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Lore of the Corps

The Trial by Military Commission of Queen Liliuokalani

Fred L. Borch
Regimental Historian & Archivist

On 8 February 1896, Queen Liliuokalani, the last monarch of Hawaii, was escorted into the Throne Room of what had once been her Royal Palace in Honolulu. Two Hawaiian policemen stood behind her as she took a seat on a high-backed chair. Seated in front of the queen, at a long table in the middle of the room, were the eight members of a military commission. This military tribunal had been convened to try Liliuokalani for “misprision of treason,” as it was alleged that the queen had concealed knowledge of a treasonous plot to overthrow the Republic of Hawaii—the newest name of the government that had taken power since the overthrow of Liliuokalani in January 1893. What follows is the story of how the last ruler of the Kingdom of Hawaii came to be prosecuted before a military commission—a largely forgotten episode in military legal history.¹



Queen Liliuokalani (shown here as Crown Princess), ca. 1887

Queen Liliuokalani’s predicament had begun some twenty years earlier when her brother, King David Kalakaua, was the reigning monarch in the Kingdom of Hawaii. Businessmen and Christian missionaries, who had come to the islands from the United States and Europe, did not like the absolutist nature of the Hawaiian monarchy, preferring instead a constitutional monarchy where the king (or queen) had significantly less power.² Additionally, as the amount of

Hawaiian land sown to sugar cane increased dramatically, and sugar mills (including the largest and most modern steam-powered facility in the world) were built, the white businessmen who dominated the sugar growing industry were increasingly unhappy with the Hawaiian system of government. In 1887, after King Kalakaua attempted to further dilute the power of the white businessmen and missionaries in the islands, these “white money men” took action against the king.³



Sanford B. Dole, President of the Provisional Government and Republic of Hawaii

Led by Sanford B. Dole,⁴ these men created the “Hawaiian League” and forced King Kalakaua to sign a new constitution that reduced his powers as a sovereign while increasing the authority of the legislature (where men like

mostly of men of Hawaiian native blood, elected the monarch. STEPHEN DANDO-COLLINS, *TAKING HAWAII* 33 (2012).

³ *Id.* at 53.

⁴ Born in Honolulu in 1844, Sanford Ballard Dole (his parents had come to Hawaii in 1840 from Maine) left the islands to attend law school, but returned in 1867 to establish a successful law practice. In 1886, he was appointed to the Kingdom of Hawaii’s Supreme Court as an Associate Justice. After the overthrow of the monarchy in 1893, Dole was elected as president of the Provisional Government. After the Provisional Government declared itself the Republic of Hawaii in 1894, Dole and his allies in the new republic lobbied Congress to annex the islands. After annexation was accomplished in 1898, President William McKinley appointed Dole as the first governor of the new Territory of Hawaii. Dole later served as a U.S. District Court Judge from 1903 to 1916. Sanford B. Dole died in Honolulu in 1926. *Sanford Ballard Dole (1844–1926)*, HAWAIIHISTORY.ORG, <http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&PageID=407> (last visited July 10, 2014); *see also* HELENA G. ALLEN, *SANFORD BALLARD DOLE: HAWAII’S ONLY PRESIDENT, 1844–1926* (1998).

¹ The author thanks Major M. Eric Bahm for suggesting the idea for this “Lore of the Corps” article.

² The Hawaiian monarch was virtually absolute in his powers, although the kingdom did have a “House of Nobles” and “Legislative Assembly.” These two bodies, however, had little power in the day-to-day running of the islands. In contrast to most monarchies, however, where blood lines determine who is a king or a queen, the Legislative Assembly, consisting

Dole were serving as members of the Reform Party). This same constitution also disenfranchised many Asians and native Hawaiians by requiring land ownership and literacy. But it expanded the franchise to wealthy non-citizens living in Hawaii, and allowed these same men to stand for election to the legislature. As a result, “only wealthy, educated whites, who made up just three percent of the population of 90,000 people, could stand for election.”⁵ Since King Kalakaua had been forced to accept the constitution by the threat of violence, it was known as the “Bayonet Constitution.”⁶

Kalakaua died in 1891 and his sister, Liliuokalani, succeeded him on the throne. When she proposed revising the existing constitution so that it would restore her powers as a monarch and extend voting rights to native Hawaiians, thirteen white businessmen and sugar planters—some of whom had been members of the Hawaiian League—now acted once more against the monarchy. They formed a “Committee of Safety” and began organizing a coup to overthrow the kingdom. The committee’s ultimate goal, driven by the strong economic, political, and family ties of its members to the United States, was American annexation of the Hawaiian Islands.⁷

On 17 January 1893, a militia created by the Committee of Safety assembled near Queen Liliuokalani’s Iolani Palace in Honolulu. They were joined by 162 Sailors and Marines from the cruiser USS *Boston*, which was moored in Honolulu Harbor. These American personnel had been ordered by John L. Stevens, the U.S. Minister to Hawaii, “to protect the lives and property of American citizens,” including the members of the Committee of Safety.⁸ Although no one will ever know what would have happened if the queen had decided to resist the coup, Liliuokalani wanted to avoid violence and consequently surrendered peacefully.

The Committee of Safety now established a “Provisional Government” and elected Sanford Dole as president.⁹ In the United States, President Grover Cleveland refused to recognize the Dole government and insisted that Queen Liliuokalani be restored to her throne. Dole and his fellow coup members, however, refused to give up power and instead proclaimed the Republic of Hawaii on 4 July 1894.¹⁰

⁵ *Id.* at 50.

⁶ *Id.* at 52.

⁷ *Id.* at 122; *see also* WILLIAM ADAM RUSS, *THE HAWAIIAN REPUBLIC (1894–1898): AND ITS STRUGGLE TO WIN ANNEXATION* (1992).

⁸ DANDO-COLLINS, *supra* note 2, at 148.

⁹ *A Revolution in Hawaii*, N. Y. TIMES, Jan. 28, 1893, at 1.

¹⁰ *Republic of Hawaii Formally Proclaimed*, N. Y. TIMES, July 28, 1894, at 1.

Six months later, on 6 January 1895, Hawaiians loyal to Queen Liliuokalani launched a counter-coup. They hoped to oust the Dole government and restore the Kingdom of Hawaii. A royalist force of some one hundred men occupied Punchbowl Hill, and men loyal to the queen also occupied the Diamond Head crater. But the uprising failed and some three hundred royalists were taken into custody by Dole’s republican government.¹¹ Queen Liliuokalani was apprehended as well.

Since the Dole Government had declared martial law, it now decided to crush royalist resistance by using military commissions to prosecute those men loyal to Queen Liliuokalani—and the queen herself—for treason in plotting to overthrow the Republic of Hawaii.

The first royalists were tried on 17 January 1896. The proceedings were held in the Throne Room and, “to save time, the commission tried the accused in batches.”¹² Apparently, all were charged with treason and open rebellion. Some pleaded guilty, some did not. When the commission finished its business after 35 days, it had heard evidence against 191 accused. Very few were found not guilty. Some were sentenced to hang.

On 24 January, Queen Liliuokalani, who had been locked up in an “improvised cell directly above the improvised courtroom,”¹³ signed a “formal declaration” prepared by the Dole Government. In this document, she abdicated her throne and called upon all her subjects to recognize the Republic of Hawaii as the nation’s legitimate government. Liliuokalani initially had strenuously resisted signing the declaration, but did so after receiving representations that, if she signed the instrument, the military trials would come to a halt and those who had already been tried and convicted would be immediately released.¹⁴

As Queen Liliuokalani soon discovered, her signature had no impact on her case or that of other royalists: the trials continued and death sentences continued to be meted out. Her own trial began at 1000 on 8 February. The judge advocate on the case was Captain William A. Kinney, an attorney who had only recently been commissioned in the Republic of Hawaii’s Army. The senior member of the military tribunal was Colonel William A. Whiting, a Harvard Law School graduate who had resigned as one of Hawaii’s circuit court judges to accept a commission as a colonel and an appointment to the military commission.

¹¹ DANDO-COLLINS, *supra* note 2, at 299.

¹² *Id.* at 305.

¹³ *Id.*

¹⁴ *Id.* at 306, 308.

Queen Liliuokalani had initially been charged with the capital offense of treason. Under pressure from the U.S. and British governments, however, the Dole Government dismissed that charge and instead tried the Hawaiian monarch for misprision of treason, which was not a death penalty offense.¹⁵

The prosecution decided to prove that Liliuokalani had known about the counter-coup and, in fact, had encouraged it. None of the coup leaders had implicated their queen in any statement, and there was no evidence that Liliuokalani had any part in financing the uprising. But two royal officials did admit that they had spoken with the queen about the coup in early January, and the military commission consequently could conclude that she “had known of some act against the government was in motion.”¹⁶ The more damning evidence, however, were the rifles and explosives found buried in the flowerbeds of the queen’s personal residence in Honolulu and entries in Liliuokalani’s diary, which indicated that she knew about the counter-coup.¹⁷ The queen denied all knowledge of any plot against the Republic of Hawaii, although it was clear that she sympathized with the aims of those who sought to restore her kingdom.

On 27 February 1896, Queen Liliuokalani was found guilty as charged. She was sentenced to be confined *to hard labor* for five years and to pay a \$5,000 fine.¹⁸ The following day, President Sanford Dole, acting as Commander in Chief, commuted most of the death sentences that had been adjudged by the military commission. In fact, no hangings were ever carried out, and most of those who had been convicted served only short prison sentences. Dole also cancelled the hard labor portion of the queen’s sentence. She subsequently was confined to a small room in Iolani Palace; she was guarded by military personnel at all times. Eight months later, Dole released Liliuokalani from confinement, and she returned to her private residence, where she remained under house arrest. A year later, she was given a full pardon and informed that she was now able to travel freely.

In May 1897, delegates from the Republic of Hawaii traveled to Washington, D.C., to negotiate the annexation of Hawaii to the United States. There was considerable congressional opposition from those with anti-imperialist views, which was buttressed by Liliuokalani, who had journeyed to Washington, D.C., with a petition containing “thousands of signatures from Hawaiians opposed to annexation.”¹⁹

For a time, it looked as if annexation efforts might fail. After the USS *Maine* blew up in Havana on 15 February 1898, however, “patriotic anger and jingoistic fervor” gripped the United States.²⁰ After the House of Representatives Foreign Relations Committee reported that Hawaii was “an essential base for U.S. operations against the Spanish in the Philippines and Guam,”²¹ events moved rapidly. A joint resolution for the annexation of the islands passed the Senate on 15 June and the House on 6 July. President William McKinley signed into law the annexation on 7 July 1898. Hawaii remained a territory until 1959, when it became the 50th state.²²

In 1993, Congress passed a joint resolution apologizing to the people of Hawaii for the U.S. government’s role in the overthrow of Queen Liliuokalani.²³ But no mention was made of the queen’s trial by military commission—proving that it remains a forgotten event in military legal history.

As for Queen Liliuokalani? She spent her remaining days in Honolulu. She died in 1917 due to complications from a stroke. She was seventy-nine years old.

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>

¹⁵ *Id.* at 308.

¹⁶ *Id.*

¹⁷ *Id.* at 309.

¹⁸ *Id.* at 311.

¹⁹ *Id.* at 317.

²⁰ *Id.*

²¹ *Id.*

²² *The U.S. Occupation, HAWAII KINGDOM*, <http://www.hawaiiankingdom.org/us-joint-resolution-1898.shtml> (last visited July 21, 2014).

²³ To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993), available at <http://www.gpo.gov/fdsys/pkg/STATUTE-107/pdf/STATUTE-107-Pg1510.pdf> (last visited July 29, 2014). The resolution identifies the role of U.S. Minister Stevens (who supported the Committee of Safety and extended diplomatic recognition to Dole’s Provisional Government) and the unlawful landing of Sailors and Marines from the USS *Boston* as the basis for the apology.

Lawful Command Emphasis: Talk Offense, Not Offender; Talk Process, Not Results

Colonel James F. Garrett,^{*} Colonel Mark “Max” Maxwell,[†] Lieutenant Colonel Matthew A. Calarco[‡] & Major Franklin D. Rosenblatt[§]

Synopsis

Unlawful command influence (UCI) has rightfully been called the mortal enemy of military justice. This concern stems back to the injustices that occurred during both World War I and II. The reaction to these events was a law—the Uniform Code of Military Justice (UCMJ)—in 1950. A provision within the UCMJ provides that it is improper and unlawful for any person to attempt to influence the action of an appointing or reviewing authority or the action of any court-martial in reaching its verdict or pronouncing sentence. In modern practice, the most common but nebulous type of UCI is the appearance of UCI. Its appearance exists where an objective and disinterested observer who is fully informed of all of the facts and circumstances would harbor a significant doubt about the fairness of the court-martial proceedings. Commanders who rely on a properly functioning military justice system in their quest for good order and discipline, and the Staff Judge Advocates (SJAs) who advise them, must remember three central tenants of military justice: commanders at every level must be free to act with independent discretion; the accused Soldier must be free to build his case without outside influences limiting the full ability to obtain evidence and witnesses with full commitment to the justice process; and members of the court-martial must be free to decide the case on the merits and, as necessary, a proper sentence based only on the evidence presented, law as instructed by the military judge, and arguments of counsel.

“Lawful command emphasis” means ensuring that these three legal tenants stay intact to ensure good order and discipline are preserved within the ranks. The balance then is between the commander’s constant participation in his unit’s life and the immutable rights and protections of the accused Soldier. The commander’s daily input in the unit’s direction plays a significant role in the tone and prioritization of the unit’s tasks to accomplish the military mission. As leaders, commanders are expected by their chain of command to prepare their units and its members to be ready to go into harm’s way. To stay within the law, commanders should always remember to talk about the offense but not the offender, and talk about the process, not the result. There will be times when commanders want to distribute information or a perspective that puts the unit’s mission in the best light possible. But judge advocates (JAs) have to give counsel so the commander understands the risk of saying something that would have a near-term positive impact, but could have a long-term detriment to both the accused and the very military justice system that allows commanders to hold Soldiers accountable.

A dialogue between the commander and his SJA helps identify the issues the commander believes need addressing.

A commander should identify and address perceived problems related to military justice. Staff Judge Advocates, however, must assist their commanders by drafting policies that are clear, have context, and avoid the appearance of UCI. Commanders want those who have violated the bonds of trust within the ranks to be held accountable. The UCMJ will maintain its relevancy by holding the individual transgressor accountable by ensuring that every accused receives a fair hearing and opportunity to present his case. This was the clear mandate of the reforms outlined by Congress in the UCMJ. The law provides commanders the tools to enforce accountability within the protections afforded an accused Soldier by the UCMJ, but simultaneously allows for commanders to discuss priorities related to good order and discipline within their ranks. When SJAs and commanders work as a team to do that properly, the result is another powerful tool: Lawful Command Emphasis.

Introduction

In the modern age, military justice must always be fair and transparent. In the words of the U.S. Army’s 22nd Chief of Staff, General George H. Decker, “it is essential that our excellent court-martial system generate public confidence in the basic fairness of the administration of military justice. No other single factor has greater tendency to destroy public confidence in the system than allegations of [unlawful] ‘command influence.’”¹ Unlawful command influence is an existential threat to the military justice system, or according to the Court of Military Appeals—its “mortal enemy.”²

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¹ SUBCOMM. ON CONST. RTS. OF THE S. COMM. OF THE JUDICIARY, 88TH CONG., REP. ON CONST. RTS. OF MILITARY PERS. 16 (Comm. Print 1963), available at http://www.loc.gov/rr/frd/Military_Law/pdf/const-rights-mil-pers.pdf [hereinafter CONST. RTS. REPORT] (quoting a 5 February 1962 letter from General George Decker, Army Chief of Staff, on the subject of command influence).

² United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986). The U.S. Court of Military Appeals (CMA) was redesignated in 1994 as the U.S. Court of Appeals for the Armed Forces (CAAF).

Unlawful command influence is, in the words of U.S. Air Force Lieutenant Colonel Erik C. Coyne, “any action taken in an attempt to influence either an outcome or another into an inappropriate action.”³ Unlawful command influence litigation frequently arises from unwitting statements by our civilian and military leaders discussing military justice. In the rigidly hierarchical military, the thinking goes: military members are naturally inclined to obey guidance from their superiors. When this guidance is perceived as penetrating the independent sphere of panel members and commanders, UCI concerns are triggered.

A prime example is President Obama’s 7 May 2013 press conference. The President, who is also the Commander-in-Chief of the armed forces, answered a question about the concerns over sexual assault in the military with tough but unscripted language:

The bottom line is: I have no tolerance for this I expect consequences I don’t just want more speeches or awareness programs or training, but ultimately folks look the other way. If we find out somebody’s engaging in this stuff, they’ve got to be held accountable: prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period.⁴

The actual impact of these comments is not quantifiable. What is more readily apparent is that the comments entered into military motions and trial practice at lightning speed. Defense counsel argued that prosecutorial decisions were tainted by a mandate from the highest military official—the Commander-in-Chief—to prosecute all sexual assault allegations and issue the severest form of punitive discharge.⁵ Military trial judges granted many of these motions and fashioned varied remedies such as additional discovery, greater leeway for defense counsel to question members during *voir dire*, liberal grants of challenges for cause, and disallowance of punitive discharges.⁶ In response

to these developments, several White House and Department of Defense officials emphasized that military officials should effectively disregard the President’s remarks and use their independent judgment when deciding cases.⁷

It is beyond the military expertise of the authors of this article to parse presidential political prerogatives.⁸ The fallout from the President’s comments, however, shows that military and civilian leaders have a strong self-interest in studying and understanding the role of command influence in military justice. The response to the legal fall-out described above led to one of the best, and most recent, examples of lawful command emphasis in the form of a memorandum from the Secretary of Defense clarifying the President’s remarks and views of the Administration.⁹ In the memorandum entitled, “Integrity of the Military Justice Process,” the Secretary of Defense sent a message that was clear and forceful: “[c]entral to military justice is the trust that those involved in the process base their decisions on their independent judgment Everyone who exercises discretionary authority in the military justice process must apply his independent judgment.”¹⁰ The Secretary told the entire Department of Defense, and the world for that matter, that there is no expectation for a certain result, regardless of the allegations. In other words, the Secretary is telling commanders to discuss process, not results, and discuss offenses, not offenders. If the President’s message had been delivered in the manner found in the Secretary of Defense memorandum, our trial courts would likely have avoided the necessity to ascend a mountain of litigation, which they continue to climb with no clear summit.

This article will grapple with the intersection of the current environment—especially when sexual assault is alleged—and doing the legally right thing. This article is both historical and tactical. In the end, understanding where a statutory provision comes from is important and helps

Erik Slavin, *Judge: Obama Sex Assault Comments ‘Unlawful Command Influence,’* STARS & STRIPES, June 14, 2013, <http://www.stripes.com/judge-obama-sex-assault-comments-unlawful-command-influence-1.225974> (describing a Marine court-martial in Hawaii and including a link to the military judge’s written ruling on an unlawful command influence motion).

⁷ Jennifer Steinhauer, *Hagel Tries to Blunt Effect of Obama Words on Sexual Assault Cases*, N.Y. TIMES, Aug. 14, 2013, http://www.nytimes.com/2013/08/15/us/politics/hagel-tries-to-blunt-effect-of-obama-words-on-sex-assault-cases.html?_r=1&.

⁸ The topic of the president’s personal role in military justice matters deserves more attention in military legal scholarship than the limited coverage in this article. For example, contrast President Obama’s tough talk on sexual assault with President Bill Clinton’s refusal to respond to media questions about a court-martial acquittal of two Marine pilots who were accused of flying recklessly and severing a gondola cable in Italy in 1998, an incident that killed twenty civilians and ignited a diplomatic impasse with Italy. A detailed factual background about that case is found in *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009).

⁹ Memorandum from the Sec’y of Def. to the Military Members of the Dep’t of Def., *Integrity of the Military Justice Process* (Aug. 6, 2013).

¹⁰ *Id.*

³ Lieutenant Colonel Erik C. Coyne, *Influence with Confidence: Enabling Lawful Command Influence By Understanding Unlawful Command Influence—A Guide for Commanders, Judge Advocates, and Subordinates*, 68 A.F. L. REV. 1, 7 (2013).

⁴ *Obama: ‘No Tolerance’ for Military Sexual Assault*, NBCNEWS.COM, (May 7, 2013), http://nbcpolitics.nbcnews.com/_news/2013/05/07/18107743-obama-no-tolerance-for-military-sexual-assault?lite. A video of the president’s full comments is available at <http://www.cbsnews.com/news/hagel-aims-to-blunt-obama-remarks-on-military-sexual-assault/> (last visited July 28, 2014).

⁵ Jennifer Steinhauer, *Remark by Obama Complicates Military Sexual Assault Trials*, N.Y. TIMES, July 13, 2013, <http://www.nytimes.com/2013/07/14/us/obama-remark-is-complicating-military-trials.html?ref=politics>.

⁶ The military judge has “broad discretion in crafting a remedy to remove the taint of unlawful command influence.” *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010). For one example of a judge-crafted remedy in response to a UCI challenge concerning the President’s comments, see

place it into context, but most commanders and JAs want the practical: what do I do? This article will discuss the history of the Uniform Code of Military Justice; the development of the concept of UCI; what constitutes UCI and how the courts have dealt with it; and a new term for consideration in our military lexicon: lawful command emphasis. Lawful command emphasis is, in short, the appropriate actions commanders or staff members can take within the military justice process to ensure good order and discipline is maintained within the ranks. The focus will be to explore the pitfalls of talking about offenders instead of offenses and the requirement to talk process and not results. The authors will conclude with some suggestions on how commanders and JAs can craft the command's message so that it stays clear of UCI and focuses on lawful command emphasis. The UCMJ is strong, and it is incumbent that those entrusted to exercise this unique authority—principally commanders with the advice of JAs—do so judiciously and fairly.

Courts-Martial Jurisdiction

Most legal discussions in American jurisprudence will include the U.S. Constitution and the Supreme Court. The Supreme Court has jealously protected the federal judiciary's constitutional power to adjudicate criminal matters, but the Court has carved out a narrow exception: military crimes. Trying military crimes in a non-Article III court—that is, outside the federal judiciary, specifically courts-martial—stems from Congress's legislative powers of Section 8, Clause 14: "To makes Rules for the Government and Regulation of the land and naval Forces."¹¹

The Court has interpreted the Constitution as granting Congress the authority to make rules for the government and regulation of the land and naval forces; this is known as the Land and Naval Forces Clause. Congress, in turn, enacted a military criminal code, which grants the Commander-in-Chief the authority to promulgate "[p]retrial, trial, and post-trial procedures, including modes of proof" for courts-martial.¹² In other words, the adjudication of military crimes is outside the purview of Article III. As articulated by the Court, "[t]rial by court-martial is constitutionally permissible only for persons who can, *on a fair appraisal*, be regarded as falling within the authority given to Congress under Article I to regulate the 'land and naval Forces' The test for jurisdiction, it follows, is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can

¹¹ U.S. CONST. art. I, § 8, cl. 14. The authority to create military tribunals resides in Section 8, Clause 10 of Article I. "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." *Id.* art. I, § 8, cl. 10; *see also Ex parte Quirin*, 317 U.S. 1, 28 (1942) (holding that the Congress "has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for [such] offenses.").

¹² 10 U.S.C. § 836(a) (2012).

be regarded as falling within the term 'land and naval Forces.'"¹³ Since the inception of the republic, the scope of court-martial jurisdiction has been narrow, "which manifested itself in a very limited grant of authority to try offenses by court-martial."¹⁴ This limited military jurisdiction continues to the present day and has been affirmed by the Court on many occasions.¹⁵

The Evolution of the Court-Martial Process

Courts-martial practice in America is as old as the United States. The Continental Congress in 1775 enacted the country's first Articles of War, which governed how the military should conduct itself during war.¹⁶ The articles enacted by the Continental Congress were modeled after, and virtually identical to, the British version, which traces its lineage to the Roman Empire. Court-martial authority vests commanders with the ability to try military personnel under their command who have committed a crime. Commanders exercised this authority on numerous occasions during the Revolutionary War. One of the most notorious courts-martial was the trial of Thomas Hickey, General Washington's military aide. Hickey was court-martialed for mutiny, sedition, and trying to poison General Washington; thirteen officers found him guilty and sentenced him to be hanged.¹⁷ The primary goal of his court-martial and others was to deter future acts of mutiny, sedition, and treachery.

Between the Revolutionary War and World War I—over 140 years—the Articles of War saw few changes. It was not until 1857 that the Supreme Court took up the issue of the constitutional validity of courts-martial. In *Dynes v. Hoover*, the Court affirmed a Sailor's court-martial conviction for desertion. The Land and Naval Forces Clause of Article I, among other constitutional provisions, "show that Congress had the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations" ¹⁸ Nearly forty years later, the first procedural manual governing how courts-martial should be conducted for the land forces came into being in 1895.¹⁹ The 1895 Manual, however, was not

¹³ *Kinsella v. Singleton*, 361 U.S. 234, 240-41 (1960) (italics in original).

¹⁴ *Soloria v. United States*, 483 U.S. 435, 457 (1987) (Marshall, J., dissenting).

¹⁵ *United States v. Averette*, 41 C.M.R. 363 (1970) (reviewing original Article 2(10)'s "in the time of war" phrase).

¹⁶ MILITARY LAWS OF THE UNITED STATES 702 n.1 (3d ed. 1898).

¹⁷ LAWRENCE J. MORRIS, MILITARY JUSTICE: A GUIDE TO THE ISSUES 14-15 (2010) (citing JAMES C. NEAGLES, SUMMER SOLDIERS: A SURVEY AND INDEX OF REVOLUTIONARY WAR COURTS-MARTIAL (1986)).

¹⁸ 61 U.S. 65, 72 (1857).

¹⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES 3 (1895). The first manual was written by First Lieutenant Arthur Murray.

nearly as detailed as the modern-day Manual for Courts-Martial. The purpose of the manual, like today's version, was to explain "the legal system that regulates the government of the military establishment."²⁰

It was not until after World War I that Congress examined the military justice system in depth. In hearings held before Congress in 1919, the testimony raised concerns regarding "service members' and society's confidence in the justice and fairness of such a system."²¹ The lightning rod for these concerns was Brigadier General Samuel T. Ansell, the Acting Army Judge Advocate General.²² In law review articles and testimony before Congress, General Ansell questioned the efficacy of a system where no independent legal authority could review the process and result of any court-martial, to include where a death sentence was imposed.²³ As historian Colonel William Winthrop noted in his now-famous 1920 treatise on military law, "the court-martial being no part of the Judiciary of the nation, and no statute having placed it in legal relations therewith, its proceedings are not subject to being directly reviewed by any federal court . . . nor are its judgments or sentences subject to be appealed from such tribunal."²⁴

Even uniformed lawyers, that is, JAs, had a limited role in the court-martial process. The only substantive role for JAs was to "prosecute in the name of the United States, but when the prisoner has made his plea, he shall so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question to the prisoner, the answer to which might tend to criminate [sic] himself."²⁵

Coupled with the lack of legal oversight, General Ansell's most stinging rebuke of the state of military justice was the commander's seemingly absolute unfettered authority: "[t]here is no legal standard to which court-martial procedure must conform and, therefore, there can be no error adjudged according a legal standard. In other words, military justice is administered not according to a standard of law at all, but under the authority of a commanding officer."²⁶ In the aftermath of World War I, General Ansell, who is referred to by some jurists as the

"father of modern American military law,"²⁷ was most concerned about command control or, by the current term, unlawful command influence.²⁸

In an effort to limit the commander's expansive authority and in response to the voices of concern, Congress enacted the 1920 Articles of War, championed by General Ansell. The 1920 Articles of War made a number of changes to the military justice system,²⁹ including strengthening the role of the JA in the court-martial process. Congress mandated (1) that the legal member of the court-martial should be a JA or if that was not possible, an officer "specially qualified to perform the duties;"³⁰ (2) the prosecutor in a court-martial should perform a distinct role from being the command's counsel;³¹ and (3) the accused could choose his own defense counsel.³² Viewed through today's lens, these changes seem conservative, but for the first time, uniformed lawyers were now statutorily part of the court-martial process. The military justice system, however, remained intact: the commander exercised overarching control over the process with limited oversight and governance.

No substantive changes were made to the military justice system between the 1920 Articles of War and World War II. In December 1941, the American Army went to war with the 1920 Articles of War. During the course of World War II, about 1.7 million courts-martial were convened, over 100 capital executions were carried out, and over 45,000 servicemembers were imprisoned.³³

At the end of the war, numerous veterans groups raised genuine concerns about the fairness of the military justice system. For example, "[n]ot infrequently the [commanding] general reprimanded the members of a court for an acquittal

²⁰ *Id.* at 3.

²¹ MORRIS, *supra* note 17, at 25.

²² Brigadier General Ansell was the Acting Army Judge Advocate General because The Judge Advocate General, Major General Enoch H. Crowder, was serving as the Army's Provost Marshal General.

²³ MORRIS, *supra* note 17, at 23.

²⁴ WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 50 (1920).

²⁵ Articles of War art. 90, 2 Stat. 359 (1806), *reprinted in* WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 976 (2d ed. 1920 reprint).

²⁶ Samuel T. Ansell, *Military Justice*, 5 CORNELL L. Q. 1, 7 (1919).

²⁷ Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 9 (1987). For an excellent overview of the history of military justice in America, see Kevin J. Barry, *A Face Lift (And Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate The Uniform Code of Military Justice*, 2002 L. REV. M.S.U.-D.C.L. 57 (2002).

²⁸ DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* 32 (1999).

²⁹ Articles of War (1920).

³⁰ *Id.* art. 8.

³¹ *Id.* art. 14.

³² *Id.*

³³ *Bills to Improve the Administration of Justice in the Armed Services: Hearing Before Subcomm. on Const. Rts. of the S. Comm. of the Judiciary and a Special Subcomm. of the S. Comm. on Armed Services*, 89th Cong. 713, 714 (1966) [hereinafter *Joint Hearings*], available at http://www.loc.gov/r/frd/Military_Law/pdf/MJ_hearings-1966.pdf (referencing a statement submitted by Professor Arthur E. Sutherland that consisted of a law-review article that was written by Rear Admiral Robert J. White).

or an insufficient sentence.”³⁴ As one commentator noted, “[t]he emotions suppressed during the long, tense period of global warfare were now released by peace, and erupted into a tornado-like explosion of violent feelings, abusive criticism of the military, and aggressive pressures on Congress for fundamental reforms in the court-martial system.”³⁵ With over 16 million servicemembers in the ranks during the war, the concerns were held by many who fought and then reintegrated into American society. As validation of these concerns about fairness, the Secretary of War, even before the Japanese surrendered in 1945, appointed a Clemency Board to review all general courts-martial in which the servicemember was adjudged confinement. The Board reduced or remitted the confinement in 85% of the cases.³⁶ The overarching concern voiced by numerous lobbies to Congress was “the denial to the courts of independence of action in many instances by the commanding officers who appointed the courts and reviewed their judgments, and who conceived it the duty of the command to interfere for disciplinary purposes.”³⁷

The Development of the Concept of Unlawful Command Influence

Subject: Inadequacy of Court-Martial Sentences

To: Colonel Cland T. Gunn, President of the general court-martial appointed by paragraph 3, Special Orders No. 104, this headquarters 16 August 1944

. . . I am completely at a loss to understand the reasons for the sentences in the case in reference. The same court but recently imposed three sentences of death in similarly serious cases As officers of the United States Army I would have expected a far clearer recognition of duty and the dictates of justice from the members of the court Unfortunately, the provisions of Article of War 19 and 31 prevent me from ascertaining which of the members of the court were responsible for

the adoption of life sentences rather than death sentences. However, those members who were guilty of such gross failure to vote for adequate punishments will themselves recognize the application of the foregoing reprimand.

Troy H. Middleton
Major General, U.S. Army
Commanding³⁸

Shortly after the cession of hostilities in World War II in March 1946, the Secretary of War, Robert P. Patterson, addressed the “command control” concern by appointing the War Department Advisory Committee on Military Justice, known as the Vanderbilt Committee because of its chair, Arthur T. Vanderbilt. The Committee’s scope was to “study the administration of military justice within the Army and the Army’s courts-martial system, and to make recommendations to the Secretary of War as to changes in existing laws, regulations, and practices”³⁹ The principle recommendation of the Vanderbilt Committee was the “checking of command control.”⁴⁰ The Committee recommended that the law “provide that it is improper and unlawful for any person to attempt to influence the action of an appointing or reviewing authority or the action of any court-martial . . . in reaching its verdict or pronouncing sentence” It also recommended the elimination of any “reprimand of the court or its members in any form.”⁴¹

In the aftermath of the Vanderbilt Committee’s report, Congressman Charles H. Elston of Ohio held hearings in 1947 on the fairness of the military justice system. These hearings held by the U.S. House Sub-Committee on Military Justice, of which Elston was the chairman, resulted in proposed legislation, known as the Elston Act.⁴² The Elston Act, supported by the Department of War, prohibited unlawfully influencing the action of a court-martial. The legislation, which passed both chambers of Congress and was signed into law by President Truman, stated in large measure, the modern-day prohibition of unlawful command influence:

³⁴ Arthur E. Farmer & Richard H. Wels, *Command Control—Or Military Justice?*, 24 N.Y.U. L. Q. REV. 263, 266 (1949).

³⁵ *Joint Hearings*, *supra* note 32, at 714 (statement submitted by Professor Sutherland).

³⁶ REPORT OF THE DEPARTMENT OF WAR ADVISORY CLEMENCY BOARD (1946).

³⁷ DEP’T OF WAR ADVISORY COMM. ON MILITARY JUSTICE, REPORT OF THE WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE 3 (1946) [hereinafter VANDERBILT COMMITTEE], available at http://www.loc.gov/rr/frd/Military_Law/pdf/report-war-dept-advisory-committee.pdf; see also Morris, *supra* note 17, at 125 (noting also that there were concerns about unlawful command influence and the protections afforded to service members during the investigative stage).

³⁸ Memorandum from Major General Troy H. Middleton, U.S. Army, Headquarters, VIII Corps, APO 308, to Colonel Gland T. Gunn, President of the General Court-Martial Appointed by Paragraph 3, Special Orders No. 104, this Headquarters 16 August 1944, subject: Inadequacy of Court-Martial Sentences (16 Oct. 1944) (excerpt from a World War II commanding general reprimanding members of a court-martial for an insufficient sentence).

³⁹ VANDERBILT COMMITTEE, *supra* note 37, at 1.

⁴⁰ Farmer & Wels, *supra* note 34, at 266 (citing the Vanderbilt Committee Report).

⁴¹ VANDERBILT COMMITTEE, *supra* note 37, at 8.

⁴² See *Sundry Legislation Affecting the Naval and Military Establishment: Hearing Before Comm. on the Armed Services Servs.*, 80th Cong. (1947), available at http://www.loc.gov/rr/frd/Military_Law/hearings_1947.html.

No authority appointing a general, special, or summary court-martial nor any other commanding officer, shall censure, reprimand, or admonish such court, or any member thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise, by such court or any member thereof, of its or his judicial responsibility. No person subject to military law shall attempt to coerce or unlawfully influence the action of a court-martial or any military court or commission, or any member thereof, in reaching the findings or sentence in any case, or the action of an appointing or reviewing or confirming authority with respect to his judicial acts.⁴³

Although a step in the right direction, some advocates believed this legislation did not go far enough: “the reforms were illusory.”⁴⁴ In response to this criticism, Secretary James V. Forrestal of the newly created Department of Defense, which replaced the Departments of War and Navy, appointed Harvard Law School Professor Edmund M. Morgan to chair a committee on military justice along with the undersecretaries of each Service. Unlike the Vanderbilt Committee, this body was to prepare a “uniform code of military justice which would be applicable alike to all three Services, and which could be submitted to the 81st Congress as the recommendation of the National Military establishment.”⁴⁵ The result was the creation of the 1950 Uniform Code of Military Justice. The UCMJ revolutionized the practice and review of courts-martial. In creating the modern-day UCMJ, signed into law by President Truman in 1950, Professor Morgan wrote of his committee’s work, “[w]e were convinced that a Code of Military Justice cannot ignore the military circumstances under which it must operate, but we were equally determined that it must be designated to administer justice. We, therefore, aimed at providing functions for command and appropriate procedures for the administration of justice. We have done our best to strike a *fair balance*.”⁴⁶

⁴³ The Selective Service Act of 1948, Pub. L. No. 80-759, § 233, 62 Stat. 604, 639 (1948).

⁴⁴ Farmer & Wels, *supra* note 34, at 273 (citing 34 A.B.A. J. 702–03 (1948)).

⁴⁵ JONATHAN LURIE, *MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775–1980*, at 90 (2001).

⁴⁶ *A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on H.R. 2498 Before Subcomm. No. 1 of the H. Comm. on the Armed Servs.*, 81st Cong. 606 (1949) [hereinafter *House UCMJ Hearings*], available at http://www.loc.gov/rr/frd/Military_Law/pdf/hearings_01.pdf (statement of Prof. Morgan) (emphasis added).

Congress established a comprehensive system of how, when, and why a court-martial could be convened. The UCMJ established roles for JAs and set their qualifications: JAs participating in a court-martial “must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.”⁴⁷ Furthermore, a three-member civilian appellate court was established, the Court of Military Appeals,⁴⁸ to review courts-martial appeals from the various services.⁴⁹

Congress made the court-martial system a creature of statute, thereby giving itself unprecedented oversight authority. As part of the new statutory framework, Congress gave the President the authority to establish a court-martial’s procedures and modes of proof.⁵⁰ The President’s Executive Orders implementing the UCMJ comprised the Manual for Courts-Martial (MCM); these presidential rules were subject to appellate review by the Court of Military Appeals and, later, the Supreme Court.

What did not change, however, was the Elston Act mandating the prohibition of unlawful command influence. The Morgan Committee adopted this language in full and thereby incorporated the Act’s language verbatim into the new UCMJ, Article 37—Unlawfully Influencing Action of Court. With minor changes,⁵¹ this provision has remained intact since its inception in 1948. The only substantive change to the modern-day Article 37 of the UCMJ occurred with the 1968 Military Justice Act. This Act, along with expanding the powers of military judges, added language to Article 37(b) that made it illegal to “consider or evaluate the performance of duty of any . . . member of a court-martial” when preparing the servicemember’s fitness or efficiency report for promotion or assignment.⁵²

Striking a Fair Balance

As Professor Morgan aptly articulated over sixty years ago, “[T]here are many schools of thought on military justice, ranging all the way from those who sponsor complete military control, to those who support a complete absence of military participation. I do not believe either of

⁴⁷ 10 U.S.C. § 827(b) (2012).

⁴⁸ UCMJ art. 67 (1950). It is now the modern-day U.S. Court of Appeals for the Armed Forces.

⁴⁹ The CMA’s appeals flowed from each military department’s Board of Review. This board, now the Court of Criminal Appeals, reviewed each conviction for both errors of law, but also sufficiency of the facts. *Id.* art. 66.

⁵⁰ *Id.* art. 36(a).

⁵¹ The word “shall” was replaced with “may” in 1956.

⁵² The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, 1338 (1968).

these extremes represents the proper solution.”⁵³ The balance then is between the commander’s constant participation in his unit’s mission and tasks and the immutable rights and protections of the servicemember who is accused of a crime. The preamble to the MCM foreshadows this balance: “The purpose of military law is to *promote justice*, to assist in *maintaining good order and discipline* in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”⁵⁴

The commander has daily input in the direction that his unit takes, and obviously plays a significant role in the tone and prioritization of the unit’s tasks to accomplish the military mission. The commander, after all, is the leader and is expected to prepare the unit and its members to be ready to go into harm’s way.

As for the civilian who becomes a servicemember, the Vanderbilt Committee succinctly observed, “[t]he civilian must realize that in entering the army he becomes a member of a closely knit community whose safety and effectiveness are dependent upon absolute obedience to the high command; and that for his own protection, as well as for the safety of his country, army justice must be swift and sure and stern.”⁵⁵ The individual servicemember becomes part of something bigger, not only in accomplishing the unit mission, but in possessing the legal obligation to sacrifice his life, if required, in its accomplishment. There is simply no civilian equivalent to this concept.

Fundamental to obtaining the obedience required to maintain the unit’s safety and effectiveness is discipline. It is the commander who is held accountable and whose obligation it is to instill, maintain, and enforce good order and discipline within the ranks. The commander is the fulcrum of discipline and justice. The Vanderbilt Committee also pointed out that “[n]othing can be worse for [Soldiers’] morale than the belief that the game is not being played according to the rules in the book, the written rules contained in . . . the Manual of Courts-Martial.”⁵⁶ Soldiers must believe the system is fair, and that it is administered accordingly. Discipline, in other words, has its limits; this was the stark lesson learned from the unfairness Soldiers perceived during World Wars I and II. Clearly, “discipline will be better and morale will be higher if service personnel receive fair treatment.”⁵⁷ Even commentators from the 19th Century “recognized that courts-martial were under the obligation to render justice in accordance with the

⁵³ *House UCMJ Hearings*, *supra* note 46, at 606.

⁵⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. 1, ¶ 3 (2012) [hereinafter MCM] (emphasis added).

⁵⁵ VANDERBILT COMMITTEE REPORT, *supra* note 37, at 5.

⁵⁶ *Id.* at 6.

⁵⁷ CONST. RTS. REPORT, *supra* note 1, at 17.

fundamental principle of law and without partiality, favor, or affection.”⁵⁸

Unlawful Command Influence

Since the passage of the UCMJ, UCI has been analyzed by the courts in two ways. One way is to discuss UCI as accusatory or adjudicative.⁵⁹ Accusatory UCI springs from command influence that invades the independent discretion of other justice actors in the preferral, forwarding, or referral of charges.⁶⁰ Adjudicative UCI, on the other hand, occurs when command influence interferes with witnesses, judges, members, or counsel.⁶¹

The other narrative is to talk about UCI and the impact it has on the military justice system in terms of actual or apparent UCI. Actual UCI is the “actual manipulation of any given trial.”⁶² For the most part, this type of UCI is rare and, if found, will normally result in the dismissal of the entire case.⁶³

The most nebulous type of UCI is the appearance of unlawful command influence. As defined by the courts, the appearance of UCI exists “where an objective, disinterested observer, fully informed of all of the facts and circumstances, would harbor a significant doubt about the fairness of the [court-martial] proceeding.”⁶⁴ The commander must strike a balance between “the commander’s responsibility for discipline . . . [and the] ‘subtle pressures that can be brought to bear by command in military society.’”⁶⁵

The Mechanics of Case Progression Without UCI

Commanders who rely on a properly functioning military justice system in their quest for good order and discipline, and the SJAs who advise them, must jealously guard three central tenants of military justice that come under attack in the presence of UCI.

⁵⁸ Farmer & Wels, *supra* note 34, at 277 (citing 1 WINTHROP, MILITARY LAW AND PRECEDENTS 61–62 (1886)).

⁵⁹ United States v. Weasler, 43 M.J. 15, 17, 18 (C.A.A.F. 1995).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² United States v. Ayers, 54 M.J. 85, 94–95 (C.A.A.F. 2000).

⁶³ See United States v. Gore, 60 M.J. 178 (C.A.A.F. 2004) (the convening authority told a defense witness not to testify at sentencing).

⁶⁴ United States v. Lewis, 63 M.J. 405, 415 (C.A.A.F. 2006).

⁶⁵ United States v. Youngblood, 47 M.J. 338, 341 (C.A.A.F. 1997) (quotation omitted).

(1) Commanders at every level must be free to act with independent discretion.⁶⁶

(2) The accused must be free to build his case without outside influences impacting a full ability to obtain evidence and witnesses with full commitment to the justice process.⁶⁷

(3) Members of the court-martial must be free to decide the case on the merits and, as necessary, a proper sentence based only on the evidence presented, law as instructed by the military judge, and arguments of counsel.⁶⁸

No doubt, Article 37 is the cornerstone of protection against UCI in military justice, but it is only the first in a line of currently existing procedures and protections found in statute, executive order, and case law. The preamble to the MCM not only highlights the necessities of good order and discipline, but also reminds us that the purpose of military law is “to promote efficiency and effectiveness in the military establishment” in an effort to strengthen the security of the Nation.⁶⁹ While all commanders value efficiency, few value efficiency above thorough investigation and analysis, which will lead to the best disposition decisions possible.

Commanders and SJAs who emphasize process in combating the day’s most notable detractors from good order and discipline, and are not focused on a particular offender or result, increase the probability of good decisions free of UCI exponentially. This begins with those levels of command closest to the Soldiers, who deserve a healthy and orderly command climate. These “immediate commander[s]” as defined by Rule for Courts-Martial (RCM) 306,⁷⁰ ordinarily have the ability and responsibility to conduct a preliminary inquiry into suspected offenses within their units.⁷¹ They then have the discretion to dispose of offenses by members of their command at the lowest possible level unless otherwise withheld.⁷²

While the initial disposition decision refers to whether to prefer charges, take some other form of action, or do nothing at all, once charges have been preferred against a Soldier, the command must next decide how to dispose of the charges.⁷³ The military’s system of justice was built to give

commanders at the lowest possible level discretion to dispose of charges.⁷⁴ As described above, the military has long valued the necessity for military justice to be portable, fair, and swift. In making decisions to act on or forward charges with recommendations, commanders and SJAs are again reminded that each commander, regardless of level of command, must exercise independent discretion.⁷⁵

Command Influence and Potential Pitfalls

Commanders may and should discuss military justice process, views, and their unit’s most pressing needs in the areas of health, welfare, and good order and discipline with their subordinates.⁷⁶ As long as a commander neither directs a particular action regarding an ongoing case or type of case, nor impacts the participation of witnesses, counsel, court-martial members, or judges, discussions that foster good order and discipline or instruct on the fair administration of justice are not UCI.⁷⁷ Most commanders know this and would never consider purposefully influencing independent command discretion or the court-martial process. But UCI most frequently occurs in a much less conspicuous manner. The comments of our Commander-in-Chief about sexual assault, as already discussed, provide but one example of how an off-the-cuff response can lead to unintended consequences. Answering unanticipated questions without reflection, addressing unit formations, staff calls, safety and briefings, and discussing views on disposition in forums like a Sexual Assault Review Board provide some of the most fertile ground from which UCI will grow for the commander-SJA team who do not cultivate frequent conversations about delivering a proper command message.

Commanders and SJAs who routinely discuss their shared understanding of the potential for a command message to impact case progression in order to identify and avoid potential UCI pitfalls foster a healthy military justice practice. While the SJA’s role focuses on more technical aspects of legal requirements, a SJA improves the commander’s awareness and vigilance through discussion of

⁶⁶ MCM, *supra* note 54, R.C.M. 306 (Initial Disposition), 401 (Forwarding and disposition of charges in general).

⁶⁷ United States v. Stombaugh, 40 M.J. 208, 212 (C.M.A. 1994).

⁶⁸ UCMJ art. 37(a) (2012); *see also* MCM, *supra* note 54, R.C.M. 104 (restating the prohibitions against unlawful command influence).

⁶⁹ MCM, *supra* note 54, pmb1.

⁷⁰ *Id.* R.C.M. 306 (Initial Disposition).

⁷¹ *Id.* R.C.M. 306(a) (Who may dispose of offenses).

⁷² *Id.*

⁷³ *Id.* R.C.M. 401(a).

⁷⁴ *Id.* (discussing each commander’s independent discretion in how charges will be disposed of unless withheld by a higher competent authority).

⁷⁵ *Id.* The discussion following RCM 401(a) also emphasizes independent commander discretion.

⁷⁶ *See* United States v. Wallace, 39 M.J. 284 (C.M.A. 1994). The Court considered the comments of a lieutenant colonel to a subordinate company commander encouraging the subordinate commander to reconsider an initial decision based on new information, leading to the subordinate commander changing his initial disposition decision from non-judicial punishment to court-martial. Because the superior commander did not direct any disposition or even indicate which decision he preferred, the Court found no UCI. *Id.*

⁷⁷ *See id.*; *see also* UCMJ art. 37(a) (creating an exception to the prohibition on UCI for “general instructional or informational courses in military justice . . .”).

these aspects. Simultaneously, while a SJA does not bear the burden of command, discussions with commanders about climate, discipline, and a commander's pre-existing beliefs regarding justice assist in identifying potential UCI issues before they become problematic.

Failing to discuss the message, and as a result to identify potential UCI in command remarks, can result in the perception, if not the reality, of the message inextricably invading the court-martial process.⁷⁸ The resulting relief granted by a trial or appellate court could be extreme, to include dismissal of charges with prejudice.⁷⁹ The system simply works best and avoids unnecessary consequences caused by UCI if the SJA and commander have an open, frank, and ongoing dialogue about cases, the system, and the command message.

This advice holds true for how commanders and JAs should manage UCI concerns during high-profile incidents. In an age of digital media and instant communications, gaffes become instantly known and quickly irretrievable. At the same time, we expect our senior leaders to be able to talk about issues directly, without being vague or requiring lawyers to vet every comment. Beyond considerations already mentioned, such as emphasizing training and education, it may help to think about UCI in a new light. Apparent UCI is not the "mortal enemy" of military justice that actual UCI is,⁸⁰ but commanders and all JAs should take every measure to ensure the dictates of the law are adhered to zealously.

Court Analysis of UCI

Given every commander's reliance on their legal advisors to guide them through potential UCI minefields, every JA in such a role should make it a priority to understand the legal framework of UCI analysis. The defense must first raise the issue of UCI at trial, as articulated in the case of *United States v. Biagase*.⁸¹ "The threshold for raising the issue at trial is low, but more than mere allegation or speculation."⁸² The facts provided to raise a UCI claim must also demonstrate that, if true, "the alleged unlawful command

influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings."⁸³

The Court in *Biagase* went on to clarify past inconsistencies in case law, clearly articulating that the government's burden in overcoming a properly raised claim of UCI is beyond a reasonable doubt.⁸⁴

The government may carry its burden (1) by disproving the predicate facts on which the allegation of unlawful command influence is based; (2) by persuading the military judge or the appellate court that the facts do not constitute unlawful command influence; (3) if at trial, by producing evidence proving that the unlawful command influence will not affect the proceedings; or (4), if on appeal, by persuading the appellate court that the unlawful command influence had no prejudicial impact on the court-martial.⁸⁵

With this case law in mind, it is imperative that commanders and JAs receive education and training on the prevention of UCI. This education and training is in the self-interest of all military justice players, especially leaders who wield the most influence in the military. This so-called "shield" of UCI prevention has the same goal as the ancient English adage, "Justice should not only be done but should be seen to be done."

Many brigade commanders and most general officers receive specific training at The Judge Advocate General's Legal Center and School (TJAGLCS) in Charlottesville, Virginia, regarding UCI.⁸⁶ In the recent past, issues that arise in sexual assault cases—the current UCI lightning rod—are also covered.⁸⁷ In this environment, commanders learn about, and freely discuss, critical areas where the pursuit of good order and discipline must patiently and unwaveringly adhere to a military justice process designed to protect against UCI. Judge advocates learn about UCI at their advanced course and ways to eliminate it from our system of justice.

The "sword" of preventing UCI, on the other hand, is wielded by defense counsel in identifying and raising issues

⁷⁸ See e.g., *United States v. Stoneman*, 57 M.J. 35 (C.A.A.F. 2010) (discussing a case in which the accused's brigade commander sent an e-mail to unit leadership promising to "declare war" on leaders who failed to lead by example).

⁷⁹ See, e.g., *United States v. Gore*, 60 M.J. 178 (C.A.A.F. 2004).

⁸⁰ But see *United States v. Ayers*, 54 M.J. 85, 94–95 (2000) (noting that the court "has recognized that the appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial") (internal quotation marks omitted).

⁸¹ *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citing *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994)).

⁸² *Id.* (citing *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994)).

⁸³ *Id.* (citing *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991)).

⁸⁴ *Id.* at 150–51.

⁸⁵ *Id.* at 151.

⁸⁶ See Fred L. Borch, *Legal Education for Commanders: The History of the General Officer Legal Orientation and Senior Officer Legal Orientation Courses*, ARMY LAW., Mar. 2014, at 68.

⁸⁷ *Id.*

of encroachments on the impartiality of the court-martial process. This focus is increasingly on apparent UCI. The current dormancy of actual UCI is a positive development, but defense counsel must be ever vigilant to ensure this mortal enemy does not rear its head. Finally, defense counsel must never subscribe to the notion that challenging an entire system is too radical or that probing the decisions of high-level commanders is a departure from the traditional customs of the military bar. Instead, defense counsel who are unencumbered in their zealotry represent the most ironclad guarantee of court-martial impartiality and justice.

The *Sinclair* and *Wilkerson* Cases

In light of President Obama's comments, two military cases grabbed the American public's interest: *United States v. Sinclair* and *United States v. Wilkerson*. Both cases occurred in the midst of a public tempest over the debate of sexual assault in the military and the role of commanders in courts-martial. The salacious facts and the senior ranks of the accused helped make both cases among the most publicized courts-martial in modern times, in particular *Sinclair*.

Brigadier General Jeffrey Sinclair pleaded to and was found guilty of maltreatment of subordinates, adultery, and solicitation, among other crimes.⁸⁸ In *Sinclair*, UCI issues were heavily litigated over the course of three motions sessions. The defense challenged the information sharing and coordination among military officials in the pre-preferred stage, the tough talk by military and civilian leaders on the problem of sexual assault, the effect of extensive media attention on the case, the potential bias of prospective general officer panel members, the influence of an outside lawyer on the prosecution, and the effect of contemporaneous sexual assault prevention initiatives on the court-martial.⁸⁹ Unlawful command influence served as a catch-all for other issues in the case, such as prosecutorial ethics and whether the convening authority displayed an inflexible disposition when he decided to reject a plea agreement based solely on the victim's desire that he reject it. Whether these issues amounted to apparent UCI is open for debate, but given its broad definition, the UCI doctrine proved that it was up to the task in *Sinclair*. After the court-

martial, there was consternation over the sentence⁹⁰ (as should be expected in such a closely watched criminal trial) but no lingering controversy over whether the military justice system had the right tools at its disposal to shield against improper interference. The scheme of burdens from *Biagase* empowered the court-martial parties to robustly explore all UCI possibilities. *Sinclair* served as an emphatic rebuttal to the most cynical criticism of military justice that it is more concerned with politically influenced show-trials than truth seeking.

Interestingly, much public discourse about the *Sinclair* trial talked about "undue" command influence rather than the correct term "unlawful" command influence.⁹¹ This is telling. "Undue influence" borrows a term of equity from contract law and probate law. "Undue" sounds more benign than the sinister connotations of "unlawful": a harm to be corrected, but short of a mortal enemy. Perhaps the mistaken label of "undue" reflects a broader undercurrent that UCI issues now skew more towards apparent UCI than actual. Unlawful command influence practice, it seems, is increasingly concerned with rooting out issues that can be perceived as harmful influence rather than thwarting affirmatively illegal meddling and obstruction. This is a welcome, positive trend.

The *Wilkerson* case, on the other hand, offers an important lesson about UCI from the perspective of favorable actions toward the accused. *United States v. Wilkerson* drew national attention when the convening authority, Air Force Lieutenant General Craig Franklin, dismissed charges of sexual assault and conduct unbecoming an officer against Lieutenant Colonel James Wilkerson after a panel convicted him and sentenced him to dismissal and one year of confinement.

Lieutenant General Franklin's post-trial decision sparked debate about military justice reform, which this article will not retread. Construed more narrowly, the *Wilkerson* case is a helpful aid in diagnosing when a convening authority has an "other than an official interest" in a case. This tenet of UCI asks whether "a reasonable person would impute to [the convening authority] a personal feeling or interest in the outcome."⁹² Anyone with an "other than an official" interest is an accuser,⁹³ and accusers are ineligible from convening

⁸⁸ Richard A. Oppel Jr., *Sexual Misconduct Case Ends with No Jail Time for General*, N.Y. TIMES, Mar. 20, 2014, http://www.nytimes.com/2014/03/21/us/general-sinclair-is-sentenced.html?_r=0.

⁸⁹ Since this sentence fell below requirements for production of a trial transcript and submission for appellate review, study of the UCI aspects in this court-martial (and there were many) is far more difficult than with a published appellate opinion. In researching the case for this article, the authors are grateful to Lieutenant Colonel Robert Stelle for providing helpful information about the three UCI motions submitted by the defense, the three government responses, and the military judge's written ruling on the first motion. Lieutenant Colonel Stelle was a trial counsel on the case.

⁹⁰ The accused was convicted of maltreatment and sentenced to a reprimand and to forfeit \$5,000 per month for four months. Oppel, *supra* note 88.

⁹¹ See, e.g., Ruth Marcus, *Break the Chain of Command on Military Sex Assault Cases*, WASH. POST, Mar. 18, 2014 (describing developments in the case of "whether there had been 'undue command influence' in pursuing the Sinclair prosecution).

⁹² *United States v. Gordon*, 2 C.M.R. 161, 166 (C.M.A. 1952); see also *United States v. Dingis*, 49 M.J. 232 (C.A.A.F. 1998).

⁹³ UCMJ art. 1(9); MCM, *supra* note 54, R.C.M. 504(c)(1).

general or special courts-martial.⁹⁴ Following from this, an accuser who carries out convening authority duties is engaged in unlawful command influence.

Published military appellate opinions about convening authorities with “other than an official interest” focus on those who display animus towards an accused.⁹⁵ *Wilkerson* demonstrates how the opposite response, favoritism, can be just as problematic. The *Wilkerson* case includes a treasure trove of internal documents released in response to public and political attention on the case.⁹⁶ These documents helped illuminate the convening authority’s manner of deliberation in ways that normally are not available to the public, and caused many to question his impartiality.

Wilkerson will never become UCI case law because the convening authority disapproved the findings of guilty and sentence and dismissed the charges. But the case is a useful lesson in how perceptions matter: if an accused’s privilege or personal connections to judicial officials garner him more favorable treatment than he would otherwise enjoy, the integrity of the military justice system suffers, just as it suffers when a convening authority displays a personal hostility towards the accused. In either case, an accuser is improperly serving as a convening authority. The rule is simple: quasi-judicial officials, like Lieutenant General Franklin, must be impartial or recuse themselves.

Focus on Lawful Command Emphasis

A review of relevant cases is replete with examples of UCI, holding true the notion that the law is made from bad cases. Yet, commanders who properly address disciplinary

issues enjoy the protection of their command responsibilities from the courts. Following the tragic death of multiple civilians riding a gondola when a Marine Prowler made contact with the cable, as outlined in the case of *United States v. Ashby*, the 2d Marine Aircraft Wing Commander addressed the officers in the Prowler community through a series of speeches.⁹⁷ The commander implied that the incident was caused because the crew was not following rules by flying too low.⁹⁸ He admonished the Prowler community as a whole for violating rules on low-level flights and discussed the possibility of punishment for violating flight rules.⁹⁹ “He never specifically addressed any disciplinary proceedings against the mishap aircrew, what would be an appropriate punishment in the case, or whether fellow aviators should testify in the case.”¹⁰⁰

The *Ashby* court considered that “[b]ecause of the highly publicized international nature of the incident, it is understandable that many senior military officials became publicly involved in the aftermath and investigation of the accident.”¹⁰¹ However, there was “no direct evidence that the actions of any of those officials improperly influenced [the] court-martial.”¹⁰² The appellate court evaluated the facts for actual UCI and “the appearance of unlawful command influence where ‘an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding,’” and found no UCI that impacted the court-martial process.¹⁰³ The court supported the commanders involved in the investigation who spoke about the cause of the incident, eventually failing to find “that the senior military officials’ interest in the investigation was anything other than proper, official, and lawfully directed at completing a quality and thorough investigation.”¹⁰⁴

Further support for a commander’s ability to lawfully influence the discipline and climate among our ranks, even with regard to sexual assault, can be found in *United States v. Wylie*.¹⁰⁵ In *Wylie*, the Navy-Marine Corps Court of

⁹⁴ UCMJ art. 22(b) (general courts-martial), art. 23(b) (special courts-martial).

⁹⁵ See, e.g., *United States v. Mack*, 56 M.J. 786 (A. Ct. Crim. App. 2002).

⁹⁶ *The Wilkerson FOIA Release*, UNITED STATES AIR FORCE FREEDOM OF INFORMATION ACT READING ROOM, <http://www.foia.af.mil/reading/the/wilkersonfoiacase.asp> (last visited July 25, 2014). The releases show that both the convening authority and the accused were officers in the same tight-knit F-16 pilot community. In his clemency submission, the accused emphasized this common background with the convening authority and noted that they flew a combat mission together in Iraq. While deliberating, Lieutenant General Franklin received e-mails from a close military advisor that the accused’s “integrity is airtight” and “character is unshakable,” and another e-mail from a retired group of F-16 pilots decrying the trial as an unfair assault on the fighter pilot community. In a memorandum justifying why he dismissed the charges, Lieutenant General Franklin said that part of his reasonable doubt came from the accused’s selection for promotion to full Colonel, service as a wing inspector general, and description as a doting father and husband. The convening authority seemed aware of how his actions would be perceived as favoritism, and addressed this in his written statement by emphasizing that he did not personally remember the accused. However, after dismissing the charges he wrote in an internal e-mail stating, “I intend to get him back to a flying assignment as soon as possible Certainly after [the accused] and [the accused’s wife] have had a chance to discuss, I would like to know what he wants to do next Please make sure Colonel Wilkerson knows he can contact me . . . about the way ahead for his next assignment.”

⁹⁷ *United States v. Ashby*, 68 M.J. 108, 126 (C.A.A.F. 2009).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* (citing *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)).

¹⁰¹ *Id.* at 129.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 128.

¹⁰⁵ *United States v. Wylie*, No. 201200088, 2012 WL 5995983 (N-M. Ct. Crim. App. Nov. 30, 2012), *review denied*, 72 M.J. 164 (C.A.A.F. 2013). It is important to note that this was an unpublished case from a sister-service court and is in no way binding within the Army. Still, it provides a good example of command commentary that survived appellate scrutiny on what is currently the most sensitive topic.

Criminal Appeals considered a two-page message from the Commander of the Pacific Fleet titled, “Leadership against Sexual Assault.”¹⁰⁶ Among other comments, the message stated,

Despite on-going training and prevention efforts, sexual assault continues to be a persistent problem in the Navy that demands our attention [T]wo-thirds of all sexual assaults are blue-on-blue, to include seniors sexually assaulting juniors. It would be unwise for [us] to underestimate the impact that sexual assault has within the Navy [I]t begins with leaders who . . . react forcefully and consistently when sexual misconduct occurs.¹⁰⁷

The court specifically called the message “an instance of lawful command influence.”¹⁰⁸ This message is an excellent example of lawful command emphasis.

Commanders may easily, and legally, influence the progression of a case or investigation without influencing a subordinate commander at all through the use of a withholding policy. Among the most notable examples of a withholding policy is the 20 April 2012 Secretary of Defense mandate that all sexual assault cases are withheld to the first O-6, special court-martial convening authority for initial disposition.¹⁰⁹ Commanders and SJAs should review this memorandum not only for its impact on dispositions in sexual assault cases, but also for its form and construction. The most notable aspect of this memorandum is the lack of reference to how any commander should dispose of a case beyond the process.¹¹⁰ Instead, the Secretary goes only so far as to support the process,¹¹¹ while emphasizing the responsibility for reviewing all matters, conducting independent reviews as necessary, encouraging subordinate commanders to make recommendations, and only then determining an appropriate disposition.¹¹²

But with these UCI parameters in place, how can commanders set priorities and a tone for their unit on a daily

basis without crossing into unlawful command influence? Commanders can talk about offenses, but should not talk about offenders. Commanders can emphasize, for example, that sexual assault is “a criminal offense that has no place in the Army. It is incompatible with Army values and is punishable” under the law.¹¹³ These actions are not an influence on a particular case, but an emphasis on the commander’s priorities. Lawful command emphasis allows the commander to prioritize those tasks so that he can accomplish the mission. To stay within the law, commanders should remember to talk about the offense, but not the offender, and talk about the process, not the result.

Talk Offense, Not Offenders

Commanders and their legal advisors should focus on the offense and how that offense harms the military’s mission and the bonds of trust within the military that make mission success possible. Therefore, commanders and their staff should not refer to an alleged offender in a derogatory manner.¹¹⁴ Intemperate comments can impact the alleged offender’s right to a fair trial.¹¹⁵ For example, if commanders or staff members make intemperate comments, alleged offenders might not be able to muster witnesses willing to testify in their defense. If commanders or primary staff members (those who are under the commander’s mantle of authority, to include the SJA or even the accused’s first-line supervisor)¹¹⁶ refer to the accused as a “terrorist” or “scumbag,” others, including potential panel members, might presume the accused is guilty. At a minimum, those types of comments will have a chilling effect on the fairness of the judicial proceedings and be “a corruption of the truth-seeking function of the trial process.”¹¹⁷

Instead, talk the offense. The phrase “sexual assault is a criminal offense that has no place in the Army” is a perfectly valid and acceptable statement for any commander to make about sexual assault. Sexual assault is not the only criminal offense that has seized the public’s narrative and made the daily news feed—some that might come to mind are hazing, driving under the influence of alcohol, sexual harassment, domestic violence, and discrimination. Each of these is a

¹⁰⁶ *Id.* at *2.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at *3.

¹⁰⁹ Memorandum from Sec’y of Defense to Sec’y of the Military Departments et al., subject: Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (20 Apr. 2012).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Memorandum from the Chief of Staff, XVIII Airborne Corps and Fort Bragg, subject: [Policy] (9 Sept. 2008) (on file with the authors).

¹¹⁴ The concept of “talk offense, not offender; talk process, not results” was outlined in 2006 by then-Lieutenant Colonel Patricia Ham, Chair of the Criminal Law Department at The Judge Advocate General’s Legal Center and School. See Patricia A. Ham, *Still Waters Run Deep? The Year in Unlawful Command Influence*, ARMY LAW., June 2006, at 53.

¹¹⁵ *Id.* at 66.

¹¹⁶ See *United States v. Douglas*, 68 M.J. 349, 353 (C.A.A.F. 2010) (finding UCI stemming from the actions of the accused’s first-line supervisor who was a senior non-commissioned officer).

¹¹⁷ *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

crime under the UCMJ, federal law, or state law. Stating that “sexual harassment in any form will not be condoned within our ranks” is a comment about the offense, not the offender.¹¹⁸ For example, a commander can always explain that every sexual assault in the Army deteriorates a unit’s ability to be prepared for the mission, using words to the effect of, “there is no place for behavior that has this kind of impact at a time with as varied a mission-set as we have, requiring 100% mission focus.”

Furthermore, commanders should not single out an alleged offender; that is, a commander should not call a particular Soldier a “druggie” for testing positive on a urinalysis examination. That commander would be veering into waters of assigning guilt before the judicial proceedings commence, which could impact the Soldier’s due process rights. Likewise, it is important for a commander to make a distinction between the crime and the person accused of the crime. So while the commander can say, “There is no place for sexual assault within the Army,” the commander should not go on to say, “or for those who commit this crime.”¹¹⁹ Even if an accused is found guilty by court-martial, the sentence might not include a discharge, meaning the accused is allowed to stay in the military.

As already discussed, commanders must always advance the narrative that their subordinates use independent judgment. The Commanding General of 1st Infantry Division and Fort Riley articulated this adroitly for the entire Division:

Independent Judgment: I expect everyone involved in the military justice system to exercise their own independent judgment and make decisions based upon the individual facts and merits of a case. Decisions are not to be made based upon personal interests, a desire for career advancement, or in an effort to please others in the chain of command. Senior officials must never pressure a subordinate to take a particular action or make a certain recommendation in any action.¹²⁰

This language tracks both the sentiment and the verbiage crafted by the Secretary of Defense’s memorandum on the integrity of the military justice system several days earlier. It reminds commanders, leaders, and all JAs that each case must be resolved on its own facts. One should not presume a conclusion without knowledge of the facts.

¹¹⁸ See *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998).

¹¹⁹ *Id.* at 438.

¹²⁰ Memorandum from the Commanding General, 1st Infantry Division and Fort Riley, subject: Danger 6 Sends 13-4, Integrity of the Military Justice System (8 Aug. 2013) (on file with the authors).

Proactive Measures on Offense

There are numerous proactive ways commanders can talk offense and not focus on the offender: policy memorandums, required unit training, and check-lists. Commanders often put out policy guidance to make those in their commands aware of the commanders’ priorities. Several years ago, alcohol abuse was an issue within the ranks. Today, alcohol-related incidents still happen, but with a focus on eliminating alcohol abuse from the ranks, there has been a down-turn in these types of incidents. As the Commander of the 4th Infantry Division and Fort Carson phrased it, “[a]buse of alcohol . . . by both military and civilian personnel is inconsistent with Army values, standards of performance, discipline, and the readiness necessary to accomplish the Army’s mission.”¹²¹ His policy memorandum goes on to set parameters of when alcohol can be present at unit functions, for example: “[u]nits . . . will not conduct fundraisers using alcohol.”¹²² The commander also requires that certain training be conducted to prevent an alcohol-related incident: leaders “will ensure that all Soldiers and Civilians are briefed prior to any holiday, training holiday, and . . . extended leave about the dangers of alcohol misuse and abuse.”¹²³

The goal is to give members of the command awareness and then the tools to help those who are affected: “[l]eaders should make available suitable programs to help reduce or eliminate alcohol-related incidents and to promote responsible social behavior.” Programs like the Army Substance Abuse Program and the Family Advocacy Program are available to all Soldiers, which should be made clear in the policy memorandum. Also, if adverse action must be taken against a Soldier because of involvement in alcohol-related misconduct, the memorandum should make clear that “[c]ommanders are expected to continue to exercise discretion in recommending” the appropriate disposition.¹²⁴ Although an excellent articulation, this sentiment could be further bolstered and driven further from any possible UCI allegations by inserting the word “independent” before discretion.

With the national narrative focused on sexual assault, commanders should consider putting out a policy memorandum on sexual assault. Such memoranda should make it clear that sexual assault is a crime, and should

¹²¹ Policy Letter, Headquarters, 4th Infantry Division (Mechanized) and Fort Carson, subject: Command Alcohol Policy 1 (13 Feb. 2012) [hereinafter *Carson Alcohol Policy*] (on file with the authors).

¹²² *Id.*; see also Policy Letter, Headquarters, XVIII Airborne Corps and Fort Bragg, subject: Mandatory Initiation of Administrative Separation for Drugs and Alcohol Related Offenses 2 (26 Mar. 2012) (on file with the authors).

¹²³ *Carson Alcohol Policy*, *supra* note 121.

¹²⁴ *Id.*

outline the unit's training responsibilities for the prevention of sexual assault. The memorandum should also include information as to how a victim should report a sexual assault and what resources are available to the victim. As one command succinctly stated, "[l]eaders at all levels must take swift and decisive action in preventing, identifying, reporting, and—after consulting with legal authorities—disposing of all incidents of sexual assault."¹²⁵ The XVIII Airborne Corps' policy on the response to incidents of sexual assault gives subordinate commanders a sexual assault victim assistance checklist and the telephone numbers of care providers and local authorities. This same policy outlines the unit's annual training requirements. The commander is trying to be proactive and set a tone that sexual assault or harassment is not acceptable behavior. With specific regard to sexual assault policies, programs that begin with Soldiers at the lowest rank and grow upward tend to be most effective and least likely to create UCI concerns. Plus, it allows commanders to teach and empower Soldiers to take care of each other when the chain of command is not present and inculcate a culture where sexual assault is not acceptable behavior.

Regardless of the subject matter, commanders are trying to "develop a command climate in which service members feel confident that they can openly address incidents of sexual assault [and harassment, hazing, or domestic violence] with their chain of command."¹²⁶ In the policy memorandum, as in the oral and written comments of a commander, the focus should be on the conduct that should not be condoned¹²⁷—these crimes interfere with the unit's mission and degrade the unit's combat effectiveness and readiness. The memorandum should simply avoid discussion of any alleged perpetrator of sexual assault, hazing, or domestic violence and refrain from commenting on what should happen to any Soldiers who are accused of such conduct presently or in the future.

We live in an age of instantaneous information and social media commentary. There is a great drive to comment on what is happening instantaneously—the current pending case, the de jure outrage—and the perception is that there is a demand to know the facts as we know them this very second. This feeding of the news cycle is a reality of our current environment, and with instantaneous communication platforms, the demand for comment or information grows more intense. In the context of the UCMJ, Colonel Erik Coyne correctly couches high-interest cases as "[b]alancing the need for information with the demands of justice."¹²⁸ Commentary that calls into question the fairness of the military justice system by discussing results is corrosive. All military courts should impartially and judiciously decide the merits of a case; this is foundational and paramount. To do otherwise is to cast into doubt the instant case that is, or potentially will be, before a court-martial. More seriously, it undermines the system. It gradually leads to doubt about the fairness of the UCMJ.

Colonel Patricia Ham,¹²⁹ former Chair of the Criminal Law Department at The Judge Advocate General's Legal Center and School, gave two excellent examples of talking process, not results. The first related to the allegation that in November 2004 in Iraq, a Marine corporal shot an unarmed man in a Fallujah mosque. The situation captured the public's attention, in part, because the episode was captured by a journalist, Kevin Sites, on camera. Instead of making conclusions or telegraphing a certain disciplinary result, General George V. Casey, the commander in Iraq at the time, stated, "[The shooting] is being investigated, and justice will be done . . . This whole operation was about the rule of law, and justice will be done."¹³⁰ General Casey, when asked about the details of what the military knew and potential culpability, was not making conclusions but discussing the process. Since there was film of the actions, there was an appetite in certain corridors of the press to bring this Marine to justice for killing a civilian,¹³¹ but General Casey and the Marine Corps leadership investigated the facts and concluded that the Marine's actions were consistent with the rules of engagement and the law of armed conflict.¹³²

¹²⁵ Policy Letter, Headquarters, Fort Campbell, subject: Fort Campbell Policy on Sexual Assault (30 Nov. 2011) (on file with the authors).

¹²⁶ Policy Letter, CG-01, Headquarters, 4th Infantry Division (Mechanized) and Fort Carson, subject: Sexual Harassment/Assault Response and Prevention (SHARP) Program (n.d.) (on file with the authors) (policy is undated).

¹²⁷ The authors recommend staying away from the terminology "will not be tolerated" given developed case law that takes a dim view of the "zero tolerance" policy. See *United States v. Simpson*, 58 M.J. 368, 376 (C.A.A.F. 2003) (finding no unlawful command influence in the use of "zero tolerance" regarding Army policy about drug use, but emphasized the court's conclusion was case-specific and warned that "zero tolerance" has improperly affected past courts-martial).

¹²⁸ Coyne, *supra* note 3, at 16.

¹²⁹ See also Ham, *supra* note 114.

¹³⁰ *Id.* at 67.

¹³¹ *New York Times Rewrites Fallujah History*, GLOBAL POL'Y FORUM (Nov. 16, 2004), <https://www.globalpolicy.org/component/content/article/168/36645.html> ("If part of that 'information war' means convincing Americans that civilians are not victims of the Fallujah invasion, the Times has signed up on the side of the Pentagon.")

¹³² Alex Chadwick, *No Court-Martial for Marine Taped Killing Unarmed Iraqi*, NAT'L PUB. RADIO (May 10, 2005), <http://www.npr.org/templates/story/story.php?storyId=4646406>.

The other example given by Colonel Ham relates to the November 2005 Haditha Dam massacre where twenty-four Iraqi civilians were killed allegedly by U.S. Marines. General Peter Pace, the Chairman of the Joint Chiefs of Staff at the time, when asked about what the military would do with the implicated Marines, said, “We will find out what happened, and we’ll make it public . . . [T]o speculate right now wouldn’t do anybody any good.” Even more than the Fallujah mosque incident, the Haditha Dam massacre seeped into the public’s narrative.¹³³ But the criminal process had not occurred at that point, and the rights of the accused would not allow the military’s leadership to talk about conclusions of culpability.

Both examples are related to requests for information about an ongoing investigation regarding potential war crimes. It is certain that both of these senior officers had information that would have put the military in a better light at the time. But both officers took a strategic pause and did not offer commentary that could have had a near-term positive impact, but could have caused long-term detriment to both the individuals involved and our military justice system.

Comments by the Commandant of the Marine Corps and the Secretary of the Army

The above comments can be juxtaposed with what two senior leaders in the military establishment recently said about matters related to sexual assault in the military. One example shows the unintended consequences of talking results and the other shows the intended benefits of talking process. The first are the comments by the Commandant of the Marine Corps, General James F. Amos, during his Heritage Brief, and the second are the comments by the Secretary of the Army, the Honorable John McHugh, about the court-martial of Brigadier General Jeffrey Sinclair.

In the spring of 2012, the Marine Corps’ Commandant, General James F. Amos, toured Marine Corps installations worldwide. During his talks with Marines, known as the Heritage Brief, he discussed his priorities as the Commandant, his responsibility for the Corps’ “spiritual health,” and those issues that impacted this health.¹³⁴ During this address, he discussed the problem of sexual assault within the Marine Corps as follows:

[W]e had 348 sexual assaults in 2011 and you go—males in here, I know exactly what you are thinking, well . . . it’s not true; it is buyer’s remorse; they got a little

¹³³ Ellen Knickmeyer, *In Haditha, Memories of a Massacre*, WASH. POST, May 27, 2006, at 3.

¹³⁴ *United States v. Howell*, No. 201200264, at *3 (N-M. Ct. Crim. App. May 22, 2014).

liquored up and got in the rack with a corporal, woke up the next morning, pants were down, what the hell happened; buyer’s remorse. *Bull shit*. I know fact. I know fact from fiction. *The fact of the matter is, 80 percent of those are legitimate sexual assaults.*¹³⁵

The Commandant also made clear his views on accountability regarding those found guilty or responsible of sexual assault:

[W]e have got a problem with accountability. I see it across the Marine Corps. I see it in the Boards of Inquiry, in their results and we have got an officer that has done something that is absolutely disgraceful and heinous and the board . . . he goes to a court-martial and he goes before a board of colonels and we elect to retain him. Why? Do I need this captain? Do I need this major? *I don’t*. Why would I want to retain someone like that? I see the same thing with staff NCOs.¹³⁶

The Commandant was talking squarely about results and not about the process. As the senior Marine, he was informing Marines that a vast majority of sexual assault allegations are “legitimate,” and once found guilty of this disgraceful and heinous act, the Marine needs to be removed from the ranks. In other words, believe the victim of sexual assault and eliminate the perpetrator.

The Commandant’s remarks landed squarely in the middle of the court-martial of Staff Sergeant Howell. Howell was accused of rape, among other violations of the UCMJ, and was found guilty by a panel of Marines and given eighteen years of confinement and a dishonorable discharge.¹³⁷ Howell raised the appearance of UCI, in part, on the Commandant’s remarks given at Parris Island where Howell was pending trial by general court-martial for sexual assault. The Navy-Marine Corps Court of Criminal Appeals agreed and set aside the findings of guilt and the sentence. The *Howell* court held that “a disinterested observer, knowing that potential court-martial members heard this very personal appeal in April from the [Commandant] to ‘fix’ the sexual assault problem, would harbor significant doubts about the fairness of a sexual assault trial held shortly thereafter in June.”¹³⁸

¹³⁵ *Id.* at *4 (emphasis added).

¹³⁶ *Id.* at *5 (emphasis added).

¹³⁷ *Id.* at *1–2.

¹³⁸ *Id.* at *17. The Court notes in a footnote that “on the date of the Heritage Brief at Parris Island, the appellant was pending trial by general court-martial for sexual assault offenses. The panel for his specific court-martial had been identified, and eight panel members were sitting in the

The lack of curative instructions to the panel members who heard the Commandant speak and the military judge's flawed rulings, along with his intemperate comments during the trial, made this case unanimous in its result. But Senior Judge Ward, in his concurring opinion, noted that "[m]uch of the Heritage Brief in my mind reflects lawful command influence. Reasonable minds can disagree as to attendant meanings from certain remarks. In many ways, the [Commandant's] remarks in regard to sexual assault reflect a broader, ongoing debate that extends well beyond our military."¹³⁹

As outlined in these pages, there are numerous steps a commander can take to ensure lawful command emphasis. What is perplexing about Senior Judge Ward's comment about sexual assault reflecting a broad, ongoing debate is that those other commentators to this debate are not the *Commandant of the U.S. Marine Corps*—the senior military officer in the Marine Corps. Like a commander, when he speaks, his subordinates listen. In the end, with position comes responsibility, and one of those responsibilities is adherence to Article 37, UCMJ. In sum, the tactical imperative of eradicating sexual assaults from our ranks cannot trump the strategic necessity of preserving our time-tested code of military justice. One of its pillars for more than sixty-five years is Article 37, UCMJ.

On the other side of the spectrum concerning comments by senior leadership is the *Sinclair* case. As already discussed, the Army court-martialed Brigadier General Jeffrey Sinclair for maltreatment of subordinates, among other crimes. After the trial but before the General Court-Martial Convening Authority (GCMCA) took action on General Sinclair's case—in which the GCMCA would review the record of trial and consider General Sinclair's clemency matters—the Secretary of the Army was asked about General Sinclair's sentence while testifying before the U.S. House of Representatives. He was asked in the context of a less than cordial audience; one Member asserted that Sinclair was "given a slap on the wrist," thereby suggesting that military justice "does not work."¹⁴⁰ Instead of defending the result or casting it into doubt, the Secretary adroitly talked about the process.

As the final decision-maker in matters of this kind, I'm really constrained in what I can say. Unlike in the civilian sector, when a jury comes in, and the case is closed, this case is not closed. They're

audience. Those panel members heard the [Commandant's] comments from a unique perspective—that of prospective members of a pending court-martial." *Id.* n.59.

¹³⁹ *Id.* at *23 (Ward, J., concurring).

¹⁴⁰ *House Armed Services Committee Holds Hearing on Department of the Army Defense Authorization Request for Fiscal 2015*, CONG. Q., Mar. 25, 2014, at 62.

under the uniform code of military justice: a continuing process of certification of the record providing both the victim as well as [Sinclair] an opportunity to respond to the content of that record What I can say is that as in the civilian sector, we do not have control over, nor do we try to influence the sentencing of the judge. The Army was faced with the prospect of prosecuting this particular individual, and it did that, and it also prosecuted in a way that obtained a conviction. Those are the things we—we do control So, we do take the steps necessary to hold soldiers accountable, but we cannot, and nor would the civilian sector, be able to make the determinations of a sentencing judge.¹⁴¹

Then a Member of Congress asked whether Sinclair would be able to retire at his current grade. The Secretary, again, talked about the process and did not telegraph what would occur.

Under the processes for the military, when a soldier goes for retirement, the secretary of the department has the authority to order a grade determination board, and that grade determination board makes recommendations as to the grade at retirement for that officer [U]nder the military procedures, at retirement, the service secretary of any of the military departments can order a grade determination board to make recommendations on grade at retirement.¹⁴²

When asked if he was going to conduct a grade determination board, the Secretary answered: "I'm not at liberty to make comment on what I may or may not do, particularly given that the case is still technically open under the UCMJ."¹⁴³ The Secretary did not make a comment that would impact General Sinclair's opportunity to have his clemency be fully and fairly considered by the GCMCA—a right afforded every accused. Secretary McHugh's responses provide a good example of a right way for leaders to talk about military justice.

¹⁴¹ *Id.*

¹⁴² *Id.* at 63.

¹⁴³ *Id.*

Crafting Your Message

While this article cannot identify every potential UCI pitfall or look into a crystal ball to predict lawful command emphasis that will always survive scrutiny, it can offer a method that helps accomplish both tasks based on lessons learned from senior leaders. The best first step is simply a conversation between the commander and the SJA identifying the issue the commander wants to address. A commander may and should identify and address perceived problems related to military justice.¹⁴⁴ Staff Judge Advocates must assist in drafting policies and statements that are clear, have context, and avoid UCI.¹⁴⁵

Both the commander and SJA should consider the content and complexity. Ask, “Can this commander address this issue and have the intended impact on the intended audience?” Most of the time, critical analysis and carefully crafted language will result in a positive answer to those questions. On other occasions, the commander-SJA team will determine the commander must exercise restraint on the issue to ensure independent discretion and fairness.¹⁴⁶

If the commander decides to address the issue, consideration of the intended audience is critical, as is the commander’s intent regarding further promulgation. Some messages are simply too complex and nuanced for transmission to a large audience.¹⁴⁷ A commander must be able to clearly and directly communicate command emphasis to an audience, orally or in writing, with some predictability regarding the manner in which listeners or readers at varying ranks will receive the message. To the extent the commander-SJA team senses the message may become murky for some, they should reevaluate the intended audience and message.

An often cited example, and the one used during General Officer Legal Orientations at TJAGLCS, comes from *United States v. Treakle*.¹⁴⁸ In *Treakle*, a commanding general was frustrated with subordinate commanders who recommended referral of cases to levels of courts-martial empowered to adjudge a punitive discharge, but then testified in favor of

retaining the Soldier.¹⁴⁹ Potential for UCI existed within both aspects of this general’s frustration. If he directed a lesser course of action, he would unlawfully influence the independent discretion of his subordinate commanders. If he directed subordinates not to testify to retain Soldiers for whom they recommended a discharge, he would unlawfully influence their testimony. Was there room for a nuanced message to the right audience that only addressed a method of doing military justice business using a systematic, consistent approach?

The commanding general in *Treakle* discussed the issue with his SJA. The SJA prepared talking points that, in part, warned against conveying a message that might discourage testimony.¹⁵⁰ While the general used the talking points, he spoke somewhat extemporaneously to several different large audiences, often leaving out the cautionary note supplied by his SJA.¹⁵¹ Subordinates at various levels of command who attended different meetings later conveyed very different understandings of the comments.¹⁵²

The general could have discussed the necessity for thorough investigations and critical analysis using all the factors listed in RCM 306,¹⁵³ and the importance of making independent recommendations and having the courage to stand behind them. Instead, he conveyed a complex message orally on several occasions to various audiences where he often strayed from the points prepared by the SJA and with a tone and tenor that confused his subordinates.¹⁵⁴ While his SJA was there for some of these meetings, he was more frequently absent and never took steps to provide course correction until it was too late.¹⁵⁵ The message, audience, forum, and legal presence were all wrong, resulting in unintended UCI instead of lawful command emphasis.

Even after a commander-SJA team determines proper lawful command emphasis to the right audience, in the correct context, should it be delivered orally or in writing? Commanders tend to appreciate the closer interpersonal aspects of in-person communications. Written policies offer

¹⁴⁴ *United States v. Treakle*, 18 M.J. 646, 653 (C.M.A. 1984) (discussing comments by a commanding general seeking to correct a perceived military justice problem that were interpreted very differently by members of the unit who heard the comments at different meetings and in different contexts).

¹⁴⁵ *Id.* at 649 (discussing a SJA who provided a point paper with cautionary warnings meant to safeguard against UCI).

¹⁴⁶ *Id.* at 653.

¹⁴⁷ *Id.* at 654.

¹⁴⁸ See CRIMINAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, GENERAL OFFICER LEGAL ORIENTATION—UNLAWFUL COMMAND INFLUENCE (quoting *Treakle*, 18 M.J. at 646).

¹⁴⁹ *Treakle*, 18 M.J. at 650.

¹⁵⁰ *Id.* at 654.

¹⁵¹ *Id.*

¹⁵² *Id.* at 650–52.

¹⁵³ MCM, *supra* note 54, R.C.M. 306(b) discussion. Some of the factors include “the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense’s effect on morale, health, safety, welfare, and discipline; . . . the views of the victim as to disposition; . . . and the character and military service of the accused.” *Id.*

¹⁵⁴ *Treakle*, 18 M.J. at 654.

¹⁵⁵ *Id.* at 649–50.

the opportunity for precise language and consistency in the way the message is received. In deciding which is best, commanders should consider their ability to predict the manner in which subordinates will receive the message and the resulting impact. Part of the impact may be responding to a UCI motion. Accordingly, when SJAs discuss delivery of the message, they must provide counsel on how both delivery and reception of the message should be preserved.

After the lawful command emphasis is delivered, commanders and JAs must follow up to ensure the message received was consistent with the commander's intent.¹⁵⁶ As an organization, the military frequently requires subordinates to provide "back-briefs" or use other methods to ensure proper understanding of an intent or operation. It is a method that every level of Soldier has experienced and understands. When exercising lawful command emphasis, both legal and command personnel should ask what subordinates gleaned from the command policy or message. Only then can the team truly assess the success of the message or the potential need for clarifying guidance.

Conclusion

The UCMJ is unique and must comport with the fundamental concepts of American justice. The balance between justice and discipline is not antithetical, however. It is complementary. All commanders and those under the mantle of command authority must make the fair and impartial functioning of the military justice system their mission. It truly is where tactics and strategy meet.

Commanders want transgressors in their units to be held accountable, which is understandable and necessary. The commander-SJA approach must ensure the strategic vibrancy of the UCMJ. The joint focus must be discipline—holding offenders accountable—and ensuring that every accused receives a fair hearing with the full opportunity to present his case. That is the goal of Article 37. Lawful command emphasis provides the commander-SJA team with the means to protect the integrity of Article 37 and the UCMJ while simultaneously addressing indiscipline within the formation. Properly applied, lawful command emphasis allows a commander to lead a stronger, mission-ready unit built on Soldier trust and trust in our military justice system.

¹⁵⁶ *Id.* at 654.

A Distinction with a Difference: Rule for Courts-Martial 304 Pretrial Restraint and Speedy Trial

Major Matthew E. Wright*

I. Introduction

The phone rings. Captain (CPT) Brown, one of the company commanders in your brigade, is calling. “I’ve got a problem with one of my Soldiers. The brigade judge advocate said I should call the trial counsel. That’s you, right?” Captain Brown informs you that one of his Soldiers has just been accused of sexually assaulting his wife. He explains that Specialist (SPC) White and his spouse have been having marital problems for a few months, but nothing like this, and SPC White has never been in trouble before. Specialist White is very depressed, and CPT Brown is concerned for the safety of both individuals. Captain Brown wants to order the Soldier into pretrial confinement (PTC).¹

You have been a trial counsel for a few months now and have dealt with similar situations several times already. You take a deep breath and launch into your standard spiel: “I understand that you want to protect the Soldier and his spouse, but PTC is only appropriate when the Soldier is a flight risk, or it is foreseeable that he will engage in additional acts of serious criminal misconduct. Because SPC White has been a good Soldier and has not had any problems in the past, I recommend you impose a lesser form of restraint.”²

You recommend that CPT Brown impose conditions on liberty pursuant to Rule for Courts-Martial (RCM) 304.³ To minimize risk, CPT Brown wants to restrict the Soldier as much as possible, so you hit the books and draft the most rigorous conditions you can, without crossing the line into “restriction tantamount to confinement.”⁴ The conditions you draft prohibit SPC White from having contact with his wife or any other potential witnesses, revoke his off-post pass privileges, require him to have CPT Brown’s permission and a non-commissioned officer (NCO) escort to

travel outside the battalion footprint, prohibit the Soldier from consuming alcohol, and impose an hourly sign-in requirement when off duty between the hours of 0600–2200 at the barracks Charge of Quarters (CQ) desk. Captain Brown takes your advice and imposes the conditions you propose.

Approximately 180 days later, after a lengthy Criminal Investigation Division (CID) investigation and an enormous amount of preparation, the case is ready to go to trial; but it never gets there. The defense moved for dismissal, alleging the government failed to take immediate steps to bring the case to trial as required by Article 10 of the Uniform Code of Military Justice (UCMJ).⁵ The military judge granted the motion and dismissed the charges with prejudice. After the motions hearing, you plop down in your office chair and wonder where you went wrong. How did the government violate Article 10 when the accused was never confined?

In the above hypothetical scenario, the trial counsel set the stage for dismissal by focusing only on avoiding restriction tantamount to confinement when imposing pretrial restraint. In doing so, he overlooked the distinction that RCM 304 creates among conditions on liberty, restriction in lieu of arrest, and arrest, and failed to consider their disparate impact on the government’s speedy trial obligations.⁶ Restriction in lieu of arrest starts the RCM 707 speedy trial clock; arrest also triggers Article 10.⁷ These collateral consequences create a high-stakes “distinction with a difference” because the only remedy for violating either speedy trial provision is dismissal, with or without prejudice.⁸ Consequently, to minimize the risk of dismissal, government counsel must be able to precisely apply RCM 304 when advising commanders on the imposition of pretrial restraint.

Unfortunately for practitioners, the RCM 304 framework contains subtle nuances that make it deceptively complex. This problem is compounded by case law that rejects bright-line rules in favor of multi-factor tests whose outcomes can be difficult to predict.⁹ The result is more confusion and more uncertainty. The key is to recognize this uncertainty and to proceed carefully and deliberately. This article attempts to make that possible.

With that goal in mind, Part II defines pretrial restraint

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¹ See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305 (2012) [hereinafter MCM] (Pretrial confinement) (establishing the requirements and procedures for imposing pretrial confinement).

² See *id.* R.C.M. 305(h)(2)(B) (stating confinement is not appropriate unless lesser forms of restraint are inadequate, and it is foreseeable that the accused will not appear at trial, pretrial hearing, or investigation, or the accused will engage in serious criminal misconduct).

³ *Id.* R.C.M. 304(a)(1) (Conditions on liberty).

⁴ For a thorough analysis of “restriction tantamount to confinement,” see Major John M. McCabe, *How Far Is Too Far? Helping the Commander to Keep Control Without Going Over the Line; the Trial Practitioner’s Guide to Conditions on Liberty and Article 13 Credit*, ARMY LAW., Aug. 2007, at 46.

⁵ UCMJ art. 10 (2012).

⁶ See *infra* Parts III.–IV.

⁷ See *infra* Part IV.

⁸ *Id.* The phrase “distinction with a difference” was specifically applied to this issue in *United States v. Wagner*, 39 M.J. 832, 833 (A.C.M.R. 1994).

⁹ See *infra* Part V.

in order to clearly delineate the applicability and scope of RCMs 304 and 305. Part III then introduces the various types of moral and physical pretrial restraint. Part IV discusses the collateral consequences associated with each type, focusing on speedy trial. Upon this foundation, Part V analyzes the legal and factual distinctions between administrative restraint and the three forms of moral restraint listed in RCM 304. The rest of the article outlines preventative law. Part VI provides an alternate course of action for situations where the chain of command may be tempted to impose restriction tantamount to confinement, while Part VII identifies steps available to the government to cure inadvertent speedy trial triggers. Finally, to prevent practitioners from falling into the same trap as the trial counsel in the hypothetical scenario, the article contains appendices illustrating a table capturing pretrial restraint's collateral consequences, and sample language that may be used to deliberately impose specific types of restraint.

II. Pretrial Restraint Defined

To successfully impose pretrial restraint, practitioners must first understand what this term means. Rule for Courts-Martial 304 defines pretrial restraint as “moral or physical restraint on a person’s liberty which is imposed before and during disposition of offenses.”¹⁰ The rule goes on to explain that pretrial restraint may be imposed whenever probable cause exists to believe that an accused committed an offense, and there is a reasonable belief that restraint is required under the circumstances.¹¹ Unless the authority has been withheld, commanding officers may impose pretrial restraint against officers and civilians subject to their authority, and any officer may order the restraint of any enlisted Soldier.¹²

The plain language of Article 13 indicates the only permissible purpose of pretrial restraint is to ensure the accused’s presence at trial.¹³ In practice, however, this provision has not been interpreted so exclusively. Historical practice, RCM 305, and case law all support the idea that pretrial restraint may properly be imposed to prevent the accused from engaging in future criminal misconduct, tampering with witnesses, or otherwise obstructing justice.¹⁴

¹⁰ MCM, *supra* note 1, R.C.M. 304(a).

¹¹ *Id.* R.C.M. 304(c).

¹² *Id.* R.C.M. 304(b).

¹³ UCMJ art. 13 (2012) (“[N]or shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to ensure his presence . . .”).

¹⁴ *See, e.g.,* United States v. Smith, 53 M.J. 168, 171 (C.A.A.F. 2000) (“In the military, the need to prevent serious misconduct is acute. ‘The business of military units and the interdependence of their members render the likelihood of serious criminal misconduct by a person awaiting trial of even graver concern than in civilian life.’”) (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 21 (1998)); MCM, *supra* note 1, R.C.M. 305(h)(2)(B) (allowing pretrial confinement to be imposed when it is

Other portions of RCM 304, the UCMJ, and case law help define pretrial restraint by explaining what it is *not*. To begin with, pretrial restraint is not punishment and may not be imposed as punishment.¹⁵ Imposing pretrial restraint in a punitive manner by requiring accused Soldiers to work extra hours, wear special uniforms, or otherwise humiliate and degrade them violates Article 13, UCMJ, as well as the fundamental idea that an accused is innocent until proven guilty.¹⁶

Pretrial restraint is also not the initial taking of a person into custody. Taking a person into custody falls under the definition of *apprehension* contained in Article 7, UCMJ.¹⁷ This distinction is emphasized by the fact that apprehension is not governed by RCM 304 but is instead regulated by a separate rule: RCM 302.¹⁸ Apprehension terminates when the proper authority, usually the accused’s commander, is notified and takes action.¹⁹

Having clarified that pretrial restraint includes neither punishment nor apprehension, practitioners must recognize that pretrial restraint does not include administrative restraint either.²⁰ Administrative restraint is imposed for reasons “independent of military justice.”²¹ This distinction highlights a very important principle: intent matters.

foreseeable that an accused will either not appear at trial or engage in “serious criminal misconduct” and defining “serious criminal misconduct” to include “intimidation of witnesses or other obstruction of justice, serious injury of others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States”); MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 19(b) (1949), http://www.loc.gov/rr/frd/Military_Law/pdf/manual-1949.pdf (authorizing pretrial restriction of an accused as “a wise precaution . . . in order that he may not again be exposed to the temptation of misconduct similar to that for which he is already under charges”).

¹⁵ MCM, *supra* note 1, R.C.M. 304(f).

¹⁶ *See, e.g.,* United States v. Gilchrist, 61 M.J. 785, 796 (A. Ct. Crim. App. 2005) (“Article 13, UCMJ, prohibits: (1) purposefully imposing punishment or penalty on an accused before guilt is established at trial . . . and (2) arrest or pretrial confinement conditions more rigorous than circumstances require to ensure an accused’s presence at trial . . .”); *see also* McCabe, *supra* note 4 (discussing restraint that violates Article 13).

¹⁷ UCMJ art. 7(a) (2012) (“Apprehension is the taking of a person into custody.”).

¹⁸ MCM, *supra* note 1, R.C.M. 302(a) discussion (“Apprehension is the equivalent of ‘arrest’ in civilian terminology. (In military terminology, ‘arrest’ is a form of restraint. *See* Article 9; R.C.M. 304.)”).

¹⁹ *Id.*

²⁰ *Id.* R.C.M. 304(h) (“Nothing in this rule prohibits limitations on a servicemember imposed for operational or other military purposes independent of military justice, including administrative hold or medical reasons.”).

²¹ *See* United States v. Fujiwara, 64 M.J. 695, 698 (A.F. Ct. Crim. App. 2007) (“Limitations imposed for legitimate administrative reasons and not as a precursor to criminal prosecution do not qualify as ‘restraint’ for purposes of R.C.M. 304 and 707.”).

The distinction between pretrial and administrative restraint is important for practitioners to understand because the RCMs do not apply to administrative restraint.²² To distinguish pretrial restraint from administrative restraint, courts look to the primary purpose of the imposing official.²³ Pretrial restraint exists when the primary purpose is to ensure the accused's presence at trial or to avoid interference with the trial process.²⁴ On the other hand, if the same level of restraint would have been imposed even if the accused were not pending trial, the restraint is likely administrative.²⁵ Appropriate reasons for imposing administrative restraint include: medical hold, military operational necessity, or safety of the accused.²⁶ Restraint imposed in a reasonable manner for one of these reasons, no matter how severe, does not constitute pretrial restraint.²⁷

Accordingly, practitioners should view pretrial restraint as a term of art that refers only to non-punitive restraint—other than apprehension—imposed to advance a valid military justice purpose. Consequently, practitioners should be precise and use the term administrative restraint when the commander's primary purpose is administrative, and should be on the lookout for situations in which pretrial restraint is used as a subterfuge for illegal pretrial punishment.

III. Pretrial Restraint as a Spectrum

The *Manual for Courts-Martial* instructs commanders to impose pretrial restraint on a case-by-case basis, and to tailor the nature of the restraint to the particular set of

circumstances before them.²⁸ Because every case is different, the level of restraint used in any particular case is likely to be different as well. As a result, courts conceptualize pretrial restraint as a spectrum.²⁹ Rules for Courts-Martial 304 and 305 establish key milestones along this spectrum.³⁰

At the outset, RCMs 304 and 305 divide restraint into two broad categories: moral and physical.³¹ Physical restraint is the more onerous of the two because “locks or guards” physically compel the accused to submit.³² Pretrial confinement is a form of physical restraint.³³ The essence of moral restraint, on the other hand, is that the accused retains the freedom to choose whether or not he will comply.³⁴

Rule for Courts-Martial 304 governs moral restraint and establishes three different types: conditions on liberty, restriction in lieu of arrest, and arrest.³⁵ Of these, arrest is the most restrictive. Arrest is an order requiring an accused to remain within specified limits. According to RCM 304(a)(3), once placed under arrest, an accused may not be required to perform “full military duties.”³⁶

²² *Id.*

²³ *United States v. Bradford*, 25 M.J. 181, 186 (C.M.A. 1987) (holding that pretrial restraint exists when “the primary purpose . . . is to restrain an accused prior to trial in order to assure his presence at trial or to avoid interference with the trial process”).

²⁴ *Id.*

²⁵ *United States v. Facey*, 26 M.J. 421, 425 (C.M.A. 1988) (“The Manual is concerned with impairments of a servicemember’s freedom which derive from his status as an accused, rather than those which are shared with all the members of his unit.”).

²⁶ MCM, *supra* note 1, R.C.M. 304(h); *Fujiwara*, 64 M.J. at 698 (identifying restraint imposed to prevent an accused from committing suicide as a legitimate basis for imposing administrative restraint not subject to Rule for Courts-Martial (RCM) 304 or RCM 707); *United States v. Smith*, 53 M.J. 168, 173 (C.A.A.F. 2000) (finding that ensuring an accused’s safety is a valid basis for imposing administrative restraint pursuant to RCM 304(h)).

²⁷ *See United States v. Miller*, 26 M.J. 959 (A.C.M.R. 1988) (ruling that five days restriction to a hospital following a suicide attempt constituted RCM 304(h) administrative restraint); *United States v. Pouncey* No. ACM 34497, 2002 WL 1162284, at *2 (A.F. Ct. Crim. App. 2002) (ruling that restraint severe enough to be tantamount to confinement was only administrative when motivated by a reasonable belief that the accused needed twelve to twenty-four hours monitoring following reported illegal drug use). *But see United States v. Doane*, 54 M.J. 978, 979 (A.F. Ct. Crim. App. 2001) (holding that an accused may not be ordered into pretrial confinement solely to prevent suicide).

²⁸ MCM, *supra* note 1, R.C.M. 304(h) (“The decision whether to impose pretrial restraint, and, if so, what type or types, should be made on a case-by-case basis. The factors listed in the Discussion of RCM 305(h)(2)(B) should be considered.”). The discussion to RCM 305(h)(2)(B) states, “Some of the factors which should be considered . . . are: (1) [t]he nature and circumstances of the offenses charged or suspected, including extenuating circumstances; (2) [t]he weight of the evidence against the accused; (3) [t]he accused’s ties to the locale, including family, off-duty employment, financial resources, and length of residence; (4) [t]he accused’s character and mental condition; (5) [t]he accused’s service record, including any record of previous misconduct; (6) [t]he accused’s record of appearance at or flight from other pretrial investigations, trials, and similar proceedings; and (7) [t]he likelihood that the accused can and will commit further serious criminal misconduct if allowed to remain at liberty.” *Id.* R.C.M. 305(h)(2)(B) discussion.

²⁹ *See, e.g., United States v. Smith*, 20 M.J. 528, 531 (A.C.M.R. 1985) (“[C]ourts closely scrutinize those factors which reflect substantial impairment of the basic rights and privileges enjoyed by service members. As a result of this factual scrutiny, levels of restraint can be identified which fall somewhere on a *spectrum* . . .”) (emphasis added).

³⁰ *See MCM, supra* note 1, R.C.M. 304–305.

³¹ Rule for Courts-Martial 304(a) describes pretrial restraint as “moral or physical restraint.” *Id.* R.C.M. 304(a). Within the types of restraint annotated in RCM 304(a), only pretrial confinement is categorized as “physical restraint.” *See id.* Rule for Courts-Martial 305(a) begins by describing pretrial confinement as “physical restraint.” *Id.* R.C.M. 305(a).

³² *See United States v. Gregory*, 21 M.J. 952, 955 (A.C.M.R. 1986) (explaining that when only moral restraint is imposed, “[n]o locks or guards block the soldier’s freedom of locomotion; only his moral conscience thereafter circumscribes his movements”).

³³ MCM, *supra* note 1, R.C.M. 305; UCMJ art. 9 (2012).

³⁴ *Gregory*, 21 M.J. at 955.

³⁵ MCM, *supra* note 1, R.C.M. 304(a).

³⁶ *Id.* R.C.M. 304(a)(3) (discussed *infra* Part V.D). According to the rule, resumption of full military duties terminates the status of arrest. *Id.*

Restriction in lieu of arrest is a less severe form of restraint than arrest.³⁷ An accused who is only restricted enjoys greater freedom of movement than one who is arrested.³⁸ In exchange for this freedom, conditions on liberty may be imposed in conjunction with restriction.³⁹

Conditions on liberty are simply orders that require an accused to “do or refrain from doing specified acts.”⁴⁰ No-contact orders that forbid an accused from communicating with potential witnesses are a common example of conditions on liberty.⁴¹

Case law further supplements this spectrum with another form of restraint not found in RCMs 304 or 305: restriction tantamount to confinement. Restriction tantamount to confinement exists when “the level of restraint falls so close to the ‘confinement’ end of the spectrum as to be tantamount thereto.”⁴² Restriction tantamount to confinement may be moral or physical.⁴³ Accordingly, practitioners should conceptualize it as occupying a place on the spectrum separate from, and more severe than, arrest.

Thus, fully fleshed out, the spectrum of restraint begins with no restraint and progresses through conditions on liberty, restriction, arrest, restriction tantamount to confinement, and finally, confinement. A progressively onerous array of collateral consequences linked to the severity of the restraint imposed provides strong incentives for commanders to remain as close to the beginning of this spectrum as possible.

IV. Trigger Points: Collateral Consequences of Imposing Restraint

Understanding where on the spectrum of restraint a particular case falls is critically important because of the collateral consequences established by the UCMJ, RCMs,

and case law. Arrest and confinement trigger Article 10, UCMJ.⁴⁴ Article 10 requires the government to take immediate steps to bring the accused to trial following arrest or confinement and exercise reasonable diligence throughout the pretrial period.⁴⁵ Violations of Article 10, UCMJ, may not be cured; the only remedy is dismissal with prejudice.⁴⁶ As was the case in the hypothetical, inadvertently triggering Article 10 can be catastrophic.

Arrest and restriction also trigger the RCM 707 speedy trial clock.⁴⁷ This rule requires the accused to be arraigned within 120 days of the imposition of restraint.⁴⁸ The only remedy for violating this provision is dismissal, with or without prejudice.⁴⁹ Because restriction tantamount to confinement must be at least as severe as arrest, it follows that it must also trigger Article 10 and RCM 707 protections.⁵⁰ Further, restriction tantamount to confinement affords the accused the added bonus of being entitled to administrative sentence credit pursuant to *United States v. Mason*⁵¹ and, in some cases, even more credit under RCM 305(k).⁵²

In contrast with the collateral effects triggered by arrest and restriction, conditions on liberty trigger neither Article 10 nor the RCM 707 speedy trial clock. Consequently, this form of pretrial restraint imposes the least burden on the government to expedite the pretrial processing of a case.⁵³ The dramatically different consequences triggered by the various forms of pretrial restraint make differentiating

³⁷ *Id.* R.C.M. 304(a)(2) (discussed *infra* Part V.D).

³⁸ *Id.* R.C.M. 304(a) discussion.

³⁹ *United States v. Miller*, 16 M.J. 858, 862–63 (N.M.C.M.R. 1983) (“To be viable, from a military point of view, restriction in lieu of arrest requires additional conditions [on liberty] to balance the greater liberty of movement granted.”); MCM, *supra* note 1, R.C.M. 304(a)(1) (“[Conditions on liberty] may be imposed with other forms of restraint or separately.”).

⁴⁰ MCM, *supra* note 1, R.C.M. 304(a)(1) (discussed *infra* Part V.B).

⁴¹ *United States v. Fujiwara*, 64 M.J. 695, 698 (A.F. Ct. Crim. App. 2007) (referring to a no contact order as “classic conditions on liberty”); MCM, *supra* note 1, R.C.M. 304(a) discussion (listing orders not to associate with potential witnesses as an example of conditions on liberty).

⁴² *United States v. Smith*, 20 M.J. 528, 531 (A.C.M.R. 1985).

⁴³ See *United States v. Rendon*, 58 M.J. 221, 225 (C.A.A.F. 2003) (acknowledging that in some situations the “conditions and constraints” of restriction tantamount to confinement may surpass moral restraint and constitute actual physical restraint).

⁴⁴ UCMJ art. 10 (2012) (“When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or dismiss the charges and release him.”).

⁴⁵ *E.g.*, *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993).

⁴⁶ *Id.*

⁴⁷ MCM, *supra* note 1, R.C.M. 707(a)(2).

⁴⁸ *Id.*

⁴⁹ *United States v. Bray*, 52 M.J. 659, 663 (A.F. Ct. Crim. App. 2000); MCM, *supra* note 1, R.C.M. 707(d).

⁵⁰ See *United States v. Smith*, 20 M.J. 528 (A.C.M.R. 1985) (using cases in which Article 10 was triggered as a starting point to determine whether restriction was tantamount to confinement).

⁵¹ *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985) (ruling an accused is entitled to day-for-day credit for time spent in restriction tantamount to confinement).

⁵² When an accused is improperly placed in pretrial confinement they are entitled to additional administrative sentence credit. MCM, *supra* note 1, R.C.M. 305(k). Rule for Courts-Martial 305(k) credit is also available to an accused who is subjected to physical forms of restriction tantamount to confinement. *United States v. Rendon*, 58 M.J. 221 (C.A.A.F. 2003).

⁵³ Conditions on liberty (and every other form of pretrial restraint) does, however, trigger an accused’s right to counsel before being subjected to a line-up. MCM, *supra* note 1, MIL. R. EVID. 321(b)(2).

between them a “distinction with a difference.”⁵⁴ Accordingly, prior to imposing pretrial restraint, military justice practitioners must attempt to gauge where on the spectrum of restraint a particular case is likely to fall.

V. Differentiating Between the Types of Restraint

A. Administrative Restraint

As previously stated, administrative restraint is not pretrial restraint.⁵⁵ As a result, administrative restraint does not impose any speedy trial burden on the government and should not serve as a basis for awarding administrative sentence credit.⁵⁶ Because of this, government counsel should be cognizant of situations in which administrative restraint, as opposed to pretrial restraint, is the most appropriate course of action. Perhaps the single greatest scenario in which this is likely to come up in today’s Army is when the commander’s primary purpose is to ensure the health, welfare, and safety of the accused.⁵⁷

The purpose of pretrial restraint is to ensure the accused is present for trial and to avoid interference with the trial process.⁵⁸ Maintaining the safety of the accused falls outside this scope.⁵⁹ Ensuring Soldier safety is, however, a valid basis for imposing administrative restraint.⁶⁰ While requiring an accused to be physically guarded and escorted at all times for the purpose of preventing flight or future criminal misconduct would almost certainly be restriction tantamount to confinement and constitute illegal pretrial punishment, imposing the same conditions to prevent a Soldier from committing suicide, or to protect an accused from violence at the hands of others, is an entirely different story.⁶¹ Commanders have an obligation to safeguard every member of their command, and should take appropriate measures to do so.⁶²

⁵⁴ Appendix A (Table: Collateral Effects of Restraint) (containing a quick reference table capturing the collateral consequences of restraint).

⁵⁵ See *supra* Part II.

⁵⁶ *Id.*

⁵⁷ U.S. DEP’T OF ARMY, REPORT, ARMY 2020: GENERATING HEALTH & DISCIPLINE IN THE FORCE AHEAD OF THE STRATEGIC RESET (2012) [hereinafter THE GOLD BOOK] (correlating engaging in criminal misconduct with a heightened risk for committing suicide).

⁵⁸ *United States v. Bradford*, 25 M.J. 181, 186 (C.M.A. 1987); MCM, *supra* note 1, R.C.M. 305(h)(2)(B).

⁵⁹ See *United States v. Doane*, 54 M.J. 978 (A.F. Ct. Crim. App. 2001).

⁶⁰ See *United States v. Fujiwara*, 64 M.J. 695, 698 (A.F. Ct. Crim. App. 2007); *United States v. Smith*, 53 M.J. 168, 173 (C.A.A.F. 2000).

⁶¹ *Id.*

⁶² See, e.g., THE GOLD BOOK, *supra* note 57 (emphasizing the importance of identifying high-risk Soldiers and imposing risk mitigation measures to protect them).

Restraint imposed for safety, or other administrative reasons, however, must be specifically tailored to fit the facts at hand.⁶³ For example, in the case of a suicidal Soldier, the restraint should not be in place “pending trial,” but rather should terminate when the commander, in consultation with medical providers, determines that the Soldier is no longer a suicide risk.⁶⁴ Likewise, commanders who are genuinely concerned about a Soldier’s potential to harm himself should avoid imposing measures that may be stigmatizing.⁶⁵ Measures that stigmatize are likely to do more harm than good, and may indicate that the commander’s articulated administrative purpose is actually a subterfuge for illegal pretrial punishment or pretrial restraint.⁶⁶

Accordingly, when the phone inevitably rings because a commander urgently wants to impose restraint, government counsel should question the commander to determine whether Soldier safety, or some other valid administrative purpose, is the primary motivator. Failure to do so may result in unnecessarily triggering the collateral consequences attached to the imposition of pretrial restraint or, even worse, result in a failure to impose adequate safeguards to protect a vulnerable Soldier.

B. Conditions on Liberty

As previously stated, conditions on liberty are orders that require an accused to “do or refrain from doing specified acts.”⁶⁷ The breadth of this definition provides commanders with an extremely flexible tool for controlling an accused. Military case law is replete with examples of creative uses of this power, including: no-contact orders, orders prohibiting the consumption of alcohol, orders to provide urine samples, requirements that accused Soldiers be escorted by NCOs, sign-in requirements at the barracks CQ or staff duty desk, revocation of civilian clothing privileges, limiting visitors, and limiting access to telephones and other communication devices.⁶⁸ As long as the order is otherwise

⁶³ See *United States v. Pouncey*, No. ACM 34497, 2002 WL 1162284, at *2 (A.F. Ct. Crim. App. 2002) (stating in dicta that a judge may order sentence credit when administrative restraint is more rigorous than is necessary).

⁶⁴ *United States v. Wilkinson*, 27 M.J. 645, 648 (A.C.M.R. 1988) (stating that imposing restraint “pending trial” and failing to dispense with restraint once medical authorities determined the accused was not a suicide risk belied the commander’s “self-serving” testimony that the primary purpose was administrative).

⁶⁵ THE GOLD BOOK, *supra* note 57, at 70 (stating that restricting an accused at risk of harming himself to the unit area may increase stigma and is likely to make things worse).

⁶⁶ See *Wilkinson*, 27 M.J. at 648.

⁶⁷ MCM, *supra* note 1, R.C.M. 304(a)(1).

⁶⁸ See, e.g., *United States v. Schuber*, 70 M.J. 181 (C.A.A.F. 2011); *United States v. Rendon*, 58 M.J. 221 (C.A.A.F. 2003); *United States v. Smith*, 53 M.J. 168, 173 (C.A.A.F. 2000); *United States v. Muniz*, No. 20000668,

lawful, does not inhibit pretrial preparation, and the commander reasonably believes it is necessary to ensure the accused's presence at trial or to prevent future acts of misconduct, it may be imposed as a condition on liberty under RCM 304(a)(1).⁶⁹

C. Differentiating Between Conditions on Liberty and Restriction in Lieu of Arrest

Just because a set of lawfully imposed requirements meet the RCM 304(a)(1) definition of "conditions on liberty," it does not mean the courts will always place it in that legal category. The court could find that the restraint rises to the level of restriction, or even arrest, because courts do not confine themselves to bright-line definitions when categorizing restraint for speedy trial purposes.⁷⁰ Courts also do not give any deference to the label applied by the command.⁷¹ Instead, courts closely scrutinize the facts of the case and examine the degree to which "the basic rights and privileges enjoyed by service members" have been substantially impaired to determine, under the totality of the circumstances, where on the spectrum of pretrial restraint a particular case falls.⁷² As articulated in *United States v. Smith*:

Some of the relevant factors to be considered in determining the nature of an accused's pretrial restraint are: the nature of the restraint (physical or moral), the area or scope of the restraint (confined to post, barracks, room, etc.), the types of duties, if any, performed during the restraint (routine military duties, fatigue duties, etc.), and the degree of privacy enjoyed within the area of restraint. Other important conditions which may significantly affect one or more of these factors are: whether the accused was required to sign in periodically with some supervising authority; whether a charge of quarters or other authority periodically checked to ensure the accused's presence; whether the accused was required to be under armed or unarmed escort; whether

and to what degree [the] accused was allowed visitation and telephone privileges; what religious, medical, recreational, educational, or other support facilities were available to the accused's use; the location of the accused's sleeping accommodations; and whether the accused was allowed to retain and use his personal property (including his civilian clothing).⁷³

As a result, practitioners must be careful because combining too many conditions on liberty together may cause a judge to conclude that, under the totality of the circumstances, the "conditions" actually constituted "restriction" and triggered the RCM 707 speedy trial clock.

The probability of this occurring is especially high when an accused's pass privileges are revoked pending trial. Until relatively recently, the prevailing view in the Army was that revoking or limiting pass privileges either did not constitute pretrial restraint or, at most, rose to the level of conditions on liberty.⁷⁴ These cases led many practitioners to conclude that revocation of pass privileges could never start the RCM 707 speedy trial clock.⁷⁵ In *United States v. Muniz*, however, the Army Court of Criminal Appeals (ACCA) signaled otherwise.⁷⁶

In *Muniz*, the accused's pass privileges were revoked, prohibiting him from leaving Fort Drum, New York, without his company commander's permission. Additionally, the commander prohibited the accused from entering any of the three establishments that served alcohol on Fort Drum. The commander's order was issued 78 days prior to the preferral of charges and 177 days prior to arraignment. Only twenty-seven days of delay were attributed to the defense or otherwise excluded. At trial, the defense moved to dismiss, arguing that the accused's speedy trial rights had been violated because the commander's order constituted restriction in lieu of arrest, thus starting the speedy trial clock 78 days prior to preferral, and resulting in an elapsed time of 150 days between the imposition of restraint and arraignment. The trial judge denied the motion and affirmatively ruled that revocation of the accused's pass privileges only constituted conditions on liberty.⁷⁷

2004 WL 5862921, at *6 (A. Ct. Crim. App. 2004); *Washington v. Greenwald*, 20 M.J. 699 (A.C.M.R. 1985).

⁶⁹ See MCM, *supra* note 1, R.C.M. 304.

⁷⁰ *E.g.*, *United States v. Gregory*, 21 M.J. 952, 955 (A.C.M.R. 1986) ("This court consistently has declined to apply a 'bright-line' test in determining the severity and character of pretrial restraint.").

⁷¹ *E.g.*, *Wilkinson*, 27 M.J. at 649 ("The characterization of the nature of the restraint by the command does not determine its actual legal nature . . .").
⁷² *United States v. Smith*, 20 M.J. 528, 531 (A.C.M.R. 1985); *see also United States v. Wagner*, 39 M.J. 832, 834 (A.C.M.R. 1994); *United States v. Russell*, 30 M.J. 977, 979 (A.C.M.R. 1990).

⁷³ *Smith*, 20 M.J. at 531-32.

⁷⁴ *See, e.g., Wilkinson*, 27 M.J. at 649 n.3 (stating that lack of pass privileges will usually have no impact on speedy trial rules).

⁷⁵ *See THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, COMMANDER'S LEGAL HANDBOOK 13* (June 2013) (stating that pulling pass privileges does not start the speedy trial clock).

⁷⁶ *United States v. Muniz*, No. 20000668, 2004 WL 5862921 (A. Ct. Crim. App. 2004).

⁷⁷ *Id.* at *1-3.

In an unpublished opinion, the ACCA disagreed and granted the defense motion to dismiss. The court's reasoning was plain:

The President's directions in R.C.M. 304 are clear. Directing a [S]oldier "to remain within specified limits" is a restriction under R.C.M. 304(a)(2), if imposed before and during disposition of offenses." For example: "You will remain on the Fort Drum installation," would be a form of restriction if imposed based on an allegation of misconduct and continued pending its final adjudication. Conditions on liberty, on the other hand, require a [S]oldier "to do or refrain from doing specified acts."⁷⁸

In reaching this result, ACCA marginalized a host of previous cases that arguably stood for the proposition that revocation of pass privileges is not the same as restriction in lieu of arrest and does not trigger the speedy trial clock. For example, in *United States v. Reynolds*, the Army Court of Military Review (ACMR) ruled that limits on the pass privilege, even when coupled with limitations on the wear of civilian clothing, constituted only conditions on liberty and did not rise to the level of restriction.⁷⁹ The *Muniz* court severely limited the applicability of this precedent, stating, "At best, *Reynolds* stands only for the proposition that some 'limits on the pass and civilian clothing privilege' [outside the continental United States] may be deemed conditions on liberty."⁸⁰

Similarly, in *United States v. Wagner*, the court stated, "When a single [S]oldier who lives in the barracks is restricted to the limits of a military installation, the action is commonly characterized as 'pulling pass privileges.' This has been held not to be restriction for speedy trial purposes . . . Thus, such a restriction is characterized as 'conditions on liberty.'"⁸¹ In *Muniz*, ACCA dismissed this unambiguous announcement as "mere dicta."⁸²

The *Muniz* opinion also takes the opportunity to highlight another potential speedy trial trigger commonly associated with conditions on liberty: physical sign-in requirements. In a footnote, the court cautioned that "[a] 'sign-in requirement' may also amount to a restriction if the time interval [is] so short as to prevent a [S]oldier from

effectively leaving a reasonably well-defined area."⁸³ The implication is that sign-in requirements that are tantamount to restriction also trigger the RCM 707 speedy trial clock. Most likely, this cautionary note only applies to sign-in requirements that require an accused to periodically report *in person* to a specified location. Armed with this insight, practitioners should consider whether imposing telephonic sign-in requirements, in lieu of physical ones, would provide an adequate level of control over the accused. Avoiding physical sign-in requirements, whenever possible, eliminates another potential source of speedy trial problems.

Accordingly, in the wake of *Muniz*, practitioners should assume that any form of restraint, regardless of its label, that serves to prevent a Soldier from leaving a reasonably well-defined area will be tantamount to restriction and trigger the RCM 707 speedy trial clock. Practitioners should recognize this is especially likely to be true in cases like *Muniz*, where the accused is stationed inside the continental United States and prohibited from using any on-post facility.

D. Differentiating Between Restriction in Lieu of Arrest and Arrest

Recall that as defined in RCM 304, both restriction in lieu of arrest and arrest are forms of moral restraint that require an accused to remain within certain specified limits.⁸⁴ The concept of arrest also has a separate statutory basis: Article 9, UCMJ. Article 9 defines arrest as "the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits."⁸⁵

On its face, this broad statutory definition appears to encompass both "restriction" and "arrest," as those terms are used in RCM 304, because both forms of restraint require Soldiers to "remain within specified limits."⁸⁶ Furthermore, nothing in the UCMJ recognizes restriction as a lesser form of pretrial restraint than arrest.⁸⁷ Consequently, the rule appears to be at odds with the statute. The Court of Appeals for the Armed Forces (CAAF) resolved this issue in *United States v. Schuber*.⁸⁸

Airman First Class Schuber was ordered into pretrial confinement after providing four urine samples that tested positive for controlled substances in a two-month period.

⁷⁸ *Id.* at *5.

⁷⁹ *United States v. Reynolds*, 36 M.J. 1128, 1130 (A.C.M.R. 1993).

⁸⁰ *Muniz*, 2004 WL 5862921, at *7.

⁸¹ *United States v. Wagner*, 39 M.J. 832, 833 (A.C.M.R. 1994) (citing *United States v. King*, 30 M.J. 59, 62 n.6 (C.M.A. 1990)).

⁸² *Muniz*, 2004 WL 5862921, at *8.

⁸³ *Id.* at *5 n.8.

⁸⁴ MCM, *supra* note 1, R.C.M. 304(a)(2)–(3) (discussed *supra* Part III).

⁸⁵ UCMJ art. 9 (2012).

⁸⁶ MCM, *supra* note 1, R.C.M. 304(a)(2)–(3).

⁸⁷ The text of the UCMJ does not mention restriction tantamount to confinement. See UCMJ (2012).

⁸⁸ *United States v. Schuber*, 70 M.J. 181 (C.A.A.F. 2011).

He was released after seventy-one days.⁸⁹ Between his release and trial, another sixty-seven days transpired in which he was required to remain within the limits of the installation (except for one three-day pass) and to provide weekly urine samples.⁹⁰ During this time, he performed full military duties, did not have an escort requirement, and could “avail himself of all usual base activities.”⁹¹ Prior to trial, defense counsel made six separate discovery requests, all of which contained a provision demanding speedy trial. In total, the accused was either restrained or confined for 138 days prior to trial.⁹²

At trial, the defense argued that this period of delay violated Article 10. Their argument was rooted in a plain-language interpretation of Article 9 that categorized any order to remain within specified limits as arrest.⁹³ The trial judge agreed and dismissed the charges.⁹⁴ On appeal, in a 3–2 decision, the CAAF rejected the accused’s plain language argument. Instead, the majority interpreted Articles 9 and 10 in light of the history of arrest in the military, and ruled that Article 10 is only triggered by pretrial restraint analogous to “close arrest.”⁹⁵ Applying this interpretation to the facts at hand, the majority ruled that the government was not accountable under Article 10 for the period of time following the accused’s release from pretrial confinement because the restraint imposed only rose to the level of “open arrest.”

To distinguish between “open” and “close” arrest, the majority adopted a contextual analysis. Under their approach, the relevant factors include: whether regular military duties are performed, the geographic limits of constraint, the extent of sign-in requirements, and whether restriction is performed with or without escorts. The court did not indicate whether any of these factors were more dispositive than the others.⁹⁶

While *Schuber* firmly establishes that restriction and arrest are not “coterminous,”⁹⁷ the majority opinion makes it difficult for practitioners to predict when moral restraint is likely to trigger Article 10; this is because neither historical practice nor case law provide any real insight into how to

apply the *Schuber* contextual analysis.

The majority opinion purports to rely on historical practice, but little historical guidance actually exists. The concept of “open arrest” is not described in any published opinions of The Judge Advocate General of the Army.⁹⁸ Nor does the majority cite to any earlier judicial opinions.⁹⁹ The only source cited by the majority opinion in *Schuber* to establish the principle that Article 10 is not triggered by restraint analogous to “open arrest” is congressional testimony from 1916 given by Brigadier General Enoch Crowder, The Judge Advocate General of the Army.¹⁰⁰ This testimony is unhelpful, however, because it only documents the existence of “open arrest” without describing what it actually entails.¹⁰¹

Winthrop’s *Military Law and Precedents* contains a fairly detailed discussion of the distinction between “open” and “close” arrest, in which numerous other military law treatises from the era are cited.¹⁰² Problematically, however, Winthrop’s explanation of “open arrest” appears to be at odds with the “contextual analysis” adopted by the majority in *Schuber*. Winthrop indicates that “close arrest” referred to the specific practice of restricting an accused to his quarters, and that the term “open arrest” described any more lenient form of restraint.¹⁰³ In other words, *Winthrop* relies on only one factor—the geographic limits of constraint—where the majority opinion in *Schuber* weighs several.¹⁰⁴ Because of this discrepancy, it is unclear whether *Winthrop* provides any insight into how courts will apply *Schuber* in future cases.

The uncertainty created by minimal, and in some cases

⁸⁹ *Id.* at 183–84.

⁹⁰ *Id.* at 184.

⁹¹ *Id.* at 187.

⁹² *Id.* at 183–84.

⁹³ *Id.* at 185.

⁹⁴ *Id.* at 184.

⁹⁵ *Id.*

⁹⁶ *Id.* at 187.

⁹⁷ *Id.*

⁹⁸ See DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY, 1912 (1917); DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1912–1930 (1932); DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1924–1930 (1932) (with 1931 Supplement); DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1912–1940 (1942) (with Supplement).

⁹⁹ See *Schuber*, 70 M.J. 181.

¹⁰⁰ This is the only source cited by the majority opinion. *Id.*

¹⁰¹ See S. REP. NO. 64-130, at 74 (1916).

¹⁰² WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 113 (2d ed. 1920 reprint).

¹⁰³ *Id.* (“[L]arger limits than the quarters . . . are granted . . . , the arrest being in this manner reduced from a ‘close’ one . . .”).

¹⁰⁴ Similarly, the majority’s adoption of a contextual analysis in *Schuber* also implicitly rejects the RCM 304(a)(3) definition as a means of distinguishing arrest from restrictions. See MCM, *supra* note 1, R.C.M. 304(a)(3) (stating that a person in the status of arrest may not be required to perform full military duties, and that arrest automatically terminates when a person is assigned duties inconsistent with the status of arrest). Had the court adopted this standard, a multi-factor contextual analysis would not be required because the only relevant factor would be whether or not full military duties were performed.

countervailing, historical guidance is further compounded by a lack of relevant case law. Dicta in *Schuber* suggests that any case dealing with this issue prior to *United States v. Walls*¹⁰⁵ may no longer be good law.¹⁰⁶ This is because prior to *Walls*, the Court of Military Appeals tended to hold that any geographic restraint triggered Article 10.¹⁰⁷ Furthermore, despite having a relatively well-developed body of case law, the majority in *Schuber* did not cite to any restriction tantamount to confinement cases to illustrate the difference between restriction and arrest.¹⁰⁸ Arguably, this omission serves to further narrow the field of applicable precedent to only those cases specifically addressing the applicability of Article 10 where restraint *not* tantamount to confinement was imposed. Between the negative treatment of all case law prior to *Walls* and the exclusion of cases dealing with restriction tantamount to confinement, the CAAF virtually cleared the field of all applicable precedent, leaving practitioners with only a handful of cases for guidance.

Of these, the most helpful is *United States v. Acireno* from 1982.¹⁰⁹ Specialist Acireno was charged with committing a lewd act upon a female under the age of sixteen. Prior to trial, he was restricted to two floors of his barracks for 153 days. He was only permitted to leave with an NCO escort, and then was only permitted to go to the mess hall, chapel, or “JAG.” His civilian clothing was confiscated, and he was prohibited from attending unit formations, physical training, and the company’s Christmas party (even though it took place in the barracks). Following his conviction, the ACMR ruled that his pretrial restraint rose to the level of arrest and violated Article 10. As a result, the court was left with only one remedy: the findings and sentence were set aside, and the charges were dismissed.¹¹⁰

Acireno shows that Article 10 protections may be triggered even when the accused is allowed freedom of movement to an area outside his immediate quarters.¹¹¹ Unfortunately for practitioners, however, the *Schuber* opinion does not strongly indicate, one way or the other, how *Acireno* would have fared under the *Schuber* contextual analysis. While practitioners in Winthrop’s period would have undoubtedly concluded that SPC Acireno was

subjected to nothing more than “open arrest,” it is hard to imagine a modern court ruling that the restraint imposed upon SPC Acireno triggered nothing more than RCM 707 speedy trial protections; only time will tell. Consequently, until post-*Schuber* case law clarifies the types of factual circumstances that distinguish restriction from arrest, prudent command legal advisors should exercise caution any time an accused is restricted to a small unit area or building complex. When in doubt, plan for the worst, and assume Article 10 is triggered.

VI. Arrest as an Alternative to Restriction Tantamount to Confinement

A plethora of case law and scholarly articles testify to the reality that, sometimes, commanders take pretrial restraint too far.¹¹² When that occurs, and the trial judge finds that restriction tantamount to confinement was imposed, the accused is sure to receive sentence credit—and lots of it.¹¹³ In contrast, no court has ever ruled that arrest imposed pursuant to RCM 304(a)(3) entitles an accused to receive any credit.¹¹⁴

Command legal advisors should keep this in mind in the event a situation arises where a significant amount of pretrial restraint is warranted, but pretrial confinement is not an option (perhaps because a part-time military magistrate disagrees with the command regarding the likelihood that the accused will engage in serious criminal misconduct). It may be possible to exercise sufficient control over the accused by imposing arrest in the historical and most literal sense: suspend the accused from performing full military duties and restrict him to quarters. If this occurs, the command should call it arrest and clearly indicate that it is imposed pursuant to RCM 304(a)(3). While the actual nature of the restraint and not the command’s characterization of it will determine its legal category,¹¹⁵ words still matter. If nothing else, labeling the restraint as “arrest” from the outset should help the government frame the issue at trial and allow trial counsel to argue that even though Article 10 was triggered, the accused is not entitled

¹⁰⁵ *United States v. Walls*, 9 M.J. 88 (C.M.A. 1980) (ruling that revocation of accused’s pass privileges, when the installation contained a service club, post exchange, snack bar, gym, chapel, and an enlisted men’s club, did not trigger Article 10).

¹⁰⁶ *United States v. Schuber*, 70 M.J. 181, 185 (C.A.A.F. 2011).

¹⁰⁷ *Id.*

¹⁰⁸ *See id.*

¹⁰⁹ *United States v. Acireno*, 15 M.J. 570 (A.C.M.R. 1982).

¹¹⁰ *Id.*

¹¹¹ *See id.*

¹¹² *See generally* McCabe, *supra* note 4.

¹¹³ *See generally id.* (discussing restriction tantamount to confinement and resulting sentence credit).

¹¹⁴ In cases not implicating Article 13, for an accused to be entitled to administrative sentence credit, the restraint must be “tantamount to confinement.” *See, e.g.,* *Washington v. Greenwald*, 20 M.J. 699, 700 (A.C.M.R. 1985) (“[W]e conclude that the petitioner’s pretrial restriction was not tantamount to confinement and that therefore no administrative credit is warranted.”). As argued throughout this article, arrest is not the same as restriction tantamount to confinement. Accordingly, individuals placed under arrest not tantamount to confinement should not be entitled to any administrative sentence credit. The period of arrest is, nevertheless, relevant for sentencing purposes. *United States v. Brown*, 33 M.J. 743, 746 (A.C.M.R. 1991).

¹¹⁵ *United States v. Muniz*, No. 20000668, 2004 WL 5862921, at *6 (A. Ct. Crim. App. 2004).

to administrative sentence credit.

VII. Curing Inadvertent Speedy Trial and Article 10 Triggers

In the event that either the RCM 707 speedy trial clock or Article 10 is inadvertently triggered by the imposition of pretrial restraint, all hope is not lost. The key is for government counsel to pay attention to what the unit is doing and catch these mistakes early. Pursuant to RCM 707, the speedy trial clock is reset whenever the accused is released from restraint for a “significant period.”¹¹⁶ As little as five days can constitute a “significant period” as long as no gamesmanship is involved.¹¹⁷ Moreover, the accused does not have to be released from *all* restraint: conditions on liberty may still be in place.¹¹⁸ In order for the government to avail themselves of this reset provision, however, the accused must also have no charges pending during the period of release.¹¹⁹ As a result, to have any meaningful impact, the period of release must generally occur prior to preferral.

In cases where the government has unwittingly triggered Article 10 by inadvertently placing the accused under arrest, the rules are less forgiving. Article 10 requires the government to take “immediate steps” to try the accused or “dismiss the charges and release him.”¹²⁰

In *Schuber*, the CAAF clarified this provision by ruling that the government is not required to both release the accused *and* dismiss the charges to toll the Article 10 clock; simply releasing the accused will suffice.¹²¹ Tolling Article 10, however, is not the same as a complete reset. Consequently, the government is still accountable under Article 10 for all of the days that the accused was under arrest, and trial counsel must be prepared to produce a chronology and demonstrate that the government took immediate steps to bring the accused to trial during this period.¹²²

¹¹⁶ MCM, *supra* note 1, R.C.M. 707(b)(3)(B).

¹¹⁷ *United States v. Hulse*, 21 M.J. 717 (A.F.C.M.R. 1975); *United States v. Miller*, 26 M.J. 959 (A.C.M.R. 1988).

¹¹⁸ *United States v. Reynolds*, 36 M.J. 1128, 1130 (A.C.M.R. 1993) (ruling that reducing an accused’s pretrial, pre-preferral restraint from restriction to conditions on liberty re-set the RCM 707 speedy trial clock).

¹¹⁹ Otherwise, the period of restriction or arrest would overlap with preferral and there would be no significant period of release. *See id.*; MCM, *supra* note 1, R.C.M. 707(b)(3)(B).

¹²⁰ UCMJ art. 10 (2012).

¹²¹ *United States v. Schuber*, 70 M.J. 181, 187 (C.A.A.F. 2011).

¹²² *See id.* Rule for Courts-Martial 707 states, “Upon accused’s timely motion to a military judge under R.C.M. 905 for speedy trial relief, counsel should provide the court a chronology detailing the processing of the case.

VIII. Conclusion

When misconduct occurs, good commanders like CPT Brown in the hypothetical will want to take immediate steps to mitigate risk, prevent future misconduct, and facilitate the administration of military justice. Pretrial restraint and administrative restraint are the most powerful and flexible tools commanders have to accomplish these objectives. When advising commanders on this topic, however, judge advocates must be careful and deliberate.

Imposing restraint without fully understanding how courts conceptualize the spectrum of restraint, and the corresponding collateral effects, can result in unnecessary sentence credit, or even worse, dismissal. Applying the right amount and form of restraint in a deliberate and precise manner, however, maximizes the usefulness of this tool, and ultimately furthers the best interests of the Army, the community, and even the accused.

This chronology should be made a part of the appellate record.” MCM, *supra* note 1, R.C.M. 707(c)(2).

Appendix A

Table: Collateral Effects of Restraint

Type of Restraint	Right Triggered				
	<i>Right to Counsel Before Line-up</i>	<i>RCM 707 Speedy Trial Clock</i>	<i>Article 10</i>	<i>Day for Day Mas on Credit</i>	<i>Potential for RCM 305(k) Credit</i>
Administrative Restraint	No	No	No	No	No
Conditions on Liberty	Yes	No	No	No	No
Restriction in Lieu of Arrest	Yes	Yes	No	No	No
Arrest	Yes	Yes	Yes	No	No
Restriction Tantamount to Confinement	Yes	Yes	Yes	Yes	No
Restriction Tantamount to Confinement (physical)	Yes	Yes	Yes	Yes	Yes
Pretrial Confinement	Yes	Yes	Yes	Yes	Yes

Appendix B

Sample Order Imposing Administrative Restraint

The following is provided as an example of RCM 304(h) administrative restraint imposed to mitigate risk of self-harm. Practitioners should feel free to deviate from these conditions as the circumstances require. The restraint may be issued in memorandum form or using DA Form 4856 (Developmental Counseling). Where helpful, explanatory notes have been added in brackets at the end of paragraphs and italicized—these should be deleted prior to use.

SUBJECT: Imposition of Administrative Restraint Pursuant to RCM 304(h)

1. After consulting with your professional health care providers, I have determined that reasonable grounds exist to believe that you may be at-risk for harming yourself. Because of this, I am imposing administrative restraint. I am taking this action because I am concerned that, due to the stressors you currently face, you may be a danger to yourself.
2. To monitor your progress and ensure that you do not harm yourself, I am imposing the following risk-mitigation measures: *[Modify as necessary under the circumstances: either less stringent or, in the case of a Soldier at high-risk for committing suicide, more stringent. Ensure that all measures imposed are reasonable under the circumstances.]*
 - a. You will live in the barracks. You will not stay overnight in any other individual's barracks room, or any other quarters, without my permission. To monitor your welfare, your squad leader and other members of your chain of command will routinely check on you during off-duty hours and weekends to ensure that you are safe and are receiving all of the support you require.
 - b. If you wish to leave the installation, you must first receive permission from me.
 - c. You may not consume or possess any alcoholic beverages, or enter any establishment on the installation that serves alcoholic beverages.
 - d. If you have any privately owned weapons on the installation, you will turn them into the unit arms room. *[When gathering information pertaining to privately owned firearms, ensure compliance with Section 1062 of the Fiscal Year (FY) 2011 National Defense Authorization Act (NDAA), as amended by Section 1057 of the FY 2013 NDAA.]*
 - e. You will obtain an NCO escort whenever you wish to leave the 11th Hussars regimental footprint. Your squad leader has been designated as your primary escort. You can reach him at (555) 555-5555, any time, day or night. His primary responsibility is to ensure your safety.
 - f. When off-duty (whether on a weekend or training holiday), you will check in telephonically with your squad leader every hour between the hours of 0600–2200. Texting does not fulfill this requirement. You must actually speak with your squad leader so that he can hear your voice and assess your demeanor. *[For lower-risk Soldiers telephonic check-in requirements may be a less stigmatizing alternative to a physical sign-in requirement.]*
3. These measures have not been imposed as punishment or as a form of pretrial restraint. The primary purpose is to ensure your health and safety. These measures will remain in effect until the chain of command, in consultation with your health care providers, determines that they are no longer necessary to ensure your welfare. *[Note that the measures are not in place pending trial or final disposition of offenses. This was expressly stated to avoid the perception that the measures were imposed for military justice purposes.]*
4. If at any time you feel these measures are too harsh or unnecessary, you may request that I review them. I will review these measures once within the next five days and then once again every thirty days to determine if these measures should be continued or amended.
5. Failure to comply with these measures may constitute a violation of Article 92 of the UCMJ (failure to obey a lawful order), and may result in punishment (either judicial or nonjudicial) or adverse administrative action.

6. You must understand that even though you may be under a considerable amount of stress at this time, committing additional acts of misconduct will not reduce that stress. I encourage you to take advantage of all the resources the Army has to help you. Chaplains, Mental Health Providers, Military One Source, and the Family Life Counselors at Army Community Services (ACS) all provide free counseling services. I cannot emphasize enough that no stigma is associated with seeking mental health services. Your chain of command is here to help you as well. I strongly encourage you to use these resources.

JAMES T. BRUDENELL
CPT, AR
Commanding

I have read and understand all paragraphs and my commander has answered any questions I had pertaining to this order.

HARRY P. FLASHMAN
SPC, USA

Appendix C

Sample Order Imposing Conditions on Liberty

The following is provided as an example of conditions on liberty imposed pursuant to RCM 304(a)(1). Practitioners should feel free to deviate from these conditions as the circumstances require. The restraint may be issued in memorandum form or using DA Form 4856 (Developmental Counseling). Where helpful, explanatory notes have been added in brackets at the end of paragraphs and italicized—these should be deleted prior to use.

SUBJECT: Imposition of Conditions on Liberty Pursuant to RCM 304(a)(1)

1. After careful deliberation, I have determined that probable cause exists to believe that you have committed the offense of Wrongful Use of Illegal Drugs in violation of Article 112a, UCMJ. *[RCM 304(e) requires the accused be notified of the offense forming the basis for imposing restraint.]*
2. To ensure your presence at trial and promote the effective administration of military justice, I am placing the following conditions on your liberty pursuant to RCM 304(a)(1):
 - a. You are prohibited from initiating any contact or communication with any potential witness in this case, either directly or through a third party. For purposes of this order, the term "communication" includes, but is not limited to, communication in person, or through a third party, via face-to-face contact, telephone, or in writing by letter, data fax, electronic mail, text message, or social media. If a potential witness initiates contact with you, you must immediately notify me regarding the facts and circumstances surrounding the contact. This order does not apply to any detailed military or retained civilian defense counsel engaged in case preparation. *[Pretrial restraint may not hinder case preparation. Rule for Courts-Martial 304(a) discussion. Much of the language in this paragraph was taken from DD Form 2873, Military Protective Order.]*
 - b. If you wish to leave the local area, you must first receive permission from me. For the purposes of this order the term "local area" includes any place within a 25 mile radius of the post headquarters. *[In response to United States v. Muniz, the accused is allowed to travel in the local area off-post. Likewise, leaving the door open for the accused to ask for permission to go elsewhere was selected by the author as a more conservative approach than outright revocation of pass privileges.]*
 - c. You may not consume or possess any alcoholic beverages. *[To distinguish these conditions from the facts of United States v. Muniz, the accused is not prohibited from entering on-post facilities that serve alcohol.]*
 - d. If you have any privately owned weapons on the installation, you will turn them into the unit arms room. *[When gathering information pertaining to privately owned firearms ensure compliance with Section 1062 of the Fiscal Year (FY) 2011 National Defense Authorization Act (NDAA), as amended by Section 1057 of the FY 2013 NDAA.]*
 - e. When off-duty (whether a weekend or training holiday), you will sign in at the staff duty desk each day at 0900 and 1700. *[Ensures personnel accountability and compliance with revocation of pass privileges, without operating as a tether to further restrain the accused's freedom of movement.]*
3. While your conditions on liberty are in place you will continue to perform full military duties. Likewise, you will have normal visitation and telephone privileges and will be allowed to retain and use your personal property (including civilian clothing). *[This paragraph addresses the privileges included in the Smith factors that are unaffected by the order.]*
4. These measures have not been imposed as punishment. These measures will remain in effect until rescinded by me or a superior commanding officer. If at any time you feel these conditions are too harsh, unnecessary, or are impeding your pretrial preparation, you may request that I review them. I will review these measures once within the next five days and then once again every thirty days to determine if these measures should be continued or amended.
5. Failure to comply with these conditions may constitute a violation of Article 92, UCMJ (failure to obey a lawful order), and may result in punishment (either judicial or nonjudicial) or adverse administrative action.

6. If you do or say anything that causes me to believe that you will disobey these conditions or if you commit additional acts of misconduct, I will consider imposing more stringent forms of restraint, to include pretrial confinement.

JAMES T. BRUDENELL
CPT, AR
Commanding

I have read and understand all paragraphs and my commander has answered any questions I had pertaining to this order.

HARRY P. FLASHMAN
SPC, USA

Appendix D

Sample Order Imposing Restriction

The following is provided as an example of restriction imposed in conjunction with conditions on liberty imposed pursuant to RCM 304(a)(1–2). Practitioners should feel free to deviate from this example as the circumstances require. The restraint may be issued in memorandum form, or using DA Form 4856 (Developmental Counseling). Remember that the imposition of restriction in lieu of arrest will start the RCM 707 speedy trial clock. Where helpful, explanatory notes have been added in brackets at the end of paragraphs and italicized—these should be deleted prior to use.

SUBJECT: Imposition of Conditions on Liberty and Restriction in Lieu of Arrest Pursuant to RCM 304(a)(1–2)

1. After careful deliberation, I have determined that probable cause exists to believe that you have committed the offense of Wrongful Use of Illegal Drugs in violation of Article 112a, UCMJ. *[RCM 304(e) requires the accused be notified of the offense forming the basis for imposing restraint.]*

2. To ensure your presence at trial and promote the effective administration of military justice, I am restricting you as follows pursuant to RCM 304(a)(2):

a. Your off-post pass privileges are revoked. If you wish to leave the installation at any time (whether on duty or off) you must first receive permission from me.

b. You will live in the barracks. You will not stay overnight in any other individual's barracks room, or any other quarters, without my permission.

c. You are restricted to the brigade footprint. *[Describe the boundaries of the brigade footprint.]* You may only travel outside the brigade footprint with an NCO escort. You may obtain an NCO escort by reporting to the battalion staff duty desk and requesting one. Additionally, you may only travel outside the brigade footprint to the following locations:

(1) If you need to purchase hygiene products, you may do so at _____ PX/Shoppette.

(2) You are authorized to attend religious services and to speak to the chaplain.

(3) You are authorized to attend sick call at the company. You may go directly to the emergency room for medical treatment in the event of an emergency. As soon as the emergency has passed or you are cleared, you will contact the company and notify us of your status and location.

(4) You are authorized to see your attorney at Trial Defense Service (TDS).

(5) You may exercise at _____ gym.

d. You are expressly prohibited from entering any establishment on the installation that serves alcoholic beverages. *[Together, these geographic limitations are less stringent than those imposed in United States v. Acireno. Unlike Acireno, in this example, the accused is able to freely travel outside the barracks anywhere in the brigade footprint.]*

3. Additionally, I am placing the following conditions on your liberty pursuant to RCM 304(a)(1):

a. You are prohibited from initiating any contact or communication with any potential witness in this case, either directly, or through a third party. For purposes of this order, the term “communication” includes, but is not limited to, communication in person, or through a third party, via face-to-face contact, telephone, or in writing by letter, data fax, electronic mail, text message, or social media. If a potential witness initiates contact with you, you must immediately notify me regarding the facts and circumstances surrounding the contact. This order does not apply to any detailed military or retained civilian defense counsel engaged in case preparation. *[Pretrial restraint may not hinder case preparation. Rule for Courts-Martial 304(a) discussion. Much of the language in this paragraph was taken from DD Form 2873, Military Protective Order.]*

b. You may not consume or possess any alcoholic beverages.

c. If you have any privately owned weapons on the installation, you will turn them into the unit arms room. *[When gathering information pertaining to privately owned firearms ensure compliance with Section 1062 of the Fiscal Year (FY) 2011 National Defense Authorization Act (NDAA), as amended by Section 1057 of the FY 2013 NDAA.]*

d. When off-duty (whether a weekend or training holiday), you will sign in at the battalion staff duty desk every four hours from 0600 to 2200.

4. While your restriction and conditions on liberty are in place, you will continue to perform full military duties. Likewise, you will have normal visitation and telephone privileges, and will be allowed to retain and use your personal property (including civilian clothing). *[This paragraph addresses the privileges included in the Smith factors that are unaffected by the order.]*

5. These measures have not been imposed as punishment. These measures will remain in effect until rescinded by me or a superior commanding officer. If at any time you feel these conditions are too harsh, unnecessary, or are impeding your pretrial preparation, you may request that I review them. I will review these measures once within the next five days and then once again every thirty days to determine if these measures should be continued or amended.

6. Failure to comply with these conditions may constitute a violation of Article 92, UCMJ (failure to obey a lawful order) or Article 134, UCMJ (breaking restriction) and may result in punishment (either judicial or nonjudicial) or adverse administrative action.

7. If you do or say anything that causes me to believe that you will disobey these conditions, break your restriction, or if you commit additional acts of misconduct, I will consider imposing more stringent forms of restraint, to include pretrial confinement.

JAMES T. BRUDENELL
CPT, AR
Commanding

I have read and understand all paragraphs and my commander has answered any questions I had pertaining to this order.

HARRY P. FLASHMAN
SPC, USA

Appendix E

Sample Order Imposing Arrest

The following is provided as an example of arrest imposed pursuant to RCM 304(a)(3). Practitioners should feel free to deviate from this example as the circumstances require. The restraint may be issued in memorandum form or using DA Form 4856 (Developmental Counseling). Where helpful, explanatory notes have been added in brackets at the end of paragraphs and italicized—these should be deleted prior to use.

SUBJECT: Imposition of Arrest Pursuant to RCM 304(a)(3)

1. After careful deliberation, I have determined that probable cause exists to believe that you have committed the offense of Wrongful Use of Illegal Drugs in violation of Article 112a, UCMJ. *[RCM 304(e) requires the accused be notified of the offense forming the basis for imposing restraint.]*
2. To ensure your presence at trial and promote the effective administration of military justice, I am placing you under arrest pursuant to RCM 304(a)(3).
3. The conditions of your arrest are as follows:
 - a. You are suspended from performing full military duties. You may, however, be required to take part in ordinary cleaning, policing, routine training, and other routine duties.
 - b. You are restricted to the limits of your barracks room. Should you desire to leave your room, you must contact your chain of command by telephone, or by reporting to the barracks CQ desk. If you desire, you may submit a schedule to me for pre-approval listing the dates, times, and locations of places you would like authorization to travel to. At a minimum, the First Sergeant will make arrangements for you to eat three times per day and to exercise once per day. You will also be allowed access to your attorney at Trial Defense Service (TDS).
 - c. You are prohibited from initiating any contact or communication with any potential witness in this case, either directly or through a third party. For purposes of this order, the term “communication” includes, but is not limited to, communication in person, or through a third party, via face-to-face contact, telephone, or in writing by letter, data fax, electronic mail, text message, or social media. If a potential witness initiates contact with you, you must immediately notify me regarding the facts and circumstances surrounding the contact. This order does not apply to any detailed military or retained civilian defense counsel engaged in case preparation. *[Pretrial restraint may not hinder case preparation. Rule for Courts-Martial 304(a) discussion. Much of the language in this paragraph was taken from DD Form 2873, Military Protective Order.]*
 - d. Your off-post pass privileges are revoked.
 - e. You may not consume or possess any alcoholic beverages.
 - f. If you have any privately owned weapons on the installation, you will turn them in to the unit arms room. *[When gathering information pertaining to privately owned firearms, ensure compliance with Section 1062 of the Fiscal Year (FY) 2011 National Defense Authorization Act (NDAA), as amended by Section 1057 of the FY 2013 NDAA.]*
 - g. While under arrest you will have normal visitation and telephone privileges and will be allowed to retain and use your personal property (including civilian clothing). *[This paragraph addresses the privileges included in the Smith factors that are unaffected by the order imposing arrest in an effort to distinguish this restraint from restriction tantamount to confinement.]*
4. These measures have not been imposed as punishment. These measures will remain in effect until rescinded by myself or a superior commanding officer. If at any time you feel these conditions are too harsh, unnecessary, or are impeding your pretrial preparation, you may request that I review them. I will review these measures once within the next five days and then once again every thirty days to determine if these measures should be continued or amended.

5. Failure to comply with the conditions of your arrest may constitute a violation of Article 92, UCMJ (failure to obey a lawful order), or Article 95, UCMJ (breaking arrest), and may result in punishment (either judicial or nonjudicial) or adverse administrative action.

6. If you do or say anything that causes me to believe that you will break the conditions of your arrest, or if you commit additional acts of misconduct, I will consider ordering you into pretrial confinement.

JAMES T. BRUDENELL
CPT, AR
Commanding

I have read and understand all paragraphs and my commander has answered any questions I had pertaining to this order.

HARRY P. FLASHMAN
SPC, USA

USALSA Report

U.S. Army Legal Services Agency

Trial Judiciary Note

A View from the Bench: Make the Routine, Routine

*Colonel James W. Herring, Jr.**

Introduction

I once attended the retirement dinner for a long time Army civilian employee. He happened to be a retired sergeant major with over forty-five years of combined service to the Army. When it came time for him to speak at the end of the evening, he pulled out a weathered and yellowed index card. On that card he had written his rules for success. One of those rules has always stuck with me. It simply said, “Make the routine, routine.”

All counsel, and particularly new counsel, could learn from that old sergeant major. One of the best ways to begin building your professional reputation with the Court and opposing counsel is to make the routine, routine. Let us look at three areas where counsel, with little effort, can begin this process: specifications, script, and suspenses.

Specifications

Read them, read them, and then read them again. The first contact military judges have with a case is when they receive the referral packet. As a matter of course, the first thing we all do is read the charge sheet. We are often concerned with immediately spotting errors and issues with the drafting. Hopefully, the charges have been drafted and—prior to referral—reviewed by several sets of eyes in the Office of the Staff Judge Advocate. For a general court-martial, the charges have been investigated¹ and the convening authority has been advised that “each specification alleges an offense under the [Uniform Code of Military Justice (UCMJ)].”² When you immediately spot a specification that fails to state an offense, it does not bode well for the credibility of the party responsible for those charges.³ When the government has displayed the inability to perform the routine task of taking what it believes to be

the facts of the case and inserting them into a properly drafted specification, its ability to perform more complex tasks is called into question.

This failure to review specifications is not confined to trial counsel. On more than one occasion, pretrial agreements (having been drafted by the defense, reviewed by the Office of the Staff Judge Advocate, and approved by the convening authority) contain offers by the accused to plead guilty to a specification that fails to state an offense. Again, this does nothing to enhance the credibility of those involved in the process. It also cannot inspire much confidence by the accused in the defense counsel if the judge dismisses a specification for failure to state an offense after that counsel advised the accused to plead guilty to that specification. Additionally, it creates more work for everyone (not to mention another visit to the convening authority) to ensure that the parties intend to be bound by the agreement if the defective specification is dismissed.

Nothing is more challenging in current practice than drafting specifications alleging violations of one of the many versions of Article 120, UCMJ. A suggested starting point is the relevant dates. Once you have these nailed down, counsel can determine with certainty the applicable version of Article 120 and either draft the specifications accordingly or review it against the sample specifications to ensure it states an offense. A best practice that is used in one jurisdiction is to state the Article 120 offense and applicable statute in parenthesis after the Specification (for example: Specification (sexual assault, offenses occurring on/after 28 June 2012)). This aids all parties in quickly determining if the Specification has been correctly drafted.

A good check on your draftsmanship is to hand the charge sheet and case file to another counsel in the office who has not been involved in the case. Things may immediately jump out to a fresh set of eyes that you do not notice because you have been working the case and can fall into the trap of seeing what should be there, not necessarily what is there.

It is not uncommon for new evidence to be discovered between the time the charges are initially drafted and referral. If this occurs, make the changes prior to referral. I have had cases where I point out an amendment that needs to be made to a specification only to have counsel tell me they were aware of the issue. Do not wait for the judge to find it; make the change prior to referral.

* Judge Advocate, U.S. Army. Presently assigned as Chief Circuit Judge, 1st Judicial Circuit, U.S. Army Trial Judiciary, Fort Belvoir, Virginia.

¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405 (2012).

² *Id.* R.C.M. 406(b)(1).

³ In the author’s view, credibility is the most important character attribute a trial attorney can have. Without it, a trial attorney cannot accomplish his two most important missions: educate and persuade the fact finder. Counsel at all times should be wary of the impact their actions may have on their credibility. But that is a topic for another article at another time.

From the defense perspective, pleading by exceptions and substitutions presents its own set of challenges. A quick way to make sure you do this successfully is to start with the specification as charged, delete the excepted words and/or figures, and then add the words and/or figures that are being substituted. Carefully examine the new specification. Does it state an offense? Is it the desired offense?⁴ It takes more to make a wrongful sexual contact specification an assault consummated by a battery specification than excepting the words “wrongful sexual contact” and substituting the words “unlawfully touch.” Yet many times approved pretrial agreements that purport to plead by exceptions and substitutions do not result in a specification that states an offense. Too often, the judge may be walking counsel through this process—for the first time—at arraignment. While counsel normally quickly see the problem, the problem could have been remedied much earlier (and possibly without another trip back to the convening authority with a newly revised pretrial agreement).

Script

Follow the script. It is there for a reason. If you have not invested time in learning (and understanding) the script, how can a judge have much confidence in your ability to actually present a case? Do not just memorize and mindlessly read the script; listen to yourself. What day was the accused served? What day is the arraignment being held? This information tells you if the statutory waiting period has expired.⁵ Do not say it has expired if the dates you announce do not support that conclusion.

Defense counsel, there are several places in the script where the judge is going to ask, “Does the accused have a copy in front of him?” This should not be your cue to start shuffling through the case file looking for the pretrial agreement, stipulation of fact, or other appropriate document. Have the documents ready. You know what the judge is going to ask for and when he is going to ask for it.⁶ Be prepared. Be professional.

⁴ Note that the *Rules of Practice Before Army Courts-Martial*, Rule 2.2.2, requires defense counsel to provide written notice of such a plea to the judge. If that plea is to a lesser-included offense, that notice will include a re-written specification. RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL (1 Nov. 2013). It is good practice for counsel to provide this re-written specification to the judge in all situations in which the accused is entering a plea other than “guilty” or “not guilty” to the specifications of all charges and all charges.

⁵ Many judges will provide counsel with a pretrial issues checklist, containing a list of questions designed to force counsel to “do the math” on these kinds of issues prior to arraignment. If your judge does provide you with such a checklist, do the judge the courtesy of having the answers to those questions prior to the Rule for Courts-Martial 802 session before trial starts.

⁶ The pretrial issues checklist will likely also have a list of items the accused should have in front of him in either a guilty plea or a contested trial. Again, the judge provides this to you to force you to be prepared, but

Trial counsel, think about how you are going to swear in and identify witnesses. This is not difficult; yet it is an area where new counsel and some not-so-new counsel constantly struggle. For most witnesses, this will be their first time testifying at trial. They are nervous and not quite sure about where to go and what to do. Often times as the witness is trying to make their way to the witness stand, counsel will blurt out as quickly as possible, “Please state your name, rank, and unit of assignment.” The witness invariably gets only part of the way through their answer before asking, “What was the third question?” This is an area where counsel need to slow down and take their time. Allow the witness to get to the witness stand before asking him to face you and raise his right hand. Once he has completed the oath, give him time to get seated comfortably in the witness chair. Only then should you ask him for the appropriate identifying information.⁷

A good procedure for handling this matter is found in Rule 16.3 of the *Rules of Practice Before Army Courts-Martial*. The trial counsel can simply ask the witness all the required information as a leading question so all the witness has to do is respond “Yes.” This gets all the information on the record, does not confuse the witness, and provides an efficient and smooth beginning to the testimony.

Suspenses

Meet them. They are not a surprise. Usually, they will be set out in the pretrial order or, in the absence of a pretrial order, in the *Rules of Practice before Army Courts-Martial* or the Rules for Courts-Martial. In those cases where you cannot meet them, ask the judge for an extension before the suspense expires. Not only is this a rule, it is basic professional courtesy. Failure to meet a suspense date set by the Court sends the signal that you are not prepared for trial. For example, how can a party be late submitting its witness list for trial when the witness list is due beyond the date the party said it was “ready” for trial at arraignment? How can you tell the Court you are “ready for trial” if you have not decided who you are going to call as witnesses? Post-referral is not the time to begin trial preparation. That may not be what is going on, but that is the impression it gives. As an advocate, you should always be mindful of the appearance of your actions.

As mentioned, if you know you will not be able to meet a suspense date, contact the judge and ask for an extension *prior* to the suspense date. New evidence may be discovered, witnesses’ testimony may change, or any

also to avoid those avoidable hiccups during trial that negatively impact counsels’ credibility. No judge wants you to look bad on the record.

⁷ Both trial and defense counsel should consider taking their witnesses into the courtroom as part of their witness preparation. Actually seeing where the witness will need to walk and sit when actually testifying will go a long way toward alleviating some of their nervousness.

number of things may happen that require you to seek additional time. Be proactive when this happens. Do not put judges in the position of having to constantly contact counsel to keep cases moving.

A final thought about suspenses: they are not a “no earlier than” date. It is certainly permissible (and appreciated) to receive some information earlier than the suspense date. What better way to show opposing counsel and the Court you are ready for trial than providing information earlier than required? You are ready to go! Do you want to be known as a counsel who keeps things moving

or one constantly struggling to keep up? This is especially true with notice of forum and pleas. As these two decisions have a direct impact on docketing, the earlier you can provide this information to the Court, the more efficient the Court can be in allocating time and resources.

Conclusion

“Make the routine, routine.” It sounds simple. All it takes is a little time and attention to detail.

Gentlemen Bastards: On the Ground in Afghanistan with America's Elite Special Forces¹

Reviewed by *Captain Israel D. King**

I think it is hard to argue with the statement that Special Forces are America's most elite [S]oldiers. It is not because they can shoot the straightest, run the fastest, or do the most push-ups. What makes them special are their smarts. They are the smartest [S]oldiers on the battlefield. They can beat you with a handshake after a long negotiation just as easily as with a bullet.²

I. Introduction

In the fall of 2010, journalist Kevin Maurer journeyed to southern Afghanistan to follow the U.S. Army Special Forces.³ This would not be his first exposure to this highly select group⁴—he had already spent a significant amount of time with the Special Forces on other trips abroad.⁵ But this trip was going to be different.⁶ This time, he would have the access and the experiences he needed to write the sequel to Robin Moore's action-packed nonfiction novel *The Green Berets*.⁷ For ten weeks, Maurer accompanied the members of Special Forces Operational Detachment Alpha (ODA) 7316 as they worked to bring peace and stability to Kandahar Province, the birthplace of the Taliban.⁸ Ultimately, Maurer would be disappointed in his search for the kind of thrilling stories he had hoped to find.⁹ Instead, what he would experience is a no less important story about the quieter side of war.¹⁰

Gentlemen Bastards is Maurer's effort to give his story shape, to show the reader what life is like for the members of a Special Forces team when they are not in the thick of battle.¹¹ Writing from a first-person perspective, Maurer places the reader in his own shoes and allows the reader to see with Maurer's eyes as he describes the difficulties Special Forces teams encounter while training Afghan

counterparts, interacting with conventional units, and conducting missions that test their ability to win the "hearts and minds" of the populace.¹²

Through his narrative, an underlying theme emerges: the Special Forces approach to counterinsurgency is in every way superior to the conventional approach.¹³ Maurer's arguments along this line provide the context for the book's central thesis: Special Forces teams should be untethered from conventional control so that they can have the independence they need to be most effective.¹⁴ To support his thesis, Maurer often seizes the opportunity to portray conventional units in a negative light, characterizing their understanding and application of counterinsurgency strategy as inadequate, misguided, and even counterproductive in comparison with their Special Forces brethren.¹⁵

Despite the force of his arguments in support of the Special Forces, Maurer's biases and lack of objectivity undermine his credibility and thereby weaken his thesis. Ultimately, Maurer's arguments do not persuade. However, despite its flaws, *Gentlemen Bastards* remains an entertaining read that poses intriguing questions on the proper relationship between conventional and Special Forces units, offers valuable lessons on how to effectively apply counterinsurgency strategy, and evokes a vivid picture of life in southern Afghanistan at the dawn of the current decade that a judge advocate reader will appreciate if he selects the book for pleasure reading rather than for pure professional development.

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¹ KEVIN MAURER, *GENTLEMEN BASTARDS: ON THE GROUND IN AFGHANISTAN WITH AMERICA'S ELITE SPECIAL FORCES* (2012).

² *Id.* at 1.

³ *Id.* at 4–5.

⁴ *Id.* at 4.

⁵ *Id.*

⁶ *Id.* at 2.

⁷ *Id.* at 2, 5.

⁸ *Id.* at 1, 24.

⁹ *Id.* at 5.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*; see also U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. A-5 (15 Dec. 2006) ("Once the unit settles into the [area of operation], its next task is to build trusted networks. This is the true meaning of the phrase 'hearts and minds . . .'").

¹³ See generally MAURER, *supra* note 1, at 1–18 (discussing the history of the Special Forces along with its key accomplishments, core competencies, and expertise in counterinsurgency efforts).

¹⁴ *Id.* at 237–39.

¹⁵ See *id.* at 62 (describing a deficiency of training and know-how among conventional units), 66 (arguing that the infantry's affiliation with Governor Tooryalai Wesa damaged the military's credibility with the populace due to Governor Wesa's purported corruption), 134 (discussing the lack of effort by a conventional unit to build rapport with the civilian population within their battlespace).

II. Background

Maurer currently works as a reporter for the *Wilmington Star News* in Wilmington, North Carolina.¹⁶ Before joining the *Star News* in 2011, Maurer worked as a reporter for the *Fayetteville Observer* in Fayetteville, North Carolina.¹⁷ It was while working at the *Observer* that Maurer's managing editor gave Maurer the opportunity to write about the military at nearby Fort Bragg.¹⁸ Over his eight years with the *Observer*, Maurer would gain an intimate familiarity with the Special Forces, culminating in five embeds with Special Forces units abroad.¹⁹ Aside from *Gentlemen Bastards*, Maurer's writing credits include co-authoring *Valleys of Death: A Memoir of the Korean War*; *Lions of Kandahar: The Story of a Fight Against All Odds*; *No Way Out: A Story of Valor in the Mountains of Afghanistan*; and *No Easy Day: The Firsthand Account of the Mission That Killed Osama Bin Laden*.²⁰

III. The Special Forces/Conventional Unit Struggle

The setting for Maurer's tale is Afghanistan in the midst of President Obama's surge, the effort that, in late 2009, brought an additional 30,000 troops into Afghanistan to beat back a resurgent Taliban and build a stable Afghan government.²¹ Maurer believes that the surge, with its emphasis on building stability as a precursor for an American withdrawal, provided the impetus needed to allow Special Forces to escape the raid-based mission structure foisted upon it by the military establishment and get back to doing what it does best: training indigenous forces and building support for the government from the bottom up.²²

Maurer's goal is to observe and record the actions of a Special Forces team as it executes these twin missions within the context of Village Stability Operations (VSO).²³ When that plan falls through, Maurer settles for the less exciting prospect of embedding with ODA 7316 as it mentors a battalion of Afghan National Civil Order Police (ANCOP) who are destined for deployment to the Zhari

District of Kandahar Province.²⁴ Maurer quickly begins the work of integrating into ODA 7316, and it is at this early stage that he begins to introduce the reader to the tensions that exist between the Special Forces and conventional units.²⁵ But it is not until Maurer accompanies ODA 7316 into the field that this tension escalates and assumes a prominent place in the narrative.

Maurer conceptualizes this tension as a struggle between the desire of Special Forces for more independence and the desire of conventional commanders for more control.²⁶ Maurer's position that the Special Forces must have more independence to operate effectively is supported by a series of illustrations designed to contrast Special Forces virtues with conventional vices. For example, when ODA 7316 encounters infantry units "cowering" in their bunkers wearing body armor to protect against persistent rocket attacks, Maurer makes it sound obvious that unit leadership should take a page from the Special Forces playbook and send out patrols to kill or capture the attackers.²⁷ Later, when ODA 7316's team leader meets with a conventional brigade commander, Maurer portrays the team leader as eminently reasonable while depicting the conventional commander as a buffoon whose only purpose in the meeting was to showcase his ego and let the team leader know who is boss.²⁸ The reader comes away from these illustrations feeling as if conventional units are so incompetent that they lack any standing upon which to contest the view that Special Forces should be allowed to operate independently. Unfortunately, this approach overly simplifies what is an inherently complex issue.²⁹

IV. The Weaknesses of Maurer's Writing

Ultimately, Maurer overextends himself in his effort to glorify the Special Forces at the expense of conventional units and leaders. Had Maurer taken a different approach and made it clear that he had considered other points of view, he would have been more persuasive. Unfortunately, there is nothing in Maurer's writing to indicate that he took

¹⁶ *Topics—Kevin Maurer*, STAR NEWS ONLINE, <http://www.starnewsonline.com/section/topic/0115> (last visited July 28, 2014).

¹⁷ MAURER, *supra* note 1, at 4.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Books*, KEVIN MAURER, AUTHOR, <http://kevinmaurer.net/books/> (last visited July 28, 2014).

²¹ JOSEPH J. COLLINS, UNDERSTANDING WAR IN AFGHANISTAN 81–84 (2011).

²² MAURER, *supra* note 1, at 13.

²³ *Id.* at 13–14.

²⁴ *Id.* at 20.

²⁵ *See id.* at 40–47. In spending time with the members of Operational Detachment Alpha (ODA) 7316 on the boardwalk of Kandahar airfield, Maurer highlights the thinly-veiled disgust the Special Forces have for nearly everyone they see, individuals who, in Maurer's words, "do everything but fight the war." *Id.* at 40.

²⁶ *Id.* at 237–39.

²⁷ *Id.* at 89–91.

²⁸ *Id.* at 162.

²⁹ *See generally* MAJOR GRANT M. MARTIN, SPECIAL OPERATIONS AND CONVENTIONAL FORCES: HOW TO IMPROVE UNITY OF EFFORT USING AFGHANISTAN AS A CASE STUDY (2009), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA513467> (identifying challenges and recommending solutions to the unity of effort problem between Special Operations Forces and conventional units).

this approach. Not once does Maurer discuss any efforts he made to talk to conventional leaders and incorporate their perspectives. Nor does he attempt to reassure the reader that his opinions are informed by a review of the scholarly literature by citing to authorities who have weighed the issue.³⁰

Although Maurer's uneven approach to his subject matter is disappointing, it is not unexpected given Maurer's apparent biases. From the very beginning, Maurer makes it clear that his goal is to lose his objectivity while he is in Afghanistan.³¹ In his own words, he wants to go "all in."³² Later, as Maurer recounts his efforts to integrate into ODA 7316's culture, the reader is left with the distinct impression that Maurer's attempts to ingratiate himself are motivated just as much by hero worship as by a desire to cultivate rapport.³³ Finally, once Maurer has earned his place on the team, he confirms his bias by expressing his contempt for conventional forces and stating unequivocally that he has taken on the mindset of a Special Forces member.³⁴

V. Alternate Viewpoints

While Maurer does a less-than-stellar job of supporting his arguments, it would be a mistake to dismiss his theories out-of-hand. The ultimate question of what relationship Special Forces units should have with conventional units remains open. Linda Robinson, the author of *Masters of Chaos: The Secret History of the Special Forces*, has expressed the view that a loose leash is best given that Special Forces training is designed to create a Soldier capable of great innovation while remaining within the bounds of law and policy.³⁵ In her opinion, the Special Forces are "at greater risk of being straitjacketed by conventional-minded commanders, fearful bureaucrats, and technology that fosters micromanagement than of becoming rogue agents running rampant."³⁶ On the other hand,

³⁰ He could have cited to numerous authorities. The tension between Special Forces and conventional units is a popular topic in the Special Forces literature. See ROBIN MOORE, *THE GREEN BERETS* 208–14 (1965) (describing an encounter between a Special Forces major and a conventional unit colonel); see also LINDA ROBINSON, *MASTERS OF CHAOS: THE SECRET HISTORY OF THE SPECIAL FORCES* 153–89 (2004) (using case studies to support the argument that Special Forces units in Afghanistan have worked better when they have more autonomy).

³¹ MAURER, *supra* note 1, at 5–6.

³² *Id.* at 5.

³³ See *id.* at 42 (where Maurer describes his efforts to integrate into ODA 7316 as trying to fit in with the "cool kids"); see also *id.* at 34 (where Maurer describes his efforts to do well on the shooting range as an attempt to maintain his "cool points" with the Special Forces team).

³⁴ *Id.* at 64.

³⁵ ROBINSON, *supra* note 30, at 366.

³⁶ *Id.*

Douglas Waller, author of *The Commandos: The Inside Story of America's Secret Soldiers*, expresses the view that more external control of the Special Forces and other special-operations groups is necessary precisely because of their strengths:

So intensely focused are they on mission, they can become tunnel-visioned to larger strategy. So close do they become to the turmoil on the ground, "they are almost proud of the fact that broader political questions aren't their concerns," says RAND Corporation analyst Benjamin Schwartz. So rigorous is their selection, so gruelingly thorough their training, they can be blinded by a can-do attitude.³⁷

Although a review of military scholarship on the issue reveals an effort to reconcile competing Special Forces and conventional-unit interests, the presence of personality conflicts and struggles over power and influence within the calculus makes this problem a tough nut to crack.³⁸

VI. Lessons Learned

While Maurer's writing is weak in some areas, it remains strong when he sticks to recounting his personal experiences, particularly when he explores and enlivens subject matter that many writers would consider boring or unworthy of comment.³⁹ As remarked by one reviewer, *Gentlemen Bastards*, rather than dwelling on combat, "presents the 95 percent of wartime experience that is much more common—a daily, punishing grind that saps motivation and makes each day a little more tedious than the one that came before."⁴⁰

Of particular interest to the military reader are the chapters in which Maurer explores the interactions between the members of ODA 7316 and their Afghan counterparts. The Americans face significant challenges from the very beginning: the Afghan battalion commander is absent, the commander's executive officer is more interested in getting handouts than doing his job, and the troops themselves are

³⁷ DOUGLAS C. WALLER, *THE COMMANDOS: THE INSIDE STORY OF AMERICA'S SECRET SOLDIERS* 369 (1995).

³⁸ See generally MARTIN, *supra* note 29.

³⁹ See generally BEN STEELMAN, *Review—Gentlemen Bastards a Fine Account*, STAR NEWS ONLINE (Sept. 12, 2012, 12:30 AM), <http://www.starnewsonline.com/article/20120902/ARTICLES/120839942>.

⁴⁰ NATHAN S. WEBSTER, *Book Review: Gentlemen Bastards by Kevin Maurer*, WAR ON TERROR NEWS (Nov. 26, 2012), <http://waronterrornews.typepad.com/cgtwa/2012/11/book-review-gentleman-bastards-by-kevin-maurer.html>.

unmotivated and occasionally insubordinate.⁴¹ To overcome these challenges, the Americans have to apply techniques that run the full length of the counterinsurgency spectrum: they build rapport, treat their counterparts like equals, serve as the example, enforce discipline, and share freely of themselves and their expertise.⁴²

The lesson the reader can glean from these pages is that when working to build capacity in the Afghan security apparatus, the key to success is caring as much about one's partners and their success as much as about oneself.⁴³ Fortunately, the Special Forces example is one that others can benefit from, as the problems they encounter are not unique.⁴⁴ Conventional Soldiers who mentor and train Afghan security forces are likely to encounter similar issues, as are judge advocates who deploy in support of Rule of Law and Security Cooperation operations.⁴⁵ These groups would do well to take heed of what the Special Forces can teach, particularly given the likelihood that U.S. forces will continue to serve in support-and-advisory roles in Afghanistan into the foreseeable future, even beyond the planned pull-out in 2014.⁴⁶

VII. Conclusion

After taking into account issues with Maurer's credibility and the reliability of his exposition, Maurer's arguments fail to persuade the reader of the truth of his thesis. However, despite its deficiencies, *Gentlemen Bastards* is well worth the read. First, the issues he raises do much to inform the reader of the conflict that exists between the Special Forces and conventional units, and provide a good starting point for further study on this topic. Second, the book gives us a rare and valuable insight into the mindset of the Special Forces. Third, Maurer offers poignant depictions of military operations and Special Forces interactions with Afghans at the lowest levels, depictions that should assist judge advocates and other Soldiers as they work to accomplish their own counterinsurgency missions. Always thought-provoking and entertaining, *Gentlemen Bastards* deserves a place on the reader's shelf.

⁴¹ MAURER, *supra* note 1, at 51, 52–57, 116–20.

⁴² *Id.* at 76, 125, 154.

⁴³ *Id.* at 188.

⁴⁴ See generally CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES 207–25 (2011) (describing challenges facing Rule of Law operations in Afghanistan).

⁴⁵ While deployed in support of Afghan Rule of Law operations in 2011, this reviewer encountered difficulties in dealing with Afghan counterparts that eerily mirror those that faced ODA 7316. By understanding and applying the counterinsurgency principles evinced by the Special Forces, judge advocates will be much better equipped to foresee potential difficulties and attack them head-on.

⁴⁶ Kristina Roman, *Some U.S. Troops to Stay in Afghanistan After 2014*, WASH. TIMES, Sept. 8, 2013, <http://www.washingtontimes.com/news/2013/sep/8/some-us-troops-to-stay-in-afghanistan-after-2014/print/>.

The Dispensable Nation: American Foreign Policy in Retreat¹

Reviewed by Major Melvin L. Williams*

Our aim for the past four years has been to engage less, do less, and have a smaller footprint. But then we should be prepared to also matter less and influence less [W]e have gone from leading everywhere to leading nowhere.²

I. Introduction

As events have unfolded in the greater Middle East over the past several years, from the wars in Iraq and Afghanistan to the crises in Egypt, Libya, and Syria, American foreign policy under President Barack Obama has increasingly weakened, failing to provide the necessary global leadership expected of the world's "one indispensable nation."³ At least that is what Vali Nasr contends in his latest book, *The Dispensable Nation: American Foreign Policy in Retreat*, a shrewd and revealing account of his two years working in the Obama administration.

In *Dispensable Nation*, Nasr⁴ presents a thought-provoking appraisal of the current state of America's foreign policy and its results by simultaneously articulating three stories. First, he details the contentious working relationship between the White House and the State Department, in particular with the Special Representative for Afghanistan and Pakistan (SRAP)—the late Richard C. Holbrooke. Second, Nasr provides an insightful review of broad U.S. foreign policy as well as the administration's diplomatic shortfalls. Lastly, he concludes with an assessment of the "coming geopolitical competition with China."⁵

Part memoir, part history lesson, and all critique, *Dispensable Nation* proves to be valuable, timely, and

relevant. While Nasr attempts to offer solutions for the perceived failures of President Obama's administration, a preponderance of Nasr's prescribed courses come across as equivocal and possibly unrealistic. However, the foreign policy contextual framework he provides, coupled with the rational arguments for American engagement instead of withdrawal, make this book a worthwhile read.

An expert in Middle Eastern affairs, Nasr has previously written two books: *Forces of Fortune: The Rise of the New Muslim Middle Class and What It Will Mean for Our World* (2009) on the new business-minded Islamic middle class that ultimately led to the 2011 uprisings known as the Arab Spring,⁶ and *The Shia Revival: How Conflicts Within Islam Will Shape the Future* (2006) on the Sunni-Shia feud that drove the postwar insurgency in Iraq. Against this backdrop, Nasr is well-equipped to distill the information and observations he gleaned from his personal involvement in State Department inner dealings and better able than his contemporaries to dissect the "implications of [the] Obama administration's foreign policy on American strategic interests."⁷

II. Holbrooke's Swan Song

Nasr opens *Dispensable Nation* by shedding light on the dynamics of the White House and State Department relationship, chronicling bureaucratic infighting, clashing of personalities, and differences in policy making and philosophy.⁸ As envoy to Afghanistan and Pakistan, or "AfPak" as it was styled, Richard Holbrooke undertook the charge for AfPak diplomatic initiatives.⁹ In Nasr's telling,

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¹ VALI NASR, *THE DISPENSABLE NATION: AMERICAN FOREIGN POLICY IN RETREAT* (2013).

² *Id.* at 252.

³ President Barack H. Obama, State of the Union Address (Jan. 24, 2012) (quoting former U.S. Sec'y of State Madeleine Albright), available at <http://www.whitehouse.gov/state-of-the-union-2012>.

⁴ Vali Nasr presently serves as Dean of the Paul H. Nitze School of Advanced International Studies at Johns Hopkins University. He is also currently a member of the U.S. Department of State's Foreign Affairs Policy Board and a director of the Rockefeller Brothers Fund and the National Democratic Institute, and has life membership on the Council on Foreign Relations. Selected by Ambassador Richard Holbrooke, Nasr served as a key advisor on the Special Representative for Afghanistan and Pakistan (SRAP) team from 2009 to 2011, leaving the State Department soon after Holbrooke's death in December 2010. *Faculty Directory*, JOHNS HOPKINS SCH. OF ADVANCED INT'L STUD., <http://www.sais-jhu.edu/faculty-and-scholarship/faculty-profiles/vali-r-nasr-phd> (last visited July 29, 2014) [hereinafter *Faculty Directory*].

⁵ NASR, *supra* note 1, at 3.

⁶ Beginning on 18 December 2010, the Arab Spring was a series of protests, demonstrations, and rebellions that swept across the Middle East and North Africa, resulting in several governments being overthrown. For more background and perspective, see Lisa Anderson, *Demystifying the Arab Spring*, FOREIGN AFF. (May/June 2011), available at <http://www.foreignaffairs.com/articles/67693/lisa-anderson/demystifying-the-arab-spring>, and Jack A. Goldstone, *Understanding the Revolutions of 2011*, FOREIGN AFF. (May/June 2011), available at <http://www.foreignaffairs.com/articles/67694/jack-a-goldstone/understanding-the-revolutions-of-2011>.

⁷ See *Faculty Directory*, *supra* note 4.

⁸ For further discussion on the internal strife within the Obama administration, see JAMES MANN, *THE OBAMANS: THE STRUGGLE INSIDE THE WHITE HOUSE TO REDEFINE AMERICAN POWER* (2013); RAJIV CHANDRASEKARAN, *LITTLE AMERICA: THE WAR WITHIN THE WAR FOR AFGHANISTAN* (2013); and BOB WOODWARD, *OBAMA'S WARS* (2011).

⁹ NASR, *supra* note 1, at 7.

Holbrooke was “a brilliant strategic thinker in the same league as such giants of American diplomacy as Averell Harriman and Henry Kissinger.”¹⁰ Yet even with his diplomatic bona fides and notable accomplishment of overseeing the 1995 Dayton peace accords, Holbrooke was stymied on practically every front during his tenure, including when he was finally leading Afghanistan on a path to reconciliation.¹¹

For his part, Nasr portrays Holbrooke—and to a lesser extent, Hillary Clinton—as a sympathetic figure, cast as the champion who was always overruled by the White House, military departments, and intelligence agencies. Nasr depicts a White House “on a warpath with Holbrooke,”¹² where marginalizing Holbrooke’s role was an effort that ultimately undermined U.S. policy abroad, including the assertion that the White House deliberately did not “[talk] to the Taliban [because it] would give Holbrooke a greater role.”¹³

Given Nasr’s daily interactions with Holbrooke and his own extensive knowledge of Middle East geopolitics, such a narrative is understandable; however, it fails to account for the harm Holbrooke did to his status in 2009 with the Obama administration,¹⁴ and it glosses over apparent shortcomings with Arab leaders¹⁵ while never identifying what success looks like in AfPak. To be sure, Holbrooke’s treatment by the White House and others was degrading, including being left out of important meetings and conferences.¹⁶ It is

¹⁰ *Id.* at 29.

¹¹ *Id.* at 56. The *General Framework Agreement for Peace in Bosnia and Herzegovina*, also known as the *Dayton Agreement*, is the peace agreement that formally ended the Bosnian War. In November 1995, the warring factions reached an agreement at Wright-Patterson Air Force Base near Dayton, Ohio, and formally signed the agreement in Paris on 14 December 1995. Richard Holbrooke was the lead negotiator and chief architect who helped broker the peace agreement. For details into his role leading up to and during the tense period of negotiations, see Roger Cohen, *Taming the Bullies of Bosnia*, N.Y. TIMES, Dec. 17, 1995, available at <http://www.nytimes.com/books/98/05/17/daily/holbrooke-profile.html>.

¹² NASR, *supra* note 1, at 38. Nasr acknowledges that each administration deals with internal turf battles. However, Nasr believes that Obama’s inner circle “resented losing [Afghanistan and Pakistan (AfPak)] to the State Department,” which meant that Holbrooke “was in their way and kept the State Department in the mix on an important foreign policy area.” *Id.* Nasr points out that the “White House tried to blame Holbrooke for leaks to the press[,]” and blocked any attempt by SRAP to propose reconciliation and diplomatic engagements with the Taliban and region at large. *Id.* at 36–37.

¹³ *Id.* at 40.

¹⁴ See, e.g., CHANDRASEKARAN, *supra* note 8, at 93–94. Holbrooke openly supported opposing presidential candidates to incumbent Afghan President Hamid Karzai during the election of 2009, and Karzai’s indignation was relayed thru the U.S. Embassy to the Obama administration. *Id.*

¹⁵ NASR, *supra* note 1, at 8–10.

¹⁶ *Id.* at 39. “Holbrooke was not included in Obama’s video conferences with Karzai and was cut out of the presidential retinue when Obama went to Afghanistan [O]n one occasion the White House AfPak team came up with the idea of excluding Holbrooke from the president’s Oval Office

evident that Nasr exudes passion, almost reverence, for his former boss, but his passion seemingly wanes into parochial complaints that diminish the efficacy of his arguments.

Despite these minor flaws, Nasr is at his best when he is stating the problems of the U.S. foreign policy process, framing the issues in the respective Middle Eastern monarchies and South Asian nations, illuminating the nuances of political Islam, and attempting to recommend the way ahead for each challenge. This is clear when Nasr boldly suggests that the Obama administration’s foreign policy should have followed Holbrooke’s diplomatic lead on Afghanistan¹⁷ instead of employing a counterinsurgency (COIN) strategy: Holbrooke believed that COIN operations would never work because Afghanistan’s government was too corrupt and that the more earnest issue at hand was Pakistan.¹⁸

Too often, President Obama would defer to his military commanders, choosing the “politically safe option that he did not like: [giving] the military what they asked for” by fully resourcing COIN, which “failed to achieve its objective.”¹⁹ Nasr argues that had the administration implemented Holbrooke’s plan to talk to the Taliban beginning in 2009, the outcome of the exit from Afghanistan would have been noncatastrophic and could have potentially ended with the Taliban’s surrender.²⁰ More importantly, though, President Obama was signaling his message that diplomacy would take a backseat to military intervention as the cornerstone of his foreign policy.²¹

III. Troops over Diplomacy

In reality, President Obama chose Soldiers over diplomats because he did not want to be seen as “soft.”²²

meeting with Karzai and then having Obama tell Karzai, ‘Everyone in this room represents me and has my trust’ (i.e., not Holbrooke).” *Id.*

¹⁷ *Id.* at 28.

¹⁸ *Id.* at 16.

¹⁹ *Id.* at 25.

²⁰ *Id.* at 57.

²¹ *Id.* at 50. But see Mark Landler, *Obama Defends U.S. Engagement in the Middle East*, N.Y. TIMES, Sept. 24, 2013, available at http://www.nytimes.com/2013/09/25/us/politics/obama-iran-syria.html?ref=middleeast&_r=1&. Based on his recent actions, President Obama has placed diplomacy at the forefront of his foreign policy as it relates to the United States’ involvement with Iran, Syria, and Ukraine. See also Ryan Lizza, *The Consequentialist*, NEW YORKER (May 2, 2011), available at http://www.newyorker.com/reporting/2011/05/02/110502fa_fact_lizza?currentPage=all (arguing that the Arab Spring helped reshape President Obama’s foreign policy, which others have commented as a “lead from behind” doctrine).

²² NASR, *supra* note 1, at 36. “A Democratic president may be too vulnerable to public opinion on national security issues to make tough decisions.” *Id.* at 127.

Nasr views the optics of placing hard power before diplomacy as shortsighted, asserting that “[m]ilitary might is supposed to be an instrument in the diplomat’s tool kit,” not vice versa.²³ In other words, successful intervention is the result of diplomatic efforts and economic assistance, in addition to military and intelligence involvement. Otherwise, a monolithic solution is fleeting; even past military leaders have recognized this belief.²⁴ Nasr points out that America’s influence in the AfPak region has lessened due to the advent of COIN operations there, only to be followed up with the abrupt decision to withdraw all troops by a specified deadline.²⁵ It is not a stretch to say that Nasr, consistent with his former boss’s thinking, believed that the military was in over its head.

To bolster his argument, this notion is reinforced in Nasr’s chapter on Pakistan, one of the most significant in his book. In Nasr’s estimation, military successes in Afghanistan can partly be attributed to “Pakistani cooperation.”²⁶ He candidly labels Pakistan as “a failure of American policy, a failure of the sort that comes from the president handing foreign policy to the Pentagon and the intelligence agencies.”²⁷

Is this position a fair criticism of the Obama administration regarding Afghanistan and Pakistan? Maybe not. Ironically, in describing the bases for failure, Nasr lays out the very reasons the administration made the choices it did. For example, it is understandable why President Obama chose to import a COIN strategy in Afghanistan when it had worked, at least nominally, in Iraq;²⁸ the architects behind that strategy were available to implement the same model in Afghanistan;²⁹ and the U.S. public was growing weary of war and wanted it to end soon.³⁰

²³ *Id.* at 34.

²⁴ See 147 CONG. REC. S18457 (daily ed. Oct. 3, 2001) (statement of General Hugh Shelton) (“The military . . . is a very powerful hammer. But not every problem we face is a nail.”).

²⁵ NASR, *supra* note 1, at 59. President Obama will withdraw all U.S. troops by the end of 2016. Andrew Tilghman, *Obama: Time to Turn the Page on Decade of War*, ARMY TIMES, May 27, 2014, available at <http://www.armytimes.com/article/20140527/NEWS05/305270037/Obama-Time-turn-page-decade-war>. President Obama’s plan calls for leaving approximately 9,800 military personnel in Afghanistan for one year after the current combat mission ends in December 2014, and will drop to 5,000 U.S. troops by the end of 2015. *Id.*

²⁶ NASR, *supra* note 1, at 64.

²⁷ *Id.* at 94.

²⁸ *Id.* at 20–28.

²⁹ *Id.* at 18. For the views of the commanders who led counterinsurgency operations in Afghanistan, see GEN. STANLEY MCCHRISTAL, *MY SHARE OF THE TASK: A MEMOIR* (2013), and FRED KAPLAN, *THE INSURGENTS: DAVID PETRAEUS AND THE PLOT TO CHANGE THE AMERICAN WAY OF WAR* (2013).

Along the same lines, the administration operated in a mode to pressure, instead of encourage Pakistan because the country still “support[ed] the Taliban [and] terrorism.”³¹ Nasr’s case that winning Pakistan was simply a matter of “giving Pakistan more (much more) aid for longer (much longer)”³² too easily dismisses the environment of fiscal austerity the United States was facing, plus the difficulty in 2009 of getting large amounts of international economic aid through Congress. Arguably, Nasr’s positions can be construed as myopic because they are viewed retrospectively, not from the time when the decisions and the calculus behind those decisions were actually made.³³

Nasr also attacks the president’s approach to Iran and the Arab Spring.³⁴ Although Nasr applauds the lack of military action against Iran, he finds fault with solely using sanctions and isolation as the means to affect the situation in Iran because the end result will likely “cause regime collapse,” invariably “turn[ing] Iran into a failed state.”³⁵ Rather than take a hardline stance against Iran’s nuclear ambitions, which has had the opposite effect of amplifying Iran’s aggressiveness in pursuing enriched uranium in order to gain “strategic parity,”³⁶ Nasr promotes offering real incentives because “[t]ightening the noose around Iran’s neck is not changing its mind on going nuclear.”³⁷ To highlight this point, Nasr effectively draws a parallel between Iran and North Korea, stating that “[t]he problem with North Korea is not that it is a nuclear state . . . but that it is a dysfunctional and failing state, militaristic and radical, in a vital area of the world.”³⁸ In short, sanctions and isolation portend a similar fate for Iran.

Nasr does not parse words concerning his assessment of the Arab Spring. President Obama had an opportunity to shape the region but could not because he did not have a strategy in place³⁹—“he was not really committed to

³⁰ NASR, *supra* note 1, at 14; see also Jennifer Agiesta & Jon Cohen, *Poll Shows Most Americans Oppose War in Afghanistan*, WASH. POST, Aug. 20, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/19/AR2009081903066.html> (“A majority of Americans now see the war in Afghanistan as not worth fighting, and just a quarter say more U.S. troops should be sent to the country[.]”).

³¹ NASR, *supra* note 1, at 81.

³² *Id.* at 79.

³³ For a counterpoint to Nasr’s description of events, see Sarah Chayes, *What Vali Nasr Gets Wrong*, FOREIGN POL’Y (Mar. 12, 2013), available at http://www.foreignpolicy.com/articles/2013/03/12/what_vali_nasr_gets_wrong_obama_afghanistan.

³⁴ See *supra* note 6.

³⁵ NASR, *supra* note 1, at 137.

³⁶ *Id.* at 107.

³⁷ *Id.* at 139.

³⁸ *Id.*

democracy in the Middle East.”⁴⁰ More troubling still, the administration did not have an answer for the broader issues affecting regional stability: lack of “basic public services and infrastructure” to support a growing, youthful, and unemployed population,⁴¹ as well as the deepening divide in Sunni–Shia relations.⁴² Such a view, however, ignores the reality that these greater issues are not necessarily indicative of inadequate U.S. action, yet rather are a function of generations of repression, among other influencing factors. Quite somberly, the United States may not really be able to solve the vexing problems of the Middle East that have flummoxed American foreign policy throughout the past decade.⁴³

Indeed, Nasr raises serious points. He crafts what are, on the surface, seemingly sensible solutions to those issues, but in truth they appear oversimplified, glossing over complexities of the region with slogan-like retorts.⁴⁴ Are his expectations too grand? Nasr’s conclusions are drawn upon counterfactuals, a “could, would, should” game that is too soon to be definitive as the president is still in office and the events described are still evolving today without absolute resolution. Regardless, that in no way reduces Nasr’s brilliance, which lies in issue spotting with precise clarity, stage setting, often in great detail, and explaining strategic thinking—this is apparent when he writes about the changing dynamics of China and how the turf war with the United States will occur in the Middle East and not throughout the Pacific Rim.

IV. Challenging China in the Middle East

Nasr insists that the foremost concern of U.S. foreign policy, and where the United States can make its biggest strategic blunder, is its policy to contain China, dubbed the “pivot to Asia.”⁴⁵ Nasr’s chapter on China conveys the

singular importance of why engagement is needed in the Middle East: “The Middle East remains the single most important region of the world . . . because it is where the great power rivalry with China will play out and where its outcome will be decided.”⁴⁶ As the United States continues to disengage from the Middle East, China is delving into the region feet first, strengthening long-term friendships with Iran and Pakistan⁴⁷ as a way to procure oil and energy assets, secure logistics routes, and “as part of its policy of managing America.”⁴⁸

Offering a refreshing and novel take, Nasr builds the case to compel Middle East engagement by showcasing how intertwined China already is with Middle Eastern countries, from being “Pakistan’s largest defense supplier”⁴⁹ to “Iran’s largest trading partner.”⁵⁰ If the United States does not sustain or enlarge its footprint and consequently continue to exert its influence in the region, then China will sweep in and “fill the vacuum” to act as its steward.⁵¹

Moreover, Nasr laments that “a region dominated by China will begin to look like China,”⁵² and as such, China should supplant counterterrorism as America’s number one foreign policy priority.⁵³ Undoubtedly, China will continuously attempt to position itself as the preeminent global power vis-à-vis its currency, military, gross domestic product, trade, etc. But it may not be entirely accurate to classify a possible void in the Middle East as simply a problem-set with only a binary choice: either a U.S. or China hegemony—such hubris may be a narrow and limiting approach, or worse, a dangerous one.

V. Conclusion

Contrary to what the title suggests, Nasr does not “believe America is declining.”⁵⁴ Rather, he beckons for

³⁹ *Id.* at 160.

⁴⁰ *Id.* at 148.

⁴¹ *Id.* at 192.

⁴² *Id.* at 200–14.

⁴³ Foreign policy columnist Aaron David Miller astutely observed, “[t]here are no solutions to any of the Middle East’s problems, only outcomes.” Aaron David Miller, *No Good Options: U.S. Can’t Fix the Middle East, Nor Leave the Region*, NEWS TRIBUNE, June 29, 2014, available at <http://www.thenewstribune.com/2014/06/29/3266943/no-good-options-us-cant-fix-the.html?sp=99/447/>.

⁴⁴ For further discussion echoing the sentiment of Nasr’s use of generalizations, see Michiko Kakutani, *Superpower, Leading from Behind*, N.Y. TIMES, Apr. 18, 2013, at C27 (“The problem with this book is that its genuinely interesting analyses are often undermined by Mr. Nasr’s certainty about matters that are subject to an incalculable number of variables . . .”).

⁴⁵ NASR, *supra* note 1, at 215.

⁴⁶ *Id.* at 216.

⁴⁷ *Id.* at 240, 242. Pakistan also refers to China as an “all-weather” friend, implying America is not. *Id.* at 239; see also Krista Mahr, *How Pakistan and China Are Strengthening Nuclear Ties*, TIME (Dec. 2, 2013), available at <http://world.time.com/2013/12/02/how-pakistan-and-china-are-strengthening-nuclear-ties/>. For evidence of China fortifying its ties with Iran, see Ben Blanchard, *China Aims to Boost Military Relations with Iran*, REUTERS, May 5, 2014, available at <http://www.reuters.com/article/2014/05/05/us-china-iran-idUSBREA4407A20140505>.

⁴⁸ NASR, *supra* note 1, at 247.

⁴⁹ *Id.* at 240.

⁵⁰ *Id.* at 244.

⁵¹ *Id.* at 236.

⁵² *Id.* at 247.

⁵³ *Id.* at 249.

⁵⁴ *Id.* at 251.

“diplomacy and economic engagement [to return] to their rightful place.”⁵⁵ While the book—more or less a primer on current American foreign policy in the Middle East—may not yield a blueprint to necessarily overcome the challenges in the Middle East (although Nasr makes a valiant effort), it is undeniably beneficial for military professionals or denizens of foreign policy to keep as a resource in their kit bags.

On one hand, *Dispensable Nation* is a provocative read that attempts to serve as a rallying cry for more U.S. engagement; on the other hand, *Dispensable Nation* may unintentionally serve as a sobering reminder that “there cannot be an American solution to every world problem.”⁵⁶ The prudent approach will likely be somewhere in between.

⁵⁵ *Id.* at 252.

⁵⁶ President John F. Kennedy, Commencement Address at the University of Washington (Nov. 16, 1961), available at <http://www.jfklibrary.org/Asset-Viewer/Aw3MwwJMf0631R6JLmAprQ.aspx>.

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 (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC). Prior to enrollment in Phase I, students must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC, they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrollment in Phase I, please 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 TJAGLCS publications available through JAGCNet.

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

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

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

(3) If you want to view other publications, click on the “Publications” link below the “School” title 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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