THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-405

February 2007

Articles

Note from the Field

Book Reviews

CLE News

Current Materials of Interest

Editor, Major Anita J. Fitch
Assistant Editor, Captain Colette E. Kitchel
Assistant Editor, Captain Alison M. Tulud
Technical Editor, Charles J. Strong

The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for $45.00 each ($63.00 foreign) per year, periodical postage paid at Charlottesville, Virginia, and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Editor and Assistant Editor thank the Adjunct Editors for their invaluable assistance. The Board of Adjunct Editors consists of highly qualified Reserve officers selected for their demonstrated academic excellence and legal research and writing skills. Prospective candidates may send Microsoft Word versions of their resumes, detailing relevant experience, to the Technical Editor at charles.strong@hqda.army.mil

The Army Lawyer welcomes articles from all military and civilian authors on topics of interest to military lawyers. Articles should be submitted via electronic mail to charles.strong@hqda.army.mil or on 3 1/2" diskettes to: Editor, *The Army Lawyer*, The Judge Advocate General's Legal Center and School, U.S. Army, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781. Articles should follow *The Bluebook, A Uniform System of Citation* (18th ed. 2005) and *Military Citation* (TJAGLCS, 11th ed. 2006). Manuscripts will be returned on specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed on the World Wide Web by registered users at http://www.jagcnet.army.mil/ArmyLawyer.

Address changes for official channels distribution: Provide changes to the Editor, *The Army Lawyer*, The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P (Mr. Strong), Charlottesville, Virginia 22903-1781, telephone 1-800-552-3978 (press 1 and extension 3396) or electronic mail to charles.strong@hqda.army.mil.

Issues may be cited as ARMY LAW., [date], at [page number].

Articles

Note from the Field

USALSA Report

U.S. Army Legal Services Agency
Trial Judiciary Note

Book Reviews

IN MEMORIAM

Major Michael R. Martinez

29 April 1962 – 7 January 2006

Colonel (Ret.) Fred L. Borch III, JAGC
Regimental Historian & Archivist

"A guy who always had a smile on his face. . ."

To all who knew him, Michael Martinez will be forever remembered for his zest for life, love of family, and devotion to the law and our Army.

Major (MAJ) Martinez was born in Frankfurt, Germany on 29 April 1962 and grew up at Fort Leonard Wood, Missouri. Major Martinez was the son of a career military Soldier. His father, Raymond C. Martinez, was a Vietnam veteran and a career noncommissioned officer who eventually retired as a command sergeant major.

Major Martinez wanted to Soldier, too, and, following in his father's footsteps, he enlisted in the Army in 1988. Major Martinez served eight years as an enlisted Soldier, beginning his military career as a paralegal specialist in the Office of the Staff Judge Advocate, 6th Infantry Division (Light), Fort Wainwright, Alaska. In 1991, MAJ Martinez completed court reporter training at the Naval Justice School, Newport, Rhode Island. He excelled in this course, graduating with honors and receiving the Hibben Award for the highest final average. Major Martinez then returned to Fort Wainwright and served as a court reporter until 1992. For his next assignment, MAJ Martinez served with the 1st Infantry Division, Fort Riley, Kansas, where he became the senior court reporter in that busy jurisdiction. He was promoted to staff sergeant in September 1992.

While on active duty, MAJ Martinez found the time and energy to complete his undergraduate studies and, having accomplished this goal, decided he was up for the challenge of law school and the legal profession. Major Martinez left active duty in 1995 and entered the University of Missouri School of Law in Columbia, Missouri. Despite his busy curriculum as a full time law student, MAJ Martinez still found time to serve as a court reporter in the Missouri National Guard.

As he neared graduation from law school, MAJ Martinez had many opportunities before him. Given his military background, however, it was only natural for him to return to the Army that he loved—and in which he had enjoyed such success. He applied for a commission as a judge advocate and, after graduating and passing the Missouri Bar, now First Lieutenant Martinez entered the 147th Judge Advocate Basic Course in October 1998. His classmate from that course, Major (MAJ) Chris Kennebeck, remembers how much MAJ Martinez knew about criminal law—perhaps not surprising given his time as a court reporter. More importantly, says Kennebeck, "what I remember most about Mike is that he always had time to help . . . and that he had innate leadership skills."

Major Martinez's first assignment as an officer brought him back to Fort Riley, where he served as a legal assistance attorney and trial counsel for the 24th Infantry Division (Mechanized). In 2001, then Captain Martinez was re-assigned to the Combined Arms Center, Fort Leavenworth, Kansas, where he was first the Chief of Military Justice and later the Chief of Administrative Law. Major Jeff Mullins, who served with MAJ Martinez at Fort Leavenworth, remembers him as:

> [A] great guy to work with . . . he always provided the best legal advice and was highly respected by everyone in our office and the entire post. He was extremely helpful to me on many occasions and would sacrifice his time to help out with any issue.

Major Martinez also had many interests outside of work. He was an avid and talented photographer and shared his passion for that hobby with anyone who was interested. He also loved working out and talking about sports. And, most of all, he loved his children and his family.

In 2004, MAJ Martinez moved to the 7th Infantry Division, Fort Carson, Colorado, where he was the Chief of Legal Assistance and was known for his caring client counseling and exceptionally hard work. Major Martinez was also a Field Screening Officer, which meant he was entrusted with selecting future members of the Judge Advocate General's Corps. With more than ten years in the Army, MAJ Martinez knew what soldiering was all about and spoke enthusiastically with young men and women about his experiences as a judge advocate.

In early 2005, MAJ Martinez volunteered to deploy to Iraq with the Fort Carson-based 3rd Armored Cavalry Regiment (ACR). Major Martinez left Fort Carson in November 2005 to join the cavalry regiment that deployed the previous April. This was MAJ Martinez's first overseas deployment in sixteen years of service, and his friends and colleagues remembered that he was proud to be a part of the 3rd ACR and looked forward to practicing law and serving his nation in Operation Iraqi Freedom.

"Everyone is really proud of him," said his brother, Daniel Martinez. "He was dedicated, and he knew what he wanted. He wanted to serve."[1]

One of the last people to see MAJ Martinez was his friend and fellow judge advocate, MAJ Alyssa Adams. Her memory of him is as "a guy who always had a smile on his face ready to greet you." Major Adams last saw MAJ Martinez at a detainee operations conference in Tikrit, Iraq, in January 2006, and talked to him the night before he was killed. Major Martinez "was in good spirits and was ready to tackle his last six weeks before heading back [to Fort Carson]," she remembers. Major Martinez knew then that he would be coming to the 55th Graduate Course in the summer of 2006, and he looked forward to moving to Charlottesville with his wife Kelly and their children.

On 7 January 2006, MAJ Martinez was passenger on a UH-60 Blackhawk helicopter flying to the 3rd ACR headquarters. That helicopter crashed seven miles east of Tal Afar, a northern city near the Syrian border MAJ Martinez and eleven other crew and passengers were killed.

Major Martinez was posthumously promoted to major on 10 January 2006 and posthumously awarded the Bronze Star Medal. His other awards and decorations include the Meritorious Service Medal, Army Commendation Medal, Army Achievement Medal, Army Good Conduct Medal, National Defense Service Medal, Global War on Terrorism Service Medal, the Iraqi Campaign Medal, the Noncommissioned Officer Professional Development Ribbon, Army Service Ribbon, Overseas Service Ribbon, Parachutist Badge, and Air Assault Badge.

Major Martinez is survived by his wife Kelly; three sons, Alexander, Colby, and Benjamin; two stepdaughters, Samantha and Kathryn; his mother, Beatrice; and his brother, Daniel. All who knew MAJ Martinez were shocked at his passing. "Mike was my only brother," stated Daniel Martinez. "It's a deep hurt. We're going to miss him deeply."[2] His tremendous success as a Soldier was a model for others, and his love of life and family was an inspiration to all his friends and colleagues.

As a token of admiration and respect for MAJ Martinez, a stained glass window honoring his memory has been donated by the cadre of the Noncommissioned Officer Academy, The Judge Advocate General's Legal Center and School (TJAGLCS). The window dedication ceremony will be held at the TJAGLCS Hall of Heroes on 4 June 2007.

---

[1] Dick Foster & Ivan Moreno, *3 Carson Crash Victims ID'd*, ROCKY MOUNTAIN NEWS, Jan. 11, 2006, http://www.rockymountainnews.com/drmn/local/article/0,1299,DRMN_15_4379225,00.html.

[2] *Id.*

Preparing Interrogators to Conduct Operations Lawfully

Major Thomas H. Barnard[*]

A top concern for commanders preparing Soldiers for operations is the ability to explain to those Soldiers the legal rules and limits of operational authority. Training is the number one mission of a unit preparing to deploy and legal training can help eliminate unnecessary problems once a unit steps into the operational mission. The task of training human intelligence (HUMINT) collectors to comply with legal principles is not overly complicated or time consuming. This article provides commanders and legal advisors with a basic framework for training HUMINT collectors, specifically interrogators,[1] to deploy and conduct operations lawfully and consistent with Army values.

Defining the Desired End-State

The first step of any training is defining the desired end-state. In the context of legal training for interrogation operations, a commander has to communicate a vision of how he considers a properly trained HUMINT collector will act and what they will look like from a legal perspective. The end-state for training should include the following four objectives: First, every Soldier must be trained to comply with the law. That, however, is only the minimum standard. The commander must incorporate training that pushes Soldiers beyond mere compliance and into comprehension of the laws and rules. This cognitive development is the second objective. Within the second objective, each Soldier must understand the tactical, operational, and *strategic* impacts of his actions.

While the first two objectives focus the Soldier on only his conduct, the third training objective requires a Soldier to look beyond his actions. The ideal interrogator must see himself as part of a team, with the desire to both encourage and expect compliance from coworkers. The trained Soldier recognizes his role as a guardian of public trust; he will see the need to impose a duty upon himself to help uphold the law. The fourth objective is for the interrogator to be able to maximize use of all available tools for intelligence collection because of a complete knowledge and understanding of the "left" and "right" legal limits of operations. Soldiers who struggle with this final objective often tend to focus on the law only as a limiting or restricting mechanism. As a desired end state, a successfully trained Soldier pieces the training together, realizes the many layers of impacts his conduct can have, and sees operations through a lens of what he can do, rather than focusing on the courses of action that violate law or policy.

The Four Building Blocks to Success

To reach these training objectives, the commander can rely on the "Four Building Blocks to Success": Code of Conduct training; Intelligence Oversight training; Law of War Fundamental Principles; and the Application of the Law of War to Interrogation and Detainee Operations.

Code of Conduct Training

Training on the Code of Conduct is part of standard Army training,[2] but it also has a particular relevance to professionals who work with detainees. In addition to being valuable training for any deploying or deployable Soldier in the event of

---

[*] Judge Advocate, U.S. Army. Currently assigned as a U.S. Army Trial Defense attorney, U.S. Army Trial Defense Service, Region I, Aberdeen Proving Ground, Maryland.

[1] Intelligence interrogation is a subset of HUMINT collection operations and is regulated as a source operation under Department of Defense guidance. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS intro. Pt. II and paras. 5-50 to 5-82 (6 Sept. 2006) [hereinafter FM 2-22.3]; *see also* Memorandum, Under Secretary of Defense for Intelligence (USD(I)), subject: Guidance for the Conduct and Oversight of Defense Human Intelligence (HUMINT) (S) (14 Dec. 2004); Memorandum, Under Secretary of Defense (I), subject: Implementing Instructions for the Conduct and Oversight of Defense Human Intelligence (HUMINT) (S) (7 Sept. 2005) (This guidance is classified, but legal advisors to units conducting source operations, including interrogations, need access to these documents).

[2] The Code of Conduct for U.S. Armed Forces was first published in 1955 by President Dwight D. Eisenhower. Exec. Order No. 10,631, 3 C.F.R. 266 (1954-1958). President Carter later amended the Code of Conduct in 1977. The Code of Conduct outlines the basic responsibilities and obligations of all U.S. servicemembers. The Code of Conduct contains the following six articles:

> Article I: I am an American fighting in the forces that guard my country and our way of life. I am prepared to give my life in their defense.
>
> Article II: I will never surrender of my own free will. If in command, I will never surrender the members of my command while they still have the means to resist.

capture, Code of Conduct training forces interrogators to think from the perspective of a captured person and to consider that most enemy Soldiers plan for their own capture with similar training and advice.

Understanding the mindset of someone in captivity is crucial to understanding the rationale for some legal limitations on treatment; this understanding also provides insight on how the HUMINT collector's behavior can manipulate the detainee's position. Code of Conduct training can be conducted in a classroom setting using the lecture method. The class can be taught by a non-lawyer and would benefit from input by an experienced noncommissioned officer (NCO) or Warrant Officer or, if possible, a former prisoner of war (POW). The key topics to discuss include the six articles of the *Code of Conduct*, with an emphasis on the "bounce-back" provision in Article V.[3] A discussion of Army values is appropriate to include as part of Code of Conduct training. The obligations of the Code of Conduct can be explained in terms of Army values, to which most Soldiers can already relate. Furthermore, discussing Army Values during Code of Conduct training will facilitate a more in-depth discussion during pre-deployment training, specifically, the interrogation block of training. Trainers should also conduct research to provide training relating to peace-time captivity and captivity by terrorists.[4] Trainers should consult the following helpful references when preparing Code of Conduct training:

- Department of Defense Directive 1300.7, Training and Education Measures Necessary to Support the Code of Conduct (8 Dec. 2000)
- U.S. Air Force Instruction 36-2209, Survival and Code of Conduct Training (27 May 1997)
- U.S. Dep't of Army Regulation 350-30, Code of Conduct, Survival Evasion, Resistance, and Escape (SERE) Training (10 Dec. 1985)
- Chief of Naval Operations Instruction 1000.24B, Code of Conduct Training (12 May 1989)

Code of Conduct training, like all training, will benefit from realistic vignettes or problems for discussion throughout the lecture. The following is an example adapted from *Training Circular 27-10-1*, *Selected Problems in the Law of War*:

> Sergeant (SGT) M is captured. The interrogating enemy officer, to whom SGT M gave his name, rank, service number, and date of birth, tells SGT M he is accused of war crimes because he returned fire against an enemy tank and killed a civilian in the process. The interrogator demands that SGT M explain his actions and unit's operations or face criminal prosecution. He is told if he refuses to defend himself, he will surely be convicted. What should SGT M do?

> Article III: If I am captured I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy.
>
> Article IV: If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way.
>
> Article V: When questioned, should I become a prisoner of war, I am required to give name, rank, service number, and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.
>
> Article VI: I will never forget that I am an American fighting for freedom, responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America.

U.S. DEP'T OF ARMY, REG. 350-30, CODE OF CONDUCT, SURVIVAL, EVASION, RESISTANCE, AND ESCAPE (SERE) TRAINING app. B (10 Dec. 1985) [hereinafter AR 350-30]. Code of Conduct training is required under *Army Regulation 350-1, Army Training and Leader Development* as mission readiness, integrated, and refresher training. U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT tbl. G-1 (13 Jan.. 2006) [hereinafter AR 350-1]. The training has been designed traditionally to prepare Soldiers for what to expect and what is expected of them if they are captured by the enemy.

[3] The "Bounce Back" provision comes from Article V of the Code of Conduct. AR 350-30, *supra* note 2, App. B, art. III. The "Bounce Back" provision recognizes that enemy interrogators will make some progress, but stresses that a servicemember recover and force the enemy interrogators to go through the whole process of breaking a detainee again. *See id.*; *see also* Robert K. Ruhl, *The Code of Conduct*, AIRMAN, May 1978, *available at* www.au.af.mil/au/awc/awcgate/au-24/ruhl.pdf. An interrogator who understands this will understand that enemies will probably receive the same training. *See* AR 350-30, *supra* note 2, para. 4-16 (b)3.

> Understand that, short of death, it is unlikely that a [prisoner of war] PW can prevent a skilled enemy interrogator, using all available psychological and physical methods of coercion, from obtaining some degree of compliance by the PW with captor demands. However, if taken past the point of maximum endurance by the captor, the PW must recover as quickly as possible and resist each successive captor exploitation to the utmost. The PW must understand that a forced answer on one point does not authorize continued compliance. Even the same answer must be resisted again at the next interrogation session.

Id.

[4] For additional training resources and references regarding more advanced training, review the links and resources at the Air War College Military Index to the Internet website at www.au.af.mil/au/awc/awcgate/awc-ndex.htm#s. *See also* Joint Personnel Recovery, www.jpra.jfcom.mil (last visited Feb. 20, 2007).

Sergeant M should not give any additional information to the enemy, regardless of threats against him. He has no obligation to answer questions beyond name, rank, service number, or date of birth. He has no obligation to answer additional questions by the enemy concerning the lawfulness or his potential criminal liability in a foreign court. Sergeant M's conduct appeared to be lawful, because he was returning fire against a lawful target. Sergeant M should only point out that he has acted in compliance with the law of war and is therefore not subject to prosecution.[5]

This sort of training on the Code of Conduct is extremely relevant to subsequent interrogation training because it points out to the Soldier that detainees cannot be forced to talk;[6] they must be convinced to talk because talking is in their best interest.

Intelligence Oversight Training

All intelligence professionals are required to receive training in Intelligence Oversight.[7] This training is extremely important immediately preceding a deployment because it reminds each HUMINT collector that his specialty is unique and subject to additional regulations. Most importantly, it reminds Soldiers of the reason for intelligence oversight regulations—the balance between individual liberty and the need for intelligence.[8]

Understanding this balance is essential to developing an ideal HUMINT collector. Using reasoning skills to select courses of action is part of developing a values-based judgment process. (Note: Balancing tests are used again in training Block 3: Law of War Fundamental Principles.[9]) Additionally, this training provides units a refresher on some authority requirements for special collection techniques.[10] Lastly, and most importantly, Intelligence Oversight training begins the processes of instilling in each Soldier the reporting obligations for questionable activities and certain federal crimes.[11] Developing a sense of duty that includes being responsible for the actions of everyone participating in the interrogation, reinforces earlier training objectives. Additionally, the obligation for enforcing rules and reporting criminal action is consistently recognized in Army standards.[12]

Intelligence Oversight training is easy to conduct in a classroom environment using the lecture method. A lawyer is the recommended instructor for intelligence oversight and is a primary source for assistance in interpreting intelligence oversight principles.[13] However, a non-lawyer, perhaps the intelligence oversight officer for the unit, can conduct this training if a lawyer is not available.

The key topics for Intelligence Oversight training include minimal coverage of Procedures 1 through 4, 14 and 15 as well as Chapters 16 and 17 of *Army Regulation 381-10, U.S. Army Intelligence Activities*, as well as any procedures pertaining to special collection techniques a unit employs.[14] The training must emphasize the importance of reporting under Procedure 15 and Chapter 16, and highlight the availability of a unit legal advisor for answering questions pertaining to the interpretation of *Army Regulation 381-10*. Trainers may wish to consult the following useful references:

---

[5] *See* AR 350-30, *supra* note 2; *see also* Geneva Convention Relative to the Treatment of Prisoners of War art. 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW] (regarding the requirement for POWs to only give name, rank, service number, and date of birth, and the prohibition on using physical or mental coercion).

[6] *See* AR 350-30, *supra* note 2; *see also GPW*, *supra* note 5.

[7] *See* U.S. DEP'T OF ARMY, REG. 381-10, U.S. ARMY INTELLIGENCE ACTIVITIES para. 14-1 (22 Nov. 2005) [hereinafter AR 381-10] (outlining the requirements for training of intelligence professionals).

[8] *See id.* para. 1-1.

[9] *See* Law of War Fundamental Principles, *infra* pg. 4 (discussing proportionality).

[10] Special collection techniques from *AR 381-10*, in Procedures 5 through 10 are not those typically used in an interrogation setting. However, HUMINT collectors outside the interrogation booth need to be aware of the unique approval requirements. Additionally, the HUMINT collector needs to understand the sort of information which could serve as the basis for requests for these types of collections. *See also* U.S. DEP'T. OF DEFENSE, REG 5240.1R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS (11 Dec. 1982) [hereinafter DOD REG. 5240.1R]; *see generally* AR 381-10, *supra* note 7, procs. 5 - 10.

[11] *See* AR 381-10, *supra* note 7, at proc. 15 and ch. 16.

[12] *See* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY paras. 2-18, 4-4, and 4-5 (1 Feb. 2006); *see also* AR 381-10, *supra* note 7, proc. 15 and ch. 16. *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV para. 95 (2005) [hereinafter MCM] (discussing misprision of serious offense); *id.* R.C.M. 301; U.S. DEP'T OF ARMY, REG. 190-40, SERIOUS INCIDENT REPORTS (9 Feb. 2006).

[13] *See* AR 381-10, *supra* note 7, para. 1-6.

[14] *See id.* para. 14-1.

- U.S. Army Regulation 381-10, *U.S. Army Intelligence Activities* (22 Nov. 2005)
- U.S. Department of Defense Regulation 5240.1R, *Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons* (11 Dec. 1982)

The most effective intelligence oversight vignettes will be those that are made relevant to a situation an interrogator may encounter. The following is an example of a vignette that can be incorporated into the training:

> During a raid in a local village in Iraq, U.S. Soldiers capture a number of suspected insurgents who were firing on U.S. and coalition forces. As you are conducting the screening process, one of the captured persons claims his place of birth is Chicago. What are some impacts of this information?

While personnel overseas are presumed to be non-U.S. persons, once a unit receives information that an individual may be a U.S. person, the unit has an obligation to gather more information to clarify that person's status before doing any other intelligence collection.[15] Additionally, the detainee's citizenship status can impact how, when, and by whom he is questioned. This information should immediately be reported through the chain of command for further guidance.[16]

This sort of vignette is valuable because it points out that interrogators are trained to be aware that certain issues require additional guidance. The discussion will focus on reporting and the need for seeking additional guidance prior to proceeding with the questioning.

Law of War Fundamental Principles

The class on Law of War fundamentals is the basic orientation to the provisions of the law of war that govern Soldier conduct during all military operations. Every Soldier receives this kind of training,[17] but commanders should be committed to ensuring it is more than an hour of "checking the block." Interrogators will need a sound understanding of the fundamental principles to properly grasp the need and rationale for the rules on interrogation operations. Law of War training should, at a minimum, discuss the four principles of Distinction, Military Necessity, Unnecessary Suffering, and Proportionality.[18] During this training, Soldiers will get their second exposure to a balancing test, which will also help Soldiers realize they are, in fact, crucial decision makers in an armed conflict. Additionally, an overview of protected places, persons and things, especially the standard rules governing POW camps, categories, and rights, will be essential.[19] Lastly, critical facets of this training block include reinforcement of potential criminal liability and the duty to report violations.

Some valuable references for this training include:

- Chairman of the Joint Chiefs of Staff Instruction 5810.01B., *Implementation of the DOD Law of War Program* (25 Mar. 2002 (current as of 28 Mar. 2005)
- Department of Defense Directive 2311.01E, *DOD Law of War Program* (9 May 2006)
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31
- Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287
- Department of Army, Field Manual 27-10, *The Law of War* (15 July 1976)

---

[15] When collecting outside the United States, individuals are presumed to be non-U.S. persons unless there is specific information to the contrary. *See id.* para. 1-8. Once you get specific information that an individual may be a U.S. person, a number of provisions change the manner in which information concerning that individual is treated. *See generally id.*

[16] Based on professional experience as a Judge Advocate working with U.S. Army Intelligence from 2004 until 2006, the capture and detention of anyone who may be a U.S. person will likely be a priority intelligence requirement (PIR).

[17] *See* Message, 240248Z Aug. 2005, Headquarters, U.S. Dep't of Army, subject: Law of War Training.

[18] *Id.* For a current training module, *see* www.jagcnet.army.mil. Go to The U.S. Army Judge Advocate General Legal Center and School (TJAGLCS) home page, click on "Departments", then "Training Development Directorate", and then "Standard Training Packages." On that page, you will be able to find the most current approved Law of War training package.

[19] An overview of the Geneva Convention rules regarding these detention operations issues could be discussed during this block and discussed again in much greater detail during the interrogation and detainee operations block.

- Department of Army, Training Circular 27-10-1, *Selected Problems in the Law of War* (June 1979)
- Int'l & Operational Law Dep't, The Judge Advocate General Legal Center & School, U.S. Army, JA 422, *Operational Law Handbook* (2006)

Law of War training can be accomplished in a classroom setting using the lecture method. A judge advocate should conduct and facilitate the training and discussion. The following is an example vignette that could be used for Law of War training:

> Your unit overtakes an enemy medical convoy displaying Red Cross symbols. The convoy fires upon the platoon. The platoon returns fire and seizes control. Inspection reveals that the convoy carried both wounded and artillery ammunition. The captured personnel stated that they fired because they feared the ammunition would be detected and they would be punished. How do we treat captured medical personnel; enemy wounded; captured medical vehicles?

Normally, medical equipment is protected from attack unless it is used in a manner inconsistent with its mission by conducting attacks or being used to support attacks.[20] When enemy medical assets initiate an attack, the vehicles and equipment are lawful targets and may be used once they are captured. In this case, any enemy medical personnel who acted as combatants lose their protected status and become lawful targets. Furthermore, the Soldiers in the enemy convoy lose the right to be considered a Retained Person because they failed to be exclusively engaged in medical activities and may also lose the opportunity for Prisoner of War status for violating the Law of War by misusing the Red Cross.[21] The wounded who surrender or are not part of the fight are protected persons, and the capturing unit would have an obligation to remove them from battlefield and care for the wounded. After ensuring the enemy wounded receive adequate provisions, the capturing unit may then convert medical vehicles to any legal use by removing any medical insignia from the vehicles.[22]

Application of the Law of War to Interrogation and Detainee Operations

The final, and most crucial, block of instruction is the application of the previous training blocks to sensible rules for interrogators during interrogation and detainee operations. This extension of fundamental Law of War principles into Soldiers' unique areas of expertise is necessary to put the training into a relevant context. The training will highlight the potential strategic importance of their mission and lessons learned from recent operations will highlight the incredibly negative impact of illegal behavior by individual Soldiers. Lastly, this scenario-based training will assist in building interrogators' confidence prior to conducting operations.

The key topic for this training is the coverage of the basic standards of detainee operations and treatment. The training must reinforce the following concepts: that the same standard of treatment—humane treatment—should be provided to all detainees regardless of status; the reporting requirements and organizations where a Soldier can go to make a report of detainee abuse; the limitations on who can conduct interrogations and what sort of activities are appropriate in support of interrogation; the potential for punitive action for abuse or failures to report; the relevant principles of the Army values to reinforce a number of conduct and reporting requirements; and the lessons learned from current operations and past instances of abuses. The basic standard concept may be effectively presented using the acronym "THINK,**"** explained in the next section.

This training can be conducted in two parts: first, in a classroom environment using the lecture method with some vignette application; and second, in a field training exercise (FTX) or military readiness exercise involving realistic legal and

---

[20] *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 18-21, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC], Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]. Once enemy medical equipment is used to engage in combat operations, that equipment and the personnel operating that equipment lose their protected status and become lawful targets.

[21] *See* GPW, *supra* note 5, arts. 3 and 4. In order to be considered a prisoner of war (POW), detainees must satisfy the four requirements of GPW art. 4. The failure to satisfy these requirements removes critical benefits which relate to legal rights, but have no impact on the standard of humane treatment reflected in Article 3 of the GPW and the GC [article 3 of both treaties is identical and generally referred to as "Common Article 3."] Soldiers should be taught the fundamental impact of not getting POW status: losing combatant immunity, *id.* art. 99, and losing the guarantee of repatriation at the end of hostilities, *id.* art. 118. Law of War training is important because Soldiers need to know that detainees might not be entitled to POW status and may be criminally punished. Furthermore, by addressing the question of POW status as a separate question from standards of treatment, Soldiers will not be confused or misled into thinking that because a person is not a POW that a different or lower minimum standard of treatment applies.

[22] *See* GWS, *supra* note 20, art. 35 (stating "Should such transports or vehicles fall into the hands of the adverse Party, they shall be subject to the laws of war, on condition that the Party to the conflict who captures them shall in all cases ensure the care of the wounded and sick they contain.").

ethical dilemmas in an interrogation environment. A judge advocate, with support from a trained and experienced interrogator, should conduct training. Key resources include the following:

- The references listed in Part 3: Law of War Fundamental Principles
- Department of Defense Directive 2311.01E, *DOD Law of War Program* (9 May 2006)
- Detainee Treatment Act of 2005, Public Law 109-148[23]
- Department of Defense Directive 3115.09, *DOD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning* (3 Nov. 2005)[24]
- Department of Defense Directive 2310.01E, *DOD Detainee Program* (5 Sept. 2006)[25]
- Message, 292015Z MAR 05, Joint Chiefs of Staff, subject: CI, HUMINT and Interrogation Support to Military Operations (authorizing implementation of Appendix C, Joint Publication 2-01.02, Joint Interrogation Operations)
- Department of Army, Field Manual 2-22.3, *Human Intelligence Collector Operations* (6 Sept. 2006)
- Manual for Courts-Martial (2005)
  Theater specific guidance[26]

The "THINK" Model

The THINK model uses five basic rules to provide a logical framework for interrogators to understand the basic standards for the treatment of detainees, as well as to reinforce the need of each Soldier to use an ethical and value based decision making process:[27]

Treat all detainees with the same standard—While a detainee's legal status may impact the use of certain interrogation approaches and techniques,[28] a unit's treatment of detainees and interrogation techniques cannot violate certain principles no

[23] Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (also commonly referred to as the McCain Amendment).

[24] This directive is one of the most recent pieces of guidance given by the DOD and contains several critical provisions. One of the most significant is the requirement for interrogators to be trained and certified and that only individuals who have attended an approved course can satisfy that requirement. *See* U.S. DEP'T OF DEFENSE, DIR. 3115.09, DOD INTELLIGENCE INTERROGATIONS, DETAINEE DEBRIEFINGS, AND TACTICAL QUESTIONING para. 4.1.9.2 (3 Nov. 2005) [hereinafter DOD DIR. 3115.09]. Additionally, this reference includes some definitions that are helpful to instruction. Specifically, look at the definition of: "detainee" (all persons held in captivity, regardless of legal status); the Law of War; and tactical questioning. *See id.* at encl. 2.

[25] This reference reiterates and reinforces the definitions mentioned *supra* note 24. *See* U.S. DEP'T OF DEFENSE, DIR. 2310.1E, DOD DETAINEE PROGRAM encl. 2 (5 Sept. 2006) [hereinafter DOD DIR. 2310.1E]. Additionally, this guidance clarifies that the "standards articulated in Common Article 3 of the Geneva Convention of 1949" shall be applicable "without regard to a detainee's legal status." *See id.* para. 4.2.

[26] Theater guidance is often the most critical reference to soldiers. Theater guidance should bring together all applicable laws and treaties to give practical, easy to understand guidance to soldiers. This fine-tuned, implementation-based guidance will almost always be classified, as the release of this information could pose a serious threat to the success of future interrogations. However, training should ensure this guidance is the primary document used for governing interrogation operations and units should conduct training on the policy at least quarterly.

[27] *See* FM 2-22.3, *supra* note 1, para. 5-76 which states:

> 5-76. While using legitimate interrogation techniques, certain applications of approaches and techniques may approach the line between permissible actions and prohibited actions. It may often be difficult to determine where permissible actions end and prohibited actions begin. In attempting to determine if a contemplated approach or technique should be considered prohibited, and therefore should not be included in an interrogation plan, consider these two tests before submitting the plan for approval:
>
> If the proposed approach technique wee used by the enemy against one of your fellow soldiers, would you believe the soldier had been abused?
>
> Could your conduct in carrying out the proposed technique violate a law or regulation? Keep in mind that even if you personally would not consider your actions to constitute abuse, the law may be more restrictive.

These two tests are included in the manual to instill in each Soldier the sense of duty and responsibility over his or her own actions. The questions are designed to force considerations of both ethical and legal obligations, and to give Soldiers a mechanism for making decisions in the area of interrogation even when they operating without direct supervision or adequate guidance. This method of decision making reinforces the "THINK" paradigm and the circumspection of thinking from the detainee's perspective began during the Code of Conduct training.

[28] The legal status of a detainee under the Geneva Convention does have consequences on interrogation approaches and techniques in two ways: First, with regard to the incentive approach, the legal status of a detainee impacts what may be considered a "right" versus an "incentive" or "privilege." *See* FM 2-22.3, *supra* note 1, para. 8-21. Take for instance a detainee who is entitled to the status as a POW under GPW, *supra* note 5, art. 4. That detainee has a right to be repatriated at the end of hostilities. *See* GPW, *supra* note 5, art. 118. Repatriation at the end of hostilities would, therefore, be an inappropriate incentive for a detainee who has the legal status of POW. However, repatriation at the end of hostilities may be an appropriate incentive for a detainee who does not have the legal status of a POW. Second, *FM 2-22.3* includes the interrogation technique of "separation." *See* FM 2-22.3, *supra* note 1, app. M. This technique is not authorized for use with a detainee who has the legal status of POW under GPW, *supra* note 5, art. 4. *See* FM 2-22.3, *supra* note 1, app. M, para. M-1.

matter what technical legal status a detainee has. Security holds, military intelligence holds, persons under U.S. control—none of these labels change how detainees should be *treated* during an interrogation.

Humane treatment is the standard[29]**—**A simple way to understand the concept of humane treatment is to think of it as having the following three major components:[30] (1) Treatment must guarantee adequate provisions of basic life necessities like food, water, shelter, clothing, medical aid, and protection; (2) Respect for individual human dignity;[31] and (3) Prohibition against illegal conduct.[32]

Interrogators interrogate—Department of Defense (DOD) policy limits authority to conduct interrogations to individuals trained and certified in courses designated by the Defense HUMINT Management Office (DHMO).[33] Interrogators need to be able to focus on doing their job and letting other specialties do theirs.[34] HUMINT professionals need to be careful not to allow their words or conduct to create the impression that they want the other specialties supporting detainee operations to "set the conditions for successful interrogations."

Need to report abuses—Soldiers must serve as the commander's eyes and ears and report abuses. The training should include practical guidance on reporting abuses as described in the Army HUMINT Field Manual.[35] Several authorities require interrogators to report abuses and questionable activities. Failure to report such abuses may subject the interrogator to adverse actions. The training must also reinforce Soldiers' responsibility for protecting individuals held captive by the United States. As the custodians of detainees, the United States must ensure interrogators from other nations, or agencies outside the DOD, comply with the DOD policy to treat detainees with the same standards as U.S. Soldiers when interrogating a detainee held in a U.S. military facility.[36] Additionally, Soldiers must be trained to document and report suspected abusive behavior by these third parties.[37]

Know the approved approaches and techniques—The training must include an overview of the techniques that will be authorized in deployed area of operations (AOR). If the unit does not have theater-specific guidance then, Field Manual 2-22.3 serves as the baseline for the techniques that can be legally employed.[38] The baseline authority may be further restricted

---

[29] *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, § 1003 (prohibiting "cruel, inhuman or degrading treatment"); *see also* DOD DIR. 3115.09, *supra* note 24.

[30] Judge advocates must understand that no authority has come forward to say exactly what is meant by the phrase "humane treatment." Accordingly, there is no single definition. One method of defining humane treatment, however, which has been successful with thousands of personnel trained by the U.S. Army Intelligence Center and the U.S. Army Intelligence and Security Command, is the three part approach described above. This three part definition has been essentially adopted and established as DOD guidance in the new *DOD Directive* 2310.01E. *See* DOD DIR. 2310.01E, *supra* note 25, encl. 4, para. E4.1.1.1 – E4.1.1.3. The phrase "humane treatment" finds its legal origins in the Geneva Convention. The phrase is used repeatedly throughout both GPW and GC, indicating there is no deviance from the standard regardless of the legal status of the detainee. At a minimum, the phrase guarantees the protections of Common Article 3. *See id.* para. 4.2. A logical means of providing useful substance to the phrase "humane treatment" is the consideration of the enumerated rights common to both GPW and GC, as the phrase "humane treatment" is common to both. *Compare* GPW, *supra* note 5, arts. 3 and 13, GC, *supra* note 20, arts. 3 and 27. Similar logic appears to support the explanation of humane treatment in U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, CIVILIAN INTERNEES, RETAINED PERSONNEL, AND OTHER DETAINEES para. 1-5 (1 Oct. 1997). Additionally, the reference to humane treatment is included over twenty times in the new field manual. *See generally* FM 2-22.3, *supra* note 1; *see also* DOD DIR. 3115.09, *supra* note 23, para. 3.1 *and* DOD DIR. 2310.01E, *supra* note 25, para. 4.2 and encl. 4.

[31] This respect corresponds to treatment that does not degrade or humiliate detainees, shows cultural awareness, and respects an individual's immutable characteristics like gender or race.

[32] Actions such as physical assault, threats, sexual assault, hostage taking, and removal of Geneva Convention protections are always illegal, and any unit legal advisor should be able to assist servicemembers in outlining these rights.

[33] *See* DOD DIR. 3115.09, *supra* note 24, paras. 3.1 and 4.1.9.2.

[34] As noted in some of the investigations into the abuses at Abu Ghraib, confusion over the limits and roles of Military Police guards and interrogators was a contributing factor to a lack of responsibility and discipline for the treatment of detainees. *See* INSPECTOR GENERAL, U.S. ARMY, INSPECTION REPORT, DETAINEE OPERATIONS INSPECTION vi and 31 (21 July 2004); *see also* LTG Anthony R. Jones & MG George R. Fay, Army Regulation 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade (Aug. 23, 2004), *available at* http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf. The new Army field manual addresses this issue in significant detail. *See* FM 2-22.3, *supra* note 1, paras. 5-57 - 5-66, and 8-2. Additional specific guidance can be found in DOD DIR. 3115.09, *supra* note 24, paras. 3.4.4 and 3.4.4.4.

[35] *See* FM 2-22.3, *supra* note 1, paras. 5-68 to 5-71.

[36] *See id.* paras. 5-55 and 5-66 (regarding treatment of other agencies and nations conducting interrogations); *see also* DOD DIR. 3115.09, *supra* note 24, para. 3.4.4.3.

[37] *See* FM 2-22.3, *supra* note 1, paras. 5-55 and 5-66; *see also* DOD DIR. 3115.09, *supra* note 24, para. 3.4.4.3.

[38] New legislation makes the Army field manual for intelligence interrogations the resource and primary source of law on the question of approved approaches. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680. This statute calls for the legalization of only those approaches "authorized by and listed" in the Army field manual on intelligence interrogation. *Id.* § 1002. The new field manual is a comprehensive document covering the full scope of HUMINT operations. *See* FM 2-22.3, *supra* note 1, para. 1-4 (discussing scope) and ch. 8 (discussing approach techniques).

by theater or local standard operating procedure or policy. Additionally, training should once again include a reminder to interrogators about their individual responsibility to ensure that any interrogation plan is both legal on paper and in execution.[39]

A good vignette for interrogation training will force interrogators to push their interrogation plans to the limits of legal conduct without going too far. An example could include:

> Your subordinate, Specialist (SPC) Newman, has completed multiple interrogation sessions with a detainee. During previous sessions, SPC Newman learned that the detainee is a bodybuilder and has previously stated he would like to work out with special exercise equipment. While SPC Newman was talking with the detainee today, the detainee refused to answer questions concerning topics on which you desperately need information. SPC Newman meets with you to discuss his future strategy and suggests offering the detainee access to free weights, something no other detainee gets. Which of the following best describes how the provisions of the Law of War relate to SPC Newman's suggestion?

A vignette like this pushes a Geneva Convention right, such as the right to exercise,[40] into an interrogator's planning considerations. The interrogator in this case should understand that the right to exercise only requires providing detainees time to walk in a defined area.[41] Knowing the minimum standard will enable an interrogator to realize that going above and beyond that minimum is a legal tactic. In this instance, access to special exercise equipment can be used as an incentive during interrogations, as long as it is in addition to the detainee's basic right to exercise. Furthermore, the interrogator should realize that this sort of incentive can be removed without legal objection.

Assistance in Preparing for Training

A unit legal advisor should take three additional steps when preparing to conduct legal training geared toward interrogation: (1) obtain and review other draft classes, presentations, and information papers; (2) read and understand the Field Manual and various interrogation approaches; and (3) seek assistance from experienced interrogators as well as other lawyers, on potential issues and questions from students.

A trainer can go to several places for interrogation related training materials. First, the U.S. Army Intelligence Center and School located at Fort Huachuca, Arizona, is the primary organization responsible for training interrogators. The intelligence school has, at all times, one to two attorneys assigned as instructors to train intelligence professionals.[42] Second, the largest command responsible for HUMINT is the U.S. Army Intelligence and Security Command (INSCOM). The INSCOM Office of the Staff Judge Advocate regularly trains or supervises the training of interrogators in deployable units. Third, trainers should contact the International and Operational Law branch at The Judge Advocate General's Legal Center and School. The Legal Center and School trains attorneys on the basics of intelligence law, including interrogations. Any of these offices can help trainers by providing references, training resources, or subject matter expertise.[43]

Reading and understanding the Army Field Manual on HUMINT collection will help the trainer turn his training from a presentation of rules and regulations into practical guidance to which all the trainees can relate. As this article discusses in detail below, the Army Field Manual provides insight into most topic areas about which students routinely have questions. Some of the common areas an instructor should be prepared to respond to include the following:

- What is the command and control relationship between the detention force and the intelligence unit at a facility?[44]
- How do interrogators coordinate with the guard force? How are conflicts between the guard force and the interrogators resolved?[45]
- How do we respond to requests from agencies outside the Department of Defense or other nations to interrogate

---

[39] *See* FM 2-22.3, *supra* note 1, paras. 7-26 and 10-15 and fig. 10-3.

[40] *See* GPW, *supra* note 5, art. 38 and GC, *supra* note 20, art. 94.

[41] *See* GPW, *supra* note 5, art. 38 and GC, *supra* note 20, art. 94.

[42] These attorneys are attached to the Fort Huachuca Office of the Staff Judge Advocate, which can be contacted at (520) 533-2095.

[43] *See* JUDGE ADVOCATE GENERAL, PUB. 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES, 2006-2007 (containing points of contact for these offices).

[44] *See generally* FM 2-22.3, *supra* note 1, at chs. 4 and 5.

[45] *See id.* at ch. 5.

detainees that the DOD has in custody?[46]

- How do I get authority or coordinate offering unique incentives? What are my authorities?[47]
- When does questioning become "coercive?" When does questioning become "humiliating or degrading?"[48]
- What does "humane treatment" require?[49]
- How and what kind of assistance can I get from medical teams?[50] What about from Behavioral Science Consultation Teams (BSCTs)?[51]
- What is the basis for the debate in the news regarding the application of the Geneva Conventions to detainees?
- What rules have we been applying?[52]
- What are my obligations if I see foreign officials abuse detainees while in that country's custody?[53]
- What rules govern contractors?[54]

To help prepare responses to these sorts of issues, instructors should draft solutions using the same methods they would employ if dealing with the issue in a real-world situation. The trainer should write down the assumptions, facts, relevant authorities, and necessary steps he used in coming to that conclusion. Then, during the class or training exercise, he should assist the student in answering the example by leading him through the same thought process. This method will enable an instructor to understand where in the thought process he and the student differ, which will then enable him to focus the instruction on that difference. Instructors should also seek reviews of training products and ideas by other, possibly more experienced, instructors. As part of this process, instructors should try to identify a couple of experienced warrant officers or NCOs to preview the instruction to ensure the training, language, and examples are both readable and realistic.

Other Training Considerations

As a unit enters the deployment preparation cycle, there are some additional training steps, beyond the instruction outlined above, that can be valuable to a unit's success. First, knowing and being prepared for the particular theater is crucial. Theater-specific policies on detention and interrogation exist and can impact operations. A unit should begin training using these policies as soon as possible. Second, all training should be conducted with the supporting Judge Advocate and should incorporate legal issues. If that particular Judge Advocate is not deploying with the unit, then he should determine what legal support will be available in theater, obtain the supporting Staff Judge Advocate's contact and location information, the staffing policies for legal review on interrogation plans, as well as the authorities and control measures on the various approaches. Third, the scenarios trained within FTXs should be consistent with the conditions of the deployed AOR, and interrogators should go through the full process of interrogation plan approval.[55]

---

[46] *See id.* paras. 5-55 and 5-56; *see also* DOD DIR. 3115.09, *supra* note 24, para. 3.4.4.3.

[47] *See* FM 2-22.3, *supra* note 1, paras. 8-21 and 8-22 (discussing the use of incentives).

[48] *See id.* paras. 5-74 to 5-77, 6-23 and p. 5-26; *see also* Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, § 1003.

[49] *See* Detainee Treatment Act of 2005, *supra* note 29 (discussing humane treatment); *see also* DOD DIR. 3115.09, *supra* note 24..

[50] *See* FM 2-22.3, *supra* note 1, paras. 5-91 through 5-94; *see also* DOD DIR. 3115.09, *supra* note 24, para. 3.4.3; U.S. DEP'T OF ARMY, SPECIAL TEXT 4-02.46, MEDICAL SUPPORT TO DETAINEE OPERATIONS (30 Sept. 2005); FM 2-22.3, *supra* note 1, para. 7-17.

[51] *See* DOD DIR. 3115.09, *supra* note 24, para 3.4.33; FM 2-22.3, *supra* note 1, para. 7-17; *see also* American Psychological Association, *APA Ethics Code* (21 Aug 2002), www.apa.org/ethics/code2002.pdf (considering general ethical principles A and D).

[52] For example, a web search for the words "Detainee and Geneva Convention" on www.msn.com on 23 September 2006 produced over 100,000 results. While not all of these results are current, they represent the background and exposure Soldiers may have had prior to arriving at the unit for training.

[53] *See* DOD DIR. 3115.09, *supra* note 24, at enclosure 3; *see* FM 2-22.3, *supra* note 1, paras. 5-69 through 5-71.

[54] *See* FM 2-22.3, *supra* note 1, at app. K; *see also* DOD DIR. 3115.09, *supra* note 24, para. 4.1.7; *see also* Memorandum, Deputy Chief of Staff for Intelligence, U.S. Army, for See Distribution, subject: Contract Interrogator Selection, Training and Certification Requirements (7 Mar. 2006) (copy on file with author).

[55] Planning HUMINT collection, or drafting an interrogation plan, is a deliberate process involving research, preparation, and coordination. This process is discussed at length in *FM 2-22.3*. *See* FM 2-22.3, *supra* note 1, at ch. 7. The HUMINT collectors must understand that their plan must be reviewed and approved before use. This review will include a check for legal compliance. *Id.* paras. 7-26, 10-15 and fig. 10-3. The appropriate level for approval may depend on the types of approaches being used and local theater policy. *See id.* para. 8-3.

Conclusion

A unit's operational success will benefit from each individual Soldier's ability to know the law and understand its importance, to obey the law, and to exercise sound judgment and encourage others to do the same. This benefit can only come from comprehensive training and thorough preparation. Judge advocates assigned to units that conduct interrogation operations must take the initiative to organize and initiate this training. Failing to equip Soldiers to deal with the legal and ethical challenges they will face during interrogation operations increases the chance of future tragedies.

Death Is Different:
***Kreutzer* and the Right to a Mitigation Specialist in Military Capital Offense Cases**

Lieutenant J. Michael Montgomery[*]

In the 12 years since Furman v. Georgia, *408 U.S. 238 (1972), every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.*[1]

I. Introduction

With no question as to his guilt, advocates of the death penalty likely find Sergeant (SGT) William Kreutzer a poster-child for the ultimate punishment. On 27 October 1995, as 1,300 members of the 82d Airborne stood in a pre-run formation, SGT Kreutzer hid in a nearby wood line with two automatic weapons and over 500 rounds of ammunition.[2] Before nearby Soldiers heroically subdued Kreutzer, he sent a bullet through the forehead of Major Stephen Badger, leaving a hole the size of a hand in the head of this career Soldier and father of eight.[3] Seventeen others were injured in the attack, including Major Guy Lafaro who was in a coma for forty-five days following the shooting and Chief Warrant Officer Two Abraham Castillo who was paralyzed after a bullet lodged in his spine.[4] Kreutzer was charged with violating multiple articles of the Uniform Code of Military Justice (UCMJ), including murder under Article 118, 10 U.S.C. § 918 (2000).[5] On 12 June 1996, a twelve member panel unanimously sentenced SGT Kreutzer to death.[6] However, on 16 August 2005, in a four-to-one decision, the Court of Appeals for the Armed Forces (CAAF) affirmed the decision of the Army Court of Criminal Appeals (ACCA),[7] setting aside the death sentence.[8] On facts as clear and horrific as these, how could the highest military court set aside Kreutzer's death sentence?

Affirming the ACCA's decision, the CAAF held the "[e]rroneous denial of Kreutzer's request for a mitigation specialist was error of constitutional magnitude."[9] This article discusses the role of a mitigation specialist and impact of the *Kreutzer* decision on capital cases in military justice.

II. Overview of Capital Punishment in the Military

In 1789, Congress enacted the first Articles of War by adopting the Articles written by the Continental Congress in 1775 and revised in 1776.[10] At that time, the death penalty was authorized for fourteen military offenses; however, civil authorities received jurisdiction over those capital crimes not specific to the military.[11] Since that time, Congress gradually expanded court-martial jurisdiction, culminating with the passage of the UCMJ in 1950.[12] Article 118 of the UCMJ, most recently revised in 2005, covers the crime of murder and provides for the availability of the death penalty for premeditated murder and certain types of felony murder.[13]

---

[*] Judge Advocate, U.S. Navy. Currently assigned as a staff attorney at the Naval Legal Service Office Pacific Detachment Pearl Harbor.

[1] Spaziano v. Florida, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part).

[2] Todd Richissin, *Nobody Listened When a Soldier Warned of His Violent Intentions*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 9, 1997, at A1.

[3] *Id*.

[4] *Id*.

[5] *See* UCMJ art 118 (2005); United States v. Kreutzer, 61 M.J. 293 (2005).

[6] *Id*.

[7] United States v. Kreutzer, 59 M.J. 773 (Army Ct. Crim. App. 2004).

[8] *Kreutzer*, 61 M.J. at 294.

[9] *Id*. at 305.

[10] Loving v. United States, 517 U.S. 748, 752 (1996).

[11] *Id*.

[12] *Id*.

[13] UCMJ art. 118 (2005).

The Supreme Court's 1972 decision in *Furman v. Georgia*[14] impacted capital punishment in many states and in the military. The constitutionality of the military capital punishment scheme was challenged in *United States v. Matthews*[15] in 1983. Noting that there are certain occasions where the "rules governing capital punishment of servicemembers will differ from those applicable to civilians,"[16] the Court of Military Appeals (COMA)[17] held that military court-martial sentencing procedures must meet "the standards established by the Supreme Court for sentencing in capital cases in civilian courts."[18] Additionally, the court noted that in enacting Article 55 of the UCMJ,[19] Congress "'intended to grant protection covering even wider limits' than 'that afforded by the Eighth Amendment.'"[20]

In analyzing "guidance from Supreme Court precedent,"[21] the COMA listed certain prerequisites to imposing a death sentence.[22] Looking back to military procedure, the COMA noted that "neither the Code nor the Manual requires that the court members specifically identify the aggravating factors upon which they have relied in choosing to impose the death penalty."[23] Despite finding no prejudicial error on mandatory review, the court held that Matthews's death sentence was improperly adjudged.[24]

President Ronald Reagan responded to the *Matthews* decision in 1985 by promulgating by executive order Rule for Courts-Martial (RCM) 1004, requiring a unanimous finding that the accused was guilty of a capital offense, that at least one aggravating factor existed, and that any extenuating or mitigating circumstances are substantially outweighed by aggravating circumstances.[25] In *Loving v. United States*, the Supreme Court held the RCM 1004 capital sentencing scheme constitutional.[26]

Trial by military judge alone is not permitted in courts-martial referred as capital cases.[27] Nor is an accused permitted to plead guilty to a capital offense.[28] Absent exigent circumstances, the capital case must be heard before a panel of not less than twelve members.[29] There are four "gates toward death-penalty eligibility"[30] in the military justice system. First, the

---

[14] 408 U.S. 238 (1972).

[15] 16 M.J. 354 (C.M.A. 1983).

[16] *Id.* at 368.

[17] The Court of Military Appeals was renamed the Court of Appeals for the Armed Forces in 1994. *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994).

[18] *Matthews*, 16 M.J. at 368.

[19] 10 U.S.C.S. § 855 (LEXIS 2007).

[20] *Matthews*, 16 M.J. at 368 (citing United States v. Wappler, 9 C.M.R. 23, 26 (C.M.A. 1953)).

[21] *Id*. at 368.

[22] *Id*. at 377.

> From the procedures approved by the Supreme Court, the following features appear:
> 1. A Bifurcated Sentencing Procedure Must Follow the Finding Of Guilt Of a Potential Capital Offense.
> 2. Specific Aggravating Circumstances Must Be Identified To the Sentencing Authority.
> 3. The Sentencing Authority Must Select and Make Findings On the Particular Aggravating Circumstances Used As a Basis For Imposing the Death Sentence.
> 4. The Defendant Must Have Unrestricted Opportunity To Present Mitigating and Extenuating Evidence.
> 5. Mandatory Appellate Review Must Be Required To Consider the Propriety Of the Sentence As To the Individual Offense and Individual Defendant and To Compare the Sentence To Similar Cases Statewide.
> In sum, the sentence must be individualized as to the defendant, and the sentencing authority must detail specific factors that support the imposition of the death penalty in the particular case.

Id.

[23] *Id*.

[24] *Id*. at 382.

[25] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 1004 (2005) [hereinafter MCM] (providing the current version of Rule 1004).

[26] 517 U.S. 748 (1996).

[27] UCMJ art. 18 (2005).

[28] *Id.* art. 45(b).

[29] *Id.* art. 25a (applying to offenses committed after 31 December 2002).

[30] United States v. Loving, 41 M.J. 213, 277 (1994).

members must find the accused guilty of a capital offense.[31] Second, they must find that an aggravating factor exists.[32] Third, the panel members must find that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances.[33] Fourth, the members must unanimously agree on the death penalty. "If at any step along the way there is not a unanimous finding, this eliminates the death penalty as an option."[34] Additionally, the members must vote on the sentence, starting with the least severe to the most severe.[35]

Following the court-martial, the convening authority must approve or disapprove the death sentence.[36] The convening authority may choose to commute the death sentence to a lesser sentence, such as life in prison. If the convening authority approves the sentence, there is an automatic appeal to the Court of Criminal Appeals for the accused's service.[37] If the Court of Criminal Appeals affirms the sentence, then there is a mandatory appeal to the CAAF.[38] The Supreme Court of the United States has discretionary certiorari jurisdiction over death penalty sentences heard by the CAAF.[39] Finally, the President must approve a military death sentence before the accused can be executed.[40]

The last execution in the military justice system was conducted on 13 April 1961 when the military hanged Army Private (PVT) John A. Bennett following his conviction for rape and attempted murder.[41] Military service members on death row are housed at the U.S. Disciplinary Barracks, Fort Leavenworth, Kansas—the only maximum security prison in the Department of Defense and the oldest penal institution in continuous operation in the federal system.[42]

Once convicted of a capital offense, a defendant has the right to present evidence in extenuation and mitigation.[43] Effective development and presentation of this evidence may be the defendant's only chance to avoid a death sentence. As will be discussed below, defense counsel are poorly equipped to perform the extensive investigation into a defendant's background required to prepare an effective case in extenuation and mitigation. Thus, a mitigation specialist is an essential member of the defense team.

III. The Role of a Mitigation Specialist in Capital Cases

A. What Is a Mitigation Specialist?

A variety of definitions of "mitigation specialist," "mitigation expert," or "mitigation investigator" exist throughout both case law and scholarly articles.[44] In an article discussing the use of mitigation specialists in death penalty litigation, Jonathan

---

[31] MCM, *supra* note 25, R.C.M. 1004(a).

[32] *Id.* R.C.M. 1004(b)(4)(A).

[33] *Id.* R.C.M. 1004(b)(4)(C).

[34] United States v. Simoy, 50 M.J. 1, 2 (1998).

[35] MCM, *supra* note 25, R.C.M. 1006(d)(3)(A).

[36] UCMJ art. 60 (2005).

[37] *Id.* art. 66(b)(1).

[38] *Id.* art. 67(a)(1).

[39] *Id.* art. 67a.

> Only those court-martial cases considered by the Court of Appeals for the Armed Forces fall within the Supreme Court's certiorari jurisdiction. Because all cases in which a Court of Criminal Appeals affirms a death sentence fall within the Court of Appeals for the Armed Forces' mandatory jurisdiction, they also fall within the Supreme Court's certiorari jurisdiction. Congress provided the Supreme Court with certiorari jurisdiction over cases reviewed by the Court of Military Appeals in 1983.

Dwight H. Sullivan et al., *Raising the Bar: Mitigation Specialists in Military Capital Litigation*, 12 GEO. MASON U. CIV. RTS. L.J. 199 n.24 (2002) (citations omitted).

[40] UCMJ art. 71(a).

[41] Death Penalty Information Center, The U.S. Military Death Penalty, http://www.deathpenaltyinfo.org/article.php?did=180&scid=32 (last visited Mar. 27, 2007).

[42] U.S. Army Combined Arms Center, U.S. Disciplinary Barracks, http://usacac.leavenworth.army.mil/CAC/usdb.asp (last visited Mar. 27, 2007).

[43] MCM, *supra* note 25, R.C.M. 1004(b)(3).

[44] Jonathan P. Tomes, *Damned If You Do, Damned If You Don't: The Use of Mitigation Experts in Death Penalty Litigation*, 24 AM. J. CRIM. L. 359, 366 (1997).

Tomes proposed the following definition: "a person qualified by knowledge, skill, experience, or training as a mental health or sociology professional to investigate, evaluate, and present psychosocial and other mitigating evidence to persuade the sentencing authority in a capital case that a death sentence is an inappropriate punishment for the defendant."[45] One court described a mitigation investigator as "an individual who specializes in compiling potentially mitigating information about the accused in a capital case."[46]

Currently, there are neither licensing authorities for mitigation specialists, nor prescribed educational criteria for an individual to be considered a mitigation specialist. Indeed, courts have certified sociologists,[47] psychiatrists,[48] and psychologists[49] in the role. Regardless of the lack of specificity as to qualifications for mitigation specialists, they are a vital member of the defense team in a capital case.

B. The Role of a Mitigation Specialist

> The jury in a capital case is instructed to consider the background and life of the defendant. In order to effectively present this information, counsel must prepare a complete social history of the defendant by engaging in a comprehensive investigation dissimilar to routine investigative efforts used in non-capital criminal cases. The time and resources required for a thorough investigation are tremendous.[50]

In *United States v. Thomas*, the Navy-Marine Court of Military Review (NMCMR) recognized that conducting this intense psychosocial investigation "is not within the ken of a competent attorney."[51] A mitigation specialist, however, has the training and necessary skill set to do such an investigation. The CAAF relied on a report adopted by the Judicial Conference of the United States to provide the following generalization concerning the role of a mitigation specialist:

> Mitigation specialists typically have graduate degrees, such as a Ph.D. or masters degree in social work, and have extensive training and experience in the defense of capital cases. They are generally hired to coordinate an investigation of the defendant's life history, identify issues requiring evaluation by psychologists, psychiatrists or other medical professionals, and assist attorneys in locating experts and providing documentary material for them to review.[52]

Useful evidence for mitigation may be found by examining the entire life of the defendant, beginning at conception. A mitigation specialist may even conduct a multi-generational investigation, looking for "genetic predispositions and environmental influences"[53] that may have impacted the defendant's personality or behavior. Generally, the mitigation specialist will look for evidence that:

> (1) portrays any positive qualities the defendant possesses, (2) makes the defendant's violent acts "humanly understandable in light of his past history and the unique circumstances affecting his formative development," (3) tends to show that his life in prison would likely be productive, or at least not be threatening to others, (4) rebuts the prosecutor's evidence of aggravating circumstances, and (5) provides evidence of extenuating circumstances surrounding the capital crime itself.[54]

---

[45] *Id*. at 368.

[46] State v. Langley, 839 P.2d 692 (Or. 1992).

[47] Tomes, *supra* note 44, at 367 (citing Boyd v. North Carolina, 319 S.E.2d 189 (N.C. 1984), *cert. denied*, 471 U.S. 1030 (1985)).

[48] *Id*. (citing Ohio v. Slagle, No. 55759, 1990 Ohio App. LEXIS 2426 (Ohio Ct. App. June 14, 1990), *cert. denied*, 510 U.S. 833 (1993)).

[49] *Id*. (citing Ohio v. Carter, No. C-920604, 1993 Ohio App. LEXIS 5233 (Ohio Ct. App. Nov. 3, 1993), *cert. denied*, 133 L. Ed. 2d 498 (1995)).

[50] *Id*. at 365.

[51] 33 M.J. 644, 647 (N.M.C.M.R. 1991).

[52] United States v. Kreutzer, 61 M.J. 293, 302 (2005) (citing Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, Federal Death Penalty Cases: *Recommendations Concerning the Cost and Quality of Defense Representation*, at Pt. I, § B.7 (May 1998), *available at* http://www.uscourts.gov/dpenalty/4report.htm) [hereinafter Judicial Conference Report]. The Judicial Conference of the United States adopted the subcommittee's recommendations on 15 September 1998. Judicial Conference Report, *supra*, at cover.

[53] Sullivan et al., *supra* note 39 (quoting Russell Stetler et al., *Mitigation Introduction: Mitigation Evidence Twenty Years After Lockett,* in CAL. DEATH PENALTY DEF. MANUAL 3 (1998)).

[54] Tomes, *supra* note 44, at 365.

Maternity and birth records may show problems in pregnancy suggesting the possibility of developmental problems.[55] Other records that must be reviewed, if available, include school records, foster care records, military records, medical records of both the defendant and his family, prison records, and employment records.[56] A criminal record may provide insight into the defendant, and the lack of a criminal record is strong mitigating evidence.[57]

In addition to reviewing records, a mitigation specialist will conduct numerous interviews. These interviews will include "the defendant's immediate and extended family, friends, neighbors, teachers, clergy, coaches, employers, co-workers, physicians or other therapists, and any lead suggested by any of the above records."[58] Interviews with the defendant's family can be particularly challenging, because they too are frequently impacted emotionally by the government's choice to pursue the death penalty.[59] Family members may be hesitant to discuss private family matters out of shame and a feeling of responsibility for a loved one's actions.[60] Additionally, they may simply be hiding "dirty laundry"[61] out of embarrassment or fear.

As one commentator noted, "law school prepares one to be an advocate, not an investigator."[62] The defense team simply cannot locate, acquire, and analyze the quantity of potential mitigation evidence that a trained expert can. Perhaps this is why inadequate presentation of mitigation evidence is "the most common basis for claims of ineffective assistance of counsel in death penalty cases across the country."[63]

IV. Mitigation Specialists and the Law

A. The Right and Responsibility to Present Mitigation Evidence

> As a practical matter, the defendant probably has little or no chance of avoiding the death sentence unless the defense counsel gives the jury something to counter both the horror of the crime and the limited information the prosecution has introduced about the defendant. Thus, defense counsel must conduct an extensive investigation into the defendant's background . . . .[64]

The Supreme Court has held "that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[65] For this reason, the Court struck down as unconstitutional the mandatory sentencing scheme in *Woodson v. North Carolina*, which made death the mandatory sentence for all persons convicted of first-degree murder.[66]

---

[55] *Id*. at 368 (noting that "[a] problem pregnancy, involving, for example, prolonged pre-term labor, can result in bleeding in the germinal matrix of the fetus's brain that can cause adverse effects running from mild developmental delay to profound mental retardation.").

[56] *Id*. at 368-69.

[57] *Id*. at 370.

[58] *Id.* at 369-70.

[59] Elizabeth Beck et al., *Seeking Sanctuary: Interviews with Family Members of Capital Defendants*, 88 CORNELL L. REV. 382, 413 (2003) (noting that "[l]ike co-victims, offenders' family members experience depression, cognitive changes, chronic grief, and symptoms consistent with [Post Traumatic Stress Syndrome]").

[60] *Id*. (noting "[t]heir shame is often intensified by the nature of mitigation which, though essential to the defense, may be interpreted as suggesting the defendant's family is culpable.").

[61] Tomes, *supra* note 44, at 370 (noting the need to conduct interviews "beyond close family members" and the possibility that "[t]he defendant or his family may distrust the attorney").

[62] *Id*. at 364.

[63] David D. Velloney, *Balancing the Scales of Justice: Expanding Access to Mitigation Specialists in Military Death Penalty Cases*, 170 MIL. L. REV. 1 (2001) (citing Stetler et al., *supra* note 53).

[64] Tomes, *supra* note 44, at 364.

[65] Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

[66] *Id*. at 305. The North Carolina statute read, in pertinent part,

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death.

In 1978, the Supreme Court held that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."[67] For that reason, the Court concluded:

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[68]

The Supreme Court recently held that "a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that that defendant proffers in support of a sentence less than death."[69] The Court reaffirmed that the standard for relevance in a capital sentencing proceeding is the same as the general evidentiary standard.[70]

The Supreme Court requires that a defendant facing the death penalty be viewed as an individual during sentencing.[71] It is the defense team's responsibility to make this happen. The Eighth Amendment does not require a judge to instruct a jury on the concept of mitigating evidence generally, nor does it require an instruction on particular statutory mitigating factors.[72] The defense team alone must compile and present to the jury reasons for sentencing the defendant to something less than death.

As discussed above, RCM 1004 governs capital punishment in the military. The rule provides that "[t]he accused shall be given broad latitude to present evidence in extenuation and mitigation."[73] Additionally, the military judge "shall instruct the members that they must consider all evidence in extenuation and mitigation before they adjudge death;"[74] a right not required by the Supreme Court. Military accused, like their civilian counterparts, are entitled to effective assistance of counsel.[75] As discussed below, failure to investigate and present mitigating evidence is grounds for reversal of a death sentence.

B. Expert Assistance in Mitigation, Case Law and Statutes

In 1985, the Supreme Court based its decision in *Ake v. Oklahoma* on the "Fourteenth Amendment's due process guarantee of fundamental fairness,"[76] holding:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.[77]

The *Ake* Court realized the importance of expert assistance at the sentencing phase as well: "We have repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case."[78] The Court noted a state's

---

Id. at 286.

[67] Lockett v. Ohio, 438 U.S. 586, 603 (1978).

[68] *Id*. at 604.

[69] Tenard v. Dretke, 542 U.S. 274, 285 (2004) (citing Payne v. Tennessee, 501 U.S. 808 (1991)).

[70] *Id*. at 284 (holding the standard to be "any tendancy to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

[71] Tomes, *supra* note 44, at 363.

[72] Buchanan v. Angelone, 522 U.S. 269 (1998).

[73] MCM, *supra* note 25, R.C.M. 1004(a)(3).

[74] *Id*. R.C.M. 1004(a)(6).

[75] United States v. Murphy, 50 M.J. 4, 8 (1998) (citing United States v. Scott, 24 M.J. 186 (C.M.A. 1987)).

[76] 470 U.S. 68, 76 (1985).

[77] *Id*. at 83.

[78] *Id*. at 83-84.

"profound interest"[79] in assuring it executes only the guilty and said "we do not see why monetary considerations should be more persuasive in this context than at trial."[80] The court must look to "the probable value that the assistance of a psychiatrist will have in [sentencing], and the risk attendant on its absence."[81]

United States v. Garries established that "as a matter of military due process, servicemembers are entitled to investigative or other expert assistance when necessary for an adequate defense, without regard to indigency."[82] The COMA, however, noted that the servicemember must show "necessity for the services"[83] as required in *Ake*.[84] Recognizing the government resources available to a military accused, the court noted that "[i]n the usual case, the investigative, medical, and other expert services available in the military are sufficient to permit the defense to adequately prepare for trial."[85]

Rule for Courts-Martial 703(d) provides the procedure for requesting an expert witness at government expense.[86] While the rule "is silent on how to request other forms of assistance,"[87] case law suggests "the process is the same regardless of whether defense counsel is requesting an expert witness or some other form of expert assistance."[88]

Under RCM 703(d), when defense counsel seek expert assistance at government expense, counsel must submit the request to the convening authority and provide notice to the prosecution. The request "shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment."[89] If the convening authority denies the assistance, then defense counsel may renew the request before the military judge. The military judge "shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute."[90] If the military judge grants the defense motion and the government fails to comply, then the judge may abate the proceedings.[91]

Article 46 of the UCMJ provides that "trial counsel, 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."[92] While not specifically stated, Article 46 applies to expert consultants in addition to witnesses.[93]

In *United States v. Allen*,[94] the NMCMR held "[m]ilitary due process entitles a servicemember to the assistance of an expert when necessary to the preparation of an adequate defense."[95] The court noted the servicemember requesting expert assistance has the burden to show necessity.[96] The court listed the following three criteria for evaluating necessity: "First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the

---

[79] *Id*. at 83.

[80] *Id*. at 84.

[81] *Id*.

[82] 22 M.J. 288, 290 (1986) (citations omitted).

[83] *Id*. at 291 (citing *Ake* v. Oklahoma, 470 U.S. 68 (1985)).

[84] *Ake*, 470 U.S. at 82-83 (holding "[w]hen the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent.").

[85] *Garries*, 22 M.J. at 290.

[86] MCM, *supra* note 25, R.C.M. 703(d).

[87] Will A. Gunn, *Supplementing the Defense Team: A Primer on Requesting and Obtaining Expert Assistance*, 39 A.F. L. REV. 143, 146 (1996).

[88] *Id*.

[89] MCM, *supra* note 25, R.C.M. 703(d).

[90] *Id*.

[91] *Id*.

[92] UCMJ art. 46 (2005).

[93] United States v. Warner, 62 M.J. 114, 118 (2005) ("While the defense request in this case was for an expert consultant rather than an expert witness, Article 46 is still applicable.").

[94] 31 M.J. 572 (N.M.C.M.R. 1990).

[95] *Id*. at 623 (citing United States v. Garries, 22 M.J. 288, 288 (1986)).

[96] *Id.*

defense counsel unable to gather and present the evidence that the expert assistant would be able to develop."[97] In *United States v. Gonzalez*,[98] the COMA favorably cited the three-part analysis set forth in *Allen*.[99] In addition, the COMA also noted they had "not drawn a distinction between a government or non-government investigator or expert."[100]

The CAAF briefly addressed the use of mitigation specialists in capital sentencing in *United States v. Loving*.[101] During a string of robberies, Army PVT Dwight J. Loving murdered two taxicab drivers and attempted to murder a third.[102] Authorities arrested Loving the next day and he confessed to the crimes on videotape.[103] A general court-martial at Fort Hood, Texas, convicted Loving and sentenced him to death.[104] On appeal, Loving raised seventy errors, including ineffective assistance of counsel for failure "to request funds for a mitigation specialist or to present a cohesive, comprehensible background, social, medical, and environmental history for [Loving]."[105]

Loving claimed that a mitigation expert is essential to all capital murder cases and that a mitigation expert could have presented evidence more logically and coherently than did his counsel.[106] In response, Loving's defense counsel asserted tactical reasons for not utilizing experts. The CAAF found defense counsel's tactical decisions reasonable, and "decline[d] to hold that such an expert is required."[107] "What is required is a reasonable investigation and competent presentation of mitigation evidence. Presentation of mitigation evidence is primarily the responsibility of counsel, not expert witnesses."[108]

In another capital punishment case, the CAAF set aside the death sentence of Army SGT James Murphy on ineffective assistance of counsel grounds.[109] Murphy was found guilty of the heinous premeditated murders of his former wife and two young children.[110] He confessed to using a hammer to bludgeon his former wife and drowning her two children, leaving their bodies to decay in their apartment building.[111] Murphy attempted to plead guilty to the charges, but he was not permitted to do so since he was charged with a capital offense.[112] On appeal, the CAAF concluded "the record of trial and post-trial affidavits leave us with only one rational conclusion: SGT Murphy was defended by two attorneys who were neither educated nor experienced in defending capital cases, and they either were not provided the resources or expertise to enable them to overcome these deficiencies, or they did not request same."[113] Only after the Army Court of Military Review affirmed Murphy's death sentence was a social history conducted. Prior to sentencing, neither defense counsel traveled to Murphy's hometown in North Carolina to investigate his background because they were "burdened by tasks from the trial defense service."[114] Rather, the defense counsel developed Murphy's extenuation and mitigation case by writing letters and making telephone calls to those who responded to the letters.[115]

---

[97] *Id.*

[98] 39 M.J. 459 (C.M.A. 1994).

[99] *Id*. at 461.

[100] *Id*.

[101] 41 M.J. 213 (1994).

[102] *Id*. at 229-30.

[103] *Id*. at 230.

[104] *Id*. at 231-32.

[105] *Id*. at 249.

[106] *Id*. at 250.

[107] *Id*.

[108] *Id*.

[109] United States v. Murphy, 50 M.J. 4 (1998).

[110] *Id*. at 5-6.

[111] *Id*. at 7.

[112] *Id*. at 12.

[113] *Id*. at 9.

[114] *Id*.

[115] *Id*. at 12.

Five years after his conviction, Murphy's appellate counsel succeeded in obtaining funding from the Judge Advocate General of the Army to hire an expert to investigate his social history.[116] The investigation, completed by a trained forensic social worker, was complemented by reviews of several other medical specialists. The investigations concluded that at the time of the offense, Murphy "suffer[ed] from a personality disorder and other psychological dysfunctions,"[117] and that he had "indications of minimal or slight cognitive and neuropsychological dysfunction"[118] as well as "persistent and severe traumatic childhood abuse."[119]

The CAAF found "reliability of result"[120] to be the theme espoused by thirty years of Supreme Court death penalty precedent and listed "key ingredients"[121] for the adversarial system to function properly. These ingredients include the following: "competent counsel; full and fair opportunity to present exculpatory evidence; individualized sentencing procedures; fair opportunity to obtain the services of experts; and fair and impartial judges and juries."[122] Finding that Murphy did not get a "full and fair sentencing hearing,"[123] due to a number of issues including the "potential mitigating effect of the posttrial evidence,"[124] the CAAF refused to affirm Murphy's death sentence and remanded the case to the ACCA.[125]

Two years after *Murphy*, the Supreme Court, applying the two-part *Strickland v. Washington*[126] test for ineffective assistance of counsel, overturned the death sentence of Terry Williams.[127] Williams confessed and a Virginia jury convicted him of robbery and capital murder and sentenced him to death. The Supreme Court agreed with Williams that he had been "denied his constitutionally guaranteed right to the effective assistance of counsel when his trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury."[128] In Williams's case, the mitigation evidence was abundant and powerful.[129] His defense attorneys, however, offered only the testimony of his mother, two neighbors, and a portion of a taped statement by a psychiatrist.[130] They failed to provide the jury any of the "extensive records graphically describing Williams' nightmarish childhood."[131] Instead, defense counsel relied solely on witness testimony that Williams was "a 'nice boy' and not a violent person."[132]

Evidence uncovered at an evidentiary hearing held as part of state habeas corpus proceedings revealed "documents prepared in connection with Williams' commitment when he was eleven years old that dramatically described mistreatment, abuse, and neglect during his early childhood, as well as testimony that he was 'borderline mentally retarded,' had suffered

---

[116] *Id*. at 13.

[117] *Id*.

[118] *Id*.

[119] *Id*.

[120] *Id*. at 14.

[121] *Id*. at 15.

[122] *Id*.

[123] *Id*.

[124] *Id*.

[125] *Id*. at 16.

[126] 466 U.S. 668, 687 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id.

[127] Williams v. Taylor, 529 U.S. 362, 390 (2000).

[128] *Id*.

[129] *Id*. at 370.

[130] *Id*. at 369 (citing app. 4-5) ("One of the neighbors had not been previously interviewed by defense counsel, but was noticed by counsel in the audience during the proceedings and asked to testify on the spot." Additionally, "[t]he weight of defense counsel's closing, however was devoted to explaining that it was difficult to find a reason why the jury should spare Williams' life.").

[131] *Id*. at 395.

[132] *Id*. at 369 (citing app. 4-5).

repeated head injuries, and might have mental impairments organic in origin."[133] Juvenile records that defense counsel did not obtain could have painted a haunting picture of life in Williams's childhood home.[134]

Following the evidentiary hearing, the Virginia trial judge found that Williams's attorneys had been ineffective during the sentencing phase of trial and recommended a rehearing on Williams's sentence.[135] The Supreme Court agreed with the trial judge's conclusion that "there existed 'a reasonable probability that the result of the sentencing phase would have been different' if the jury had heard that evidence."[136] Certainly, this evidence would have been uncovered by an expert trained as a mitigation specialist.

The Supreme Court again reversed a death sentence on ineffective assistance of counsel grounds in *Wiggins v. Smith*[137] when defense counsel failed to properly investigate and present mitigation evidence. A Maryland court convicted Wiggins of first-degree murder, robbery, and two counts of theft. Defense counsel unsuccessfully motioned for a bifurcation of sentencing, intending to first argue that Wiggins was not directly responsible for the death of the seventy-seven-year-old woman and then only present mitigation evidence if necessary. Despite defense counsel's assertion to the jury that they would hear evidence of Wiggins's "difficult life," the defense failed to present such evidence.[138]

In preparation for Wiggins's post-conviction proceedings, a licensed social worker prepared a social history report. Just as in *Williams*, the potential mitigation evidence was abundant and "powerful."[139] Wiggins's alcoholic mother severely abused him both physically and sexually and often left him and his siblings home alone for days "forcing them to beg for food and to eat paint chips and garbage."[140] "She had sex with men while her children slept in the same bed and, on one occasion, forced [Wiggins's] hand against a hot stove burner . . . ."[141] Wiggins entered foster care at the age of six, was allegedly raped and abused by multiple foster parents, and lived on the streets from age sixteen.[142]

The Court found that "[Wiggins] thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability."[143] Wiggins's trial defense counsel, however, claimed they made a tactical decision to "focus their efforts on 'retrying the factual case' and disputing Wiggins's direct responsibility for the murder"[144] rather than conducting a thorough social history investigation. The Court rejected the post-conviction trial court's conclusion that "when the decision not to investigate . . . is a matter of trial tactics, there is no ineffective assistance of counsel."[145] Instead, the Supreme Court noted that under *Strickland*, "'the proper measure of attorney performance remains simply reasonableness under prevailing professional norms,'"[146] and that Wiggins's counsel did not meet this standard.[147] The Court "emphasize[d]

---

[133] *Id*. at 370.

[134] *Id*. at 395 (citing app. 528-529).

> The home was a complete wreck . . . . There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash . . . . The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them . . . . The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey.

Id.

[135] *Id*. at 370.

[136] *Id*. at 397.

[137] 539 U.S. 510 (2003).

[138] *Id*. at 515.

[139] *Id*. at 534.

[140] *Id*. at 516-17.

[141] *Id*. at 517.

[142] *Id*.

[143] *Id*. at 535 (citing Penry v. Lynaugh, 492 U.S. 302, 319 (1989) ("'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse[.]'")) (quoting California v. Brown, 49 U.S. 538, 545 (1987) (O'Connor, C.J., concurring)).

[144] *Id*. at 517.

[145] *Id*. at 517-18.

[146] *Id*. at 521 (citing Strickland v. Washington, 466 U.S. 668, 680 (1984)).

[147] *Id*. at 534.

that Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing."[148] The conduct must be reasonable under "'[p]revailing norms of practice as reflected in American Bar Association standards and the like'"[149] that can be used to determine reasonableness. Wiggins's defense counsel's conduct fell short of these "well-defined norms."[150]

C. American Bar Association Guidelines

> An attorney representing the accused in a death penalty case must fully investigate the relevant facts. Because counsel faces what are effectively two different trials - one regarding whether the defendant is guilty of a capital crime, and the other concerning whether the defendant should be sentenced to death - providing quality representation in capital cases requires counsel to undertake correspondingly broad investigation and preparation. Investigation and planning for both phases must begin immediately upon counsel's entry into the case, even before the prosecution has affirmatively indicated that it will seek the death penalty.[151]

The *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*ABA Guidelines*) state that the defense team should contain an investigator and a mitigation specialist.[152] Moreover, the *ABA Guidelines* note that a mitigation specialist is "an indispensable member of the defense team throughout all capital proceedings,"[153] and that "[m]itigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have."[154] "Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case . . . ."[155] The *ABA Guidelines* also note the importance the mitigation specialist plays "in maintaining close contact with the client and his family while the case is pending,"[156] and how that rapport "can be the key to persuading a client to accept a plea to a sentence less than death."[157]

The CAAF has repeatedly refused to require military defense counsel in capital cases to meet the minimum requirements of the *ABA Guidelines*.[158] In *Loving*, Judge H.F. "Sparky" Gierke noted: "Appellate defense counsel have repeatedly invited this Court to involve itself in the internal personnel management of the military services, and we have repeatedly declined the invitation."[159] The quality of representation, Judge Gierke held, "is determined by reference to *Strickland v. Washington*."[160] He also pointed out that the *ABA Guidelines* expressly provided "for such exceptions . . . as may be appropriate in the military."[161] This "military exception" was removed from the most recent edition of the *ABA Guidelines*.[162]

---

[148] *Id*. at 533.

[149] *Id*. at 522 (citing *Strickland*, 466 U.S. at 688-89).

[150] *Id*. at 524.

[151] American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 925-26 (2003) [hereinafter *ABA Guidelines*].

[152] *Id*. at 952.

[153] *Id*. at 959.

[154] *Id*.

[155] *Id*.

[156] *Id*. at 960.

[157] *Id*.

[158] United States v. Loving, 41 M.J. 213, 300 (1994); United States v. Curtis, 44 MJ 106, 126-27 (1996); United States v. Murphy, 50 M.J. 4, 9-10 (1998).

[159] *Loving*, 41 M.J. at 300 (citations omitted).

[160] *Id*.

[161] *Id*. (citation omitted) (referencing the 1989 version of the *ABA Guidelines*).

[162] *See ABA Guidelines*, *supra* note 151, at 921 (noting that "[t]he use of the term 'jurisdiction' as now defined has the effect of broadening the range of proceedings covered. In accordance with current ABA policy, the Guidelines now apply to military proceedings, whether by way of a court martial, military commission or tribunal, or otherwise.").

V. *United States v. Kreutzer*

A. Background

William Kreutzer, Jr. grew up fascinated with military history.[163] His dream of being a Soldier[164] came true when he enlisted in the Army in February, 1992.[165] In March of 1993 he joined the 325th Airborne Infantry Regiment of the 82d Airborne Division in Fort Bragg, North Carolina.[166] Some of his superiors described him as a good Soldier.[167] Throughout his career, however, Kreutzer's fellow Soldiers made fun of "his intelligence, his quiet demeanor and his thick glasses,"[168] and he had trouble fitting in with his peers.[169] Military records show that "from nearly the beginning of his service . . . Kreutzer spoke persistently about killing."[170] One superior noted that he "seemed to be fixated on death."[171]

Over time, Kreutzer lost the ability to deal with the derogatory remarks and practical jokes. He began responding with tears and anger, and told a friend "that he was losing control, that he was on the verge of killing himself or members of his squad."[172] Later, while standing guard duty, Kreutzer threatened to kill members of his unit, as he cried in frustration.[173] After that incident, he was brought to see Dr. (Captain) Darren Fong, his division's mental health officer.[174] Dr. Fong's report concluded that Kreutzer "has inappropriate coping mechanisms in dealing with his anger. This morning, [Kreutzer] said he wanted to kill his squad and he had plans using weapons and ammunition."[175] Kreutzer also told Dr. Fong that he had considered suicide on several occasions, and had gotten as far as holding a gun to his head.[176] Following that meeting, Dr. Fong approached Kreutzer's leadership who then confiscated Kreutzer's weapons and removed him to a camp containing noncombat personnel.[177] Despite his other remarks, Dr. Fong concluded that Kreutzer was not a danger to himself or others,[178] and chose not to refer Kreutzer's case to a psychiatrist or psychologist.[179] "'That may have been the biggest single mistake involving Kreutzer.'"[180]

Although he continued to have serious problems interacting with other Soldiers, Kreutzer was promoted to SGT in March 1995 and assigned as a weapons squad leader.[181] Later that year, he began to fall apart. Fellow Soldiers continued to chide him and call him names such as "Wild Bill"[182] and "Crazy Kreutzer."[183] In early October, Kreutzer was disciplined for

---

[163] Richissin, *supra* note 2.

[164] *Id*.

[165] United States v. Kreutzer, 61 M.J. 293, 296 (2005).

[166] *Id*.

[167] *Id*.

[168] Richissin, *supra* note 2.

[169] *Kreutzer*, 61 M.J. at 296.

[170] Richissin, *supra* note 2.

> In looking at Kreutzer's case, The News & Observer reviewed internal Army psychiatric evaluations that detail [Kreutzer's] mental history, Army reports obtained through the Freedom of Information Act and more than 1,800 pages of investigative and court records. In addition, the N&O conducted extensive interviews inside and outside the military, including 12 hours of telephone interviews with Kreutzer himself.

Id.

[171] *Id*.

[172] *Id*.

[173] *Kreutzer*, 61 M.J. at 296.

[174] *Id*.

[175] United States v. Kreutzer, 59 M.J. 773, 787 (Army Ct. Crim. App. 2004) (Currie, J., concurring).

[176] Richissin, *supra* note 2.

[177] *Id*.

[178] *Kreutzer*, 61 M.J. at 296.

[179] Richissin, *supra* note 2.

[180] *Id*. (quoting Tony Martin, one of Kreutzer's defense counsel).

[181] United States v. Kreutzer, 59 M.J. 773, 787 (Army Ct. Crim. App. 2004) (Currie, J., concurring).

[182] *Id*.

losing the barrel to an M-60 machine gun and "took it hard, again crying to other soldiers."[184] Soon after, he failed an inspection.[185] Kreutzer "felt increasingly depressed, suicidal, and angry."[186] Remembering that he had told Dr. Fong he would seek help if he felt he was going to lose control, Kreutzer did so on 21 October 2005.[187] He received no response to his request for help.[188] Kreutzer called a friend, Specialist (SPC) Mays, and told him he was "going to shoot the run the following day."[189]

Kreutzer spent the night of 26 October 1995 in a motel room, loading magazines in preparation for his attack.[190] He later described that he felt like he was operating on "automatic pilot" that night and that he "had two goals: (1) to send a message to the Army that the upper ranks did not care about the lower ranks and that he was an NCO willing to kill and die for his men, and (2) to be killed."[191] The next morning, SPC Mays brought the threats to the attention of his superiors.[192] As they dismissed his threats, Kreutzer prepared to kill. Earlier that morning, Kreutzer parked his car, left a suicide note,[193] and found a hiding place. "At 0631, [Kreutzer] methodically opened fire on his fellow soldiers. He wounded eighteen soldiers and killed one."[194]

Kreutzer admitted that he was the shooter and said he was attempting to send a message that his unit did not care about its men.[195] On 26 January 1996, charges against Kreutzer were referred to a capital general court-martial.[196] Shortly thereafter, Kreutzer's detailed defense counsel filed a request to the convening authority for the assistance of a mitigation specialist.[197] The convening authority denied that request.[198] Defense counsel renewed their request before the military judge.

> Defense counsel provided a copy of the request they had made to the convening authority in which they asserted that they lacked "the experience and scientific expertise to uncover all potentially mitigating events or factors in SGT Kreutzer's case." They also provided an extensive affidavit from a "mitigation specialist" that explained the necessity of a mitigation investigation in capital cases, the scope of that investigation, and the role of a mitigation specialist.[199]

---

[183] Todd Richissin, *Shooting Victims Testify in Bragg Trial*, NEWS & OBSERVER (Raleigh, N.C.), June 11, 1996, at A3.

[184] Richissin, *supra* note 2.

[185] *Id*.

[186] *Kreutzer*, 59 M.J. at 788 (Currie, J., concurring).

[187] Richissin, *supra* note 2.

[188] *Kreutzer*, 59 M.J. at 789 (Currie, J., concurring) ("[Kreutzer] stated that he attempted to get mental health phone support . . . but no one answered the phone.").

[189] United States v. Kreutzer, 61 M.J. 293, 296 (2005).

[190] *Kreutzer*, 59 M.J. at 788 (Currie, J., concurring).

[191] *Id.*

[192] *Kreutzer*, 61 M.J. at 296.

[193] *Kreutzer*, 59 M.J. at 789 (Currie, J., concurring).

> In [the car] was a suicide note dated 21 October: The bad dreams just won't end. I don't care where I go as long as its [sic] away from here. I'm a loser who just keeps on losing. I have nothing to look forward to. Fuck the world! Suicide is the ultimate test of faith. It shows one is ready to risk all to see if his God will accept him. I love my parents, my sisters, my brother, and my closest friends, but I must leave them. I don't want to hurt them, but there is no other way. AA Self-Storage—sell the contents of unit A-130 to pay for the funeral—sell my car too.

Id.

[194] *Id*. at 788.

[195] *Kreutzer*, 61 M.J. at 296.

[196] *Id*. at 297.

[197] *Id*.

[198] *Id*.

[199] *Id*.

Despite defense counsel's lack of training and claim that they could not conduct an appropriate mitigation investigation, the military judge denied the request.[200]

Kreutzer refused to accept a plea agreement that included life imprisonment with the possibility of parole.[201] His counsel, without the assistance of a mitigation specialist, had regular meetings with him, attempting to convince him to accept the plea.[202] Counsel later noted, "Our failure to get SGT Kreutzer to make a timely decision and accept the plea was of tragic proportions."[203]

The members took two hours to return a finding of guilty as charged.[204] They returned a sentence in less than four hours: "The court martial, all of the members concurring, sentences you to be reduced to the grade of E-1, to total forfeiture of all pay and allowances, to be dishonorably discharged from the service, and to be put to death."[205]

B. The Court of Appeals for the Armed Forces' Decision

The Army Judge Advocate General asked the CAAF to "determine whether the Court of Criminal Appeals erred in finding that the Government did not meet its burden of demonstrating that the erroneous denial of a mitigation specialist was harmless beyond a reasonable doubt."[206] Therefore, the court did not directly address the lower court's ruling "that the military judge erred in denying Kreutzer's request for a mitigation specialist."[207] The court began its discussion by noting the possible sources of the right Kreutzer was denied:

> The right to the expert assistance of a mitigation specialist in a capital case is determined on a case-by-case basis. Where such a request is erroneously denied, that ruling implicates the right to present a defense, compulsory process, and due process conferred by the Constitution, the right to obtain witnesses and evidence conferred by Article 46, UCMJ, and the right to the assistance of necessary experts conferred by R.C.M. 703(d).[208]

With no further discussion, the CAAF relied on solely due process grounds and held the denial of the expert an "error of constitutional magnitude."[209] Judge Susan J. Crawford, in dissent, found the majority's decision "unfortunately consistent with this Court's recent overreliance on due process, often without articulation of the source for that reliance."[210] The rest of the majority decision focused on the test for prejudice of the constitutional violation. The court noted that the ACCA used the proper standard—harmlessness beyond a reasonable doubt—yet "went on to misstate the nature of the inquiry."[211]

---

[200] *Id*. ("The military judge denied the motion without entering any findings of fact by simply stating: 'I find the law here at *United States v. Loving* 41 M.J. 213, 250. I don't find the showing requiring me to order one.'").

[201] Affidavit of James Anthony Martin, United States v. Kreutzer, 59 M.J. 773, 811 (Army Ct. Crim. App. 2004) (James A. Martin served as one of Kreutzer's defense counsel).

[202] *Id*.

[203] *Id*.

[204] Richissin, *supra* note 2.

[205] *Id*.

[206] United States v. Kreutzer, 61 M.J. 293, 295 (2005).

[207] *Id*.

> The Judge Advocate General of the Army made a decision to certify a precise issue relating to the lower court's finding of prejudice. Despite the opportunity to bring the lower court's ruling before this court . . . , TJAG chose not to do so. Under these circumstances, we conclude that the lower court's ruling that the military judge erred in denying Appellee's request for expert assistance is the law of the case.

Id. (citation omitted).

[208] *Id*. at 298 (citation omitted).

[209] *Id*.

[210] *Id*. at 310 (Crawford, J., dissenting) (citations omitted).

[211] *Id.* at 299.

The CAAF then conducted a de novo review of the denial of Kreutzer's request for a mitigation specialist.[212] Specifically, the court reviewed the general role of a mitigation specialist and how one could have been used in Kreutzer's case. The court noted "it is likely that a mitigation specialist may be the most experienced member of the defense team in capital litigation."[213] The court found Kreutzer's case "replete with evidence or information indicating that Kreutzer's mental health was dubious."[214] "[T]he presentation of the defense case-in-chief[, however,] include[d] testimony from only three individuals about Kreutzer's performance, behavior and reputation, and expert testimony from a single mental health professional." [215] The entire trial took approximately nineteen hours; the defense's entire case—two hours and forty-seven minutes.[216]

The CAAF could have achieved the same result on non-constitutional grounds. "The rights given to service members in the pretrial, trial, and post-trial stages are often more protective than the rights given citizens in both the federal and state courts."[217] Thus, the court could have found the right to a mitigation specialist in a capital case rooted in Article 46 of the UCMJ.[218] While specifically noting the denial of a request for a mitigation specialist implicated Article 46, the court analyzed the denial on due process grounds.

Less than two months after deciding *Kreutzer*, the court chose to base its related holding in *United States v. Warner*[219] on a statutory interpretation of Article 46, rather than due process grounds.[220] In *Warner*, the court held that Article 46 entitles defense counsel to an expert reasonably comparable to the government expert. Rejecting Judge Crawford's reliance on the Sixth Amendment in dissent, the court said "Congress was free to, and did, adopt a more protective statutory system for military accused than the Constitution provides for civilians in a criminal trial."[221] The court could have used the same logic in *Kreutzer* by expanding its interpretation of Article 46, but chose instead to find the denial of a mitigation specialist "error of constitutional magnitude."[222]

VI. After *Kreutzer*—Questions Unanswered

A. What Showing Is Now Required?

Before the *Kreutzer* decision, the three-part analysis laid out by the NMCMR in *Allen* provided the framework for defense counsel's request for expert assistance.[223] The CAAF did not discuss the required showing in *Kreutzer*. It did say, however, that "when a defendant subject to the death sentence requests a mitigation specialist, trial courts should give such requests careful consideration in view of relevant capital litigation precedent and any denial of such a request should be

---

[212] The court stated the burden on the government:

> The Government must demonstrate there is no reasonable possibility that the absence of a mitigation specialist contributed to the contested findings of guilty, or, in this case, that not even a single member would have harbored a reasonable doubt after considering the mental health evidence that the mitigation specialist could have gathered, analyzed, and assisted the defense in presenting.

Id. at 302.

[213] *Id*. at 299.

[214] *Id*. at 303.

[215] *Id*. "The only mental health professional called by the defense on the merits was Doctor (Major) Carroll J. Diebold, the Chief of the Department of Psychiatry and Neurology at Womack Army Medical Center, Fort Bragg, North Carolina." *Id*. "Doctor Diebold was called as a defense witness despite his recommendation to defense counsel 'that they should reconsider calling me to testify' and he specifically indicated that his 'testimony might not be helpful in front of the panel.'" *Id*. at 303 n.13.

[216] Richissin, *supra* note 2.

[217] Francis A. Gilligan, *The Bill of Rights and Service Members*, ARMY LAW., Dec. 1987, at 3.

[218] UCMJ art. 46 (2005).

[219] 62 M.J. 114 (2005).

[220] *Id*. at 119 ("Providing the defense with a "competent" expert satisfies the Government's due process obligations, but may nevertheless be insufficient to satisfy Article 46 if the Government's expert concerning the same subject matter area has vastly superior qualifications.").

[221] *Id*. at 121 (citation omitted).

[222] United States v. Kreutzer, 61 M.J. 293, 298 (2005).

[223] *See* United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994); United States v. Allen, 31 M.J. 572, 623 (1990).

supported with written findings of fact and conclusions of law."[224] In light of the constitutional right found by the CAAF in *Kreutzer*, has the burden on defense counsel lessened?

Judge Crawford, in dissent, claimed the majority expanded the Supreme Court's holding in *Ake* "by finding in the U.S. Constitution a right of an accused to a death penalty mitigation specialist on the defense team without the accused first demonstrating the need for such an expert."[225] The majority said only that an accused is entitled to mitigation specialists "where their services would be necessary to the defense team."[226] The ACCA held that the defense team had made the appropriate showing under the *Gonzalez* three-pronged test and found the military judge's legal conclusion unsupported by the facts.[227] Judge Crawford disagreed, finding that Kreutzer's defense team failed to meet the *Gonzalez* test despite the evidence relied on by both the lower court and the CAAF's majority.[228] Ignoring counsel's lack of experience or training in capital cases, and in spite of tremendous support to the conclusion that capital cases differ profoundly from non-capital cases, Judge Crawford concluded "defense counsel are expected to educate themselves to obtain competence in defending an issue presented in a particular case."[229]

Is Judge Crawford right to assume the *Gonzalez* test is no longer required following *Kreutzer*? Had the Judge Advocate General of the Army certified the question whether the military judge erred in denying Kreutzer's request for expert assistance, the court likely would have answered that question. One can certainly predict that military trial judges will be more lenient in granting defense requests for mitigation specialists in capital cases following *Kreutzer*. What showing is required, however, is yet to be seen.

B. *Ex Parte* Access

> Is it unfair to require the defense to disclose its trial strategy to the government to seek litigation support funds, while the trial counsel bears no similar requirement to reveal his or her trial strategy to the defense? Should the military justice system instead follow the federal model—as it does in so many other areas—by permitting the defense to appear before the judge in an ex parte hearing to try to establish the necessity of funding for an expert witness or other litigation support?[230]

In *Ake*, the Supreme Court held that "[w]hen the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent."[231] Likewise, 18 U.S.C. § 3006(e) provides an ex parte hearing for a person financially unable to obtain expert and other services. Legislative history of 18 U.S.C. § 3006A(e)[232] details concern that without ex parte access, defense counsel may be forced to disclose their strategy prematurely.[233] In contrast, the military justice system requires defense counsel to make the showing of necessity for the expert assistance to the convening authority. If the convening authority denies the assistance, then defense counsel may renew the request before the military judge. In both instances, however, the defense risks providing the prosecution valuable information about its case and strategy.

To prevent this disclosure and harm to the defense's case, counsel may request an ex parte hearing. Accused in the military justice system, however, are not guaranteed an ex parte hearing, and such a hearing "will only be used if the

---

[224] *Kreutzer*, 61 M.J. at 298. The military judge in Kreutzer's trial "denied the motion without entering any finds of fact. . . ." *Id*. at 297.

[225] *Id*. at 306 (Crawford, J., dissenting).

[226] *Id*. at 305.

[227] *See* United States v. Kreutzer, 59 M.J. 773, 778-79 (Army Ct. Crim App. 2004).

[228] *Kreutzer*, 61 M.J. at 311 (Crawford, J., dissenting).

[229] *Id*. "Judge Crawford has at times signaled her intent to drive a wedge between the American servicemember and his Constitutional rights." United States v. Taylor, 41 M.J. 168, 174 (C.M.A. 1994) (Sullivan, J., dissenting).

[230] H.F. "Sparky" Gierke, *Five Questions About the Military Justice System*, 56 A.F. L. REV. 249, 256 (2005) (as part of the overall question: "[S]hould the structure of the military trial judiciary be changed?").

[231] Ake v. Oklahoma, 470 U.S. 68, 82-3 (1985).

[232] 18 U.S.C. § 3006A(e) (LEXIS 2007).

[233] Mary M. Foreman, *Military Capital Litigation Meeting the Heightened Standards of* United States v. Curtis, 174 MIL. L. REV. 1, 35 (2002) (citing *Criminal Justice Act of 1963: Hearings on S. 63 and H. 1057 Before the Senate Comm. on the Judiciary*, 88th Cong. 173 (1963) ("the penalty for asking for funds and services may be the disclosure, prematurely, and ill-advisedly, of a defense")).

circumstances are 'unusual.'"[234] Nor does 18 U.S.C. § 3006(e) apply to the military.[235] In *Kaspers*, the CAAF realized this rule forces defense counsel to "make a choice between justifying necessary expert assistance and disclosing valuable trial strategy,"[236] yet held the military judge's discretion to allow an ex parte hearing on the issue a sufficient remedy.[237]

If defense counsel requesting expert assistance must still satisfy the three-part *Gonzalez* test in order to show necessity, the lack of a right to an ex parte hearing will continue to be a significant issue. Despite the importance of obtaining a mitigation specialist, counsel may determine that the disclosure required to meet the *Gonzalez* test outweighs the benefit of expert assistance. Regardless of counsel's choice, the defense's case will suffer.

VII. Conclusion

> *[O]ne of the most frequent grounds for setting aside state death penalty verdicts is counsel's failure to investigate and present available mitigating information.*[238]

The role of a mitigation specialist in capital cases is paramount in preventing the death sentence because defense attorneys do not have the knowledge, experience, or capability to handle that aspect of the case.

The CAAF has held that the law does not require the appointment of a mitigation specialist in every capital case.[239] As noted above, however, the Supreme Court will look to "'[p]revailing norms of practice as reflected in American Bar Association standards'"[240] in determining the reasonableness of counsel's performance under the *Strickland* standard for ineffectiveness of counsel. The *ABA Guidelines* note that "the use of mitigation specialists has become 'part of the existing standard of care' in capital cases, ensuring 'high quality investigation and preparation of the penalty phase.'"[241] Additionally, the Judicial Conference of the United States found that a mitigation specialist's "work is part of the existing 'standard of care' in a federal death penalty case."[242] Most recently, the CAAF held that erroneous denial of a request for a mitigation specialist "was error of constitutional magnitude."[243]

In light of the *Kreutzer* decision, prudent military defense counsel in capital cases should request the services of a mitigation specialist and convening authorities should provide funds for the expert assistance absent rare circumstances.

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.[244]

---

[234] United States v. Kaspers, 47 M.J. 176, 180 (1997); *see also* 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 14-63.20 (2d ed. 1999).

[235] United States v. Garries, 22 M.J. 288, 290 (1986) ("The provisions of 18 U.S.C. § 3006A concern representation of indigent defendants in federal district courts and are inapplicable to the military.").

[236] *Kaspers*, 47 M.J. at 180. In *Garries*, the "defense refused to make a showing of necessity on the record." *Garries*, 22 M.J. at 291. Likewise, defense counsel in *Kaspers* initially asked for an ex parte hearing, but "opted to reveal strategic information necessary to obtain an expert," after the military judge refused such hearing. *Kaspers*, 47 M.J. at 179. The court found persuasive Kaspers argument that "defense counsel often treads lightly with the famous Sword of Damocles hanging over them when attempting to justify expert requests to the military judge." *Id*. at 180.

[237] *See Kaspers*, 47 M.J. at 180.

[238] Judicial Conference Report, *supra* note 52, at pt. I, § B.3.4

[239] United States v. Kreutzer, 61 M.J. 293, 305 (2005).

[240] Wiggins v. Smith, 539 U.S. 510, 522 (2003) (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)).

[241] *ABA Guidelines*, *supra* note 151, at 960 (citations omitted).

[242] Judicial Conference Report, *supra* note 52, at recommendation 7 cmt.

[243] *Kreutzer*, 61 M.J. at 305.

[244] Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

Note from the Field

They Asked, But Can We Help?
A Judge Advocate's Guide to Immediate Response Authority (IRA)

Lieutenant Colonel Mary J. Bradley
Staff Judge Advocate
Joint Task Force Civil Support
Fort Monroe, Virginia

Major Kathleen V.E. Reder, U.S. Air Force Reserve
Domestic Operational Attorney
Joint Task Force Civil Support
Fort Monroe, Virginia

Scenario

During your morning drive to work, WXYZ reports a loud blast in your community; a bomb detonated at the local court house just ten miles away from your installation. As you arrive at work, your staff judge advocate (SJA) is hustling to the commander's office. You learn that dozens of casualties resulted from this explosion, that terrorism is suspected, and warnings of additional bombings linger. Your commander wants to help the local community and requires your immediate advice. As the operational law attorney, your SJA asks you to research the question, "Can your commander assist the local community?"

Introduction

The answer is yes; your commander may help the local community, provided that he assists within the parameters of immediate response authority (IRA).[1] Military commanders and responsible officials of Department of Defense (DOD) components and agencies are authorized, when time does not permit prior approval from higher headquarters and subject to supplemental direction, to take immediate actions in response to requests from domestic civil authorities "to save lives, prevent human suffering, or mitigate great property damage."[2] Such "actions" are referred to as "immediate response."[3]

When an emergency occurs, state and local authorities may not have the equipment or capability immediately available to respond and assist their community. In some circumstances, the local military commander, who is ready and capable of rapid response, can immediately begin the relief effort while civilian authorities are marshalling the necessary relief assets. Sufficient local and state assets should arrive on scene and assume control within a short period of time. The IRA is *not* a blanket authority to provide unlimited military assistance. Specific requirements and criteria must be satisfied before providing such assistance, and it must end at the appropriate time.[4]

Immediate response may include DOD assistance to civil agencies in rescue, evacuation, emergency medical treatment, emergency restoration of essential public services, and emergency clearance of debris to permit rescue or movement of people from effected areas.[5] While the DOD directive provides a complete list of IRA activities, essentially any actions, not otherwise prohibited by law, may be conducted if they "save lives, prevent human suffering, or mitigate great property damage."[6]

An important distinction should also be made between other types of "immediate" response. Separate from IRA authority is an installation commander's Fire and Emergency Services Authority (F&ESA).[7] Under F&ESA, installation

---

[1] U.S. DEP'T OF DEFENSE, DIR. 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (MSCA) para. 4.5. (15 Jan. 1993) [hereinafter DOD DIR. 3025.1].

[2] *Id.* para. 4.5.1.

[3] *Id.*

[4] *See generally id.* para. 4.5.

[5] *Id.* para. 4.5.4.

[6] *Id.* paras. 4.5.1, 4.5.4.

[7] U.S. DEP'T OF DEFENSE, INSTR. 6055.06, DOD FIRE AND EMERGENCY SERVICES (F&ES) PROGRAM (21 Dec. 2006).

commanders may enter into a reciprocal agreement with a local community for fire and emergency services. In the absence of such an agreement, "installation commanders are authorized to render emergency assistance to preserve life and property in the vicinity of a DOD installation, when . . . such assistance is in the best interest of the United States . . . ."[8] No request from civil authorities is necessary when an agreement is in place.[9]

Another type of "immediate" response that should not be confused with IRA is emergency response authority. Military forces may be used for law enforcement purposes when necessary to prevent the loss of life or wanton destruction of property or to restore governmental functioning and public order during sudden and unexpected civil disturbances beyond the control of local civilian authorities.[10] This authority should be exercised with extreme caution and prior approval is highly recommended. Emergency response authority is outside the scope of this note; the below criteria should not be used when analyzing the legality of an emergency response.

With this basic understanding of IRA, you can use the follow steps to analyze a particular request for assistance:

Step by Step Analysis

STEP 1. Has there been a request for assistance from civil authorities?

The DOD cannot assist local authorities unless they have made a request. Essentially, the DOD shall not impose its resources or authority on a domestic civilian community. The DOD assists, if possible, *when asked* to do so by proper authority. Civil authorities *must* request assistance from a commander before any assistance is granted under IRA. A verbal request is sufficient, but it must be followed by a written request as soon as possible.[11]

STEP 2. Is there time to seek approval from the chain of command, specifically the Secretary of Defense?

The general rule is that defense support to civil authorities requires prior authorization from the chain of command; under the National Response Plan (NRP) these requests require approval from the Secretary of Defense.[12] The exception to this rule is the IRA doctrine, as provided in DOD directives, which allows military commanders and responsible officials of DOD activities, where time does not permit prior approval from higher headquarters, to take immediate action to "save lives, prevent human suffering, or mitigate great property damage."[13] Requests for assistance under IRA are time-sensitive and should be received from local government officials at the time of the incident or within twenty-four hours of a damage assessment.[14] After the initial emergency period, the local and state authorities should follow the procedures laid out in the NRP if they require assistance from the federal government.[15]

STEP 3. Have you and your commander evaluated the request for assistance under the criteria established in DOD Directive 3025.15?

Under IRA, judge advocates (JAs) advise their commanders in analyzing requests for civil support. Requests from civil authorities for DOD assistance, whether under IRA or through the NRP, must be evaluated against specific criteria.[16] Under the NRP, attorneys in the office of the Chairman Joint Chiefs of Staff, Joint Director of Military Support (JDOM) analyze requests for civil support and advise the Secretary of Defense on approving defense support to civil authorities.[17] Under IRA, when a commander asks, "Can I do this?" the local JAs use the same criteria as the JDOM attorneys use to advise their

---

[8] *Id.* para. E5.1.4.4.

[9] *Id.*

[10] U.S. DEP'T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS) para. 4.2.1.1 (4 Feb. 1994); U.S. DEP'T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS para. E4.1.2.3.1 (15 Jan. 1986).

[11] U.S. DEP'T OF DEFENSE, DIR. 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES para. 4.7.1 (18 Feb. 1997).

[12] U.S. DEP'T OF HOMELAND SECURITY, NATIONAL RESPONSE PLAN 42 (Dec. 2004) [hereinafter NATIONAL RESPONSE PLAN].

[13] DOD DIR. 3025.1, *supra* note 1, para. 4.5.1.

[14] U.S. DEP'T OF DEFENSE, MANUAL 3025.1-M, MANUAL FOR CIVIL EMERGENCIES para. C2.2.2 (June 1994).

[15] *See generally* Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121 - 5206 (as amended by Pub. L. No. 109-308 (2006)); *see also* DOMESTIC OPERATIONAL LAW HANDBOOK FOR JUDGE ADVOCATES, VOL. 1, CH. 5 (18 July 2006) (providing an overview of the NRP, the Stafford Act, the role of the DOD and the principal federal agency).

[16] DOD DIR. 3025.15, *supra* note 11, para. 4.2.

[17] *Id.* para. 4.5; NATIONAL RESPONSE PLAN, *supra* note 12, at 10, 42, 104.

commanders and ensure they have considered each of the criteria when making decisions about whether to authorize immediate assistance. The evaluation criteria are as follows:

-Legality (compliance with laws)
-Lethality (potential use of lethal force by or against DOD forces)
-Risk (safety of DOD forces)
-Cost (who pays, impact on DOD budget)
-Appropriateness (whether the requested mission is in the interest of the Department to conduct)
-Readiness (impact on the [unit's] ability to perform its primary mission)[18]

Legality

Judge advocates must ask questions and determine exactly what type of assistance the civil authorities are requesting. Not all types of assistance are lawful, no matter how much we want to help. The most significant legal impediment to assistance is the Posse Comitatus Act (PCA),[19] which prohibits military participation in direct civil law enforcement activities, such as apprehension, arrest, interrogation, search, seizure, stop and frisk, and surveillance.[20] While there are exceptions to the PCA, the exceptions are narrow and infrequent. A request from local authorities for assistance investigating and detaining suspected terrorists *cannot* be accommodated, as such assistance by military personnel would violate the PCA. Local police, the Federal Bureau of Investigation, and other designated federal law enforcement bodies would typically investigate and detain civilian suspects. Alternatively, if local authorities request the use of military working dogs in order to immediately identify additional bombs within local government structures and thereby save lives, such assistance can probably be provided, subject to additional analysis. If the request for assistance does not violate the PCA, then the JA should next review the DOD directives to determine whether the type of assistance falls within one of the enumerated types of assistance.[21]

Lethality

Lethality refers to whether there is a potential for use of lethal force by or against DOD personnel. A commander must consider the environment where the assistance will be provided. The Rules for the Use of Force (RUF) in a domestic environment are more restrictive than the permissive rules applicable in a hostile foreign territory. The Secretary of Defense

---

[18] DOD DIR. 3025.15, *supra* note 11, para. 4.2.

[19] 18 U.S.C. § 1385 (2000).

[20] DOD DIR. 5525.5, *supra* note 10, para. E.2.1.8. *See also* Hayes v. Hawes, 921 F.2d 100, 103 n.3 (7th Cir. 1990) (noting that 10 U.S.C. ch. 18 specifically incorporates 18 U.S.C. sec 1385 and provides the primary restrictions on military participation in civilian law enforcement activities); United States v. Red Feather, 392 F. Supp. 916, 922 (W.D.S.D. 1975).

[21] According to *DOD Directive 3025.1, para 4.5.4*:

> Immediate Response may include DOD assistance to civil agencies in meeting the following types of need:
>
> -Rescue, evacuation, and emergency medical treatment of casualties, maintenance or restoration or emergency medical capabilities, and safeguarding the public health.
>
> -Emergency restoration of essential public services (including fire-fighting, water, communications, transportation, power, and fuel).
>
> -Emergency clearance of debris, rubble, and explosive ordnance from public facilities and other areas to permit rescue or movement of people and restoration of essential services.
>
> -Recovery, identification, registration, and disposal of the dead.
>
> -Monitoring and decontaminating radiological, chemical, and biological effects; controlling contaminated areas; and reporting through national warning and hazard control systems.
>
> -Roadway movement control and planning.
>
> -Safeguarding, collecting, and distributing food, essential supplies, and materiel on the basis of critical priorities.
>
> -Damage assessment.
>
> -Interim emergency communications.
>
> -Facilitating the reestablishment of civil government functions.

DOD DIR. 3025.1, *supra* note 1, para. 4.5.4.

has withheld the authority to arm any military troops operating in the homeland in a Defense Support to Civil Authority mission, so a local commander cannot arm personnel who are conducting an IRA mission.[22] If use of force by or against personnel is an issue then the commander should exercise caution, expedite notifications, or perhaps wait for DOD approval.

Risk

Will DOD forces be safe in providing assistance? If there are risks, then do the civil authorities have a plan to manage the risk? Commanders should consider that risks to military personnel also mean risks to overall unit readiness.

Cost

Assistance "should not be delayed or denied because of the inability or unwillingness of the requester to make a commitment to reimburse the Department of Defense."[23] However, defense support to civil authorities should be on a reimbursable basis whenever possible. Costs should be tracked for reimbursement purposes; however, if no one reimburses the affected command, the costs of immediate response assistance are funded through operation and maintenance funds.[24]

Appropriateness

The DOD cannot, for legal and fiscal reasons, become a first responder to all types of emergencies. Local and state authorities must first apply their own resources to the situation prior to making the request and have found that the situation was beyond their capabilities to affect the required response in quick order. It is important to recognize that local authorities may not even know what they need.

Another aspect of appropriateness, unique to IRA, is whether your unit is the appropriate DOD responder based on proximity and time. That is, are you the closest DOD unit that has the required capability? While a strict guideline for distance from an emergency to a DOD unit does not exit, a commander must consider this factor when determining whether to assist under his IRA. Further, is the type of assistance appropriate for IRA, or should the request be processed as a federal "request for assistance?" The guideline for the "time" determination has been whether this assistance be provided and completed within seventy-two hours.[25] A request for assistance that would take any longer to complete should be made through appropriate federal channels, rather than directly to a local commander under IRA.

An example of inappropriate immediate response based on time is a request to the local installation commander for medical personnel and supplies to care for casualties for the next month. This does not mean that the DOD cannot or would not provide this medical assistance under certain circumstances, but long term care is not immediate assistance. Medical care is not the unique purview of the DOD and would not typically be provided upon request by civil authorities unless all local resources were exhausted. A more appropriate immediate response request may be to provide ambulances staffed with military personnel to report to a mass casualty site and transport those casualties to local hospitals.

Debris removal may initially appear to be an inappropriate type of assistance for an IRA mission; however, it can be appropriate when the local authorities request debris removal to allow access to particular areas for search and rescue.[26] A commander may have equipment and personnel readily available to remove debris in a community where the same service is not otherwise available without inordinate delay. If all other factors are met, then debris removal would be appropriate immediate assistance.

---

[22] Message, 281832Z Apr 06, PTC Washington, D.C., subject: Defense Support to Civil Authorities Standing (DSCA) EXORD para. 9.O.

[23] DOD DIR. 3025.1, *supra* note 1, para. 4.5.2.

[24] Department of Defense Appropriations Act, 2007, Pub. L. No. 109-289, tit. II, 120 Stat. 1257 (2006); DOD DIR. 3025.1, *supra* note 1, para. 4.5.2 (stating that immediate response should be provided to civil agencies on a cost-reimbursable basis if possible). Initial expenses are paid for through a unit's operation and maintenance funds, as these are the only funds available for such purposes initially).

[25] The "72-hour" guideline for the time determination is not authoritative or documented in a directive, policy, or statute; however, it provides a method for determining whether the assistance is genuinely immediate response that cannot wait for formal requests to the Secretary of Defense. The types of immediate response allowed under *DOD Dir. 3025.1, para. 4.5.4,* are those that can be completed within seventy-two hours and generally focus on saving lives, preventing human suffer, or mitigating great property damage. DOD DIR. 3025.1, *supra* note 1, para. 4.5.4.

[26] *Id.* para. 4.5.4.3.

Readiness

A unit must always stand ready to perform its primary mission to defend the United States. If assistance to civil authorities may impact readiness, a commander must carefully tailor the assistance provided to ensure readiness is maintained.

STEP 4. If you decide to respond under IRA, what do you need to do next?

Commanders shall advise their chain of command of any assistance provided to civil authorities as quickly as possible and shall seek approval or additional authorizations as needed.[27] Notice should reach the National Military Command Center within a few hours of the decision to provide immediate response.[28] Forward the written request for assistance through command channels as soon as it becomes available.

STEP 5. How long can you help?

Immediate response is not an indefinite response. As discussed above, a commander should respond to requests that can typically be completed within seventy-two hours. This is a guideline only, but it underlies the concept that IRA is narrow in scope and duration, and a formal request should be made for assistance that is required for a longer time and does not involve immediate live-saving activities. If, after an initial request is satisfied, a commander is still able to provide support to civil authorities, then follow-on requests and assistance should be made through the lead federal agency or principal federal agency based on the Stafford Act process and NRP.[29] A commander can notify their service force provider of their availability and capability to support a Defense Coordinating Officer (commonly known as DCO) on a longer-term basis or to become part of an established joint task force to respond to mission assignments.

Conclusion

Just as every emergency is unique and cannot be fully anticipated, each request for civil support is unique. This article serves as a checklist for the consideration of immediate response, as well as an analytical tool to ensure that all parties maintain the legal boundaries of immediate response authority. Armed with this information, JAs of any experience level may respond readily and correctly to a commander's inquiry, "I want to help the local authorities, can I do this?"

---

[27] *Id.* para. 4.5.3.

[28] Memorandum, Deputy Secretary of Defense, for Secretaries of the Military Departments, et al., subject: Reporting "Immediate Response" Requests from Civil Authorities (25 Apr. 2005).

[29] Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121 - 5206 (as amended by Pub. L. No. 109-308 (2006)); *see also* DOMESTIC OPERATIONAL LAW HANDBOOK FOR JUDGE ADVOCATES, VOL. 1, CH. 5 (18 July 2006) (providing an overview of the NRP, the Stafford Act, the role of the DOD and the principal federal agency).

USALSA Report
U.S. Army Legal Services Agency

Trial Judiciary Note

A View from the Bench: A Military Judge's Perspective on Court-Martial Providency

Colonel Thomas S. Berg[1]
Military Judge, 3rd Judicial Circuit
U.S. Army Trial Judiciary, Fort Hood, Texas

Introduction

After almost thirty years in the shoes of the criminal defense lawyer,[2] I am intimately familiar with trial defense counsel's challenge at a guilty plea—how to persuade an anxious, often barely post-adolescent, accused in the biggest trouble of his life to fess up and talk candidly with a judicial officer of intimidating rank, and to publicly admit the truth of what that Soldier did. But getting that emotionally conflicted Soldier to plead guilty is *not* the job of the military judge. Assuming that a guilty plea is in the accused's best interest, that job belongs to the trial defense counsel and, to a lesser but still important extent, to the government trial counsel to "make it happen." Nonetheless, before discussing the responsibilities of the trial lawyers, it is useful to reflect briefly on the role of the military judge at the guilty plea and his responsibilities both to the rights of the accused and to the military justice system that eventually reviews the record of what transpired.

The Legal Framework for Guilty Pleas—Getting All the Parties on the Same Page

The requirements of a provident guilty plea are a creature of both the *Manual for Courts-Martial* and the United States Constitution. Rule for Courts-Martial (RCM) 910[3] imposes the following: that the military judge address the accused personally and determine that the accused understands (1) the nature of the charges to which the accused is pleading guilty; (2) the range of punishment provided by law; (3) the accused's right to representation by qualified counsel; (4) the accused's right to plead not guilty and be tried by a court-martial at which he enjoys the right of confrontation and the right against self-incrimination; (5) that, if the accused pleads guilty, he waives those enumerated rights; and, (6) that, upon pleading guilty, the military judge will question the accused about the offense under oath—answers that, if made under oath on the record in the presence of counsel, may be used against him at sentencing.[4]

The military judge "shall not" accept a guilty plea unless, after addressing the accused personally, the military judge determines that the plea is voluntary. This inquiry encompasses concerns about whether the plea is the product of force or of threats or promises other than a permissible pretrial agreement (PTA) under RCM 705.[5] Other than any sentence limitation term (the "quantum"), the military judge must discuss the entirety of the agreement with the accused on the record.[6] The

---

[1] Currently assigned to the 150th Legal Services Organization (Military Judge) as a reserve military judge with duty in the 3rd Judicial Circuit. Prior to his appointment by The Judge Advocate General to the military bench, Colonel Berg served active duty tours as Staff Judge Advocate (SJA) for the Coalition Joint Civil-Military Operations Task Force in Afghanistan (2003-2004), SJA for Joint Task Force - 160 in Guantanamo Bay, Cuba (2002), Trial Counsel (TC) on the OTJAG "Tiger Team" for military commissions (2001-2002), Chief of Justice for Multi-National Division – North and 10th Mountain Division (LI) in Bosnia (1999-2000) and TC with 5th Infantry Division (Mechanized) and Fort Polk (1990-1991). Colonel Berg has also served in a variety of reserve assignments including several years as a trial defense counsel, as well as command and deputy staff judge advocate positions with criminal law responsibilities.

[2] Licensed in the State of Texas 1978, Assistant Federal Public Defender, Southern District of Texas 1982-present, Board Certified – Criminal Law, Texas Board of Legal Specialization 1984-present.

[3] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 910, app. 21, Analysis of Rules for Courts-Martial (2005) [hereinafter MCM]. Rule for Court-Martial 910 generally tracks the guilty plea format of Federal Rule of Criminal Procedure (FRCP) 11. Rule for Court-Martial 910(c), (d), and (e) codify the requirements of *United States v. Care*, 40 C.M.R. 247 (1969) discussed *infra* at n.8.

[4] MCM, *supra* note 3, R.C.M. 910(c) (1-5).

[5] *Id.* R.C.M. 910(d); Boykin v. Alabama, 395 U.S. 238 (1969) (holding that the Due Process Clause of 14th Amendment requires knowing waivers of constitutional rights at a guilty plea to be reflected on the record).

[6] MCM, *supra* note 3, R.C.M. 910(f)(3); United States v. Green, 1 M.J. 453 (C.M.A. 1976) (holding that the military judge must establish "on the record that the accused understands the meaning and effect of each provision in the pretrial agreement").

military judge is obligated to perform this inquiry to ensure that the accused understands the agreement and that both the government and the defense agree as to the import of its terms.[7]

There must be a factual basis for the plea in addition to the accused's mere admission of guilt.[8] As mentioned earlier, the military judge must directly address and elicit from the accused under oath, his understanding of what he did and how that conduct violated the law.[9]

Defense Preparation for Providency

There is more to preparing an accused for his guilty plea than showing him where in the script he should say, "Yes, Your Honor." The Soldier needs to be ready to have a full discussion with the military judge on any aspect of the providency proceeding. Indeed, the appellate courts that grade the trial court's work soundly condemn reliance by the military judge on leading or legally conclusive questions, especially as they apply to the elements of the offense and the interrelated factual basis for the plea.[10] In other words, the Soldier needs to be prepared for some two-sided conversation about his understanding of the rights he is surrendering and his understanding of the elements of the crimes for which he is pleading guilty. In addition, the Soldier must be able to cogently and consistently explain what he did and why it was wrongful.[11]

"Rehearsal" may strike some as too explicit a term for the necessary preparation, because it suggests rote responses and lacks spontaneity. However, the defense counsel is responsible for making sure that *before* he enters the courtroom, the accused is prepared to discuss his guilty plea with the military judge. If the accused is not in confinement, then bring him to the courtroom on a slow day and walk him through the providency inquiry. Let him absorb a sense of the courtroom so that he will be less fearful of the surroundings. While the accused is doubtless not happy to talk with the judge, he needs to understand providency in order for his plea to be successful.[12] The full-fledged discussion is absolutely necessary in order that the military judge make the required findings to ultimately accept the plea.[13]

Government Cooperation with an Eye Toward Providency

Assuming the government has brought its prosecution in good faith that the accused is guilty, the government should be somewhat satisfied that it has nearly achieved its objective of a conviction without a contest. The government controls its side of the terms of the PTA, a role in drafting a stipulation of facts applicable to the plea, and the power to help clean up inconsistencies and minor errors in the charge sheet. Mindful that the accused is generally untrained in the law, writing the terms of the PTA and the stipulation briefly and in plain English rather than "legalese" will go a long way toward insuring that the accused actually understands these documents and their purposes. Keeping things simple and unambiguous makes it much more likely that the plea will survive appellate scrutiny.

---

[7] MCM, *supra* note 3, R.C.M. 910(f)(4); *Green*, 1 M.J. 453.

[8] A big "foot stomp" here. This is the part of the providency inquiry that is not completely scripted in the *U.S. Department of the Army, Pamphlet 27-9*. Accordingly, it is the stage where, as we will discuss shortly, the plea may come apart either at trial or on appeal. *See* U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCH BOOK ch. 2, § II (15 Sept. 2002).

[9] MCM, *supra* note 3, R.C.M. 910(e); *see, e.g.*, McCarthy v. United States, 394 U.S. 459 (1969) (mandating direct inquiry into accused's understanding of law in relation to facts under FRCP 11); United States v. Care, 40 C.M.R. 247 (C.M.A. 1969) (prospectively adopting the reasoning in *McCarthy v. United States* and the voluntariness/waiver of rights requirements of *Boykin v. Alabama* in guilty pleas under the RCM).

[10] *E.g.*, United States v. Jordan, 57 M.J. 236 (2002) (finding that the accused's "yes" response to legally conclusive question whether his conduct was prejudicial or service discrediting failed to establish factual predicate). The obviously better question would have been, "Tell me how you think your conduct was prejudicial to good order and discipline or service discrediting?"

[11] The court has no knowledge of what happened and relies on the parties in court for the facts even if provided a stipulation of facts beforehand. Material inconsistencies are resolved by contested trials and not guilty pleas. Further, the parties should be careful that inconsistent facts do not arise during sentencing because this may reopen providency and compromise the plea. This is exactly what occurred in the recent effort by one of the Abu Ghraib defendants, Private First Class Lynndie England, to plead guilty, only to have the military judge declare a mistrial after her boyfriend, a co-defendant, testified on her behalf at sentencing that she was unaware of the wrongfulness of her conduct and was "just following orders." *Abu Ghraib Judge Declares Mistrial*, CNN.COM, May 4, 2005, http://www.cnn.com/2005/LAW/05/04/prisoner.abuse.england/index.html.

[12] I have occasionally reminded counsel in RCM 802 sessions that I have a law degree but not a degree in dentistry so I am reluctant to "pull teeth" to get through the plea.

[13] MCM, *supra* note 3, R.C.M. 910(g).

Conclusion

You can bring the accused to providency, but neither you nor the military judge can make him plead guilty. The accused must want to plead guilty and must be able to do so with a complete understanding of his rights, and the impact of his conduct on the mores of military society. The accused must know and appreciate the terms of any agreement with the convening authority that affected the decision to surrender his rights and plead guilty. Preparation of the accused takes time, patience, and a commitment from the defense counsel to the accused's education in the legal process. The government can assist this objective by keeping things simple and clear. The critical performance by the accused will be in the development of a factual basis in support of his plea of guilty and its interrelation to the elements of each offense. That will take place in the course of an unscripted conversation between the Soldier and the military judge. Preparing the accused to participate in this conversation will assure that his plea will be found and remain provident.

AWOL: THE UNEXCUSED ABSENCE OF AMERICA'S UPPER CLASS FROM MILITARY SERVICE—AND HOW IT HURTS OUR COUNTRY[1]

REVIEWED BY MAJOR CHARLES KUHFAHL JR.[2]

[W]e need a strong military and it is the duty of all classes to be involved in making it so.[3]

AWOL: The Unexcused Absence of America's Upper Class from Military Service—and How It Hurts Our Country, attempts to provide a critical analysis of the diminishing relationship between the upper classes and the military, and the alleged detriment resulting from the weakening relationship. The end result, however, is merely the collective penance or catharsis of two writers thrown together, who willingly discuss their self-enlightenment concerning today's modern military.[4] As appropriately described by General Tommy Franks (Retired), *AWOL* is, above all else, "a love story."[5] And while love stories have their place as a literary genre, AWOL's use as an analytical tool for today's military is probably misplaced.

AWOL is the collaborative effort of Kathy Roth-Douquet[6] and Frank Schaeffer.[7] Roth-Douquet, "a former agitator, feminist, Ivy Leaguer," and Clintonite has led a life of political activism and democratic service.[8] While serving in the White House she learned first hand the role of the military in world affairs.[9] Eventually, she married a Marine officer and became, in her words, a "Marine Wife."[10] Through her husband's service, especially his deployments in support of the war effort, Roth-Douquet began to develop a different view of the military: the view of a family member forced to live with and accept her loved one's service.

Frank Schaeffer is the product of a "British boarding school" education. He, like Roth-Douquet, had no connection to, much less an understanding of, America's military.[11] Schaeffer was born, raised, and lived in the world of the well-to-do. He wrote books, raised his children as he had been raised, and lived in "a very me-centered quest for fulfillment."[12] Never did it occur to him that his youngest son would do something as "insanely self-destructive" as join the military.[13] While first ashamed of his son's choice of profession, Schaeffer ultimately began to understand the "brotherhood of pride" that his son had entered.[14]

It is through their collective experiences, both as the wife of a servicemember and the father of a servicemember, that Roth-Douquet and Schaeffer began to believe that not everyone was pulling their fair share in the defense of the country. More than anything else, AWOL is the authors' attempt to set the record straight. Providing a bit of first person authenticity, both writers readily admit they come from the very social class their book attempts to expose: the upper class.[15] Both were

---

[1] KATHY ROTH-DOUQUET & FRANK SCHAEFFER, AWOL: THE UNEXCUSED ABSENCE OF AMERICA'S UPPER CLASS FROM MILITARY SERVICE—AND HOW IT HURTS OUR COUNTRY (2006).

[2] Judge Advocate, U.S. Army. Written while assigned as a student, 55th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] ROTH-DOUQUET & SCHAEFFER, *supra* note 1, at 183.

[4] *Id*. at 2.

[5] *Id.* at xi.

[6] "Roth-Douquet is a veteran of every presidential campaign of the past twenty years and has served in the Clinton White House and the Department of Defense. . . . At the Pentagon, she served in the Office of the Secretary of Defense primarily on defense-reform issues." About Kathy Roth-Douquet, http://www.roth-douquet.com/about.shtml (last visited Mar. 8, 2007) [hereinafter About Kathy Roth-Douquet].

[7] "Frank has written for *USA Today*, the *Washington Post*, *Reader's Digest*, the *San Francisco Chronicle*, the *Los Angeles Times*, the *Baltimore Sun* and many other publications on topics ranging from his critique of American right wing fundamentalism to his experiences as a military parent and novelist." The Official Website of Frank Schaeffer, http://www.frankschaeffer.com/ (last visited Mar. 8, 2007).

[8] *See* ROTH-DOUQUET & SCHAEFFER, *supra* note 1, 12-14.

[9] *Id.* at 13.

[10] *Id.* at 14

[11] *Id.* at 21.

[12] *Id.* at 19.

[13] *Id.* at 22.

[14] *Id.* at 23.

[15] *Id.* at 1 ("We were raised in a culture, a privileged culture, that misunderstands and underestimates the meaning of military service.").

also forced to accept the realities of military service not by a personal choice but because of the service of loved ones: a husband for Roth-Douquet[16] and a son for Schaeffer.[17]

The simple premise of *AWOL*, as described by the authors, is:

> We believe that the increasing gap between the most privileged classes and those in the military raises three major problems: It hurts our country, particularly our ability to make the best policy possible. It undermines the strength of our civilian leadership, which no longer has significant numbers who have the experience and wisdom that comes from national service. Finally, it makes our military less strong in the long run.[18]

While most readers will agree with the authors' general assertion that there is an absence of America's upper classes from military service, the evidence presented in *AWOL* in support of the alleged ramifications of such absence falls short of convincing.

Roth-Douquet and Schaeffer provide a wealth of statistical data demonstrating the truly astonishing historical decline of the presence of upper classes in America's military. According to the authors' research, "[s]eventy percent of Congress were veterans in 1969. Twenty-five percent were veterans in the Congress of 2004."[19] Additionally, this apparent generational decline in the motivation to serve does not bode well for the future where "[o]nly slightly more than one percent of members of Congress [presently] have a child serving."[20] This lack of service is not reserved to only the political elite, though. The upper class, in general, seems to have dismissed the idea of military service as even a possibility. As the authors point out, "[a]bout half of the graduating classes of Princeton and Harvard entered the service for a tour of duty in the fifties. Today, less than one percent do."[21]

While the statistics alone are staggering enough to the common reader, the authors miss an important opportunity to personify the politically elite's desire to avoid military service outright by relegating Vice President Dick Cheney's "legal draft dodging" to a mere footnote.[22] This relegation is surprising considering Roth-Douquet's democratic leanings.[23] There simply can be no argument, at least based on historical percentages, that today's upper classes are woefully underrepresented in today's military. Such absence alone, however, does little to support the authors' overall contention that the military, and the country, are being significantly impaired by that absence.

In claiming that the absence hurts the country by preventing the elected officials to make the best policy decisions possible, the authors base their proposition primarily on the model set during World War II.[24] The authors show clear reverence for the unique situation that was presented in the 1940's where the child of a sitting president actually served in the military during a time of war.[25] Such a situation would, according to Roth-Douquet and Schaeffer, provide a leader with an "intimate connection to active duty—and to the personal consequences of his foreign policy decision making[:]"[26]

> This human dimension of Roosevelt's and Churchill's wartime lives has largely been forgotten, but the safety of their children was always on their minds, and they often asked after each other's broods. . . .

---

[16] *Id.* at 14.

[17] *Id.* at 20.

[18] *Id.* at 10.

[19] *Id.* at 7 n.2 (citing Donald N. Zillman, *Where Have All the Soldiers Gone II: Military Veterans in Congress and the State of Civil-Military Relations,* 58 ME. L. REV. 135 (2006)).

[20] *Id.* at 7.

[21] *Id.* at 10.

[22] *Id.* at 111 n.14 ("Vice President Richard Cheney explained the eleven deferments he sought and received from the Vietnam draft as simply a matter of having 'other priorities' than military service at that time in his life. Quoted in an interview by George C. Wilson in the *Washington Post*, 1989, as quoted by Timothy Noah 'How Dick Cheney Is Like Dan Quayle.'" *See* Timothy Noah, *How Dick Cheney is Like Dan Quayle*, SLATE, July 27, 2000, http://www.slate.com/id/1005761/).

[23] *See* About Kathy Roth-Douquet, *supra* note 6.

[24] *See* ROTH-DOUQUET & SCHAEFFER, *supra* note 1, at 10.

[25] *Id.* at 109.

[26] *Id.*

> Those pins [marking the position of troops] in the map rooms, from London to Washington, had faces attached to them—and some of those faces were their own children's.[27]

Ultimately, Schaeffer argues that political leaders having a personal stake in the military, through their children's service, "will keep us out of stupid elective wars."[28] Such a conclusion begs several questions, however, and perhaps suggests that the author has not abandoned all of his liberal-elitist leanings in the interest of objectivity. For example, who will decide which wars are "stupid" or "elective"? Will personalization of the military inadvertently keep the United States out of "important" wars, to the detriment of the country and the rest of the world? Finally, is it truly best for "the country" if decisions concerning war and foreign policy are based on the number of children of elected officials who may be impacted? Regrettably, these questions are left unanswered. Had Schaeffer or Roth-Douquet been able to provide concrete examples of actual poor foreign policy decisions being based on an absence of America's upper class, perhaps the overall theory would not sound so "utopian."

Notwithstanding this idealistic view of the preferred paternalistic relationship between America's leaders and America's military, it is unabashedly obvious that both authors possess a profound affinity for the men and women in uniform. At a minimum, the reader will come away with a better, and probably more positive view of the armed services, which is most likely one of the unstated goals of Roth-Douquet and Schaeffer. For example, in taking the media to task for the lack of positive coverage of military personnel,[29] the authors attempt to shine a contrasting positive light on the military by devoting a significant number of pages to anecdotal evidence of heroism and bravery.[30] They also provide several testimonials from current military officers who graduated from the same Ivy League schools that the authors chastise for being anti-military.[31] These testimonials do an admirable job of extolling the overall virtues of military service and act as a calling to the upper class elite to take responsibility for their citizenship. In the end, however, they do little, if anything, to support the authors' overall thesis.

It is this lack of substance that undercuts the authors' final claim that the lack of upper class participation in the military makes our military less strong.[32] The biggest danger the authors forecast for the military–based on this lack of upper class participation—is a revolt and mass exodus of military members based on dissatisfaction that they are carrying too much of the service burden.[33] The major problem facing the authors with this theory is that their forecast is based on faulty assumptions. For example, Roth-Douquet and Schaeffer believe that "at some point military personnel will ask: 'why should I fight and perhaps die for a bunch of rich and powerful people who never send their own sons and daughters to serve with us?'"[34] It is this class jealousy, this "lack of solidarity between all classes of Americans [that] lies at the heart of the threat of a mass departure from military service."[35] Unfortunately, statistical data shows just the opposite is true. Not only is there no present threat of a mass departure from the military; present servicemembers are continuing their service in steady numbers.[36] In fact, the director of Military Personnel Management, Major General Sean Byrne, recently pointed out that: "The Army has met its retention goals for the past nine years in a row . . . , [and t]he Army reenlistment rate remains high. Two out of [three] Soldiers eligible to reenlist do."[37] The complete lack of statistical data in support of the authors' claims is a glaring omission that detracts from the credibility of their argument. The authors do provide one anecdotal example of eight helicopter pilots who left the service after the mid-point of their careers because "they saw no end in site to what the county was asking them

---

[27] *Id.* at 110 (quoting JON MEACHUM, FRANKLIN AND WINSTON: AN INTIMATE PORTRAIT OF AN EPIC FRIENDSHIP 176 (New York: Random House) (2003)).

[28] *Id.* at 231 (advocating for the institution of a mandatory draft to ensure participation by the upper classes).

[29] *Id.* at 51 ("In conversation, magazine editors almost without exception are hostile and contemptuous of the military.") (quoting WILLIAM V. KENNEDY, THE MEDIA AND THE MILITARY: WHY THE PRESS CANNOT BE TRUSTED TO COVER A WAR (1991)).

[30] *See id.* at 54-59.

[31] *See id.* at 77-84; i*d.* at 44 ("At the university level, some of the outright hostility toward military service, particularly from the faculty, is focused on ROTC.").

[32] *Id.* at 10.

[33] *Id.* at 169-70.

[34] *Id.* at 169.

[35] *Id.* at 170.

[36] Donna Miles, U.S. Dep't of Defense, *Five Years After 9/11, Recruiting, Retention Remain Solid* (Sept. 12, 2006), http://www.defenselink.mil/news/News Article. aspx?ID=823 ("[R]etention remains solid across the board, with all services expected to meet their retention goals for the fiscal year.").

[37] Army Public Affairs, Army News Service, *Army Reaches Retention Goal with Fort Campbell Soldier* (Aug. 31, 2006), http://www4.army.mil/ocpa/read. php?story_id_key=9493.

to do . . . ."[38] This lone example of mass exodus, however, is unpersuasive considering the unusual marketability of the servicemembers in question.

Undeterred by the statistical evidence to the contrary, Roth-Douquet and Schaeffer take their theory a step further, positing that "[i]t is time for a midcourse correction in the policy of the all-volunteer military and how it recruits."[39] Given the generational decline of military service among the leadership class, the authors believe "[i]f present statistical trends continue, we are fast approaching the day when no one in Congress and no president will have served or have any children serving."[40] Interestingly, it is this one point where recent statistical data actually supports the Roth-Douquet and Schaeffer contention. While the Army met its 2006 recruiting goals, it did so with a much lower educated recruiting class.[41] Obviously, socio-economic conditions play a vital role in this decline of high school graduates. And those who have the financial resources to attain a better education are apparently choosing not to join the military. Furthermore, while the various branches of service trumpet the fact that they are reaching their recruiting goals, they are also being forced to reach further and further down the educational food chain to attain those goals. Such a fact only heightens the distinctions between the haves and have-nots, makes our military less educationally balanced, and allows for the scenario that the authors predict.[42]

While it is enticing to agree with the author's view that "we need a strong military and it is the duty of all classes to be involved in making it so;"[43] it will be difficult for the reader to accept their final proposition of compulsory service—either military or civilian—for everyone. Specifically, it is difficult to accept because the authors do not provide a defense for the ramifications of such a program.[44] The primary consequence of compulsory service is that it would eliminate the enlistment tools and programs currently available to the non-upper classes. In essence, it would eliminate one of the main avenues through which the non-upper class has to improve its station in life.[45] In fairness, the authors do provide "the argument against broadening the spectrum of those who serve."[46] A Marine Corps personnel officer succinctly identifies this issue as one of a cost-benefit analysis. By instituting a policy of compulsory service, "society would lose an important avenue for the lower classes. Any effort to increase representation of one class requires a reduction in representation of another class."[47] Unfortunately, instead of addressing the legitimate concerns expressed by that officer, Roth-Douquet and Schaeffer dismiss the entire view as "nonsense in light of the very real sacrifices people in the military are asked to make."[48] Interviews with senior military officials, either in support of or against the authors' position, would have added a much needed dose of credibility and balance to the book.

It is hard to argue with the Roth-Douquet and Schaeffer's position that military service, in general, would benefit everyone; specifically those who serve and society at large.[49] The authors make a compelling argument, if the argument is to

---

[38] *See* ROTH-DOUQUET & SCHAEFFER, *supra* note 1, at 170.

[39] *Id.* at 201.

[40] *Id.* at 206.

[41] Ann Scott Tyson, *Army on Pace to Meet Year's Recruiting Goal*, WASH. POST, Sept. 9, 2006, at A9 ("The Army . . . will fall short in the percentage of high-school graduates as the education level of enlistees dips below the norm of the past decade.").

[42] *But see* Joyce Howard Price, *Army Reaches Retention Goal Early; Guard, Reserve, West Point Also See Gains in 2006*, WASH. TIMES, Aug. 31, 2006, at A9.

> The outlook also is good at West Point. As of Aug. 17, the academy had received 7,870 applications for the class that will report in June 2007 and will graduate in 2011. That is a 14 percent increase from the same time last year, according to West Point spokesman Mike D'Aquino.

Id.

[43] *See* ROTH-DOUQUET & SCHAEFFER, *supra* note 1, at 183.

[44] *Id.* at 231 ("Kathy and I agree that in some areas society has the right to compel people to do things. The only issue is what the circle of compulsion should include.").

[45] *Id.* at 199 ("In other words you will end up refusing to allow certain people to join the service even though they are willing and perceive military service to be *their best employment option*.").

[46] *Id.* at 197.

[47] *Id.* at 198-99.

[48] *Id.* at 200.

[49] *Id.* at 233.

be based solely on what Americans think is fair. Under the bright lights of statistical analysis, however, the authors' premise is less than convincing. Today's military is no less prepared than it was fifty years ago when the "elite" chose to serve in greater numbers. Military service was then and will always be for those select individuals who have the capacity to understand and appreciate what sacrifice is all about. If today's political and social elite do not understand that principle and choose not to serve; it is their loss and not ours. Our military will survive and prosper nonetheless. And that perhaps best explains General Franks' description of *AWOL* as "a hard hitting account of military life" and "a love story."[50]

> We both agree that the common shared experience of having a great deal expected of you, working to meet a physical and mental challenge, and the readjustment of one's mind from a me-centered universe to broad community awareness and the ideal of shared responsibility and teamwork for a cause greater than oneself would benefit future generations of Americans immeasurably. It would also create a better class of leaders.

Id.

[50] *Id.* at xi.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

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

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).
> Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

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

2. TJAGLCS CLE Course Schedule (June 2006 - October 2007) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	55th Graduate Course	14 Aug 06 – 24 May 07
5-27-C22	56th Graduate Course	13 Aug 07 – 22 May 08
5-27-C20	173d JA Officer Basic Course	1 – 13 Jul 07 (BOLC III) Ft. Lee
		13 – Jul – 26 Sep 07 (BOLC III) TJAGSA **(Tentative)**
5F-F70	38th Methods of Instruction Course	26 – 27 Jul 07
5F-F1	197th Senior Officers Legal Orientation Course	11 – 15 Jun 07
5F-F1	198th Senior Officers Legal Orientation Course	10 – 14 Sep 07
5F-JAG	2007 JAG Annual CLE Workshop	2 – 5 Oct 07
JARC-181	2007 JA Professional Recruiting Seminar	16 – 20 Jul 07

NCO ACADEMY COURSES		
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	11 Jun – 13 Jul 07
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	13 Aug – 14 Sep 07
512-27D40 (Phase 2)	Paralegal Specialist ANCOC	11 Jun – 13 Jul 07
512-27D40 (Phase 2)	Paralegal Specialist ANCOC	13 Aug – 14 Sep 07
WARRANT OFFICER COURSES		
7A-270A2	8th JA Warrant Officer Advanced Course	16 Jul – 3 Aug 07
7A-270A0	14th JA Warrant Officer Basic Course	29 May – 22 Jun 07
ENLISTED COURSES		
512-27DC5	23d Court Reporter Course	23 Apr – 22 Jun 07
512-27DC5	24th Court Reporter Course	30 Jul – 28 Sep 07
512-27DC6	8th Court Reporting Symposium	29 Oct – 3 Nov 07
512-27D/40/50	16th Senior Paralegal Course	18 – 22 Jun 07
512-27D-CSP	1st BCT NCOIC Course	18 – 22 Jun 07
ADMINISTRATIVE AND CIVIL LAW		
5F-F21	6th Advanced Law of Federal Employment Course	17 – 19 Oct 07
5F-F22	61st Law of Federal Employment Course	15 – 19 Oct 07
5F-F23	61st Legal Assistance Course	29 Oct – 2 Nov 07
5F-F29	25th Federal Litigation Course	6 – 10 Aug 07
5F-F202	5th Ethics Counselors Course	16 – 20 Apr 07
5F-F23E	2007 USAREUR Legal Assistance CLE	22 – 26 Oct 07
5F-F24E	2007 USAREUR Administrative Law CLE	17 – 21 Sep 07
5F-F26E	2007 USAREUR Claims Course	15 – 19 Oct 07
CONTRACT AND FISCAL LAW		
5F-F10	158th Contract Attorneys Course	23 Jul – 3 Aug 07

CRIMINAL LAW		
5F-F31	13th Military Justice Managers Course	15 – 19 Oct 07
5F-F34	28th Criminal Law Advocacy Course	10 – 21 Sep 07
5F-F35	31st Criminal Law New Developments Course	5 – 8 Nov 07
INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	3d Intelligence Law Course	25 – 29 Jun 07
5F-F43	3d Advanced Intelligence Law Course	27 – 29 Jun 07
5F-F42	88th Law of War Course	9 – 13 Jul 07
5F-F44	2d Legal Issues Across the Information Operations Spectrum	16 – 20 Jul 07
5F-F45	7th Domestic Operational Law Course	29 Oct – 2 Nov 07
5F-F47	48th Operational Law Course	30 Jul – 10 Aug 07

3. Naval Justice School and FY 2007 Course Schedule

Please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131, for information about the courses.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (030) Lawyer Course (040)	4 Jun – 3 Aug 07 13 Aug – 12 Oct 07
BOLT	BOLT (030) BOLT (030)	6 – 10 Aug 07 (USMC) 6 – 10 Aug 07 (NJS)
900B	Reserve Lawyer Course (020)	10 – 14 Sep 07
914L	Law of Naval Operations (Reservists) (020)	17 – 21 May 07
850T	SJA/E-Law Course (020)	6 – 17 Aug 07
850V	Law of Military Operations (010)	11 – 22 Jun 07
	National Institute of Trial Advocacy (020)	14 – 18 May 07 (San Diego)
0258	Senior Officer (050) Senior Officer (060)	23 – 27 Jul 07 (New Port) 24 – 28 Sep 07 (New Port)
4048	Estate Planning (010)	23 – 27 Jul 07
748B	Naval Legal Service Command Senior Officer Leadership (010)	20 – 31 Aug 07

3938	Computer Crimes (010)	21 – 25 May 07 (Norfolk)
961D	Military Law Update Workshop (Officer) (010) Military Law Update Workshop (Officer) (020)	TBD TBD
961J	Defending Complex Cases (010)	16 – 20 Jul 07
525N	Prosecuting Complex Cases (010)	9 – 13 Jul 07
2622	Senior Officer (Fleet) (120) Senior Officer (Fleet) (130)	9 – 13 Jul 07 (Pensacola, FL) 27 – 31 Aug 07 (Pensacola, FL)
3090	Legalman Course (020)	16 Apr – 29 Jun 07
846L	Senior Legalman Leadership Course (010)	23 – 27 Jul 07
846M	Reserve Legalman Course (Phase III) (010)	7 – 18 May 07
5764	LN/Legal Specialist Mid Career Course (020)	17 – 28 Sep 07
961G	Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted (020)	TBD TBD
4040	Paralegal Research & Writing (020) Paralegal Research & Writing (030)	7 – 18 May 07 (Norfolk) 16 – 27 Jul 07 (San Diego)
4046	SJA Legalman (020)	29 May – 7 Jun 07 (Newport)
627S	Senior Enlisted Leadership Course (140) Senior Enlisted Leadership Course (150) Senior Enlisted Leadership Course (160) Senior Enlisted Leadership Course (170) Senior Enlisted Leadership Course (180)	23 – 25 May 07 (Norfolk) 17 – 19 Jul 07 (San Diego) 18 – 20 Jul 07 (Great Lakes) 15 – 17 Aug 07 (Norfolk) 28 – 30 Aug 07 (Pendleton)
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	30 Apr – 18 May 07 4 – 22 Jun 07 23 Jul – 10 Aug 07 10 – 28 Sep 07
0379	Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	4 – 15 Jun 07 30 Jul – 10 Aug 07 10 – 21 Sep 07
3760	Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	25 – 29 Jun 07 16 – 20 Jul 07 (Great Lakes) 27 – 31 Aug 07
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalmen (030)	18 – 29 Jun 07

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	7 – 25 May 07 11 – 29 Jun 07 30 Jul – 17 Aug 07 10 – 28 Sep 07
947J	Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	7 – 18 May 07 11 – 22 Jun 07 30 Jul – 10 Aug 07
3759	Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	4 – 8 Jun 07 (San Diego) 20 – 24 Aug 07 (San Diego) 27 – 31 Aug 07 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2007 Course Schedule

Please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445, for information about attending the listed courses.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Reserve Forces Judge Advocate Course, Class 07-A	7 – 11 May 07
Reserve Forces Paralegal Course, Class 07-A	7 – 18 May 07
Operations Law Course, Class 07-A	14 – 24 May 07
Military Justice Administration Course, Class 07-A	21 – 25 May 07
Accident Investigation Board Legal Advisors' Course, Class 07-A	4 – 8 Jun 07
Staff Judge Advocate Course, Class 07-A	11 – 22 Jun 07
Law Office Management Course, Class 07-A	11 – 22 Jun 07
Paralegal Apprentice Course, Class 07-05	18 Jun – 31 Jul 07
Advanced Labor & Employment Law Course, Class 07-A	25 – 29 Jun 07
Negotiation and Appropriate Dispute Resolution Course, Class 07-A	9 – 13 Jul 07
Judge Advocate Staff Officer Course, Class 07-C	16 Jul – 14 Sep 07
Paralegal Craftsman Course, Class 07-04	7 Aug – 11 Sep 07
Paralegal Apprentice Course, Class 07-06	13 Aug – 25 Sep 07
Reserve Forces Judge Advocate Course, Class 07-B	27 – 31 Aug 07
Trial & Defense Advocacy Course, Class 07-B	17 – 28 Sep 07
Legal Aspects of Sexual Assault Workshop, Class 07-A	25 – 27 Sep 07

5. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the March 2006 issue of *The Army Lawyer*.

6. Phase I (Correspondence Phase), Deadline for RC-JAOAC 2008

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2007***, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2008. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2008 JAOAC will be held in January 2008 and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2007). If the student receives notice of the need to re-do any examination or exercise after 1 October 2007, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2007 will not be cleared to attend the 2008 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions regarding attendance at Phase II (Residence Phase) or completion of Phase I writing exercises, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil.

For system or help desk issues regarding JAOAC or any on-line or correspondence course material, please contact the Distance Learning Department at jagc.training@hqda.army.mil or commercial telephone (434) 971-3153.

7. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually
Iowa	1 March annually

Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December
Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed and reported by last day of birth month each year
Utah	31 January annually

Vermont	2 July annually
Virginia	31 October Completion Deadline; 15 December reporting deadline
Washington	31 January triennially
West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

* Military exempt (exemption must be declared with state).
**Must declare exemption.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2006-2007).

Date	Unit/Location	ATTRS Course Number	Topic	POC
19-20 May 07	139th LSO Nashville, TN	Class: 011	Contract & Fiscal Law Criminal Law	LTC Kymberly Haas (615) 256-3148 attorneykhaas@aol.com
19-20 May 07	91st LSO Oak Brook, IL	Class: 012	International & Operational Law Administrative & Civil Law/Legal Assistance	CPT Bradley Olson (309) 782-3361 bradley.olson@us.army.mil
23-24 Jun 07	94th RRC Boston/Devins, MA	Class: 013	International & Operational Law Administrative & Civil Law/Legal Assistance	CPT Susan Lynch (978) 784-3933 susan.lynch@usar.army.mil

2. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available Through The Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile.Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95.
AD A301095	Government Contract Law Desk book, vol. 2, JA-501-2-95.
AD A265777	Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

A384333	Servicemembers Civil Relief Act Guide, JA-260 (2006).
AD A333321	Real Property Guide—Legal Assistance, JA-261 (1997).
AD A326002	Wills Guide, JA-262 (1997).
AD A346757	Family Law Guide, JA 263 (1998).
AD A384376	Consumer Law Deskbook, JA 265 (2004).
AD A372624	Legal Assistance Worldwide Directory, JA-267 (1999).
AD A360700	Tax Information Series, JA 269 (2002).
AD A350513	Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).
AD A350514	Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).
AD A329216	Legal Assistance Office Administration Guide, JA 271 (1997).
AD A276984	Legal Assistance Deployment Guide, JA-272 (1994).
AD A452505	Uniformed Services Former Spouses' Protection Act, JA 274 (2005).
AD A326316	Model Income Tax Assistance Guide, JA 275 (2001).
AD A282033	Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829	Defensive Federal Litigation, JA-200 (2000).
AD A327379	Military Personnel Law, JA 215 (1997).
AD A255346	Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).
AD A452516	Environmental Law Deskbook, JA-234 (2006).
AD A377491	Government Information Practices, JA-235 (2000).
AD A377563	Federal Tort Claims Act, JA 241 (2000).
AD A332865	AR 15-6 Investigations, JA-281 (1998).

Labor Law

AD A360707	The Law of Federal Employment, JA-210 (2000).
AD A360707	The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

AD A302672	Unauthorized Absences Programmed Text, JA-301 (2003).
AD A302674	Crimes and Defenses Deskbook, JA-337 (2005).
AD A274413	United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522	Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
** Indicates new publication or revised edition pending inclusion in the DTIC database.

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

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

b. Access to the JAGCNet:

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

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

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

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

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information of TJAGLCS Publications available through the LAAWS XXI JAGCNet, see the March 2006, issue of *The Army Lawyer*.

5. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

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

6. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mrs. Dottie Evans, The Judge Advocate General's School, U.S. Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3278, commercial: (434) 971-3278, or e-mail at Dottie.Evans@hqda.army.mil.

Individual Paid Subscriptions to *The Army Lawyer*

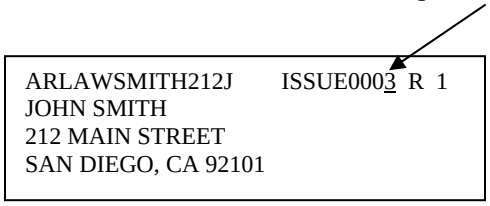
Attention Individual Subscribers!

The Government Printing Office offers a paid subscription service to *The Army Lawyer*. To receive an annual individual paid subscription (12 issues) to *The Army Lawyer*, complete and return the order form below (photocopies of the order form are acceptable).

Renewals of Paid Subscriptions

When your subscription is about to expire, the Government Printing Office will mail each individual paid subscriber only one renewal notice. You can determine when your subscription will expire by looking at your mailing label. Check the number that follows "ISSUE" on the top line of the mailing label as shown in this example:

A renewal notice will be sent when this digit is 3.



The numbers following ISSUE indicate how many issues remain in the subscription. For example, ISSUE001 indicates a subscriber will receive one more issue. When the number reads ISSUE000, you have received your last issue unless you renew.

You should receive your renewal notice around the same time that you receive the issue with ISSUE003.

To avoid a lapse in your subscription, promptly return the renewal notice with payment to the Superintendent of Documents. If your subscription service is discontinued, simply send your mailing label from any issue to the Superintendent of Documents with the proper remittance and your subscription will be reinstated.

Inquiries and Change of Address Information

The individual paid subscription service for *The Army Lawyer* is handled solely by the Superintendent of Documents, not the Editor of *The Army Lawyer* in Charlottesville, Virginia. Active Duty, Reserve, and National Guard members receive bulk quantities of *The Army Lawyer* through official channels and must contact the Editor of *The Army Lawyer* concerning this service (see inside front cover of the latest issue of *The Army Lawyer*).

For inquiries and change of address for individual paid subscriptions, fax your mailing label and new address to the following address:

United States Government Printing Office
Superintendent of Documents
ATTN: Chief, Mail List Branch
Mail Stop: SSOM
Washington, D.C. 20402

United States Government INFORMATION
PUBLICATIONS ★ PERIODICALS ★ ELECTRONIC PRODUCTS

Army Lawyer and Military Review SUBSCRIPTION ORDER FORM

Order Processing Code: 5937

Easy Secure Internet: bookstore.gpo.gov
Toll Free: 866 512-1800
Phone: 202 512-1800
Fax: 202 512-2104
Mail: Superintendent of Documents, PO Box 371954, Pittsburgh, PA 15250-7954

☐ **YES,** enter my subscription(s) as follows:

_____subscription(s) of the *Army Lawyer* (ARLAW) for $50 each ($70 foreign) per year.

_____subscription(s) of the *Military Law Review* (MILR) for $20 each ($28 foreign) per year. The total cost of my order is $_____.

Prices include first class shipping and handling and is subject to change.

Personal name (Please type or print)

Company name

Street address City, State, Zip code

Daytime phone including area code

Purchase Order Number

Check method of payment:

☐ Check payable to Superintendent of Documents

☐ SOD Deposit Account ☐☐☐☐☐☐ – ☐

☐ VISA ☐ MasterCard ☐ Discover/NOVUS ☐ American Express

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

☐☐☐☐ (expiration date)

Thank you for your order!

Authorizing signature

11/02

By Order of the Secretary of the Army:

PETER J. SCHOOMAKER
General, United States Army
Chief of Staff

Official:

JOYCE E. MORROW
Administrative Assistant to the
Secretary of the Army
0709206

Department of the Army
The Judge Advocate General's Legal Center & School
U.S. Army
ATTN: JAGS-ADA-P, Technical Editor
Charlottesville, VA 22903-1781

PERIODICALS