conditions from one period of service does not constitute a bar to VA benefits if there was another period of qualifying service upon which a claim could be predicated.”¹⁶ The only time that a subsequent OTH will affect VA disability compensation benefits accrued from a previous period of service is when “any person [is] shown by evidence satisfactory to the Secretary [of Veteran Affairs] to be guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or of its allies.”¹⁷ Such persons “shall forfeit all accrued or future gratuitous benefits under laws administered by the Secretary.”¹⁸

In a 2004 opinion, the DVA General Counsel held “that a claimant’s eligibility for VA disability compensation is

governed by the character or release from the [active duty for training (ADT)] period during which a disabling injury or disease was incurred, [and that] [D]VA is not required to reconsider an award based on a period of ADT if the claimant is subsequently discharged from the National Guard under other than honorable conditions.”¹⁹ In other words, a Guardsman could continue receiving VA benefits from a previous period of ADT even though she was subsequently separated from the ARNG with a service characterization of OTH. Hence, an OTH from the ARNG would not affect SGT Smith’s benefits to which she is entitled based on the previous honorable period of service.

V. The Adjudication Process

When a veteran applies for VA disability compensation benefits, a VA adjudicator at a DVA regional office determines one’s eligibility by using the DVA Adjudication Manual. The manual is “designed to provide procedures for benefit payments and . . . uniform procedures for all offices in the application of laws, regulations and development activities.”²⁰ Using this manual, the adjudicator first determines whether there is a qualifying discharge.²¹

According to the manual, “[a] discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.”²² In our scenario, SGT Smith has a discharge characterized as under honorable conditions from her deployment. Therefore, the Army’s determination of her service is binding on the DVA.

For disability compensation benefits, the DVA does make determinations on a case-by-case basis when the characterization is OTH; however, the Adjudication Manual specifically states that the DVA will not make a character of discharge determination “if there is a separate period of honorable service, which qualifies the person for the benefits claimed.”²³ In our scenario, SGT Smith has a separate period of honorable service during which she suffered her PTSD; therefore, a case-by-case determination is not needed. This scenario evidences that AR 135-178’s description that all OTH discharges require a character of discharge determination is incorrect.²⁴ The DVA will not conduct a

¹⁵ *Id.* para. 2-8(a).

¹⁶ The Effect of a Discharge Under Dishonorable Conditions on Eligibility for Gratuitous Veterans’ Benefits Based on a Prior Period of Honorable Service, Vet. Aff. Op. Gen. Couns. Prec. 61-91 (July 17, 1991) [hereinafter VAOPGCPREC 61-91] (citing Adm’rs Decision No. 655 (June 20, 1945); Op. Sol. 218-51 (June 4, 1951)). According to VA regulations, the VA General Counsel is authorized to designate precedential opinions. 38 C.F.R. § 2.6(e)(8) (“The General Counsel, or the Deputy General Counsel acting as or for the General Counsel, is authorized to designate, in accordance with established standards, those legal opinions of the General Counsel which will be considered precedent opinions involving veterans’ benefits under laws administered by the Department of Veterans Affairs.”).

¹⁷ 38 U.S.C. § 6104.

¹⁸ *Id.*

¹⁹ Character of Discharge of National Guard Member, Vet. Aff. Op. Gen. Couns. Prec. 06-04 (July 12, 2004).

²⁰ U.S. DEP’T OF VETERANS AFFAIRS, M21-1 ADJUDICATION PROCEDURES pt. 1, ch. 3, subch. II, para. 3.03(b)(1) (C16, Aug. 23, 1993).

²¹ DVA M21-1MR, *supra* note 3, pt. 3, subpt. V, ch. 1, sec. B, para. 5(a) (“To be eligible for Department of Veterans Affairs (DVA) benefits based on the service of a veteran, a discharge under conditions other than dishonorable is required.”).

²² 38 C.F.R. § 3.12(a).

²³ DVA M21-1MR, *supra* note 3, pt. 3, subpt. V, ch. 1, sec. B, para. 7(b).

²⁴ AR 135-178, *supra* note 1, para. 2-8(a). “Separation characterized as under other than honorable conditions could deprive the Soldier of veterans

case-by-case analysis of SGT Smith's character of discharge because she received an honorable discharge for the time period in which she incurred PTSD. This honorable discharge entitles her to VA benefits without being affected by the subsequent ARNG's OTH.

This is similar to how the DVA treats individuals with more than one period of active service. If a Soldier receives an honorable discharge and leaves the military for a few years, then reenlists and receives an OTH from that second period of service, the benefits to which the Soldier is entitled from the first period of service are not affected by the subsequent OTH, "unless the individual is guilty of an offense listed in 38 U.S.C. § 6104."²⁵

VI. Conclusion

The current interpretation of VA benefits and eligibility in AR 135-178 undermines the effectiveness of ARNG administrative separation boards. Under the current wording of AR 135-178, defense counsel can argue that a previously deployed Soldier who has a service connected disease or injury may lose his VA disability compensation and health care benefits if he is separated with a service characterization of OTH. Counsel will argue that a general under honorable conditions characterization is needed. Playing on the board's sympathy, this argument may persuade board members to recommend a general discharge when an OTH would otherwise be appropriate. While this argument is persuasive, it is an incorrect interpretation of VA law.

A subsequent OTH for misconduct committed during drill will not affect VA benefits that a Guardsman attained from a previous honorable period of service. The DVA does not make a case-by-case basis determination of one's eligibility for VA disability compensation and health care benefits for injuries incurred during a previous period of service as long as the separation from that period of service is characterized as honorable or general under honorable conditions.

The interpretation of VA benefits eligibility in AR 135-178 needs to be revised to clarify that an ARNG's OTH will not affect the disability compensation and health care benefits to which Guardsman are entitled on the basis of a previous honorable active service deployment. It needs to specifically address Guardsmen's VA eligibility like our hypothetical Guardsman, SGT Jane Smith, who has a previous honorable discharge from active service and subsequently receives an OTH from the ARNG.

benefits administered by the Department of Veterans Affairs (DVA). A determination by that agency is required in each case." *Id.*

²⁵ VAOPGPCREC 61-91, *supra* note 16.

The Insurgents: David Petraeus and the Plot to Change the American Way of War¹

Reviewed by Major Jeremy A. Haugh*

“War upon rebellion was messy and slow, like eating soup with a knife.”²

I. Introduction

The insurgents Fred Kaplan writes about were not America’s enemies. They were not Sunni or Shiite or Pashtun; they were not Baathists or the Taliban. The insurgents in this case were a new breed of leaders and thinkers in the U.S. Army. They were a group of self-styled Soldier-scholars,³ originally “The Sosh Mafia”⁴ and later “COINdinistas,”⁵ who sought to change the way America fights wars by advancing counterinsurgency (COIN) strategy. In *The Insurgents: David Petraeus and the Plot to Change the American Way of War*, Fred Kaplan weaves a historical account of the “messy and slow”⁶ development of COIN strategy from the halls of West Point to the highest reaches of the Defense Department and government. Although the book is more about the journey (the people involved in and the development of COIN strategy) and less about the destination (using COIN in a modern armed conflict), Kaplan draws out lessons from Iraq and Afghanistan to show the limits of COIN.

Kaplan argues, “In the end, [the insurgents] didn’t, they couldn’t, change—at least in the way they wanted to change—the American way of war.”⁷ His final analysis of the plot’s outcome is undoubtedly correct.⁸ Through a

“messy and slow”⁹ process, the insurgents brought COIN to the forefront of Army strategy and used it with some success in Iraq.¹⁰ They were, however, ultimately unsuccessful in installing COIN as America’s new strategy for all wars due to its inherent limits¹¹ and failure to turn the tide in Afghanistan.¹²

Through tracing COIN’s development and its use in Iraq and Afghanistan, Kaplan presents a timely study on how America plans and fights its wars. *The Insurgents* contains weaknesses, but as the current wars wind down and the Army plans for the inevitable next war, it is a useful resource for Army leaders, including judge advocates,¹³ on the limits of strategy and the need for the Army to change as the enemy changes.

II. Background

Fred Kaplan is a former Pulitzer Prize-winning reporter for the *Boston Globe*.¹⁴ He writes the War Stories column for *Slate Magazine* and is a frequent contributor to the *New York Times*. He is the author of three books on military and

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¹ FRED KAPLAN, *THE INSURGENTS: DAVID PETRAEUS AND THE PLOT TO CHANGE THE AMERICAN WAY OF WAR* (2013).

² T.E. LAWRENCE, *SEVEN PILLARS OF WISDOM* 193 (1935).

³ KAPLAN, *supra* note 1, at 10.

⁴ *Id.* at 5. “Sosh” refers to the West Point Social Sciences Department where many of the “insurgents” studied and taught.

⁵ *Id.* at 3. COINdinistas is a wordplay that combines the abbreviation for COIN with the name of the leftist insurgency that seized power in Nicaragua in the late 1970s (Sandinistas).

⁶ LAWRENCE, *supra* note 2. “Messy and slow” became a subtext throughout Kaplan’s book. Just as T.E. Lawrence described the Arab revolt against the Ottomans from 1916 to 1918, Kaplan described COIN’s development as messy and slow.

⁷ KAPLAN, *supra* note 1, at 365.

⁸ See discussion *infra* Part VI. Even here in his final analysis Kaplan hedges and shows the weakness of his argument. Kaplan finds that the insurgents did not change the way America fights wars, “at least in the way they intended” This shows that he believes the insurgents did change the way America fights its wars and made the Army more of a “thinking organization.”

⁹ LAWRENCE, *supra* note 2.

¹⁰ KAPLAN, *supra* note 1, at 268–69. Kaplan cites other factors that led to success in Iraq, including the Anbar Awakening, but credits COIN strategy with harnessing those factors.

¹¹ *Id.* at 364. The ideal counterinsurgency campaign, according to Petraeus protégé John Nagl, is one fought “on a peninsula against a visibly obvious ethnic minority before CNN was invented.” In other words, the perfect COIN campaign does not exist and it can only be successful in certain places—like Iraq—where circumstances converge to help it succeed.

¹² *Id.* at 348.

¹³ *Id.* at 262. Judge advocates (“command’s lawyers”) are mentioned here with regard to approving the use of the Commander’s Emergency Response Program (CERP) money for uses other than humanitarian projects, such as paying the Sons of Iraq (an organization that arose to oppose foreign fighters in that country) for “site security” during the Surge. Kaplan reports the lawyers “squirmed but concluded that it would probably be all right.” *Id.* Despite just this short mention, judge advocates can draw leadership and practical lessons on changing the Army’s way of thinking from this book.

¹⁴ Fred Kaplan—Biography, <http://www.fredkaplan.info/bio.htm> (last visited June 9, 2014) [hereinafter *Kaplan Biography*]. Kaplan was lead member of a team of *Boston Globe* reporters who won the 1983 Pulitzer Prize for a special *Boston Globe Magazine* article, “War and Peace in the Nuclear Age,” on the U.S.-Soviet nuclear arms race. *The Insurgents* was a finalist for the 2014 Pulitzer Prize for General Non-Fiction.

national security,¹⁵ holds a Ph.D. in Political Science from MIT, and is well-respected in the national security arena.¹⁶ The *New York Times* calls him “the rare combination of defense intellectual and pugnacious reporter.”¹⁷ Kaplan interviewed “more than one hundred [military and academia] players” from the COIN movement for *The Insurgents*.¹⁸ He turned those interviews into a critical analysis of the development of COIN strategy, how the Army and Department of Defense establishment fought it, and how Afghanistan ultimately revealed its limits.

III. The Insurgents

The heroes of *The Insurgents* are General David Petraeus and other COINdinistas, including General Ray Odierno (a convert to COIN),¹⁹ Colonel H.R. McMaster (who led a successful COIN campaign in Tal Afar, Iraq),²⁰ Colonel Sean MacFarland (a former Sosh cadet²¹ who was “the Awakening’s chief strategist” in Anbar Province, Iraq, in 2007),²² and Lieutenant Colonel John Nagl (part of the Sosh Mafia and author of *Learning to Eat Soup with a Knife*),²³

¹⁵ In addition to *The Insurgents* (2013), Kaplan authored *Wizards of Armageddon* (1983), an inside history of nuclear strategy, and *Daydream Believers* (2008), about American foreign policy in the early 21st century.

¹⁶ Kaplan Biography, *supra* note 14.

¹⁷ Thanassis Cambanis, *How We Fight: Fred Kaplan’s “Insurgents,” on David Petraeus*, N.Y. TIMES SUNDAY BOOK REV., (Jan. 24, 2013), <http://www.nytimes.com/2013/01/27/books/review/fred-kaplans-insurgents-on-david-petraeus.html?pagewanted=all>.

¹⁸ KAPLAN, *supra* note 1, at 397. Kaplan interviewed over 100 present and former military leaders, civilian scholars, and high-ranking civilian officials for the book. Prominent interviewees include General John Abizaid, General George Casey, Jr., General Peter Chiarelli, General Martin Dempsey, Lieutenant General (Retired) Karl Eikenberry, Robert M. Gates, Pete Geren, David Kilcullen, Major General Sean MacFarland, General Stanley McChrystal, Major General H.R. McMaster, Admiral Mike Mullen, John Nagl, General Raymond Odierno, Meghan O’Sullivan, General David Petraeus, General Peter Schoomaker, Sarah Sewell, Emma Sky, and General William Scott Wallace.

¹⁹ *Id.* at 239–41. *Id.* at 212, picture 16 and accompanying text. Kaplan explains that while Commander of the 4th Infantry Division in Tikrit, Iraq, in 2003–2004, General Odierno conducted operations in direct contradiction to COIN strategy. *Id.* at 228. Later, while working as the assistant to the Joint Chiefs of Staff as the military’s liaison to the Secretary of State, General Odierno realized that his tactics in Tikrit had been “too aggressive.” *Id.* at 194. When General Odierno became Deputy Commander in Iraq under General Petraeus, he helped implement a new strategy for the Surge based on counterinsurgency principles. *Id.* at 251.

²⁰ *Id.* at 245–46, 212 (picture 14 and accompanying text).

²¹ *Id.* at 5.

²² *Id.* at 244–48, 212 (picture 18 and accompanying text).

²³ JOHN NAGL, *LEARNING TO EAT SOUP WITH A KNIFE: COUNTERINSURGENCY LESSONS FROM MALAYA AND VIETNAM* (2002). The book, published in 2002, was widely read and distributed among military and civilian leaders who were working on solving the insurgency issues in Iraq and Afghanistan. KAPLAN, *supra* note 1, at 94, 238, 320.

among others.²⁴ Kaplan presents them, especially Petraeus, as heroes with tragic flaws.²⁵ In Kaplan’s view (ultimately proven true in Afghanistan), COIN was a strategy that works in specific circumstances and areas where the local government and U.S. interests are aligned.²⁶ The insurgents’ fatal flaw is that they saw COIN—at least in the beginning²⁷—as a set of universal principles to be applied to just about any war the Army might fight.²⁸ Kaplan proves that this is not the case.

IV. COIN Development

Much of the book is dedicated to the development of COIN strategy.²⁹ Kaplan makes a strategic decision to spend more time delving into the process of moving the Army away from the conventional war strategy to COIN, and less time on the already crowded field of recounting Iraq and Afghanistan outcomes. Kaplan’s strategy makes sense. Many readers will know what happened in Iraq and Afghanistan, but will not know the process that convinced the Army that COIN strategy would bring success in those theaters. Kaplan’s review of COIN development provides the reader—especially a military reader—insight into how the Army changes, how difficult change is, and the limits of change. It also gives insight into a new set of leaders in the Army, “a military-intellectual complex composed of think-

²⁴ KAPLAN, *supra* note 1, at 212. The number of people referred to in the book makes it difficult to keep them all straight. See discussion *infra* Part VI.

²⁵ *Id.* at 367. “Tragic flaw” means a flaw in character that brings about the downfall of the hero of a tragedy. According to Kaplan, General Petraeus’s flaw is that he tried to adopt the same COIN techniques in Afghanistan that had worked in Iraq, despite Afghanistan being a much different country with much different human and political terrain. Kaplan does not reference the scandal that brought General Petraeus down as his tragic flaw, but does address it in the postscript.

²⁶ *Id.* at 267–69. Kaplan believes the strategy only worked in “certain parts” of Iraq where U.S. interests and the local government interests aligned. It did not work in Afghanistan because U.S. and Afghan interests were often at odds. *Id.* at 347.

²⁷ *Id.* at 364. Kaplan points out that one of the main adherents to COIN, David Kilcullen, “concluded it was ‘folly’ to embark on a counterinsurgency campaign [in Afghanistan] in the first place.” Kilcullen is a former Australian Army officer with an expertise in counterinsurgency. During the height of the Iraq war, he was hired by the Department of Defense to work on the Quadrennial Defense Review (QDR), “a congressionally mandated report that outlines the nation’s strategy and links it to the Defense Departments’ budget and programs.” *Id.* at 89. Kilcullen went on to serve as a senior COIN advisor to General Petraeus in 2007 and 2008, and as a special advisor on COIN to Secretary of State Condoleezza Rice. He has written three books on counterinsurgency: *The Accidental Guerilla: Fighting Small Wars in the Midst of a Big One* (2009), *Counterinsurgency* (2010), and *Out of the Mountains: The Coming of Age of the Urban Guerilla* (2013).

²⁸ *Id.* at 363.

²⁹ The first fifteen chapters are dedicated to COIN development. The last seven chapters focus on what happened in Iraq and Afghanistan.

tank researchers, policy theorists, academics, Pentagon bureaucrats, [and] officers with PhDs . . . ,” who “greatly influenced America’s military strategy in Iraq and Afghanistan.”³⁰ These “Soldier-scholars,”³¹ as Kaplan describes them, are the leaders who developed COIN into the Army’s strategy of the future, used it with some success in Iraq and Afghanistan, and trained those who will be the leaders in the next war.

V. COIN Success and Failure

Kaplan argues that COIN was a success in some parts of Iraq³² because it was given the time, troops, and treasure needed to be a success.³³ On 10 February 2007, General Petraeus assumed command of U.S. and coalition forces in Iraq.³⁴ He received 30,000 more troops to carry out his COIN strategy, otherwise known as “the Surge;” the time to carry out the strategy; and the support of President Bush and the country.³⁵

The Surge was a success due to a number of factors, not all having to do with General Petraeus’s COIN strategy. Kaplan does give credit to the Surge and COIN strategy for facilitating many of the changes that happened in Iraq during 2007, including the Anbar Awakening.³⁶

The success of COIN strategy in Iraq gave the insurgents cachet among the leaders in Washington and provided an opportunity to prove that COIN was truly the Army’s war strategy of the future. The ultimate undoing of COIN as a grand strategy was Afghanistan, where the facts, political terrain, and timetable were not conducive to it.

³⁰ Tony Perry, *Fred Kaplan’s ‘The Insurgents’ Takes on Petraeus and Policy*, L.A. TIMES (Jan. 18, 2013), <http://articles.latimes.com/2013/jan/18/entertainment/la-ca-jc-fred-kaplan-20130120>.

³¹ KAPLAN, *supra* note 1, at 10.

³² *Id.* at 267–69.

³³ *Id.*

³⁴ *Id.* at 259.

³⁵ *Id.* at 267–69.

³⁶ *Id.* at 268. Kaplan calls one of the “insurgents,” then-Colonel (COL) Sean MacFarland, “the chief strategist of the Anbar Awakening” of 2007 *Id.* at 244. The Anbar Awakening began in Ramadi, the capital of Anbar Province, where before the Awakening, “Sunni insurgents ran free and al Qaeda gunmen enjoyed unchecked control.” *Id.* at 245. Colonel MacFarland commanded a brigade with three Army battalions, a Marine regiment, and several Navy SEAL teams. *Id.* He used counterinsurgency strategy to clear al Qaeda’s strongholds, hold neighborhood outposts throughout the city, and rebuild the police force and other governing structures in Ramadi. *Id.* at 248. Ramadi became a model for COIN in Iraq and later became known as the Anbar Awakening. *Id.* MacFarland is now a Major General.

Kaplan persuasively argues that COIN is a strategy for a specific set of circumstances, like mountain warfare or jungle warfare. “COIN—the field manual and the long history of ideas it embodied—was like a set of instructions on how to drill an oil well: it didn’t guarantee that there was oil in the ground or that drilling for oil was the wisest energy policy.”³⁷ The strategy that brought such miraculous results in Iraq was just not right for Afghanistan, largely because the insurgents, particularly General Petraeus, failed to recognize that the enemy and political situation in Afghanistan were vastly different from Iraq.³⁸ Kaplan argues Petraeus and other military leaders failed to change with the enemy, and thought (wrongly, it turns out) that they could duplicate the miraculous results in Iraq despite long odds and much different human and political terrain.³⁹ In the end, Kaplan “faults [Petraeus] for not warning President Obama that he was not providing enough time or troops for a similar effort to be successful in Afghanistan.”⁴⁰ Afghanistan was the final straw for COIN as Army policy.⁴¹

VI. Counterinsurgents (Opposing Views)

Reviews of the *The Insurgents* have been generally positive,⁴² but Kaplan does have critics and his arguments in *The Insurgents* have notable weaknesses. Colonel Gian Gentile, who commanded an Army battalion in Baghdad in 2006 and holds a Ph.D. in history from Stanford University, reviewed *The Insurgents* in the *New York Journal of*

³⁷ *Id.* at 363. The field manual Kaplan refers to is FM 3-24, *Counterinsurgency*, originally published in 2006.

³⁸ *Id.* at 345. The enemy in Afghanistan was different from the enemy in Iraq, in part because it had learned lessons from the Iraq insurgency. See ROB JOHNSON, *THE AFGHAN WAY OF WAR* 249–306 (2012) (describing the fighters who made up the Afghan insurgency after 2001, including Taliban, al Qaeda militants, and Arab and Iraqi mujahideen who brought with them “the latest IED technology and suicide-bomber tactics they had learned in the Iraqi resistance during combat with U.S. forces”).

³⁹ KAPLAN, *supra* note 1, at 347. Kaplan argues that General Petraeus’s frustrations in Afghanistan were not just with a changed enemy, but “stemmed . . . from the nature of Afghanistan itself: its primitive economy (which impeded the rise of an educated, entrepreneurial class); its vastly scattered, rural population (which a weak central government could rule only through a corrupt patronage network); and its long border with a state whose leaders were assisting the insurgency (which limited the success of any fight confined to Afghan territory).”

⁴⁰ Perry, *supra* note 30.

⁴¹ KAPLAN, *supra* note 1, at 357. President Obama spoke at the Pentagon on 5 January 2012 and said, “As we look beyond the wars in Iraq and Afghanistan—and the end of long-term nation building with large military footprints—we’ll be able to ensure our security with smaller conventional forces.” According to Kaplan, this was the point where COIN was no longer a “core mission” of the American military. *Id.* at 358.

⁴² Cambanis, *supra* note 17; Greg Jaffe, Book Review, ‘*The Insurgents*’ by Fred Kaplan and ‘*My Share of the Task*,’ by Stanley A. McChrystal, WASH. POST (Jan. 6, 2013), http://articles.washingtonpost.com/2013-01-06/opinions/36209022_1_david-h-petraeus-insurgents-generals.

Books.⁴³ Colonel Gentile takes Kaplan to task for his “part in the promotion of the myth of American counterinsurgency and the idea that it was a better way of war.”⁴⁴ Gentile argues that COIN was not a better way of war and Kaplan’s book is needlessly focused on its development rather than its failure.⁴⁵ He further argues that, aside from the concluding couple of chapters where Kaplan presents a “fundamentally correct criticism,” *The Insurgents* is “nothing more than a paean to Petraeus and the COIN experts.”⁴⁶

Gentile’s criticism is misplaced. There is no doubt that Kaplan presents Petraeus as a crusading warrior for COIN. But he balances it with a fair analysis of Petraeus’s and COIN’s limits.⁴⁷ The weaknesses of Kaplan’s argument lie elsewhere, and they are both procedural and substantive. First, procedurally, Kaplan’s story is difficult to follow because he jumps from one time period to another during the development of COIN. He also weaves in a large number of characters who had a hand in developing COIN.⁴⁸ A reader may need a flow chart to follow all of the individuals Kaplan writes about and to determine their relationship to General Petraeus and the COIN movement. Kaplan’s argument would have been more successful (and easier to read) if he had focused on the insurgents who had a direct effect on the Army’s COIN strategy in Iraq and Afghanistan, rather than bit players and side issues.⁴⁹ Second, substantively, Kaplan chooses to focus on the insurgents’ failure to make COIN the Army’s overarching way to fight future wars over the insurgents’ success in making the Army more flexible, more adaptive, and a “learning organization.”⁵⁰ Kaplan

acknowledges that the insurgents were partially successful,⁵¹ but buries this under his view that their push for COIN was ultimately a failure. Kaplan’s thesis would have been stronger if he had focused on the bigger picture: the insurgents changed the way the Army reacts and adapts to the enemy, and they changed how the Army learns from its mistakes. In other words, the insurgents were unsuccessful in installing COIN as the way to fight all of America’s wars, but that would have been counterproductive. The insurgents ultimately did change the culture of the Army to allow for different views and the development of new strategies to defeat America’s enemies, whether in a large war, a small war, or small wars within big wars. This success will serve the Army well in future wars.

VII. Conclusion

The Insurgents can serve as a guide (and a cautionary tale) for Army leaders facing a challenge that calls for a new way of thinking. It shows how resistant to change the Army is, even when facts and circumstances call for a change. After years of planning for conventional warfare, 9/11 was a wake-up call for the Army. It was no longer fighting a war against an enemy massed on the plains of Europe. This new enemy was made up of shadowy figures flying planes into buildings in our most populous city. The enemy was now fighting with improvised explosive devices (IEDs) and rocket-propelled grenades as the military went house to house looking for them.⁵² But the Army leadership and Defense establishment⁵³ remained mired in the old way of thinking about war. The insurgents offered an alternative strategy and plotted to make it happen by working both within and outside of the Army power structure. Eventually, after years of working in the background, it worked.

In the end, the Army did change and the insurgents’ plot paid off. But the plot fell victim to the adage, “the enemy has a vote,” meaning that “you can go into battle with a brilliant plan, but if the enemy adapts and shifts gears, the plan is rendered worthless after the first shots are fired.”⁵⁴

⁴³ Gian Gentile, *Review of The Insurgents: David Petraeus and the Plot to Change the American Way of War*, N.Y. J. OF BOOKS (Jan. 2, 2012), <http://www.nyjournalofbooks.com/review/insurgents-david-petraeus-and-plot-change-american-way-war>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Perry, *supra* note 30.

⁴⁸ KAPLAN, *supra* note 1, at 397. At times, it seems as though Kaplan told the back story of each of the more than 100 people he interviewed for the book.

⁴⁹ *Id.* at 279–83. Kaplan uses several pages to talk about H.R. McMaster’s and John Nagl’s promotion boards and the boards’ decisions not to select the two for promotion, and attributes their non-selection to their close association to the COINdinitas. While it gave yet another example that the Army is resistant to change and (at least in Kaplan’s view) rewards those who toe the line, it went too far afield.

⁵⁰ *Id.* at 361. A “learning organization” is one that, as part of its culture, reviews its past mistakes and ensures that it does not repeat the same mistakes in the future. John Nagl, author of *Learning to Eat Soup with a Knife*, studied how the British succeeded in defeating the Malayan insurgency in the 1950s, and contrasted that with how the United States failed to defeat the Viet Cong in the 1960s. His conclusion was that the difference between the British victory and the defeat in Vietnam was “best explained by the differing organizational cultures of the two armies; in short, that the British army was a learning institution and the American

army was not.” *Id.* The Insurgents, as part of the COIN strategy, sought to change the culture in the U.S. Army so that it became an organization that learned from past mistakes and did not repeat them in the future.

⁵¹ *Id.*

⁵² See generally DAVID KILCULLEN, *THE ACCIDENTAL GUERRILLA: FIGHTING SMALL WARS IN THE MIDST OF A BIG ONE* 115 (2009) (describing the Iraqi insurgency tactics during the 2007 Surge); see also STEVEN METZ, *LEARNING FROM IRAQ: COUNTERINSURGENCY IN AMERICAN STRATEGY* (2007) (describing the Iraq insurgency and the tactics used by insurgents).

⁵³ KAPLAN, *supra* note 1, at 171. At a press conference in late 2003, Chairman of the Joint Chiefs of Staff, General Peter Pace, referred to the enemy in Iraq as insurgents. Secretary of Defense Donald Rumsfeld “standing at his side, brusquely admonished him, insisting that the resisters in Iraq were too disorganized to merit the i-word.” *Id.*

⁵⁴ *Id.* at 362.

Kaplan correctly points out in his final analysis that the insurgents did not change the way America fights its wars in the way they originally intended.⁵⁵ However, Kaplan failed to focus on the ultimate success of the insurgents. The leaders and Soldiers who served in Iraq and Afghanistan with General Petraeus and the other insurgents fought wars in ways the old hands in the Pentagon would never have thought of. The lessons learned (both good and bad) from Iraq and Afghanistan will inform the Army's operations in

the next war and beyond. *The Insurgents* reminds Army leaders (including judge advocates⁵⁶) that there are limits to those lessons: it is most important for the Army to be flexible, pragmatic, and focused on problem-solving to win the wars of the future.

⁵⁵ *Id.* at 365.

⁵⁶ *Id.* at 164. Kaplan says that Petraeus “sometimes talked about an army of ‘pentathlete’ Soldiers and counterinsurgency as one piece in a broader doctrine of ‘full-spectrum operations.’” *Id.* The insurgents changed the way the Army works and talks. The JAG Corps has adopted the insurgents’ language and encourages its lawyers to be “pentathletes”—in other words, be able to do many things well.

Lean In: Women, Work and the Will to Lead¹

Reviewed by Major Allison D. McFeatters*

*One of the things about equality is not just that you be treated equally to a man, but that you treat yourself equally to the way you treat a man.*²

I. Introduction

Ranked ninth on the 2013 Forbes list of the world's most powerful women,³ Sheryl Sandberg appears to have it all with few worries. She is Facebook's chief operating officer;⁴ the wife of David Goldberg, the current Chief Executive Officer of SurveyMonkey;⁵ mother of two;⁶ and now esteemed author. She worked for non-profits,⁷ in the federal government,⁸ and for powerhouses like Google⁹ before taking a chance on a start-up company called Facebook.¹⁰ In a combination of hard data, academic research, input from colleagues, and personal experience, Sandberg creates a thought-provoking and surprisingly controversial¹¹ book that strives to encourage women to not only embrace, but seek out professional challenges.

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¹ SHERYL SANDBERG, *LEAN IN: WOMEN, WORK AND THE WILL TO LEAD* (2013).

² Brainy Quotes, Marlo Thomas, BRAINYQUOTE.COM, http://www.brainyquote.com/quotes/authors/m/marlo_thomas.html (last visited May 8, 2014).

³ Caroline Howard, *The World's 100 Most Powerful Women in 2013*, FORBES.COM, LLC (July 2, 2014, 11:32 AM), <http://www.forbes.com/power-women> (following the top three most powerful women: Angela Merkel, Janet Yellen, and Melinda Gates, respectively.)

⁴ SANDBERG, *supra* note 1, at 229.

⁵ Lisa Belkin, *Dave Goldberg, Sheryl Sandberg's Husband, Talks About Their Marriage (VIDEO)*, HUFFINGTON POST (May 3, 2013, 3:15 PM), http://www.huffingtonpost.com/2013/05/03/dave-goldberg-sheryl-sandberg-husband-video_n_3210036.html.

⁶ SANDBERG, *supra* note 1, at 229.

⁷ Sandberg's first job out of college was for the World Bank Organization as a research assistant. *Id.* at 55.

⁸ After completing Harvard Business School and a brief stint with the private firm McKinsey & Company, Sandberg worked for the Deputy Secretary of Treasury in the U.S. Treasury Department. *Id.* at 56.

⁹ *Id.* at 59.

¹⁰ *Id.* at 133.

¹¹ Sandberg has been heavily criticized for her opinions since the release of this book. Several feel she places the burden of change on women. Others question her ability to push women to take on challenges like she has when she has the luxury of millions of dollars to invest in her support system, unlike the majority of women in her audience. For more information, see Tania Lombrozo, *Should All Women Heed Author's Advice to 'Lean In'?*,

How does the professional advice of Facebook's chief operating officer, with no military background, apply to military women and family members? Consider, as an example, Major Squared Away,¹² who after thirteen years of service in the Judge Advocate General's Corps following her direct commission, is selected for one of the coveted resident positions at Command and General Staff College (CGSC). Attendance at the school requires her to live in Fort Leavenworth, Kansas, for one school year. Her children are comfortable having been in the same school district for three years—a school district that they love. Her husband landed a job with promise and security. Does she accept the offer to attend CGSC and uproot her family knowing that they will be moving again in a year? Does she leave her family in place and embark on a year separation? Does she turn the offer down, giving the family desires greater priority than her own?

The root of Major Squared Away's problem is similar to that faced by civilian professionals and their families considering a professional change. Sandberg wrote this book for "any woman who wants to increase her chances of making it to the top of her field or pursue any goal vigorously," as well as "any man who wants to understand what a woman—a colleague, wife, mother, or daughter—is up against so he can do his part to build an equal world."¹³ This review first provides an overview of Sandberg's advice to working mothers and her main theories on what is needed to reach true workforce equality,¹⁴ and then explores whether those opinions can or should apply to military culture. Although full of recommendations slightly more applicable to the civilian sector than the military, *Lean In* is the paperback cheerleader every working mother needs in her pocket, cargo or otherwise, as a source of motivational support.

NPR.ORG (Apr. 2, 2013, 7:38 AM ET), <http://www.npr.org/blogs/13/7/2013/03/31/175862363/should-all-women-heed-authors-advice-to-lean-in>.

¹² Major Squared-Away is a fictitious character loosely based off experiences and choices faced by female judge advocates.

¹³ *Id.* at 10.

¹⁴ Sandberg defines true world equality as a world "where women [run] half our countries and companies and men [run] half our homes." SANDBERG, *supra* note 1, at 7.

II. You Are Your Own Worst Enemy

Lean In calls on women, particularly working mothers, to stop being their own worst enemy. Relying on a mix of raw data from national surveys and personal experience, Sandberg believes men currently run the world, citing that women lead roughly nine percent of the world's independent countries and occupy twenty percent of parliament seats.¹⁵ The main reason Sandberg thinks women hold a minority of leadership roles is that women routinely choose family responsibilities over professional challenges once they become mothers.

We hold ourselves back in ways both big and small, by lacking self-confidence, by not raising our hands, and by pulling back when we should be leaning in. We internalize the negative messages we get throughout our lives—the messages that say it's wrong to be outspoken, aggressive, more powerful than men. We lower our own expectations of what we can achieve. We continue to do the majority of the housework and child care. We compromise our career goals to make room for partners and children who may not even exist yet.¹⁶

Sandberg proposes women end this struggle to reach their full potential through a reformed perception of self and household norms.

Sandberg begins by asking the reader to imagine the extent of their potential if fear was not a factor. “What would you do if you weren't afraid?”¹⁷ The reader is amused by stories about Sandberg's grandmother and Sandberg's own upbringing¹⁸ before they are confronted with Sandberg's opinion that the women of today's generation are too practical and overly cautious. Sandberg says this generational shift occurred after women watched

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 8.

¹⁷ *Id.* at 12.

¹⁸ In the first chapter, Sandberg talks about her grandmother, Rosalind “Girly” Einhorn, who valued education and was not afraid to take risks during the Depression, when the majority of the populace valued certainty and security. After being pulled from high school to support her family as a seamstress during the Depression, Rosalind went against the odds by graduating from high school and college, and saving her husband's struggling business through hard decisions and determination. Sandberg compares that to her own childhood home, where she and her siblings were encouraged to excel in school, complete their chores, and participate in extracurricular activities despite Sandberg's athletic shortcomings—all early lessons in the value of competition and balanced lifestyles. *Id.* at 12-15.

their mothers attempt to juggle both work and family, and inevitably choose one over the other.¹⁹

The female reader is then encouraged to treat herself with the same respect she would pay her male counterpart by “sit(ting) at the table,”²⁰ focusing on her success instead of her likeability,²¹ and to speak authentically.²² Each page of *Lean In* includes personal anecdotes that allow the reader to better understand Sandberg's advice and find ways to apply Sandberg's tactics to their own life. *Lean In* is not a list of hard and fast rules, but a compilation of good ideas that professional women, and men working alongside women, may find helpful during various phases of her career.

III. The Internal Struggle

In an exceptional manner, *Lean In* highlights the internal struggle working, married mothers experience when searching for personal balance between work, spouse, and children. Through stories about missed dinners and babysitting fiascos, Sandberg brings the reader into her household and the weekly coordination she and husband, David, juggle through to ensure the kids have a ride to school and dinner on the table.²³ Sandberg admits that she and her husband are fortunate to be able to afford excellent child care and help²⁴ when their career schedules do not mesh with their children's needs. After reading this book, the working mother walks away with a sense of vindication—I am not the only one trying to do it all!

Sandberg is not the first author to air dirty family laundry and personal struggles in print,²⁵ but she does it with such candor and directness that a reader can relate to Sandberg's

¹⁹ *Id.* at 15.

²⁰ *Id.* at 27.

²¹ *Id.* at 39.

²² *Id.* at 77.

²³ Sandberg explains how she and her husband worked in different cities for their first year as parents, until Sandberg accepted a promotion at work and Dave found a job which allowed him to live full time with Sandberg and their child. From that point on, Sandberg describes how she and Dave sit down at the beginning of each week and agree on who will drive the children to school and be home with the kids each night. *Id.* at 111.

²⁴ Sandberg readily admits that she has “remarkable resources” at hand to assist her in balancing the struggles of work and home, which include a husband who is a “real partner;” the financial ability to hire assistants for the office and home; a sister who is a pediatrician, lives close by, and is willing to take care of Sandberg's children when needed; and a good measure of control over her work schedule. *Id.* at 134.

²⁵ Carmine Gallo, *How Sheryl Sandberg's Last Minute Addition To Her TED Talk Sparked A Movement*, FORBES.COM, LLC (Feb. 28, 2014, 9:17 am), <http://www.forbes.com/search/?q=Sheryl+Sandberg+TED+Talk> (analyzing the number of personal stories told in the 500 most popular TED Talks, as well as the importance of using personal stories when influencing others).

parental challenges and choices even without sharing the luxury of a multi-million-dollar bank account.²⁶

IV. Military Application? Yes and No

A. The Issues That Affect Us All

Servicemembers do not often have the ability to defer deployments, assignments, or promotions for personal matters, but sometimes we do. Think first of the dual military couple and the choices one spouse has to make when her partner has an opportunity to serve his dream job and one is left to fill a position that does not compete with or create a conflict of interest with the other's spouse's position. Consider those parents with children in the Exceptional Family Member Program who are limited in assignment locations. Do they take the "good" job in a location not suitable to their family's needs and bear the separation, or do they settle for the "okay" job that allows their family to remain under one roof? Consider the parent that may turn down a chance to deploy in fear of the effect an extended absence may have on his child.

These are honest, real, and reasonable factors active duty spouses and parents analyze during each assignment cycle. The root of these issues is not military specific, but are challenges working parents face in one way or another regardless of their employment. As we learn from *Lean In*, Sandberg would advise dual military spouses to challenge themselves with jobs that will independently prepare each individual for future success and promotion potential. Women should not settle for jobs that simply align with their spouses, but advocate for a job that betters them for future positions of authority. Sandberg encourages parents, especially working mothers, to not feel guilty for time spent away from the home, but to rely on their support systems to ensure their children's needs are met and define success as "making the best choices we can . . . and accepting them."²⁷

B. Application to the Judge Advocate Female

All too often, officers are faced with difficult choices like Major Squared Away's. Like the entry-level employees mentioned in *Lean In*, junior captains are watching their senior leadership and paying close attention to who is selected for promotion and who is chosen for schools. When

²⁶ Morningstar, Inc. determined through federal disclosure filings that Sandberg's total Facebook compensation in 2011 was \$30,957,954. \$466,833 was salary and cash bonus while the rest constitutes Sandberg's share of Facebook stock awards. FORBES.COM, *LLC, Sheryl Sandberg Profile*, <http://www.forbes.com/profile/sheryl-sandberg> (last visited July 8, 2014).

²⁷ SANDBERG, *supra* note 1, at 139.

making these difficult and personal decisions, we need to be cognizant of what Sandberg calls the "leadership ambition gap,"²⁸ and try to make decisions regarding professional growth without fear of failure or an overly practical approach.

The "leadership ambition gap" is Sandberg's proposition that professional men aspire to senior leadership positions more than professional women. Sandberg points to studies that have found that working women who were born between 1980 and 2000 are less likely than working men born during the same era to describe themselves as "leaders," "visionaries," "self-confident," and "willing to take risks." Sandberg believes this is partly because women of this era share the same equal opportunities their mothers did, but are the first to recognize that more opportunity does not always translate to professional achievement. "Many of these girls watched their mothers try to 'do it all' and then decide that something had to give. That something was usually their career."²⁹

As today's working women once watched their professional mothers struggle to balance opportunities, so are subordinate employees (possibly enlisted Soldiers and junior officers) watching their leaders balance career progression with family obligations. Sandberg points out that fear serves as the root for many barriers to professional success and personal fulfillment, and that professional leaders should strive to create a culture that encourages people to take risks.³⁰ This begs the question: how does a professional, especially female leader, avoid contributing to the leadership ambition gap and balance the responsibility of making decisions that are best for their family, without sending risk-adverse messages to subordinates? Rather than answers, *Lean In* provides encouragement to leaders, particularly women, to find the individual approach that works for them while sending a message they want to convey to their subordinates.

C. A Fruitless Battle?

Women have less chance of promotion and retention in the military than their male counterparts, often through no fault of their own. The military has long imposed policy that restricts career progression, and thereby promotion potential, of female servicemembers.³¹ After years of closed-off

²⁸ *Id.* at 12–26.

²⁹ *Id.* at 15.

³⁰ *Id.* at 24.

³¹ BETH J. ASCH, TREY MILLER & ALESSANDRO MALCHIODI, *A NEW LOOK AT GENDER AND MINORITY DIFFERENCES IN OFFICER CAREER PROGRESSION IN THE MILITARY* (2012). The RAND National Defense Research Institute concluded a study of promotion and retention rates among officers based on gender and ethnicity in 2012 for the Office of the Secretary of Defense. Building upon a previous study, this research

military occupational specialties, the military branches are just now analyzing when and how to expand the number of specialties open to women at the lowest reasonable level of command.³² Although the Department of Defense is making progress on women's equality among our ranks, women will remain ineligible for service in infantry,³³ armor, or special operations military occupational specialties, which then makes it improbable for women to hold some of the most distinguished senior leadership positions (i.e. command positions) in several of the U.S. Army's division and corps elements.

Sandberg opines that women will not see true equality in the world until we reach a fifty/fifty ratio of male leaders to female leaders.³⁴ In February 2013, the Office of the Undersecretary of Defense, Personnel and Readiness,

reexamined promotion and retention rates among men, women, whites, blacks, Asians, Hispanics, and other racial backgrounds through 2010. The overall finding was that "military accession of women, blacks, Asians, Hispanics, and persons of other racial backgrounds have increased over time," yet "the proportions of these groups in the senior officer corps remain relatively low." Relying on Proxy-PERSTEMPO data including information on "officer service, occupation, grade, months to current grade, source of commission, deployments, dates of entry and of commission, and demographic variables such as race, ethnicity, gender, marital status and education," the study found that "female officers are less likely to be promoted than white males." *Id.* at Summary xi; U.S. DEP'T OF ARMY, REG. 600-13, ARMY POLICY FOR THE ASSIGNMENT OF FEMALE SOLDIERS para. 1-12 (27 Mar. 1992). Under the Combat Exclusion Policy, "service members are eligible to be assigned to all positions for which they are qualified, except that women shall be excluded from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground." *Id.*

³² Led by Secretary of Defense Leon Panetta, the Department of Defense overturned the Combat Exclusion Policy in January 2013. Secretary Panetta directed all branches of the military to compose plans to allow women to serve in previously closed positions. The goal is to have these plans through service review, through congressional notification procedures, and implemented before 1 January 2016. Office of the Asst. Sec. of Def., Pub. Affairs, *Defense Department Rescinds Direct Combat Exclusion Rule; Services to Expand Integration of Women into Previously Restricted Occupations and Units*, U.S. DEP'T OF DEF. (Jan. 23, 2013), <http://www.defense.gov/Releases/Release.aspx?ReleaseID=15784>; Michelle Tan, *Women in Combat: Army to Open 14,000 Jobs*, 6 *MOSs*, ARMY TIMES (May 2, 2012, 2:57 PM), <http://www.armytimes.com/article/20120502/NEWS/205020312/Women-combat-Army-open-14K-jobs-6-MOSs>. The U.S. Army announced its plan to open six military occupational specialties and 14,000 jobs to women. In the near future, female officers will be able to serve as Adjutant General (42B), Chaplain (56M), Chemical Officer (74A), Field Artillery Fire Support Officer or Effects Coordinator (13A), Logistics Officer (90A), Field Surgeon or Medical Platoon Leader (62B), Military Intelligence Officer (70B), Signal Officer (25A) or Physician Assistant (65D) at battalion level. The six military occupational specialties opening up to women include Multiple Launch Rocket System (MLRS) Coordinator (13M), MLRS Operations Fire Detection Specialist (13P), Field Artillery Fire Finder Radar Operator Specialist (13R), M1 Abrams Tank System Maintainer (91A), Bradley Fighting Vehicle System Maintainer (91M), and Artillery Mechanic (91P).

³³ OFFICE OF THE UNDER SEC. OF DEFENSE, PERS. AND READINESS, REPORT TO CONGRESS ON THE REVIEW OF LAWS, POLICIES AND REGULATIONS RESTRICTING THE SERVICE OF FEMALE MEMBERS IN THE U.S. ARMED FORCES 15 (2012).

³⁴ SANDBERG, *supra* note 1, at 7; *see supra* note 14 and accompanying text.

reported that women comprise approximately seven percent of active component general/flag officers and approximately eleven percent of the senior enlisted force.³⁵ That is far from the fifty/fifty ratio Sandberg finds a requisite premise to true workforce equality. In a volunteer military incapable of forcing an increase in volunteer female accessions, with built-in barriers to promotion and service in several military occupational specialties, Sandberg's proposal for women in senior leadership positions to help subordinate female employees circumvent the professional jungle gym will never work.³⁶

V. Conclusion

Sandberg offers pointed advice and an often ignored view into the guilt and internal struggle every mother experiences at one time or another, whether working inside or outside the home. It is an excellent read for women wanting to increase their chances of making it to the top of their careers, and for the men who want to support them. It is also an excellent source of encouragement for female Soldiers faced with difficult decisions that could inadvertently send a negative message to junior Soldiers. It does not, however, offer advice on how women can change a culture that makes certain promotions simply unobtainable. This is not a fault of the book or a fault of Sandberg. She has more than enough experience in the civilian sector to support her opinions on gender equality in the workforce, but lacks the military experience necessary to understand the challenges unique to military women. Military women face a brass ceiling,³⁷ while Sandberg's experience lies in successfully breaking through a glass ceiling.

Lean In encourages women to take care of themselves and their female colleagues. Although it does not speak to the single parent or the military woman desiring positions currently unavailable as a matter of policy, it gives working women everywhere comfort in knowing they are not the only people struggling to find a balance between professional obligations and family commitments.

³⁵ *Id.* at 3.

³⁶ Despite the lack of senior female military leaders, military women of all ranks are helping their female colleagues circumvent the professional jungle gym within the Armed Forces through Women's Mentorship Networks, such as the program currently underway at Fort Hood. Amaani Lyle, *Women Mentorship Program Empowers Service Members*, AMERICAN FORCES PRESS SERVICES, Feb. 10, 2014, <http://www.defense.gov/news/newsarticle.aspx?id=121637>.

³⁷ Jeremiah Goulka, *Breaking the Military's Brass Ceiling*, AM. PROSPECT (Jan. 29, 2013), <http://prospect.org/article/breaking-military%E2%80%99s-brass-ceiling>. "... lots of women already serve in combat, get shot at, get wounded, and get killed. But like the military before Truman desegregated it, the system created a ceiling made of brass rather than glass. Denied the opportunity to command the types of units that are actually required for rising to the very top of the military hierarchy, top female personnel leave the military." *Id.*

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS) is restricted to students who have confirmed reservations. Reservations for 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, U.S. Army (TJAGLCS).

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

b. The Naval Justice School (NJS).

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

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

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

3. Civilian-Sponsored CLE Institutions

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

- AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225
- ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600
- ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990
- CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973
- CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747
- CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662
- ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900
- FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

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

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

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

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

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

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

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

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

MC Law: Mississippi College School of Law
151 East Griffith Street
Jackson, MS 39201
(601) 925-7107, fax (601) 925-7115

NAC: National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(803) 705-5000

NDAA: National District Attorneys Association
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
(703) 549-9222

NDAED: National District Attorneys Education Division
1600 Hampton Street
Columbia, SC 29208
(803) 705-5095

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

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

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

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

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

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

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

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

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

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

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

a. The JAOAC is mandatory for all Reserve Component company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD) at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each 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 (JAIBC) 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 JAIBC, unless, at the time of their accession into the JAGC, they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrollment in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each December at TJAGLCS. Students must have submitted by 1 November all Phase I subcourses, to include all writing exercises, and have received a passing score to be eligible to attend the two-week resident Phase II in December of the following year.

d. Students who fail to submit all Phase I non-resident subcourses by 2400 hours, 1 November 2014, will not be allowed to attend the December 2014 Phase II resident JAOAC. Phase II includes a mandatory 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 MAJ T. Scott Randall, commercial telephone (434) 971-3359, or e-mail thomas.s.randall2.mil@mail.mil.

5. Mandatory Continuing Legal Education

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

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

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

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

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

Current Materials of Interest

1. The USALSA Information Technology Division and JAGCNet

a. The USALSA Information Technology Division operates a knowledge management, and information service, called JAGCNet. Its primary 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 TJAGSA 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 and click on it. 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.

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

a. The Judge Advocate General's Legal Center and School (TJAGLCS), Charlottesville, Virginia, continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows 7 Enterprise and Microsoft Office 2007 Professional.

b. The faculty and staff of TJAGLCS are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNet. If you have any problems, please contact the Information Technology Division at (703) 693-0000. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

c. For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jt.cnet.army.mil/tjagsa>. Click on "directory" for the listings.

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

3. Additional Materials of Interest

a. Additional material related to the Judge Advocate General's Corps can be found on the JAG Corps Network (JAGCNet) at www.jagcnet.army.mil.

b. In addition to links for JAG University (JAGU) and other JAG Corps portals, there is a "Public Doc Libraries" section link on the home page for information available to the general public.

c. Additional information is available once you have been granted access to the non-public section of JAGCNet, via the "Access" link on the homepage.

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

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