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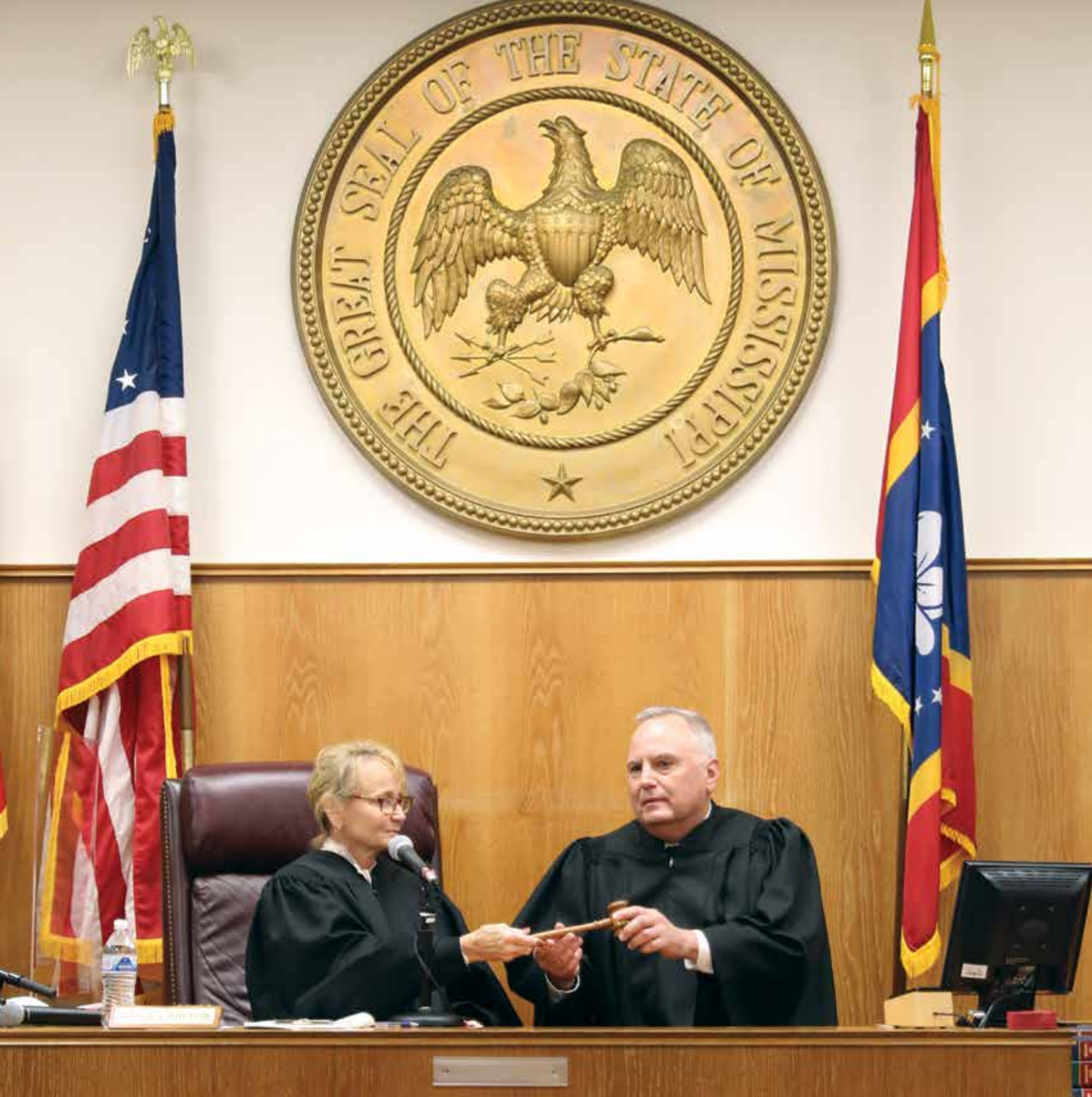

AROUND THE CORPS

Judge Virginia Carlton, retired Army JAG officer and presiding judge of the Mississippi Court of Appeals, gifts a gavel to COL Lawrence Austin, Sr., Mississippi Military Judge, during his promotion and investiture ceremony at Grenada County Court House, Grenada, Mississippi. COL Austin is tasked with overseeing the Mississippi National Guard's Military Justice program and presiding over courts-martial and administrative proceedings. (Credit: SGT Taylor Cleveland)

AROUND THE CORPS

The seal of the Fourth Judicial Circuit of the U.S. Army Trial Judiciary in the courthouse at Joint Base Lewis-McChord (JBLM) in spring of 2023. JBLM is now part of the Sixth Judicial Circuit. (Photo courtesy of MAJ Ian P. Sandall)

Army Lawyer

Editorial Board

Issue 2 • 2023

By Order of the Secretary of the Army

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Articles may be cited as: [author's name], [article title in italics], Army Law., [issue number], at [first page of article], [pincite].

On the cover: Past and current editions of the *Manual for Courts-Martial* displayed in the Atrium Deck at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia, in November 2023. (Credit: LTC Mary E. Jones)

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The motto of the Army's new OSTC is Veritas, Justitia, Fiducia, which translates into Truth, Justice, Trust. (Credit: Aerial Mike - stock.adobe.com)

Court Is Assembled

The Office of Special Trial Counsel

Veritas, Justitia, Fiducia

By the Headquarters of the Office of Special Trial Counsel

An underlying philosophy of American government is that its legitimacy rests on "the consent of the governed," and that consent is conditioned on public trust that the system will operate justly.[1] The truism that "[n]obody cares how much you know until they know how much you care"[2] applies as much to organizations as it does to individuals. In June 2012, director Kirby Dick released a documentary film featuring a group of Service members who, as part of a class action suit against the Department of Defense, claimed that the Services failed to properly respond to their sexual assault allegations.[3] The film, *The Invisible War*, asserted there were frequent sexual assault incidents within the military to which leaders had not appropriately reacted. The documentary sparked widespread interest among advocacy groups, Congress, and the broader U.S. population. The next year, General (GEN) Raymond Odierno, then-Chief of Staff of the Army, made "combating sexual assault and sexual harassment within . . . [the Army his] number-one priority."[4]

Trust: The Bedrock of Our Profession

In remarks to Congress, GEN Odierno focused on the trust needed between leaders and those they lead, arguing that the military "profession is built upon the bedrock of trust."[5] He also strongly advocated that "maintaining the central role of the commander in the military justice system is absolutely critical."[6] In the years since, Congress, the Army, and our sister Services instituted many changes to increase trust in the military justice system and victim care. Examples of just a few of the changes include withholding initial disposition authority for sexual assault allegations to colonels, removing a commander's power to disapprove certain court-martial findings

and sentences, and instituting the Special Victims' Counsel (SVC) Program, the expedited transfer policy, a restricted reporting option, brigade-imbedded victim advocate positions, and a commander-run Sexual Assault Response Board to track victim care.

Despite these changes, many observers remained concerned with the efficacy and fairness of the military justice system. Indeed, the tragic murder of Specialist Vanessa Guillén, a prior victim of sexual harassment,[7] eventually eroded Congress and the public's trust in military commanders to appropriately address sexual misconduct within the military.

However, there was evidence the military achieved some objectives in its effort to address sexual assault: the estimated rates of sexual assault in the Army[8] are below the rate estimated to occur on college campuses.[9] It is reasonable to use campus life as a benchmark because the students living there share many, albeit not all, of the relevant characteristics as Service members. Further, a congressionally mandated committee examining the health of the military justice system concluded that military commanders had not failed to send cases with sufficient evidence to trial.[10] Finally, even before but especially after the 2014 reforms, the military justice system's comprehensive victim care through the provision of SVC services is practically without precedent in any civilian jurisdiction.[11]

Despite these successes, there continued to be, rightly, an expectation that Service members and military leaders be held to a higher standard of performance. Additionally, behind-the-scenes successes rarely draw applause, and as others have recognized, "justice should not only be done, but should manifestly and undoubtedly be seen to be done."[12] The erosion of the public's and, more concerningly, Soldiers' trust in the military's ability to prevent and respond to sexual assault led to a new approach. Extending the legal principle of open justice and the public trial, which requires presumptive openness of judicial proceedings to the public and the media, there is important value in timely sharing information while still protecting stakeholders' interests to strengthen trust in the military justice system.[13]

The National Defense Authorization Act for Fiscal Year 2022: A New Chapter in Military Justice

In 2021, a majority of political leaders determined that the Military Services required a significant change in who decides which cases go to trial. In the waning days of 2022, Congress compromised on an agreement that would, for the first time in our Nation's history, shift the responsibility of deciding which criminal allegations should be tried by court-martial from commanders to judge advocates (JAs).[14] Congress chose eleven offenses (expanded to fourteen the next year[15]) to be covered under the new statute. The new law requires specially trained JAs, titled special trial counsel[16] (STCs), to make referral decisions and to be detailed to subsequent courts-martial when covered offenses are alleged.[17] While commanders remain responsible for good order and discipline, court-martial logistics, and, critically, for the care of their Soldiers (victim and accused), STCs now have the responsibility to determine whether there is sufficient evidence to charge and try a covered offense.

The statute and subsequent policy give STCs six primary responsibilities. First, they are to advise on the investigation of covered offenses. Second, they alone determine whether an allegation is a covered offense.[18] Third, they may exercise authority over other offenses an accused may have committed in addition to a covered offense, and also any offense committed by people related to a covered-offense case.[19] Fourth, STCs possess independent authority to determine which allegations should be referred to court-martial and which should be returned to commanders and their legal advisors for action.[20] Fifth, STCs have the authority to enter into plea agreements with an accused.[21] And finally, the statute gives the lead special trial counsel the sole authority to decide when to file an appeal in a covered-offense case under Article 62, Uniform Code of Military Justice.[22]

The Army has organized its Office of Special Trial Counsel (OSTC) into twenty-eight field offices, which in most cases are embedded in installation military justice shops. Those twenty-eight field offices fall under one of eight chief circuit STCs who supervise the field offices and their OSTC personnel.

What Constitutes Success for This New Organization and the Army?

Understanding the objective is the first requirement to achieving that objective, and the first requirement to establishing an objective is ensuring that it is possible to achieve. It is a tragic truth that while "Thou shalt not kill" has been written into civilization's earliest written laws,[23] murder remains a sad societal reality. Likewise, the "War on Drugs" declared by President Richard Nixon in 1971[24] has not eliminated drug abuse, which last year killed 109,357 in the United States.[25] Prosecutions of sexual assault—in any jurisdiction—cannot alone eradicate occurrences of sexual assault.

If ending sexual assault is impossible via prosecution, what then, does success look like for the Army and its OSTC? In short, the answer is ensuring that evidence is impartially evaluated and professionally presented, victims are treated respectfully, accused Soldiers are prosecuted fairly, and consequently, there is a promotion of trust in the military justice system.[26]

The motto of the Army's new OSTC is *Veritas, Justitia, Fiducia*, which translates into Truth, Justice, Trust. These three principles are the bedrock of this new organization, and they feed into the five primary OSTC priorities as we prepare to begin operations. Those priorities are: first, making wise, responsible decisions based on the law, evidence, and provable facts on behalf of the Army community; second, professionalism; third, zealous prosecutions that protect due process for an accused and seek justice for victims and the larger Army community; fourth, victim care throughout the investigative and prosecution processes; and finally, clearly communicating the work of Army prosecutors to the larger community to establish trust.

Veritas (Truth)

Wise, Responsible Decisions on Behalf of the Army Community

Making wise, responsible decisions based on credible and admissible evidence—what the facts lead us to believe is true—is critical to promoting trust. To find the truth, STCs

(Credit: moodboard - stock.adobe.com)

will work with law enforcement to gather all available evidence, objectively analyze that evidence, and make sound decisions based on the evidence and law. This sequence is essential to earn the public's trust. Prosecutors take cases, victims, and facts as they find them, and the duty of an STC, like all prosecutors, is to make responsible decisions based on facts they can prove in accordance with the law, not on what they wish they can prove.

The statute establishing OSTC specifically provides STCs with independence in making prosecutorial decisions. In light of this independence, who is the STC's client? On whose behalf does the STC operate? Of course, a trial counsel always prosecutes an accused in the name of the United States.[27] Army Regulation 27-26, *Rules of Professional Conduct for Lawyers*, specifies that the Army is a JA's client unless specifically assigned to represent an individual client.[28] The Office of Special Trial Counsel interprets "the Army" broadly. We consider our client the Army *community*, which includes: the Army enterprise as led by the Secretary, Chief of Staff, and commanders at all levels; Soldiers; Families, on post and off; Department of the Army Civilians; and others who live and work among us or are affected by our presence. Those recovering from the traumatic experience of a crime as well as those moving through the judicial process in their defense against an allegation are all critical segments of the community requiring special care. Responsible decisions take into account the interests of the entire community using the factors in *Manual for Courts-Martial* Appendix 2.1, such as "the nature, seriousness, and circumstances of the offense"; the "extent of harm caused to any victim" and their views; "the accused's willingness to cooperate" and "history of misconduct"; and "the effect of the offenses on the morale, health, safety, welfare, and good order and discipline of the command."[29]

There is also a fine line between hard cases the Government should try and cases where the evidence is insufficient to obtain a conviction. The Office of Special Trial Counsel will continue to refer hard cases to trial, as we know commanders have done in the past. But unlike some cases that may have been referred based solely on the existence of probable cause, and consistent with our duties to prosecute zealously and fairly on behalf of our entire Army community,

OSTC attorneys have been counseled to only refer cases in which the evidence is "likely [to] be sufficient to obtain and sustain a conviction."[30]

With a willingness to take on hard cases, one should not expect across-the-board convictions—"likely to" does not mean "always will," and trials are, as all litigators know, dynamic events. Proof beyond a reasonable doubt is—and should be—a high evidentiary standard. And in any event, measuring the success of OSTC using conviction rates is a disservice to victims who find meaning in their participation simply wishing to be heard. Another reason conviction rates are an inappropriate measuring stick is that their use disincentivizes taking on difficult cases that may warrant a trial.

What is a must is that—in every case—STCs objectively weigh all admissible evidence, consider the likely effect on the factfinder in light of the law, and professionally try cases. We owe that to the community. As the public sees prosecutors making wise, responsible decisions and, in most cases, getting results favorable to the community, trust will increase.

Victim Care

While the STC's client is the Army—and the United States—often our cases depend on victims stepping forward and testifying truthfully about terrible acts. Consequently, victim care is a moral imperative essential to our mission. One of our top priorities is consistent and candid communication with those who may be victims of crime. A special victim liaison, embedded into every OSTC field office, will work with the victim and the STC to develop a Victim Engagement Plan. The plan will document victim preferences on how and when OSTC communicates with that victim and set expectations on what to expect moving forward. Victims will receive a copy of their personalized plan.

At the conclusion of every investigation or court-martial, a member of the prosecution team will personally discuss with each alleged victim, or their SVC if the victim prefers, the disposition decision or court-martial result. A candid and empathetic conversation on the decisions reached is critical. It is the nature of criminal justice that some may be dissatisfied with a prosecutor's decision, a panel's findings, or a judge's sentence, but everyone deserves to be respectfully informed of a decision not to prosecute or to agree to a plea, as well as receive assistance in understanding the results of a trial.

Eventually, we recommend establishing a victim feedback mechanism to gauge victims' perspectives on how the prosecution team treated them during the adjudication process. Victim feedback is the best way to gauge progress; did the victim feel heard, informed, and treated with respect? If they did, we begin to build back trust.

Communication with Commanders and Staff Judge Advocates

Congress gave OSTC complete independence, subject to the direction of the Secretary of the Army, to refer or defer covered offense allegations. Its independence will allow it to make disposition decisions that are binding on the command.[32] However, Congress also directed that commanders for both the accused and a victim should have the opportunity to make recommendations.

Additionally, Congress kept commanders in charge of funding litigation expenses and completing all administrative functions of a court-martial, such as witness production, convening a court with panel members, and provision of bailiffs and court reporters, among other duties. The statutory authorities commanders have, such as making disposition recommendations and administratively supporting courts-martial, require synchronization between OSTC, local Offices of the Staff Judge Advocate (OSJAs), and commanders. Local staff judge advocates (SJAs) and their staffs will continue to be the primary legal advisors to commanders, but STCs will be available to explain decisions.

In order to train a bench of future STCs, local trial counsel should also be detailed to covered-offense cases to assist, and many allegations may eventually be deferred to commanders for nonjudical and administrative action. To be successful, STCs, chiefs of justice, trial counsel, and SJAs must work together to seamlessly administer justice. And commanders, who remain responsible for good order and discipline and the welfare of all Soldiers—whether an accused, a witness, or a victim—must remain informed and committed to the military justice process. That is only possible with constant communication between the parties.

Justitia (Justice)

Vigorous Prosecution

The former Army Chief of Staff drove home the message that in our Army, "winning matters."[32] That is true on the battlefield, and winning should matter to a prosecutor as well. For a prosecutor, winning is achieving an outcome that is favorable to the Government by getting to the truth and helping to restore order, deter wrongdoing, rehabilitate wrongdoers, and protect community safety.[33] Frankly, these are also wins for victims, the military justice system, and the Army community at large. "Hard but fair blows"[34] has long been a rallying cry for prosecutors in the military justice system, and STCs should vigorously seek justice at all times. Likewise, once in court, counsel must be litigation experts and know their cases better than anyone else could. While counsel may not win every case, no case should be lost due to failures to admit admissible evidence or clearly explain its relevance to the factfinders. In the end, STCs promote trust by vigorously trying cases on behalf of the Army community.

Due Process

No system of justice can claim legitimacy if the accused is not afforded due process under law. One of the great things about Army JAs is their simultaneous desire to excel and win the day as well as foster a sense of courtesy and collegiality with opposing counsel. While STCs will vigorously prosecute cases with the intent to convict the guilty, a prosecutor's first duty is to justice and the rule of law. That includes making sure the accused is convicted only after being afforded every constitutional right. It includes strict observance of Rule of Professional Conduct for Lawyers 3.4, Fairness to Opposing Party and Counsel,[35] and Rule 3.8, Special Responsibilities of a Trial Counsel and Other Army Counsel.[36] While no system or counsel is perfect, and

The Army and the American people expect a professional force of litigators just as they expect professional infantry and armor formations.

there will inevitably be mistakes, making fundamental fairness and due process a default is another way that OSTC can build trust as it seeks justice.

Fiducia (Trust)

Training and Experience

By statute, STCs are to be "well-trained, experienced, highly skilled, and competent in handling cases involving covered offenses."[37] The Judge Advocate General (TJAG) selects and certifies all STCs based on qualities of "education, training, experience, and temperament."[38]

For the initial tranche of STCs, TJAG selected and certified sixty-five attorneys, including seven Reserve component attorneys, all of whom had significant prior criminal law experience and were vetted for temperament. Among the cohort include a former chair of the Criminal Law Department of The Judge Advocate General's Legal Center and School (TJAGLCS), an assistant U.S. attorney, current and former assistant district attorneys, former special victim prosecutors, former defense counsel, and former trial counsel who had shown litigation talent. The average criminal justice experience of the eight chief circuit STCs is 10.3 years, with 7.8 years of that time personally litigating in the courtroom. Other military justice jobs held include chief of justice, regional defense counsel, SJA, and professor of criminal law.

Additionally, the sixty-five attorneys TJAG certified as STCs attended four weeks of specially tailored training—black letter law at TJAGLCS[39] and advocacy training at the U.S. Army Advocacy Center. Both blocks included discussions led by military and civilian experts in community-based prosecutions and special victim forensic issues. In short, the experience, maturity, and training of current STCs, combined with their ability to make disposition decisions "free from unlawful or unauthorized influence or coercion,"[40] should assure the public of the competence of those charged with handling covered-offense cases.

Professionalism

For STCs, professionalism is paramount to OSTC and the Army's ability to maintain community trust. Judge advocates are dual professionals: officers commissioned by the President to lead our Nation's armed fighting force and lawyers bound by rules of conduct. Both roles require an oath of fidelity to the Constitution and have rules demanding high moral character. For example, attorneys licensed to practice in Mississippi take this oath:

> I do solemnly swear (or affirm) that I will demean myself, as an attorney and counselor of this court, according to the best of my learning and ability, and with all good fidelity as well to the court as to the client; that I will use no falsehood nor delay any person's cause for lucre or malice, and that I will support the Constitution of the State of Mississippi and the Constitution of the United States. So help me God.[41]

Other states use different formulations to communicate the same end: integrity, courtesy, and professionalism.

Merriam-Webster's definition of a professional includes "conforming to the technical and ethical standards of a profession" and "exhibiting a courteous, conscientious, and generally businesslike manner."[42] Those attributes are exactly what we expect of ourselves and what the Army community deserves.

Army OSTC's success in gaining trust requires that its personnel demonstrate the highest levels of professionalism when dealing with victims, defense counsel, the judiciary, witnesses, law enforcement, commanders, OSJA personnel, the public, and SVCs.[43] Additionally, as officers, STCs must also understand the customs and courtesies of the profession of arms, live the Army values,[44] and maintain Army standards of combat proficiency, dress and grooming, and physical fitness.

Communicating with the Community

Members of OSTC and OSJAs can do all of the things discussed above—make sound decisions, act professionally, zealously and fairly try cases, and care for victims—but if those things are invisible to the Army community and the public at large, we will not regain trust in the military justice system. For years, JAs have given sound advice, competently tried cases, acted professionally, and cared for victims. However, the Army value of selfless service has sometimes meant that we act behind the scenes without telling our story. Going forward, we must better show what we do and how we do it. To that end, OSTC will have a communications director with a public affairs background. We will quickly provide media outlets with information on completed courts-martial. Our counsel are highly trained, motivated, competitively compensated, and experienced in criminal law. They favorably compare to elected or politically appointed civilian prosecutors in the communities surrounding our Army installations. By sharing with the public who we are, what we do, and how we do it, we can help promote trust.

Conclusion: Trust Is the Sum of All Other Successes

The Army and the American people expect a professional force of litigators just as they expect professional infantry and armor formations. Congress established OSTC to be that formation. No one metric will define OSTC's success, and effective prosecution will never eliminate sexual misconduct from the Army. But, by a combination of factors based on truth, trust, and justice, OSTC can become trusted as that professional formation. We will do so by selecting experienced, mature counsel who focus on seeking and appropriately acting on true facts. We will do so by acting deliberately to obtain due-process-based justice. And finally, we will do so through excellent training, unwavering professionalism, and constant, clear communication with Army leaders, SJAs, Soldiers, and the public. In

the end, the success of OSTC is a matter of trust—a trust we intend to earn. **TAL**

Notes

1. The Declaration of Independence para. 2 (U.S. 1776) ("That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.").

2. This quote is often attributed to both Theodore Roosevelt and John C. Maxwell. *See, e.g.*, *Theodore Roosevelt Quotes*, Theodore Roosevelt Ctr., https://www.theodorerooseveltcenter.org/Learn-About-TR/TR-Quotes?page=112 (last visited Nov. 3, 2023); John C. Maxwell, The Complete 101 Collection: What Every Leader Needs to Know 30 (2010).

3. The Invisible War (Chain Camera Pictures 2012).

4. *Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military, Hearing Before the S. Comm. on Armed Servs.*, 113th Cong. 9 (2013) (statement of General Raymond T. Odierno, Chief of Staff, U.S. Army).

5. *Id.*

6. *Id.* at 12.

7. An AR 15-6 investigation determined by a preponderance of evidence that a noncommissioned officer in Specialist Guillen's unit previously sexually harassed her. Memorandum from Commanding Gen., U.S. Army Futures Command, to Commander, U.S. Army Forces Command, subject: Army Regulation (AR) 15-6 Investigation – Fort Hood's Command Involvement in, and Response to, the Disappearance and Death of SPC Vanessa Guillén and Other Specific Topic Areas para. 3(c)(1) (5 Mar. 2021). However, no evidence linked her murder to sexual assault or sexual harassment. *See id.* para. 3(c)(2).

8. U.S. Dep't of Def., Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2019, annex 1, at 8 (2020) (reporting that about 5.8 percent of active-duty Army women indicated experiencing a sexual assault in the year preceding the survey).

9. Rape, Abuse & Incest National Network indicates that 13 percent of all students experience rape or sexual assault (among all graduate and undergraduate students) and 26.4 percent of female undergraduate students experience rape or sexual assault. *Campus Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/campus-sexual-violence (last visited Oct. 16, 2023). Duke University's 2018 Student Experiential Survey indicated the rate of sexual assault for undergraduate female students was 47.8 percent. Duke Univ., 2018 Student Experiences Survey 12 fig.ES8 (2018). The Wake Forest University Campus Climate Survey indicated a 16.3 percent prevalence rate of unwanted/nonconsensual sexual contact. Wake Forest Univ., Executive Summary: Wake Forest University's Campus Climate Survey 2 tbl.1 (2022).

10. Def. Advisory Comm. on Investigation, Prosecution, and Def. of Sexual Assault in the Armed Forces, Third Annual Report (2019).

11. The Judge Advoc. Gen., U.S. Army, TJAG Sends, Vol. 39-02, Special Victim Advocate Program (15 Oct. 2013); Colonel Louis P. Yob, *The Special Victim Counsel Program at Five Years: An Overview of Its Origins and Developments*, Army Law., no. 1, 2019, at 65, 65.

12. R v. Sussex Justices, *Ex Parte* McCarthy [1924] 1 KB 256, 259.

13. *See generally* U.S. Const. amend. VI; Manual for Courts-Martial, United States, R.C.M. 806 (2019) [hereinafter MCM].

14. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021).

15. James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 541, 136 Stat. 2395, 2579-80 (2022).

16. The National Defense Authorization Act for Fiscal Year 2022 created the name "special trial counsel." *See* sec. 533(2), § 801(18), 135 Stat. at 1695-96.

17. Secs. 531(a), 535, §§ 824a(c), 827(e), 135 Stat. at 1692, 1696.

18. *Id.* sec. 531(a), § 824a(c)(2)(A), 135 Stat. at 1692 ("A special trial counsel shall have exclusive authority to determine if a reported offense is a covered offense and shall exercise authority over any such offense.").

19. *Id.* sec. 531(a), § 824a(c)(2)(B), 135 Stat. at 1692.

20. *Id.* sec. 531(a), §§ 824a(c)(3), (5), 135 Stat. at 1692.

21. *Id.* All plea agreements must be accepted by the military judge to become binding on the parties. *See* MCM, *supra* note 13, R.C.M. 910(f).

22. Sec. 539A, 135 Stat. at 1698; Exec. Order No. 14103, annex 2, § 2(eeee), 88 Fed. Reg. 50535, 50680 (July 28, 2023) (R.C.M. 908(b)(7)); UCMJ art. 62 (2021); *see also* U.S. Dep't of Army, Field Manual 5-0, Planning and Orders Production (16 May 2022).

23. *Exodus* 20:13; *Deuteronomy* 5:17; Code of Ur-Nammu § 1 (c. 2050 B.C.E.); *see* Code of Hammurabi, King of Babylon: About 2250 B.C., at 10 (Robert Francis Harper trans., 2d. ed. 1904).

24. *War on Drugs*, History (Dec. 17, 2019), www.history.com/topics/the-war-on-drugs.

25. *Provisional Drug Overdose Death Counts*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm (last visited Oct. 17, 2023).

26.

> The mission of the US Army Office of Special Trial Counsel is to seek justice by independently and equitably evaluating covered criminal allegations and effectively prosecuting cases warranted by the evidence in the best interests of the Army community, while maintaining honest, clear communication with victims, the Army, and the public in order to promote trust in the military justice system.

Office of Special Trial Counsel, JAGCNet, https://www.jagcnet.army.mil/Sites/OSTC.nsf (last visited Nov. 3, 2023).

27. Court-martial cases are always styled United States v. (Accused's last name). *See also* MCM, *supra* note 13, R.C.M. 103(17)(B).

28. U.S. Dep't of Army, Reg. 27-26, Rules of Professional Conduct for Lawyers paras. 7(e)(1)-(2) (28 June 2018) [hereinafter AR 27-26].

29. MCM, *supra* note 13, app. 2.1 ("Non-Binding Disposition Guidance").

30. *Id.* app. 2.1, para. 2.1(h).

31. UCMJ art. 24a(c)(4) (2021).

32. *See, e.g.*, U.S. Dep't of Army, The Army People Strategy 2 (2019) (quoting Gen. James McConville, 40th Chief of Staff, U.S. Army).

33. MCM, *supra* note 13, R.C.M. 1002(f)(3); U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook 81 (29 Feb. 2020).

34. *E.g.* United States v. Johnson, ARMY 2013075, 2016 WL 1311423 (A. Ct. Crim. App. Mar. 31, 2016).

35. AR 27-26, *supra* note 28, r. 3.4.

36. *Id.* r. 3.8.

37. 10 U.S.C. § 1044f(a)(4).

38. 10 U.S.C. § 824a(b)(1)(B).

39. Army STCs attended the Advanced Justice Practitioner's Course along with attorneys from the U.S. Army Trial Defense Service and members of the Navy, Marine Corps, and Air Force OSTCs.

40. 10 U.S.C. § 1044f(a)(3)(B).

41. Miss. Code Ann. § 73-3-35 (2011).

42. *Professional*, Merriam-Webster (Oct. 11, 2023), www.merriam-webster.com/dictionary/professional.

43. *See* AR 27-26, *supra* note 28, r. 3.5 cmt. 4.

44. *The Army Values*, U.S. Army, www.army.mil/values (last visited Oct. 18, 2023).

News & Notes

Photo 1:
SGT Walkker Shaw and SPC Ciarra Castillo stand with COL Russell Parson, SJA, U.S. Army Pacific (USARPAC), and SGM Ernest Ko, the USARPAC SGM overseeing the USARPAC Best Paralegal Warrior Challenge, on 8 September 2023 at Historic Palm Circle, Fort Shafter, HI. SGT Shaw and SPC Castillo placed first in the USARPAC 2023 Paralegal Warrior Challenge in

the NCO and Junior Enlisted categories, respectively. (Credit: SPC Taylor Gray)

Photo 2:
COL Toby N. Curto, 1st Infantry Division and Fort Riley SJA, received the Legion of Merit at Victory Hall, Fort Riley, KS, on 21 June 2023. COL Curto earned the award for his commendable work while serving two 1st Infantry Division and Fort Riley commanding generals. (Credit: SPC Joshua Holladay)

Photo 3:
COL Frank McGovern, SJA of Task Force Spartan, gives a gift to Kuwait Army Captain Mohammed Al-Ajmi after the Task Force Spartan Kuwait Legal Symposium on 26 June 2023. The symposium provides an opportunity for partner nations to build relationships and learn how legal staff are incorporated into each country's respective warfighting functions. (Credit: SPC Christian Cote)

Photo 4:
Members of the Red River Army Depot Legal Counsel were recognized with the Army Materiel Command 2022 Robert J. Parise Team Project Award. Pictured are (from left) Jay Nash, Ivor Jorgensen, Garland Yarber, Gloria Briseno, and Rodney LaGrone. Also recognized but not pictured are Kathy Wright and Cynthia White. (Credit: Adrenne Brown)

Photo 5:
1LT Adam Curfman and 1LT Matt Blackburn of the 220th OBC participated in a Norwegian Foot March hosted at Fort Detrick on 1 October 2023. First held in 1915 as an endurance test for the Norwegian Army, the event is an 18.6-mile (30-km) ruck march with a 25-lb (11-kg) pack. Individuals with qualifying times earn the

coveted Marsjmerket badge awarded by the Norwegian Armed Forces. Both lieutenants finished with qualifying times and represented the 220th and their run group well. (Credit: 1LT Matt Blackburn)

Photo 6:
The U.S. Army Reserve Command OSJA poses with summer interns in front of the "Iron Mike" statue at Fort Liberty, NC. (Credit: LTC Juan A. Agueda)

Photo 7:
Various members of the legal community joined LTC Ted Allison in swearing in CPT Amber Ebanks during her promotion in front of the Buffalo Soldier monument at Fort Leavenworth, KS. From left to right: LTC Christopher Anderson, SDC; SGT Ricardo Munoz, TDS; COL Robert Manley, SJA; LTC Stephanie Cooper, DSJA; LTC Ted Allison, RDC; Mrs. Ebanks, mother of CPT Ebanks; CPT Amber Ebanks, TDS; CPT Alex Vanscoy; CPT Rob Sowards, OSJA; then-1LT Anthony Keach, OSJA; and SPC Jennifer Abell. (Credit: LTC Ted Allison)

Photo 8:
The Fort Irwin TDS Field Office unveils the TDS Rock at the Painted Rocks, Fort Irwin, CA. From left to right: CPT Andrew Rittenhouse, SDC; CPT Kristofher Beralo, outgoing SDC; LTC Brigid Osei-Bobie, RDC, 6th Circuit; SGT Steven Arriola, Paralegal NCO; and CPT Benoy Sanil, Trial Defense Counsel. The Fort Irwin TDS Field Office advocated for and obtained permission to paint the first TDS rock, consciously located to signify TDS's role in "Defending Those Who Defend America." For several days, the small cohesive team spent countless early morning hours painting the rock, strengthening their bond and allegiance to the TDS mission. (Credit: Ana Maria Bondoc)

The U.S. Army Trial Defense Service, Eurasia South Field Team poses together outside their office at the Area Support Group-Kuwait Headquarters on Camp Arifjan, Kuwait: (from left to right) LTC Michael Fritz, Sr. (USAR), SGT Yolanda Pinckney (NYARNG), SSG Jodie Cassidy (USAR), and MAJ Rob Rodriguez (Active Duty).

Pivotal Perspective

United States Army Trial Defense Service and Military Justice Next

Continuing to Defend Those Who Defend America

By Colonel Sean T. McGarry

There is no more fulfilling job and exhilarating feeling than to stand next to your client when the military judge says, "Accused and defense counsel, please rise,"[1] and then hear the fact-finder state, "To all charges and their specifications, not guilty."[2] In the more than forty years since its establishment, the U.S. Army Trial Defense Service (USATDS) has provided principled counsel and zealous representation of our Soldiers who defend America, nesting within the Judge Advocate General's (JAG) Corps mission to "provide principled counsel and premier legal services."[3] At times seemingly underappreciated, yet working the most challenging and professionally rewarding job one could do in our Corps, defense counsel protect the rights of our Soldiers and serve within the only constitutionally required segment of our military justice (MJ) system. Professionally adversarial to the Government side of our MJ system, USATDS serves as the critical check and balance that ensures fairness for our Soldiers navigating the judicial, nonjudicial, or administrative components of our system.

From the U.S. Army's inception in 1775 the JAG Corps has conducted courts-martial, but shockingly, USATDS has only been part of our Corps since 1980. With Service-specific justice systems through World War II, our Nation saw more than 1.7 million courts-martial conducted for a 16-million-strong force.[4] The sheer volume of cases alone exceeded the ability to detail individual defense counsel

The old USATDS patch. (Image courtesy of author)

The current USATDS patch. (Image courtesy of author)

to the accused. Additionally, neither the Articles of War[5] nor the Articles for the Government,[6] which governed the Army and Navy, respectively, required licensed attorneys to serve as presiding officers or individual detailed counsel.[7] This left America's greatest generation without the minimum due process protections we take for granted today. One well-known example is featured in the HBO mini-series, *Band of Brothers*, which depicts First Lieutenant Dick Winters receiving a one-paragraph note from his commander, Captain Herbert Sobel, under Article of War 104 (what we now refer to as nonjudicial punishment), directing him to elect either punishment for a minor infraction or face trial by court-martial.[8] First Lieutenant Winters did not have the opportunity to consult with counsel prior to making his election because that right did not exist at the time (nor would it for nearly another forty years). Individual due process, while non-existent in an archaic system of justice, highlighted a need for improvements, and our Corps responded.

The first Uniform Code of Military Justice, enacted in 1950, provided a single set of rules applicable to each of our Services in the fair and orderly administration of MJ. However, it took another twenty-five years before we saw the first real steps taken toward the creation of the independent organization.[9] In 1975, The U.S. Army Judge Advocate General, Major General Wilton B. Persons, Jr., approved an experimental "Field Defense Services Office" as a branch of the Defense Appellate Division, to oversee and execute training for defense counsel and to provide legal advice to defense counsel in the field.[10] Despite establishing this Field Defense Services Office, defense counsel in the field were assigned to the Office of the Staff Judge Advocate (OSJA).[11] The command's control over both the prosecutor and defense counsel not only raised professional responsibility concerns with the unlawful, improper, and inappropriate influence of both counsel, it also infringed upon the independent attorney-client relationship.[12] As a result of these concerns and to ensure fairness in the MJ system, the JAG Corps, with strong command support, formally established USATDS in 1980 as a separate organization completely independent of the OSJA.[13] The initial establishment of USATDS was staffed with about 200 judge advocates (JAs) in the Active component located across nine geographic regions and sixty field offices.[14]

Throughout the forty-three years following its establishment, USATDS continued to alleviate previous concerns related to command influence over the defense's independent organization and effectively demonstrated that protecting clients' constitutional rights and interests is critical to an effective, efficient, and fair MJ system. The foundational concepts of fairness and justice that USATDS embodies as an organization have become so ingrained in the JAG Corps's culture that it is hard to fathom a time when an accused did not have access to independent counsel unconstrained by fealty to command interests. The current patch, authorized in 2006, continues to remind defense counsel of the constitutional import of trial defense work, as both the shield for those who defend America and the dual-professional character of JAs as members of the professions of arms and law.[15]

A properly resourced, trained, and staffed organization is key to USATDS's independence. The USATDS organizational structure and resourcing have evolved over the years, but the JAG Corps and USATDS remain committed to provide the principled counsel that our Soldiers deserve and have earned. The Army has changed and downsized significantly since USATDS's founding. With a current force that includes 140 JAs, one legal administrator, thirty-three paralegals (filling TDS-specific billets), thirty-one Department of the Army Civilians, and forty-two paralegals (resourced by local OSJAs in our organizational structure) divided between the Office of the Chief and eight circuits,[16] USATDS's core contribution to fairness and effective justice has remained constant. As the JAG Corps moves toward 2030 and the Army of the future, USATDS personnel, as part of "the most highly trained, inclusive, and values-based team of trusted legal Army professionals,"[17] will continue to provide that necessary check and balance to an effective MJ system.

Current force management initiatives across the JAG Corps to implement the National Defense Authorization Act for Fiscal Year 2022's[18] "MJ Next"-based growth will enhance independence and fairness for both sides of the aisle. The MJ Next personnel increases approved specifically for USATDS, similarly allotting to the defense certain litigation resourcing previously made available to the Special Victims' Prosecutor Program, will ensure parity with changes occurring within the Office of Special Trial Counsel and other Government prosecutorial functions.[19] As the JAG Corps implements the MJ Next programming personnel growth through fiscal year (FY) 2025, USATDS will grow to roughly 350 personnel in our Active component and over 700 personnel when including our Reserve component personnel. The multi-component structure of USATDS facilitates mutual support for both garrison and deployable mission sets and provides for cross-component transfers as a talent management mechanism, to best position USATDS for retention and effective utilization of its collective litigation talent across all components.

The USATDS mission to provide the full range of defense legal services to our Soldiers around the world has not substantively

As the environment changes, we must keep pace with all client needs; we owe it to them and the sacrifices they have made in defense of our Nation.

changed since its founding in 1980, but the capabilities to do so efficiently and effectively have evolved significantly. The single biggest change came in 2007 with the establishment of the Defense Counsel Assistance Program (DCAP), a centralized resource to substantively advise and train defense counsel in the field. Providing both world-class training and case-specific reach-back support from highly qualified experts and experienced former defense counsel, who are also available for case consultation or detailing, DCAP is litigation-practitioner-focused. In FY 2019, USATDS also established a complex litigation section specifically designed to litigate and advise defense counsel involved in high-profile and complex cases as well as train the JAG Corps's next generation of litigation experts.

With approved MJ Next personnel growth through FY 2025, USATDS will add sixteen complex defense litigation teams,[20] with two teams per circuit at the Army's busiest jurisdictions. Additional circuit-level growth will include eight Civilian legal administrators (GS-11/12), eight nominative regional defense paralegal noncommissioned officers (RDPNs) (sergeants first class), and twenty-seven defense investigators, each designed to optimize both circuit-level management and provide more robust capabilities than existed previously in USATDS.

Each new position is purposed to improve the overall defense capabilities at the circuit level and, specifically, to free the regional defense counsel to focus on providing more direct litigation and leadership development across the multiple field offices within each circuit. Inherently important is the current initiative to strike a proper balance of the additional paralegal resources needed to manage USATDS field offices; such an initiative is expected to build efficiencies in how we support our Soldiers. Combined with the recently approved nominative selection for both the RDPNs and defense litigation paralegals, USATDS continues to accrue the necessary tools for organizational evolution. Moreover, such development allows the perfect balance to strike between leadership and enhanced subject matter expertise in criminal law at every strata of the organization.

The JAG Corps continues to demonstrate flexibility, balance, and efficiency with our collective MJ practice. As the environment changes, we must keep pace with all client needs; we owe it to them and the sacrifices they have made in defense of our Nation. The MJ enterprise is no exception. With the ever-increasing requirements placed upon our system, there is also opportunity. As the JAG Corps career model expands to allow for successive MJ assignments and increased cross-pollination between Government and defense positions, there is no better opportunity in the JAG Corps to develop strong MJ proficiency and leadership skills than USATDS. **TAL**

COL McGarry is the Chief of U.S. Army Trial Defense Service at Fort Belvoir, Virginia.

Notes

1. U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook 74 (29 Feb. 2020).

2. *See id.* (providing the script for military judges to follow while findings are announced).

3. *Mission and Vision*, JAGCNet, https://www.jagcnet.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentId=DEE613DFEC84B73B852579BC006142CE (last visited Oct. 5, 2023) [hereinafter *Mission and Vision*]; *see also U.S. Army Trial Defense Service – History*, JAGCNet, https://www.jagcnet.army.mil/Sites/USATDS.nsf/homeContent.xsp?open&documentId=C440AF1C1F5589C285257B490069B306 (last visited Oct. 5, 2023) [hereinafter *History*].

4. Fred L. Borch III, *TDS at 40: A Short History of Its Origins*, Army Law., no. 6, 2020, at 25 [hereinafter *TDS at 40*]; Edward F. Sherman, *Military Justice Without Military Control*, 82 Yale L.J. 1398, 1398 n.1 (1973).

5. Articles of War of June 4, 1920, 41 Stat. 759 (1920).

6. U.S. Dep't of Navy, Articles for the Government of the United States Navy (1930).

7. *See* Fred L. Borch III, *JAG Department to JAG Corps: Why Did It Happen?*, Army Law. no. 1, 2023, at 32.

8. *Band of Brothers: Currahee* (HBO broadcast Sept. 9, 2001); Erik Dorr & Jared Frederick, Hang Tough: The WWII Letters and Artifacts of Major Dick Winters (2020).

9. *TDS at 40, supra* note 4, at 25.

10. *Id.*

11. *Id.*

12. *See id.*

13. *See id.* at 26.

14. *Id.*

15. *Id.*; *History*, *supra* note 3.

16. 1st: Atlantic; 2nd: Southeast; 3rd: Mississippi Valley; 4th: Great Plains; 5th: Southwest; 6th: West; 7th: Pacific; and 8th: Europe.

17. *Mission and Vision*, *supra* note 3.

18. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021).

19. *See* The Judge Advoc. Gen. & Regimental Command Sergeant Major, TJAG & RCSM Sends, Vol. 41-08, MJ Reform (18 Jan. 2022).

20. Sixteen complex litigation defense counsel (lieutenant colonels/majors) and sixteen nominative defense litigation paralegals (staff sergeants).

SSG Brandon P. Labue (Image courtesy of author)

What's It Like?

What Does It Mean to Be a Special Trial Counsel Noncommissioned Officer

By Staff Sergeant Brandon P. Labue

What does it mean to be a special trial counsel (STC) noncommissioned officer (NCO)? What does it mean to be an Army paralegal? While there are many characteristics, traits, and work philosophies that could answer these questions, it is personally meaningful to be able to articulate exactly what it means to be a paralegal within the Office of Special Trial Counsel (OSTC) and what qualities best serve an aspiring NCO. My military journey as a litigation and brigade paralegal has led to a significant amount of self-reflection and constant re-examination of my priorities. It has definitely informed my view on what makes an exemplary STC NCO.

Partnership with Your Trial Counsel

The relationship between a paralegal and their trial counsel must be a partnership like that of a first sergeant and their commander. Though the commissioned officer has command over everyone in a unit, the first sergeant is just as responsible for ensuring mission accomplishment. Both the commander and the first sergeant feel the pains of failure and the elation of success. To create a similar partnership, the paralegal must take on the burden of empowerment and be as invested as their trial counsel in the disposition of every case. The paralegal must take ownership of their role and realize that what they do is just as impactful as their partner's role in the pursuit of justice.

As a junior paralegal, I always placed judge advocates (JAs) on a pedestal and intuitively placed their decisions and opinions above my own. I discovered I had some serious issues with imposter syndrome and low self-esteem that took time and effort to overcome. However, the biggest issue that I saw in myself—and what I often see in many developing paralegals—was the fear of accountability. I believed that as long as I stayed in my lane, only did what I was ordered to do, and did not value myself or my role as one of importance to the team, then I would never have to take responsibility for the failures in a case. I feared that if I took responsibility occasionally, or if I achieved occasional success, then I would be forced to always handle responsibility and achieve success. Under the weight of that pressure, I was afraid that I would fail stupendously, and everyone would find out that I was a fraud. In time I recognized that I am only human just like everyone else, even the attorneys who I supported. Ultimately, to form a partnership with my

trial counsel, I had to commit as much as they did. I had to own the successes and failures of our combined efforts. Once I took that leap of faith, I realized that no one belongs on a pedestal and that I can form partnerships with anyone.

The partnership between a paralegal and their trial counsel is vital to ensuring that the team divides and distributes responsibilities equitably. While there is no perfect partnership, we approach perfection through patience, managing expectations, and trust. There will always be mistakes and lapses in judgment, but these can be managed if everyone is duly invested. This type of partnership is what previously drew me to the Special Victim Prosecution Program and what inspires me to continue my military career with OSTC.

Steward of Procedures

Taking lead on every case that involves a special victim can quickly become an overwhelming task. Every case is different and requires its own tailored touch, which can lead to chaos if unstructured. One of the most important responsibilities of an STC NCO is to establish and maintain a system of checks and balances and to ensure that no case falls through the cracks—to ultimately provide structure and calmness in a volatile environment.

My experience in the Judge Advocate General's (JAG) Corps has shown me that organization and foresight are crucial for success; the ability to track steps, anticipate future needs, and take initiative is essential to succeeding as a litigation paralegal. Being able to do those things well can elevate an average paralegal into a highly regarded one. This can be incredibly difficult, especially given the volume of work that ligation paralegals perform. Tracking more than one hundred to two hundred plus cases—each with their own steps and substeps—can be tedious and disorienting. It is vital to have systems in place to field every reported case and to actively manage that system. In this regard, OSTC paralegals will have an abundance of support. The OSTC leadership, both at the circuit and higher levels, constantly develops and improves systems, trackers, and resources that can be tailored to the team's needs.

I freely admit that my memory is imperfect and that I am not always able to remember how to do everything at a moment's notice. Fortunately, my memory does not need to be perfect to do my job well. I employ a living tracker and a series of checklists that allow me to intake data and to action directives. These tools give me the confidence I need to be a good steward of the profession and to give solid guidance to those who are involved with each case. Everyone in the JAG Corps knows how complex a trial can be, and they all want to be a part of the solution. The difficult part is identifying what is truly important and what is merely nice to have. One of the biggest impacts I have on my teammates is that I enforce the tailored standards of operations and maintain their cases' momentum.

Be Involved, Be Daring

If you have a passion for litigation, the investigative process, and for working with individuals who are growing experts in their field while growing your own expertise, then be bold and submit an OSTC nomination packet today. It is that boldness and willingness to dive into cases, gather evidence, canvass witnesses, testify in court, and tackle a myriad of other trial-related tasks that increase the quality of each case. Being proactive and bold is that impactful. Mistakes may occasionally occur, especially while proactively pursuing new challenges, but no mistake will be as grave as the mistake of being inactive.

Preparing cases for litigation will always be a long and arduous road. The temptation to ignore an obstacle and pretend it does not exist will always be present. However, the inaction always constructs a bigger and more difficult obstacle to climb over. Worst case, the obstacle crashes to the floor, destroying the case all together. It can be something as simple as a victim who felt neglected and now does not want to participate or not gathering corroborating evidence to support a testimony. These examples of inaction commonly plague several jurisdictions and result in cases that fail to be adequately reviewed and considered on their merits. Being bold and inspiring other members of your team is the best remedy. Being accountable, constantly growing, and elevating your space of operations is what allows everyone the chance to ensure no case is left behind and has the highest likelihood of review under our administrative and judicial systems.

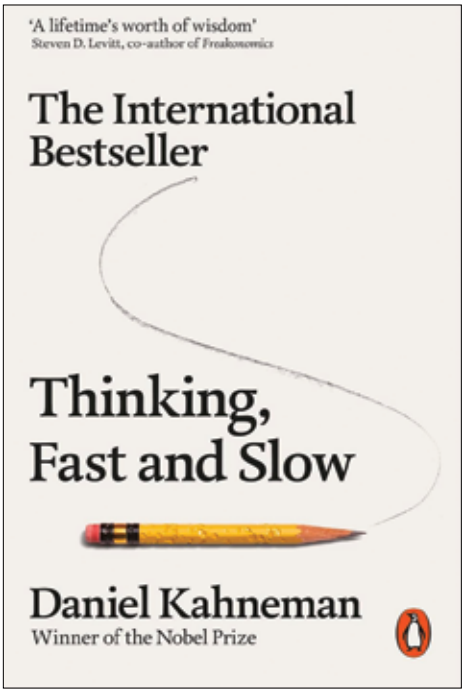
Proactiveness is one of the greatest attributes needed for an STC NCO or a trial counsel. However, it can be draining and lead to burnout. That is why if there is a desire to work in litigation, it is important to form partnerships with individuals who are going through the same obstacles and to be a part of an organization that will give you both the space to hone your skills and the time to process everything this job entails.

Conclusion

Again, what does it mean to be an STC NCO? What does it mean to be an Army paralegal? It means stepping up to the plate and being a starter. It is constantly growing your skills and mastery of trial and case procedures and tracking their every update. It is being armed with all the resources and surrounded by aspiring litigation experts. It is growing and developing your own expertise. Becoming an OSTC paralegal means that you are committed to honing your craft and to developing your capacities as a legal professional.

Being an STC NCO and Army paralegal means what it has always meant: an opportunity to make a significant impact on the U.S. Army. It is an opportunity to make a lasting difference in yourself. **TAL**

SSG LaBue is the Special Trial Counsel Noncommissioned Officer serving the Military District of Washington at Fort McNair in Washington, D.C.



Book Review

Slowing Our Thinking

An Institutional Response to Racial Disparities in Military Justice

Reviewed by Janet K. Mansfield

Daniel Kahneman's 2011 seminal work on individual judgment and decision-making, *Thinking, Fast and Slow*,[1] provides a useful framework for shaping an institutional response to the persistent existence of racial disparities in our military justice system.

Kahneman argues that human decision-making can be categorized into two separate systems. System 1 "operates automatically and quickly, with little or no effort, and no sense of voluntary control."[2] System 1, however, by necessity, utilizes shortcuts: "systematic errors that it is prone to make in specified circumstances," and, as System 1 operates unconsciously, it cannot be turned off.[3] In contrast, "System 2 allocates attention to the effortful mental activities that demand it, including complex computations."[4]

Examination of military justice data, through Kahneman's lens of System 1 and System 2 thinking, can help identify specific military justice processes that risk System 1 thinking, where unconscious bias and other heuristics that Kahneman describes can unintentionally result in disparate treatment. Within these specific processes, identifying common factors or themes can provide the Army with the opportunity to implement policies and training that encourage the "System 2" or "Slow Thinking" analysis that Kahneman posits will reduce the role of unconscious bias in disciplinary decision-making and thereby reduce disparities in our system.

Pending recommendations from the Internal Review Team (IRT) on Racial Disparities in the Investigative and Military Justice Systems[5]—emphasizing additional due process, oversight, and training—offer initial policy and process changes that impose guardrails to protect against the fast thinking Kahneman describes and provide a path forward to address the disparities that erode trust in our system.

The Challenge: Racial Disparities in the Military Justice System

Statistical racial disparities have been documented in the military justice system in studies dating back to 1972.[6] More recently, the murder of George Floyd and the subsequent nationwide interest in racial issues in law enforcement and civilian judicial systems brought a renewed focus on racial disparities in the military justice system. A series of new reports, detailed below, provide more data and analysis that allow the Army to focus its efforts on specific stages of the military justice system and to develop institutional strategies and policy to reduce disparities where they persist.

2019 Government Accountability Office Report

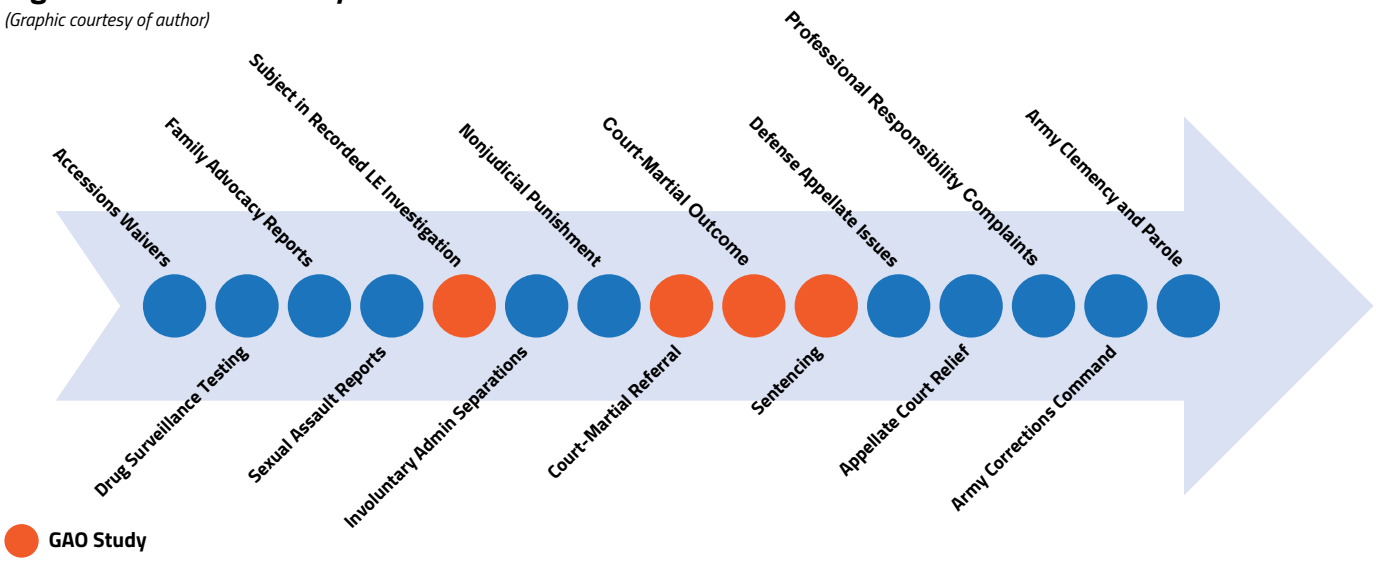
In a House report accompanying the National Defense Authorization Act for Fiscal Year 2018, Congress tasked the Government Accountability Office (GAO) with assessing the Military Services' ability to collect race and ethnicity data in investigations and disciplinary actions and determine whether or not disparities exist in the military justice system.[7] The resulting GAO report, *Military Justice: [DoD] and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities*,[8] included a multi-variate analysis of military law enforcement and judicial data. The GAO looked at four specific data points: subjects in recorded law enforcement investigations, referral to general and special courts-martial, findings at court-martial, and the severity of sentences (measured by punitive discharge and more than one year in confinement).[9] The investigation found that, across the Department of Defense (DoD), Black, Hispanic, and male Service members were more likely than White or female Service members to be subjects in law enforcement investigation and to be tried in general and special courts-martial when controlling for sex, race, rank, and education.[10] However, race was not a statistically significant factor in the likelihood of conviction.[11] Minority members were also either less likely to receive a more severe punishment than White members or there was no difference among racial groups.[12] The GAO concluded that "disparities may be limited to particular stages of the process,"[13] specifically the accusatory and initial adjudicative stages.[14]

United States Army Holistic Evaluation and Assessment of Racial Disparities in the Military Justice System

Following the release of the GAO report and a June 2020 congressional hearing before the House Armed Services Military Personnel Subcommittee on racial disparities in the military justice system, the Secretary of the Army directed The Judge Advocate General and the Provost Marshal General to complete a holistic assessment of

Figure 1: HEARD Military Justice Timeline Data Collection

(Graphic courtesy of author)



racial disparity in the Army's investigative and disciplinary systems.[15]

The resulting Holistic Evaluation and Assessment of Racial Disparities in the Military Justice System (HEARD) attempted a more expansive view than the GAO study.[16] The evaluation and assessment looked at fifteen data points across a very broadly defined military justice timeline to determine where disparities exist, where they are exacerbated, and where they are alleviated.[17]

Specifically, HEARD looked at baseline race and ethnicity data (as compared to end-strength or Army-wide rates) for: accessions waivers for misconduct; random drug testing and referrals to substance abuse programs; Family Advocacy Program substantiation rates for child and spouse abuse; sexual assault and sexual harassment reporting; subjects in law enforcement reports for all offenses and five specific offenses that reflect the spectrum of law enforcement officer discretion; involuntary administrative separations for misconduct, unsatisfactory performance, substance abuse, and entry-level performance and conduct; nonjudicial punishment at the accusatory and findings stages; nonjudicial punishments for Articles 89[18] (Disrespect) and 91[19] (Insubordinate Conduct) of the Uniform Code of Military Justice; courts-martial at arraignment, findings, and sentencing; Defense Appellate Division issue identification; appellate relief at the Army Court of Criminal Appeals; professional responsibility complaints against judge advocates (JAs) alleging bias; Army Corrections Command disciplinary proceedings; and Army Clemency and Parole Board proceedings.[20] For every data point, HEARD identified discretionary actors in the process who were making recommendations or findings—with varying degrees of training, oversight, and due process—that affected the Soldier's continued interaction with disciplinary systems.[21]

While comparison of baseline rates without multi-variate analysis that considers and controls for individual demographic characteristics does not establish a statistical likelihood of a different outcome based on race, every over-representation in the process should be seen as a red flag that the process or policy should face additional scrutiny. While HEARD sets forth findings for each racial group, and White Soldiers comprise the majority of subjects across the military justice timeline, the most consistently troubling findings are for Black Soldiers.[22] Black Soldiers are over-represented, as compared to end-strength baseline or Army-wide rates, for ten of the fifteen data points.[23]

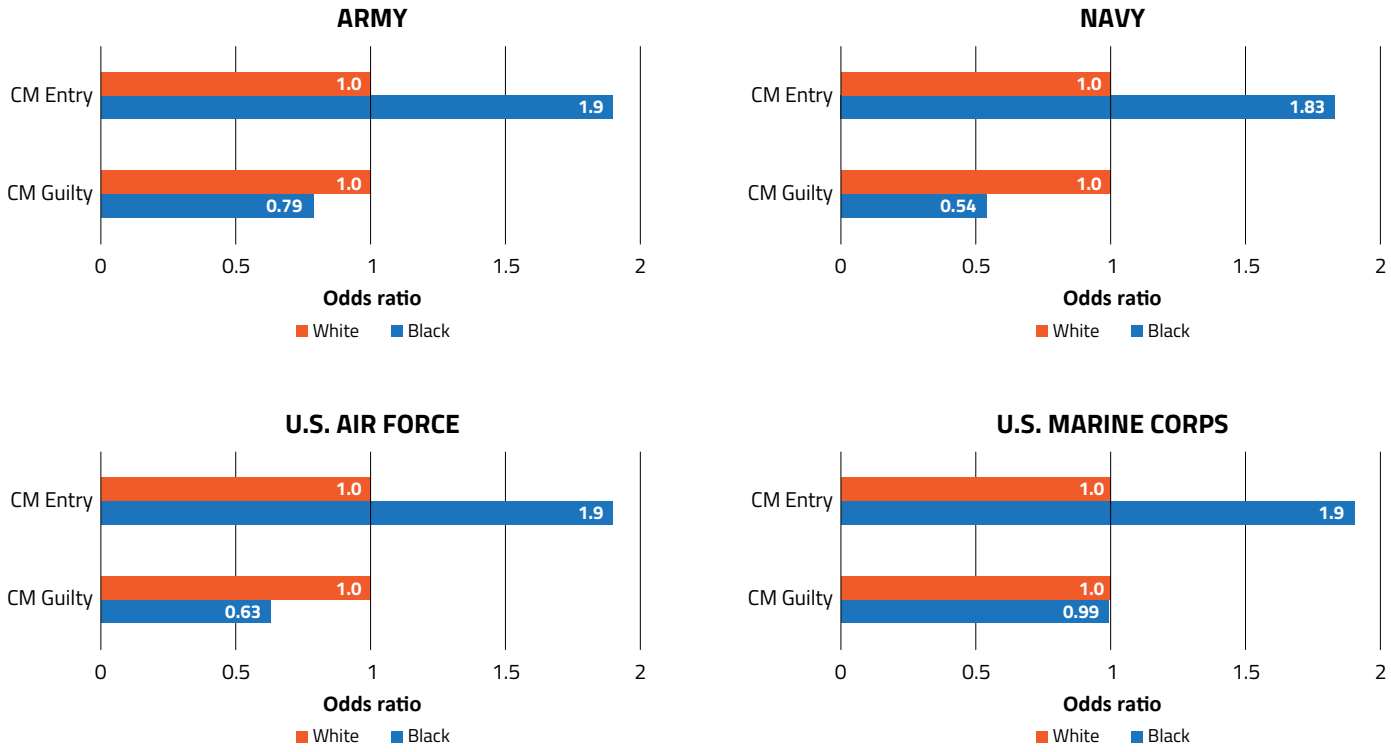
For Black Soldiers, disparities exist throughout the timeline. The disparities begin with the accessions process and continue through Army intervention programs and throughout the disposition process.[24] There is no single actor or process the removal of which would explain or resolve the disparities. Instead, HEARD identifies discretionary actors for each data point—including recruiters, first-line supervisors, commanders, social workers, substance abuse counselors, law enforcement personnel, and JAs—who are making recommendations or adjudications that will impact the trajectory of a Soldier's career and interactions with the military investigative and judicial system.[25]

As in the GAO study, a deeper dive into the data indicates that disparities are substantially reduced as due process and oversight increase in a process. For example, as with GAO, disparities that exist at court-martial arraignment are substantially reduced or eliminated at findings and sentencing.[26] The HEARD data also illustrates a similar reduction in disparities from the first reading of nonjudicial punishment to findings or adjudication by commanders.[27] Additionally, along the broadly defined timeline of military justice, disparities begin in Army intervention programs and administrative actions in which due process is limited and discretionary actors, including first-line supervisors, lack legal training. Conversely, disparities are alleviated in processes with significant due process and oversight, such as appellate court relief.

Figure 2: CNA Data Highlights: Fiscal Years 2014-2020

Court-Martial (CM) Entries and Findings of Guilt by Race Across Services

(Graphic courtesy of author)



Controlled for the Following Variables:

- Ethnicity
- Gender
- Fiscal year
- Marital and parental status
- Home of record
- Education level
- UIC location
- Paygrade band and over age status
- DoD occupation
- Enlistment waiver indicator
- Prior CM or NJP indicators
- Offense type indicators
- Offense counts

***CM entry variables:**

- Navy and Marine Corps: CM case opened by legal office
- Army: Referred to CM
- Air Force: Tried by CM

Center for Naval Analyses

The Office of the Executive Director for Force Resiliency within the Office of the Under Secretary of Defense for Personnel and Readiness contracted with the Center for Naval Analyses (CNA), a federally funded research and development center, to fulfill the National Defense Authorization Act for Fiscal Year 2020's requirement to issue guidance that establishes criteria to assess racial disparities and to evaluate their potential causes.[28] The contract provided CNA with full access to the Service personnel, law enforcement, and judicial databases.[29]

While much of the resulting report, *Exploring Racial, Ethnic, and Gender Disparities in the Military Justice System*,[30] is focused on data collection and recommended courses of action for periodic assessments, CNA did conduct a multi-variate analysis of courts-martial referrals and findings, controlling for thirteen variables.[31] Replicating both GAO and HEARD, CNA found that while Black Service members were nearly twice as likely to have charges referred to a general court-martial, Black Service members were convicted at lower rates.[32] This data allows for two inferences, both of which can be true at the same time: that Black Service members are more likely to be accused of an offense when there was insufficient evidence to establish their guilt, and that the level of due process provided in a court-martial can work to reduce that disparity.

Internal Review Team on Racial Disparity in Military Justice

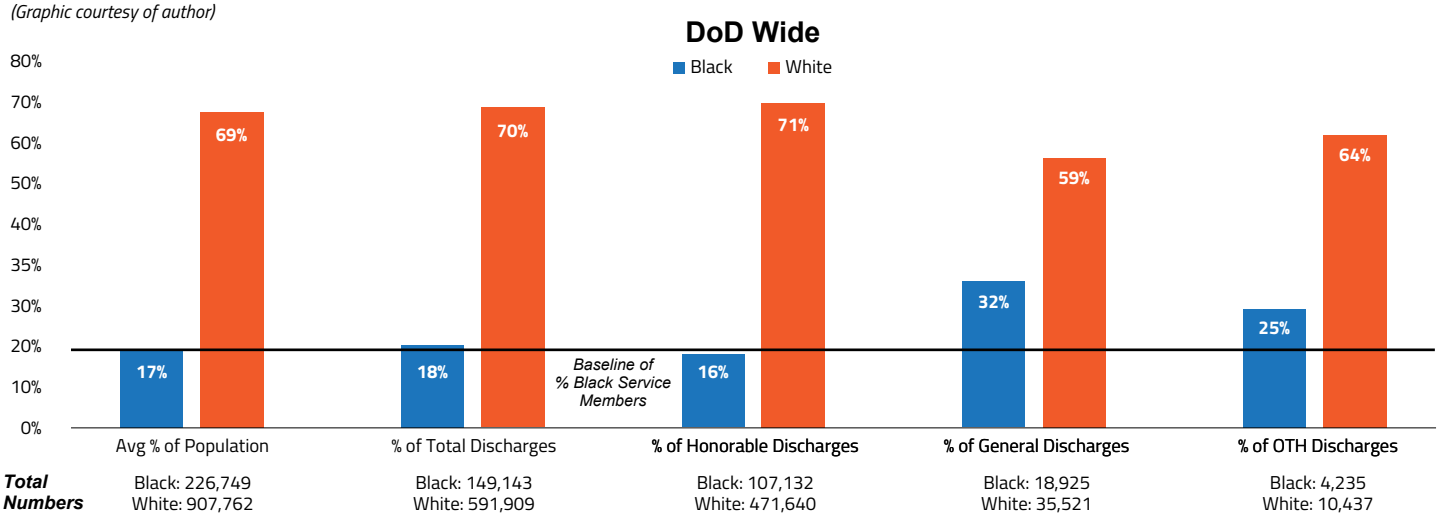
In May 2022, the Deputy Secretary of Defense directed a ninety-day IRT on Racial Disparities in the Investigative and Military Justice Systems.[33] Cognizant of all the preceding studies that have consistently replicated disparities, the IRT did not concentrate on additional data collection or analysis. With access to all Service personnel, law enforcement, and judicial databases, however, the IRT did examine one additional data point that adds to a fuller understanding of the impact of due process and discretion on disparities.

While HEARD looked at baseline race and ethnicity for involuntary administrative separations, the IRT took that a step further and examined characterizations of service in involuntary separations. As Figure 3 below illustrates, while Black Service members comprise 17 percent of the total DoD population and 18 percent of total discharges, Black Service members are overrepresented as 32 percent of general discharges and over 20 percent of other than honorable discharges. Notably, statutory and service regulations provide significantly less due

Figure 3: DoD-Wide Characterization of Discharges: Fiscal Years 2017-2021

Percentages of Discharge Population by Race

(Graphic courtesy of author)



Total Numbers	Black: 226,749 White: 907,762	Black: 149,143 White: 591,909	Black: 107,132 White: 471,640	Black: 18,925 White: 35,521	Black: 4,235 White: 10,437

Note: Percentages in each set of columns do not add to 100% because not all races are included.
Source: DMDC Data FYs 2017-2021 (Avg % of Population is from ADASD (MC&FP))

process for Service members with less than six years of service being administratively separated with a general, under honorable conditions discharge than separations with an other than honorable discharge.[34]

Identifying Common Factors That Alleviate or Exacerbate Disparities

With the benefit of the prior studies and data analysis, the IRT was able to identify three characteristics that appear to impact disparities: due process, oversight, and levels of training for discretionary actors.

Due Process. Data replicated in the GAO, HEARD, and CNA studies indicate that initial racial disparities in courts-martial are reduced, or even eliminated, through the adjudication process. The HEARD report suggests that the same finding applies in nonjudicial punishments, as disparities are reduced between the first reading and adjudication by the commander.[35] Similarly, the IRT data on service characterization suggests that additional due process provided in involuntary administrative separations also works to reduce disparities.[36] Data can never provide us with the "why" or a qualitative understanding of the causes of disparities, but this data does suggest what should be intuitive to most practitioners: when there is additional due process provided to accused Service members—involvement of counsel and rules that govern evidence and process—disparities will be reduced. However, no system should rely solely on due process in the adjudication of allegations to reduce disparities. As every practitioner would acknowledge, simply being put through a disciplinary process such as court-martial, nonjudicial punishment, or involuntary separation, even if that process results in an acquittal or retention, can have lasting negative effects on a Service member.

Oversight and Discretion. Intertwined with due process, the levels of discretion and oversight afforded to decision-makers in a process can also impact disparities, but at an earlier stage of the process. As the IRT states, "The greatest disparities exist along the continuum where there is significant discretion and limited oversight or procedural protections."[37] While external observers addressing racial disparities in military justice have typically targeted the role of commanders with court-martial convening authority, the IRT rightly focused on the role of first-line supervisors, senior enlisted leaders, and junior officers.[38] These more immediate supervisors not only train and develop new Service members but "also help shape how a commanding officer receives information and recommendations for action. It is often these early discretionary decisions made by these junior leaders that move a young Service member from the training and development phase of military service into the investigative and military justice systems."[39]

This dynamic should feel familiar to every military justice practitioner who has reviewed a command packet for an involuntary separation or nonjudicial punishment for minor misconduct or unsatisfactory performance. Counseling statements that squad leaders draft, supported by platoon-level leadership, build the case for disciplinary action as opposed to rehabilitation. Standard counseling forms routinely include pre-printed "magic language" intended to comply with regulatory requirements to warn Soldiers of the sometimes seemingly inevitable road to formal disciplinary actions while also sending a clear message to Soldiers that their path has already been determined. Judge advocates risk falling into the same pattern, reviewing routine actions purely for legal sufficiency without questioning whether unconscious bias and other heuristics or inexperience has played a role in determining a Service member's fate.

Training For Discretionary Actors. Again, intertwined with a lack of oversight for discretionary actors early in the process is the sufficiency of training for personnel making discretionary decisions. The IRT found that "Service members, particularly junior leaders, have not received sufficient

training and education to execute their roles in the investigative and military justice systems."[40] Senior commanders with convening authority responsibilities have been the primary recipients of legal training that includes the role of unconscious bias in decision-making. However, by the time senior commanders become involved or are asked to make critical legal decisions, subordinates and other discretionary actors in Army intervention programs, such as Family Advocacy or the Substance Abuse Disorder Clinical Care Program, who are not afforded the same level of training, may have established an inevitable path toward formal disciplinary consequences.

The Response: Finding a Framework in *Thinking, Fast and Slow*

Thinking, Fast and Slow provides example after example of how the unconscious mind utilizes shortcuts, heuristics, and cognitive bias to process information and arrive at judgments. Kahneman's examples will sound familiar to many practitioners, either from an introspective assessment of our own work or in discussing investigations and potential disciplinary actions with law enforcement personnel, Army Regulation 15-6 investigating officers, Army intervention personnel, and members of the chain of command.

Throughout the book, Kahneman presents research on numerous heuristics that System 1 thinking uses to find, more simply, answers to hard questions. Some of these thinking traps are relevant to evidentiary review and advice on disciplinary actions. For example, the halo effect describes when the brain uses a small amount of information to form broader conclusions.[41] The priming effect occurs when exposure to an idea, theme, or location causes your brain to pull related associations more readily.[42] Cognitive illusions describe the mistaken idea that a poor judgment or decision that happened to turn out well was a well-thought-out judgment,[43] which can lead to overconfidence in decision-making.[44]

Viewing the IRT findings regarding the outsized role of first-line supervisors and junior leaders through the lens of *Thinking, Fast and Slow*, three heuristics seem particularly applicable to the JA's role in reviewing actions and advising commanders. Kahneman uses the acronym WYSIATI (what you see is all there is) to name the tendency to use the information at hand as if it were the only or complete information.[45] Similarly, Kahneman describes "theory induced blindness" as the concept that once an individual has accepted a theory or judgment, flaws in that theory become harder to recognize,[46] and "sunk cost fallacy" to describe the unconscious tendency to continue with a path after investing substantial time and effort, even in the face of contrary evidence.[47] Mindful of these three related heuristics, practitioners should view every administrative or nonjudicial punishment action with an eye toward understanding what information is not there and the role of early decision-makers in the pending action.

Understanding the thinking traps in our System 1 thinking can serve two purposes. First, as a check on our work, merely being aware of the thinking traps can allow practitioners to slow their process, question their initial judgments, request additional information, seek input from alternative viewpoints, use checklists, and apply additional levels of independent review. Second, acknowledging the unavoidable nature of System 1 thinking traps should spur policymakers to implement processes and new tools that both encourage System 2 slow thinking and allow discretionary actors, including commanders and JAs, to track the demographics of disciplinary actions and identify trends or red flags.

While Kahneman focuses nearly exclusively on the role of heuristics and biases in individual decision-making, at the close of the book, he turns to where our focus and effort can begin: the role of organizations. As Kahneman writes:

> Organizations are better than individuals when it comes to avoiding errors, because they naturally think more slowly and have the power to impose orderly procedures. Organizations can institute and enforce the application of useful checklists, as well as more elaborate exercises, such as reference-class forecasting and the premortem. At least in part by providing a distinctive vocabulary, organizations can also encourage a culture in which people watch out for one another as they approach minefields. Whatever else it produces, an organization is a factory that manufactures judgments and decisions. Every factory must have ways to ensure the quality of its products in the initial design, in fabrication, and in final inspections. The corresponding stages in the production of decisions are the framing of the problem that is to be solved, the collection of relevant information leading to a decision, and reflection and review.[48]

An Institutional Response to Slow Our Thinking: IRT Recommendations

The IRT, focused on the common themes of due process, oversight and transparency, and training and education, all derived from data and qualitative research, proposed seventeen recommendations,[49] which Kahneman would no doubt agree are examples of the "orderly procedures" and concrete actions that the institution can impose to reduce individual fast thinking and the resulting cognitive errors and biases.

Training and Education

The IRT's first set of four recommendations[50] focus on the role of training,

***Thinking, Fast and Slow* provides example after example of how the unconscious mind utilizes shortcuts, heuristics, and cognitive bias to process information and arrive at judgments.**

particularly for populations who have not traditionally received education on their legal roles and responsibilities or the impact their discretionary decisions can have in predicting a Service member's involvement in future disciplinary actions. The force must be educated on the broad continuum of military justice, with an understanding of both the System 1 cognitive biases we all share and the effect that early decisions have on a Service member's career trajectory. In hindsight, it is easy to trace an inevitable path to punitive measures from an initial counseling to reactionary measures that reinforce or reaffirm an existing impression.

While the first two IRT recommendations relate to standardizing and improving equal opportunity and leadership training and education across the DoD, two additional recommendations directly target three groups of discretionary actors: first-line supervisors, military police investigators, and officers tasked with command-directed investigations.[51] The IRT notes that these actors' "decisions early in the process have a significant cascading effect that can set the Service member on an irreversible path, either toward improvement and inclusion or discipline and discharge."[52] Recommended training for first-line supervisors is modeled on the Senior Officer Legal Orientation, a best practice provided at The Judge Advocate General's Legal Center and School for officers assuming convening authority duties.[53] The Judge Advocate General embraced this recommendation in 2022, directing the development of a professional military education curriculum for junior noncommissioned officers and officers. Similarly, the Provost Marshal General has already instituted culturally competent policing training at the U.S. Army Military Police School. Additionally, the IRT recommended enhancing and standardizing the training for investigating officers.

Service Member Protections: Due Process

The IRT's next set of eight recommendations[54] addresses additional due process protections and is aimed directly at the underlying data that illustrates the role of due process in reducing disparities. Recommendations standardize rights to consult with counsel for nonjudicial punishment, particularly in the sea Services, and full representation at summary courts-martial.[55]

While the Army already provides many of these protections, two recommendations have potential to reduce disparities in processes that may lack sufficient safeguards: first, criminal titling, indexing, and expungement from law enforcement databases and second, legal reviews of all involuntary administrative separations.[56] Higher standards of proof for indexing—an independent legal review by an attorney outside the prosecution team—and an enhanced, independent process for expungements would provide better protections commensurate with civilian practice at a stage in the process in which disparities are pronounced. While Army attorneys typically conduct a legal sufficiency review for involuntary administrative separation actions, the IRT recommendation would implement into policy a more comprehensive review that requires both JAs and commanders to address issues Service members raise and to consider the impacts of service characterization. The institution, as Kahneman would recommend, can put in place policy and process that force slow thinking and avoid the pitfalls Kahneman would see stakeholders fall into while reviewing their own work.

Oversight and Transparency

The final five IRT recommendations[57] focus primarily on data collection and analysis and transparency. These recommendations would standardize the collected data, provide for collection of additional data items such as administrative investigations, and provide data analysis to commanders and JAs (including defense counsel) in a timely manner. Our ability to see ourselves clearly depends on accurate, consistent data collected over time to identify trends. While many JAs have reported anecdotal examples of what they perceived to be different outcomes for Soldiers with similar offenses, others have gone further and pulled data from memorandums of reprimand, administrative separations, and nonjudicial punishments to educate not only themselves but also the chain of command they are advising. At the Pre-Command Course at Fort Leavenworth, Kansas, Judge Advocate General's Corps leadership encourages incoming brigade and battalion commanders to request demographic data on disciplinary actions from staff judge advocates, which allows commanders to see themselves and self-correct, or self-reflect, accordingly.

Conclusion

After reading *Thinking, Fast and Slow*, one could conclude/despair that there is no way to untrain our brains from eliminating System 1 thinking in our individual or collective decision-making across the military justice timeline. This despair is heightened when we acknowledge the persistence of statistical racial disparities in the judicial system despite sustained focus on achieving diversity, equity, and inclusion and a better understanding and acceptance of the neuroscience underlying unconscious bias.

However, Kahneman's decades of research and enduring influence offer our institution a way forward to continue to directly impact the factors that force individual System 2 slow thinking and reduce the risk of disparities: due process, oversight, and training aimed at all discretionary actors. While study after study has verified statistical disparities, the IRT is the first attempt to look deeper and identify factors that can chip away at those disparities, which undermine trust and readiness and cause real harm to Service members.

The Army should not pause at this moment. Recognizing our opportunity to push forward, policymakers can continue to develop initiatives—such as further limiting discretion in adverse administrative actions and involuntary separations or providing additional and elevated levels of review—that complement or even extend the IRT recommendations. In addition, the Army should explore avenues to address past disparities. For example, Army leadership could consider the feasibility and advisability of issuing a *Kurta*-like memorandum, similar to guidance on sexual assault and mental health conditions, which could allow the Army Board for Correction of Military Records to liberally consider discharge upgrade requests from applicants who present evidence of disparate treatment based on race in the discharge process.[58] At its core, all of our ongoing and

future efforts to address racial disparities in our system embody two principles and fundamental elements of leadership we have always valued: seeing ourselves clearly and taking care of people. **TAL**

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Notes

1. Daniel Kahneman, Thinking, Fast and Slow (2011).

2. *Id.* at 105.

3. *Id.* at 25.

4. *Id.* at 21.

5. *See* Memorandum from Deputy Sec'y of Def. to Senior Pentagon Leadership et al., subject: Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems (3 May 2022).

6. *See* 1 U.S. Dep't of Def., Task Force on the Administration of Military Justice in the Armed Forces (1972).

7. H.R. Rep. No. 115-200, at 126-27 (2017).

8. U.S. Gov't Accountability Off., GAO-19-344, Military Justice: [DoD] and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities (2019) [hereinafter GAO-19-344].

9. *Id.*

10. *Id.* at 38.

11. *Id.* at 38-39.

12. *Id.*

13. *Id.* at 67-68.

14. *See id.* at 67.

15. *Racial Disparity in the Military Justice System – How to Fix the Culture, Hearing Before the H. Armed Servs. Comm. Subcomm. on Mil. Pers.* 116th Cong. 2-3 (2020) (statement of Lieutenant Gen. Charles N. Pede, Judge Advoc. Gen., U.S. Army); *Midyear 2021: How U.S. Military Is Driving Criminal Justice Reform*, ABA (Feb. 17, 2021), https://www.americanbar.org/news/abanews/aba-news-archives/2021/02/midyear-2021—how-u-s—military-is-driving-criminal-justice-refo.

16. U.S. Dep't of Army, Holistic Evaluation and Assessment of Racial Disparity in Military Justice (2022) [hereinafter HEARD Report].

17. *See id.* at iii.

18. UCMJ art. 89 (2021).

19. UCMJ art. 91 (2022).

20. *See id.* at vii.

21. *Id.* at iv.

22. *Id.* at v.

23. *Id.* at v.

> Black Soldiers had the highest percentage of drug and alcohol accessions waivers and are overrepresented as compared to their baseline end strength as: substantiated incidents of family abuse by the Family Advocacy Program; illicit drug positives on random urinalysis results; drug and alcohol clinical referrals; as subjects and victims in unrestricted reports of sexual assault; as subjects in law enforcement reports (regardless of the degree of discretion given to law enforcement officers); as recipients of administrative separations in lieu of court-martial and for misconduct; as recipients of nonjudicial punishment; as recipients of nonjudicial punishment for military discipline offenses; and as Soldiers arraigned at a court-martial.

Id.

24. *See id.*

25. *See, e.g., id.* at 8 (describing the discretionary actors in the drug testing process).

26. *See id.* at 58-67.

27. *Id.* at 44-47.

28. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, sec. 540I, 133 Stat. 1198, 1370 (2019).

29. Amanda Kraus et al., CNA, Exploring Racial, Ethnic, and Gender Disparities in the Military Justice System, at i (2023).

30. *Id.*

31. *Id.* at ii. The CNA study controlled for ethnicity, gender, fiscal year, marital and parental status, home of record, education level, UIC location, paygrade/rank and over age status, DoD occupation, enlistment waiver indicator, prior court-martial or nonjudicial punishment indicator, offense type indicators, and offense counts. *Id.* at 33-35.

32. *Id.* at iii.

33. Memorandum from Deputy Sec'y of Def. to Senior Pentagon Leadership et al., subject: Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems (3 May 2022).

34. *See generally* U.S. Dep't of Army, Reg. 635-200, Active Duty Enlisted Administrative Separations (28 June 2021) (prescribing policies and standards for Soldier administrative separations).

35. *See* HEARD Report, *supra* note 16, at 44-47.

36. *See supra* figure titled "DoD-Wide."

37. U.S. Dep't of Def., Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems 20 (2022) [hereinafter IRT Report].

38. *Id.* at 21.

39. *Id.* at 21-22.

40. *Id.* at 22.

41. Kahneman, *supra* note 1, at 82-83.

42. *Id.* at 55-57.

43. *Id.* at 27.

44. *See id.* pt. III.

45. *Id.* at 86-88.

46. *Id.* at 277.

47. *Id.* at 345-46.

48. *Id.* at 417-18.

49. IRT Report, *supra* note 37, at 23-33.

50. *Id.* at 22-26 (recommending to: 1) develop core competencies for training across the DoD; 2) train leaders on talent management; 3) enhance legal training for all discretionary actors, with focus on first-line supervisors; and 4) train all military police investigators and officers who conduct command-directed investigations).

51. *See id.*

52. *Id.* at 25.

53. *See JA Professional Military Education / Command Courses: Senior Officer Legal Orientation (SOLO)*, Judge Advoc. Gen.'s Legal Ctr. & Sch., https://tjaglcs.army.mil/en/pmecourses (last visited Oct. 19, 2023).

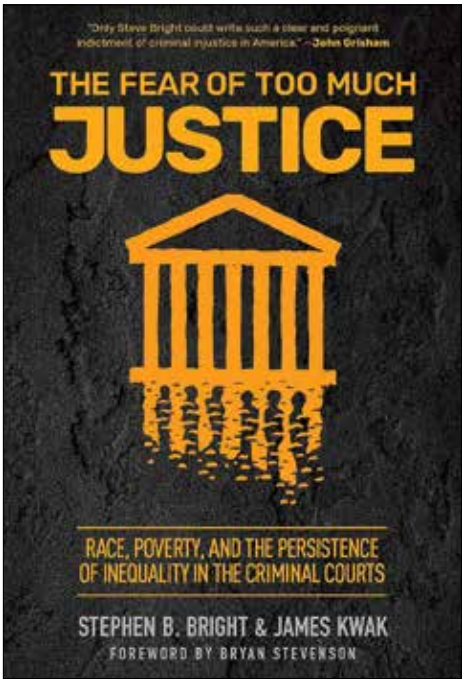
54. IRT Report, *supra* note 37, at 26-31 (recommending to: 5) adopt modern policing practices including body-worn cameras and recording suspect interviews; 6) provide right to counsel prior to nonjudicial punishment proceedings and appeal; 7) restrict the use of "vessel exception" for nonjudicial punishment to operationally necessary circumstances; 8) provide right to representation at summary courts-martial; 9) prohibit accused's commanding officer from serving as summary court-martial officer; 10) include additional due process in administrative separation proceedings for Service members not otherwise entitled to a separation board; 11) provide additional due process for titling, indexing, and expunging data in Federal criminal databases; and, 12) increase compliance with Article 137, Uniform Code of Military Justice for training on punitive articles).

55. *See id.*

56. *See id.* at 29-30.

57. *See id.* at 31-33 (recommending to: 13) improve and standardize data collection across all stages of investigative, administrative, and military justice systems; 14) develop processes and policy to timely analyze and report data to commanders and key stakeholders; 15) provide commanders with "detection tools" to address potential areas of disparity; 16) establish a principal staff assistant for law enforcement at the Office of the Secretary of Defense level, and; 17) institute appropriate oversight mechanisms to assess the impact of actions taken to address disparities).

58. *See* Memorandum from Acting Under Sec'y of Def. for Pers. and Readiness, to Sec'ies of the Mil. Dep'ts, subject: Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment (25 Aug. 2017), https://dod.defense.gov/Portals/1/Documents/pubs/Clarifying-Guidance-to-Military-Discharge-Review-Boards.pdf; *see also* Memorandum from Sec'y of Def. to Sec'ies of the Mil. Dep'ts, subject: Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder (3 Sept. 2014); https://www.secnav.navy.mil/mra/bcnr/Documents/HagelMemo.pdf.



The Fear of Too Much Justice

Exercising Fair and Impartial Prosecutorial Discretion beyond the Law

Reviewed by Major Hope E. Revelle

There is a fear that embracing the principles of fairness . . . will risk the loss of convictions. But there is far more to be gained by having a system in which all of the participants are fully informed and decisions are based on a thorough exploration of all of the facts of the crime and the circumstances of the person accused of committing it.[1]

Who Should Read This Book?

Stephen Bright and James Kwak offer a comprehensive criticism of the civilian criminal justice system in their new book, *The Fear of Too Much Justice*.[2] Bright's extensive criminal law practice and experience representing indigent people facing the death penalty over the past four decades make him the right attorney to provide readers with countless examples of how the civilian system repeatedly falls short of yielding fair and just results.[3] The book's title originates from Justice William Brennan's dissent in *McCleskey v. Kemp*, after the Court's reluctance to address racial discrimination during the sentencing phase of a capital case essentially because such acknowledgment would open a can of worms for other claims of discrimination.[4] Writing for the majority, Justice Lewis Powell asserted, "Apparent disparities in sentencing are an inevitable part of our criminal justice system."[5]

The book maintains the theme of racial disparity in the criminal justice system as it (1) examines the role of prosecutors, judges, and juries; (2) scrutinizes the influence of money and politics; (3) explores the complexities of mental illness; and (4) proposes tangible solutions to help correct such disparities. Anyone who doubts that the criminal justice system disproportionately punishes the poor and is one of the best examples of institutionalized racism in America should absolutely read this book. The judge advocate (JA) looking to transition into a civilian criminal law practice should read this book, if for no other reason, to explore the significant differences between military justice and criminal practice in the state and Federal systems.[6] Any attorney that may become involved in capital litigation should read this book, as the authors focus on death penalty trials and case law. Military trial counsel and defense counsel should maintain their focus on the *Manual for Courts-Martial*[7] and case law. Meanwhile, military justice leaders should also study *The Fear of Too Much Justice* as they prepare for the imminent shift of prosecutorial discretion from commanders to the Office of Special Trial Counsel (OSTC) while considering the implications of that new autonomy on issues like discovery and bias.

Focus Areas for Military Justice Practitioners

This review does not suggest this book offers military justice leaders any new or unknown information. Rather, it proposes areas of focus for supervisors to train, coach, and mentor their subordinate attorneys, paralegals, and legal support staff, based upon the authors' perspectives shared in *The Fear of Too Much Justice*. Notably, a significant number of shortcomings cited by the authors demonstrate how, in many ways, the military justice system offers more protections and guarantees of fairness to Service members than the criminal justice system offers to civilians. For example, extensive providence inquiries at guilty pleas minimize the risk of innocent Service members pleading guilty at courts-martial, a serious concern within the civilian sector.[8]

However, there are also several issues that are consistent across the practice of criminal law, in and out of the military. With the impending implementation of OSTC, JAs should also consider the implications of assuming responsibility (and accountability) for traditional prosecutorial discretion over the most serious offenses under the Uniform Code of Military Justice (UCMJ).[9] This is particularly true when fulfilling discovery obligations and preventing biased decision-making.

With the impending implementation of OSTC, JAs should also consider the implications of assuming responsibility (and accountability) for traditional prosecutorial discretion over the most serious offenses under the Uniform Code of Military Justice (UCMJ).

Discovery

The widely accepted standard for a Government "win" among JAs is a conviction that

survives appellate review. However, the authors point out that the caselaw allows convictions to be upheld despite egregious discovery violations.[10] The Supreme Court held in *United States v. Bagley* that the appellant was only entitled to relief upon a showing of a "reasonable probability that, had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been different."[11] Even more troublesome, the authors point out that "prosecutors who violate [discovery obligations] rarely face discipline."[12]

The codification of *Brady* obligations under Rule for Courts-Martial (RCM) 701(a)(6), which requires immediate disclosure of evidence favorable to the defense, is a critical rule of procedure to ensure a fair trial—and military justice leaders must emphasize it during the training and supervision of their litigation teams.[13] The rule's definition of "evidence favorable to the defense" is broad,[14] and the discussion section goes on to encourage the trial counsel to, "exercise due diligence and good faith in learning about any evidence favorable to the defense."[15] While a plain reading of the RCM might suggest there is nothing controversial about the rule, Justice Thurgood Marshall's dissent in *Bagley* discussed his concern that the reasonable probability standard set forth by the majority in that case incentivized prosecutors to "gamble" with interpretations of the rules to disclose evidence favorable to the defense.[16]

Indeed, the book provides several shocking examples of bad-faith *Brady* violations.[17] However, the more nuanced issue that could cause problems within OSTC and military justice shops are the "close calls." It is critical to mentor new prosecutors, helping them see that the rule should be interpreted in favor of disclosure.[18] A zealous prosecutor may wonder why they should disclose something not required by the rules or case law, so long as they are acting in good faith. The book cites a horrific anecdote where a victim committed suicide in 2004 when he learned that DNA evidence exonerated the man he identified as his rapist in 1983.[19] If police had refrigerated the victim's clothing in order to properly preserve the evidence, forensic testing could have exonerated the misidentified defendant, but the Supreme Court denied the appellant relief in 1988, "[holding] that the failure to preserve evidence denies a defendant a fair trial *only if the police acted in bad faith.*"[20] Although this ruling arose within a case evaluating a preservation issue and not *Brady*, the lesson can still be drawn that good faith does not change the real-world consequences of an unjust conviction that survives appellate review, sending innocent people to prison and closing unsolved criminal investigations. If a case cannot survive full disclosure of evidence that *might* (or might not) be favorable to the defense, then justice may dictate an acquittal. If leadership does not encourage this perspective on military justice, the young trial counsel could be tempted to "play the odds."[21]

From a practical perspective, military justice leaders should also generally encourage open file discovery, and specifically, full disclosure of case files at preferral. A plain reading of RCM 701(a)(1) reveals that trial counsel are not required to provide copies of case files to defense until after referral.[22] However, military justice shops often request submission of plea deals *before* the convening authority refers the case in order to process the action efficiently.[23] A defense counsel runs the serious risk of ineffectively representing their client if they advise a Service member to offer a plea of guilty without first reviewing the entirety of the case file in every case.[24] Encouraging trial counsel to disclose "early and often" not only prevents potential discovery violations and promotes transparency but may also facilitate earlier offers to plea in certain cases.

The Office of Special Trial Counsel will soon have the authority to approve offers to plea, in addition to the authority to refer charges to court-martial and grant immunity.

Bias

A common feature across all criminal justice systems is the high frequency of cases that result in plea deals.[25] The Office of Special Trial Counsel will soon have the authority to approve offers to plea, in addition to the authority to refer charges to court-martial and grant immunity.[26] Scholars suggest that such wide discretion can become a harmful source of discrimination and bias within a criminal justice system.[27] As the military faces the historic evolution of the UCMJ and the role of the special trial counsel (STC), now is an opportune time to consider how implicit and explicit biases can result in disparate treatment of Service members in the military justice system.

The Fear of Too Much Justice reminds the reader of the historic racism rooted in the law and baked into the American criminal justice system. While the book is organized into chapters addressing separate issues (such as elected judges, mental illness, and juries), every dimension of the system contributes to the disparate treatment of people of color—most notably, Black people.[28] The authors trace laws beginning with those that legitimized slavery to laws that "expressly differentiated between crimes committed by and against Blacks and whites," to Jim Crow, to convict leasing programs, and ultimately to the mass incarceration of Black people today.[29] Military justice is certainly not immune from the history of committing atrocities against Black Service members.[30] Rather than dismissing this problem as one relegated to the past, we must meet the opportunity to do better now.

Over the past five decades, the military conducted numerous studies that confirm disparate treatment of Black Service members.[31] After acknowledging that these inequalities exist within our system, the discussion too often ends with the question, "how can military justice leaders address such injustices beyond sending their counsel to the required implicit bias trainings?" Notably, Bright and Kwak remind the reader that discrimination within criminal justice

The military procedure for guilty pleas allows defense counsel to present individualized "life histories of their clients and propose sentences that respond to their particular needs," as opposed to the civilian "meet 'em and plead 'em" sessions Bright and Kwak describe.

systems is not only the result of implicit bias—explicit bias is still rampant across our Nation.[32] Leaders must stand guard over their offices to ensure counsel, paralegals, and other support staff with explicit biases are not practicing military justice; it is irresponsible to assume that such people do not exist within the ranks.

"[T]here is a limit to what can be achieved through [the authors' proposed] reforms, which focus on specific types of people and offenses or depend on the use of prosecutorial discretion."[33] The newly minted OSTC leaders should consider how bias may impact their charging decisions, plea negotiations, and sentencing recommendations. Implicit bias training often focuses on the negative bias against people of color, but also prevalent in the criminal justice system is a bias that favors victims with whom prosecutors identify.[34] Leaders should train counsel to be mindful not only of their negative bias but also the instinct to more easily empathize with victims to whom they may more closely relate. The authors plainly remark that, "[r]ace has always mattered" in criminal cases, and even without a statistical analysis, that fact, "was obvious to people who closely observed Georgia's criminal courts."[35] It remains obvious to criminal law attorneys today.

Finally, the authors highlight the "trial penalty" as a common source of injustice resulting from unrestrained prosecutorial discretion.[36] The American Bar Association (ABA) published a 2023 Plea Bargain Task Force Report that outlines fourteen principles "to guide plea practices . . . based on the fundamental [c]onstitutional right to trial."[37] The ABA's report supports the authors' assertions that the disparity in bargaining power between a prosecutor and defense often leads to unjust results at both guilty pleas and contested trials.[38] The Office of Special Trial Counsel should consider how to implement these principles within its practice of plea negotiations to prevent unfair tactics and create uniformity across jurisdictions.

We Can Always Welcome More Justice

Because of their unmatched authority and power, it is not enough for a prosecutor to simply play by the rules. Justice requires integrity, empathy, and humility from the attorneys who practice criminal law. The good news is that the military already employs several strategies that the authors offer to promote justice. For instance, the military typically handles drug use and possession cases through nonjudicial punishment and administrative separations, offering free substance abuse treatment to Service members.[39] The military procedure for guilty pleas allows defense counsel to present individualized "life histories of their clients and propose sentences that respond to their particular needs," as opposed to the civilian "meet 'em and plead 'em" sessions Bright and Kwak describe.[40]

Nonetheless, the pursuit for more justice is a perpetual duty that, as illustrated by Bright and Kwak, extends beyond case law and the Rules for Professional Conduct:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but in that justice shall be done . . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[41]

As military justice leaders face the transition toward a more civilianized criminal system, they should study the lessons from seasoned civilian practitioners like Stephen Bright and instill them in young practitioners.[42] Justice is not as simple as following the rules or applying precedent—it requires a moral compass to complement legal and ethical duties. In the pursuit of justice, practitioners should remember that they may always choose to be more ethical and more compassionate than is required under the law. **TAL**

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Notes

1. Stephen B. Bright & James Kwak, The Fear of Too Much Justice: Race Poverty, and the Persistence of Inequality in the Criminal Courts 258 (2023).

2. *Id.*

3. *See Stephen B. Bright*, Yale L. Sch., https://law.yale.edu/stephen-b-bright (last visited Oct. 24, 2023). Notably, Bright is also an early mentor of public interest lawyer Bryan Stevenson. *See* Bryan Stevenson, Just Mercy 6 (2014).

4. Bright & Kwak, *supra* note 1, at 10-11 (citing McCleskey v. Kemp, 481 U.S. 279, 312, 315, 315 n.38, 317 (1987)).

> The Court next states that its unwillingness to regard petitioner's evidence as sufficient is based in part on the fear that recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing. Taken on its face, such a statement seems to suggest a fear of too much justice.

McCleskey, 481 U.S. at 339 (Brennan, W., dissenting).

5. *See McCleskey*, 481 U.S. at 312.

6. *E.g.*, bail and bond procedures, elected prosecutors and judges, court-appointed defense attorneys, probation and diversion programs. *See generally* Bright & Kwak, *supra* note 1.

7. Manual for Courts-Martial, United States (2019) [hereinafter MCM].

8. Bright & Kwak, *supra* note 1, at 25 ("The National Registry of Exonerations reports that, as of 2015, 15 percent of people who had been exonerated—261 of 1,702—pleaded guilty. Eight percent of them pleaded guilty to murder . . . .") (citing Nat'l Registry of Exonerations, Innocents Who Plead Guilty 1 (2015)).

9. *See generally* Exec. Order No. 14103, 88 Fed. Reg. 50535, annex 2 (July 28, 2023) ("[T]he National Defense Authorization Act for Fiscal Year 2022 made historic reforms to the military justice system, including the unprecedented transfer of prosecutorial discretion from commanders to independent, specialized counsel to prosecute certain covered offenses, including sexual assault and domestic violence. . . .").

10. Bright & Kwak, *supra* note 1, at 36.

11. United States v. Bagley, 473 U.S. 667, 668 (1985).

12. Bright & Kwak, *supra* note 1, at 37 (citing Bennett L. Gersham, *Reflections on* Brady v. Maryland, 47 S. Tex. L. Rev. 685, 689, 715 (2006)).

13. *See* MCM, *supra* note 7, R.C.M. 701(a)(6) (2019).

14. *See id.*

> Trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known the trial counsel which reasonably tends to – (A) Negate the guilt of the accused of an offense charged; (B) Reduce the degree of guilt of the accused of an offense charges; (C) Reduce the punishment; or (D) Adversely affect the credibility of any prosecution witness or evidence.

Id.

15. MCM, *supra* note 7, R.C.M. 701(a), Discussion.

16. Bright & Kwak, *supra* note 1, at 36 (citing United States v. Bagley, 473 U.S. 667, 693-703 (1985) (Marshall, J., dissenting)).

17. *Id.* at 38-39 (describing the efforts to reform discovery laws in Texas after Michael Morton was exonerated after spending more than twenty years in prison for the murder of his wife because the prosecutor withheld exculpatory evidence at trial).

18. *See* MCM, *supra* note 7, R.C.M. 701(e); UCMJ art. 46 (2019) (mandating that both parties are granted equal access to interview witnesses and inspect evidence). The equal access mandate is another example of how military procedure promotes fairness, illuminated by the stories in Bright and Kwak's book. *See also* ABA Comm. on Ethics & Pro. Resp., Formal Op. 09-454, at 4 (2009) ("In particular, Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information on a trial's outcome. The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.").

19. Bright & Kwak, *supra* note 1, at 40-41 (citing Marc Bookman, *Does an Innocent Man Have the Right to be Exonerated?*, The Atlantic (Dec. 6, 2014), https://www.theatlantic.com/national/archive/2014/12/does-an-innocent-man-have-the-right-to-be-exonerated/383343).

20. Bright & Kwak, *supra* note 1, at 41 (citing Arizona v. Youngblood, 488 U.S. 51, 57-58 (1988)) (emphasis added).

21. Bright & Kwak, *supra* note 1, at 36 (citing United States v. Bagley, 473 U.S. 667, 693-703 (1985) (Marshall, J., dissenting)).

> At best, this standard places on the prosecutor a responsibility to speculate, at times without foundation, since the prosecutor will not normally know what strategy the defense will pursue or what evidence the defense will find useful. At worst, the standard invites a prosecutor, whose interests are conflicting, to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive.

Bagley, 473 U.S. at 701 (Marshall, J., dissenting).

22. *See* MCM, *supra* note 7, R.C.M. 701(a)(1).

23. *Cf.* Bright & Kwak, *supra* note 1, at 258 (describing the unfair results in situations "when prosecutors offer plea bargains that must be accepted or rejected quickly while refusing to disclose any information about the case").

24. U.S. Dep't of Army, Reg. 27-26, Rules of Professional Conduct for Lawyers r. 1.1 (28 June 2018) ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.").

25. *See* Colonel Jeff A. Bovarnick, *Plea Bargaining in the Military*, 27 Fed. Sent. Rep. 95, 95 ("With an estimated 90 percent of courts-martial resulting in guilty pleas, plea bargaining procedures primarily in the form of pretrial agreements are critical to the fair administration of military justice and essential to the overall court-martial process."); *see also* Bright & Kwak, *supra* note 1, at 6 ("97 percent of [F]ederal convictions and 94 percent of state convictions . . . are resolved with guilty pleas.") (citing Missouri v. Frye, 566 U.S. 134, 143 (2012)).

26. *See generally* Exec. Order No. 14103, 88 Fed. Reg. 50535, annex 2 (July 28, 2023).

27. *See* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795 (2012).

> From the arrest of a suspect to the sentencing of a defendant, consider the range of discretion-based decisions that prosecutors must make on a daily basis: Should an arrested citizen be charged with a crime? … What crime or crimes will be charged? Should charges be dropped? Should a plea bargain be offered or negotiated? Which prosecuting attorney will prosecute which alleged crime? What will the trial strategy be? Will minority jurors be challenged for cause or with peremptory challenges? What sentence will be recommended?

Id.

28. *See generally* Bright & Kwak, *supra* note 1.

29. *See id.* at 217-19.

30. *See* Betsy Reed, *Group Seeks Clemency for 110 Black Soldiers Convicted in 1917 Houston Riot*, Guardian (Dec. 20, 2021), https://www.theguardian.com/us-news/2021/dec/20/clemency-110-black-soldiers-1917-houston-mutiny (describing efforts to fight for the posthumous clemency of more than one hundred Black Soldiers who were denied any semblance of due process in the largest murder trial, a court-martial, in U.S. history following a race-motivated riot in the Jim Crow era in Houston, Texas, after which nineteen of the Soldiers were hanged).

31. *See generally* U.S. Dept. of Def., Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems (2022).

32. Bright & Kwak, *supra* note 1, at 9 (citing five capital cases in Georgia where "defense lawyers referred to their own clients with racial slurs before the jury") (citing Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in the Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433 (1995)).

33. *Id.* at 253.

34. *Id.* at 10-11 (discussing how the attorneys in *McCleskey v. Kemp* were unsuccessful in convincing the Supreme Court of an injustice when they presented statistics proving "that [Georgia] prosecutors sought the death penalty primarily in cases where the victims were white, even though Black people were the victims of over 60 percent of murder cases in the state, and that death was more likely to be imposed in cases involving white victims and Black defendants") (citing McCleskey v. Kemp, 481 U.S. 279, 286-287 (1987); David C. Baldus et al., Equal Justice and the Death Penalty: A Legal and Empirical Analysis (1990)).

35. *Id.* at 10.

36. *See generally* Bright & Kwak, *supra* note 1, at 19-25.

37. Thea Johnson, American Bar Association 2023 Plea Bargain Task Force Report 9 (2023).

38. *See generally id.; see also* Bright & Kwak, *supra* note 1, at 23 ("As the Supreme Court has observed, people who take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate because the longer sentences exist on the books largely for bargaining purposes.") (citing Missouri v. Frye, 566 U.S. 134, 143 (2012)). Note, the authors incorrectly cite an article in *The Guardian* in the book, but this quote originates in Frye.

39. Although Service members receive treatment through the Army Substance Abuse Program after illicit drug use is discovered, this does not automatically curtail punishment. Unless a Service member self-enrolls *before* detection of illicit drug use, the initiation of separation for that use is mandatory. *See generally* U.S. Dep't of Army, Reg. 600-85, The Army Substance Abuse Program (23 July 2020). Considering the high rate of drug use among Service members and Army-wide retention problems, perhaps drug diversion programs should be considered in lieu of administrative actions. *See* Bright & Kwak, *supra* note 1, at 252-56 (advocating for prosecutors to "[decline] to arrest or prosecute people where it would serve no purpose" and highlighting the "over prosecution of drug offense").

40. Bright & Kwak, *supra* note 1, at 258.

41. Berger v. United States, 295 U.S. 78, 88 (1935).

42. *See also* Bryan Stevenson, Just Mercy (2014). Bryan Stevenson is another renowned criminal justice advocate, and his novel provides a provoking, yet hopeful, firsthand perspective of representing indigent clients in the civilian criminal justice system.

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Azimuth Check

Ten Years In

Special Victims' Counsel Practice in the Era of the Office of Special Trial Counsel

By Colonel Evah K. McGinley

Military justice is certainly not new as a practice area within our Army; military justice predates the very founding of our country. Mirroring the history of our own Judge Advocate General's (JAG) Corps, the practice of military justice can trace its roots all the way back to 1775 and the Articles of War established by the Second Continental Congress.[1] By contrast, the Special Victims' Counsel (SVC) Program is dramatically younger, having commemorated its tenth anniversary on 13 October 2023. Throughout the past decade, the SVC Program has developed and adapted; it will continue to do so as we embark upon an entirely new chapter of military justice practice.

Where We Have Been

Now a decade old, SVC programs across the Department of Defense (DoD) grew from congressional (and DoD) concerns about the representation of victims' interests in military justice proceedings. Each Service stood up its own version of the SVC Program. The Air Force was the first out of the gate with the Army following closely behind several months later, ultimately beating the timeline within the National Defense Authorization Act for Fiscal Year

2014 statutory provisions through which Congress directed the program.[2]

Upon its inception, the Army's SVC Program consisted of JAG Corps attorneys already serving in an array of different jobs, pulled together on short notice for a critical new mission—but without clear guidance on what the future might look like.[3] The first SVCs knew the congressional (and secretarial) intent[4] and worked to execute with independent initiative and absolute dedication to the needs of their assigned clients. These early Army SVCs were actually SVAs (special victim advocates) prior to an impromptu name change to avoid confusion with other stakeholder entities, including victim advocates.[5] This change clearly delineated SVCs as dedicated attorneys representing individual clients—with the same attorney-client relationship seen in legal assistance offices or Trial Defense Service.[6]

Originally, the SVC Program was limited to the Active component and provided services only for adult victims of sexual assault.[7] By May of 2014, the Secretary of the Army expanded the SVC Program to include the Reserve components.[8] In the years following, developments continued, including the amendment of Military Rule of Evidence 513 to provide additional victim rights[9] and access to SVC representation for DoD Civilians in May of 2017.[10] Three years later, in 2020, the Army gave SVCs the mission to provide legal representation to victims of domestic violence, including cases where that violence is not connected to a sexual assault.[11]

Where We Are Now

Attorneys entering the JAG Corps today have never known the practice of law in the Army without the SVC Program. The same can be said for judge advocates in the ranks of captain and major and even some lieutenant colonels, many having personally served in this role. Simultaneously, many of their leaders are too senior ever to have served as SVCs themselves and spent the majority of their formative jobs practicing military justice before the advent of any SVC programs. As a result, SVC practice occupies a unique space where it is the standard for some but still relatively new to others.

The SVC practice is also unique in that it occupies space in two different traditional practice areas: military justice and legal assistance.[12] The balance between those two areas and interests can vary widely depending upon the case. On one hand, SVCs can be seen as one of the four pillars of military justice practice,[13] joining their colleagues in the prosecution, defense, and the judiciary. However, at its core the SVC Program is a hybrid between military justice and a legal assistance construct, described within Army Regulation 27-3, *The Army Legal Assistance Program.*[14] Special victims' counsel also fall under the supervisory purview of their local chief of client services, solidifying their legal assistance roots.

Attorneys entering the JAG Corps today have never known the practice of law in the Army without the SVC Program.

The organizational framework is also structured for such consonance. Staff judge advocates (SJAs) maintain command and control of SVCs as individual personnel, ensuring their installations and commands support SVC services. The SVC Program Office maintains technical chain support, and the regional managers work to cross-level SVC services between installations and SVCs. Ultimately, the individual SJAs directly manage the SVC support available within their offices, but to do so requires a team effort to ensure that cross-leveling support between SJAs is manageable and efficient.

A mixture of military justice and legal assistance, SVC work is intricate and varied. Some cases may be almost exclusively military justice work, involving preparation for and representation through a Criminal Investigation Division interview followed by work at a court-martial, perhaps including arguing motions before the court. In other cases, the work may be primarily assisting a client with their understanding of administrative processes in the Army and guiding them through a separation agreement or, perhaps, a landlord-tenant issue emerging from the disruption to housing arrangements following a domestic violence incident.

That same synthesis is seen in both the Reserve and National Guard SVCs as well, although the work there is not identical. In the National Guard, the SVC program manager directly manages the program rather than the individual SJAs as in the Active component. In the U.S. Army Reserve, the legal operations detachment manages SVCs, responsible for ensuring appropriate SVC support across the force, but they are aided by a centralized SVC Program Office at Legal Command. For both Reserve components, the complications of providing services to a part-time, often geographically dispersed force is significant.

Army Regulation 27-3 covers the SVC Program along with all other legal assistance services, so no independent regulation governs the SVC Program's conduct. However, a much-anticipated DoD instruction focusing on SVCs is imminent. Taking both documents in tandem may help to better define the unique role SVCs occupy. What is clear is that SVCs offer something no other practitioners can: a dedicated and specific representation of their client's interests. Notably, SVCs do not always pursue what may be termed "the client's best interests." Rather, SVCs pursue the express intent of their client, requiring the client to directly inform their counsel of their desired outcome and interests—even when such an outcome might not necessarily be in line with the client's objective best interests. While that might initially seem counterintuitive, it nonetheless represents the key aspect of SVC practice: assisting the client to understand and manage a situation resulting from an incident or incidents where the client did not have agency and control. Restoring the client's ability to have a "say so" in the matter is a dramatic step towards helping that client to regain that lost sense of control.

Where We Are Heading

The unique aspects of SVC practice have made it successful over the last ten years

If the pilot proves successful, the option for a Civilian SVC would dramatically increase flexibility for SJAs in an environment with a limited number of uniformed attorneys.

and are likely to define how the practice will continue. A client-centric approach to service underpins the SVC Program, now a mainstay component of the military justice landscape across the Army.

The resourcing and advocacy of SVCs is without a linear counterpart in the civilian system. While various jurisdictions continue to make strides with respect to support and advocacy for victims, the broad nature of SVC services for clients in courts and proceedings across the Army gives eligible victims a benefit unavailable in the civilian system.

Special victims' counsel are privileged to assist clients who are enduring some of the most difficult days of their lives.[15] This is a type of hands-on, meaningful practice available to few attorneys in the civilian sector and rarely with the level of resourcing and training provided to our Army counsel. As a single (and massive) jurisdiction, the Army has uniformly and successfully implemented funding and methodological infrastructure throughout our footprint to continue in service and protection of victims' rights. In every area of operation within the larger Army jurisdiction, SVCs serve in that critical role between the justice system and the victim-clients.

Evolution continues as the SVC Program expands the breadth of experienced counsel. Most recently, The Judge Advocate General authorized the launch of the Civilian SVC Pilot Program to determine how the Army might leverage the expertise and experience of our Civilian legal assistance attorneys as SVCs. If the pilot proves successful, the option for a Civilian SVC would dramatically increase flexibility for SJAs in an environment with a limited number of uniformed attorneys. It would also allow clients, especially those unlikely to move from their local area, to maintain the same SVC throughout the duration of their case—even in situations where the case may take numerous months.

Further evolution into a more robust appellate practice is also on the table as the Army reviews ways to engage in that work.

Conclusion

As the practice of military justice in our Army enters an entirely new chapter with the Office of Special Trial Counsel, the SVC Program will continue to develop and adapt. The provision of dedicated counsel is imperative for this critical mission that ensures our Soldiers, Family members, and Civilian employees are provided the best advocacy possible. **TAL**

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Notes

1. 2 Journals of the Continental Congress 1774-1789, at 111-23 (W.C. Ford ed., 1905) (June 30, 1775); *see also* William Winthrop, Military Law and Precedents 21-23 (2d ed. 1920).

2. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, sec. 1716, 127 Stat. 672, 966 (2013).

3. The Judge Advoc. Gen., U.S. Army, TJAG Sends, Vol. 39-02, Special Victim Advocate Program (15 Oct. 2013).

4. *See* 10 U.S.C. § 1044e; National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, sec. 573, 126 Stat. 1632, 1755.

5. Lieutenant General Stuart W. Risch, Judge Advoc. Gen., U.S. Army, *Address at the Tenth Anniversary of Special Victims Counsel Program*, at 32:49, DVIDS (Oct. 24, 2023), https://www.dvidshub.net/video/901522/10th-anniversary-special-victims-counsel-program (attributing this shift in title to Major Kate Mitroka); *id.* at 20:25 (featuring Major Kate Mitroka describing her conversation with then-Lieutenant Colonel James R. "Jay" McKee to change "special victim advocate" to "special victim counsel").

6. *See* 10 U.S.C. § 1044e(c); U.S. Dep't of Army, Reg. 27-3, The Army Legal Assistance Program ch. 7 (26 Mar. 2020) [hereinafter AR 27-3]; U.S. Dep't of Army, Reg. 27-10, Military Justice ch. 6 (20 Nov. 2020).

7. Colonel Louis P. Yob, *The Special Victim Counsel Program at Five Years: An Overview of Its Origins and Developments*, Army Law., no. 1, 2019, at 65, 69.

8. U.S. Dep't of Army, Dir. 2014-09, Reserve Component Eligibility for the Special Victims' Counsel Program (7 May 2014); *see also* U.S. Dep't of Army, Sexual Assault Prevention and Response Progress Report to the President of the United States 17 (5 Nov. 2014).

9. *See* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act of Fiscal Year 2015, Pub. L. No. 113-291, sec. 537, 128 Stat. 3292, 3369 (2014).

10. U.S. Dep't of Army, Dir. 2017-16, Civilian Employee Eligibility for the Special Victims' Counsel Program (1 May 2017).

11. Memorandum from The Judge Advoc. Gen., U.S. Army, to Judge Advoc. Legal Servs. Pers., subject: Domestic Violence Victim Representation Program (19 June 2020); National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, sec. 548, 133 Stat. 1198, 1378 (2019).

12. *See* 10 U.S.C. § 1044e(c); AR 27-3, *supra* note 6, ch. 7; U.S. Dep't of Army, Reg. 27-10, Military Justice paras. 17-7(c), 17-11 (20 Nov. 2020).

13. Lieutenant General Stuart W. Risch, State of the Corps (31 Oct. 2023) (unpublished PowerPoint presentation) (on file with author).

14. AR 27-3, *supra* note 6.

15. Pol'y Memorandum 22-13, The Judge Advoc. Gen., U.S. Army, subject: Special Victims' Counsel (1 Mar. 2022).

LTG John J. Tolson (left), Commanding General, XVIII Airborne Corps and Fort Bragg, congratulates COL Cecil L. Forinash (right) after presenting him with the Legion of Merit upon his retirement, 31 October 1969. (Photo courtesy of author)

Lore of the Corps

A Prisoner of the Japanese and a Judge Advocate

The Life and Times of Cecil L. Forinash

By Fred L. Borch III

Cecil L. Forinash, who served in our Corps from 1950 until 1969, had a very successful career as an Army lawyer, including tours as the staff judge advocate (SJA) at Fort Carson, Colorado, Fort Bragg (now Fort Liberty), North Carolina, and at VII Corps, Stuttgart, Germany. But Forinash had also served as an Infantry lieutenant and captain in the Philippines in World War II, and he survived both the Bataan Death March and captivity as a prisoner of war (POW) from November 1942 until the Japanese

surrender in 1945. This is the story of his remarkable life and career as a Soldier.

Born in West Chester, Iowa, on 9 December 1917, Cecil Lavone Forinash grew up in a "small but thriving" town of about 225 inhabitants.[1] His father did various jobs, including carpentry, masonry, and working as a laborer on nearby farms. Forinash's mother died when he was three years old and his father had a tough time as a widower caring for young Cecil, his two-year-old sister, and two older boys. With the onset of the Great Depression, it only got tougher to earn a living.[2]

After graduating from high school in 1935, Forinash moved to Iowa City, where he found a job paying thirty cents an hour and began taking classes at the University of Iowa. As the university was a land-grant college, every male student was required to enroll in the Reserve Officer Training Corps (ROTC) program—and that was Cecil Forinash's introduction to the Army.[3]

He liked the ROTC program, especially close-order drill, but it was the seven dollars a month that one earned for participating in Army ROTC that kept him in uniform as a cadet. In 1939, after completing four years of ROTC, Forinash was commissioned as a second lieutenant in the Army Reserve, even though he did not have enough academic credits at the time to earn a degree from Iowa.[4]

When the Army announced that a small number of Army Reserve lieutenants could request active duty, Forinash decided it was a good idea. He applied, was accepted, and reported for duty in July 1939 at Fort Snelling, Minnesota. Later that year, Second Lieutenant Forinash travelled to Camp Jackson, South Carolina, and Fort Benning (now Fort Moore), Georgia.[5]

In the summer of 1940, Forinash applied for extended active duty. His assignment choices were Panama, Hawaii, or the Philippines. He chose the Philippines and shipped out for Manila on the USS *Grant.* This Army transport ship travelled at about 10 knots (about 11 miles per hour)—so it took some twenty-one days to reach Manila with stops in Hawaii and Guam along the way. When Forinash arrived, he was assigned to a heavy weapons company in the 45th Infantry Regiment, a part of the Philippine Scouts.[6]

In January 1941, First Lieutenant (1LT) Forinash volunteered for duty as an artillery aerial observer with the Second Observation Squadron at Clark Field. He learned how to send messages in Morse code and use an aerial camera. There also was training on firing the machine gun located in the rear seat of the observer plane.

One morning, while flying over a mountainous area, the aircraft in which Forinash was the observer suddenly lost altitude, clipped a tree, caught fire, and crashed. Forinash "was surprised to find himself alive."[7] He managed to climb out the rear of the plane but immediately saw that the pilot was trapped and was unable to open his canopy to escape. Forinash managed to pull the pilot—whose feet were on fire—out through the fuselage and saved his life. Despite this near-death experience, Cecil Forinash liked flying, and he applied and was accepted for Army pilot training at Randolph Field, Texas. He was scheduled to begin flight school at the end of his tour of duty in the Philippines, but the Japanese attack on the Philippines on 8 December 1941 meant there would be no return to the United States in the near future, much less learning how to fly at Randolph Field.[8]

When the Japanese did attack, 1LT Forinash was ordered to join the pilot of a Curtiss O-52 observation airplane[9] and fly to Nichols Field, which was located south of Manila. When the airplane approached the airfield, the Japanese fired on it. The engine stopped—as it had been damaged by the enemy's gunfire—and as the airplane began losing altitude, the pilot ordered Forinash to jump. Consequently, he went through the emergency door, crawled out on the wing, and jumped. As Forinash remembers:

> When my parachute opened, all the [Japanese] ground fire was directed at me instead of at the plane. Tracers and bullets whizzed by me. One caught me on the left side of the chest, circled around my rib, and came out the back. When I put my hand on my back I came up with a handful of blood. My immediate thought was that I had been hit in the heart.[10]

Forinash landed near several American Soldiers. Someone said, "Get a chaplain," but Forinash yelled, "Hell, get me a doctor."[11] A field ambulance soon took him to the hospital at Fort McKinley. There were some reports that 1LT Forinash had been killed in action, but reports of his death obviously were exaggerated.[12]

In February 1942, when Forinash's wounds were healed and he was discharged from the hospital, the Japanese were on the move and the Americans and Filipinos were in retreat. Then-Captain (CPT) Forinash was assigned to the 31st Infantry Regiment, Philippine Army. His battalion was assigned to defend the main road into south Bataan. It was tough going because food was in short supply and the American and Filipino soldiers were "hungry and weak."[13] Despite their efforts, the Japanese repeatedly broke through the American defenses. Forinash and some 10,000 American and tens of thousands of Filipino soldiers surrendered to Japanese forces on 9 April 1942.[14]

Over the next days, Forinash was a part of what is now called the Bataan Death March. He and his fellow POWs endured a six-day, sixty-mile trek during which the Japanese guards beat, bayonetted, or shot those who offered any resistance or who impeded the pace of the march.[15] The "death march" was conducted without food or water and thousands died, but Cecil Forinash survived to arrive at Camp O'Donnell.[16] Conditions at this location, however, were no better for the Americans. There was only one water faucet for some 6,000 to 7,000 prisoners. Only rice and watery soup were available to eat. Forinash remembered that about sixty Americans were dying every day at the camp; ultimately, about 1,200-1,500 died.[17] Also, Cecil was suffering from malaria, but a friend managed to get him some quinine, which helped mitigate his chills and fever.[18]

In June 1942, Forinash and his fellow American POWs were made to walk nine miles from Camp O'Donnell back to Capas,[19] where they boarded a train for Cabanatuan. There, they joined POWs who had been captured on Corregidor. On several occasions, CPT Forinash "witnessed Japanese soldiers carrying Philippine heads tied to bamboo poles by the hair."[20] At the

time, he remembered wishing that he had a camera with him to record this war crime.[21]

In November 1942, CPT Forinash and some 1,500 POWs were transferred to the Japanese ship, *Nagata Maru.* It took three weeks to reach Moji, Japan, and the men were crammed into the hold for the entire journey. "Life in the hold of the ship," remembered Forinash, "was impossible for anyone to describe. It was pitch black and unbearably hot."[22]

When the ship docked in Japan, CPT Forinash "was so weak that [he] fell to the ground."[23] Fortunately, his fellow prisoners helped him get on the train that took them to Osaka. Forinash was assigned to live and work in a factory that produced galvanized sheet metal. It was hard work and Americans soon began to die from illness caused by lack of food; the Americans only received a little rice and some watery green soup. There was rarely any meat. Once again, however, Cecil Forinash managed to survive, although about 100 of the 400 POWs in the factory did not.[24]

In June 1943, Forinash left Osaka for a POW camp in Zentsuji, which was located on the island of Chikoku. He remained there until June 1945, when the Japanese moved the Americans to the island of Honshu. On 6 August 1945, the United States dropped the first atomic bomb on Hiroshima.[25] Three days later, a second bomb detonated over Nagasaki.[26] About two weeks later, the Japanese commander assembled all the prisoners in Forinash's POW camp and announced that "the emperor had brought peace to the world."[27] He and the Japanese guards then disappeared. The war—at least for CPT Cecil Forinash—was over.[28] He had weighed about 155 or 160 pounds when the war started; he now was "down to about 110 or maybe 100 [pounds]" and was "skin and bones."[29] But he was alive.

On 8 September 1945, Soldiers from the 1st Cavalry Division arrived to prepare Forinash and his fellow POWs for their return home. The men sailed from Yokohama to Manila and then to San Francisco. While recuperating from injuries sustained during captivity, CPT Forinash travelled to Miami Beach, Florida, where he met a woman, Mary May, in charge of local Red Cross operations. They married in July 1946.[30]

After being discharged from the Army, Forinash settled in Knoxville, Tennessee, and decided that he wanted to be a lawyer. He entered the University of Tennessee College of Law, took the bar examination his second year of law school, and passed. He was in the last class permitted to take the Tennessee bar examination after completing the second year of law school.[31]

Forinash then decided to apply for a Regular Army commission in the new Judge Advocate General's Corps.[32] His wife was not certain that this was a good course of action, but Forinash convinced her that with his more than six years of active-duty service before, during, and after World War II, he had fewer than fifteen years to serve before he would have an Army retirement.[33]

Having promoted to major (MAJ), MAJ Forinash reported for duty to Fort Monmouth, New Jersey, which was the home of the Army Signal Corps. He was the deputy staff judge advocate (DSJA). His duties included sitting as the law officer (the forerunner of today's military judge) on general courts-martial, assisting Article 32 investigating officers, and reviewing records of trial.[34]

Major Forinash also served as legal counsel to the First Army's Loyalty Security Review Board. At the time, U.S. Senator Joseph McCarthy's search for communists in the U.S. Government had resulted in Army investigations of personnel assigned to Signal Corps engineering and laboratory facilities at Monmouth. Forinash's job as legal counsel was to question employees alleged to be security risks. At the time, he felt that there was "little evidence" supporting these allegations, but the board generally took a hard line and recommended termination of any employee who appeared before it.[35]

In 1951, MAJ Forinash was assigned to Seventh U.S. Army, then located in Stuttgart, Germany. He worked in the Military Affairs Office, served as a law officer, and represented more than a few accused Soldiers at general courts-martial. One infamous case involved two Soldiers, Private (PVT) Clarence Brooks and PVT Herbert Edwards. On 2 May 1953, the two men attacked a German woman who was walking with her boyfriend in a park in Karlsruhe, Germany.[36] The two Americans also attacked the boyfriend, but he was able to flee and telephone the military police.[37] In the meantime, Brooks and Edwards dragged the woman into the nearby woods, repeatedly struck her in the face and on the body, and raped her.[38]

Both PVTs Brooks and Edwards were subsequently apprehended and, under questioning by Army Criminal Investigation Division (CID) agents, confessed to the rape. Although PVTs Brooks and Edwards were tried separately, they received the same punishment after being found guilty: a dishonorable discharge and fifty years' confinement at hard labor.[39]

As defense counsel for both PVTs Brooks and Edwards, MAJ Forinash requested that at least one-third of the panel consist of enlisted personnel—which had only been permitted since 1951.[40] He thought having a mixed panel would be better than officer members only. The most damning evidence against both Soldiers was their confessions to CID. After investigating the taking of the statements, however, Forinash was unable to find a basis to request their suppression. Consequently, he did not object when they were offered as evidence at trial. Given the aggravated nature of the sexual assault, and the fact that the victim was White while both Soldiers were Black, MAJ Forinash thought they might be sentenced to death, as rape was then a capital offense under the Uniform Code of Military Justice.[41] But they were not. Since PVT Brooks had already been convicted three times at previous courts-martial, Forinash must have been most worried about him.[42]

Forinash was promoted to lieutenant colonel (LTC) while he was in Stuttgart, and he returned to the United States in 1954. He was assigned to the General Branch, Litigation Division, Office of The Judge Advocate General. This branch monitored the hundreds of litigation cases in which the Army was involved.[43]

Probably the most significant case in which he participated was *Reid v. Covert.*[44] The case was a companion to the military criminal proceedings against Dorothy Krueger Smith, who was the daughter of a four-star Army general and was also married to an Army colonel.[45] After she stabbed her husband to death with a long hunting knife

in their Tokyo quarters, Ms. Smith was tried by a general court-martial for the murder.[46] She was convicted, sentenced to life imprisonment, and confined at a Federal prison camp in Charleston, West Virginia.[47]

Ms. Smith's defense counsel, LTC Howard S. Levie, had objected to the proceedings on the ground that the court-martial had no personal jurisdiction over Smith because she was a civilian—but his argument was rejected at trial.[48] Several years later, however, Smith—who now went by her maiden name of Krueger—hired Mr. Frederick "Fritz" Wiener, who was also a Reserve colonel (COL) in the Judge Advocate General's Corps, to file a writ of habeas corpus on her behalf. He alleged that it was unconstitutional for the Army to prosecute her because she was a civilian and the offense occurred during peacetime. Lieutenant Colonel Forinash and another judge advocate (JA) represented the Army in U.S. District Court for the Southern District of West Virginia, and the judge denied the petition.[49] Ms. Krueger remained in jail.

In the meantime, another civilian female, Ms. Clarice B. Covert, had been court-martialed at an airbase in England for murdering her Air Force sergeant husband with an axe while he slept.[50] She was sentenced to imprisonment at a Federal penitentiary. When her attorney filed a writ of habeas corpus, the U.S. District Court for the District of Columbia granted the writ—freeing Ms. Covert.[51] As a result, the *Smith* case (now styled *Kinsella v. Krueger*, with Kinsella being the prison warden) and *Covert* cases were consolidated—because of the conflicting District Court opinions—and the U.S. Supreme Court granted a writ of certiorari.[52]

Initially, in a five-four decision, the Supreme Court upheld the Army and the Air Force's exercise of jurisdiction over a civilian accompanying the U.S. Armed Forces. But, when Fritz Wiener filed a petition for a rehearing, the Supreme Court reversed—because Justice John Marshall Harlan III, who had voted with the majority in the Court's decision, now had changed his mind.[53]

Lieutenant Colonel Forinash was tasked with writing a brief that would convince Justice Harlan that the exercise of jurisdiction was constitutional. His argument was that the "necessary and proper" clause of the U.S. Constitution gave the Army and the Air Force authority to prosecute civilians.[54] Justice Harlan was not persuaded—and the Court reversed its original decision and now sided with Covert and Smith. In a six-two decision, Justice Hugo Black wrote that the need for the military to be able to exercise court-martial jurisdiction over civilians accompanying it made sense but that the Constitution did not permit it—because a trial by court-martial deprives a U.S. citizen of his or her Bill of Rights protections.[55] The decision is significant not only for its restriction on *in personam* jurisdiction over civilians, but also, because it is the only time in history that the Supreme Court, without a change in membership, reversed a decision as the result of a petition of rehearing.[56]

Then-COL Forinash's next assignment was at Fort Liberty, where he was the post SJA. In 1960, he was reassigned to Korea, where he was the DSJA, United Nations, Joint Services, Eighth Army.[57]

His next assignment was SJA, Fort Carson, Colorado. Within months of his arrival there, the Army re-established the 5th Infantry Division. As the new unit was being stood up, it soon became obvious that there was insufficient land in the area for the division's training needs. The Fort Carson engineer was having some success in obtaining land for training, but the largest landowner was holding out—concerned that the Army might not pay claims for damage to his land or injuries to his cattle. Colonel Forinash was able to convince this landowner that there was a claims procedure and that he would work closely with the engineer to obtain payment of any valid claims. As a result of his efforts, the landowner agreed to let the division use thousands of acres of property for training—and the Army did pay a claim of a little more than $40,000 during the first year the land was used for training. Ultimately, the United States purchased the entire ranch for Fort Carson.[58]

After a tour of duty in the Inspector General's Office in the Pentagon, COL Forinash was assigned as the SJA of VII Corps in Stuttgart. When he reported to the commanding general, his new boss said: "I don't like [JAs] and that includes the present Judge Advocate General of the Army . . . they have been disloyal to me and you begin from there."[59]

As COL Forinash remembered it: "That was the beginning and almost the end of my tour."[60] Over the next few months, the commanding general routinely resisted COL Forinash's advice and insisted that "command and law were incompatible."[61]

Colonel Forinash was able to convince this landowner that there was a claims procedure and that he would work closely with the engineer to obtain payment of any valid claims.

However, COL Forinash continued to provide advice and counsel to the commander and, after about six months, the VII Corps commander began "accepting" COL Forinash's advice and recommendations.[62]

At the end of his tour of duty at VII Corps, COL Forinash had thirty years of service for retirement purposes. He served briefly at Fort Liberty before deciding to retire on 1 November 1969.[63]

Upon retirement, COL Forinash and his wife moved to Knoxville, Tennessee. Initially he joined a small firm of attorneys but then left the private practice of law to be a prosecutor in Knoxville City Court. He soon established a reputation as a "fair but firm" courtroom lawyer.[64] Colonel Forinash retired as an Assistant Attorney General in Knox County in 1983. He died on 25 July 2015 after a brief illness. He was ninety-six years old.[65]

Talk about a life well-lived: from a boy on a farm in Iowa to the Philippines and

years in Japanese captivity, to an outstanding career as a JA and senior leader in our Corps, to a civilian career in public service, COL Cecil L. Forinash's life is worth remembering. **TAL**

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Notes

1. Cecil L. Forinash, Memoir, *reprinted in* Oral History, Colonel Cecil L. Forinash, app. at 4 (2004) (on file with author).

2. *Id.* at 7.

3. *Id.* at 10.

4. *Archive Record: Cecil L. Forinash*, Am. Defs. of Bataan and Corregidor Museum, https://philippinedefenders.pastperfectonline.com/archive/7998756A-CD61-4283-9504-429615144736 [hereinafter Philippine Defenders] (last visited July 11, 2023).

5. *Id.*

6. *Id.* The Philippine Scouts consisted of Filipinos and Filipino-Americans, and they were a permanent part of the Regular U.S. Army. Historical Dictionary of the U.S. Army 366-67 (Jerold E. Brown ed., 2001). Most officers commanding scout units were seconded from the U.S. Army (like Forinash), but after Filipinos began attending the U.S. Military Academy in 1908, those who graduated returned to the Philippines and commanded scout units. *Id.* When General MacArthur assumed command of the forces in the Far East in July 1941, there were more than 11,900 scouts under his command. *Id.*

7. Forinash, *supra* note 1, at 15.

8. *Id.*

9. Manufactured by the Curtiss-Wright Corporation, the O-52 "Owl" was a two-seat observation aircraft used widely by the Army before and during World War II. *Curtiss O-52 Owl*, Nat'l Museum of the U.S. Air Force, https://www.nationalmuseum.af.mil/Visit/Museum-Exhibits/Fact-Sheets/Display/Article/195666/curtiss-o-52-owl (last visited July 11, 2023). It had one forward- and one rearward-firing .30-caliber machine gun. *Id.*

10. Forinash, *supra* note 1, at 20.

11. *Id.*

12. *Id.* at 21.

13. *Id.* at 23.

14. Michael Norman & Elizabeth M. Norman, *Bataan Death March: World War II*, Britannica (May 18, 2023), https://www.britannica.com/event/Bataan-Death-March.

15. *Id.*

16. The death march brought the prisoners of war to a rail head in San Fernando, where they were transported under horrific conditions to the Capas train station to endure an additional 9-mile march to Camp O'Donnell, the former Philippine army training ground. *See id.*

17. *Id.*

18. Philippine Defenders, *supra* note 4.

19. *See Bataan Death March*, *in* World War II in the Pacific: An Encyclopedia 157, 158 (Stanley Sandler ed., 2001).

20. Philippine Defenders, *supra* note 4.

21. *Id.*

22. Forinash, *supra* note 1, at 32.

23. *Id.* at 36.

24. *Id.*

25. *Atomic Bombings of Hiroshima and Nagasaki: World War II [1945]*, Britannica (June 29, 2023), https://www.britannica.com/event/atomic-bombings-of-Hiroshima-and-Nagasaki.

26. *See id.*

27. Forinash, *supra* note 1, at 42.

28. *Id.* at 42.

29. *Id.* at 44.

30. Philippine Defenders, *supra* note 4.

31. Forinash, *supra* note 1, at 48.

32. The Judge Advocate General's Department became The Judge Advocate General's Corps in 1947. *See* Selective Service Act of 1948, Pub. L. No. 80-759, § 246, 62 Stat. 604, 643 (1948).

33. Forinash, *supra* note 1, at 48.

34. *Id.* at 49.

35. *Id.* Ultimately, Senator McCarthy's claim that "hundreds of Communists had infiltrated the State Department and other Federal agencies" was simply false. *"Have You No Sense of Decency?,"* U.S. Senate, https://www.senate.gov/about/powers-procedures/investigations/mccarthy-hearings/have-you-no-sense-of-decency.htm (last visited July 11, 2023). Today the word "McCarthyism" has come to mean a practice that endorses the use of unfair allegations. *See McCarthyism*, Merriam-Webster, https://www.merriam-webster.com/dictionary/McCarthyism (last visited July 11, 2023).

36. Forinash, *supra* note 1, at 50-51; United States v. Brooks, 13 C.M.R. 334, 338 (A.B.R. 1953); United States v. Edwards, 13 C.M.R. 322, 325-26 (A.B.R. 1953).

37. *Brooks*, 13 C.M.R. at 338; *Edwards*, 13 C.M.R. at 325-36.

38. Forinash, *supra* note 1, at 50-51; *Brooks*, 13 C.M.R. at 338; *Edwards*, 13 C.M.R. at 325-36.

39. *Brooks*, 13 C.M.R. at 334, 339; *Edwards*, 13 C.M.R. at 325-36. On appeal, the Board of Review (the forerunner of today's Army Court of Criminal Appeals) reduced Edwards's sentence to thirty years and reduced Brooks's to thirty-five years. *Brooks*, 13 C.M.R. at 339; *Edwards*, 13 C.M.R. at 333.

40. *See* An Act 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, Pub. L. No. 81-506, art. 25(c)(1), 64 Stat. 107, 116 (1950).

41. UCMJ art. 120 (1951) ("Any person subject to this code who commits an act of sexual intercourse with a female intercourse with a female . . . by force and without her consent, by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.").

42. Forinash, *supra* note 1, at 50-51.

43. *Id.* at 52.

44. Reid v. Covert, 354 U.S. 1 (1957).

45. *Mrs. Smith Guilty, Sentenced to Life: Tokyo Court Martial Decides General's Daughter Slew Colonel Deliberately*, N.Y. Times, Jan. 10, 1953, at 2 [hereinafter *Mrs. Smith Guilty*]. Smith was the daughter of General Walter Krueger. *Id.* She was married to Colonel Aubrey D. Smith, a 1930 graduate of the U.S. Military Academy. *Aubrey Dewitt Smith*, Am. Battle Monuments Comm'n, https://www.abmc.gov/decedent-search/smith%3Daubrey-0.

46. *Mrs. Smith Guilty, supra* note 45.

47. *Id.*

48. *See* United States v. Smith, 17 C.M.R. 314 (C.M.A. 1954). Levie had a remarkable career as an Army lawyer and was the principal author of the cease-fire agreement that today remains in force on the Korean peninsula. For more on Levie, see Fred L. Borch, *The Cease Fire on the Korean Peninsula: The Story of the Judge Advocate Who Drafted the Armistice Agreement that Ended the Korean War*, Army Law., Aug. 2013, at 1.

49. United States *ex rel.* Krueger v. Kinsella, 137 F. Supp. 806, 811 (S.D.W. Va. 1956).

50. United States v. Covert, 16 C.M.R. 465 (A.F.B.R. 1954).

51. Reid v. Covert, 354 U.S. 1, 4 (1957).

52. *Id.*; Forinash, *supra* note 1, at 53-55.

53. 354 U.S. at 5; Forinash, *supra* note 1, at 53-55.

54. *See* Supplemental Brief for Appellant and Petitioner on Rehearing, Reid v. Covert, 354 U.S. 1 (1957) (Nos. 701, 713), 1957 WL 87830.

55. 354 U.S. at 3, 6, 41.

56. Brittany Warren, *The Case of the Murdering Wives: Reid v. Covert and the Complicated Question of Civilians and Courts-Martial*, 212 Mil. L. Rev. 133, 133 (2012); *see also Reid v. Covert; Kinsella v. Krueger*, 51 Am. J. Int'l L. 783 (1957).

57. Forinash, *supra* note 1, at 56-58.

58. *Id.* at 58-59.

59. *Id.* at 60.

60. *Id.* at 62.

61. *Id.*

62. *Id.*

63. *Id.* at 63.

64. *Id.*

65. *Cecil L. Forinash*, Knoxville News Sentinel (Aug. 13, 2014), https://www.legacy.com/us/obituaries/knoxnews/name/cecil-forinash-obituary?id=16918351.

President Lyndon Baines Johnson signed the Military Justice Act of 1968, on 24 October 1968. In this photograph, taken at the signing event, BG Harold E. Parker, who later became The Assistant Judge Advocate General, is at LBJ's immediate right. MG Kenneth J. Hodson, The Judge Advocate General, stands next to BG Parker. (Photo courtesy of author)

Military Justice in the Army

The Evolution of Courts-Martial from the Revolutionary War Era to the Twenty-First Century

By Fred L. Borch III

No one would argue with the statement that military justice in the Army has changed from the last quarter of the eighteenth century, when General George Washington commanded a Continental Army of between 10,000 and 25,000 soldiers, to the first quarter of the twenty-first century, when the American Army consists of an active force of some 475,000 men and women, with thousands more in the Army Reserve and Army National Guard. This article explores that change—or evolution—in military justice over the last 250 years. It shows that changes in military justice can best be described as a transformation that occurred in two phases: "judicialization" and "civilianization." Judicialization describes how courts-martial became more like courts—a metamorphosis that began during the World War I era. This judicialization was followed by a second phase that is best thought of as civilianization. This phase, which overlapped to some extent with judicialization, was

This manual's publication signaled the Army's recognition that courts-martial would function better with some guidance for convening authorities and those officers participating in courts-martial.

the process by which courts-martial were altered to become more like civilian courts. What follows is the story of how and why this judicialization and civilianization occurred and what it means for the future of the military criminal legal system.

The Original Practice

In the early years of the Republic, and throughout the nineteenth century, courts-martial were viewed exclusively as a commander's tool to maintain good order and discipline in his command. This is not to say that courts-martial were unfair or that justice was not done, but rather that the military criminal law system created by the Articles of War[1] offered an accused minimal due process. Army criminal law in the early years discouraged any lawyer involvement—especially when it involved advising the accused.

The earliest known example of a court-martial record dates to 1808, and, while it identifies the members of the panel, the judge advocate (JA), the charges and specifications, the questions and answers of the witnesses, the decision of the court, and the action of the convening authority, the record says nothing about how the accused defended himself.[2]

A record of trial from the following year, however, reveals that there were significant restrictions on the representation of an accused at a court-martial.[3] In the general court-martial of Captain W. Wilson, the accused, who was an artillery officer, had the services of a Mr. William Thompson as his individual counsel.[4] While Thompson may or may not have had legal qualifications as an attorney, he certainly knew how to conduct a vigorous defense; he examined witnesses, made objections, and read a statement the accused wrote.[5]

While the panel convicted and sentenced Wilson, the reviewing authority, General James Wilkinson, was exceedingly unhappy with the defense counsel's participation in the proceedings.[6] Consequently, he disapproved the court-martial and wrote the following in his action:

> [T]he General [Wilkinson] owes it to the Army . . . not only to disapprove the proceedings and sentence of this general [court] martial, but to exhibit the Causes of his disapproval.
>
> The main points of exception . . . are the admission of Counsel for the defense of the prisoner . . . . Shall Counsel be admitted . . . to appear before General Court-Martial [and] to interrogate, to except, to plead, to teaze [sic], perplex [and] embarrass by legal subtilties [and] abstract sophistical Distinctions?
>
> However various the opinions of professional men on this Question, the honor of the Army [and] the Interests of the service forbid it . . . . Were Courts-Martial thrown open to the Bar, the officers of the Army would be compelled to direct their attention from the military service [and the] Art of War, to the study of Law.
>
> No one will deny to a prisoner, the aid of Counsel who may suggest Questions or objections to him, to prepare his defense in writing—but he is not to open his mouth in Court.[7]

General Wilkinson's sentiments in the *Wilson* trial reflected the prevailing view that courts-martial were courts of discipline and not justice.[8] Consequently, permitting lawyers to transform these disciplinary proceedings into law courts was anathema—and would not be tolerated. After all, Article 69 of the Articles of War of 1806 provided what was then thought to be enough to guarantee that the accused received a fair hearing:

> The [JA] . . . shall prosecute in the name of the United States, but shall so far consider himself *as counsel for the prisoner*, after the said prisoner shall have made his plea, as to object to any leading question to any of the witnesses or any question to the prisoner, the answer which might tend to criminate himself . . . .[9]

It would be many more decades before the Army—and lawyers wearing uniforms—were willing to accept that courts-martial should operate more like courts and that the accused should have a robust—and legally qualified—defense.[10] In fact, there was no official *Manual for Courts-Martial* (MCM) until 1895, when the Army copied a privately printed manual to publish its first procedural guide for the conduct of courts-martial.[11] This manual's publication signaled the Army's recognition that courts-martial would function better with some guidance for convening authorities and those officers participating in courts-martial. But, it was not until the World War I era that the idea that courts-martial should be more like courts and the process of judicialization began.

Judicialization (1917 – 1969)

The impetus for judicialization occurred in 1917 when several trials by courts-martial convinced The Acting Judge Advocate General, Brigadier General Samuel T. Ansell, that serious deficiencies in the Articles of War required reform; courts-martial needed to be more like courts.

In the fall of 1917, a group of twelve to fifteen enlisted Soldiers at Fort Bliss, Texas, were court-martialed for mutiny when they refused an order to attend a drill formation. The accused, who had been "under arrest" for minor disciplinary infractions when ordered to drill, refused the order because an Army regulation provided that non-commissioned officers (NCOs) under arrest should not attend drill.[12] A young officer insisted that the NCOs attend drill and,

when they refused to obey the order, he had them court-martialed for mutiny.[13] All were found guilty and were sentenced to be dishonorably discharged with jail terms ranging from ten to twenty-five years.[14]

After the cases were reviewed, approved, and ordered executed by the convening authority, the records of trial in these "Texas Mutiny Cases" were sent to the Office of The Judge Advocate General for review as required by section 1199 of the Revised Statutes of 1878.[15] That provision stated that:

> [T]he said Judge Advocate General shall receive, revise, and have recorded the proceedings of all courts-martial, courts-of-inquiry, and military commissions, and shall perform other such duties as have been heretofore performed by the Judge Advocate General of the Army.[16]

It was Brigadier General Ansell's view that section 1199 gave him the authority to set aside the findings and sentences in the Texas Mutiny Cases based chiefly on his conviction that an Army regulation in fact prohibited enlisted Soldiers "in arrest" from performing drill.[17] When Major General Enoch H. Crowder, then-Judge Advocate General who was taking a leave of absence to serve as the Army's Provost Marshal General, heard that Ansell was attempting to reverse the results of the Fort Bliss courts-martial, he told Secretary of War Newton Baker that section 1199 provided no such authority and that Ansell was wrong.[18]

While Generals Ansell and Crowder disputed the true meaning of section 1199, a second court-martial, convened at Fort Sam Houston, Texas, brought the Ansell-Crowder controversy into sharper—and much more public—focus.

After the War Department decided to build a training camp near Houston, Texas, a battalion of Soldiers from the all-African-American 24th Infantry Regiment were deployed to act as guards for the construction site. During the summer months of 1917, frequent confrontations erupted between the Black Soldiers and the White residents of Houston.[19] From the outset, the Soldiers resented the "Whites Only" signage prevalent in Houston. They also were infuriated by the White townspeople's use of the N-word, provoking angry responses from the Soldiers. The troopers also came into conflict with the police, streetcar conductors, and other passengers when they refused to sit in the rear of Houston streetcars. The police arrested more than a few Soldiers as a result of these run-ins with local citizens, and beatings or other mistreatment often accompanied these arrests.[20]

On 23 August 1917, White police officers arrested two Black Soldiers for disorderly conduct.[21] While they were subsequently released, the rumor back at the training camp was that the police had killed one Soldier.[22] Although their battalion commander urged them to remain calm and stay in the camp, the Soldiers were so angry that they took their Springfield rifles and marched toward Houston. When they entered the city, the infantrymen fought a series of running battles with the police, local citizens, and National Guardsmen before disbanding, slipping out of town, and returning to camp.

After about two hours of rioting, fifteen White citizens were dead (including four Houston police officers); some of the dead had been mutilated by bayonets. Eleven other civilian men and women had been seriously injured. Four Soldiers also died. Two were accidentally shot by their fellow troopers. A third was killed after he was discovered hiding under a house after the riots.[23]

A little more than two months later, on 1 November 1917, a general court-martial convened at Fort Sam Houston began hearing evidence against sixty-three Soldiers who allegedly participated in the Houston riot. All were charged with disobeying a lawful order (to remain in camp), assault, mutiny, and murder. The accused—all of whom pleaded not guilty—were represented by a single defense counsel.[24]

The trial lasted twenty-two days and the court heard from 196 witnesses.[25] The most damning evidence came from the testimony of a few self-confessed rioters, who took the stand against their fellow Soldiers in return for immunity from prosecution. The lone defense counsel (who was not a lawyer) argued that some of the men should be acquitted because they lacked the requisite mens rea required for murder or mutiny.[26] He also argued that the Government failed to prove its case beyond a reasonable doubt against some of the accused.[27]

In the immediate aftermath of the Houston Riot cases, General Ansell insisted once again that section 1199 gave him the authority to take "revisionary action on court-martial records."

When the trial finished in early December 1917, the court-martial panel acquitted five accused.[28] Of the remaining Soldiers, thirteen were sentenced to be hanged and forty-one were sentenced to life imprisonment.[29] Only four Soldiers received lesser jail terms.[30]

On 9 December 1917, the accused were informed that the convening authority in their court-martial had approved the sentences as adjudged. Two days later, on 11 December 1917, the thirteen condemned men were hanged at sunrise. It was the first mass execution since 1847.[31]

When the record of trial in the case reached General Ansell, he was outraged. As he later testified before the Senate Committee on Military Affairs:

> The men were executed immediately upon the termination of the trial and before their records could be forwarded to Washington or examined by anybody, and without, so far as I can see, any one of them having had time or opportunity to seek clemency from the source of

clemency [the convening authority], if he had been so advised.[32]

In the immediate aftermath of the Houston Riot cases, General Ansell insisted once again that section 1199 gave him the authority to take "revisionary action on court-martial records."[33] He also stressed that the carrying out of thirteen death sentences on 11 December 1917, without any opportunity for the condemned men to ask for clemency or reconsideration, was proof that the War Department must take action to prevent any such future injustice.

As a result of Ansell's agitation, Secretary of War Newton Baker issued General Orders No. 7 on 17 January 1918.[34] It prohibited the execution of any death sentence before a review and a determination of legality by the Judge Advocate General.[35] As a result of General Orders No. 7, General Ansell established boards of review, which had duties "in the nature of an appellate tribunal."[36] The boards were tasked with reviewing records of trial in all serious general courts-martial, and, while their opinions were advisory only, the boards of review were the first formal appellate structure in the court-martial process.[37] The board may have been a quasi-judicial body, but it was the first step toward judicialization as an appellate court is integral to any judicial system.

While Ansell was pleased with General Orders No. 7, he saw this measure as only the first step of many that were needed to reform the military criminal justice system. Supported by Senator George E. Chamberlain of Oregon, Ansell launched his public campaign for revising the Articles of War, establishing himself as the standard bearer for the judicialization of military justice.[38]

His many proposals—some of which were truly revolutionary for the time—included the following: punitive provisions in the Articles of War should be rewritten to define each offense with sufficient particularity; statutory penalties should be specified for each offense; no charge should be referred for trial until the officer with summary court-martial jurisdiction over the accused has made a preliminary investigation of the charge, and has given the accused the right to make a statement or present evidence; and no charge should be referred to trial unless an officer of the Judge Advocate General's (JAG) Department certified in writing that the charge was legally sufficient and there was prima facie proof of guilt.[39]

At the time, the 1916 Articles of War did not clearly define the elements of an enumerated offense, and a court-martial panel had wide discretion when it came to punishing an accused.

At the time, the 1916 Articles of War[40] did not clearly define the elements of an enumerated offense, and a court-martial panel had wide discretion when it came to punishing an accused. Ansell wanted more clarity and specified punishments. As for Ansell's preliminary investigation proposal, the Articles of War did not require such an inquiry. While it was true that paragraph 76 of the 1917 MCM stated that any charge should be "carefully" investigated prior to referral, this was an MCM provision only and, consequently, the Secretary of War could change it at any time;[41] Ansell wanted the requirement to be statutory. As for the last proposal, Ansell wanted to remove the commander as the sole decider as to when there should be a court-martial. He believed that inserting a lawyer into the process would prevent arbitrary and capricious decisions by a commander.[42]

Other changes proposed by General Ansell included that: general courts-martial would consist of eight members; special courts would have three members; enlisted men would be tried by courts containing enlisted members (three on a general court and one on a special court); the required vote for conviction would be increased from two-thirds to three-quarters, with a unanimous verdict required before a death sentence could be imposed; and a "court judge advocate" (a lawyer from the JAG Department or else an officer specially qualified by reason of legal learning or judicial temperament) would sit with each court-martial and would be akin to a civilian judge (he would rule on motions and questions of law, summarize the evidence and applicable law at the end of a case, and review findings for legal sufficiency, and impose any sentence).[43]

The idea that enlisted personnel had a place on the panel was truly remarkable, as officer-only panels had been the rule since General Washington first convened courts-martial in the Continental Army during the Revolution. But Ansell thought that the time had come for an enlisted accused to have at least some enlisted members—his peers—sitting in judgment.

Just as revolutionary was General Ansell's proposal that a court-martial needed a quasi-judicial official—and one who would have the power to impose a sentence. The "court judge advocate" proposal was yet another way to limit the commander's power in the judicial process. Ansell did not think the existing judgeless court was fair to an accused because the prosecutor-judge advocate—who worked for the commander—performed all the judicial functions. The legally qualified court judge advocate would ensure that the proceedings were fuller and fairer.[44] Additionally, by giving the power to sentence an accused to the court judge advocate, Ansell believed that justice would be better served and would move courts-martial away from their focus on discipline at the expense of justice.[45]

Finally, General Ansell proposed that Congress create a military appeals court of three civilian judges. This Court of Military Appeals (COMA) would consist of lawyers that the President would appoint for life, with the pay and retirement equivalent to a judge on U.S. circuit courts of appeals.[46] The COMA would have limited jurisdiction in that it could only hear general courts-martial cases in which the accused had been sentenced to death, a dishonorable discharge or dismissal, or confinement of

more than six months.[47] Ansell believed that lawyers who were not in the chain of command or otherwise part of the military establishment should be involved in reviewing court-martial convictions. His COMA not only established judicial review of serious courts-martial but also injected civilians into the process. It was a radical proposal given that the 1916 Articles of War contained no appellate structure whatsoever, much less any provision for civilian oversight of the military justice system.

All General Ansell's proposals were contained in Senator Chamberlain's legislation to revise the 1916 Articles of War, which Chamberlain introduced in the Senate in early 1919.[48] In a *Yale Law Journal* article of that same year, Professor Edmund Morgan described the reforms as follows:

> Obviously the basic principle of the bill is the very antithesis of that of the existing court-martial system. *The theory upon which the bill is framed is that the tribunal erected by Congress for the determination of guilt or innocence of a person subject to military law is a court, that its proceedings from beginning to end are judicial, and that questions properly submitted to it are to be judicially determined.* As the civil judiciary is free from the control of the executive, so the military judiciary must be untrammeled and uncontrolled in the exercise of its functions by the power of military command.[49]

The Senate Committee on Military Affairs held hearings on the legislation throughout most of 1919,[50] but the Chamberlain bill did not get sufficient traction to become law.

Nonetheless, a few of General Ansell's reforms did emerge as amendments to the Articles of War in 1920.[51] Chief among these was the creation of "law member," who would be appointed to sit on a general court-martial and who would rule on interlocutory questions and instruct the court on the presumption of innocence and the burden of proof.[52] But the law member's rulings were final only in regards to the admissibility of evidence; in all other matters, a majority vote of the court could overrule him. Another major change was that, for the first time, the Articles of War required The Judge Advocate General to establish boards of review consisting of three or more officers who would review general courts-martial in which a discharge, dismissal, or imprisonment had been imposed at sentencing.[53] This statutory change—inserted as Article 50 1/2 of the Articles of War—was the first legislative basis for an appellate court, and consequently was the forerunner of the Army Court of Military Review and Army Court of Criminal Appeals.[54]

A few of General Ansell's other proposed reforms were also enacted. A pretrial investigation was now required by law, and the accused was permitted to present evidence at such an investigation.[55] The recommendations of the investigating officer, however, were not binding on the convening authority. Additionally, while General Ansell's idea for enlisted personnel on the court was not enacted, Congress did give clear guidance to the convening authority about the qualities that a court member should possess; for the first time, the Articles of War required the commander to select officer panel members who were best qualified "by reason of age, training, experience, and judicial temperament."[56]

Congress rejected the rest of General Ansell's reform proposals: fixed numbers of members on courts, three-quarters vote required to convict, enlisted personnel on panels, lawyer defense counsel for an accused, and a civilian COMA. Major General Crowder and the War Department had won; Ansell had lost. With Crowder now back as The Judge Advocate General, Ansell was reduced to his permanent rank of lieutenant colonel in March 1919; he resigned his commission and left the Army a short time later.[57]

General Ansell's ideas about military justice were not forgotten. His firm belief that there must be more limits on the role of the commander in the system, and that civilians must play a part in the process, were accepted by Congress when it established a three-judge civilian COMA as part of the Uniform Code of Military Justice (UCMJ) in 1950 and when it later created the position of the military judge in the Military Justice Act of 1968.[58] Most importantly, the requirement that courts-martial be more like civilian courts was enshrined in Article 36, UCMJ.[59] This provision requires that courts-martial mirror, if practicable, the pretrial, trial, and post-trial procedures including modes of proof used in U.S. district courts.[60]

Civilianization (1950 – Present)

While courts-martial were increasingly becoming like courts, judicialization was not sufficient to counter the uproar about military justice that accompanied the return of citizen-soldiers to civilian life after World War II. Both men and women who served between 1941 and 1945 witnessed a system controlled exclusively by commanders and which could often be arbitrary and capricious. The result was that in the late 1940s, Congress began examining ways to inject more due process into the Articles of War, and it concluded that making courts-martial more like civilian courts would accomplish this goal. This civilianization phase began with the enactment of the UCMJ in 1950, which became effective one year later.

Its major provisions included the following—all of which mirrored practice in Federal civilian courts: any person subject to the UCMJ could prefer charges against another person also subject to the UCMJ, making it more like filing a criminal complaint in civilian court; before changes could be referred to a general court-martial for trial, there had to be "a thorough and impartial investigation" where the accused would have the chance to present evidence and cross-examine witnesses (while not the same as a grand jury proceeding, the idea was the same—that no serious criminal prosecution occur without an investigation); enlisted men could now serve on courts-martial for the first time when the accused was on trial; accused had the right to request that at least one-third of the panel consist of enlisted personnel senior in rank to themselves; accused had the right to legally qualified counsel to defend them at courts-martial (this was a major reform as the Articles of War had no such requirement); and a three-judge civilian COMA was now at the top of the appellate hierarchy in the military justice system (this was another major piece of civilianization in that there was no civilian involvement

in courts-martial at any level under the Articles of War).[61]

In addition to this civilianization, the UCMJ also added more judicialization: every general court-martial now had a "law officer" assigned to it.[62] This was not yet the military judge that would come with the Military Justice Act of 1968, but it was yet another step toward making courts-martial more like courts. The law officer had to be a licensed attorney and The Judge Advocate General had to certify them as qualified for duty.[63]

While the UCMJ was revolutionary in many aspects, Article 36 was arguably its most important provision because its language mandated civilianization of the system in the future. Article 36 read, in part, that courts-martial "shall, so far as . . . practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the [U.S.] district courts."[64] This meant that as the law and rules of evidence changed in U.S. district courts, the same change should occur at courts-martial—at least as far as "practicable."

Eighteen years after the creation of the UCMJ, President Lyndon B. Johnson signed the Military Justice Act of 1968 into law.[65] The legislation was the culmination of efforts to amend the UCMJ that had been underway almost as soon as it was originally enacted in 1950. Now, with the reforms ushered in by President Johnson's signature, courts-martial were about to experience a second revolution in less than twenty years. The first revolution was the creation of a single military criminal code in 1950 that was uniformly applicable to all Services: a remarkable achievement in every respect.[66] This second revolution in 1968 was no less remarkable.

Starting in the early 1960s, Senator Sam Ervin of North Carolina, head of the Subcommittee on Constitutional Rights (part of the Senate Judiciary Committee), began hearing complaints from Soldiers about injustices they had suffered under the UCMJ.[67] At the time, there was no JA involvement at special courts-martial (line officers served as trial and defense counsel in the proceedings) and more than a few Soldiers complained about arbitrary and capricious treatment at this level of courts-martial. Even at general courts-martial, non-lawyer decision-making dominated the process and, while legally qualified counsel prosecuted and defended at this level of the process, the law officer (the forerunner of today's military judge) had only limited powers.[68] There was, for example, no option for a trial by judge alone; all courts-martial were trials by panel. This meant that there could be no judge-alone sentencing either; panels imposed all punishments.

Senator Ervin became convinced that courts-martial would be fairer if they were more like civilian courts. Prior to 1966, he introduced eighteen separate pieces of legislation that would have amended the UCMJ.[69] Most of these bills had the goal of reducing, if not eliminating, the role of non-lawyers in the military justice system. This was because, in Senator Ervin's opinion, the court-martial process would be better if administered by uniformed lawyers.[70]

At the beginning of the 90th Congress, which was in session from 1967 to 1969, Senator Ervin combined all previous UCMJ legislation into a single bill and introduced it into the Senate.[71] Since the Department of Defense (DoD) opposed most of the changes in Ervin's single bill, its supporters on the Senate Armed Services Committee blocked action on the bill.[72]

Ervin's allies in the House of Representatives now took a new approach: they introduced legislation in the House containing only those reforms in Ervin's Senate legislation that were acceptable to the DoD. As most of these reforms were "designed principally to increase the participation of military lawyers in [special] courts-martial," there was little objection to them.[73] After all, since special courts-martial featured no lawyers, it was hard to argue against injecting at least some JA involvement in the process, especially when a Soldier might be sentenced to six months' confinement by a special court.[74]

When this House legislation reached the Senate in June 1968, Senator Ervin immediately began amending the House-passed bill so it would have "the minimum reforms necessary to any meaningful legislation."[75]

At this point in the process, Senator Ervin was aided by a fortuitous event: Major General Kenneth J. Hodson, who had only recently become The Judge Advocate General of the Army, was the DoD's representative in negotiations on Ervin's Senate reforms. Hodson, who had a strong background in military criminal law, agreed with most of Ervin's reforms, and he seems to have convinced other DoD officials to accept the legislation Senator Ervin proposed.[76] As Hodson later recalled, the final bill was "the best bill we could get at the time. . . . But [it] was worth the effort, because without it, we would have had an extremely difficult time handling the sophisticated problems that came to us in the My Lai cases."[77]

The end result was that the Senate Armed Services Committee accepted the amended legislation. After the bill was reported out of committee, both the House of Representatives and the Senate adopted it on a voice vote, without any dissent, in early October 1968.[78] President Johnson signed the Military Justice Act in a White House ceremony on 24 October 1968.[79]

The new legislation was a revolution in courts-martial practice and procedure. The law officer—the quasi-judge official created by the original UCMJ in 1950—was now renamed the "military judge," and he was given new authority that made him comparable to a civilian judge. The most remarkable change was that the new military judge, who presided over all general and special courts-martial, had the authority to try the case by himself.[80] No longer would guilt or innocence be determined exclusively by a panel of non-lawyers. Rather, if the accused, knowing the identity of the judge (and after consultation with defense counsel), requested in writing that the court be composed solely of the military judge, then only that judge would decide both findings and a sentence.[81]

But the Military Justice Act also gave the judge other powers that the court-martial panel had previously performed. For the first time, the judge had the power to call the court into session without the attendance of the panel members for the purpose of deciding interlocutory motions and motions raising defenses and objections.[82] The judge also could arraign the accused and receive his plea. In addition, for the first time, the judge had the authority

to decide challenges for cause against panel members; previously, the court itself voted on challenges to its own membership.[83]

Another provision of the Act required that each Service's Judge Advocate General creates a field judiciary from which military judges would be assigned to courts-martial.[84] Prior to this time, all JAs serving as law officers had been part of the convening authority's command and were assigned to the staff judge advocate's office. Requiring a field judiciary meant that judges were now truly independent from the local command, as they were not rated by a commander or convening authority. While the Army and the Navy had already established field judiciaries prior to October 1968, the new legislation guaranteed that military judges from all the Services would be independent of the convening authority. Finally, in the Army at least, military judges began wearing black robes and being addressed as "Your Honor."[85]

Special courts-martial also underwent additional unprecedented changes. While Senator Ervin's legislation did not require that the trial and defense counsel at special courts-martial be licensed attorneys, the new law provided that the accused "shall be afforded an opportunity to be represented" by a lawyer at a trial by special court-martial.[86] There was only one exception: if "physical conditions" or "military exigencies" meant that counsel "having such qualifications" could not be obtained, then a non-lawyer might represent the accused.[87] As a practical matter, however, this exception has rarely been used.

Just as the act upgraded the law officer to the new position of military judge, it also upgraded the existing boards of review. They were re-designated as "courts of military review" and their members were now called judges.[88] These appellate courts remained under the authority of The Judge Advocate General, but the new legislation meant that there was a chief judge who could now divide the other judges into panels of not less than three, and who also appointed a senior judge to preside over each panel. Under the original UCMJ, there were separate boards of review; after the Military Justice Act of 1968, there was only one court with several panels. The idea behind this change was that a single court would ensure greater consistency in decision-making and a higher-quality legal decision than that of separate review panels.[89]

Even the COMA (today's Court of Appeals for the Armed Forces) saw some change. For the first time, an accused could petition COMA for a new trial on the basis of newly discovered evidence or fraud; previously, an accused could petition COMA only if sentenced to death, dismissal, punitive discharge, or a year or more confinement. The new act also extended the time within which an accused could petition COMA from one year to two years.[90]

While the Military Justice Act of 1968 was a revolution, it was a second revolution in the sense that it completed the process that had begun with the creation of the UCMJ. Prior to 1950, the role of lawyers in the military justice system was minimal. Consequently, it was a clear break with the past when, in enacting the new UCMJ, lawyers were accepted as part of military criminal law and were given defined powers to make legally binding decisions at the trial level. It follows that changes made to the UCMJ in 1968 were a fulfillment of initiatives started in 1950; the Military Justice Act of 1968 completed the revolution started in 1950. When the legislation went into effect on 1 August 1969 (accompanied by a new MCM[91]), uniformed lawyers had the additional tools that would, in a short time, transform courts-martial into fuller and fairer proceedings with due process akin to that enjoyed by defendants in U.S. district courts.

Aspects of the UCMJ that we take for granted today did not exist prior to 1968, like Article 39a sessions outside the hearing of the members, judge-alone trials, and lawyers at special courts. But, these changes did not end all complaints about the system. Books published in the 1970s, such as Robert Sherrill's unflattering *Military Justice Is to Justice as Military Music Is to Music*[92] and Luther West's highly critical *They Call It Justice*,[93] convinced more than a few observers that additional reforms were needed if military criminal law was to provide the same due process for Soldiers that civilians enjoyed in civilian courts. Even authors who recognized that the Military Justice Act of 1968 ushered in considerable reforms remained unsatisfied. In *Justice Under Fire*, for example, Yale professor Joseph Bishop argued that additional reforms should be made to the UCMJ. "Civilians," he wrote, "should be employed as military judges" at both the trial and appellate level.[94] As for substantive law, Bishop argued that Articles 88, 133, and 134 "should be repealed."[95]

In the years since the Military Justice Act of 1968, civilianization has continued. The Military Rules of Evidence, modeled after the Federal Rules of Evidence, were adopted in 1980.[96] This meant that the process for admitting evidence at courts-martial was basically the same as the process for admitting evidence in U.S. district courts. In the 1980s, Congress also amended the UCMJ to provide for direct appeal from the Court of Appeals for the Armed Forces to the U.S. Supreme Court—another recognition that the civilianization of the military justice system had occurred to such an extent that there should be a direct appeal mechanism to the highest court in the land. Yet another example of the ongoing civilianization of courts-martial is the most recent changes to military justice for sexual harassment offenses.[97] After all, when activists demanded systematic changes in how the military handles allegations of sex-related offenses at courts-martial, they looked to procedures in civilian courts for solutions.

Changes to the UCMJ, effective after 27 December 2023, remove authority from commanders to decide whether certain offenses are referred to trial by general or special courts-martial and give that authority to "special trial counsel."[98] These are experienced JAs with specialized training both in criminal law and in special victim litigation.

Offenses now under the control of lawyers include: murder; manslaughter; rape and sexual assault; sexual assault of a child; kidnapping; domestic violence; stalking; child pornography; and substantiated sexual harassment.[99] Just as lawyers serving as civilian prosecutors in cities and counties in the United States determine whether an offense should go to trial, so too uniformed lawyers in the armed forces will now decide whether serious victim-centric felony-level offenses go to trial by courts-martial.

While a commander continues to be responsible for good order and discipline in his command, special trial counsel are independent of the chain of command of the victim and of the accused.

Another significant change, effective 27 December 2023, is that all sentencing will be by military judge alone under Article 53, UCMJ.[100] Prior to this change, if the accused elected trial by a panel, and entered pleas of not guilty, then the panel would decide guilt or innocence and determine an appropriate sentence. This civilianization of sentencing also includes "sentencing parameters," which the President implemented in July 2023 to set sentencing ranges based on five factors, including the offense and corresponding guidelines in U.S. district court.[101] The linkage to civilian practice in Federal court is obvious—as the UCMJ parameters specifically required the military judge to look at civilian court sentencing guidelines.[102]

Conclusion

The impetus for the transformation of the military justice system—both judicialization and civilianization—came from different events. The courts-martial arising out of the Houston Riot of 1917 was the triggering event for judicialization, a process that was pushed farther along by the view of citizen-soldiers in World War II and Vietnam that courts-martial were unfair and should be more judicial in nature.

The impetus for civilianization was Congress's decision that courts-martial would be fairer if they mirrored the practice of criminal law in U.S. district courts, and the addition of Article 36 to the UCMJ inexorably led to greater civilianization. The presence of qualified legal counsel at special courts, the creation of the position of military judge, the establishment of Military Rules of Evidence, and direct appeal to the U.S. Supreme Court all reflect civilianization. Viewed from this perspective, the most recent changes to the UCMJ—and the emergence of the Office of Special Trial Counsel with decision-making power over offenses previously in the domain of commanders—reflects this increasing civilianization. Regardless of the impetus for change, the solution inexorably meant more civilianization. For example, when Congress decided that sentencing by panels under the UCMJ was arbitrary and capricious, it looked to the judge-alone structure of the U.S. district courts as the fix—more civilianization. When Congress decided that non-lawyer commanders were deficient in handling sex-related misconduct, Congress gave decision-making authority on serious felonies to lawyers with power akin to that of a civilian prosecutor—more civilianization.

There will likely be more civilianization in the years to come. Might Congress decide that punitive discharges should no longer be part of a courts-martial sentence and should be replaced with a process whereby a Soldier convicted of a felony-level offense at court-martial is discharged administratively under other than honorable conditions? Might Congress decide that fairness requires that a commander be completely removed from the military justice system and that lawyers be given complete control over the referral of charges to trial and all post-trial matters?

Only time will tell. But there is no doubt that, in the years to come, the military justice system will continue to reflect the changes necessary to maintain good order and discipline while ensuring judicial standards commensurate with society's understanding of justice. **TAL**

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Notes

1. Articles of War of 1806, *reprinted in* 2 William Winthrop, Military Law and Precedents 1509 (1886).

2. *See* Judge Advoc. Gen.'s Corps, U.S. Army, The Army Lawyer: A History of the Judge Advocate General's Corps, 1775—1975, at 29 (1975) [hereinafter The Army Lawyer].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. For another court-martial involving General Wilkinson and an officer who refused to cut his pig-tail, see Fred L. Borch, *The True Story of a Colonel's Pigtail and a Court-Martial*, Army Law., Mar. 2010, at 3, 3-4.

9. Articles of War of 1806, art. 69, *reprinted in* 2 Winthrop, *supra* note 1 (emphasis added).

10. Not until the enactment of the Uniform Code of Military Justice in 1950 did an accused have the absolute right to legally qualified counsel, and then only at general courts-martial. An Act 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, Pub. L. No. 81-506, art. 27, 64 Stat. 107, 117 (1950).

11. Arthur Murray, A Manual for Courts-Martial (1895). For more on this first manual, see Fred L. Borch, *The History of the Paperback Manual for Courts-Martial*, Army Law., Aug. 2016, at 1, 1.

12. The Army Lawyer, *supra* note 2, at 125.

13. *Id.*

14. *Id.*

15. The Revised Statutes of the United States, first published in 1874, served as the predecessor of the U.S. Code. Margaret Wood, *The Revised Statutes of the United States: Predecessor to the U.S. Code*, Lib. of Cong. Blogs: In Custodia Legis (July 2, 2015), https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code.

16. An Act Reorganizing the Several Staff Corps of the Army (Act of June 23, 1874), ch. 458, § 2, 18 Stat. 244.

17. The Army Lawyer, *supra* note 2, at 127-28.

18. *Id.* at 128-29. For a comprehensive look at the Ansell-Crowder controversy, see Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 Mil. L. Rev. 1 (1967).

19. The Army Lawyer, *supra* note 2, at 126.

20. Garna L. Christian, Black Soldiers in Jim Crow Texas 1899-1917, at 145 (1995). For more on the Houston Riot cases, see Fred L. Borch III, *"The Largest Murder Trial in the History of the United States": The Houston Riots Courts-Martial of 1917*, Army Law., Feb. 2011, at 1.

21. The Army Lawyer, *supra* note 2, at 126.

22. *Id.*

23. Christian, *supra* note 20, at 153, 172.

24. *Id.* at 162.

25. John Minton, The Houston Riot and Courts-Martial of 1917, at 16 (1990).

26. *Id.*

27. *Id.*

28. The Army Lawyer, *supra* note 2, at 127.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Trials by Court-Martial, Hearing Before S. Comm. On Mil. Affs. on S. 5320,* 65th Cong. 39 (1919) (statement of Brigadier General Samuel T. Ansell); The Army Lawyer, *supra* note 2, at 127.

33. The Army Lawyer, *supra* note 2, at 129.

34. Headquarters, War Dep't, Gen. Orders No. 7 (17 Jan. 1918).

35. *See id.*

36. The Army Lawyer, *supra* note 2, at 130.

37. *Id.*

38. *Id.*

39. *Id.* at 132-34.

40. Articles of War, Pub. L. No. 64-242, 39 Stat. 619 (1916).

41. A Manual for Courts-Martial Courts of Inquiry and of Other Procedure under Military Law, U.S. War Dep't, ch. VI, sec. I, para. 76, at 40-41 (1917). It was not until the enactment of the Uniform Code of Military Justice in 1950, and the publication of a *uniform* MCM in 1951, that the entire MCM was "prescribed" by the President via an executive order. President Harry S. Truman prescribed the *Manual for Courts-Martial, United States, 1951*, on 8 February 1951 when he signed Executive Order 10214. *See* Exec. Order No. 10214, 16 Fed. Reg. 1303 (Feb. 10, 1951).

42. The Army Lawyer, *supra* note 2, at 132.

43. *Id.* at 133-34.

44. *Id.* at 134.

45. *See id.* at 133-34.

46. *See id.* at 134-35.

47. *Id.* at 135.

48. S. 64, 66th Cong. (1919) ("A Bill to Establish Military Justice").

49. Edmund Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 Yale L.J. 52, 73-74 (1919) (emphasis added).

50. *See, e.g., Establishment of Military Justice: Hearings Before a Subcomm. of the S. Comm. On Mil. Affs.,* 66th Cong. (1919).

51. 1920 Articles of War, Pub. L. No. 66-242, 41 Stat. 749.

52. *Id.* sec. II.B, art. 8, 41 Stat. at 788; *see also* The Army Lawyer, *supra* note 2, at 136-37.

53. Sec. II.G, art. 50 1/2, 41 Stat. at 797.

54. *See* The Army Lawyer, *supra* note 2, at 136-37.

55. Sec. III.D, art. 70, 41 Stat. at 802.

56. Sec. II.A., art. 4, 41 Stat. at 788; A Manual for Courts-Martial, U.S. War Dep't para. 6(c), at 9-10 (1921).

57. The Army Lawyer, *supra* note 2, at 43. Ansell believed that his reduction in rank was in retaliation for his "outspoken opposition to the Articles of War and the administration of military justice." *Id.* This may or may not have been true. Given that World War I was at an end, the Army was rapidly reducing in size, and Crowder had returned to full-time duties as The Judge Advocate General, it is possible that Secretary of War Newton Baker and the War Department decided that since Ansell was no longer The Acting Judge Advocate General, his temporary rank of brigadier general was no longer appropriate.

58. An Act 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, Pub. L. No. 81-506, art. 67, 64 Stat. 107, 129 (1950); Military Justice Act of 1968, Pub. L. No. 90-632, sec. 2(2), 82 Stat. 1335, 1335.

59. Act of August 10, 1956, ch. 1041, § 836, 70A Stat. 36, 50.

60. UCMJ art. 36 (2006).

61. An Act 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, Pub. L. No. 81-506, 64 Stat. 107 (1950).

62. *Id.* art. 26, 64 Stat. at 117.

63. *Id.*

64. *Id.* art. 36, 64 Stat. at 120.

65. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

66. Prior to 1950, the Army conducted courts-martial under the Articles of War while courts-martial in the Navy were governed by the Articles for the Government of the Navy. The new UCMJ created a single criminal code and greatly increased lawyer participation in the court-martial process. While there had been limited lawyer involvement under the Articles of War (a judge advocate served as a law member at general courts-martial in the Army after 1920), there was no requirement, much less any role, for legally qualified counsel at Navy courts-martial until the enactment of the UCMJ. The Army Lawyer, *supra* note 2, at 136. Line-officer opposition to lawyer participation at Navy courts-martial meant that the Navy resisted the creation of a separate corps for lawyers until 1967, when Congress finally passed legislation creating a Navy Judge Advocate General's Corps. Jay M. Siegel, Origins of the United States Navy Judge Advocate General's Corps 617-86 (1997).

67. *See* The Army Lawyer, *supra* note 2, at 243-44; *Constitutional Rights of Military Personnel: Hearings Before the Subcomm. on Const. Rights of the S. Comm. on the Judiciary Pursuant to S. Res. 260*, 87th Cong. (1962).

68. *See* Manual for Courts-Martial, United States ch. IX, para. 39, at 55 (1951). The law officer (who was present only at a general court) ruled on all interlocutory questions except challenges for cause; the panel members themselves decided whether to sustain or overrule a challenge for cause against a member. The law officer's rulings were final except that the court-martial panel could overrule him on a motion for a finding of not guilty. The court also could overrule the law officer on the question of the accused's sanity. While the law officer was an important part of the process, it was the president of the panel who oversaw the court-martial. *See id.*

69. The Army Lawyer, *supra* note 2, at 243-44.

70. *Id.*

71. S. 2009, 90th Cong. (1967); *see also* The Army Lawyer, *supra* note 2, at 244.

72. The Army Lawyer, *supra* note 2, at 244; *see also* Sam J. Ervin, Jr., *The Military Justice Act of 1968*, 45 Mil. L. Rev. 77 (1969) (providing background and legislative history of the Military Justice Act of 1968).

73. The Army Lawyer, *supra* note 2, at 244.

74. Until the UCMJ was amended in 1999, the maximum confinement that could be imposed at a special court was six months. The National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, sec. 577, 113 Stat. 512, 625 (1999), increased that six-month jurisdictional limit to one year.

75. The Army Lawyer, *supra* note 2, at 245.

76. *Id.*

77. Major General Kenneth J. Hodson, *The Manual for Courts-Martial—1984*, 57 Mil. L. Rev. 1, 8 (1972). Hodson was referring to the general courts-martial arising out of the 16 March 1968 murders of unarmed and unresisting Vietnamese civilians by Lieutenant William L. "Rusty" Calley and his platoon. *See* Fred L. Borch III, *What Really Happened at My Lai on March 16, 1968? The War Crime and Legal Aftermath*, Army Law., Mar. 2018, at 1.

78. The Army Lawyer, *supra* note 2, at 245.

79. Ervin, *supra* note 72, at 78.

80. Military Justice Act of 1968, Pub. L. No. 90-632, sec. 2(3), § 816, 82 Stat. 1335.

81. *Id.*

82. *Id.* sec. 2(15), § 839, 82 Stat. at 1338.

83. *Id.* sec. 2(17), § 841, 82 Stat. at 1339.

84. *See id.* sec. 2(9), § 826, 82 Stat. at 1336.

85. The Army Lawyer, *supra* note 2, at 247.

86. Sec. 2(10)(B), § 827, 82 Stat. at 1337.

87. *Id.*

88. *Id.* secs. 2(26), (27), (28), (31), (32), 3(b), 82 Stat. at 1341-43.

89. For more on the new Army Court of Military Review, see Fred L. Borch, *The Army Court of Military Review: The First Year (1969-1970)*, Army Law., Mar. 2016, at 68.

90. Sec. 2(33), § 873, 82 Stat. at 1342-43. The Military Justice Act of 2016 extends this two-year time limit to three years. Military Justice Act of 2016, Pub. L. No. 114-328, div. E, sec. 5336, 130 Stat. 2894, 2937.

91. Manual for Courts-Martial, United States (1969).

92. Robert Sherrill, Military Justice is to Justice as Military Music is to Music (1970).

93. Luther C. West, They Call It Justice (1977).

94. Joseph W. Bishop, Jr., Military Justice Under Fire: A Study of Military Law 301 (1974).

95. *Id.* at 302-03.

96. Exec. Order No. 12198, 45 Fed. Reg. 16932 (Mar. 12, 1980).

97. The Vanessa Guillen murder was the impetus for these changes. Johnny Diaz, Maria Cramer, & Christina Morales, *What to Know About the Death of Vanessa Guillen,* N.Y. Times (Nov. 30, 2022), https://www.nytimes.com/article/vanessa-guillen-fort-hood.html. The Netflix documentary, *I am Vanessa Guillen,* increased public awareness of sexual harassment allegations made by female Soldiers. *See* I Am Vanessa Guillen (Netflix 2022).

98. *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 531(a), § 824a(c)(2)(B), 135 Stat. 1541, 1692 (2021).

99. *Id.* secs. 531(a), 533(2), §§ 824a(c)(2)(A), 801(17), 135 Stat. at 1692, 1695-96.

100. *Id.* sec. 539E(a)(1), § 853(b)(1), 135 Stat. at 1700.

101. *See id.* sec. 539E(e), 135 Stat. at 1704; Exec. Order No. 14103, §§ 2-3, 88 Fed. Reg. 50535, 50535 (July 28, 2023).

102. *See generally* Michael Lewis, *Major Changes in the Uniform Code of Military Justice,* ABA (Oct. 7, 2022), https://www.americanbar.org/groups/judicial/publications/judicial_division_record_home/2022/vol26-1/major-changes-in-uniform-code-of-military-justice.

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Practice Notes

The New and Improved Residual Hearsay Exception

By Major Casey R. Keppler

The residual hearsay exception offers a unique, oft-misunderstood route to overcoming the ubiquitous and dreaded hearsay objection from opposing counsel. Making its original appearance in the Federal Rules of Evidence (FRE) in 1975, the residual hearsay exception was adopted for courts-martial practice as part of the 1980 amendments to the Military Rules of Evidence (MRE).[1] In the decades that followed, amendments to the Federal rule were mirrored in the military rule,[2] a reflection of the explicit desire for common evidentiary standards in these separate and distinct judicial fora.[3] The most recent amendments to the Federal residual hearsay exception—FRE 807—were, by operation of law, incorporated into its military counterpart, MRE 807, effective 1 June 2021.[4] Given the frequency with which residual hearsay is litigated,[5] exploring the amendment of MRE 807 is a fruitful exercise for military justice practitioners, particularly because several aspects of the amendment could meaningfully impact court-martial practice. A refresher on the history and text of this rule will lay the groundwork for a detailed discussion of the potential impact of its recent amendment.

The Residual Hearsay Exception: A Brief History

The residual hearsay exception is commonly considered the "catch-all" exception—an avenue of last resort for litigants to admit a hearsay statement when no other exception applies. Generally, litigants in this position are standing on shaky ground, because the legislative history evinces a clear intent for use as a narrow exception:

> It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection, and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.[6]

Federal courts have cited this cautionary language from Congress regarding the Federal residual hearsay exception ad nauseam over the course of the past four-plus decades.[7] The residual hearsay exception applicable to courts-martial[8] was adopted "without change" from the FRE and was intended to "be employed in the same manner as it is generally applied in the Article III courts."[9] Not surprisingly, military courts quickly latched on to the legislative history of the exception and closely scrutinized residual hearsay offers.[10] With one notable exception—out-of-court statements from child victims of sexual abuse[11]—military courts have continually demonstrated skepticism toward residual hearsay offers.[12]

Military Rule of Evidence 807

In order to facilitate a detailed discussion of the recent amendment, a review of the text of the residual hearsay exception is necessary. The 2021 amendment to MRE 807 resulted in the following changes:[13]

> (a) *In General.* Under the following ~~circumstances~~ conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not ~~specifically covered by~~ admissible under a hearsay exception in [MRE] 803 or 804:
>
> (1) the statement ~~has equivalent circumstantial~~is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
>
> ~~(2) it is offered as evidence of a material fact;~~
>
> (32) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.~~; and~~
>
> ~~(4) admitting it will best serve the purposes of these rules and the interests of justice~~
>
> (b) *Notice.* The statement is admissible only if~~, before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of the intent to offer the statement—~~and its particulars,~~ including its substance and the declarant's name ~~and address,~~ —so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.[14]

The 2021 amendment thus changed three aspects of the residual hearsay exception that could meaningfully impact court-martial practice: (1) the elimination of the "material fact" prong; (2) changes to the "trustworthiness" prong; and (3) modifications to the notice requirement.[15] The congressional committee that analyzed and recommended amending FRE 807 articulated the rationale for each of these changes.[16] Because these changes were subsequently applied to MRE 807 by operation of law rather than by the President's affirmative action, there is no corresponding executive branch rationale for the changes to MRE 807.

Elimination of "Material Fact" Prong

Residual hearsay proponents are no longer required to demonstrate that the evidence at issue is being "offered as evidence of a material fact."[17] A military appellate court described the former materiality prong as "a multi-factored test looking at the importance of the issue for which the evidence was offered in relation to the other issues in [the] case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to that issue."[18] The elimination of a requirement that entails a "multi-faceted" analysis should, of course, be welcome news to residual hearsay proponents, as it removes a potential barrier to admission.

The materiality prong was removed from the Federal rule based on a congressional determination that it was superfluous; a basic relevance objection, Congress reasoned, affords residual hearsay opponents the same basis for objection.[19] While residual hearsay opponents can certainly raise this argument in the court-martial context, two points of distinction are worth noting: (i) the amendment to MRE 807 was not supplemented with the same (or any) rationale; and (ii) military courts have long recognized that "relevant" and "material" are terms with different meanings,[20] so a relevance objection pursuant to MRE 401 may not necessarily yield the same result as a proponent's failure to adequately demonstrate materiality under the pre-amendment version of MRE 807.

At the very least, elimination of the materiality prong creates an avenue for residual hearsay proponents to argue that their required showing is less onerous than that under the pre-amendment version of MRE 807.

Modifications to the Trustworthiness Analysis

Most residual hearsay determinations hinge on whether the proffered statement is sufficiently trustworthy.[21] Military Rule of Evidence 807 now expressly (i) states that the trustworthiness inquiry should be assessed by considering the totality of the circumstances under which the statement was made, and (ii) permits the military judge to consider evidence corroborating the statement as part of the trustworthiness inquiry.[22] Although military courts have generally applied a totality of the circumstances analysis despite the absence of such language in the pre-amendment version of MRE 807, they have inconsistently

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considered corroborating evidence.[23] The express inclusion of corroborating evidence as a permissible consideration is crucial because proponents often cite corroborating evidence as a primary basis for concluding that the offered residual hearsay evidence is sufficiently trustworthy. The codification of the totality of the circumstances standard and corroborating evidence as a relevant factor in the residual hearsay analysis is a critical step forward in providing rule-based clarity to both court-martial litigants and military judges.

Notice Requirement Modification

A unique aspect of the residual hearsay exception is the requirement that the proponent provide pretrial notice to the adverse party. The pretrial notice requirement has been amended in three important respects: (i) to require that notice be provided "in writing";[24] (ii) to require that the notice include the "substance" of the hearsay statement; and (iii) to create a good-cause exception in cases where pretrial notice is impracticable.[25] The Court of Appeals for the Armed Forces highlighted the ambiguity regarding the content of the notice under the pre-amendment version of MRE 807. In *United States v. Czachorowski*, the court concluded that defense counsel's awareness of both the hearsay statement and trial counsel's intent to offer it into evidence was all that MRE 807 required; notice to the defense of "the means by which [trial counsel intended] to seek admission" was not required.[26]

The recent amendment dictates a different result because it requires the notice to include the substance of the statement. Under the amended rule, counsel must now be vigilant to timely provide this detailed notice of the substance of residual hearsay statements in advance of trial. In practice, the requirement for more detailed notice should lead to more efficient (and, ideally, pretrial) resolution of residual hearsay admissibility disputes.

In contrast with many other rules of evidence,[27] the pre-amendment text of MRE 807 did not include a good-cause exception,[28] and no military appellate court read such an exception into the rule. In the absence of such an exception, the occurrence of either of two events was problematic for residual hearsay proponents: (i) a witness who was expected to testify suddenly became unavailable, thereby rendering the residual hearsay exception the only viable means of admitting the unavailable witness's hearsay statement; or (ii) mid-trial disclosure of a hearsay statement previously unknown to counsel. In either event, the proponent would have previously been left in the unenviable position of arguing policy in the absence of support in the law. The addition of a good-cause exception to MRE 807 now equips residual hearsay proponents with a rule-based argument for admission under these circumstances.

Takeaways

Effective June 2021, MRE 807 was amended in three ways that could meaningfully impact residual hearsay litigation before courts-martial. The elimination of the "material fact" prong potentially opens the aperture for the type of evidence that may be admitted under the rule. The express inclusion of the nature of the analysis—totality of the circumstances—and a critical factor that may be considered—corroborating evidence—provides clarity for litigants in weighing the likelihood of success of their potential residual hearsay arguments and for judges in ruling on residual hearsay offers. Additionally, the requirement for a more robust, written pretrial notice dictates that proponents must be vigilant in

apprising the opposing party of the precise substance of the statement to be offered under the residual hearsay exception. Finally, the addition of a good-cause exception to the notice requirement provides proponents with a rule-based argument for admission that was previously unavailable. Given the frequency with which residual hearsay issues are litigated, these amendments should be expected to have wide-ranging implications in court-martial practice. **TAL**

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Notes

1. *See* Exec. Order No. 12198, 45 Fed. Reg. 16932 (Mar 12, 1980).

2. In 1997, the Federal residual hearsay exception was relocated to Federal Rule of Evidence 807. FED. R. EVID. 807 advisory committee's note (1997 Amendment). In 1999, the military residual hearsay exception was similarly relocated to Military Rule of Evidence (MRE) 807. MANUAL FOR COURTS-MARTIAL, UNITED STATES, M.R.E. 807 (2000). Similar stylistic changes were made to the Federal rule and the military rule in 2011 and 2013, respectively. *See* FED. R. EVID. 807 advisory committee's note (2011 Amendment); Exec. Order No. 13643, 78 Fed. Reg. 29559 (May 21, 2013) (2013 Amendments to the Manual for Courts-Martial, United States); MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 22, at A22-67 (2013) (Residual exception).

3. Not only were the Federal Rules of Evidence (FRE) the model for the modern MRE, but their interpretation and application by Federal courts is persuasive authority in court-martial practice. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, M.R.E. 101(b) (2019) ("In the absence of guidance in [the Manual for Courts-Martial] or these rules, courts-martial will apply . . . the Federal Rules of Evidence and the case law interpreting them.").

4. *See id.* M.R.E. 1102(a) ("Amendments to the Federal Rules of Evidence—other than Articles III and V—will amend parallel provisions of the [MRE] by operation of law 18 months after the effective date of such amendments, unless action to the contrary is taken by the President."). Because the President took no such contrary action, the amendments to the Federal rule, which took effect on 1 December 2019, were applied to the military rule on 1 June 2021.

5. Based on the author's caselaw research and review, since 1980, military appellate courts have substantively addressed the residual hearsay exception in approximately 150 cases. While obtaining an accurate count of trial-level residual hearsay litigation is impracticable, common sense dictates that it is a significantly higher number.

6. S. REP. NO. 93-1277, at 20 (1974). The Senate Committee on the Judiciary drafted this passage after approving a residual hearsay exception. *See id.* at 19. Its companion committee in the House of Representatives rejected a similar residual hearsay exception altogether. *See* H.R. REP. NO. 93-1597 (1974) (Conf. Rep.). The residual exception was ultimately adopted by the conference committee after the addition of a provision requiring a proponent of such evidence to provide pretrial notice to an adverse party. *See* An Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, r. 804(b)(5), 88 Stat. 1926, 1943 (1975).

7. *See, e.g.*, United States v. Cain, 587 F.2d 678, 682 (5th Cir. 1979); United States v. Heyward, 729 F.2d 297, 299–300 (4th Cir. 1984); Fryar v. Bissonette, 185 F. Supp. 2d 87, 93 (D. Mass. 2002). Originally, separate but identical residual hearsay exceptions existed under FRE 803 (exceptions applicable regardless of the declarant's availability) and FRE 804 (exceptions applicable only if the declarant is unavailable). *See* 88 Stat. at 1941–43. In 1997, the residual hearsay exceptions were removed from Rules 803 and 804 and merged into the newly created FRE 807 as a purely administrative measure. *See* FED. R. EVID. 807 advisory committee's note (1997 Amendment).

8. Similar to the FRE, the MRE originally contained two residual hearsay exceptions—MRE 803(24) and MRE 804(b)(5); the two exceptions, however, were merged into the newly created MRE 807 as part of the June 1999 amendments to the MRE. United States v. Donaldson, 58 M.J. 477, 479 n.* (C.A.A.F. 2003). The merger "did not alter the meaning or application of the residual hearsay exception." *Id.*

9. United States v. Pollard, 38 M.J. 41, 49 (C.M.A. 1993) (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES, M.R.E. 804 analysis, at A22-51 (1984)); *see also* United States v. McGrath, 39 M.J. 158, 165 (C.M.A. 1994) ("The military 'residual hearsay' rules, after all, are but verbatim copies of their [FRE] counterparts . . . .").

10. *See, e.g.*, United States v. Ruffin, 12 M.J. 952, 955 (A.F.C.M.R. 1982).

11. Based on the author's caselaw research and review, approximately 80 percent of the military appellate opinions that have ruled in favor of admitting residual hearsay since 1980 have involved statements of a child. As an appellate court astutely observed, "many, if not nearly all" residual hearsay cases involve statements of a child. *See* United States v. Zamora, 80 M.J. 614, 627 (N-M. Ct. Crim. App. 2020).

12. In fact, excluding statements from children, the author's research reveals that only twenty military appellate court opinions have ruled in favor of admitting residual hearsay since the exception was adopted more than forty years ago.

13. Additions to the rule are represented by underlined text; deletions are represented by ~~strikethrough~~ text.

14. MANUAL FOR COURTS-MARTIAL, UNITED STATES, M.R.E. 807 (2023) [hereinafter MCM]; MANUAL FOR COURTS-MARTIAL, UNITED STATES, M.R.E. 807 (2019).

15. The elimination of the rarely litigated "interests of justice" prong should not impact court-martial practice because MRE 102 essentially sets forth the same basis for objection. *See* FED. R. EVID. 807 advisory committee's note (2019 Amendment) (providing that the "interests of justice" prong was removed from the Federal rule because FRE 102 offers the same basis for objection); United States v. Hines, 23 M.J. 125, 134 (C.M.A. 1986) (providing that this requirement "has not proved significant" in residual hearsay litigation). The slight phrasing change in paragraph (a)—from "specifically covered by" to "admissible under"—should similarly not impact court-martial practice; that change was directed at a limited Federal court practice that never took root in military jurisprudence. *See* FED. R. EVID. 807 advisory committee's note (2019 amendment) (providing that a minority of Federal courts construed the exception too narrowly so as to prohibit admission under the residual exception of types of evidence specifically covered by an enumerated exception); *compare* Glowczenski v. Taser Int'l, Inc., 928 F. Supp. 2d 564, 573 (E.D.N.Y. 2013) (denying the admission of a scholarly article under the residual exception on the grounds that an enumerated exception specifically addresses this form of evidence), *with* United States v. Grant, 42 M.J. 340, 343 (C.A.A.F. 1995) (providing that "[e]vidence which fails to meet a particular requirement of the enumerated exceptions may qualify as residual hearsay under [MRE 807]").

16. *See generally* FED. R. EVID. 807 advisory committee's note (2019 amendment).

17. This was commonly referred to as the "materiality" prong of the analysis. *See, e.g.*, United States v. Kelley, 45 M.J. 275, 280 (C.A.A.F. 1996); *see supra* note 14 and accompanying text.

18. United States v. Dominguez, 81 M.J. 800, 811 (N-M. Ct. Crim. App. 2021) (quoting United States v. Ellerbrock, 70 M.J. 314, 318 (C.A.A.F. 2011)).

19. FED. R. EVID. 807 advisory committee's note (2019 amendment).

20. *See, e.g.*, *Ellerbrock*, 70 M.J. at 318–19 (providing that evidence must be both relevant and material to be constitutionally required under MRE 412); J.M. v. Payton-O'Brien, 76 M.J. 782, 790–91 (N-M. Ct. Crim. App. 2017) (providing that the Government's failure to disclose classified evidence that is "relevant and material" warrants relief in favor of the defense).

21. Courts commonly refer to this as the "reliability" prong of the analysis. *See, e.g.*, *Kelley*, 45 M.J. at 280.

22. *See supra* note 14 and accompanying text.

23. *Compare* United States v. Valdez, 35 M.J. 555, 563 (A.C.M.R. 1992) (criticizing the military judge's consideration of corroborating evidence), *with* United States v. McGrath, 39 M.J. 158, 166 (C.M.A. 1994) (concluding that "corroboration by other evidence is one of the means by which hearsay evidence can be tested for trustworthiness").

24. Military Rule of Evidence 101 includes electronic communications as proper means of "written" notice. *See* MCM, *supra* note 14, M.R.E. 101(c)(2).

25. *See supra* note 14 and accompanying text.

26. United States v. Czachorowski, 66 M.J. 432, 435 (C.A.A.F. 2008).

27. *See, e.g.*, MCM, *supra* note 14, M.R.E. 404(b), 412(c), 413(b), 414(b), 513(e), 514(e).

28. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, M.R.E. 807 (2019).

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Practice Notes

How to (Try to) Prevent a Continuance

A Military Justice Practitioner's Guide to Paying for Experts

By Major Lauren Teel Browning

A military judge (MJ) and a defense counsel (DC) are at a motions hearing.
MJ: Defense Counsel, will you be able to proceed on the docketed date?
DC: No, Your Honor. We are less than a month away from trial and our expert still has not been contracted for the eighty hours of pretrial work we need.
MJ: Understood, we will continue the case.

The above scenario plays out in courtrooms across the world. Procuring experts often causes delays in courts-martial.[1] In 2022, in *United States v. Grindstaff*, the Government cited failure to contract an expert as a reason for delay when the defense asserted the accused's rights to a speedy trial were violated.[2] The Government took five months to contract the expert after the convening authority (CA) approved the expert's services.[3] The Army Court said, "In August, the [G]overnment authorized a defense DNA expert, but failed to execute a contract and allow the expert to start work until January 2020. We presume, based on a lack of information in the evidence, that these delays were the result of negligence . . . ."[4]

Military justice practitioners (MJPs) must seek the swift execution of justice;[5] they also require expert witnesses and consultants.[6]

This can lead to tension between speedy justice and ensuring enough time for experts to assist in the process.[7]

Many experts that MJPs use already work for the Government.[8] They require no payment other than costs for temporary duty (TDY).[9] However, due to need or preference, MJPs may require expert services of a non-governmental employee.[10] These require a method of payment.

Thankfully, MJPs are not helpless in the seemingly mysterious world of Government acquisitions. They can and should understand principles, hiring methods, and processes of contract and fiscal law to achieve their tandem goals of expeditious yet fair administration of justice. Military justice practitioners play a key role in the timely execution of justice and the proper hiring of much-needed expert assistance.[11]

To further illustrate issues that arise when hiring experts, contemplate another scenario.

> *Scenario 2:*
> *A chief of military justice (CoJ) and a trial counsel (TC) are talking two days before a contested sexual assault case.*
> *TC: Our expert is still not contracted. Should we ask for a continuance?*
> *CoJ: Of course not! Tell them to come anyway, and we will get it figured out. Surely we can contract them in two days.*

Imagine you are the TC in Scenario 2. You followed your CoJ's direction and told the expert to come to the trial. If the contract is not in place before the expert travels to the trial, you may have just made an unauthorized commitment.[12] If not ratified by the contracting office,[13] you and the CoJ might both be reported to Congress.[14]

Similarly, a defense counsel recently spoke with an expert to prepare the expert request.[15] The CA later approved the expert. Before performing more work, the CA approved a non-trial disposition. The expert then submitted a several-hundred-dollar invoice. Should it be paid?[16]

Another version of this scenario happens when a trial takes longer than anticipated and extends beyond the contracted dates. Though likely to be a simple contract modification, counsel must coordinate with the contracting officer (KO) for approval.[17]

These situations are not uncommon and, unfortunately, not always properly handled. Colonel Bret Batdorff, Chief Circuit Judge, 2d Judicial Circuit, U.S. Army Trial Judiciary, says that experts who begin performance before the contract is finalized "never get paid or they fight for months/years to get paid."[18] In some cases, the experts allege that they were incorrectly told the contract was in place; other times, it is the expert's fault.[19] "But, the counsel need to know that they should not begin work with their expert(s) until they have a contract that's finally approved . . . which leads to delay!"[20]

Preventing delay requires coordination.[21] Coming to stakeholders with requisite knowledge of the processes and options helps facilitate proper execution. This primer aims to give MJPs an understanding of how to write comprehensive expert requests (that will later become the basis of a contract or binding agreement),[22] how to educate experts on how they are fully hired (and thus will be paid for their work),[23] and how to articulate reasons for delays to courts when necessary.

If the importance to individual clients and cases does not allow the magnitude of funding experts to sink in, consider this: the 25th Infantry Division spent $365,000 on experts in fiscal year 2022.[24] Over $100,000 was on fees, with the remainder spent on travel.[25] Extrapolated, the Army spends millions of dollars on experts.[26]

Hiring experts requires knowledge of both contract and fiscal law.[27] First, MJPs should understand the principles of contract and fiscal law generally and as applied to hiring experts. These principles are rooted fundamentally in the Constitution and its separation of powers; the Competition in Contracting Act[28] (CICA), its exceptions, and the Federal Acquisition Regulation (FAR)[29] provisions and thresholds; and finally, the policies providing for miscellaneous payments (MP). The following section of this primer explains these fundamentals.

There are many FAR-based methods for procuring experts.[30] However, this primer focuses on two methods: Government purchase cards (GPC) (for expenditures under the micro-purchase threshold (MPT))[31] and contracting with an expert for a single case/trial. The final section focuses on MP as a third, non-FAR-based method to pay for experts.[32]

Principles: Constitutional, Statutory, and Policy Basics for Military Justice Practitioners

Most rights of the accused in the military justice realm stem from the Constitution, while others stem from statutes and executive orders.[33] Article 46 of the Uniform Code of Military Justice (UCMJ) provides that the accused, the Government, and the court-martial have equal opportunity to obtain witnesses.[34] Hiring experts is required because non-government experts expect payment, and there are few reasons that the Government will accept voluntary services.[35] Similar to the rights of the accused, the Constitution speaks on these issues.

The Constitution and Separation of Powers

The framers of the Constitution vested Congress with the power of the purse by requiring that "no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[36] Any exercise of power by a Government agency "is limited by a valid reservation of congressional control over funds in the Treasury."[37] Federal agencies may not make any payment unless Congress authorized funding authority.[38] Congress codified this principle in the Antideficiency Act (ADA), which further delineates the separation of powers.[39] When an executive agency spends without authority and violates this law (and cannot remedy it), Congress requires notification to the President and Congress.[40]

Similarly, the Supreme Court has recognized the Government's sovereign and inherent right to contract.[41] Congress then granted that authority to contract to only certain Government actors within public policy goals via legislation, including CICA.[42]

The Competition in Contracting Act and FAR

The Competition in Contracting Act requires the Government to use full and open competition in obtaining goods and services unless an exception applies.[43] In addition to its requirements, CICA requires the use of FAR procedures.[44] The Federal Acquisition System balances giving "the best value product or service to the customer while

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maintaining the public's trust and fulfilling public policy objectives."[45] Further, the acquisition process must "satisfy the customer in terms of cost, quality, and timeliness" while prioritizing proficient contractors and encouraging competition.[46] The rule, except for experts, is to use competition to allow for the best use of public resources.[47] However, the rest of the FAR applies to contract-based expert hiring.[48]

Another FAR-based method used for purchases under the MPT is a GPC.[49] The MPT differs for different types of purchases, but $2,500 is the maximum amount for non-recurring services.[50] The GPC may be useful for initial consultations, as discussed below. In addition to the GPC and contracting, some units use MP.[51]

Miscellaneous Payments

Miscellaneous payments are a "result of a claim for payment or reimbursement of a valid, non-recurring, non-contractual expense of the [Department of Defense (DoD)], that is not payroll related for a military or civilian member, and when use of the [GPC] is not feasible or appropriate."[52] The DoD Financial Management Regulation[53] (FMR) and the *DoD Guidebook for Miscellaneous Payments*[54] (*MP Guidebook*) govern these transactions.

The *MP Guidebook* example form confusingly cites 28 U.S.C. § 2412 as the authority for expert witness payment, which refers to civil litigation, while also referring to experts for courts-martial.[55] Instead of 28 U.S.C. § 2412, MP are derived from the Purpose Statute.[56] The Purpose Statute provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."[57] When not explicitly provided for, the expenditure must be a "necessary expense" that is (1) logically related to an appropriation's purpose, (2) not prohibited, and (3) not otherwise provided for.[58] Applying the first prong, the Government Accountability Office has "long held that where funds are available for a broad purpose, such as 'operation and maintenance,' the purpose of the appropriation is informed by the underlying program or organic legislation."[59] An "appropriation is available . . . to carry out . . . statutory responsibilities."[60]

Here, the 2023 Consolidated Appropriations Act provides operations and maintenance funds for the Army for expenses not otherwise provided for.[61] The

"underlying program or organic legislation" here stems back to the first UCMJ in 1951, which allowed expert compensation.[62] In 1961, 32 C.F.R. § 534.3(f) provided for spending Government funds on experts,[63] and the *MP Guidebook* still cites section 534.3 generally.[64] Additionally, in Article 46, UCMJ, Congress provides that "the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."[65] The President promulgated Rule for Courts-Martial (RCM) 703(d) to reflect case law and to flesh out Article 46, UCMJ by categorizing experts into both witnesses and consultants.[66] Finally, the James N. Inhofe National Defense Authorization Act for Fiscal Year 2023 discusses the approval authority for experts.[67]

Arguably, witnesses, including expert witnesses and consultants, fall within the statutory responsibilities and underlying program of the UCMJ and, therefore, the Army. Miscellaneous payments expenditures for experts are appropriate because they are: (1) logically related to the appropriation's purpose, (2) not prohibited, and (3) not otherwise provided for.[68]

Provisions of the CICA do not apply, as MP are non-contractual.[69] However, MP require binding agreements, which appear similar to contracts.[70] This tension and lack of express statutory authority lead some units to prohibit MP.[71] In those situations, FAR-based payments suffice.

Procurement Methods: FAR-based Methods to Obtain Experts

While many ways to pay for experts exist, two frequently used methods are based in FAR.[72] First, for small commitments of time costing less than $2,500, a GPC may be used.[73] Second, experts may be contracted.[74] This section covers both.

Government Purchase Cards

A GPC can be used for services under the MPT.[75] A cardholder is the only person authorized to use the GPC bearing their name.[76] A micro-purchase means "an acquisition of supplies or services using simplified acquisition procedures, the aggregate amount of which does not exceed the [MPT]."[77] The maximum amount allowed to be spent on a stand-alone purchase is the MPT.[78] While the MPT is normally $10,000, the limit is lowered to $2,500 for non-recurring services.[79] This $2,500 limit applies to expert witness services.[80]

For some MJPs, the idea may occur to ask a cardholder to segregate one large payment into separate payments.[81] However, these "split purchases" are prohibited.[82] A split purchase "is the intentional breaking down of a known requirement to stay within . . . the MPT to avoid other procurement methods or competition requirements."[83] In these cases, contracting may work instead.[84]

Government Purchase Card Process

The process for using a GPC is: (1) the CA approves the use of funds,[85] (2) the G-8 and CA sign a Department of the Army (DA) Form 3953, Purchase Request and Commitment Sheet,[86] and (3) the GPC cardholder remits payment.[87]

Rule for Courts-Martial 703(d)(1) requires the CA's authorization to employ an expert at any Government expense.[88] This request may be simple because there may not be enough information yet for the formal request for work exceeding $2,500.[89] However, RCM 703(d) requires the CA to approve the expenditure.[90]

The CA is unlikely to be the cardholder, so coordination with the cardholder is required to remit payment.[91] The cardholder remits payment either before or after the expert's performance, which completes the process.

Initial Consultation to Determine "Necessity" for Experts

Sometimes MJPs may not know what the expert will accomplish for the accused without an in-depth conversation with the expert.[92] An MJP can use a GPC to pay for this consultation and avoid an unauthorized commitment by implying that the expert will be paid later.[93] Using a GPC also prevents the expert from volunteering their services to secure a contract later.[94] An initial consultation can help the MJP draft the formal request.[95]

A formal expert witness request must meet the *United States v. Gonzalez* standard for necessity, which requires: "First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop."[96] An initial consultation can aid in determining the answers to these questions.

Similarly, MJPs must show the necessity for an expert consultant.[97] Necessity is more than "mere possibility of assistance from a requested expert."[98] Rather, "[t]he accused must show that a reasonable probability exists both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial."[99] Expert consultants may later testify as witnesses.[100] The initial consultation helps meet this standard.[101]

However, some cases require expenses over $2,500. These require a contract[102] or MP.[103]

Contracting

The Army procures experts with contracts.[104] Contracts are the most time-consuming of the methods, partly because contracts require coordination with the most stakeholders. However, contracts have the clearest statutory authority.[105] Regardless of whether an MJP's leadership prefers contracts or MP, the ultimate goal is to find efficiencies and to prevent delays. A helpful starting place to understand the contracting process is with the key players.

Stakeholders

The G-8, or resource manager, programs "resources against approved materiel requirements" and provides "fiscal stewardship."[106] They plan, budget, and execute financial resources.[107]

Legal administrators handle the business operations of installation Offices of the Staff Judge Advocate (OSJAs).[108] In this role, they are usually the point of contact between the local contracting offices and the MJPs to facilitate contracting.[109] Legal administrators (or a paralegal) serve as a contracting officer representative (COR) once the contract is awarded.[110] The COR "assists in the technical monitoring or administration of a contract."[111] The MJP verifies to the COR that the hours claimed

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by the expert were actually worked so the invoices can be validated and paid.[112]

The KO is the only person with authority to bind the Government.[113] "Contracting officers have authority to enter into, administer, or terminate contracts . . . [and] may bind the Government only to the extent of the authority delegated to them."[114] Many KOs work at the Mission Installation Contracting Command (MICC) contracting offices.[115] The contracting office awards, executes, and administers contracts for supplies or services.[116]

The "requiring activity" is the entity that requires the supplies or services.[117] In the case of experts, the OSJA and the MJP are the requiring activity. The requiring activity is responsible for describing its needs.[118] Here, that includes articulating the expert's purpose in the expert request.

A CA convenes the court-martial.[119] The Secretary of the Service and certain commanders are designated CAs.[120] Rule for Courts-Martial 703 requires Office of Special Trial Counsel or CA authorization to employ an expert, but commanders are not KOs.[121]

A commander exercises command authorities and responsibilities.[122] A commander is a "commissioned or warrant officer . . . who . . . exercises primary command authority over a military organization."[123] Some commanders are CAs.[124] Command authority does not include contracting authority, so commanders work with KOs.[125]

Contracting Process

The CICA and FAR specifically provide that full and open competition is not required "to procure the services of an expert" for litigation.[126] The experts may be used "in any litigation or dispute" regardless of "whether or not the expert is expected to testify."[127] Because of this deviation from the general rule encouraging competition, the KO must justify their decision to only negotiate and contract with a single (sole) source and seek the appropriate approval authority.[128] This is called a "justification and approval" (J&A).[129] The KO and legal administrator use the information provided by the MJP in the expert request to the CA or court[130] as the basis for the contract and J&A.[131]

Market Research and Sole Source Justification. A "sole source justification" is used when only one person can meet the needs of the requiring activity.[132] Using a sole source justification for an expert exempts the process from advertising the role to encourage competition.[133] Experts are one of the few exceptions to competition that allow for sole sourcing.[134]

While MJPs focus on finding the best expert for their case, they are conducting the necessary market research to find the only person—the sole source—who can provide the services needed and whether

their costs are consistent with others of commensurate experience.[135] If there is only one qualified person who is available for the trial dates, and their cost is reasonable, then a sole source justification is appropriate.[136] The explanation of this need for the expert is then reused.

The Request Becomes the Contract: Draft Wisely. Performance-based services contracts must contain either a "performance work statement" (PWS) or a statement of objectives, as well as measurable performance standards, including metrics such as "quality [or] timeliness."[137] A PWS describes "the work in terms of the required results rather than . . . 'how' the work is to be accomplished."[138] The PWS of the contract is drawn from the MJP's request.[139] For example, an MJP may request and then the PWS reflect that an expert consult for ten hours on alcohol's effects on memory before the trial date. The MJP would not list the journals to be referenced, but rather the required type of assistance on that topic in connection to the facts of the case.

To support the expert request, the MJP should include the expert's curriculum vitae and fee schedule because they show the person's qualifications[140] as well as the costs.[141]

Once compensation and roles are fixed, they become the basis for the contract.[142] If an MJP wants an expert consultant to testify as a witness, then the request and contract should provide for this option.[143] The MJP and expert should stay within the bounds of the contract. If not, then the expert might not be paid for their work.[144] Only the KO may bind the Government, and altering the terms of the agreement requires KO approval.[145] Thus, MJPs should carefully craft expert requests to encompass all requirements and timelines.

From Request to Payment: How to Get from A to Z. The MJP should inform the legal administrator of the submission of expert requests.[146] This allows the legal administrator (and paralegals) to prepare the Purchase Request and Commitment Sheet before the CA appointment.[147] Then, when the legal administrator receives an approved[148] expert request back, they work with the MJP and paralegals for completion of other paperwork.[149] A template packet can aid in streamlining this process.[150] An MJP can help by proofreading documents and monitoring completion.

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The legal administrator will upload the documents into the Paperless Contracting File, which allows the legal administrator to observe MICC processing.[151]

The experts will need accounts on SAM.gov, the System for Awards Management, as well as the Procurement Integrated Enterprise Environment (PIEE).[152]

Most expert contracts will be under the simplified acquisition threshold (SAT) of $250,000.[153] For contracts under the SAT, the process is truncated.[154] After completing the necessary documentation, the KO signs the J&A and receives the appropriate approval.[155] Then, the KO awards the contract, and the MICC will notify the OSJA and expert.[156]

Finally, the expert may begin. Experts and MJPs should be careful to account for the amount of time the expert works. Should they anticipate exceeding the contract amount, the entire process of approving funds and modifying the contract must begin again.[157] Exceeding the time or dollar amount is a potential ADA violation, which could require investigation and might result in notification to Congress.[158]

If there are performance issues while the contract is ongoing, the MJP and the legal administrator (as the COR) should work with the KO to resolve and document issues in the Contractor Performance Assessment Reporting System (CPARS).[159]

Like any staffing in the Army, relationships are important. The legal administrator works with the MICC on all OSJA contracts, and the MICC typically works on all command contracts.[160] Most MICCs are staffed by Civilian employees, who are subject to restrictive overtime laws and regulations.[161] While one case may be of utmost importance to a particular MJP, the offices involved in processing the

requests are also working on many different projects.[162]

After the expert consults or testifies, then the expert invoices in PIEE and the COR accepts the invoice. The MJP should verify the number of hours the contractor worked with the COR. Then, the MICC will work with the G-8 to release funds.[163] The expert will be paid via the Defense Accounting and Finance System (DFAS).[164] After that, on to the next case!

Procurement Method: MP

Miscellaneous payments are another option to pay for experts.[165] Should an MJP's G-8 and OSJA leadership be comfortable using this method, MP are the fastest way to hire experts (and therefore prevent a continuance).[166] They require the fewest stakeholders and forms but are also exempt from some potentially helpful systems, like CPARS.[167] Of note, the Air Force, Space Force, Navy, and Marine Corps use this method to hire experts.[168]

Process

The MP process does not require a contracting office.[169] Instead, it requires coordination with the CA, OSJA, and the G-8 or resource manager.[170] The expert must file a Standard Form 1034: A Public Voucher for Purchases and Services Other Than Personal.[171] To substantiate the form, and to "establish auditability and to validate entitlement systems and payment records, a copy of all supporting documentation must accompany each payment request."[172] Substantiating documents must include the basis for the entitlement, including an "authority for reimbursement, . . . value, timing, and funding source.[173] The form also requires an "invoice, binding agreement, receipts, and approved purchase or entitlement authorization and certification of funds document."[174] The certifying official at the G-8 must also document their approval.[175] The FMR requires a Taxpayer Identification Number[176] before the miscellaneous obligation package is forwarded to DFAS and a disbursing officer for payment in the General Fund Enterprise Business System.[177]

To further understand these forms and processes, the Army can look to the other Services.

Sister Services

The Air Force updated their regulation, Air Force Instruction 51-207, in 2022 to continue its reliance on MP, which began as early as 2017.[178] The Air Force (and Space Force) complies with RCM 703[179] and memorializes the approved terms of employment in a memorandum of agreement (MOA) for expert witnesses.[180] A sample MOA is provided in the Appendix. This MOA satisfies the "binding agreement" that is required to substantiate the MP.[181] To process payment, the Air Force uses SF 1034.[182] The entire process involves the CA, the staff judge advocate (and their staff), the expert, and the finance/G-8 office (for the certifying official and the disbursing officer).[183]

The Air Force and Space Force are not alone in using this process; the Navy and Marine Corps also operate similarly. The Navy and Marine Corps[184] updated JAG Instruction 5800.7G, the Manual of the Judge Advocate General, in February 2022 to continue their reliance on MP, which began as early as 2012.[185]

Should an MJP desire to use MP instead of contracting, looking to sister Services' long-standing practices (particularly the Air Force's binding agreement in the Appendix) may aid the transition. However, understanding the purposes, processes, and players in contracting should facilitate the MJP's ability to expedite movement of contract actions.

Conclusion

Obtaining experts does not have to be a source of mystery, friction, or delay for MJPs. Once the processes and expectations are set, MJPs can take many actions to diligently prevent a continuance. Each of the hiring methods is a tool to obtain expert assistance that helps the system run efficiently and effectively. In the pursuit of justice, and with liberty at stake, practitioners should be well-informed to fully utilize these important tools. **TAL**

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Notes

1. Email from Colonel G. Bret Batdorff, Chief Cir. Judge, 2d Jud. Cir., U.S. Army Trial Judiciary, to author (Dec. 5, 2022, 12:24 PM) (on file with author).

2. United States v. Grindstaff, No. 20200315, 2022 WL 4008733, at *4 (A. Ct. Crim. App. Aug. 30, 2022).

3. *See id.*

4. *Id.*

5. UCMJ art. 10 (2016); Manual for Courts-Martial, United States, R.C.M. 707 (2019) [hereinafter MCM] (requiring the accused to be brought to trial within 120 days of preferral or other triggering events).

6. *See* United States v. Tinsley, 81 M.J. 836, 840 (A. Ct. Crim. App. 2021) (quoting United States v. Turner, 28 M.J. 487, 488 (C.M.A. 1989)) ("[I]n trials where expert testimony is central to the outcome, a defendant must be provided expert assistance.").

7. United States v. Weisbeck, 50 M.J. 461, 465–66 (C.A.A.F. 1999), *rev'd on other grounds,* 58 M.J. 287 (C.A.A.F. 2003) (finding military judge abused discretion in denying defense's continuance request to work with expert for "expeditious processing" of the court-martial).

8. *See* Major Dan Dalrymple, *Make the Most of It: How Defense Counsel Needing Expert Assistance Can Access Existing Government Resources,* Army Law., May 2013, at 35, 41–42.

9. *Id.* at 42 ("As members of the military, or even federally employed [Civilians], the cost of their involvement amounts to little more than a [TDY] assignment." (citing 5 U.S.C. § 5537)).

10. *See generally id.*

11. *See id.* at 35.

12. *See generally* 31 U.S.C. § 1341. An unauthorized commitment is "an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into that agreement on behalf of the Government." FAR 1.602-3(a) (2022).

13. FAR 1.602-3 (2022). Ratification of unauthorized commitments "means the act of approving an unauthorized commitment by an official who has the authority to do so." Military justice practitioners (MJPs) should avoid these; therefore, they are not covered in this article.

14. A person with authority must obligate the funds for the expert. 31 U.S.C. § 1341(a)(1) (2022); U.S. Gov't Accountability Off., GAO-16-463SP, Principles of Federal Appropriations Law ch. 2, sec. A.1, at 2-1 (4th ed. 2016) [hereinafter GAO Red Book]. Without a proper obligation of funds, among other things, an investigation may be necessary to determine if there is a violation of the Antideficiency Act (ADA). An ADA violation requires notification to Congress. 31 U.S.C. §§ 1341, 1351. Additionally, improper acceptance of voluntary services is prohibited. 31 U.S.C. § 1342; *see also* U.S. Dep't of Army, Reg. 608-1, Army Community Service para. 5-9 (19 Oct. 2017) [hereinafter AR 608-1].

15. This scenario from 2022 is anonymized to minimize potential embarrassment to any counsel.

16. A method to prevent this situation is discussed below. This primer does not answer the question of how this exact scenario was resolved, but it does seek to prevent it from happening again.

17. It might surprise MJPs to learn that while convening authorities (CAs) sign purchase requests, they are not vested with the authority to sign contracts. Only "contracting officers have authority to enter into, administer, or terminate contracts . . . . Contracting officers may bind the Government only to the extent of the authority delegated to them." FAR 1.602-1 (2022). As a practice point, contracts can be written for an entire year rather than for specific trial dates.

18. Batdorff E-mail, *supra* note 1.

19. *Id.*

20. *Id.*

21. Stakeholders include but are not limited to the CA, the G-8, the contracting office, and the Office of the Staff Judge Advocate (OSJA) legal administrator. *See infra* Section titled "Stakeholders."

22. Interview with Chief Warrant Officer 3 Shaniqua Coley, Instructor/Writer, Leadership Ctr., The Judge Advoc. Gen.'s Legal Ctr. & Sch., U.S. Army, in Charlottesville, Va. (Oct. 24, 2022) [hereinafter Oct. 24 Coley Interview]. Ms. Coley facilitated seventy-five contracts for the 3d Infantry Division at Fort Stewart, Georgia. She discussed using miscellaneous payments with the G-8 during her tenure. *Id.*

23. *Id.*

24. Email from Lieutenant Colonel Steven Schnurr, Assistant Chief of Staff, G-8, 25th Infantry Div., Schofield Barracks, to author (Dec. 5, 2022, 2:33 EST) (on file with author).

25. *Id.*

26. *See id.*

27. Fiscal law requires that expenditures are proper in three ways: (1) time money spent for a bona fide need during that fiscal year, (2) purpose of expenditure, and (3) amount. *See* 31 U.S.C. § 1502. The fiscal year runs from 1 October to 30 September. 31 U.S.C. § 1102. For a full treatment of this topic, please see Matthew H. Solomson, Chad E. Miller & Wesley A. Demory, *Fiscal Matters: An Introduction to Federal Fiscal Law & Principles*, Briefing Papers, June 2010, at 1.

28. Competition in Contracting Act of 1984, Pub. L. No. 98-369, §§ 2701–2753, 98 Stat. 494, 1175–1203 (codified as amended in various sections of 10 U.S.C. and 41 U.S.C., among others).

29. The Federal Acquisition Regulation (FAR), codified at Title 48 of the Code of Federal Regulations (C.F.R.) parts 1 through 53, governs acquisitions of goods and services by executive agencies. *See* Erika K. Lunder et al., Cong. Rsch. Serv., R42826, The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions 7 (2015). The FAR governs the management of contracts procured under FAR-based methods. *Id.* For ease of access, this primer will largely refer to the FAR, the Defense FAR (DFARS), and the Army FAR (AFARS) sections and not the C.F.R.

30. For example, there are at least four other ways to procure expert services. *Indefinite Delivery, Indefinite Quantity Contracts*, U.S. Gen. Servs. Admin., https://www.gsa.gov/small-business/register-your-business/explore-business-models/indefinite-delivery-indefinite-quantity-idiq (last visited Feb. 25, 2023) (explaining that the General Services Administration uses indefinite delivery, indefinite quantity (IDIQ) contracts for architecture, engineering, and other services); FAR 13.303-1 (2022) (blanket purchase agreements (BPA)); FAR 16.703(a) (2022) (basic ordering agreements (BOA)); FAR 38.101(a) (the Federal Supply Schedule program, pursuant to 41 U.S.C. § 152(3)).

31. *See generally* DFARS 213.270 (Dec. 2022); AFARS 5113.270-90 (Nov. 7, 2022).

32. U.S. Dep't of Def., 7000.14-R, DoD Financial Management Regulation vol. 10, ch. 12, para. 1.2 (May 2022) [hereinafter DoD FMR].

33. *E.g.*, U.S. Const., amends. IV, V, VI; UCMJ arts. 10 (right to speedy processing while confined), 31 (right against self-incrimination) (2019).

34. UCMJ art. 46 (2019).

35. *See* 31 U.S.C. § 1342; AR 608-1, *supra* note 14.

36. U.S. Const., art. I, § 9, cl. 7; *see also* GAO Red Book, *supra* note 14, ch. 1, sec. A, at 1–4.

37. Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 425 (1990).

38. 31 U.S.C. § 1341.

> Except as specified in this subchapter or any other provision of law, an officer or employee of the United States Government . . . may not—(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or] (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law . . . .

Id.; *see also* GAO Red Book, *supra* note 14, ch. 1, sec. A, at 1–4.

39. 31 U.S.C. § 1341.

40. 31 U.S.C. § 1351. An investigation is required to determine if there is a violation. *See generally id.*

41. United States v. Tingey, 30 U.S. 115, 125 (1831) ("It is an incident to the general right of sovereignty; and the United States being a body politic may, within the sphere of the constitutional powers confided to it, . . . enter into contracts not prohibited by law, and appropriate to the just exercise of those powers.").

42. Competition in Contracting Act of 1984, Pub. L. No. 98-369, §§ 2701–2753, 98 Stat. 494, 1175–1203 (codified as amended in various sections of 10 U.S.C. and 41 U.S.C., among others).

43. *Id.* § 2723(a)(1)(C) (codified as amended at 10 U.S.C. § 3201).

44. 41 U.S.C. § 3301(a)(1).

45. FAR 1.102(a) (2022).

46. FAR 1.102(b) (2022).

47. *See* 41 U.S.C. § 3301(a)(1), (c). For further discussion, see *infra* Section titled "Market Research and Sole Source Justification."

48. *See* FAR 6.302-3(a)(2)(iii) (2023).

49. AFARS app. EE, para. 6-14, tbl.1-2 (Aug. 9, 2023) ("Non-recurring services involve one-time, unpredictable, or occasional requirements, and may be purchased with the GPC up to the MPT whenever a requirement occurs." If any doubt exists as to which category a service falls under, the cardholder shall consult with the local contracting office for a written determination.").

50. AFARS app. EE, para. 1-7 (Aug. 9, 2023). For example, a cardholder cannot use a Government purchase card (GPC) for monthly lawn maintenance.

51. U.S. Army Fin. Mgmt. Command, U.S. Army Miscellaneous Payments Standard Operating Procedure (SOP) and Guide (2 Mar. 2022) [hereinafter Army MP SOP].

52. DoD FMR, *supra* note 32, vol. 10, ch. 12, para. 1.2.

53. DoD FMR, *supra* note 32.

54. U.S. Dep't of Def., Guidebook for Miscellaneous payments 35 (Dec. 2021) [hereinafter MP Guidebook] (explaining that "Expert Witness Fees" apply to a "[n]on-Federal employee subpoenaed for any legal proceedings to provide expert testimony . . . approved by a convening authority to testify at court[s]-martial[]").

55. This provision provides for payment for expert fees for a prevailing party in a civil action brought by or against the United States or any agency or any official of the United States. 28 U.S.C. § 2412.

56. 31 U.S.C. § 1301(a).

57. *Id.*

58. Sec'y of Interior, B-120676, 34 Comp. Gen. 195 (1954). 31 U.S.C. § 3325 allows agencies to make payments with "vouchers," which are different from "contract vouchers" under 10 U.S.C. § 4602.

59. Matter of: Daniel K. Inouye Asia-Pacific Center for Security Studies—Use of Appropriated Funds to Purchase COVID-19 Self-Test Kits, B-333691, 2022 WL 370940 (Comp. Gen. Feb. 8, 2022).

60. *Id.*

61. Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, tit. II, 136 Stat. 4459, 4569 (2022); *see also* Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, tit. II, 136 Stat. 49, 157.

62. President Harry S. Truman signed the Regulations Supplementing the Manual for Courts-Martial into effect in 1951. Exec. Order No. 10214, 16 Fed. Reg. 1303 (1951). Paragraph 116 says, "When the employment of an expert is necessary during a trial by court-martial, the trial counsel . . . [will] request the convening authority to authorize such employment and to fix the limit of compensation to be paid the expert." *Id.* at 1358.

63. 32 C.F.R. § 534.3(f) (1961).

64. MP Guidebook, *supra* note 54, at 95 (citing 32 C.F.R. § 534.2 as authority for "Witness Fees").

65. UCMJ art. 46(a) (2016).

66. *See* MCM, *supra* note 5, R.C.M. 703(d).

67. James N. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 541(c), 136 Stat. 2395, 2580 (2022). This law shifts the authority to authorize experts to the new Office of Special Trial Counsel (OSTC) for select cases. *Id.*

68. *See* To MAJ. J. A. Marmon, A-36296, 11 Comp. Gen. 504 (1931). Though a pre-CICA case, expenditures on an expert witness for a general court-martial were a valid use of public funds. *Id.* 32 C.F.R. § 534.3(f) (Oct. 25, 1961) cites this case and is still law, bolstering the use of MP.

69. FAR 2.101 (2022) (defining "acquisition"). "Acquisition means the acquiring *by contract* with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease . . . ." *Id.* (emphasis added). Acquisition includes "award of *contracts*, *contract* financing, *contract* performance, *contract* administration, and those technical and management functions directly related to the process of fulfilling agency needs by *contract*."

Id. (emphasis added). Arguably, the requirements for contracts expressed in 41 U.S.C. § 3301 (for full and open competition) do not apply to MP because Article 46 of the UCMJ falls into the category of non-contractual "procurement otherwise expressly authorized by statute." 41 U.S.C. § 3301(a). Congress does not require any specific procurement method or justification and approval (J&A) in Article 46. Moreover, the President's procedures for hiring experts in RCM 703 only require that the CA authorize an expert's employment and fix their compensation. *See* MCM, *supra* note 5, R.C.M. 703(d). However, reasonable minds can differ as to whether an MP is a sole source contract without a proper J&A.

70. MP Guidebook, *supra* note 54, at 35 (explaining the reimbursement requirements for expert witness fees). The Appendix provides an Air Force binding agreement.

71. Oct. 24 Coley Interview, *supra* note 22.

72. FAR 6.302-3(b)(3)(i) (2022); AFARS app. EE, para. 6-14, tbl.1-2 (Aug. 9, 2023). For experts that are used over and over, there are several other FAR-based options. One of these options may be a good fit for experts who do not testify or would not be hindered by becoming a "Government-" or "defense-" only witness. The risk of an eviscerating cross-examination of a witness attacking the stock "Government" witness who only works for OSTC must be considered. For example, the U.S. Army Legal Services Agency recently awarded a $41 million IDIQ contract to Deloitte Financial Services LLP for digital forensic investigation experts, among many others. Email from Gazala A. Shaikh, Chief, eDiscovery Div., Dir., Army eDiscovery Program, to author (Mar. 21, 2023, 3:13 PM) (on file with author). To place a task order, click on the FLASH button on the JAGCNet eDiscovery page. *Id.*

73. AFARS app. EE, para. 6-14, tbl.1-2 (Aug. 9, 2023).

74. FAR 6.302-3(b)(3)(i) (2023).

75. FAR 2.101 (2023) (defining "micro-purchase threshold").

76. AFARS app. EE, para. 2-7(aa) (Sept. 7, 2023). After submitting the required training, a cardholder (CH) is appointed in the Joint Appointment Module (JAM), an application within Procurement Integrated Enterprise Environment (PIEE). *Id.* para. 1-5(b). The JAM is the "mandatory enterprise tool for appointing and delegating authority to GPC personnel." *Id.*

77. FAR 2.101 (2023) (defining "micro-purchase").

78. *Id.* (defining "micro-purchase threshold"); DFARS 213.301(2) (Dec. 2022); AFARS 5113.270-90 (Aug. 9, 2023).

79. AFARS app. EE, para. 6-14, tbl.1-2 (Aug. 9, 2023).

80. *Id.*

81. *See id.* app. EE, para. 14-5(a).

82. *Id.*

83. *Id.*

84. *Id.*

85. MCM, *supra* note 5, R.C.M. 703(d)(1). This will soon change for some offenses under the OSTC. Congress directed the President to prescribe "regulations to ensure that residual prosecutorial duties and other judicial functions of convening authorities, including . . . hiring experts" are transferred to OSTC. James N. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 541(c), 136 Stat. 2395, 2580 (2022).

86. U.S. Dep't of Army, DA Form 3953, Purchase Request and Commitment Sheet (Mar. 1, 1991).

87. AFARS app. EE, para. 6-2 (Aug. 9, 2023).

88. MCM, *supra* note 5, R.C.M. 703(d)(1).

89. United States v. Gonzalez, 39 M.J. 459 (C.M.A. 1994). For the purposes of this primer, a "formal appointment" is when the CA has authorized an expert to be a consultant or witness for the entirety of the case. This can occur upon request of the parties under RCM 703(d)(1) or by order of a military judge after a motion for employment of an expert under RCM 703(d)(2).

90. MCM, *supra* note 5, R.C.M. 703(d)(1).

91. AFARS app. EE, fig.2-2 (defining "cardholder").

92. *See Gonzalez*, 39 M.J. at 461 (internal citations omitted). This is similar to but also different from "market research" under the FAR. Market research helps "determine if sources [are] capable of satisfying the agency's requirements," which is akin to researching and asking for resumes. FAR 10.001(a)(3)(i) (2023). However, "agencies should not request potential sources to submit more than the minimum information necessary." *Id.* 10.001(b).

93. *See* 31 U.S.C. § 1341. This was discussed in the Introduction.

94. Volunteering services to the Government is prohibited absent narrow exceptions. 31 U.S.C. § 1342.

95. MCM, *supra* note 5, R.C.M. 703(d).

96. *Gonzalez*, 39 M.J. at 460–61 (internal citations omitted).

97. *See* United States v. Bresnahan, 62 M.J. 137, 143 (C.A.A.F. 2005) (citing *Gonzalez*, 39 M.J. at 461); United States v. Freeman, 65 M.J. 451, 458 (C.A.A.F. 2008).

98. *Bresnahan*, 62 M.J. at 143.

99. *Id.*

100. *See generally* MCM, *supra* note 5, R.C.M. 703(d). Any request should list both as options.

101. The invoice terms for an initial consultation require careful consideration and explanation to the expert. The expert is not formally appointed, and their compensation is capped without further approval. *See* MCM, *supra* note 5, R.C.M. 703(d); AFARS app. EE, para. 6-14, tbl.1-2 (Aug. 9, 2023). If there are travel costs with the expert's consultation fees, then the total cost must remain under $2,500 to prevent a split purchase.

102. *See supra* notes 81-84 and accompanying text.

103. DoD FMR, *supra* note 32.

104. Oct. 24 Coley Interview, *supra* note 22. Reliance on contracts is typically due to G-8 preference. *Id.*

105. *See* Competition in Contracting Act of 1984, Pub. L. No. 98-369, §§ 2701–2753, 98 Stat. 494, 1175–1203 (codified as amended in various sections of 10 U.S.C. and 41 U.S.C., among others).

106. *G-8*, U.S. Army, https://army.mil/g-8 (last visited Sept. 12, 2023) (describing "Mission and Roles").

107. *Id.*

108. U.S. Dep't of Army, Reg. 27-1, Judge Advocate Legal Services para. 3-7 (24 Jan. 2017).

109. Oct. 24 Coley Interview, *supra* note 22.

110. *Id.*

111. FAR 1.604 (2023).

112. Oct. 24 Coley Interview, *supra* note 22.

113. *See* FAR 1.602-1 (2023).

114. *Id.*

115. Oct. 24 Coley Interview, *supra* note 22. Some work at other types of contracting offices. *Id.*

116. FAR 2.101 (2023) (defining "contracting office"). Contracting officers have support, like paralegals are to attorneys, who help administer contracts. They are called contracting specialists.

117. *See* FAR 6.301 (2023).

118. *See* FAR pt. 11 (2023).

119. UCMJ art. 22 (2012).

120. *Id.*

121. MCM, *supra* note 5, R.C.M. 703(d)(1). *See supra* note 67 (describing recent changes with OSTC).

122. *See* U.S. Dep't of Army, Reg. 600-20, Army Command Policy para. 1-6(b) (24 July 2020) [hereinafter AR 600-20].

123. *Id.* para. 1-6(a).

124. *See* UCMJ art. 22 (2012).

125. *See* FAR 1.602-2 (2023). Commanders have different authority than KOs. One of the few references to contractors in *Army Command Policy* is regarding how commanders have no authority over contractors who have prohibited relationships with trainees. AR 600-20, *supra* note 122, para. 4-15(e)(3). This provision highlights the distinction between command and contract authority. Contract officers alone hold authority over contracts. *See* FAR 1.602-2 (2023).

126. 41 U.S.C. § 3304(a)(3)(D); *accord* FAR 6.302-3(a)(2)(iii) (2023).

127. FAR 6.302-3(b)(3)(i) (2023).

128. *Id.* 6.302-3(c).

129. *See id.*; FAR 6.304 (2023).

130. Like MP and GPCs, expenditures on experts require CA, OSTC, or court approval.

131. Oct. 24 Coley Interview, *supra* note 22.

132. FAR 6.303-1 (2023).

133. FAR 5.202(a)(14) (2023).

134. *See id.*

135. FAR 10.001(a)(2)(ii), 10.002(b) (2023). Market research "determine[s] if sources [are] capable of satisfying the agency's requirements." FAR 10.001(a)(3)(i) (2023).

136. *See* FAR 6.303-2(c) (2023).

137. FAR 37.601 (2023).

138. FAR 37.602 (2023).

139. Oct. 24 Coley Interview, *supra* note 22.

140. The curriculum vitae may also be used for the Government to select an adequate substitute for the requested expert. *See* MCM, *supra* note 5, R.C.M. 703(d)(2)(A)(ii) (allowing the Government to offer an adequate substitute).

141. MCM, *supra* note 5, R.C.M. 703(d)(1) (requiring an estimate of costs be presented to the CA to affix compensation); U.S. Dep't of Army, Reg. 27-10, Military Justice paras. 5-33(e), 6-5, 28-8 (20 Nov. 2020); *see* Oct. 24 Coley Interview, *supra* note 22. Ensure compensation plans for travel days.

142. Oct. 24 Coley Interview, *supra* note 22.

143. *See* United States v. Bresnahan, 62 M.J. 137, 143 (C.A.A.F. 2005).

144. 31 U.S.C. § 1351; *see supra* note 12 and accompanying text on unauthorized commitments.

145. *See* FAR 1.602-1 (2023).

146. Interview with Chief Warrant Officer 3 Shaniqua Coley, Instructor/Writer, Leadership Ctr., The Judge Advoc. Gen.'s Legal Ctr. & Sch., U.S. Army, in Charlottesville, Va. (Mar. 9, 2023) [hereinafter Mar. 9 Coley Interview].

147. U.S. Dep't of Army, DA Form 3953, Purchase Request and Commitment Sheet (Mar. 1, 1991) (requiring a line of accounting from the G-8); Oct. 24 Coley Interview, *supra* note 22. This is a best practice. The CA is the last signature after G-8, so if the staff judge advocate is recommending approval of the expert request, it is prudent to complete the form so that both the form and approval can be signed contemporaneously.

148. *See supra* Sections titled "Government Purchase Card Process" and "Initial Consultation to Determine 'Necessity' for Experts" regarding CA and OSTC approval processes.

149. Oct. 24 Coley Interview, *supra* note 22. While different offices may work in different ways, Fort Stewart, Georgia, used this process. Paralegals and legal administrators complete the sole source justification along with a Contract Requirements Package Antiterrorism/Operations Security Review Coversheet, a Quality Assurance Surveillance Plan, and a Request for Services Contract Approval (RSCA). Oct. 24 Coley Interview, *supra* note 22; U.S. Dep't of Army, RSCA (May 2017), http://www.asamra.army.mil/scra/documents/RSCA%20Version%202.0.pdf. At Fort Stewart, the Division Acquisition Review Board (DARB) met once a year and approved an RSCA for all court-martial expert contracts under a certain dollar threshold for that year. Mar. 9 Coley Interview, *supra* note 146. Otherwise, the DARB may meet at a frequency (such as monthly) that may cause delay.

150. Oct. 24 Coley Interview, *supra* note 22. Ms. Coley recommends training everyone from the MJPs to the MICC so stakeholders can meet and understand their roles in the process. *Id.* The most common errors in the paperwork were failing to update names or miscalculating hours. *Id.*

151. Oct. 24 Coley Interview, *supra* note 22.

152. The Procurement Integrated Enterprise Environment is home to the Wide Area Workflow. *See About PIEE,* Procurement Integrated Enter. Env't, https://piee.eb.mil (last visited Sept. 13, 2023); Sys. for Awards Mgmt., https://SAM.gov (last visited Sept. 13, 2023) (explaining that users also need a unique entity ID (formerly a Data Universal Numbering System number) that SAM.gov generates).

153. The threshold is $250,000 except generally for commercial and contingency operations. FAR 2.101 (2023) (defining "simplified acquisition threshold").

154. The simplified acquisition procedure "means the methods prescribed in [FAR] part 13 for making purchases of supplies or services." FAR 2.101 (2023) (defining "simplified acquisition procedures"). Broadly, simplified acquisitions combine synopsis and solicitation periods or allow a reasonable opportunity to respond with solicitations for non-commercial items and are usually set aside for small or disadvantaged businesses. *See* FAR 13.003 (2023). However, none of these procedures apply to experts.

155. Oct. 24 Coley Interview, *supra* note 22.

156. *Id.*

157. *See* FAR pt. 43 (2023) ("Contract Modifications"); Oct. 24 Coley Interview, *supra* note 22.

158. *See supra* Section titled "The Constitution and Separation of Powers."

159. FAR 42.1501(b) (2023) ("Agencies shall . . . use [CPARS] metric tools to measure the quality and timely reporting of past performance information. CPARS is the official source for past performance information."). This system is unavailable for MP because the experts are not contractors.

160. Oct. 24 Coley Interview, *supra* note 22.

161. *Id.*; *see* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19; 29 C.F.R. § 778 (2023).

162. Oct. 24 Coley Interview, *supra* note 22.

163. *Id.*

164. *Id.*

165. *See supra* Section titled "Miscellaneous Payments" (covering the statutory and regulatory authority for MP).

166. Oct. 24 Coley Interview, *supra* note 22.

167. However, some of this risk is mitigated by the fact that the MJP community and Judge Advocate General's Corps are not as large as the Federal Government as a whole. Word of mouth aids in market research, which lowers the risk of unknown experts failing to perform. Additionally, if the expert does not perform, then they are not entitled to payment, which in most cases should be sufficient to ensure performance.

168. *See* U.S. Dep't of Air Force, Instr. 51-207, Victim and Witness Rights and Procedures para. 7.14 (1 Feb. 2023) [hereinafter AFI 51-207]; U.S. Dep't of Navy, JAGINST 5800.7G, Manual of the Judge Advocate General (JAGMAN) sec. 0146(k)(1) (14 Feb. 2022) [hereinafter JAGMAN]; Memorandum from Sec'y of Air Force to U.S. Space Force Field Commands, subject: United States Space Force Military Justice, Administrative Matters, and Legal Support Matters (20 Oct. 2020).

169. MP Guidebook, *supra* note 54, at 3 ("An authorized miscellaneous payment is not initiated by a contract or task order and is generally a one-time occurrence for which the government receives benefit.").

170. Oct. 24 Coley Interview, *supra* note 22.

171. U.S. Gen. Servs. Admin., SF Form 1034, Public Voucher for Purchases and Services Other Than Personal (Oct. 1987).

172. DoD FMR, *supra* note 32, vol. 10, ch. 12, para. 1.2.2.

173. *Id.*

174. MP Guidebook, *supra* note 54, at 35 (explaining the reimbursement requirements for "Expert Witness Fees"); *accord* Army MP SOP, *supra* note 51, apps. 6, 12.

175. DoD FMR, *supra* note 32, vol. 10, ch. 12, para. 1.2.4.

176. *Id.* vol. 10, ch. 12, para. 1.2.6.

177. *Id.* vol. 3, ch. 8, para. 4.2.6; Army MP SOP, *supra* note 51, apps. 6, 12 (describing the Army's use of the General Fund Enterprise Business Systems for experts). Accountable officials, such as disbursing officers (DOs) and certifying officers (COs), are subject to pecuniary liability. DoD FMR, *supra* note 32, vol. 5, ch. 5, para. 1.1.1, ch. 6, para. 1.3. Remembering this is key when any process seems to take time. Those authorizing the payment could be personally liable, so they want to ensure proper processing.

178. *See* AFI 51-208, *supra* note 168, para. 7.14. The now-obsolete regulation establishing this process is U.S. Dep't of Air Force, Instr. 51-201, Administration of Military Justice para. 6.4.10, fig.A6.6 (8 Dec. 2017).

179. *See* AFI 51-208, *supra* note 168, para. 7.14.

180. *Id.*; *see also* Judge Advoc. Gen.'s Corps, U.S. Dep't of Air Force, AF/JAJM Central Witness Funding Guide para. 5.1 (5 May 2022).

181. *See* MP Guidebook, *supra* note 54, at 35 (explaining reimbursement standards for "Expert Witness Fees").

182. AFI 51-207, *supra* note 168, para. 9.8.

183. *See id.*

184. Email from Marine Corps Chief Warrant Officer 2 Ryan J. Cole, Legal Administrator, Legal Services Support Team, Twentynine Palms, Cal., to author (Feb. 2, 2023, 12:59 PM) (on file with author). Mr. Cole has processed military justice experts for three years. They treat expert services as "non-severable services" to prevent fiscal year crossover. *Id.* The Marine Corps uses PIEE and requires the expert to have an existing account in SAM.gov with an active Commercial and Government Entity code. *Id.*

185. JAGMAN, *supra* note 168, sec. 0146(k)(1). The now-obsolete regulation that established this process is U.S. Dep't of Navy, JAGINST 5800.7F, Manual of the Judge Advocate General para. 0146 (26 June 2012). Their process is: "An expert witness employed in strict accordance with RCM 703(d), MCM, may be paid compensation . . . . After an expert witness has testified pursuant to such employment, the certificate of the [trial counsel]" will be presented to the disbursing officer and CA. JAGMAN, *supra* note 168, sec. 0146 (k)(3) (citing To MAJ. J. A. Marmon, A-36296, 11 Comp. Gen. 504 (1931) to bolster its legal basis for non-contract payment).

Appendix

MEMORANDUM OF AGREEMENT
FOR
EMPLOYMENT OF CIVILIAN EXPERT WITNESS

1. (Doctor)(Mr.)(Ms.) _____ is hereby retained as an expert witness to provide review, analysis, consultation, and testimony, as needed, in the court-martial case of *United States v.* _____, on behalf of the (Government) (Defense). The witness is an expert in the field of _____.

2. The expert witness agrees to provide the following services:

a. Review all documentation relevant to the area of expertise which pertains to the guilt or innocence of the accused, and which has been provided by the (trial counsel) (defense counsel).

b. Act as an expert technical consultant for the (Government) (Defense).

c. Assist the (trial counsel) (defense counsel) to prepare for the expert witness's in-court testimony, and to be available for a pretrial interview by opposing counsel.

d. Travel to the location of the trial on invitational travel orders and to testify on behalf of the (Government) (Defense), and, if requested by the (trial counsel) (defense counsel), to observe and evaluate the testimony of any expert witness for the opposing side.

e. Provide a copy of the expert's resume or curriculum vitae to the (trial counsel) (defense counsel).

f. Submit a Government travel voucher for payment, following the instructions provided, and accompanied by required documentation of travel, lodging, and other expenses.

g. Certify that the fee charged for expert services is no greater than the expert's normal professional rate.

3. The Government agrees to pay the expert witness, as follows:

a. Reimbursement for actual travel costs, either coach air travel or mileage, according to the Joint Travel Regulations.

b. Per diem for meals, and the lesser of actual cost of lodging or the Government local lodging rate, including payment for all travel days, according to the Joint Travel Regulations.

c. A fee of $_____ per day for in-court testimony.

d. A fee of $_____ when professional advice and services are rendered, but no travel or in-court testimony is involved.

e. An inconvenience fee of up to $_____ if the travel and testimony of the expert witness is canceled or rescheduled within five (5) days prior to the expert's scheduled travel day. The witness is expected to reasonably mitigate any financial loss caused by cancellation. Consequently, this fee is to be reduced to the extent other gainful activities may be undertaken. The expert witness must provide written substantiation in the form of demonstrable actual inconvenience and financial loss to support payment of an inconvenience fee.

4. [*Optional: If the Defense requested and the convening authority granted confidentiality to the expert, add*: Discussions between the expert witness and the defense counsel, the accused, and any member of the Defense team regarding this case are confidential. However, if the expert witness is called as a witness by the Defense, the content of those conversations may, subject to the Military Rules of Evidence, lose confidential status.]

5. Payment will be under Defense Finance and Accounting Service-Denver/Air Force Interim Guidance, *Procedures for Travel Accounting Operations*, July 2001, section 5, part U. [*If urinalysis expert, add*: Payment under this agreement has been approved by the Air Force Legal Operations Agency, Military Justice Division. Payment will be made from the Air Force Central Travel Fund, up to a maximum of $_____ and in accordance with AFI 51-201. The remaining balance has been approved and will be paid by the court-martial convening authority in this case.]

Signed by the parties on the dates entered below:

_____ _____

Staff Judge Advocate (Date)

_____ _____

Expert Witness (Date)

(Credit: Nutlegal - stock.adobe.com)

Practice Notes

Can I Get a Witness?[1]

A Primer for Analyzing Non-Participating Victim Statements in Military Domestic Violence Cases

By Major Greta L. Ellis

A "Confrontation"

You are drafting a prosecution memorandum for a domestic violence[2] case. The subject is Major (MAJ) Roger Smith, and the alleged victim is his wife, Sherry. Some weeks back, after Sherry returned home from an evening out with friends, the neighbors heard yelling and furniture crashing at the Smith household. Sherry called 911, crying. She frantically asked the dispatcher for help, stating that her husband, Roger, just punched her several times in the head and ribs. Sherry had managed to escape momentarily. When police responded, they immediately isolated MAJ Smith in a separate room to ensure Sherry's safety. Police then asked Sherry several questions about the assault, and she responded with more details than she told the 911 dispatcher. When questioned, MAJ Smith requested an attorney. Police transported Sherry to the emergency room, where she described the source of her injuries to a doctor before receiving treatment. A day later, Sherry told the neighbors that Roger "beat her up" the day before, and that she was afraid he would do it again.

You plan to recommend court-martialing MAJ Smith under Article 128b, Uniform Code of Military Justice.[3] With Sherry testifying, you are certain you could prove the charge beyond a reasonable doubt. What is more, you believe justice requires trial. Domestic violence results in serious emotional and physical injury to victims, which can worsen in degree if left unchecked.[4] Confinement resulting from a guilty verdict will protect the victim, punish MAJ Smith, and deter him from future abuse.[5]

Then the special victims' counsel (SVC)[6] calls: Sherry no longer wishes to participate at trial. Can you use Sherry's statements without her on the stand? Should you still recommend trial by court-martial?

To make a well-informed recommendation, you must analyze the admissibility of each statement under the law as well as ensure you have witnesses and evidence available to prove the case at trial. The first step is to contextualize and analyze each statement under the Confrontation Clause, as presented in the following section and Appendix A, and then under hearsay exceptions, discussed below. After finishing the legal analysis, you must address important practical considerations this practice note poses, such as securing the trial presence of people who witnessed and can testify to Sherry's statements, collecting evidence in corroboration, and methodically tracking all evidence to prove each element of the offense. This practice note then uses the fictional case of *United States v. MAJ Smith* as an example to apply the rules and practical considerations.

Confrontation Clause: Applicable Legal Rules

The Confrontation Clause affords criminal defendants, including Service members,[7] the right to confront witnesses whose statements are used against them at trial.[8] Confrontation Clause analysis is the first step in determining admissibility of a non-present witness's oral or written statements.[9] The "principal evil" avoided through the Confrontation Clause is entry of inculpatory evidence without giving the accused adequate opportunity to test its veracity by examining the witness who asserted it.[10] Historically, unfettered entry of such evidence has led to unjust results.[11]

Supreme Court Interpretation of the Confrontation Clause

Before 2004, Confrontation Clause analysis fell under a test established in *Ohio v. Roberts*:[12] if the government sought to enter an absent witness's statement at trial, it had to show that the witness was "unavailable"[13] and that the statement bore "adequate indicia of reliability."[14] Under *Roberts*, cross-examination of the witness's statement at a prior proceeding was an indicator of reliability, but it was not necessary to satisfy the test.[15]

In 2004, the Supreme Court in *Crawford v. Washington*[16] reexamined the *Roberts* test, finding it to be inherently "amorphous, if not entirely subjective."[17] The Court listed a multitude of wildly inconsistent results nationwide due to courts' varying interpretations of what constituted "adequate indicia of reliability."[18] The divergence of analysis and unpredictable results were incongruent with the Confrontation Clause's historical mandate.[19]

The *Crawford* opinion changed the landscape of Confrontation Clause analysis, distinguishing between "testimonial" and "nontestimonial" statements of absent witnesses.[20] Testimonial statements are those created in anticipation of litigation, for later introduction at trial.[21] The ultimate significance of the testimonial or nontestimonial determination is that it governs which test is used for the statement's admissibility under the Confrontation Clause.[22] *Crawford* created a new, high bar for admissibility of testimonial statements: they may be admitted at trial only if "the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine" the declarant.[23] Holding testimonial evidence to the "crucible" of cross-examination is imperative, the Court reasoned, because it guards the opposing party's right to challenge inculpatory evidence proffered at trial.[24]

Determining Whether a Statement Is Testimonial

The Court in *Crawford* declined to offer a "comprehensive" definition of testimonial statements, but it did pose some examples.[25] "At a minimum," the Court stated, testimonial statements include "*ex parte* in-court testimony or its functional equivalent," such as affidavits, depositions, prior testimony, confessions, and custodial examinations.[26] The Court noted that testimony is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."[27] *Crawford* found that "police interrogations" are testimonial and merit their own framework due to their distinct purpose in many instances: to develop evidence for later use at trial.[28] Most broadly, the Court deemed as testimonial "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[29]

The breadth of *Crawford*'s examples left several unresolved issues. It was unclear what particular circumstances constituted police "interrogation" sufficient to make responsive statements testimonial. Additionally, *Crawford* did not specify how to analyze statements to non-law-enforcement personnel, such as friends, neighbors, or doctors. Using Supreme Court and military case law, the following section explores subsequent guidance.

Statements to Law Enforcement

In 2006, the Supreme Court further addressed whether certain police questioning constituted "interrogations,"[30] making the statements given in response "testimonial" for purposes of Confrontation Clause analysis. *Davis v. Washington*[31] involved a 911 call related to an immediate emergency, while *Hammon v. Indiana*[32] involved statements made during a crime scene investigation. In its ruling addressing both cases, the Supreme Court articulated the following general rule:

> [S]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove

Domestic violence results in serious emotional and physical injury to victims, which can worsen in degree if left unchecked. (Credit: Iweta0077 - stock.adobe.com)

past events potentially relevant to later criminal prosecution.[33]

911 Calls and Responses to Emergency

Many statements arising from domestic violence are "spontaneous" or "heat-of-the-moment," occurring during or immediately after the incident itself, with danger still present. *Davis v. Washington* is the quintessential 911 case, presenting a fact pattern that does *not* qualify as "interrogation" due to the emergency response nature of the questioning.[34]

In *Davis*, the victim dialed 911 and then hung up.[35] The 911 operator called back and asked the victim what was going on.[36] The victim replied that the accused was "jumpin' on me again" and "usin' his fists."[37] The operator gathered additional information for emergency response, including the accused's full name and birthday, and the context of the assault.[38] Only four minutes after the 911 call, police arrived to find the victim "shaken," with fresh, visible injuries, and collecting belongings so she and her children could flee their home.[39]

The victim declined participation at trial.[40] The government's witnesses thus were limited to the two officers who responded to the 911 call, neither of whom could testify to contemporaneous knowledge of the injury's source.[41] The 911 call was the only evidence establishing cause of injury.[42] The Supreme Court held that the victim's statements to the 911 emergency dispatcher were not testimonial due to their nature and purpose of requesting help for an ongoing emergency.[43] Statements made during an emergency response exchange do not implicate the same constitutional concerns as statements made in preparation for trial.[44]

This rationale extends beyond 911 calls to officers responding at emergency scenes. In *Michigan v. Bryant*,[45] police responded to the victim of a shooting, who gave them details of the incident while bleeding from a gunshot wound to his abdomen.[46] The victim was in "considerable pain," having difficulty "breathing and talking," and interspersing answers to police questioning with his own questions about when medical personnel would arrive.[47] The victim died before trial, leaving the government to prosecute its case without him.[48]

Holding that the victim's responses to police questioning were nontestimonial, the Court noted that the police did not know whether the threat was limited to one victim, or whether additional people were at risk—especially given the perpetrator's use of a firearm.[49] The Court also accounted for the victim's severe injuries and reflexive responses, noting that it "is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would be a testimonial

one."[50] Finally, the circumstances "lacked any formality."[51] All indicia pointed to emergency response as the questioning's purpose, not gathering evidence.[52]

Davis and *Bryant* support the proposition that an officer's initial inquiries may not lead to "testimonial" responses if the purpose of the inquiry is to enable police assistance to meet an ongoing emergency, and police ask questions informally to "assess the situation, the threat to their own safety, and to possible danger to the potential victim."[53] This analysis is *objective*, based on surrounding circumstances as well as the nature of the parties' statements and actions, rather than a subjective inquiry into officer intent.[54] Case-dependent details—such as a concern for additional victims, or type of weapon involved, as well as a lack of formality in the questioning—are important factors that would be involved in assessing the admissibility of statements.[55] Nontestimonial interactions are more "fluid" and "confused" than structured police interrogations.[56]

Interrogation by Law Enforcement

Police questioning in response to a domestic violence call may be considered "interrogation" if it is after the violence has subsided; the victim is relatively safe; the victim and accused are separated; the interview is structured; and the totality of the circumstances point to the purpose of questioning as gathering evidence for a future trial.[57] In *Hammon*, police responded to a "reported domestic disturbance" to find the victim alone on her porch, frightened but in no apparent immediate danger.[58] When officers entered the home, they saw a broken heating unit emitting flames, surrounded by shattered glass.[59] After the accused denied any physical altercation, officers separated the accused and the victim into different rooms for questioning, despite "several attempts [by the accused] to participate in [the victim's] conversation with the police."[60] The victim told the officer who questioned her that the altercation became physical when the accused broke several pieces of furniture and appliances, threw her down into the shattered glass, and punched her in the chest twice.[61] After oral questioning, the police officer requested the victim draft and sign an affidavit for the purpose of "establish[ing] events that . . . occurred previously."[62]

Although subpoenaed, the victim in *Hammon* did not appear at trial.[63] The Supreme Court held the victim's statements were testimonial because they were in response to a "police interrogation" that took place "some time after the events described were over," and after they had "actively separated" the victim from the defendant and removed her from danger.[64] The Court noted police questioning resulted in deliberate recounting of potentially criminal past events, not just contemporaneous facts.[65]

Ultimately, whether an interaction is viewed as interrogation will depend upon the totality of the circumstances. Thus, trial counsel should determine the purpose of questioning by examining how and why the officers were called to the scene; whether the victim was in danger while the officers spoke with them; whether the accused was separated from the victim; the formality of questioning; the position and circumstances of other potential victims; and any other pertinent facts.[66] The purpose of the interaction is a heavily weighed factor—as shown further in the next section, on statements to non-law enforcement personnel.

Statements to Non-Law Enforcement

Statements that are not clearly made in anticipation of trial or in response to law enforcement questioning must be analyzed under a totality of the circumstances approach, assessing whether the "statements . . . were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[67] In *United States v. Rankin*,[68] the Court of Appeals for the Armed Forces (CAAF) developed a three-part test to assess whether these circumstances are present:

> First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Second, did the "statement" involve more than a routine and objective cataloguing of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial?[69]

This three-pronged test is not intended for rigid, bright-line application; each application is fact-specific.[70] Subsequent military case law describes this test as a tool the court *could* consider when looking at the totality of the circumstances.[71]

Friends and Neighbors

When analyzing statements to friends and neighbors under the Confrontation Clause, courts have focused on the primary purpose of the victim's statements.[72] Statements are nontestimonial when the apparent purpose is to have a casual discussion or "neighborly conversation," and there is no indication the victim has a "reasonable belief" their statements will be used later in prosecution of a crime.[73] When analyzing statements to friends or neighbors, consider the surrounding circumstances of the statement, including the relationship between the witness and the victim; the demeanor of the victim; the age of the victim;[74] and any other facts that may point to the purpose of the victim's disclosure.

Medical Personnel

In determining whether statements to medical personnel are testimonial under the *Rankin* test, courts heavily weigh the *purpose* of the interaction with the medical professional. In *United States v. Squire*,[75] CAAF held that a child victim's statements to a doctor were nontestimonial where the child's mother brought the child into the doctor under no direction from law enforcement; the doctor was an emergency room physician, not a forensic examiner; and the questions asked were "narrow in scope, fact-oriented, and limited to addressing [the victim's] emergency medical conditions and its causes."[76] Though medical practitioners are mandatory reporters of sexual assault under many state laws, CAAF rejected the argument that this "general requirement" alone is sufficient to establish the medical practitioner was acting as an arm of law enforcement.[77]

United States v. Gardinier presented facts leading the court to a different conclusion, holding a statement to a sexual assault forensic examiner to be testimonial.[78] In its reasoning, the court heavily weighed the content and purpose of the exam questionnaire, noting that the form contained reference to a separate

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medical examination—which implied that the forensic examination was not, itself, a medical exam.[79] The form asked what the victim discussed with law enforcement.[80] Law enforcement arranged the forensic examination and paid for it, and the consent form for the examination explicitly disclosed it would be sent back to law enforcement—which it ultimately was.[81] Finally, the sexual assault nurse examiner had been qualified as a government expert over fifty times.[82] All of these facts weighed in the court's determination that the victim's statement was testimonial and, therefore, subject to the requirement of cross-examination.[83]

In all cases, victim statements must be analyzed on the facts specific to that case. Even if law enforcement or another member of the government team refers a victim to the doctor, this fact does not obligate the court to find the victim's statements to the doctor testimonial.[84] Likewise, not every self-referred victim's statement to a doctor will be nontestimonial.[85]

Having established the statement's category, the next step is to determine whether the statement is admissible. Testimonial statements are analyzed under *Crawford*, while, in the military, nontestimonial statements fall under the analysis discussed in the next section.

Tests for Admissibility of Nontestimonial Statements

Nontestimonial statements are more casual and organic, clearly not prepared for trial purposes. It is not required that defense have a prior opportunity to cross-examine the nontestimonial statements of an unavailable witness. Under current military case law, the *Roberts* test governs admissibility for an unavailable witness's nontestimonial statements under the Confrontation Clause: the statement must bear "adequate indicia of reliability," which can be (1) "inferred" if the statement "falls within a firmly rooted hearsay exception," or (2) established by showing "particularized guarantees of trustworthiness"[86] under the totality of circumstances at the time the statement was made.[87] Firmly rooted hearsay exceptions include most exceptions listed in Military Rule of Evidence (MRE) 803.[88] "Residual hearsay"[89] and "statements against interest"[90] are not firmly rooted hearsay exceptions.[91]

The *Roberts* test for admissibility of nontestimonial hearsay has persisted in military courts,[92] despite the Supreme Court case *Whorton v. Bockting*,[93] which held that nontestimonial hearsay falls outside the ambit of the Confrontation Clause.[94] *Michigan v. Bryant* reiterated this rule, commenting that reliability for nontestimonial statements is not a constitutional issue and

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is adequately tested through other rules of evidence, such as hearsay.[95] If trial counsel seek to enter nontestimonial statements under residual hearsay or statements against interest, consider filing a motion to argue that nontestimonial hearsay does not implicate Confrontation Clause analysis under *Whorton*.[96]

Expanding on the discussion of hearsay, the next section presents common hearsay scenarios in domestic violence cases.

Hearsay Analysis of Victim Statements

Having contemplated the Confrontation Clause, the Government must also analyze hearsay. Hearsay is an out-of-court statement entered for the truth of the matter asserted.[97] Hearsay generally is inadmissible unless provided otherwise in a Federal statute or the MRE.[98] To perform hearsay analysis, trial counsel first must determine why the statement is relevant and, given the statement's purpose, whether it is hearsay.[99]

Statements not hearsay include prior inconsistent statements given "under penalty of perjury" at another proceeding or deposition, as well as prior consistent statements.[100] Prior consistent statements are "offered: (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground."[101] Even if the victim is participating, a wise prosecutor will prepare witnesses who can testify to the victim's prior consistent statements if her credibility is questioned at trial. This often arises if defense insinuates through questions that the victim was coached by the prosecutor or has an improper motive to testify.[102]

If the statement is for substantive use and qualifies as hearsay, it must fit within an exception to the hearsay exclusionary rule.

Excited Utterance

The excited utterance exception allows "statements relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."[103] The underlying rationale for this exception is that in the limited amount of time between the startling event and the declaration, the declarant is unable or unlikely to form a falsehood.[104] There is a three-prong test for establishing the foundation: (1) "the statement must be spontaneous, excited[,] or impulsive rather than the product of reflection and deliberation";[105] (2) "the event [prompting the statement] must be startling";[106] and (3) "the declarant must be under the stress of

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excitement caused by the event."[107] This exception is likely to be used in 911 or other emergency response scenarios. Many of the facts elicited to establish that the situation was an ongoing emergency (such as the victim's demeanor or injury) will be helpful in establishing the foundation for excited utterance.[108]

It is helpful to establish the timing of the startling event in relation to the statement, to show that the event prompted the excited reaction. More fundamentally, in questioning the witness to lay the foundation, trial counsel must ensure they establish that the victim was excited.[109] Best-practice questions will elicit details such as the victim's speech, demeanor, appearance, stance, gestures, voice level, crying, and other behavior.[110]

Present Sense Impression

Military Rule of Evidence 803(1) allows "statement[s] describing or explaining an event or condition, made while or immediately after the declarant perceived it."[111] Present sense impression is similar to excited utterance except that the main focus is the amount of time between the event and declaration, and showing excitement is unnecessary.[112] The foundation for present sense impression must include the following: "(1) an event occurred; (2) the declarant had personal knowledge of the event; (3) the declarant made the statement during or very shortly after the event; (4) the statement relates to the event."[113] While there is no bright-line timing rule, the Army Court of Criminal Appeals has ruled that "as a general matter, . . . five minutes will usually be within the present sense impression exception and twenty minutes is at the outer edge of the exception."[114]

Then-Existing Mental, Emotional, or Physical Condition

Military Rule of Evidence 803(3), Then-Existing Mental, Emotional, or Physical Condition, allows a "statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed."[115] The foundation must include "(1) [w]here the statement was made; (2) [w]hen the statement was made; (3) [w]ho was present; (4) [w]ho made the statement; (5) [w]hom the statement was made to; and (6) [t]he substance of the statement."[116] Such statements easily could occur in cases of abuse where the victim describes the effects of abuse, both emotional and physical. The state of mind must be relevant to the case—for example, to rebut the assertion that the accused and victim had a healthy relationship;[117] or to rebut theories that the accused acted in self-defense, the victim self-harmed, or the accused harmed her by accident.[118]

It is not uncommon for such statements to contain more than one assertion. For example, when analyzing a statement like, "I am so scared he will beat me up again," there are three assertions: (1) the victim is scared; (2) because the accused beat her up before; and (3) she believes he might do it again. The second assertion may

be objectionable if it is offered to "prove the fact remembered." Depending on the defense theory, however, the entire statement may become admissible. For example, if the defense presents a self-defense theory, the declarant's entire statement may be admissible to rebut that theory.[119]

Statements for Purpose of Receiving Medical Treatment

Military Rule of Evidence 803(4) allows "a statement that (A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause."[120] This exception is "grounded on the assumption that declarants will make reliable statements when they are seeking medical assistance."[121] The foundation for this exception consists of the following elements: "(1) [t]he declarant made the statement to a proper addressee; (2) [t]he declarant made the statement for purposes of diagnoses or treatment; [and] (3) [t]he subject matter of the statement was proper."[122] Doctors are not the only "proper addressees"; nurses, including Family Advocacy nurses, are included.[123] Statements to nonmedical personnel may be admissible if they are for the purpose of seeking treatment.[124] The focus of the second element is the "subjective intent of the declarant-patient," while the focus of the third element is what a reasonable medical professional would deem to be proper.[125] When eliciting facts to lay the foundation for this exception, trial counsel should examine the medical provider's purpose in treating the victim, the type of provider, what symptoms the victim described, whether there was a treatment plan or medication prescribed, and other facts indicating the victim's intent in seeking treatment.[126]

It is imperative to establish through the victim or other witness that the *purpose* of the statement was made for medical diagnosis or treatment. Trial counsel have failed at admitting victim statements under MRE 803(4) when law enforcement called emergency responders and they could present no testimony or evidence that the victim sought or wanted medical treatment.[127] Additionally, defense may argue that the doctor does not need to know the identity of the injurer to treat the injuries. Courts have ruled, however, that knowing the source is a domestic partner is important to develop a treatment plan, including avoiding reintroducing the victim to the source of physical violence.[128]

This is not a complete list of potential exceptions; trial counsel should consider all exceptions within the MRE. Additionally, trial counsel should distinguish carefully between hearsay and constitutional analysis in supporting case law. "[N]ot all hearsay implicates the Sixth Amendment's core concerns,"[129] and conversely, evidence that satisfies a hearsay exception may not satisfy the Confrontation Clause.[130]

Developing a Case: Making Statements Admissible and Credible through Context

Once an out-of-court statement is determined to pass muster under the legal precepts, trial counsel must address critical, practical aspects of entering the statement into evidence at trial. First, ensure the proper witnesses are available for trial and prepared to testify; then, confirm that the victim's statements are corroborated firmly and as much as possible to present a cohesive, convincing case for proof beyond a reasonable doubt.

Witness Preparation

Preparing *all* witnesses is critical. For each statement by the unavailable victim, interview each person who heard the statement to determine whether they can establish the facts to admit the statements over Confrontation Clause and hearsay objections. Review the foundations necessary to admit the victim's statement at trial and ensure that the individuals could testify to them. For example, someone who observed a victim's frantic behavior immediately after the incident could describe details that support the excited utterance exception. For recorded statements such as 911 calls, confirm who is the proper witness to authenticate the call.[131] The earlier trial counsel discover and interview witnesses the better, as they are the gateway to making a good trial record.

If an eyewitness forgets details that were in a prior statement to law enforcement, trial counsel may use the eyewitness's prior statement to law enforcement to refresh their recollection during pretrial preparation.[132] The fact that the witness forgot some of the facts is disclosable to defense.[133] But, the damage done through an inconsistent witness statement at trial is likely significantly more detrimental than cross-examination about how the witness had their memory refreshed with a statement many months after the assault. Cross-examination's impact can be lessened further if trial counsel prepare a question in re-direct to explain why reviewing the statement was necessary.

Without a victim testifying, ensuring that the proper witnesses are available for trial is crucial. Thus, as early as possible, trial counsel should also ask witnesses about their life circumstances and whether anything would prevent their testimony at trial. It is a bad day when trial counsel realize they have failed to obtain a deposition from the only witness to a victim's statement, and that witness has become unavailable.[134] Subpoenas are not a cure-all—for example, if the witness has a complicated pregnancy and cannot travel or is terminally ill. If trial counsel identify this issue early, there will be sufficient time to file a motion with the judge to request the witness's deposition to enter in later at trial.[135]

Maintain constant communication with witnesses about anticipated trial dates, motions hearings, and life circumstances. Do not fear the possibility of unearthing evidence beneficial to defense during thorough witness communication. When analyzing the case file and considering indicia of reliability, it is worth considering all exculpatory facts supporting possible defense theories. Potential motives to lie, bias, prior instances of untruthfulness, and evidence indicating that the accused acted in self-defense are all relevant. Ultimately, if a case falls apart after witness discussions and thorough investigation, the case likely was not provable beyond a reasonable doubt to begin with and the most just result may be alternate disposition. The prosecutor's charge is to ensure justice while upholding the integrity of the criminal justice system, not to secure convictions with improper methods.[136]

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Methodical Case Preparation

Corroboration is key to establishing the foundations for hearsay exceptions, presenting a full picture to the fact finder, and rebutting defense theories.[137] Trial counsel should ensure law enforcement collects pictures of the house, injuries, and any other corroborating evidence. If law enforcement is hesitant to investigate a case without a participating victim, explain why the case is prosecutable and what evidence to collect.[138] Trial counsel should also consider providing testimony from an expert witness, who could explain the emotional complexities of spousal abuse, to fill in the blanks for an absent victim.

Each piece of evidence must come together to prove every element of the charged offenses. Trial counsel should track exactly what piece of evidence proves each element and how that piece of evidence or testimony will be admitted. An element that would be simple to prove with a testifying victim—such as whether the assault occurred within the charged timeframe—becomes more difficult when the victim is absent, and trial counsel must use multiple pieces of evidence to present the greater picture.

Bringing It All Together: Analysis of *United States v. MAJ Roger Smith*

Applying law to the facts of *United States v. MAJ Smith*, the next section will examine Sherry's statements (1) to 911 dispatchers; (2) to law enforcement after separation from the accused and in response to questioning; (3) to medical personnel; and (4) to neighbors on the day following the incident.

Sherry's initial statement to the officer responding to her 911 call are likely nontestimonial regarding the Confrontation Clause. Because the statement was made to law enforcement, we must consider whether the exchange constituted "interrogation."[139] The facts are very similar to *Davis*, as the purpose of the 911 call was to seek an emergency response, not to establish facts for an investigation.[140] Moving on to the hearsay analysis, the call probably would be admissible as an excited utterance, given that she made the call shortly after the abuse and was still in an excited state.[141] Trial counsel should pay special attention to crying, tone of voice, the contents of the statement, and yelling or other sounds in the background.[142]

Conversely, Sherry's subsequent statement to law enforcement is likely inadmissible because it was testimonial and there was no opportunity for cross-examination. This fact pattern is comparable to *Hammon* and probably constitutes "interrogation" because it took place after the threat to Sherry's safety had been neutralized.[143] Sherry was in a different room than MAJ Smith. Based on this, the purpose of the questioning was to gain evidence for eventual criminal prosecution. Thus, Sherry's second statement to police must be excluded under the Confrontation Clause.

This second police statement illustrates the difference between hearsay and Confrontation Clause analysis. Sherry's

statement could be admissible under the excited utterance exception to hearsay if trial counsel could establish that she was still under the stress of the event.[144] However, given the lack of an ongoing emergency, separation from her husband, and formality of questioning, it likely would qualify as testimonial under *Hammon* and thus be inadmissible under the Confrontation Clause.

Sherry's description of the source of her injuries to the doctor may be admissible under the Confrontation Clause and hearsay bars, but more facts are needed. First, for the constitutional analysis, this statement should be analyzed under the totality of the circumstances using the *Rankin* factors. Though Sherry made her statement to the doctor as a result of law enforcement response, it could still be considered nontestimonial under the Confrontation Clause if the purpose was to treat an ongoing medical problem rather than for a forensic interview specifically designed to document evidence for trial.[145] To overcome a hearsay objection, it is necessary to show that Sherry made this statement for the purpose of receiving medical treatment. It would also help to show the statement helped medical providers form a treatment plan for the injuries.

Likewise, Sherry's statement to the neighbors ("my husband beat me yesterday, and I'm scared it will happen again") may not be testimonial if, under the totality of the circumstances, she was participating in a "neighborly discussion" without an eye toward trial.[146] The fact that Sherry is scared fits within a firmly rooted hearsay exception: MRE 803(3), Then-Existing Mental, Emotional, or Physical Condition.[147] However, the portion of the statement referring to the assault may not be admissible under this exception because it is arguably admitted to prove the fact remembered. It is necessary to speak with the neighbors to assess the surrounding circumstances, asking exactly what Sherry said, how the conversation was started, and what her demeanor was like.

In addition to factual questioning, it is important to discuss with each witness to Sherry's statements their availability and ensure they are prepared to lay the foundations to admit Sherry's statements. Using Appendix B as a guide, counsel should collect evidence corroborating Sherry's statements, such as photographs of her injuries and the house where the assault took place. Finally, counsel should ensure testimony and other evidence satisfy every element of the charged offenses—even seemingly simple elements, such as the time and place of the assault.

Conclusion

Domestic violence cases are at higher risk for victim non-participation than other types of cases because they are often riddled with complicated emotions and family circumstances.[148] Further complicating emotional aspects are other factors such as religious mores, immigration status, joint financial interests, children, and family or community pressure.[149] Military spouses may deal with unique pressures of being far from family and unemployment from frequent relocation.[150] Due to these complexities, domestic violence victims often will recant, request charges be dropped, or testify on behalf of the perpetrator.[151]

Domestic violence cases may be prosecutable even without an alleged victim testifying at trial. The most important pieces of the case become victim statements that are admissible under the Confrontation Clause and other rules of evidence, entered through witnesses who are prepared and available for trial, and corroborated. Thinking through admissibility and practical preparation lands strong cases in court or provides thoughtful rationale for why alternate disposition is more appropriate. **TAL**

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Notes

1. Marvin Gaye, Can I Get a Witness? (Tamla Records, 1964).

2. "Domestic violence" is a "pattern of behavior resulting in emotional or psychological abuse, economic control, or interference with personal liberty that is directed toward a . . . current or former spouse, [p]erson with whom the alleged abuser shares a child in common," or other types of intimate partners. U.S. Dep't of Def., Instr. 6400.06, DoD Coordinated Community Response to Domestic Abuse Involving DoD Military and Certain Affiliated Personnel, at G.2 (15 Dec. 2021) (C2, 16 May 2023). The term "intimate partner" includes dating partners, sexual partners, and other types of relationships characterized by romantic, emotional, or family connection. *See id.*

3. UCMJ art. 128b (2019).

4. *Fast Facts: Preventing Intimate Partner Violence*, Ctrs. for Disease Control & Prevention (Oct. 11, 2022), https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html.

5. Specific deterrence and retribution are sentencing goals under the Uniform Code of Military Justice. Manual for Courts-Martial, United States, R.C.M. 1002(f) (2019) [hereinafter MCM].

6. Special victims' counsel provide "legal representation to eligible clients who report they are victims of a sex-related or domestic violence offense." Memorandum from The Judge Advoc. Gen., U.S. Army, to Judge Advoc. Legal Servs. Pers., subject: Policy Memorandum 22-13 – Special Victims' Counsel, para. 3 (1 Mar. 2022). Alleged victims of domestic violence are eligible for special victims' counsel services. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 548, 133 Stat. 1198, 1378 (2019); Memorandum from The Judge Advoc. Gen., U.S. Army, to Judge Advoc. Legal Servs. Pers., subject: Policy Memorandum 22-09 – Domestic Violence Victim Representation Program (1 Mar. 2022).

7. United States v. Jacoby, 29 C.M.R. 244, 246–47 (C.M.A. 1960).

8. U.S. Const. amend. VI.

9. The Confrontation Clause applies to both oral and written statements. Davis v. Washington, 547 U.S. 813, 827 (2006). The clause does not apply, however, if a defendant makes a witness unavailable through threats, harm, or anything else. Giles v. California, 554 U.S. 353, 377 (2008). If this occurs, the Government may enter into evidence statements that otherwise would be barred. *Id.* If trial counsel believe the accused has taken actions to make witnesses unavailable, consider filing a pretrial motion for a preliminary ruling on whether the accused has forfeited his right to confrontation. Note the standard for this test is high, requiring the accused have specific intent to make the victim unavailable due to his actions, at the time he committed the actions. United States v. Becker, 81 M.J. 483, 489–90 (C.A.A.F. 2021). Simply creating the effect of unavailability is not enough. *Id.; c.f.* United States v. Santiago, ARMY MISC 20230094, 2023 CCA LEXIS 194, at *10 (A. Ct. Crim. App. May 3, 2023) (finding that the accused's prior threats to kill his wife if she disclosed past abuse to the police may prove the accused had specific intent to "silence her through fear" during the charged event).

10. Crawford v. Washington, 541 U.S. 36, 50 (2004).

11. *See id.* at 44–45. At Sir Walter Raleigh's treason trial in 1603, prosecutors read an inculpatory letter from an alleged "accomplice" to the jury, without giving Raleigh an opportunity to test the veracity of the letter's writer at trial. *Id.* at 44. Raleigh argued that the accomplice was lying to "save himself," and famously demanded: "[L]et [him] be here, let him speak it. Call my accuser before my face." *Id.* Yet the judges did not require the accomplice's presence, and Raleigh was sentenced to death. *Id.* Later, one judge "lamented": "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh." *Id.*

12. Ohio v. Roberts, 448 U.S. 56 (1980), *overruled in part by* Crawford v. Washington, 541 U.S. 36 (2004).

13. Military Rule of Evidence 804 includes as "unavailable" witnesses who invoke privilege, refuse to testify, or cannot be procured, among other scenarios. MCM, *supra* note 5, M.R.E. 804(a). It is the Government's burden to make affirmative measures in "good faith" before a witness is deemed unavailable. *Roberts,* 448 U.S. at 74–75. Courts consider evidence of subpoenaing the witness an indicator of "good faith effort." *See, e.g.,* United States v. Cabrera-Frattini, 65 M.J. 241, 246 (C.A.A.F. 2007). But it is an open question whether making a "good faith effort" *requires* subpoenaing an unwilling victim. Though there is nothing barring prosecutors from subpoenaing victims of domestic violence, practically and morally speaking, this is not always the best course of action. Additionally, "there is ample precedent for finding a witness, even a critical one, unavailable where the act of testifying in court is determined to be detrimental to the witness's physical or mental well-being." *Id.* (citations omitted).

14. *Roberts*, 448 U.S. at 56.

15. *See id.* at 70.

16. 541 U.S. 36 (2004).

17. *Id.* at 63.

18. *See id.* at 63–66.

19. *Id.* at 61 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'").

20. *See id.* at 52–53.

21. *Id.* at 51.

22. *See infra* Section titled "Tests for Admissibility of Nontestimonial Statements."

23. *Crawford*, 541 U.S. at 59.

24. *Id.* at 61.

25. *Id.* at 53, 68.

26. *Id.* at 51. Though *Crawford* lays out two different "formulations" for this type of evidence, *see id.* at 51–52 (listing "*ex parte* in-court testimony or its functional equivalent" and "extrajudicial statements"), the author finds them functionally indistinguishable and has thus grouped them together.

27. *Id.* at 51 (citing 2 Noah Webster, An American Dictionary of the English Language 206 (1828)).

28. *Id.* at 52; *see also* Ohio v. Clark, 576 U.S. 237, 249 ("Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers.").

29. 541 U.S. at 52.

30. "Interrogations" for Confrontation Clause analysis is used in a more colloquial sense than "interrogations" for other legal issues. *See* Davis v. Washington, 547 U.S. 813, 823 (2006). Here, "interrogation" merely means police questioning for the purpose of establishing evidence for a criminal case. *See id.*

31. 547 U.S. 813 (2006).

32. *Id.*

33. *Id.* at 822.

34. *Id.* at 817–19.

35. *Id.* at 817.

36. *Id.* at 818.

37. *Id.*

38. *Id.*

39. *Id.* at 819.

40. *Id.*

41. *Id.*

42. *Id.* The 911 call was admitted over defense objection. *Id.*

43. *Id.* at 822. See *infra* Section titled "Hearsay Analysis of Victim Statements" for a discussion on common hearsay exceptions for 911 calls.

44. *See* 547 U.S. at 826–27.

45. Michigan v. Bryant, 562 U.S. 344 (2011).

46. *Id.* at 375.

47. *Id.*

48. *See id.* at 349.

49. *Id.* at 375–76.

50. *Id.* at 364–65.

51. *Id.* at 377.

52. *Id.* at 377–78.

53. *Id.* at 376 (citing Davis v. Washington, 547 U.S. 813, 832 (2006)).

54. *Id.* at 359–60.

55. *Id.*

56. *Id.* at 377.

57. *See Davis*, 547 U.S. 813, 830 (2006) (including the *Hammon v. Indiana* opinion, with the full caption reading *Davis v. Washington, Hammon v. Indiana*).

58. *Id.* at 819.

59. *Id.*

60. *Id.* at 819–20.

61. *Id.* at 821.

62. *Id.* at 832.

63. *Id.* at 820.

64. *Id.* at 830.

65. *Id.* at 831–32.

66. *See, e.g., id.* at 813, 831–32.

67. Crawford v. Washington, 541 U.S. 36, 52 (2004).

68. United States v. Rankin, 64 M.J. 348 (C.A.A.F. 2007).

69. *Id.* at 352.

70. *Id.*

71. *See* United States v. Squire, 72 M.J. 285, 289 (C.A.A.F. 2013).

72. *See, e.g.*, United States v. Zamora, 80 M.J. 614, 626 (N-M. Ct. Crim. App. 2020).

73. *Id.*

74. Ohio v. Clark, 576 U.S. 237, 247–58 (2015). "Statements by very young children will rarely, if ever, implicate the Confrontation Clause." *Id.* at 238.

75. 72 M.J. 285 (C.A.A.F. 2013).

76. *Id.* at 291.

77. *Id.* at 288–89. The Supreme Court has applied the same rationale to statements made to preschool teachers, who also have mandatory reporting requirements. Ohio v. Clark, 576 U.S. 237, 247 (2015) (holding that suspected child abuse qualified as a potential ongoing emergency).

78. United States v. Gardinier, 65 M.J. 60, 66–67 (C.A.A.F. 2007).

79. *Id.*

80. *Id.* at 66.

81. *Id.*

82. *Id.*

83. *Id.* at 66–67.

84. United States v. Squire, 72 M.J. 285, 289 n.7 (C.A.A.F. 2013).

85. *See id.*

86. Ohio v. Roberts, 448 U.S. 56, 66 (1980), *overruled in part by* Crawford v. Washington, 541 U.S. 36 (2004).

87. Idaho v. Wright, 497 U.S. 805, 819 (1990).

88. Firmly rooted hearsay exceptions include: excited utterance, United States v. Arnold, 25 M.J. 129, 133 (C.M.A. 1987) (citing United States v. Dunlap, 25 M.J. 89, 92 (C.M.A. 1987); then-existing mental, emotional, or physical condition, United States v. Lingle, 27 M.J. 704, 708 (A.F.C.M.R. 1988); statements for purpose of medical diagnosis or treatment, White v. Illinois, 502 U.S. 346, 355 n.8 (1992); past recollection recorded, Hatch v. Oklahoma, 58 F.3d 1447, 1467 (10th Cir. 1995), *overruled on other grounds by* Daniels v. United States, 254 F.3d 1180 (10th Cir. 2001); dying declarations, Pointer v. Texas, 380 U.S. 400, 407 (1965); prior trial testimony, Mancusi v. Stubbs, 408 U.S. 204, 213–16 (1972); business records, *Roberts*, 448 U.S. at 66 n.8; and public records, *id.*

89. MCM, *supra* note 5, M.R.E. 807.

90. *Id.* M.R.E. 804(b)(3).

91. *Wright*, 497 U.S. at 812–13.

92. *See, e.g.*, United States v. Scheurer, 62 M.J. 100, 106 (C.A.A.F. 2005); United States v. Rankin, 64 M.J. 348, 353 (C.A.A.F. 2007); United States v. Magyari, 63 M.J. 123, 128 (C.A.A.F. 2006); United States v. Zamora, 80 M.J. 614, 627 (N-M. Ct. Crim. App. 2020).

93. Whorton v. Bockting, 549 U.S. 406, 420 (2007) ("Under *Crawford*, . . . the Confrontation Clause has no application to [nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability."). This case was decided a mere month after *Rankin. See* 64 M.J. 348. Though CAAF has acknowledged *Whorton*'s ruling in a footnote, it has not explicitly addressed the discrepancy. *See* United States v. Czachorowski, 66 M.J. 432, 434 n.3 (C.A.A.F. 2008).

94. 549 U.S. at 420. "When the Supreme Court construes the Constitution, . . . the CAAF must consider the extent to which that constitutional provision applies to the military justice system." H. F. "Sparky" Gierke, *The Use of Article III Case Law in Military Jurisprudence*, Army Law., Aug. 2005, at 25, 26.

95. Michigan v. Bryant, 562 U.S. 344, 358–59 (2011) ("Where no such primary purpose [of preparing evidence for trial] exists, the admissibility of a statement is the concern of state and [F]ederal rules of evidence, not the Confrontation Clause."). *See also* Laird C. Kirkpatrick, *Nontestimonial Hearsay After* Crawford, Davis *and* Bockting, 19 Regent U. L. Rev. 367 (2007).

96. Though a full discussion of this is outside the scope of this paper, establishing a statement carries "particularized guarantees of trustworthiness" under

Roberts and its progeny poses a higher bar than meeting requirements under the residual hearsay exception, because the "particularized guarantees of trustworthiness" analysis does not permit consideration of extrinsic, corroborating evidence or *ex post facto* corroboration. *See, e.g.*, Idaho v. Wright, 497 U.S. 805 (1990). Conversely, *United States v. Zimmer* illustrates how residual hearsay can demonstrate reliability when judges consider extrinsic corroborating evidence. *See* United States v. Zimmer, Army 20200671, 2023 CCA LEXIS 1, at *22 (A. Ct. Crim. App. Jan. 4, 2023); *see also* Lieutenant Commander David M. Gonzalez, *The Continuing Fallout from* Crawford*: Implications for Military Justice Practitioners*, 55 Naval L. Rev. 31, 44–48 (2008).

97. MCM, *supra* note 5, M.R.E. 801(c).

98. *Id.* M.R.E. 802.

99. *See id.* M.R.E. 801–803. If the declaration is a question or a command, it likely is not a "statement" fitting within the definition of hearsay. *See id.* M.R.E. 801(a). Likewise, if trial counsel do not wish to use the statement for the "truth of the matter asserted," but rather for effect on the listener, the statement also is not hearsay. *See id.* M.R.E. 801(c)(2). Beware that in this latter circumstance, however, the statement will not come in substantively and cannot be argued as evidence.

100. *Id.* M.R.E. 801(d)(1)(A).

101. *Id.* M.R.E. 801(d)(1)(B).

102. *See, e.g.*, United States v. Finch, 78 M.J. 781, 785 (A. Ct. Crim. App. 2019).

103. MCM, *supra* note 5, M.R.E. 803(2).

104. Idaho v. Wright, 497 U.S. 805, 820 (1990) ("The basis for the 'excited utterance' exception . . . is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation . . . .").

105. United States v. Arnold, 25 M.J. 129, 132 (C.M.A. 1987).

106. *Id.*

107. *Id.*

108. *See* Michigan v. Bryant, 562 U.S. 344, 361–62 (2011) ("This logic [of emergency response] is not unlike that justifying the excited utterance exception in hearsay law. . . . An ongoing emergency has a similar effect of focusing an individual's attention on responding to the emergency.").

109. *See* United States v. Grant, 42 M.J. 340, 343–44 (C.A.A.F. 1995) (finding that declarant's statements were too calm to qualify as "excited utterances").

110. *E.g.*, United States v. Henry, 81 M.J. 91, 98 (C.A.A.F. 2021) (noting that yelling and looking scared and frightened are indicators of excitement for purposes of the excited utterance exception).

111. MCM, *supra* note 5, M.R.E. 803(1).

112. David A. Schlueter et al., Military Evidentiary Foundations § 11-7(1) (7th ed. 2021).

113. *Id.*

114. United States v. Brown, ARMY 20160195, 2018 CCA LEXIS 107, at *32 (A. Ct. Crim. App. Feb. 28, 2018) (citing Taylor v. Erna, No. 08-10534-DPW, 2009 U.S. Dist. LEXIS 61612, at *15 (D. Mass. July 14, 2009)).

115. MCM, *supra* note 5, M.R.E. 803(3).

116. Schlueter, *supra* note 112, § 11-9(1)(b).

117. *See* United States v. Elmore, 33 M.J. 387, 397 (C.M.A. 1991).

118. United States v. Brown, 490 F.2d 758, 767 (D.C. Cir. 1973).

119. *See id.*

120. MCM, *supra* note 5, M.R.E. 803(4).

121. Schlueter, *supra* note 112, § 11-9(2)(a).

122. *Id.* § 11-9(2)(b).

123. *See* United States v. Cucuzzella, 66 M.J. 57 (C.A.A.F. 2008).

124. *Id.* at 59.

125. Schlueter, *supra* note 112, § 11-9(2)(b) n.32.

126. *See, e.g.*, United States v. Ureta, 44 M.J. 290 (C.A.A.F. 1996).

127. *E.g.*, United States v. Hughes, 48 M.J. 700, 711 (A.F.C.M.R. 1998) (hearsay did not fall within 803(4) when Government could not establish the patient made the declaration for the purpose of medical treatment).

128. *E.g.*, United States v. Ortiz, 34 M.J. 831, 834 (A.F.C.M.R. 1992).

129. Crawford v. Washington, 541 U.S. 36, 51 (2004).

130. *See, e.g.*, Davis v. Washington, 547 U.S. 813, 820 (2006).

131. Authentication means introducing sufficient evidence to show the evidence trial counsel seeks to admit is what it purports to be. MCM, *supra* note 5, M.R.E. 901. If trial counsel seek to admit a recording of the victim's statements in a 911 call, refer to *id.* M.R.E. 901(6) (Evidence About a Telephone Conversation). Either the dispatcher or the record keeper for the 911 call could authenticate the call at trial. *See id.*

132. *See* MCM, *supra* note 5, M.R.E. 612.

133. *See* Brady v. Maryland, 373 U.S. 83 (1963) (holding that material, exculpatory evidence must be disclosed to the defense); MCM, *supra* note 5, R.C.M. 701(a)(6) (requiring trial counsel to, "as soon as practicable, disclose to the defense" evidence that "reasonably tends to . . . [n]egate the guilt of the accused of an offense charged; . . . [r]educe the degree of guilt of the accused of an offense charged; . . . or . . . [a]dversely affect the credibility of any prosecution witness or evidence.").

134. Interview with Major Joseph Levin, Student, Command and General Staff College, Fort Leavenworth, Kan. (Nov. 2, 2022).

135. *See* MCM, *supra* note 5, R.C.M 702.

136. *See* Berger v. United States, 295 U.S. 78, 88 (1935) ("[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

137. See Appendix B for a list of corroboration examples.

138. Some investigators cease putting full effort into a domestic violence case file if a victim ceases to participate due to agents' incorrect belief that these types of cases cannot be prosecuted. Interview with Major Callin Kerr, Chief of Justice, Fort Campbell, Ky. (Oct. 19, 2022). Chiefs of Justice (CoJs) can help their trial counsel shape the case file by explaining to investigative offices that these cases may still be prosecutable and providing checklists for thorough case files. *Id.* If the incident occurred off-post or in a place with concurrent Federal jurisdiction, CoJs should determine jurisdiction early so the military investigative body knows whether it has ownership over the case and is more invested in the investigation. *Id.*

139. *See supra* Section titled "Determining Whether a Statement Is Testimonial."

140. *See* Davis v. Washington, 547 U.S. 813, 823 (2006).

141. *See id.*

142. *See supra* note 110 and accompanying text.

143. *See Davis*, 547 U.S. at 818–20.

144. *See supra* Section titled "Excited Utterance."

145. *See supra* Section titled "Medical Personnel."

146. *See supra* Section titled "Friends and Neighbors."

147. *See* MCM, *supra* note 5, M.R.E. 803(3).

148. *See* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 Va. L. Rev. 747, 768–71 (2005).

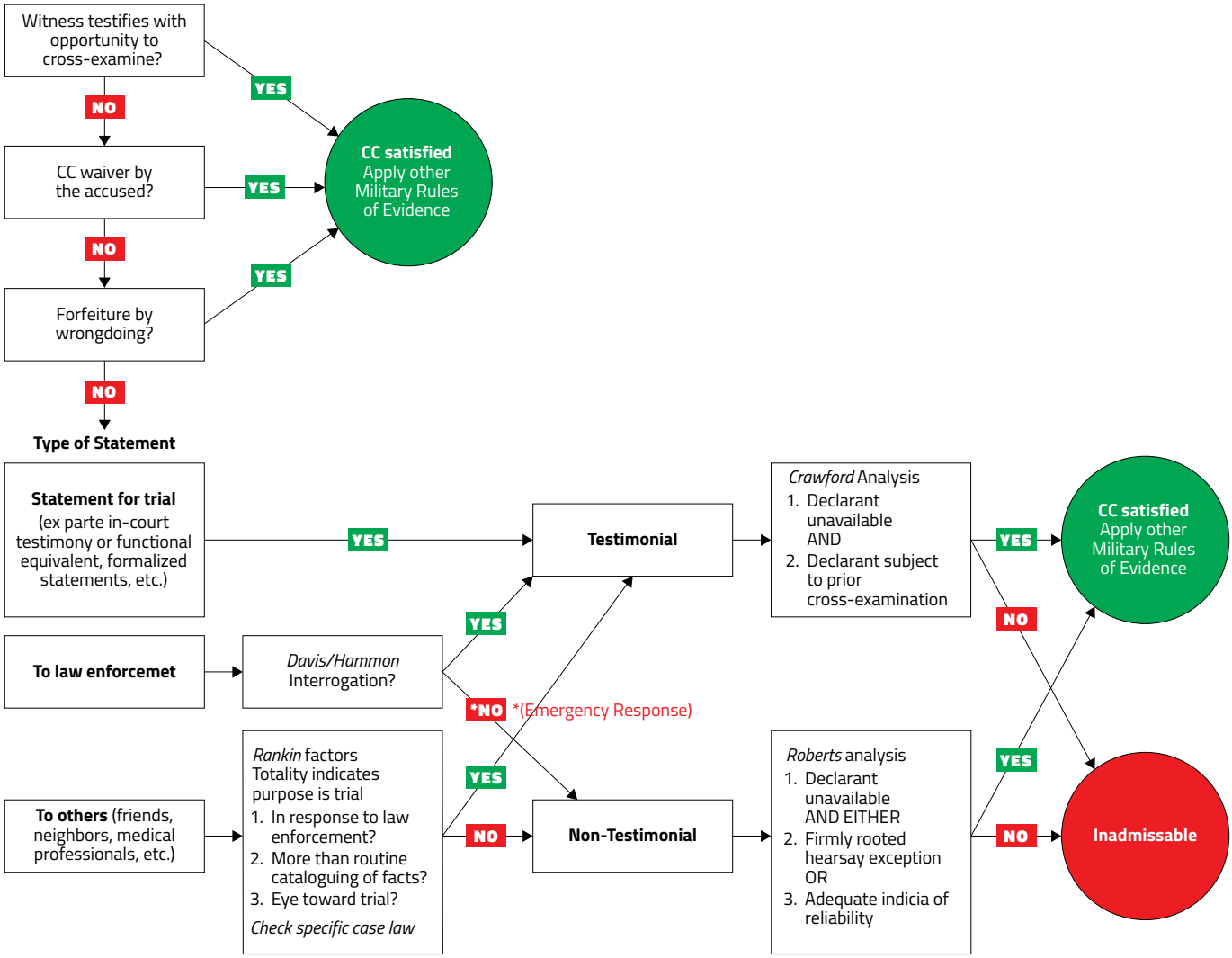
149. *Id.*

150. *See* Exec. Order No. 14100, 88 Fed. Reg. 39111 (June 15, 2023) (stating that active-duty military spouses experience a 21 percent unemployment rate).

151. *See* Lininger, *supra* note 148, at 768–71; *see also* People v. Brown, 94 P.3d 574, 581 (Cal. 2004) (citing a government expert's trial testimony that "about 80 percent of the time a woman who has been 'initially assaulted' by a boyfriend, husband, or lover will recant, change, or minimize her story").

Appendix A: Confrontation Clause (CC) Flow Chart

This chart is designed to anchor the reader of this primer, not as a substitute for understanding specific case law.



Key Quotations

Crawford v. Washington, 541 U.S. 36, 51-52 (2004): Testimonial statements include: 1) "Ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; 2) "Extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; 3) "[S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Davis v. Washington, 547 U.S. 813, 822 (2006): "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

United States v. Rankin, 64 M.J. 348, 354 (C.A.A.F. 2007): "First, was the statement at issue elicited by or made in response to a law enforcement or prosecutorial inquiry? Second, did the 'statement' involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial?"

Ohio v. Roberts, 448 U.S. 56, 66 (1980): "In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."

Appendix B: Evidence to Obtain and/or Analyze in Domestic Violence Cases

1. 911 calls
2. Medical records[1]
3. CCTV or other video footage from the scene of the assault[2]
4. Photographic evidence
   a. Crime scene photographs[3]
   b. Injuries
   c. Damaged property
   d. Alcohol
5. Other physical evidence, such as weapons
6. All witnesses
   a. Lay eye witnesses
   b. First responders
   c. Children
7. Phone records
8. Social media
9. Confessions or admissions of the accused
10. Apologies
11. Past criminal record of the accused or other history of domestic violence
12. Expert analysis and testimony

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1. Trial counsel should ask victims to sign a medical release for records related to their injuries as early as possible while the victim is still participating. Unless abnormal circumstances are present, do *not* request mental health records.

2. Request the Criminal Investigation Division collect video footage as soon as possible, because CCTV videos are not archived forever and may be recorded over in a certain timeframe—sometimes as soon as twenty-four hours afterward.

3. Recommend trial counsel visit the site of the alleged assault and take their own pictures. If presenting eyewitness testimony, consider taking pictures from the angle of the eyewitness to present to the factfinder.

(Credit: Jason Yoder - stock.adobe.com)

No. 1

This Is Not Your Grandparents' Military Justice System

The 2022 and 2023 National Defense Authorization Acts

By Professor David A. Schlueter and Associate Dean Lisa M. Schenck

This is a companion piece to the authors' recent publication in the Military Law Review *titled* Transforming Military Justice: The 2022 and 2023 National Defense Authorization Acts.[1]

Despite the major reforms to the American military justice system in the 2016 Military Justice Act,[2] the drumbeat for reform has continued. One of the most-often heard calls for reform over the last decade has suggested removing commanders from the military justice system.[3] Some have argued that a command-centric military justice system was outdated, and it was time to make the system look more like the Federal criminal procedure system.[4] Other critics have advocated for a military justice system that looks more like those of our allied nations. In large part, those calls for reform were driven by the seemingly intractable problem of sexual assaults in the military.[5]

On 27 December 2021, the President signed the National Defense Authorization Act for Fiscal Year 2022 (2022 NDAA),[6] which effected a number of significant changes to the Uniform Code of Military Justice (UCMJ). Further changes were made to the UCMJ in the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (2023 NDAA).[7] On 28 July 2023, the President signed Executive Order 14103, which amends the *Manual for Courts-Martial* (MCM);[8] some of those amendments went into effect immediately, while others went into effect in December 2023.[9]

This article briefly addresses the 2022 and 2023 NDAA changes to the military justice system and suggests that certain issues that were not addressed in the acts will continue to present challenges to those charged with administering military justice.[10]

Creating the Office of Special Trial Counsel

One of the 2022 NDAA's most significant changes was the addition of Article 24a to the UCMJ, which creates the Office of Special Trial Counsel.[11] This new article, which reduces commanders' role in the disposition of certain offenses, reflects a compromise between proposals offered by the Department of Defense (DoD), the Senate, and the House of Representatives.

The Pentagon's proposals rested on recommendations from the Independent Review Commission on Sexual Assault (established by Secretary of Defense Lloyd J. Austin) issued in May 2021.[12] Those proposals recommended, inter alia, establishing the Office of the Special Victim Prosecutor in the Office of the Secretary of Defense.[13] That newly established office would decide whether to prosecute certain offenses, including sexual assault, sexual harassment, and certain hate crimes.[14]

The House and Senate approaches, both of which seemed to be attempts to implement the recommendations of the Independent Review Commission, were similar, but they included more offenses that would fall under the discretion of a special military prosecutor.[15] The House proposed delimiting the commander's prosecutorial authority for thirteen offenses, and two Senate proposals would have covered eight and thirty-eight offenses, respectively.[16]

The new Article 24a, UCMJ provides that each Service Secretary will promulgate regulations assigning commissioned judge advocates, uniformed lawyers, to serve as special trial counsel.[17] The lead special trial counsel must be in the grade of at least O-7[18] with military justice experience.[19]

Special trial counsel will have exclusive authority to refer court-martial charges for "covered offenses."[20] The covered offenses include: Article 117a (Wrongful Broadcast or Distribution of Intimate Visual Images); Article 118 (Murder); Article 119 (Manslaughter); Article 120 (Rape and Sexual Assault Generally); Article 120b (Rape and Sexual Assault of a Child); Article 120c (Other Sexual Misconduct); Article 125 (Kidnapping); Article 128b (Domestic Violence); Article 130 (Stalking); Article 132 (Retaliation); Article 134 (Child Pornography); Article 80 (Attempt to Commit One of the Foregoing Offenses); Article 81 (Conspiracy to Commit One of the Foregoing Offenses); and Article 82 (Solicitation to Commit One of the Foregoing Offenses).[21]

In the 2023 NDAA, Congress added the following offenses to the list of covered offenses that will fall within the Office of Special Trial Counsel's prosecutorial discretion: Article 119a (Death or Injury of an Unborn Child);[22] Article 120a (Mails: Deposit of Obscene Matter);[23] and Article 134 (Sexual Harassment) (effective at the later date of 1 January 2025).[24]

Pursuant to Section 532 of the 2022 NDAA, the Service Secretaries must establish policies for the Office of Special Trial Counsel. Those policies must address oversight functions, responsibilities, experience levels of those assigned to work for special trial counsel, insulation from unlawful command influence, and victim input. In short, the 2022 NDAA directs a deliberate, Service-specific process through explicit direction to establish an office that will supervise and oversee special trial counsel.[25] The lead special trial counsel will be responsible for special trial counsel in that Service and will report directly to the Secretary of the Service concerned "without intervening authority."[26] This is an apparent intent to insure that special trial counsel are not responsible to the established chain of command for uniformed lawyers. Special trial counsel, and other personnel assigned to that office, are to be "independent of the military chains of command of both the victims and those accused."[27] Special trial counsel must be experienced, well-trained, and competent to handle cases involving the covered offenses.[28] Cases are to be free from "unlawful or unauthorized influence or coercion."[29] Commanders of the victim and the accused will have the ability to provide nonbinding input to special trial counsel regarding the disposition of covered offenses.[30]

Special trial counsel's decision to refer charges and specifications to a court-martial is binding on the convening authority.[31] In addition, where the covered offenses are concerned, special trial counsel have the exclusive authority to withdraw or dismiss the charges,[32] enter into plea agreements with an accused,[33] and determine whether a rehearing would be impracticable.[34] But, apparently, the convening authority will retain the power to select the members and convene the court-martial.[35]

If a special trial counsel decides not to prefer or refer charges for a covered offense, the commander or convening authority may exercise any of the options available to that officer under the UCMJ, except the referral of charges for a covered offense to a special or general court-martial.[36]

Traditionally, commanders have been an integral part of the military justice system. Even though the role of uniformed judge advocates has expanded over the decades, the commander has remained a key player in the investigation phase and processing of court-martial charges. One of the questions raised by the addition of special trial counsel is how those new prosecutors will interact with commanders on a wide variety of decisions arising throughout the processing of court-martial charges. Potential issues include: pretrial investigations (such as Rule for Courts-Martial (RCM) 303, commander's inquiries[37]) that in turn may result in allegations that the accused committed an offense; ordering an accused into pretrial confinement; initial disposition determination and coordination and preferring of court-martial charges against an accused; grants of immunity; approval of an accused's request for individual military counsel; requests for witnesses; and post-trial actions by the convening authority.[38]

In the 2023 NDAA, Congress included a provision specifying that the President is charged with effecting the transfer of the commander's residual powers in the MCM.[39] Section 541 of that act provides that when the special trial counsel becomes responsible for a case due to the inclusion of at least one covered offense alleged, the "residual prosecutorial duties and other judicial functions"[40] of the commander will transfer to special trial counsel, to military judges, or other authorities;[41] these changes will be effective in December 2023.[42] The recent amendments to the MCM indicate that on the question of granting immunity to witnesses, for covered offenses, special trial counsel or their delegee may grant immunity.[43] The MCM amendments also transfer the power to authorize pre-referral depositions to the military judge;[44] the same applies to authorizing the funding of expert assistance for the defense.[45] The question, however, remains as to what extent Congress intended to strip the commander's powers to impose administrative measures for covered offenses.

The creation of the Office of Special Trial Counsel generates a bifurcated military justice system. If the alleged offense is not a covered offense, then the current system will continue; that is, commanders will be responsible for deciding how to dispose of alleged wrongdoing, including preferral of court-martial charges.

Transforming Sentencing Procedures

Military Judge Sentencing

The 2022 NDAA makes two significant changes to sentencing procedures in the military. The first major change requires that in all non-capital special and general courts-martial, the military judge will impose the sentence.[46] That follows

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decades-long recommendations from commentators and others that the military adopt the sentencing procedures used in Federal courts—with the judge imposing the sentences using Federal Sentencing Guidelines.[47] In capital cases, however, members must decide (1) whether the sentence for the offense will be "death or life in prison without the eligibility for parole;" or (2) "the matter should be returned to the military judge for a determination of a lesser punishment."[48] The military judge must then sentence the accused in accordance with the court members' determination.[49]

Establishing Sentencing Parameters and Criteria

In addition to requiring military judge alone sentencing, the 2022 NDAA requires the President to establish sentencing parameters and criteria and creates the Military Sentencing Parameters and Criteria Board within the DoD.[50] Section 539E(e) of the 2022 NDAA required the President to prescribe, within two years of the date of enactment, sentencing parameters and criteria for offenses under the UCMJ.[51]

The 2022 NDAA requires the President to establish sentencing parameters that must cover (1) "sentences of confinement" and (2) "lesser punishments, as the President determines appropriate."[52] The parameters must:

> (A) identify a delineated sentencing range for an offense that is appropriate for a typical violation of the offense, taking into consideration—(i) the severity of the offense; (ii) the guideline or offense category that would apply to the offense if the offense were tried in a United States district court; (iii) any military-specific sentencing factors; (iv) the need for the sentencing parameter to be sufficiently broad to allow for individualized consideration of the offense and the accused; and (v) any other relevant sentencing guideline.
>
> (B) include no fewer than [five] and no more than [twelve] offense categories;
>
> (C) assign each offense under the this chapter to an offense category unless the offense is identified as unsuitable for sentencing parameters . . . ; and
>
> (D) delineate the confinement range for each offense category by setting an upper confinement limit and a lower confinement limit.[53]

In addition to establishing sentencing parameters, the 2022 NDAA requires the President to establish sentencing criteria that identifies "offense-specific factors the military judge should consider and any collateral effects of [the] available punishments."[54] This "sentencing criteria" would be used to assist the military judge in imposing a sentence where there is no applicable sentencing parameter for a specific offense.[55]

Application of Sentencing Parameters and Criteria

The 2022 NDAA includes several amendments to Article 56, UCMJ that support and explain the application of the sentencing parameters and criteria. Subject to certain exceptions, the military judge must sentence the accused within the specified parameters.[56]

In announcing a sentence under Article 53, UCMJ, the military judge in a general or special court-martial, regarding "each offense of which the accused [was] found guilty, [must] specify the term of confinement, if any, and the amount of a fine, if any."[57] If the military judge is imposing a sentence for more than one offense, the military judge must "specify whether the terms of confinement [will] run consecutively or concurrently."[58] Sentencing parameters and sentencing criteria do not apply in deciding whether the death penalty should be imposed.[59]

If the accused is convicted of an offense for which a court-martial may impose a sentence of confinement for life, the military judge may impose a sentence of "life without eligibility for parole."[60] In that case, the accused will be confined for the remainder of their life, barring certain actions by the convening authority or applicable Service Secretary, post-trial appellate action, or executive pardon.[61]

Appellate Review of Sentences by Courts of Criminal Appeals

Section 539E(d) of the 2022 NDAA also amends Article 66, UCMJ, which addresses the review powers of the military courts of criminal appeals.[62] Under a new provision, the courts may review whether a sentence violates the law or is inappropriately severe. When determining severity, the court should apply these factors:

> (i) if the sentence is for an offense for which the President has not established a sentencing parameter . . .; or
>
> (ii) in the case of an offense for which the President has established a sentencing parameter . . . , if the sentence is above the upper range of such sentencing parameter.[63]

In addition to law violations and inappropriate severity, the courts may also consider "whether the sentence is plainly unreasonable."[64] If the "sentence [is] for an offense for which [there is a] . . . sentencing parameter," appellate courts may also consider "whether the sentence is the result of an incorrect application of that parameter."[65] And, if the sentence was death or life in prison without the eligibility of parole, they may consider "whether the sentence is otherwise appropriate under the rules prescribed by the President."[66]

The amended Article 66 provides that when the Government is appealing an adjudged sentence, the record on appeal must contain: (1) "any portion of the record that is designated to be pertinent by any party";[67] (2) "the information submitted during the sentencing proceeding";[68] and (3) "any information required by rule or order of the Court of Criminal Appeals."[69]

Military Sentencing Parameters and Criteria Board

Section 539E(e)(4) of the 2022 NDAA creates—within the DoD—the Military Sentencing Parameters and Criteria Board.[70] That board will consist of five voting members: (1) the chief trial judges designated under Article 26(g), UCMJ; (2) a trial judge of the Navy if there is no chief trial judge in the Navy under Article 26(g); and (3) a trial judge of the Marine Corps if Article 26(g) does not include a chief trial judge in the Marine Corps.[71] Section 539E(e)(4) also provides that the board will include the following nonvoting members: (1) a designee by the chief judge of the United States Court of Appeals for the Armed Forces, (2) a designee by the chairman of the Joint Chiefs of Staff, and (3) a designee by the general counsel of the DoD.[72]

The Board is charged with reviewing the sentencing parameters and recommending any appropriate changes.[73] The Board must also develop a means of measuring the effectiveness of the applicable sentencing, penal, and correctional practices, regarding the sentencing factors and policies of Section 539E.[74] This 2022 NDAA Section also repeals the provisions of Section 537 of the National Defense Authorization Act for Fiscal Year 2020 (2020 NDAA), which required secretarial guidelines on sentences.[75]

Potential Issues in Sentencing

The 2022 NDAA reflects a clear change in the sentencing process in the military justice system, from indeterminate sentencing[76] to determinate sentencing similar to that of the Federal system. The lingering question is whether the framework established by the Federal Sentencing Commission can or should be applied in the military setting.

The procedures for imposing sentences in Federal courts is very different from the military's current system. For example, in Federal practice, a probation officer completes a detailed presentence report, which recommends a particular sentence to the Federal judge.[77] Federal court sentencing hearings occur months after trial on the findings and the convicted defendant may be incarcerated pending the sentencing hearing.[78] Given those key differences, it remains to be seen whether the new sentencing scheme will work efficiently and effectively.

Victims' Rights

In General

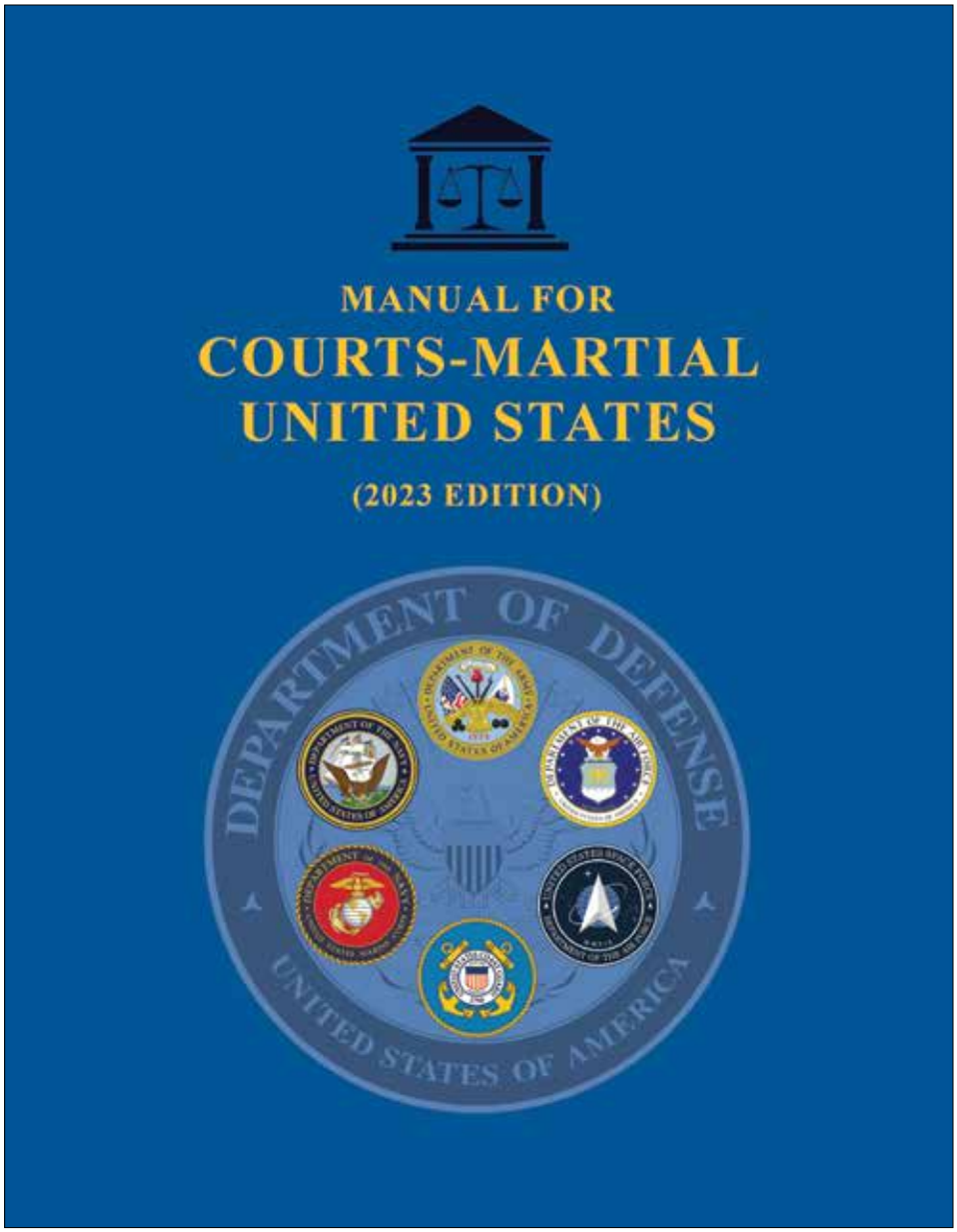
Over the past decade, the armed forces have implemented wide-ranging protections to safeguard the rights of sexual assault victims in the military justice system. Victims' rights are set forth expressly in the UCMJ. For example, Article 6b provides victims with the rights "to be reasonably protected from the accused"; "to reasonable, accurate, and timely notice" throughout the process; "not to be excluded from any public hearing or proceeding"; "to be reasonably heard" at certain public hearings regarding the case; "to confer with [Government] counsel" in

the proceedings; to "restitution as provided in law"; to "proceedings free from unreasonable delay"; and "to be treated with fairness and with respect."[79] Other victims' rights are provided in the RCM (such as Rule 1001(c)(1), providing the right to be reasonably heard at the presentencing proceeding)[80] or in Service regulations.[81]

The 2022 NDAA included further changes designed to protect victims and provide them with procedural rights.[82] One of the key provisions in Article 6b of the UCMJ is the requirement that the victim be apprised of the case status.[83] The 2022 NDAA expands Article 6b(a) by adding a new provision, which states:

> (8) The right to be informed in a timely manner of any plea agreement, separation-in-lieu-of-trial agreement, or non-prosecution agreement relating to the offense, unless providing such information would jeopardize a law enforcement proceeding or would violate the privacy concerns of an individual other than the accused.[84]

The application of this requirement potentially implicates both counsel and commanders, even if commanders are no longer involved in the formal prosecution of covered offenses. For example, if the case involves covered offenses, the special trial counsel leading the preferral and referral process is best suited to oversee and ensure the required timely updates to any victims. In cases involving noncovered offenses, the trial counsel is better suited for ensuring compliance with Article 6b(a) requirements. Additionally, in a case involving a military victim, the commander of the victim, who already has the responsibility to ensure their subordinate receives appropriate care,[85] should be aware of the new provisional requirement that the victim receive information about dispositional decisions.



The new Article 24a, UCMJ, provides that each Service Secretary will promulgate regulations assigning commissioned judge advocates to serve as special trial counsel. The lead special trial counsel must be in the grade of at least O-7, with military justice experience. (Credit: jsc.defense.gov)

Modification of Notice to Victims of Disposition of Cases

Section 545 of the 2022 NDAA modifies Section 549 of the 2020 NDAA[86] by adding language that requires a commander, after final disposition of a case, to notify a victim of "the type of action taken on such case, the outcome of the action (including any punishments assigned or characterization of service, as applicable), and such other information as the commander determines to be relevant."[87]

Referral of Sexual Harassment Complaints to Independent Investigator

The 2022 NDAA also amends Section 1561 of Title 10 to require that a commander who receives a formal complaint of sexual harassment must direct, within seventy-two hours of receiving the complaint, that an independent investigation be conducted.[88] The commander must report on the results of that investigation to the next superior officer within twenty days after the investigation commences and every fourteen days thereafter until the investigation is completed, and then submit a final report on the results of the investigation and any actions taken as a result of that investigation.[89]

Civilian Positions to Support Special Victims' Counsel

Section 546 of the 2022 NDAA states that each Secretary of a military department

(Credit: Ulf - stock.adobe.com)

may establish one or more civilian positions within every Office of Special Victims' Counsel.[90] Those individuals are to provide support to special victims' counsel, which will include "legal, paralegal, and administrative" support.[91] Section 546 states that the purpose of these civilian positions is to provide continuity of legal services when special victims' counsel transition to other positions.[92]

Changes to the Punitive Articles

The New Offense of Sexual Harassment

Section 539D of the 2022 NDAA requires the President, within thirty days of the act's enactment, to include in the MCM the offense of sexual harassment under Article 134.[93] On 26 January 2022, the President signed Executive Order 14062, amending the MCM to reflect the new offense.[94] The executive order adds a new paragraph 107a in Part IV of the MCM, for the offense of Sexual Harassment, and also makes other amendments to existing offenses in Part IV.[95] One of those amendments includes the existing offense of Domestic Violence (Article 128b), which is covered in the new Paragraph 78a.[96]

Article 133 Amendment

Article 133 of the UCMJ is one of two general articles (the other being Article 134). Article 133 focuses on the conduct of commissioned officers.[97] This punitive article has been commonly referred to as "conduct unbecoming an officer and a gentleman."[98] Section 542 of the 2022 NDAA made Article 133 gender-neutral by removing the words "and a gentleman."[99] This punitive article was otherwise unchanged.

Random Selection of Court Members

One of the hallmarks of the American military justice system is the convening authority's power to select the members to serve on courts-martial. Article 25, UCMJ states that in selecting the members, the convening authority "shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[100] Although commentators have proposed reforms for the methods of selecting members,[101] and in particular

random selection of members,[102] random selection has not been required.[103] Nonetheless, some installations have used random selection[104] and the Army Court of Military Review approved an experimental program for random selection.[105]

In the 2023 NDAA, Congress made random selection a reality by adding a new provision to Article 25(e), which states:

> When convening a court-martial, the convening authority shall detail as members thereof members of the armed forces under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent practicable.[106]

This amendment will go into effect on 22 December 2024.[107] The challenge will be to draft RCM or other regulations that will utilize an efficient and randomized selection process and at the same time reflect the current guidance in Article 25, UCMJ for selecting the best-qualified members.

Expanding the Jurisdiction of the Service Courts of Criminal Appeals

Article 66 of the UCMJ addresses the jurisdiction of the Service Courts of Criminal Appeals.[108] Currently, Article 66(b)(1) provides that an accused can appeal their court-martial conviction if the sentence adjudged is more than six months;[109] the Government has previously appealed a ruling by a military judge under Article 62, UCMJ;[110] the Government has appealed a court-martial sentence;[111] or the accused has filed an application for review of a decision by the Judge Advocate General.[112] On the other hand, review by the Service courts is automatic if the judgment entered by the court-martial includes a sentence of death; dismissal of a commissioned officer, cadet, or midshipman; a dishonorable discharge; a bad-conduct discharge; or confinement for two years or more.

In the 2023 NDAA, Congress dramatically amended Article 66(b)(1) by deleting the existing provisions and inserting new language, which provides that the Service appellate courts will have jurisdiction over:

> (A) a timely appeal from the judgment of a court-martial, entered into the record under section 860c(a) of this title ([A]rticle 60c(a)), that includes a finding of guilty; and
>
> (B) a summary court-martial case in which the accused filed an application for review with the Court under section 869(d)(1) of this title ([A]rticle 69(d)(1)) and for which the application has been granted by the Court.[113]

The amendment eliminates the ability of the accused to appeal to a Service court if the Government has appealed a ruling under Article 62 or if the Government has appealed a sentence. So, while on the one hand the accused's ability to seek review by a Service appellate court has been reduced in those two instances,[114] on the other hand, the courts' jurisdiction will be expanded because an accused will be able to appeal a court-martial conviction regardless of the adjudged sentence and regardless of whether it was a special or general court-martial. These amendments apparently went into effect the date the President signed the bill: 22 December 2022.

In addition, Congress amended Article 69, UCMJ, which provides for the Judge Advocate General's review of certain courts-martial convictions.[115] That article was amended, inter alia, by changing the deadlines for seeking review by the Judge Advocate General. These amendments also went into effect the date the President signed the bill: 22 December 2022.

Concluding Thoughts

It is clear that the 2022 and 2023 NDAAs will effect major changes to the military justice system. The real question is whether the changes will result in the outcomes that Congress intended.

To avoid potentially adverse consequences to the military justice system, we encourage Congress in the future to hold extensive hearings on proposed amendments to the UCMJ.[116] Congress should hear the views of a wide range of stakeholders and interest groups and also consider the full extent of ripple effects from its proposals so that the American military justice system is transformed at a principled and measured pace. In that way, Congress will be able to more effectively carry out its constitutional mandate to make rules and regulations affecting the military. **TAL**

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Notes

1. David A. Schlueter & Lisa M. Schenck, *Transforming Military Justice: The 2022 and 2023 National Defense Authorization Acts*, 231 Mil. L. Rev. 1 (2023). The authors gratefully acknowledge the assistance of U.S. Army Captain Kendall Stanley, J.D. 2024, the George Washington University Law School, for her assistance in preparing this article.

2. 2016 Military Justice Act, Pub. L. No. 114-328, sec. 5001, 130 Stat. 2000, 2894; *see generally* David Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 St. Mary's L.J. 1 (2017) (discussing 2016 changes to the Uniform Code of Military Justice).

3. For example, in 2013, Senator Kirsten Gillibrand sponsored the Military Justice Improvement Act (MJIA), which proposed that commanders would no longer have jurisdiction over specified offenses and the commander's power to grant post-trial clemency would be limited. Military Justice Improvement Act of 2013, S. 1752, 113th Cong. (2014). That proposal failed in the Senate by a close vote, despite bipartisan support. *See Actions Overview: S.1752—113th Congress (2013-2014)*, Congress.gov, https://www.congress.gov/bill/113th-congress/senate-bill/1752/actions (last visited Aug. 9, 2023). For another example of a modern call to decrease the commander's role in the military justice system, see Eugene Fidell, *What Is to Be Done? Herewith a Proposed Ansell-Hodson Military Justice Reform Act of 2014*, Glob. Mil. J. Reform (May 13, 2014), http://globalmjreform.blogspot.com/2014/05/what-is-to-be-done-herewith-proposed.html (proposing "Ansell-Hodson Military Justice Reform Act of 2014").

4. *See, e.g.*, Heidi L. Brady, *Justice Is No Longer Blind: How the Effort to Eradicate Sexual Assault in the Military Unbalanced the Military Justice System*, 2016 Univ. Ill. L. Rev. 193 (2016) (proposing use of independent prosecutors); Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 Mil. L. Rev. 129 (2014) (proposing that military lawyers have prosecutorial discretion over disposition of offenses); Letter from Heidi Boghosian, Exec. Dir., Nat'l Laws. Guild, to Mr. Paul S. Koffsky, Deputy Gen. Coun., Dep't of Def. (June 30, 2014) (recommending that prosecutorial discretion be placed in hands of independent prosecutors).

5. *See* Meghann Myers, *The Military's Sexual Assault Problem Is Only Getting Worse*, Mil. Times (Sept. 1, 2022), https://www.militarytimes.com/news/your-military/2022/09/01/the-militarys-sexual-assault-problem-is-only-getting-worse.

6. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021) (effective Dec. 2023). Though the effective date of the National Defense Authorization Act for Fiscal Year 2022 (2022 NDAA) is December 2023, some provisions became effective earlier and others become effective on later dates. *See, e.g.*, *id.* sec. 539E(e).

7. *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 541, 136 Stat. 2395, 2579 (2022).

8. Exec. Order No. 14103, 88 Fed. Reg. 50535 (July 20, 2023).

9. *See id.*

10. For example, although the 2022 NDAA creates the position of special trial counsel, who will have exclusive authority in several areas of military justice, the act does not change the commander's role in a significant number of other areas (topics that we discuss below).

11. Sec. 531, 135 Stat. at 1692.

12. *See generally* Ind. Rev. Comm'n on Sexual Assault in the Mil., Hard Truths and the Duty to Change: Recommendations from the Independent Review Commission on Sexual Assault in the Military (2021) (issuing more than eighty recommendations to address sexual assault accountability and prevention).

13. *See id.* at 7 (recommending the creation of the Office of the Special Victim Prosecutor).

14. *See id.* (recommending the Office of the Special Victim Prosecutor makes decisions about sexual assault case prosecutions instead of the chain of command).

15. *See* Alan Ott & Kristy N. Karmark, Cong. Rsch. Serv, R46940, Military Justice Disposition Delimitation Legislation in the 117th Congress (2021).

16. *See id.*

17. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 531(a), 135 Stat. 1541, 1692 (2021).

18. *Id.* sec. 531(a), § 824a(b)(2).

19. *Id.* sec. 531(a), § 824a(b)(1)(B) (specifying that the special trial counsel shall be "qualified, by reason of education, training, experience, and temperament"). Later within the statutory scheme, Congress directs that in order to be appointed as the lead special trial counsel, an officer must have "significant experience in military justice." *Id.* sec. 532(a), § 1044f(a)(2)(A). The act does not further address or define what is meant by the term "significant experience in military justice."

20. *Id.* sec. 531(a), § 824a(c)(2)(A).

21. *Id.* sec. 533(2), § 801(17) (amending UCMJ art. 1 by listing covered offenses).

22. James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 541(a)(1), § 801(17)(A), 136 Stat. 2395, 2579-80 (2022) (adding UCMJ art. 119a as a covered offense).

23. *Id.* (adding UCMJ art. 120a as a covered offense).

24. *Id.* sec. 541(b)(1)(B), § 801(17)(A) (adding sexual harassment as a covered offense under UCMJ art. 134).

25. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 532(a), § 1044f(a)(1), 135 Stat. 1541, 1694 (2021).

26. *Id.* sec. 532(a), §§ 1044f(a)(2)(B)-(C).

27. *Id.* sec. 532(a), § 1044f(a)(3)(A).

28. *Id.* sec. 532(a), § 1044f(a)(4).

29. *Id.* sec. 532(a), § 1044f(a)(3)(B).

30. *Id.* sec. 532(a), § 1044f(a)(5).

31. *Id.* sec. 531(c)(4), 135 Stat. at 1692.

32. *Id.* sec. 531(a), § 824a(c)(3)(A).

33. *Id.* sec. 531(a), § 824a(c)(3)(C).

34. *Id.* sec. 531(a), § 824a(c)(3)(D).

35. *See* UCMJ art. 25(e) (2016); James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 543(a), § 825(e)(4), 136 Stat. 2395, 2582 (2022) ("When convening a court-martial, the convening authority shall detail as members thereof members of the armed forces under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent practicable.").

36. Sec. 531(a), § 824a(c)(5), 135 Stat. at 1693.

37. Manual for Courts-Martial, United States, R.C.M. 303 (2019) [hereinafter MCM].

38. *See* Schlueter & Schenck, *supra* note 1, Section II.E.

39. Sec. 541(c), 136 Stat. at 2580.

40. *Id.* The language following this phrase suggests that "residual" in this context means tasks that the 2022 NDAA did not explicitly reassign from the commander to the special trial counsel and others. But this remains an undefined term that may include a non-exhaustive list of what one may consider "residual" during the lawmaking process.

41. *Id.*

42. *See id.*

43. Exec. Order No. 14103, annex 2, § 2(bbb), 88 Fed. Reg. 50535 (July 28, 2023) (R.C.M. 704(c)(2)).

44. *Id.* annex 2, § 2(x), 88 Fed. Reg. at 50622 (R.C.M. 309(b)(10)).

45. *Id.* annex 2, § 2(zz), 88 Fed. Reg. at 50660 (R.C.M. 703(d)(2)).

46. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 539E(a)(1), § 853(b)(1), 135 Stat. 1541, 1700 (2021).

47. *See, e.g.*, Mil. Just. Rev. Grp., Report of the Military Justice Review Group Part I: UCMJ Recommendations 475-76 (2015) [hereinafter MJRG Report]; Colin A. Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 Naval L. Rev. 39 (2009); James Kevin Lovejoy, *Abolition of Court Members Sentencing in the Military*, 142 Mil. L. Rev. 1 (1993); Captain Megan N. Schmid, *This Court-Martial Hereby (Arbitrarily) Sentences You: Problems with Court Member Sentencing in the Military and Proposed Solutions*, 67 A.F. L. Rev. 245, 267-68 (2011). The Military Justice Review Group recommended that the military should align more closely to Federal civilian practice, and, according to the Military Justice Review Group, this would also:

> conform military sentencing standards to the practice in the vast majority of state courts, as reflected in the ABA Standards for Criminal Justice in Sentencing, which state: "Imposition of sentences is a judicial function to be performed by sentencing courts. The function of sentencing courts is to impose a sentence upon each offender that is appropriate to the offense and the offender. The jury's role in a criminal trial should not extend to determination of the appropriate sentence."

MJRG Report, *supra* at 475. According to the Group's report, requiring judge-alone sentencing would allow for other reforms in the sentencing process, such as expansion of evidence and information provided to the sentencing authority to adjudge an appropriate sentence, increased transparency in the sentencing process, use of victim-impact statements as in civilian courts, and expansion of R.C.M. 1002 to implement "sentencing guidance," promoting greater consistency. *Id.* at 476.

48. Sec. 539E(a)(2), §§ 853(c)(1)(A)(i)-(ii), 135 Stat. at 1700.

49. *Id.* § 853(c)(1)(B).

50. *Id.* sec. 539E(e)(4), 135 Stat. at 1704.

51. *Id.* sec. 539E(e)(1).

52. *Id.* secs. 539E(e)(1)(A)-(B).

53. *Id.* secs. 539E(e)(2)(A)-(D).

54. *Id.* sec. 539E(e)(3).

55. *See id.* sec. 539E(e).

56. *Id.* sec. 539E(c), § 856(c)(2)(A), 135 Stat. at 1701.

57. *Id.* sec. 539E(c)(1)(B), § 856(c)(4).

58. *Id.*

59. *Id.* sec. 539E(c)(1)(B), § 856(c)(5).

60. *Id.* sec. 539E(c)(1)(B), § 856(c)(6)(A).

61. *Id.* sec. 539E(c)(1)(B), §§ 856(c)(6)(B)(i)-(iii).

62. *Id.* sec. 539E(d).

63. *Id.* sec. 539E(d)(2), §§ 866(e)(1)(B)(i)-(ii).

64. *Id.* sec. 539E(d)(2), § 866(e)(1)(D).

65. *Id.* sec. 539E(d)(2), § 866(e)(1)(C).

66. *Id.* sec. 539E(d)(2), § 866(e)(1)(E).

67. *Id.* sec. 539E(d)(2), § 866(e)(2)(A).

68. *Id.* sec. 539E(d)(2), § 866(e)(2)(B).

69. *Id.* sec. 539E(d)(2), § 866(e)(2)(C).

70. *Id.* sec. 539E(e)(4)(A).

71. *Id.* secs. 539E(e)(4)(B)(i)-(iii).

72. *Id.* sec. 539E(e)(4)(C).

73. *Id.* secs. 539E(e)(4)(F)(i)-(v).

74. *Id.* sec. 539E(e)(4)(F)(vi).

75. *Id.* sec. 539E(g).

76. UCMJ art. 56 (2021) (prescribing mandatory minimums and reserving discretionary maximum sentences for the President); *see also* Lisa M. Schenck, Modern Military Justice: Cases and Materials 351-52 (3d ed. 2019) (explaining sentencing pursuant to UCMJ art. 56).

77. *See* U.S. Sent'g Comm'n, Guidelines Manual 2021, at 487 (2021) [hereinafter Guidelines Manual]. ("The probation officer must conduct a presentence investigation and submit a report to the court before it imposes a sentence . . . .").

78. *See Steps in the Federal Criminal Process: Sentencing*, Dep't of Just.: Offs. of the U.S. Att'ys, https://www.justice.gov/usao/justice-101/sentencing (last visited Sept. 21, 2023) ("A few months after the defendant is found guilty, they return to court to be sentenced.").

79. UCMJ art. 6b (2021).

80. MCM, *supra* note 37, R.C.M. 1001(c)(1) ("After presentation by trial counsel, a crime victim of an offense of which the accused has been found guilty has

the right to be reasonably heard at the presentencing proceeding relating to that offense.").

81. *See, e.g.*, U.S. Dep't of Army, Reg. 600-20, Army Command Policy para. 7-8 (explaining the Army's policy against sexual assault and how it offers support to victims). Of course, the appellate courts may weigh in on the extent, applicability, and implementation of those rights. For example, in *Fink v. Y.B. and United States*, the U.S. Court of Appeals for the Armed Forces (CAAF) described the appropriate appellate process for a victim's writ of mandamus petition to a Service court of criminal appeals. 83 M.J. 222 (C.A.A.F. 2023). In *Fink*, the U.S. Coast Guard Court of Criminal Appeals granted the victim's petition for mandamus regarding the military judge's Military Rule of Evidence 412 ruling. *See In re* Y.B., 83 M.J. 501 (C.G. Ct. Crim. App. 2022). The accused appealed that adverse decision to CAAF and that court held that notwithstanding its decision in *Randolph v. HV*, 76 M.J. 27 (C.A.A.F. 2017), a 2017 amendment to Article 67(c)(1)(B) now extended the CAAF's jurisdiction to consider the accused's appeal. 83 M.J. at 225. Essentially, the court held that if the victim of an offense petitions a Service court of criminal appeals for a writ of mandamus under Article 6b(e), UCMJ, challenging a military judge's decision or order, and if the Service court affirms or sets aside the military judge's decision or order, the accused may petition the CAAF for review under Article 67(a)(3), UCMJ. *Id.* Pursuant to Article 67(c)(1)(B), the CAAF, in turn, may act with respect to the military judge's decision or order. *See* UCMJ art. 67(c)(1)(B). Also, in *M.W. v. United States*, CAAF held that despite recent amendments to Article 6b, UCMJ, the court still lacks jurisdiction to hear an appeal filed by the victim of an offense. M.W. v. United States, No. 23-0104, 2023 CAAF LEXIS 472, at *14 (July 13, 2023). Most recently, *H.V.Z v. United States & Fewell* is currently pending review at CAAF to determine, inter alia, the applicable standard of appellate review for issuance of a writ of mandamus under Article 6b(e). *In re* HVZ, Misc. Dkt. No. 2023-03, 2023 CCA LEXIS 292 (A.F.C.C.A. July 14, 2023), *rev. granted*, H.V.Z v. United States, No. 23-0250/AF, 2023 CAAF LEXIS 651 (C.A.A.F. Sept. 13, 2023).

82. *See*, *e.g.*, National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, secs. 545, 546 135 Stat. 1541, 1711-12 (2021) (codifying sexual assault victims' rights to notification when a case is not referred to court-martial and continuing legal services support through special victims' counsel).

83. UCMJ art. 6b (2021).

84. Sec. 541, 135 Stat. at 1708.

85. *See, e.g.*, U.S. Dep't of Def., Instr. 1030.02, Victim and Witness Assistance para. 3.2 (27 July 2023) (assigning responsibilities to commanders to assist victims and witnesses).

86. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019).

87. Sec. 545, 135 Stat. at 1712.

88. Sec. 543(a), § 1561(b), 135 Stat. at 1709.

89. *Id.* sec. 543(a), § 1561(d).

90. *Id.* sec. 546(a), 135 Stat. at 1712.

91. *Id.* sec. 546(b)(1).

92. *Id.* sec. 546(b)(2).

93. *Id.* sec. 539D(a).

94. *See* Exec. Order No. 14062, 87 Fed. Reg. 4763 (Jan. 26, 2022).

95. *See id.* annex, § 1(p), 87 Fed. Reg. at 4784.

96. *See id.* annex, § 1(o), 87 Fed. Reg. at 4777.

97. UCMJ art. 133 (2021). *See generally* 1 David A. Schlueter, Military Criminal Justice: Practice and Procedure § 2-5 (10th ed. 2018) (discussing offenses under Article 133).

98. UCMJ art. 133 (1956).

99. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 542(a), 135 Stat. 1541, 1709 (2021); *see also* Nino C. Monea, *An Officer and a Gentlewoman: Why Congress Should Modernize Article 133 of the UCMJ*, 61 Washburn L.J. 345 (2022) (recommending Article 133 be amended to make the language gender-neutral).

100. UCMJ art. 25(e)(2) (2016).

101. *See generally* Joseph Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 Ind. L.J. 193 (1973) (proposing reforms); Major Gary C. Smallridge, *The Military Jury Selection Reform Movement*, 19 A.F. L. Rev. 343, 380-81 (1977) (proposing various changes to methods of selecting members, including random selection); Captain John D. Van Sant, *Trial by Jury of Military Peers*, 15 A.F. L. Rev. 185 (1973) (noting attempts by Senator Birch Bayh to change methods of selecting members); Major Craig Schwender, *One Potato, Two Potato . . .: A Method to Select Court Members*, Army Law., May 1984, at 12 (proposing changes to method of selecting members).

102. *See, e.g.*, Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 Mil. L. Rev. 1, 72 (1998) (recommending development of computer database to randomly select court members and noting that random selection promotes diversity and fairness); Major R. Rex Brookshire, *Juror Selection under the Uniform Code of Military Justice: Fact and Fiction*, 58 Mil. L. Rev. 71, 106-07 (1972) (recommending random selection of members).

103. In the National Defense Authorization Act for Fiscal Year 1999, Congress directed the Secretary of Defense to study the possibility of using randomly selected members in courts-martial. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, sec. 552, 112 Stat. 1920, 2023 (1998). No changes were made to Article 25. *See* Smallridge, *supra* note 101, at 354 (noting prior attempts by Congress to require random selection of members).

104. *See* Lieutenant Colonel Bradley J. Huestis, *Anatomy of a Random Court-Martial Panel*, Army Law., Oct. 2006, at 22 (discussing procedures used by Army's V Corps to randomly select court members and satisfy Article 25 requirements).

105. *See* United States v. Perl, 2 M.J. 1269, 1271 (A.C.M.R. 1976) (approving an "experimental program [at Fort Riley, Kansas,] for the selection of court members on a random basis").

106. James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 543(a), § 825(e)(4), 136 Stat. 2395, 2582 (2022). The issue of random selection was before Congress two decades ago. The Secretary of Defense was tasked with studying the possibility of using randomly selected juries in the military; that report was due in April 1999, *see* Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, sec. 552, 112 Stat. 1920, 2023 (1998), but no changes resulted from the report.

107. Sec. 543(b), 136 Stat. at 2582.

108. UCMJ art. 66 (2021).

109. *Id.* art. 66(b)(1)(A).

110. *Id.* art. 66(b)(1)(B).

111. *Id.* art. 66(b)(1)(C).

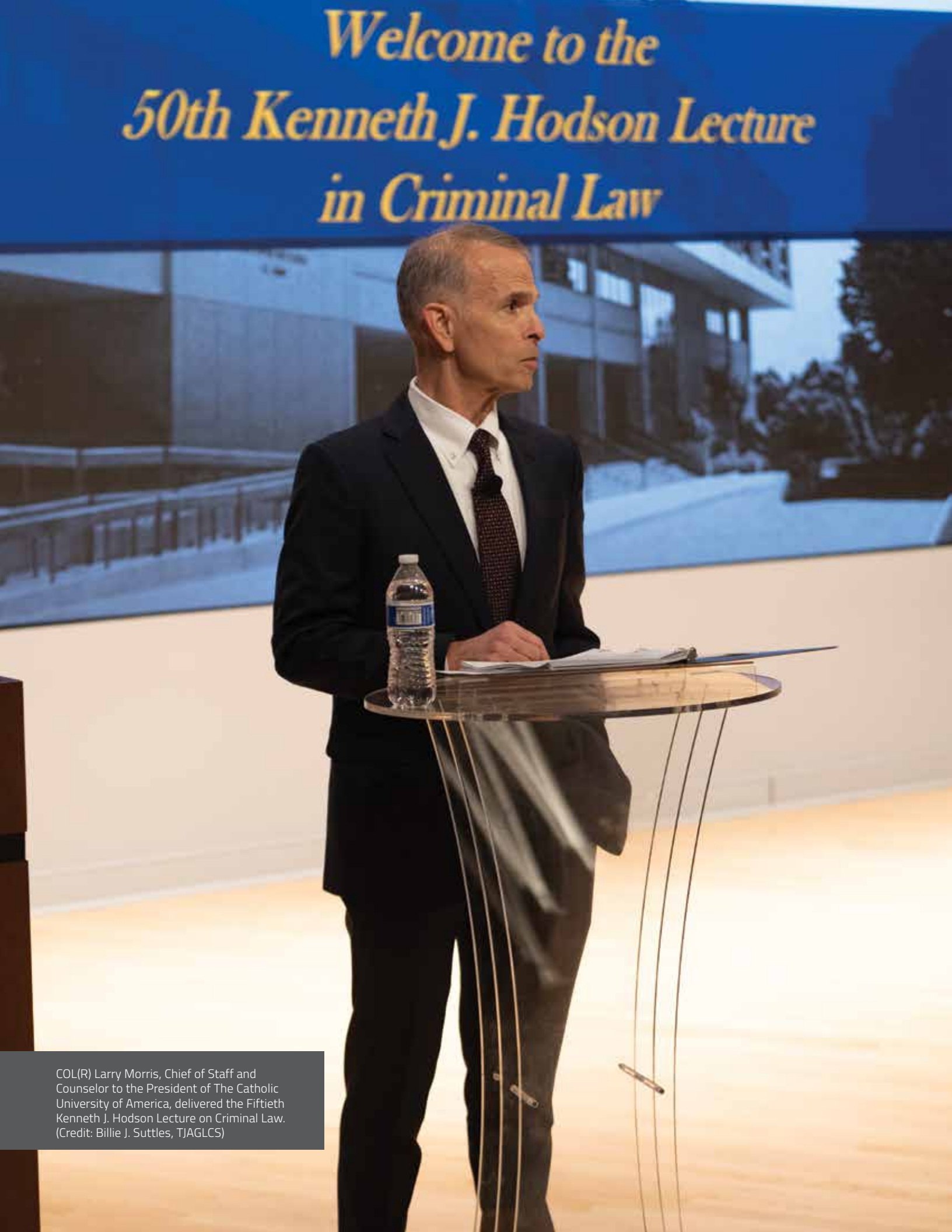
112. *Id.* art. 66(b)(1)(D).

113. James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 544(b)(1), § 866(b)(1), 136 Stat. 2395, 2582 (2022).

114. Even though the amendment removes language that provided the accused with those two paths to the Service appellate courts, in reality, if the Government has appealed a military judge's ruling under Article 62 or has appealed the sentence, the accused will be provided with an opportunity to appear before the Service court, albeit on a more limited basis.

115. Sec. 544(c), § 869, 136 Stat. at 2582.

116. In enacting the extensive legislation in the 2016 Military Justice Act, Congress held no real hearings on the legislation. In subsequent NDAAs, few comprehensive hearings have been held.



COL(R) Larry Morris, Chief of Staff and Counselor to the President of The Catholic University of America, delivered the Fiftieth Kenneth J. Hodson Lecture on Criminal Law. (Credit: Billie J. Suttles, TJAGLCS)

No. 2

Excerpts from the Fiftieth Kenneth J. Hodson Lecture on Criminal Law

By Colonel (Retired) Lawrence J. Morris

On 10 April 2023, Colonel (Retired) Larry Morris delivered the Fiftieth Kenneth J. Hodson Lecture on Criminal Law. His remarks touched on challenges facing practitioners, some suggested approaches, and some recommendations and observations on the military justice system. What follows are excerpts from those remarks.[1] *The full lecture will be available in the* Military Law Review*, volume 231, issue 2.*

Military justice has always evolved. That evolution has not necessarily moved at a steady pace, and never with the volatility of the last fifteen years or so. So, when I was asked to talk about military justice in transition, it prompted me to think about the nature of change in our system, how practitioners adapted, and what it might tell us about our practice as judge advocates as we move from an almost exclusively supporting role to a decision-making role in many aspects of good order and discipline.

Now, over the years, most of the changes to the Uniform Code of Military Justice and the *Manual for Courts-Martial*[2] ratcheted toward greater due process. Many changes came from the civilian justice system, which yielded what some have used as a sort of pejorative: "civilianization." But, it might more accurately be called "judicialization." The changes that are now coming about were brought on largely by us: military leaders and lawyers. There were just enough anomalous cases to create a string of anecdotes that suggested to a critical observer or a badly treated victim that the system was too capricious, too uncertain, and too unsteady to be trusted to continue operating with the same rules and assumptions that have characterized military justice for decades. I do not agree with those assumptions in many respects, but I want to talk today mainly about what is in front of the justice system for leaders, lawyers, and, most importantly, for those facing discipline. We should also think about the impact for complainants, victims, and participants in the process.

Now, the change from a command-driven or command-dominant justice system *is* a big change, and, in some respects, is more demanding for practitioners because it is less about changes in the rules. As lawyers, we can learn the law and at least as much about the assumptions on which the system is built. The greater challenge for judge advocates is accomplishing what is expected of them to make the system work. When defining military courses of action, we find operators using the phrase that a plan might "create conditions for" whatever the mission is: taking the hill, bombing an outpost, or providing security transit for refugees. While commanders adjust to a radically different concept of authority and leadership in light of losing or dulling some of the tools of discipline, it is the lawyers' turn to create conditions for successful

implementation of a foundational change. Before we finish, I will offer some of the challenges facing practitioners, suggest some approaches, and conclude with some recommendations and observations on the military justice system, as we are a couple of years away from the seventy-fifth birthday of the Uniform Code of Military Justice.

So, how should we think about what's next? If you wanted a further "judicialized" system, what is the next set of changes you would seek? Critics of the justice system would like us to have our own *Findlay* case[3]: the UK case that came before the European Court of Human Rights about twenty-five years ago, which pretty much ended traditional military justice in the United Kingdom. Critics would argue that non-deployment felonies should be sent to Federal courts. This would represent, in a way, a return to the disputatious and fragmented justice system of the Supreme Court's *O'Callahan v. Parker*[4] era, which reigned from 1969 until the Court's corrective opinion in 1987, *Solorio v. United States*.[5]

gument that we might at some point see regulation or new legislation intended to bring back the service-connection analysis in fancier threads to demarcate the line between the military and civilian systems.

While I believe it wise to resist the urge to implement additional reform to a justice system that is undergoing its most fundamental change since 1950, so long as we are on the operating table, let me suggest what else may be coming.

Professional Purple Judiciary

Henry Kissinger is said to have said "whatever must happen ultimately should happen immediately."[6] With the move to judge-alone sentencing and the sentencing committee, it seems near inevitable that the military judiciaries will merge into a single purple (joint) judiciary, even as we forfeit the community's involvement in administering sentences. The arguments against it get thinner as time goes by, primarily the need to educate judges on service, customs, and traditions when they hear cases from

We drill commanders to "nest" their judgment on operational matters with that of senior leaders all the time, but in the area where they are least competent and least experienced—military justice—we expect them to ignore their senior leaders, whose counsel is more important in this area than in the operational space where they normally live.

The *Solorio* Court declared simply that the military has jurisdiction in any case in which the accused is a member of the military. *Solorio* is thirty-six years old, and I expect that commanders find the unity of effort that comes from universal jurisdiction as giving them the maximum ability to affect order and discipline. Ceding that authority to the civilian system introduces variables, including the incarceration, trial, and corrections process, which undermine the leaders' ability to affect as many aspects of justice and, therefore, a unit's discipline. It is worth preparing to engage the arother Services. But this probably underestimates judges' brains and adaptability and counsels' ability to articulate these kinds of differences. Judges will be even more consequential under the new revisions, giving rise to a discussion about whether it is time for a board-selected cadre of judicial professionals. And these differences are probably small enough anyway. Does the Marine Corps view unauthorized absences *that* differently from the Air Force that a judge from one or the other Service could not hear a case? We also have to remember to trust counsel to educate the judges, and the judges to judge with some humility. This likely would have the collateral impact of fewer, busier, and more selectively appointed judges.

Panel Selection

As for member selection, with all the changes that have happened, does it almost seem odd that convening authority selection of panel members has survived this long? Are the arguments as strong as they ever were for our kind of blue-ribbon panels with judicial temperament? And with diminished command control, is it important to preserve this as a leader's function? It seems to be the change that drew a lot of scholarly attention over the years, and Major General Kenneth J. Hodson[7] and Brigadier General (Retired) John Cooke[8] both embraced it. It might be worth thinking about revisions short of random selection that would serve the interests that have kept Article 25[9] in play for all these years.

Command Influence

I would like to say a couple of words on command influence. First, on old-school command influence, my argument would be to redefine it, legalize it, tax it. Why do we not do with undue command influence (UCI) what so many jurisdictions have done with cannabis: legalize it and regulate it? Any form of command influence remains uniquely corrupting. We never can declare victory over UCI because each new wave of practitioners has the opportunity to corrupt the system anew and become too personally involved or biased. The arc of the legal universe does not automatically bend toward justice. So, we need measures in place to guard the integrity of the system. Commanders really *will* have less authority and, therefore, less direct opportunity to exert influence. We drill commanders to "nest" their judgment on operational matters with that of senior leaders all the time, but in the area where they are least competent and least experienced—military justice—we expect them to ignore their senior leaders, whose counsel is more important in this area than in the operational space where they normally live.

As a result, some of the old-school constraints on UCI were marginal and unreal-

istic. Reduced command authority calls for a refreshed rubric for evaluating command influence. Then, there is new-school UCI: UCI in a flannel suit. While one set of command influence fades, there is a need to address the new set of potential command influence in the new structure. The lead special trial counsel will report directly to the Secretary of the Army, an official nominated by the President and confirmed by the Senate. The Court of Appeals for the Armed Forces has said for years that there is no such thing as "command influence in the air,"[10] but this is an inaccurate statement. What they meant to say was that most of the command influence in the air was not sufficiently detectable or traceable to warrant judicial relief. It was always in the air, but we had carbon monoxide detectors in place to reduce its reach and its lethality. We need a new term to describe unlawful influence under the new scheme.

These changes to the system have come from Congress, and properly so. Congress is responsible for the rules governing the land and naval forces; however, placing a political appointee at the apex of the system risks seeping into the judgment of those who have to make referral decisions. A recent article in the *Yale Law Journal* talked about the pressures Congress can place directly or otherwise on military practitioners, and it was published even before the move to special trial counsel.[11] The author considers the *Bergdahl* case[12] and others in which Congress delved deeply into particular military justice matters—there really was a bill introduced in Congress called the No Back Pay for Bergdahl Act.[13] So, as we are preparing to implement the new rules, we should think about how to respect Congress's legitimate oversight while guarding against dispositive decisions that tilt one way or another because of a perceived congressional preference.

The Death Penalty

Next, I would suggest that serious thought be given to rescinding the death penalty. It is hard to justify retaining a desuetudinal practice on the books for symbolic reasons. It is hard to imagine a scenario that would plausibly result in an actual execution. The last military execution was approved by President Kennedy, and the accused was hanged at Fort Leavenworth in April 1961. Sixty-two years and twelve commanders-in-chief later, there have been no further executions, despite cases being tried with great sophistication, exactitude, and integrity, and despite multiple court decisions upholding the military death penalty. Regardless of anybody's personal philosophy, there are secondary impacts as well. At the height of the military commission effort, we negotiated with various foreign judicial officials about access to important terrorism evidence around the world. Several countries refused to provide us timely and high-quality evidence because we refused to rule out the possibility of a death verdict in those cases. Just the fact that it was on the books—not even that it had been used—had an impact.

Sixty-two years and twelve commanders-in-chief later, there have been no further executions, despite cases being tried with great sophistication, exactitude, and integrity, and despite multiple court decisions upholding the military death penalty.

Military Corrections

I would also suggest reexamining military corrections to revise the mission or close the facilities. Our lassitude regarding the death penalty naturally prompts the question of why we continue to operate a corrections system when we do not revive legitimate return to duty. There is less reason than ever to keep a boutique corrections system functioning where nearly zero accused are returned to duty. Keeping corrections facilities operating so that we have a warm pipeline of corrections professionals in the event of a major deployment is insufficient reason alone to keep open a set of facilities that are distinguished only by the prior profession of its confinees. Abu Ghraib prison did not exactly validate that model.

Trial Defense Service

We must continue to strengthen our Trial Defense Service (TDS). It is one of the hallmarks of our system, along with the competence and independence that are indispensable to its value for our Service members. Here is something from the old days that I hope you cannot relate to anymore. Many of you know of or read the book *Fatal Vision*.[14] If not, you should put it on your list. It is about a 1970 case at Fort Bragg[15] where a lieutenant was on trial for murdering his wife and children. He was in a room with his TDS attorney and on the phone with his civilian defense counsel, who was going through a very strict law-based inquiry.[16] The civilian attorney then asked the lieutenant to check and see if his military defense counsel's shoes were shined. The lieutenant looked down, confused and incredulous, and responded that no, they were not shined and were "kind of scruffy."[17] The civilian defense counsel said, "Okay, in that case, trust him. Cooperate with him until I can get down there myself."[18]

The civilian defense counsel's point was that if an Army lawyer keeps his shoes shined, he is trying to impress the system. And if he was trying to impress the system—one which had a vested interest in seeing the accused convicted—then he was not going to do any good. The scruffy shoes meant that maybe he cared more about being a lawyer. Well, to us that is probably partly amusing, partly insulting, and definitely way out of date. But there cannot be any compromise on the institutional commitment to competence and independence. It will be truer than ever as we implement this new system.

It does not hurt to remind ourselves that it is not at all a defense counsel's job to serve as a sort of test pilot in improving or validating the new system. Every defense counsel has only one job: defend the person

Military counsel from all the Services had an acute concern for the legitimacy and integrity of the military justice system and the impact on the reputation of the justice system and its practitioners.

they are assigned to defend ethically, for sure, but with a wide band of tolerance for techniques. This high-quality advocacy might well lead to improvements in the system, but that is not their goal. Their goal is to defend the Soldier next to them. And Justice Byron White, who tilted jurisprudentially toward the prosecution, gave the following endorsement to the defense function, which defense counsel should consider if they are contemplating a sleeve tattoo. He said:

> Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the state to its proof, to put the state's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.[19]

And, therefore, it is okay to shine your shoes.

Military Commissions

I would like to briefly discuss military commissions as one last example of transition. At the end of the Reagan administration, in December 1988, a Libyan bomb detonated on a plane over Lockerbie, Scotland, murdering all 259 passengers, who were mainly Americans returning from their studies in Europe for Christmas, and 11 individuals on the ground. A then-young Department of Justice official, William Barr, suggested that the murderers should be tried by military commissions—which had last been used in World War II—because it was not just a crime in his view. It was not just 270 discrete murders, but an attack on America by noncitizen unlawful combatants. His memo advocating this move was incisive and creative, but probably just too novel for an event that was occurring on the seam between two Presidential administrations.

President George W. Bush did revive military commissions, but at some cost and with mixed results. The Army led a team of talented lawyers from all Services in the preparation of the military order putting commissions into place for certain cases of terrorism. For several weeks, we briefed the Secretary of the Army every morning. We researched commissions and assisted with drafting the President's order, which was published in November 2001. The administration showed imagination and audacity in dusting off a mechanism last used before the court-driven criminal law revolution of the middle of the century. The Army leadership endorsed the concept of military commissions and joined in the effort to bring a historically rooted mechanism back to life. Our sense was to look at the changes in military justice and criminal law since 1942, the date of the *Quirin* decision,[20] and decide which to adopt, which to modify, and which to not incorporate at all.

Military counsel from all the Services had an acute concern for the legitimacy and integrity of the military justice system and the impact on the reputation of the justice system and its practitioners. Several key members of the civilian Department of Defense leadership, however, exhibited a lack of confidence in judge advocates, which was helpful in revealing an unfamiliarity with military justice and dated assumptions about practitioners. Some critical differences emerged, and several in the civilian leadership operated on an assumption that we did not share: that the closer they stuck to *Quirin*, the more likely it was that commissions would be successful.

There were a couple of key differences. The civilians wanted to bring back the law member,[21] since it was the law in 1942, out of a worry that—in their terms—rogue military judges would unduly "judicialize" the commission's process. Our sense was that the military judge had become a fundamental, deeply rooted legislative change in effect since 1968: a rudiment of due process. Some key policy professionals did not understand the idea of totally independent military defense counsel.

By 2001, it was the norm for all Services, but some civilian officials, lawyers and not, assumed a pliability on the part of uniformed military defense counsel that would generate easy guilty pleas. They did not understand sufficiently that a military defense counsel who sought a plea agreement would have his work carefully scrutinized. They also did not want to permit civilian counsel to participate in the process, though that perspective changed over time. And, the administration wanted to use this process as part of its effort to reassert executive primacy. At that time, debates surrounded the "unitary executive,"[22] which was a paramount motivation of this senior official who was the theoretical brains behind resuscitating commissions. This factor distorted the judgment of those analyzing this flexible, constitutional mechanism of justice.

Preparation

One of the tools of well-prepared ethical advocacy is Appendix 2.1 of the *Manual for Courts-Martial*,[23] which is the successor to the discussion that used to be after Rule for Courts-Martial 306.[24] As a young prosecutor, I blew that up, photocopied it, and

put it under the glass on my desk so that when I was talking to a commander, I could remember to prompt them with questions that I should have known to be asking. Appendix 2.1 is an exemplary analytic rubric for commanders and, therefore, for those who advise them. It lists factors that boil down to an assessment of the military impact and the human impact of an offense. It helps you fill in your thinking process.

Concluding Thoughts

We are all talking about how significant the change in referral authority is, and it is. But in some respects, it is pretty close to what we have already done. Judge advocates have been the trusted gatekeepers for information and perspective about the case. Here are the strengths. Here are the weaknesses. Here are the variables. Here is a sense of how we have treated similar cases in the past. Now, judge advocates will have the opportunity to be the deciders at the very top of the pyramid. But, most judge advocates will still be preparing cases and making recommendations, although in certain circumstances to the special trial counsel.

So as I conclude, I cannot imagine a better time to be a judge advocate. I do not think that we who have worked in the system get nostalgic about what we did. But we can relate to this period in your careers where the system is in ferment. It needs smart, ethical counsel to give advice and, soon, to make decisions regarding matters of justice. I would suggest you wear your authority confidently, but lightly. In some ways, you can keep commanders closer than ever because they are allowed to influence you. What a tremendous opportunity and responsibility for those who teach the Senior Officer Legal Orientation course here at The Judge Advocate General's Legal Center and School or who are out in the field talking to Soldiers and leaders. The commanders are not your bosses, but you are their emancipated servants, informed by those leaders' perspectives while managing the disposition of significant offenses. Vacuum up that perspective, remain open to hearing—not obeying, but hearing—what is on their minds: why one offense is really serious, why some we think are serious might not be in their eyes, and all that goes into forming and maintaining a combat-ready force.

Georges Clémenceau is said to have originated the phrase "military justice is to justice as military music is to music"[25]—not intended as a compliment. But Clémenceau and John Philip Sousa[26] were more or less contemporaries. The Frenchman likely did not know Sousa, because if he did he would know that the best military music can get your toes tapping and your left foot hitting the ground on the strike of the bass drum. You are the custodians who can continue to show that the French need better martial music or Clémenceau needs a new metaphor. And when you are listening as hard as you can and figuring out the advice to give to those who trust your judgment, sneak another peek at those factors under the glass on your desk. **TAL**

COL (R) Morris is the Chief of Staff and Counselor to the President of The Catholic University of America in Washington, D.C.

Notes

1. This transcript has been edited for brevity and clarity.

2. Manual for Courts-Martial, United States (2019) [hereinafter MCM].

3. Case of Findlay v. The United Kingdom, App. No. 22107/93 (Feb. 25, 1997), https://hudoc.echr.coe.int/eng?i=001-58016.

4. O'Callahan v. Parker, 395 U.S. 258 (1969) (portraying the military justice system in a harsh light, constricting the military's authority to try certain cases, and injecting massive confusion into what constituted service connection).

5. Solorio v. United States, 483 U.S. 435 (1987).

6. *Who Was Betrayed?*, Time, Dec. 8, 1986 at 17, 26 (quoting Henry Kissinger).

7. Major General Hodson, for whom this lecture is named, served as: The Judge Advocate General, U.S. Army, from 1967 to 1971, the first Chief Judge of the Army Court of Military Review, and a principal architect of the Military Justice Act of 1968. Major General Michael J. Nardotti, Jr., *The Twenty-Fifth Annual Kenneth J. Hodson Lecture: General Ken Hodson—A Thoroughly Remarkable Man*, 151 Mil. L. Rev. 202, 202 (1996).

8. Brigadier General Cooke served in the U.S. Army Judge Advocate General's Corps from 1972 to 1998. His last assignment was as Chief Judge, U.S. Army Court of Criminal Appeals. *BG (Ret) John Cooke,* JAGCNet, https://www.jagcnet.army.mil/Sites/acca.nsf/xsp/.ibmmodres/domino/OpenAttachment/sites/acca.nsf/55F5C0CE7E3F70A2852584500069EDF3/Attachments/Bio%20-%20BG(R)%20Cooke.docx (last visited Oct. 31, 2023).

9. UCMJ art. 25 (2021).

10. *See, e.g.*, United States v. Shea, 76 M.J. 277, 282 (C.A.A.F. 2017).

11. Max Jesse Goldberg, *Congressional Influence on Military Justice*, 130 Yale L.J. 2110 (2021).

12. United States v. Bergdahl, 80 M.J. 230 (C.A.A.F. 2020).

13. Goldberg, *supra* note 11, at 2145-46; *see also* No Back Pay for Bergdahl Act, H.R. 4413, 115th Cong. (2017).

14. Joe McGinniss, Fatal Vision (Signet 2012) (1983).

15. Now Fort Liberty.

16. McGinniss, *supra* note 14, at 223.

17. *Id.* at 224.

18. *Id.*

19. United States v. Wade, 388 U.S. 218, 257-58 (White, B., concurring in part).

20. *Ex parte* Quirin, 317 U.S. 1 (1942) (upholding a U.S. military tribunal's jurisdiction over the World War II trial of eight German saboteurs).

21. The law member was the predecessor to the military judge. *See* 1920 Articles of War, Pub. L. No. 66-242, sec. II.B, art. 8, 41 Stat. 749, 788; *see also* Judge Advoc. Gen.'s Corps, U.S. Army, The Army Lawyer: A History of the Judge Advocate General's Corps, 1775—1975, at 136-37 (1975).

22. The unitary executive theory, which the Bush administration adopted with Vice President Richard (Dick) Cheney credited as its major proponent, describes the theory that "the [P]resident, given 'the executive power' under the Constitution, has virtually all of that power, unchecked by Congress or the courts, especially in critical realms of authority." Mark J. Rozell & Mitchel A. Sollenberger, *The Unitary Executive Theory and the Bush Legacy*, *in* Taking the Measure: The Presidency of George W. Bush 36 (Donald R. Kelley & Todd G. Shields eds., 2013); *id.* at 37.

23. MCM, *supra* note 2, app. 2.1 (Non-Binding Disposition Guidance).

24. MCM, *supra* note 2, R.C.M. 306.

25. *See, e.g.*, United Nations Educ., Sci., and Cultural Org., Les Droits culturels au Maghreb et en Egypte [Cultural Rights in Maghreb and Egypt] 237 (Souri Saad-Zoy & Johanne Bouchard eds., 2010) (Fr.) ("Il suffit d'ajouter 'militaire' à un mot pour lui faire perdre sa signification. Ainsi la justice militaire n'est pas la justice, la musique militaire n'est pas la musique." ["Just adding 'military' to a word can make it lose its meaning. Thus military justice is not justice, military music is not music."]) (quoting Georges Clémenceau).

26. John Phillip Sousa, who composed the national march, *Stars and Stripes Forever*, served as the 17th Director of "The President's Own" U.S. Marine Band from 1880-1882. *John Philip Sousa,* U.S. Marine Corps, https://www.marineband.marines.mil/About/Our-History/John-Philip-Sousa (last visited Oct. 11, 2023).

The highly talented officers, lawyers, and jurists from the Army and sister Services formally robed and invested as military judges during the 66th Military Judge Course investiture ceremony held on 13 June 2023 in the Decker Auditorium, TJAGLCS, Charlottesville, VA. (Credit: Billie J. Suttles, TJAGLCS)

Closing Argument

Graduation and Investiture Remarks to the 66th Military Judges Course

By Lieutenant General Stuart W. Risch

On 9 June 2023, Lieutenant General Stuart W. Risch, The 41st Judge Advocate General, U.S. Army, delivered the following remarks to members of the staff and faculty, distinguished guests, and officers attending the graduation ceremony for the 66th Military Judges Course at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.[1]

Good morning, ladies and gentlemen, and welcome to our regimental home. On behalf of our entire regiment, let me extend a very warm welcome to each of you and allow me to give a special welcome to our distinguished guests in attendance: Brigadier General Scott Woodard, Marine Corps Lead Special Trial Counsel; Captain (CAPT) Frank Hutchison, Department of the Navy Acting Chief Judge; CAPT Mike Hollifield, Navy-Marine Corps Court of Criminal Appeals Chief Judge; Colonel (COL) Chuck Wiedie, Air Force Chief Trial Judge; COL Tyesha Smith, Army Chief Trial Judge; CAPT Stephen Adler, Coast Guard Chief Trial Judge; CAPT Stephen Reyes, Navy-Marine Chief Trial Judge; and COL Alyssa Adams, Commander and Chief Trial Judge, 150th Legal Operations Detatchment. Thank you all for your steadfast support of this course and to the trial judges in your respective Services.

Before I begin my substantive remarks, I would like to specifically recognize our very special guests in attendance – the Families and friends of these forty-three highly talented officers, lawyers, and jurists from the Army and our sister Services whom we will formally robe and invest as military judges during this ceremony. These exceptional individuals have arrived at this day because of your support, encouragement, love, care, and belief in them throughout their careers. This ceremony is momentous not only for these future judges, our respective Judge Advocate General's (JAG) Corps, and our military Services, but also for you, their Families who have sacrificed mightily to allow these officers to serve our great Nation. Thank you for all you have done, and continue to do, for your Service member.

To our distinguished visitors and special guests, you have joined us at the conclusion of perhaps the most academically rigorous and stressful three weeks of our graduates' careers—the Military Judges Course. This is the 66th iteration of this crucible course, one of our flagship courses here at The Judge Advocate General's Legal Center and School (TJAGLCS). Our faculty and the respective Services recognize it as a demanding, intense, and unforgiving period of instruction and training. The course is challenging because it has to be. Our Nation, its citizens, and the Military Services all expect the utmost dedication, intellect, and judgment from our military judges. As a result, the services ensure that only the foremost military justice practitioners, possessing premier legal minds and appropriate temperaments, are selected to attend this course.

Most of you in attendance are aware of my interest in, and affection for, history and the significance of certain people, places, and things, particularly concerning today's event and its location. Admittedly, I would be remiss if I didn't take an opportunity to briefly discuss some Army JAG Corps history tied to this meaningful ceremony.

It is fitting that this ceremony is being held in Decker Auditorium, which is named in honor of Major General Charles L. Decker—The 25th Judge Advocate General of the Army. He had a significant and lasting impact on military law in the United States, as one of the drafters of the *Manual for Courts-Martial*,[2] both before and immediately after the Uniform Code of Military Justice (UCMJ) was promulgated.[3] Major General Decker's efforts laid the groundwork for Major General Kenneth J. Hodson's tireless work with the American Bar Association and Congress to make the Military Justice Act of 1968[4] a reality. As most of those in attendance know, the respective JAG Corps are preparing to embark on the most significant changes in the area of military justice since that 1968 act.

For those who may not be aware, the Military Justice Act of 1968 transformed our military justice system in myriad ways. One of its most revolutionary changes in modernizing the UCMJ was requiring a separate military judiciary.[5] It is fitting that we are about to invest forty-three of the military's finest lawyers as part of that very same military judiciary in an auditorium named for an individual who profoundly impacted military justice. Major General Decker was a trailblazer in many respects, and our Corps owes him a significant debt of gratitude for his devotion to our regiment and his tireless and insightful work in the military justice arena. With that historical backdrop, let us proceed to the business for which we are all in attendance this morning.

We are here to invest these stellar attorneys with an additional office to that of Soldier, officer, judge advocate, litigator, leader, and mentor, which they proudly hold—that of military judge. Investiture is a long-standing tradition that dates to medieval Europe and the feudal system.[6] Individuals were invested in an office when they were presented with the symbol and authority of that office during a ceremony. The symbol we use today is the black robe, representing the honors and duties of a judge. The authority we bestow upon them today as judges comes, of course, with additional responsibility. The black robe signifies their role as both a judge and a representative of the law.

The tradition of the black robe for American judges dates to 1801. During his U.S. Supreme Court swearing-in ceremony, Chief Justice John Marshall eschewed the British custom of scarlet robes in favor of a black one.[7] Since Marshall's deliberate decision to break from British legal influence, it has become a tradition that judges throughout the United States don the black robe. In fact, some states have gone so far as to mandate black as the only acceptable color for judges under their purview.[8]

To our soon-to-be judges, do not let the magnitude of what may at first glance appear to be a simple black robe be lost on you. Former U.S. Supreme Court Justice Sandra Day O'Connor stated that the significance of the black robe for judges is that it "shows that all of us [who wear the robe] are engaged in upholding the Constitution and the rule of law."[9] That is no small task, no easy feat.

The oath these forty-three officers will take in due course is just as important as the symbol and authority conferred. Unlike the oath that we are most familiar with, taken by all officers upon commissioning and often renewed during promotions, the oath these officers are about to take is emblematic of their unique judicial role. They will soon stand before you and take an additional oath, one with the guiding principles of *impartiality, their conscience,* and the *law.* This oath complements their commissioning oath, the U.S. Oath of Office.[10] Yet, it represents the dual role each of them will have as a U.S. military officer and a judicial officer. The latter role requires them to uphold the law while being guided by impartiality and conscience. The JAG Corps of all Military Services are teeming with proud dual professionals, those who serve the profession of arms and the profession of the law. Still, these forty-three individuals are about to embark on a genuinely uncommon journey within our ranks by becoming members of the Trial Judiciary.

To the graduates: by joining the Trial Judiciary, I know you understand that much is expected of you. Your new roles demand leadership, scholarship, focus, legal precision, and the wisdom of Solomon. Rest assured that each of you possesses the tools and requisite temperament to understand those expectations and to excel in your new duty, even if you may sometimes feel as if the sword of Damocles is precariously ever-present. Military judges have an immense responsibility, for they protect our time-tested military justice system, a legal system unlike any other. Our system ensures good order and discipline for our military, its commanders, and leaders while simultaneously protecting the rights of our Soldiers, Sailors, Airmen, Guardians, Coast Guardsmen, and Marines. Our judges, counsel, and commanders are all part of this vital process. Each must fully and responsibly execute their duties within our system to ensure that the process functions as Congress intended.

The Trial Judiciary has extraordinary powers in our military justice system. Chief among these is the tremendous authority and responsibility to see justice done under the law. In your new roles, you will build precedent for the future, and your cases will become the foundation of the cases that follow. More than most in our ranks, you will shape the law and every practitioner who administers it—a tremendous opportunity,

yet simultaneously, an immense responsibility. So please keep in the forefront of your mind, as I know you will, that you have a sacred obligation to do so justly, equitably, and honorably. The authority invested in you is given to only the most trusted officers in the Army and our sister Services.

Who we select to serve as a judge signals the importance each of the respective JAG Corps places on our military justice system. A review of the service records of these forty-three extraordinary individuals about to be invested and their performance in this rigorous course unequivocally establishes that the right people were selected for the military justice system at the right time. Like their brothers and sisters in arms who have served, or are serving, in the Trial Judiciary or appellate courts with the highest distinction before them, I am supremely confident in their ability to fulfill the monumental responsibilities incumbent on their position and further enhance the stature of our military justice system and the Trial Judiciary.

Our military justice system and TJAGLCS both maintain incredibly high standards. You are present in this auditorium today because you are standard-bearers for excellence. Yet, I urge you to remain humble and eager to continue learning and self-developing as you assume this heightened position of stewardship. Each of you now has the opportunity and duty to steward the profession and those who practice in it so that the bench is never empty. That will require your servant leadership. Never forget that the next generation of aspiring judges is looking to you and *at you*.

The Army Trial Judiciary's motto, which is emblazoned on the coin that our distinguished graduate will receive, is: "Independent but Invested." I charge each of you to guard your independence fiercely and to never shirk from your responsibility to train and mentor the future judges practicing before you.

Effectively mentoring future counsel and future judges will necessitate your relentless pursuit of a mastery of the law. You must remain current on the latest developments in the law by reading opinions from across the Trial Judiciary, military appellate courts, and the U.S. Supreme Court. And likewise, throughout your tenure on the bench, ensure you remain ever vigilant to complacency. Relevant case law will change over time, and each case will present different facts, so even if you have presided over dozens of a specific type of case, you must conduct a refresher on applicable case law to make certain you understand the current legal landscape on that issue.

It is your obligation to be the very definition of principled counsel for the judge advocates practicing before you. You will make difficult calls that could lead to staunch criticism from individuals in the media or Congress. You must tune out the noise and focus on each case, following the facts and applying the law to reach the just result. I charge you to remain faithful to what is true, honorable, fair, and just despite the storms that could arise based on your resolute adherence to those noble concepts. There is an adage in the JAG Corps that says, "Every SJA needs an SJA." I contend that underlying sentiment is just as applicable to the Trial Judiciary in that "every judge needs a judge." If you are ever in doubt about your contemplated decision or actions, seek principled counsel from your learned colleagues in the Trial Judiciary.

Seek out your colleagues for examples. Yet, do not limit yourself solely to examples of prior rulings. Take a deliberate approach to your methodology, temperament, and conduct, and look to the excellent examples around you to help guide you. These can all help lead you to fair and reasoned decisions, while also shepherding you to appropriate comportment as a military judge. To that end, above all, remain humble. The robe you are about to don provides all the gravitas you will ever need. You were selected for this honor in part because of your experience. Thus, it is expected that you will be far more seasoned in military justice than those practicing before you. Regardless of their respective skill level, treat all counsel entering your courtroom with appropriate respect so that all parties to the case unequivocally know they have equal access to justice.

Undoubtedly, much is expected of you. But each of you has proven yourself worthy of the challenge throughout your career, and you have only further confirmed your *bona fides* during this course. I am confident your response to the challenge of serving in the Trial Judiciary will be no different. Please know that I am immensely proud to serve alongside each of you.

Finally, by your word and deed, I charge you to follow the law and your conscience and impartially and fairly ensure that your respective trial judiciaries remain true to their highest principles. Thank you in advance for your unwavering commitment to justice.

With that, let's proceed with robing these forty-three amazing jurists to make their ascension to the bench official. I respectfully request that all in attendance join me in a rousing ovation for these superior officers. Thank you, and I'll meet you on the high ground! **TAL**

LTG Risch is The 41st Judge Advocate General of the U.S. Army Judge Advocate General's Corps at the Pentagon.

Notes

1. This transcript has been edited for brevity and clarity.

2. Manual for Courts-Martial, United States (1951).

3. *See* Colonel Charles L. Decker, *History, Preparation and Processing, Manual for Courts-Martial, United States, 1951*, *in* U.S. Dep't of Def., Legal and Legislative Basis: Manual for Courts-Martial (1951) (providing a brief history of the preparation of the *Manual for Courts-Martial*).

4. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

5. *See id.* sec. 2(2), 82 Stat. at 1335.

6. *See* Robes and Honor: The Medieval World of Investiture (Stewart Gordon ed., 2001).

7. Jean Edward Smith, John Marshall: Definer of a Nation 285-86 (1996).

8. *See, e.g.*, Fla. R. Jud. Admin. 2.340 (2018) ("During any judicial proceeding, robes worn by a judge must be solid black with no embellishment"); Cal. R. Ct. 10.505 (2023) ("The judicial robe required . . . must be black . . . ."); Wis. Sup. Ct. R. 62.02(e) ("Judges shall wear black robes while presiding on the bench . . . .").

9. Sandra Day O'Connor, *Justice Sandra Day O'Connor on Why Judges Wear Black Robes: The Supreme Court Icon Breaks Down the Tradition*, Smithsonian Mag. (Nov. 2013), https://www.smithsonianmag.com/history/justice-sandra-day-oconnor-on-why-judges-wear-black-robes-4370574.

10. 5 U.S.C. § 3331.

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