The JAG Reporter

2022 Archive

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Civil Law: Civil law disciplines are interwoven with the acquisition, operation, protection, and preservation of the force and its people, funds, weapon systems, materiel, and installations.

Is a Defense Contractor Knocking on Your Door?

Posted: 17 March 2022

By Ms. Libbi Finelsen, edited by Major Brittany Byrd

This article provides a series of best practices that attorneys can use to ensure their government clients successfully balance robust communications with industry while avoiding the pitfall of oversharing information.

The Centaur's Dilemma

Posted: 13 July 2022

Book review by Lieutenant Colonel Timothy D. Litka, USA

The eye-opening moment of The Centaur's Dilemma comes when you realize you are not only gaining a profound perspective into National Security Law but you also learn how AI implications are in almost every legal practice area.

Acquiring Machine-Readable Data

Posted: 29 November 2022

By Major Andrew Bowne and Captain Ryan Holte

This article presents contracting and program management best practices on how to negotiate for the delivery of and rights to AI-Ready data, including sample clauses that can be used in all contracts and agreements.

Special Education Legal Assistance

Posted: 1 December 2022

By Ms. Sharon J. Ackah

The Department of the Air Force recognizes the need to ensure that military service is not a barrier to our children's educational progress. This December 2nd, Special Education Day is met with invigorated resolve to combat the notion that our families' geographic mobility is an excuse to deny services to our children.

Scholarly Articles

Posted: 29 December 2022

By the JAG Corps

Members of the Air Force JAG Corps continue to make significant contributions to academic discourse and dialogue, a sample of which is listed below from Calendar Year 2022.

Leadership: Our mission readiness and success depend on leadership development across all domains, including knowledge management, professional development, training, planning and resourcing, and inspections

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Acknowledgment

Posted: 17 August 2022; reprint from *The Reporter,* Volume 29-2 (June 2002)
By Major General Robert I. Gruber

Timeless Leadership Series: This edition serves as a reminder to all of the importance acknowledgment plays in the development and maintenance of a ready Total Force.

Seven Pillars for Building Tomorrow's Air Force Leaders

Posted: 20 October 2022; reprint from *The Reporter*, Volume 31-3 (Sept 2004)
By Lieutenant Colonel Timothy Cothrel

Timeless Leadership Series: This edition analyzes the importance of building strong foundations in the practice of leadership.

Veterans Day

Posted: 7 November 2022
By Major Allison K.W. Johnson

As we come upon this Veterans Day, we remember the sacrifices of those who have gone before us in battle, and continue to learn from those who share their experiences.

End of Year Reflection

Posted: 28 December 2022
By Colonel Mark D. Hoover, Lieutenant Colonel Sarah W. Edmundson, and Chief Master Sergeant Lindsey A. Wolf

From the leadership team at The Judge Advocate General's School, we wish you a very happy and safe holiday season.

Scholarly Articles

Posted: 29 December 2022
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Members of the Air Force JAG Corps continue to make significant contributions to academic discourse and dialogue, a sample of which is listed below from Calendar Year 2022.

Military Justice and Discipline – The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby strengthen national security.

Combating Vicarious Trauma

Posted: 24 June 2022
By Major Daria C. Awusah

Mitigating vicarious trauma requires a comprehensive strategic plan that calls for the JAG Corps to develop and implement policies and initiatives to identify and mitigate vicarious trauma and its effect on Department of the Air Force military judges, litigators, and paralegals.

The Centaur's Dilemma

Posted: 13 July 2022
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The eye-opening moment of The Centaur's Dilemma comes when you realize you are not only gaining a profound perspective into National Security Law but you also learn how AI implications are in almost every legal practice area.

Military Rule of Evidence 513

Posted: 27 September 2022
By Captain Rocco J. Carbone, III and Captain Christina L. Heath

C.A.A.F.'s opinions and actions this term helped to demarcate some of the boundaries to Mil. R. Evid. 513, yet the likelihood of litigation remains high.

Scholarly Articles

Posted: 29 December 2022
By the JAG Corps

Members of the Air Force JAG Corps continue to make significant contributions to academic discourse and dialogue, a sample of which is listed below from Calendar Year 2022.

Operations and International Law – Operations and International law capabilities enhance command situational awareness, maximize decision space, and promote optimal conditions for the projection of ready forces to defend the Nation and our allies.

The Centaur's Dilemma

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Nothing. Everything.

Posted: 17 February 2022

Review by Lieutenant Colonel Daniel Schoeni

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CATEGORY Book Review

Text Excerpt from JAG Reporter Post: 17 Feb 2022 https://www.jagreporter.af.mil

NOTHING. EVERYTHING.

A Review of *Fulfillment: Winning and Losing in One-click America, by Alec MacGillis*

BOOK REVIEW BY LIEUTENANT COLONEL DANIEL E. SCHOENI

Fulfillment covers a lot of ground, but it is a book about the tertiary effects of e-commerce on both America as a whole and, in particular, the Rust Belt.

Why would a book that is manifestly about a non-legal, non-military subject be relevant for a judge advocate?

What does this have to do with the practice of law in the Air Force? Why should it be reviewed in these pages? Let me borrow a line from an underappreciated movie. When his forces reconquered the Holy Land in 1187, the character based on the Ayyubid sultan, Saladin, is asked what Jerusalem was worth, he says: "Nothing. Everything."[1] So it is here. This book has *nothing* (directly) and *everything* (indirectly) to do with our practice.

Fulfillment covers a lot of ground, but it is a book about the tertiary effects of e-commerce on both America as a whole and, in particular, the Rust Belt. This subject is a vital concern for at least three reasons. First, a disproportionate share of Airmen hail from the kinds of places described in this book;[2] a better understanding of our clients makes us better lawyers. Second, it begins with the story of a town that is of historical interest to all Airmen and describes its industrial decline in the last three decades: Dayton, Ohio. Third, it raises worrisome questions about whether a post-industrial America would win a fight with near-peer adversaries. Any one of these three would make the book worth reading.

SOMETIMES HARD TO FOLLOW

Yet I also find this book maddening. Rather than the linear reasoning taught in law school, it employs a discursive, meandering narrative that is sometimes hard to follow. Its conclusions are not plainly stated, its logic frustratingly elliptical. Insofar as I can discern what MacGillis is driving at, I mostly disagree with him. But even for an unapologetic free-trader and economic libertarian like me, there is value in exploring the sociology of our times and in considering what economic success on the coasts has wrought for the forgotten places in "flyover" country. He and I probably disagree about the causes of the problems he describes, their long-term consequences, and what policies (if any) ought to be undertaken. Even so, the story he tells is worth considering.

KNOWING OUR CLIENTS

There's a canard that after the landslide election of 1972, a writer at the *New Yorker* said, "I can't believe Nixon won. I don't know anyone who voted for him."[3] Happen to you lately? It has to me. I'm a recovering political junkie, but I have been surprised by the results of two of the last three presidential elections. Many would argue that white working-class men have driven the election results in the last several cycles, either by showing up at the polls or staying home. We may fancy ourselves astute observers of our countrymen because during our careers we live in a half dozen states across the land. I wonder, however, if a steady government paycheck insulates us from our neighbors and if we never live long enough in one place to notice the local pathologies.[4] *Fulfillment* provides a crash course in what is going on with the white working class.

Fulfillment provides a crash course in what is going on with the white working class.

Since white working-class men are a shrinking share of the population, why do we care? This is just one demographic group, albeit a large one. Fair question. This book does not provide a monocausal explanation for all that ails the body politic, much less prescribe a single remedy. But disgruntled members of this group have been in the news lately. It behooves us to understand them better so that we can provide our clients legal counsel enriched with the perspective of moral, economic, social, and political considerations.[5] This would include not only advising on the root causes of political extremism but also could make litigators more sensitive to socioeconomic factors that could serve as useful evidence in mitigation or perhaps inform advice we give during legal assistance. This is not the only book of its kind, but it serves as an introduction to a group that our twenty-first century economy has left behind.

A common concern that America has fully deindustrialized, that we no longer *make* anything. **But is that true?**

SILICON VALLEY TO THE RUST BELT

All Airmen should know the story of Orville and Wilbur Wright. There is no better introduction than David McCullough's *The Wright Brothers*.[6] But while McCullough shows that there was something special about the bookish home in which the brothers were raised and how that contributed to their innovations,[7] MacGillis describes the broader cultural milieu that made the twentieth century Midwest the Silicon Valley of its time. Though a small city, Dayton was the paradigmatic example of that innovation culture,[8] with not only the advancements in aviation to its credit but also two other major firms that designed and produced world-beating technologies. In recent decades, Dayton has lost its manufacturing jobs; its shiny corporate headquarters have departed. What does this portend for our lead in innovation? Will San Jose go the way of Dayton? These questions lie beyond the scope of the book, but for Airmen keenly aware that our technological advantage is narrowing,[9] such worries linger. Whither innovation?[10]

A DEINDUSTRIALIZED ARSENAL

Many historians would argue that the allies won World War II not so much because of the genius of their generals but because of the combined industrial output of the Anglo-American "arsenal of democracy".[11] This view is not uncontested, but industrial output certainly mattered. In like manner, MacGillis quotes a former worker at Baltimore's Sparrows Point steel mill, who warns that but for the mill, we would all be speaking Japanese or German. This echoes a common concern that America has fully deindustrialized, that we no longer *make* anything. But is that true?

Despite the popular lament, U.S. manufacturing is actually stronger than it has ever been. At the same time, it is also a fact that manufacturing jobs have been cut in recent decades. But jobs are not the same as output. One study indicated that in the half century from 1950 to 2010, U.S. manufactures increased by 600 percent.[12] Though manufacturing *jobs* are fewer, our *output* is second only to China.

> Don't count us out only because *some* American cities are no longer flourishing.

Another problem with the book is that it sometimes feels like MacGillis is cherry-picking, making his account tendentious. For every city whose travails he describes in heartbreaking detail, there is another that has adapted. Dayton, Baltimore, and El Paso may struggle,[13] but other non-coastal heartland cities such as Columbus, Kansas City, Des Moines, Madison, and Minneapolis are doing just fine, thank you.[14] Further, not every lost job is outsourced;[15] if jobs are not so much disappearing but rather moving to more business-friendly cities or regions, that is perhaps less worrisome than MacGillis's ominous account would suggest.

As for the defense industrial base, this is my rejoinder. Like America generally, the Rust Belt is not so deindustrialized or hapless as MacGillis supposes.[16] Threats abroad are multiplying. But those who would do us harm would do well to remember that the U.S. armed forces, as well as its supporting industrial base, have time and again proven themselves to be formidable adversaries.[17] Don't count us out only because *some* American cities are no longer flourishing.

CONCLUSION

As other reviews have noted, if you are seeking an understanding of the internal workings of Amazon, you will not find it here.[18] This book is instead about the flotsam and jetsam that have been set adrift as educated workers emigrate and financial, business, and political power consolidate in elite coastal cities such as Seattle, San Francisco, New York, and D.C. Despite its nostalgia for an economy and social arrangements of a bygone age and its inconclusiveness, which at times seems like advocacy for a weak form of socialism or perhaps a robust industrial policy, the book raises important questions. There is value in considering the collateral damage of the last four decades' astonishing economic growth,[19] even if we are still grateful for that progress and ultimately unconvinced that affluence must be zero sum. That makes this book a worthwhile read. MacGillis's broader thesis, that by delivering *everything* to our doorsteps, e-commerce may leave us with *nothing*—bereft of remunerative work, domestic manufacturing, even hope for the future—is, however, unpersuasive.

Edited by Captain Charlton S. Hedden
Layout by Thomasa Huffstutler

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(B.A., Brigham Young University; M.A., University of Iowa; J.D., University of Iowa; LL.M., George Washington University; Ph.D. University of Nottingham, ABD) is currently assigned as the Chief of Acquisition Law at Headquarters Air Force Materiel Command, Wright-Patterson AFB, Ohio. He is licensed in Iowa and the District of Columbia.

ENDNOTES

[1] Kingdom of Heaven (Twentieth Century Fox 2005).

[2] *See Population Representation in the Military Services: Fiscal Year 2015 Summary Report*, 22–23 CNA (2015), https://www.cna.org/pop-rep/2015/summary/summary.pdf; Ann Scott Tyson, *Youths in Rural U.S. are Drawn to Military*, Wash. Post., Nov. 4, 2005, https://www.washingtonpost.com/archive/politics/2005/11/04/youths-in-rural-us-are-drawn-to-military/24122550-6bb7-4174-93a0-7e1d91a78b2d/ Dave Philipps & Tim Arango, *Who Signs Up to Fight? Makeup of U.S. Recruits Showing Glaring Disparity*, N.Y. Times, Jan. 10, 2020, https://www.nytimes.com/2020/01/10/us/military-enlistment.html.

[3] *See, e.g.*, John Podhoretz, *The Actual Pauline Kael Quote—Not as Bad, and Worse*, Commentary, Feb. 27, 2011, https://www.commentary.org/john-podhoretz/the-actual-pauline-kael-quote%E2%80%94not-as-bad-and-worse/.

[4] You may want to consider whether you have more in common with the residents of Fishtown or Belmont using the following quiz; I suspect that the vast majority of the JAG Corps has much more in common with Belmont. *Do You Live in a Bubble? A Quiz*, PBS News Hour, Mar. 24, 2016, https://www.pbs.org/newshour/economy/do-you-live-in-a-bubble-a-quiz-2. *Cf.* Charles Murray, Coming Apart: The State of White America, 1960–2010 (2012).

[5] Air Force Rules of Professional Conduct (2018), Rule 2.1.

[6] For a valuable review of McCullough's book and explanation of its relevance to procuring next-generation defense technology, see Stephen L. Schooner & Nathan E. Castellano, *Reinvigorating Innovation: Lessons Learned from the Wright Brothers*, 56 Cont. Mgmt. 46 (April 2016).

[7] David McCullough, The Wright Brothers 17, 30, 73 (2015) (describing a vast family library and the encouragement of learning); *id.* at 28–30, 34, 36–39, 51–52, 67–68, 91–92 (arguing that Orville and Wilbur unlocked the mystery of heavier than air flight not only because of mechanical skills acquired from tinkering with bicycles but through their studies of the works on aeronautics and observations of birds in flight). In many ways, they were not outliers but representative of the broader culture of the Midwest, whose contributions to humanity have been considerable, and the account of which has been mostly neglected by professional historians. *See generally* Jon K. Lauck, The Lost Region: Toward a Revival of Midwestern History (2013).

[8] *See* Mark Bernstein, Grand Eccentrics: Turning the Century: Dayton and the Inventing of America (1996) (describing four prominent Dayton inventors who were contemporaries with the Orville and Wilbur Wright: Charles Kettering, John H. Patterson, Arthur Morgan, and James Cox).

[9] *See* Gen Charles Q. Brown, Jr., *Accelerate Change or Lose* (Aug. 2020) at 3–4, https://www.af.mil/Portals/1/documents/csaf/CSAF_22/CSAF_22_Strategic_Approach_Accelerate_Change_or_Lose_31_Aug_2020.pdf (describing the erosion of America's competitive advantage, noting China's aggressive efforts to narrow that gap, and observing that "[a]ir dominance is not a birthright").

[10] For an introduction to this debate, see Daniel Schoeni, *Three Competing Options for Acquiring Innovation*, 32 Air & Space Power J. 4 (Winter 2018) (summarizing three articles written in response to the AFJAGS's first national security law writing competition by Brig Gen Linell Letendre, Maj Nicholas Frommelt, and Capt Matthew Ormsbee and arguing that wider competition open systems architecture is the better course).

[11] FDR made the phrase "arsenal of democracy" famous in his eponymous speech delivered on December 29, 1940, but industrialist-turned-mobilizer Bill Knudson who coined the term. *See* Arthur Herman, Freedom's Forge: How American Business Produced Victory During WWII 69–71,115, 129 (2012).

[12] William A. Strauss, *Is U.S. Manufacturing Disappearing?*, Midwest Econ. Blog, Fed. Res. Bank Chi., Aug. 19, 2010, https://www.chicagofed.org/publications/blogs/midwest-economy/2010/isusmanufacturing. Most Americans polled in a recent survey were aware that U.S. output had increased, with nearly half (47%) believing it had declined. Drew Desilver, *Most Americans Unaware that as U.S. Manufacturing Jobs Have Disappeared, Output Has Grown*, Pew Res. Center, July 25, 2017, https://www.pewresearch.org/fact-tank/2017/07/25/most-americans-unaware-that-as-u-s-manufacturing-jobs-have-disappeared-output-has-grown/.

[13] To that list could be added several other stagnant Rust Belt cities: Flint, Youngstown, Rockford, Muncie, and Erie. *See* Aaron M. Renn, *The Rust Belt's Mixed Population Story*, City J., Jul. 1, 2019, https://www.city-journal.org/rust-belt-population-growth.

[14] *Id.* Moreover, smaller cities are also succeeding: Iowa City, Iowa; Lafayette, Indiana; and Traverse City, Michigan. Aaron M. Renn, *The Sunny Side of Midsize*, City J., Sept. 18, 2018, https://twitter.com/cityjournal/status/1048405989563793408, reviewing Mick Cornett & Jayson White, The Next American City (2018) (arguing that mid-sized cities such as Oklahoma City, Des Moines, and Charleston are creating competitive alternatives to the elite coastal megacities). *See also* Adam Roberts, *The Midwest: A Region with an Outsized Punch*, Economist, Jul. 23, 2020, https://www.economist.com/special-report/2020/07/23/a-region-with-outsized-punch (observing that smaller cities like Ann Arbor, Madison, and Pittsburgh have done well of late). Even before the current pandemic accelerated the flight from large cities, a Rust Belt "revival" was already underway. *See Schumpeter, A Rust-belt Revival*, Economist, Mar. 5, 2016, https://www.economist.com/business/2016/03/03/a-rust-belt-revival. This was not merely a shift toward lower paying jobs in the services sector, but even saw the return of manufacturing in once dying cities. *See* Aaron M. Renn, *Manufacturing a Comeback*, City J., Spring 2018, https://www.city-journal.org/html/manufacturing-comeback-15833.html (describing the rebound in Grand Rapids only seven years after *Newsweek* declared it one of America's dying cities). With the ability to telework from virtually anywhere has come further interest in low-cost cities between the coasts. *See* Matt S. Clancy, *Remote Work's Time Has Come*, City J., Spring 2020, https://www.city-journal.org/remote-works-time-has-come.

[15] Over the last half century, there has been a well-documented migration of industry from the Midwest to the South. *See, e.g.*, Gavin Wright, *The Economic Revolution in the American South*, 1:1 Econ. Persp. 161 (1987).

[16] *America's Mittelstand*, Economist, Jul. 23, 2020, https://www.economist.com/special-report/2020/07/23/americas-mittelstand (reporting, "Midwesterners still like to make stuff.").

[17] As one commentator recently observed, "China is testing the patterns of history by taking on the United States" as "America is the most lethal competitor of the modern era," having "defeated a series of illiberal powers—Germany (twice), Japan, and the Soviet Union". "For over a century, the surest path to destruction has been inviting the focused hostility of the United States." Hal Brands, *China's Creative Challenge—and the Threat to America*, Commentary, May 2021, https://www.commentary.org/articles/hal-brands/chinas-geopolitical-challenge-threat-to-america/.

[18] *See, e.g.*, Jennifer Szalai, *In 'Fulfillment', One-Click Shopping Is Cheap, Easy and Economically Unsustainable*, N.Y. Times, Mar. 2021, https://www.nytimes.com/2021/03/10/books/review-fulfillment-alec-macgillis.html.

[19] *Alternative States*, Economist, Mar. 31, 2018, https://www.economist.com/finance-and-economics/2018/03/31/the-average-american-is-much-better-off-now-than-four-decades-ago (citing data indicating the average American is much better off than four decades ago, with a 51% rise in median household income between 1979 and 2014).

CATEGORY Civil Law

Text Excerpt from JAG Reporter Post: 17 Mar 2022 https://www.jagreporter.af.mil

Is a Defense Contractor Knocking on Your Door?

Best Practices for Engaging with Existing and Potential Defense Contractors

BY MS. LIBBI J. FINELSEN

This article provides a series of best practices that attorneys can use to ensure their government clients successfully balance robust communications with industry while avoiding the pitfall of oversharing information.

INTRODUCTION

The Department of Defense is turning to defense contractors to protect its industrial assets and to modernize key capabilities. Contractors are viewed as the best source of information as the Government develops acquisition strategies and tries to understand the marketplace. To facilitate this exchange of information, existing and potential defense contractors schedule "industry engagements" with government personnel to discuss their capabilities and to demonstrate their supplies and services. While it is helpful for government personnel to learn what industry has to offer as the Government defines requirements for supplies and services, there are risks of missteps. This article discusses the issues encountered during industry engagements, including post-government employment representation bans, impacts on ongoing acquisitions, and the penalties associated with disclosing proprietary information. This article goes on to provide a series of best practices that attorneys can use to ensure their government clients successfully balance robust communications with industry while avoiding the pitfall of oversharing information.

As part of the National Defense Strategy, the Department of Defense (DoD) is increasingly turning to industry, i.e., defense contractors, to protect its industrial assets and to

Modified Illustration © iStock.com/alashi

modernize key capabilities. Defense contractors are seen as the best source of information as the Government develops acquisition strategies, seeks opportunities for small business, negotiates contract terms, and tries to understand the marketplace.[1] As a result, it is not unusual for existing and potential defense contractors to schedule "industry engagements" with senior leaders, program managers, or other government personnel who define the supplies and services the Government needs to discuss their capabilities and to demonstrate their latest products. While it is helpful for government personnel to learn what industry has to offer as the Government defines requirements for supplies and services, each engagement includes the risk of ethical missteps. The challenge becomes balancing robust communications with industry, while avoiding the pitfall of oversharing government information.

> Attorneys play a vital role in helping their clients ensure discussions with industry are productive and ethical.

Attorneys play a vital role in helping their clients ensure discussions with industry are productive and ethical. This article will discuss best practices that attorneys can follow to guarantee successful and ethical industry engagements.

SUCCESSFUL INDUSTRY ENGAGEMENTS BEGIN BEFORE THE MEETING IS SCHEDULED

Government personnel and the commands in which they work must lay the groundwork for a successful industry engagement well before the meeting is even scheduled.[2] For that reason, it is vital for commands to establish standard procedures that attorneys and contracting personnel can use to vet industry requests for meetings with government personnel. Both industry personnel who plan to attend the meeting and the issues to be discussed should be vetted to limit ethics issues.

COMMANDS MUST VET INDUSTRY ATTENDEES TO ENSURE THEY ARE NOT SUBJECT TO A REPRESENTATION BAN

Defense contractors frequently hire former government employees to work on defense contracts. Attorneys must ensure that the former government personnel who attend industry engagements are not subject to post-government employment representation bans. For example, former non-senior government employees[3] cannot represent a defense contractor before the Government regarding a particular matter on which they worked while in government service for the lifetime of the matter.[4] Similarly, former non-senior government employees cannot represent a defense contractor before the Government regarding a particular matter that was pending under their official responsibility during their last year of government service for two years from the end of their government service.[5] Moreover, military officers on terminal leave may not receive compensation to represent anyone before a federal agency or court on a matter in which the United States is a party or has a substantial interest.[6] For example, a Government contracting officer who drafted a solicitation to acquire computer hardware cannot go to work for a vendor competing for that contract and speak to the Government about that procurement.

Senior officials face similar representation bans. Former senior officials[7] may not represent a defense contractor, with the intent to influence, before their former agencies regarding any official action.[8] Moreover, departing flag and general officers and their civilian equivalents cannot engage in lobbying activities with respect to DoD before covered executive branch officials.[9] Similar to non-senior officials, former senior officials cannot represent a defense contractor to the Government regarding particular matters on which they worked while in government service for the lifetime of the matter and cannot represent a defense contractor back to the Government regarding a particular matter that was pending under their official responsibility during their last year of government service for two years.[10] For example, a Commanding General cannot represent the interests of a vendor competing for a contract for the command's computer hardware back to the command.

While former government employees under a representation ban cannot represent back to the Government, they can provide background assistance to a defense contractor if the assistance does not involve a communication to or an appearance before the Government.[11] Accordingly, attorneys must ensure that former government employees who are subject to a representation ban are excluded from all industry engagements on matters to which the ban applies even when those same individuals are providing background assistance on those matters. Violations of the post-government representation bans may result in penalties of up to five years in prison and fines.[12]

> The attorney can prepare an industry engagement memorandum for their client that outlines what can and cannot be discussed during the meeting.

COMMANDS MUST VET TOPICS TO BE DISCUSSED DURING AN INDUSTRY ENGAGEMENT

Commands must vet the topics to be discussed during the industry engagement with the same or greater level of scrutiny as the defense contractor employees who will attend the meeting. Accordingly, the command's standard procedures should examine whether the topics for discussion relate to ongoing source selections or contracts, claims, or requests for equitable adjustment, litigation, or acquisition integrity issues.

The easiest way for attorneys to learn the topics to be discussed during an industry engagement is for the defense contractor to provide that information in a format such as an agenda or a narrative included on a government intake form when requesting the meeting. In addition, the defense contractor should identify all current contracts and proposals pending before the contracting activity holding the meeting. Even if the defense contractor provides a robust list of topics, current contracts, and proposals, it is a best practice to query government personnel for a list of current contracts, source selections, litigation, and acquisition integrity issues to ensure the list is as complete as possible.

Once the command knows the topics to be discussed and the defense contractor's current contracts, proposals, litigation, and acquisition integrity issues, the attorney can prepare an industry engagement memorandum for their client that outlines what can and cannot be discussed during the meeting. For example, it is advisable for certain government personnel to avoid meeting with defense contractors who are competing for those requirements during the pendency of the acquisition in order to avoid derailing the acquisition.[13] For example, it may be unwise for a Wing Commander to meet with a defense contractor if that contractor is competing for contract award. Even if the government employee does not discuss the acquisition during an industry engagement with an offeror, the mere fact the meeting occurred is fodder for future protests if that offeror is the ultimate awardee.

Similarly, attorneys can use an industry engagement memorandum to provide information about ongoing litigation, fraud-related investigations, or other acquisition integrity issues so the client does not inadvertently wade into these areas and make any statements that would negatively impact the litigation or investigations. The industry engagement memorandum should also highlight ongoing contract performance issues so that the client can discuss the Government's expectations with respect to complying with contractual terms and conditions. Sometimes, focused government attention is all that is needed to put contractual performance back on track.

ATTORNEYS CAN HELP CLIENTS AVOID DISCUSSING PROHIBITED TOPICS DURING INDUSTRY ENGAGEMENTS

While industry engagements are a good opportunity for defense contractors and the Government to communicate about new products and services, there is a great deal of information that cannot be discussed during these meetings. Defense contractors should not provide proprietary data during the meeting. Similarly, government personnel cannot disclose source selection information, such as information

about cost proposals, technical proposals, source selection plans, competitive range determinations, ranking of proposals, evaluation reports, or any other information that would jeopardize the integrity of any ongoing procurements.[14] One way to ensure that government personnel do not inadvertently disclose protected information is for attorneys to attend the industry engagement with their client. Attending the industry engagement allows attorneys to stop conversations that veer into any of these prohibited areas. Attorneys can also meet with their client prior to the industry engagement to outline prohibited areas of discussion so the client knows what topics they should not discuss.

THE STRUCTURE OF INDUSTRY ENGAGEMENTS MATTERS

Industry engagements can take a variety of forms, so attorneys in commands should provide advice as to the structure of the meeting. Certainly, the tried-and-true "Industry Day" is one way for industry and the Government to communicate about a defense contractor's capabilities and the Government's requirements.[15] The Government can publicize Industry Days, which ensures openness and transparency. All defense contractors attending the Industry Day will hear the Government's presentation and its responses to industry questions at the same time.[16] That will ensure equal access to information. However, holding open discussions during an Industry Day may not be the best way to solicit information about an individual defense contractor's capability. A defense contractor is unlikely to discuss its proprietary approach to a new product in an open forum. Under those circumstances, a one-on-one meeting may be a better approach than holding an Industry Day, if any information that could directly affect proposal preparation is shared in a timely manner with all potential offerors to avoid providing an offeror with an unfair advantage.[17]

While one-on-one meetings between defense contractors and the Government are not discouraged, they do raise concerns that are not present in a group setting. For example, an appearance could exist that a defense contractor is receiving preferential treatment or unequal access to decisionmakers and information. This is especially true if the defense contractor's representatives are former government employees. Moreover, there may be organizational conflicts of interest, especially if the vendor is interested in competing for requirements about which it previously advised the Government. An additional problem is how to handle proprietary information that may be transmitted by the defense contractor during a one-on-one session. Proprietary information that is transmitted during one-on-one meetings do not receive contractual protection if the meeting is not related to contract administration issues. Similarly, the proprietary information would not be protected as source selection information because the information would not have been transmitted as part of a proposal or quotation.

While one-on-one meetings between defense contractors and the Government are not discouraged, they do raise concerns that are not present in a group setting.

The easiest way to address the concerns inherent with one-on-one meetings with industry is to establish pre-scheduling procedures, as discussed earlier in this article. Knowing that an attorney has vetted the defense contractor employees who will attend the meeting and the topics to be discussed during the meeting will give government personnel confidence that they know what can be freely discussed and with whom. Similarly, having an attorney attend the meeting will give government clients confidence that the parties will stay on-topic and that their statements will not be construed as an unauthorized commitment or viewed as providing unequal access to information.

BENEFITS TO ATTORNEY PARTICIPATION IN INDUSTRY ENGAGEMENTS

Some government personnel may be resistant to attorney participation in industry engagements. They may believe that having counsel present will chill the conversation and will prevent the free flow of information. While the conversation may have a different tone with an attorney present, that

should not preclude attorney attendance at industry engagements. The penalties associated with government employees disclosing proprietary data or source selection information are severe. The **Trade Secrets Act** is a criminal statute that prohibits government employees from releasing proprietary data.[18] A violation of the Trade Secrets Act carries penalties of up to one year in jail, fines, or both as well as dismissal from government employment.[19] Similarly, the **Procurement Integrity Act** is a criminal statute that prohibits government employees from exchanging source selection information for anything of value or to give a person a competitive advantage in the award of a federal procurement contract.[20] A violation of the Procurement Integrity Act carries penalties of up to five years in jail, fines, or both.[21] The benefits of avoiding the penalties associated with the disclosure of protected information far outweigh any concerns about attorneys potentially chilling the conversation in order to avoid an inadvertent disclosure. Attorneys should educate their clients regarding the penalties associated with government employees disclosing proprietary data or source selection information, and discuss with clients the benefits of their presence at the industry engagement.

> The penalties associated with government employees disclosing proprietary data or source selection information are severe.

OTHER ETHICAL ISSUES TO CONSIDER

In addition to vetting attendees and topics and advising on the structure of meetings, attorneys must advise their clients on a plethora of other ethics issues that may arise at industry engagements. The following is a list of ethics considerations attorneys should be prepared to advise their clients.

- **Impartially**
  Government personnel must act impartially and cannot give or appear to give a competitive advantage, special access, or other preferential treatment to a particular company or organization.[22] Accordingly, if government personnel meet with one non-federal entity, they must be prepared to meet with other such entities.

- **Endorsements**
  Government personnel cannot expressly or implicitly endorse a non-federal entity.[23] Thus, government personnel should not allow non-federal entities to take photographs or videos of them during industry engagement without consulting with their attorney and public affairs. The photographs and videos are not owned by DoD and can be used by non-federal entities in their promotional materials.

- **Awards**
  Government personnel cannot recognize or give awards to entities that have a commercial or profit-making relationship with DoD or one of its components, except under very limited circumstances.[24] Attorneys can advise their clients under what circumstances it may be appropriate to recognize non-federal entities.

- **Commitments**
  Government personnel cannot make any commitments that could bind the Government.[25] They can ask informational or clarifying questions during an industry engagement and can request follow-up information. However, it must be clear that they are not authorizing award of a new contract or authorizing changes to an existing one. Attorneys can ensure that appropriate disclaimers are made during industry engagements.

- **Gifts**
  Government personnel must follow applicable gift and post-government employment rules.[26] Attorneys should advise government personnel on whether they can accept a gift from a non-federal entity or whether they could be deemed to be seeking employment.

- **Financial Gain**
  Government personnel cannot participate personally and substantially in an official capacity in a particular matter that has a direct and predictable effect on their

financial interests or those inputted to them.[27] In addition to avoiding an actual conflict of interest, they must avoid the appearance of a conflict of interest. Attorneys can advise their clients on whether an official action would result in an actual conflict of interest or give rise to an appearance of a conflict.

- **Advice**

  Government personnel must comply with the Federal Advisory Committee Act (FACA) when seeking advice or recommendations from a group that includes individuals who are not active duty members or full-time or permanent part-time federal employees.[28] Attorneys can advise clients regarding FACA compliance prior to any group meetings or requests for recommendations or advice.

CONCLUSION

Industry engagements are an effective way for the Government and industry to improve the source selection process and for the Government to obtain improved and innovative solutions to its requirements. Attorneys play a vital role in establishing pre-meeting ground rules and in vetting engagement attendees and topics. Their efforts will ensure that these engagements are conducted in a fair, effective, and ethical manner.

Edited by Major Brittany T. Byrd
Layout by Thomasa Huffstutler

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ENDNOTES

[1] Memorandum from Daniel I. Gordon, Adm'r for Fed. Procurement Policy to Chief Acquisition Officers, Senior Procurement Executives, and Chief Information Officers (Feb. 2, 2011) (hereinafter "Myth-Busting Memo") at 1 (on file at https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/procurement/memo/Myth-Busting.pdf).

[2] Myth-Busting Memo, *supra* note 1, at 2 (agencies should develop a high-level vendor communication plan to provide direction to the workforce and to clarify the nature and schedule of industry engagements).

[3] For purposes of the representation ban, the Department of Defense (DoD) Standards of Conduct Office (SOCO) defines non-senior personnel as Military Personnel in grades O-1 through O-6 and civilians whose rate of base pay is less than 86.5% of the rate for Executive Schedule Level II. Dep't of Def. Standards of Conduct Office, Non-Senior Employee Post-Government Employment Restrictions (2021), https://dodsoco.ogc.osd.mil/Portals/102/Documents/PGE%20and%20PI/Toolbox%20-%20PGE-PI/2021%20Post%20Gov%20Service%20Non%20Senior%20No%20Pledge.pdf. The representation ban does not apply to former enlisted military personnel. *Id.*

[4] 18 U.S.C. § 207(a)(1) (2021), 5 C.F.R. § 2641.201(c) (2021). A particular matter is one that involves deliberation, decision, or action that is focused on the interest of a specific person or a discrete and identifiable class of persons, such as a contract, claim, or investigation. 18 U.S.C. § 207(i)(3) (2021); 5 C.F.R. § 2641.201(h) (2021).

[5] 18 U.S.C. § 207(a)(2) (2021); 5 C.F.R. § 2641.202 (2021).

[6] 18 U.S.C. §§ 203, 205 (2021).

[7] DoD SOCO defines senior officials as civilian personnel whose rate of base pay is at or above 86.5% of the rate for Executive Schedule Level II; Flag and General Officers; and all Presidential Appointees confirmed with the advice and consent of the Senate (i.e., PAS officials). Dep't of Def. Standards of Conduct Office, Senior Employee Post-Government Employment Restrictions (2021) (hereinafter "Senior Employee Post-Government Employment Restrictions"), https://dodsoco.ogc.osd.mil/Portals/102/Documents/PGE%20and%20PI/Toolbox%20-%20PGE-PI/2021%20Post%20Gov%20Service%20Senior%20Biden%20Pledge.pdf.

[8] 18 U.S.C. § 207(c) (2021). The definition of "agency" varies depending on the position the former government employee held. For PAS officials, the representation ban applies to all the Department of Defense. Senior Employee Post-Government Employment Restrictions, *supra*, note 7. For other senior officials, the representation ban applies to the component in which they served one year before leaving their senior position. *Id.*

[9] Covered executive branch officials include Presidential Appointees confirmed with the advice and consent of the Senate (PAS) officials, military officers in grades O-7 and above, and non-career Senior Executive Service (SES) officials. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1045, 131 Stat. 1283, 1555-1556 (2017). Military officers in grades O-9 and O-10, career and non-career SES and Defense Intelligence SES at Tier three and above, and all PAS officials departing service after December 12, 2017, are prohibited from engaging in lobbying activities with respect to DoD for two years after their retirement or separation date. *Id.* at § 1045(a), 131 Stat. at 1555. Military officers in grades O-7 and O-8, and career and non-career SES and Defense Intelligence SES at Tiers one and two departing service after December 12, 2017, are prohibited from engaging in lobbying activities with respect to DoD for one year after their retirement or separation date. *Id.* at § 1045(b), 131 Stat. at 1555.

[10] 18 U.S.C. §§ 207(a)(1), (a)(2) (2021). The representation is not prohibited unless, at the time of the proposed industry engagement, the former government employee knows or reasonably should have known that the matter was pending under their official responsibility within the one-year prior to termination of government service. 5 C.F.R. § 2641.202(j)(7) (2021). Senior officials, who are military officers on terminal leave, may not receive compensation to represent anyone before a federal agency or court on a matter in which the United States is a party or has a substantial interest. 18 U.S.C. §§ 203, 205 (2021).

[11] 5 C.F.R. § 2641.201(d)(3) (2021).

[12] 18 U.S.C. §§ 216(a), (b) (2021).

[13] *See* Christian Davenport, *A NASA official asked Boeing if it would protest a major contract it lost. Instead, Boeing resubmitted its bid.*, Washington Post, Nov. 17, 2020, https://www.washingtonpost.com/technology/2020/11/17/nasa-boeing-lunar-lander-probe/. (Grand jury investigates conversation between NASA official and offeror after offeror submitted new proposal after being told that it would not win contract).

[14] Present or former federal employees cannot knowingly disclose contractor bid or proposal information or source selection information before the award of a federal procurement contract to which the information relates. 41 U.S.C. §§ 2102(a)(1), 2102(a)(3)(A)(i) (2021); *see also* 48 C.F.R. §§ 3.104-3(a), 3.104-4(a) (2021). This prohibition also applies to individuals who are acting for or on behalf of, or who are advising, the federal government with respect to a federal agency procurement and who had access to contractor bid or proposal information or source selection information. 41 U.S.C. § 2102(a)(3)(A)(ii) (2021).

[15] An Industry Day is a meeting at which the Government presents its requirements for supplies and services to industry representatives so industry better understands the Government's needs. *See, e.g.,* 48 C.F.R. § 10.002(b)(2)(viii).

[16] *See* Myth-Busting Memo, *supra* note 1, at 9. Industry days benefit the Government by providing a common understanding of the procurement requirements, the solicitation terms and conditions, and the evaluation criteria. *Id.* Moreover, industry input into government acquisition strategies and solicitation documents may result in improved solutions to the Government's requirements. Memorandum from Lesley A. Field, Acting Adm'r for Fed. Procurement Policy to Chief Acquisition Officers, Senior Procurement Executives, and Chief Information Officers (May 7, 2012) (hereinafter "Myth-Busting 2 Memo") at 8 (on file at https://obamawhitehouse.archives.gov/sites/default/files/omb/procurement/memo/myth-busting-2-addressing-misconceptions-and-further-improving-communication-during-the-acquisition-process.pdf). The events benefit industry by providing prime contractors and subcontractors with an opportunity to meet and develop teaming agreements that benefit contract performance. Myth Busting Memo, *supra* note 1, at 9.

[17] *See* 48 C.F.R. § 15.201; *see also* Myth-Busting Memo, *supra* note 1, at 5; Memorandum from Lesley A. Field, Acting Adm'r for Fed. Procurement Policy to Chief Acquisition Officers, Senior Procurement Executives, and Chief Information Officers (Apr. 30, 2019) (hereinafter Myth-Busting 4 Memo) at 9 (on file at https://www.whitehouse.gov/wp-content/uploads/2019/05/SIGNED-Myth-Busting-4-Strenthening-Engagement-with-Industry-Partners-through-Innovative-Business-Practices.pdf) (acquisition officials are encouraged to hold one-on-one discussions with industry to gain information that may not be shared in a more public setting and to capture industry feedback to improve acquisition planning and requirements definition).

[18] 18 U.S.C. § 1905 (2021); *see also* Myth-Busting 2 Memo, *supra* note 16 at 10 (outlining the Government's responsibility to protect information received from a defense contractor).

[19] 18 U.S.C. § 1905 (2021).

[20] 41 U.S.C. § 2105 (2021).

[21] 41 U.S.C. § 2105 (2021).

[22] 5 C.F.R. §§ 2635.101(b)(8), 2635.501-2635.503 (2021).

[23] 5 C.F.R. § 2635.702(c) (2021).

[24] Dep.'t of Def, Instruction 1400.25, DOD Civilian Personnel Management System: Performance Management and Appraisal Program, V451, ¶ 3.h; *see also Id.*, Enclosure 3, ¶ 11.b.

[25] 5 C.F.R. § 2635.101(b)(6) (2021).

[26] 5 C.F.R. §§ 2635.101(b)(4), 2635.201-2635.206 (gifts from outside sources), 2635.601-607 (seeking outside employment) (2021).

[27] 18 U.S.C. § 208(a) (2021); 5 C.F.R. §§ 2635.101(b)(2), 2635.402 (2021).

[28] 5 U.S.C. App. (2021).

CATEGORY Military Justice and Discipline

Text Excerpt from JAG Reporter Post: 24 June 2022 https://www.jagreporter.af.mil

A Corps-Wide Strategic Approach to Combating Vicarious Trauma

BY MAJOR DARIA C. AWUSAH, USAF

Mitigating vicarious trauma requires a comprehensive strategic plan that calls for the JAG Corps to develop and implement policies and initiatives to identify and mitigate vicarious trauma and its effect on Department of the Air Force military judges, litigators, and paralegals.

Department of the Air Force military judges, litigators, and the paralegals who assist in the investigation and prosecution of serious crimes are often exposed to shocking and horrific details of criminal misconduct. Among these are witness testimony and gruesome photographic and video evidence related to rape and other sexual assaults, child abuse, domestic violence, child pornography, and various acts of violence. Repeated exposure to such evidence and the trauma suffered by others can lead to feelings of guilt, dreams or recollections of the event, increased alcohol and substance consumption, disturbed sleep and increased irritability, loss of faith in humanity, and hypervigilance.[1] All of these are symptoms commonly associated with vicarious trauma, a form of post-traumatic stress disorder (PTSD).[2]

Over the last two decades, significant resources—funds, personnel, and training—have been devoted to improving the Department of Defense's (DoD) efforts to enhance sexual assault prevention and response, victim protection and support, and military justice investigative and judicial processes. Eradicating sexual assault from our ranks remains the focus. However, reforms aimed at curtailing the psychological impact of repeated and secondhand exposure to trauma on advocates and advisors, as well as investigators, prosecutors, defense attorneys, victims' counsel, and members of the judiciary, remain a mere afterthought. If such efforts are not prioritized, the DoD runs the risk that its support team personnel and trial participants will develop vicarious trauma, which, in turn, will negatively

impact the quality of care crime victims receive, the quality of representation and advocacy, and the objectivity of judges in military courtrooms.

This article first examines the impact of secondhand exposure to traumatic events on trial participants' mental health in certain types of cases and discusses nationwide efforts to combat vicarious trauma. This article advocates for mitigating vicarious trauma through a comprehensive strategic plan that calls for The Department of the Air Force's Judge Advocate General's Corps (JAG Corps) to (1) employ a supervisory licensed mental health professional and embed at least one licensed mental health professional within each of the five litigation circuits, (2) enhance and standardize education and training in vicarious trauma for trial participants and supervisors, and (3) implement psychological assessments at various stages of a military judge, litigator, and paralegal's assignment in litigation-centered roles.

> Nationwide recognition that PTSD is no longer a mental health condition ascribed exclusively to combat veterans and that trauma could be experienced through indirect and secondhand exposure.

UNDERSTANDING VICARIOUS TRAUMA AND ITS ROLE IN MILITARY JUSTICE

In 2013, as the Air Force launched the DoD's first Special Victims Counsel Program, the American Psychiatric Association (APA) revised the PTSD diagnostic criteria set forth in the Fifth Edition of its Diagnostic and Statistical Manual of Mental Disorders (DSM-5). The APA included "sexual violence" within the core premise of trauma and added "repeated or extreme indirect exposure to aversive details of a traumatic event" as a qualifying stressor to meet criteria for diagnosis of PTSD.[3] Although decades of research have shown that 15 to 20 percent of trauma counselors and psychotherapists develop PTSD from hearing and sharing stories of their clients who survived such abuse,[4] the inclusion of repeated or indirect exposure to traumatic events as a form of PTSD signaled a nationwide recognition that PTSD is no longer a mental health condition ascribed exclusively to combat veterans and that trauma could be experienced through indirect and secondhand exposure.[5] This inclusion signaled that, in addition to directly experiencing a traumatic event such as sexual violence, witnessing it as it occurred to another, learning it occurred to a close family member or friend, or repeated exposure to its aversive details may result in vicarious trauma, which, if unaddressed, may lead to PTSD. [6]

Just as individuals respond to trauma differently, the symptoms of vicarious trauma will differ from person to person. "Responses may be negative, neutral, or positive; can change over time; and can vary from individual to individual, particularly with prolonged exposure."[7] Symptoms, if and when experienced, will fall into five major categories—emotional, behavioral, physiological, cognitive, and spiritual.[8] Individuals experiencing vicarious trauma may become irritable, angry, cynical or negative, experience changes in mood or sense of humor, isolate or feel disconnected from others, increase alcohol or substance consumption, find it difficult to separate work and personal life, experience difficulty sleeping or other negative effects on their physical well-being, and/or find it difficult to stop thinking about the trauma experienced by another, even when not at work.[9]

When speaking of vicarious trauma, many mental health professionals will cite as examples first responders collecting human remains and police officers exposed to details of child abuse.[10] The practice of law, notably military justice, may result in repeat and/or extreme indirect exposure to aversive details of traumatic events experienced by others.

- **Victims' Counsel (VCs) and Victims' Paralegals (VPs)** work daily with child and adult survivors of trauma who, during the investigation and prosecution of their alleged offender, repeatedly relay their traumatic experiences to others. In order to provide zealous and competent

representation, SVCs and SVPs accompany their clients to interviews with investigators, prosecutors, defense counsel, and may sit through a court-martial where their clients again relay the trauma to a military judge and/or panel members.

The practice of law, may result in repeat and/or extreme indirect exposure to aversive details of traumatic events experienced by others.

- **Circuit Defense Counsels (CDCs), Area Defense Counsels (ADCs), and Defense Paralegals (DPs)** represent clients accused of criminal misconduct ranging from minor offenses to felony-level crimes. To provide zealous and competent representation, CDCs, ADCs, and DPs will review evidence to include witness statements and photographic and video evidence, and participate in victim and witness pretrial interviews during which victims relay accounts of trauma to them. Their clients may disclose to them gruesome details of their criminal misconduct. As professional responsibility rules preclude CDCs, ADCs, and DPs from disclosing confidential client communications, these attorneys guard the information learned in the course of their representation, often at the expense of their own mental and emotional well-being. Despite the repeated exposure to the trauma endured by others and/or inflicted by their clients, CDCs, ADCs, and DPs reserve judgment of their clients and their alleged wrongdoings to provide effective and zealous client representation, in and out of court.

- **Military Judges**, day in and day out, preside over pretrial motions as well as criminal trials. In some cases, the judge also acts as the trier-of-fact, weighing the evidence presented and deciding the fate of the alleged offender, knowing their high-stake decisions will have a lifelong impact on the accused and their family members and are often irreversible. Given the nature of cases tried in military courtrooms, it is likely most military judges will preside over cases involving sexual assault, aggravated assault, assault, child abuse, child sexual assault, and child pornography. Military judges presiding over courts-martial for these offenses must review evidence (written, oral, and photographic) to rule on their admissibility through pretrial motions and, at trial, must suppress their emotions and natural facial expressions to avoid improperly influencing the court.

- **Circuit Trial Counsels (CTCs)** travel across the world, prosecuting the most serious offenses including domestic violence, sexual assault, aggravated assault, and child abuse. CTCs advise criminal investigators through all aspects of a criminal investigation and mentor junior litigators through pretrial preparation and prosecution of these offenses. Due to the nature of their job, especially for CTCs in the Special Victims Unit, these litigators are repeatedly and indirectly exposed to the trauma suffered by others through witness interviews, case file review, examination of photographic and video evidence, and trial testimonies.

- **Assistant Staff Judge Advocates and Case Paralegals** assigned to installation-level legal offices advise law enforcement officials through all aspects of a criminal investigation, conduct victim and witness interviews in preparation for trial or alternative disposition of criminal misconduct, and review voluminous investigative files for offenses such as sexual assault. These attorneys and case paralegals are often the Department of the Air Force's newest Airmen and Guardians, enlisted and officers, and are yet, just months, weeks, or even days after technical training, tasked with this grave responsibility. Some of these attorneys and paralegals may silently shoulder their own unresolved trauma, while simultaneously acclimating to military service.

Similar to police officers, military judges, litigators, and paralegals are at an increased risk of experiencing the psychological effects of vicarious trauma as a result of continuous exposure to traumatic materials and repeatedly hearing victims' stories. At the conclusion of the above

litigation assignments, military judges, litigators, and paralegals proceed to their next assignment without undergoing an evaluation or counseling regarding the psychological impact of their litigation experiences.

COMPARATIVE ANALYSIS – BEST PRACTICES

The American Bar Association noted that attorneys who practice criminal law may be susceptible to compassion fatigue or vicarious trauma "as they are regularly exposed to human-induced trauma, and are called on to empathetically listen to victims' stories, read reports and descriptions of traumatic events, view crime scenes, and view graphic evidence of traumatic victimization."[11] Another study found judges and court staff may also be at risk and susceptible to vicarious trauma "due to the combination of working in a busy court, hearing repeated accounts of harrowing or traumatic events, and worrying about safety issues that may arise around volatile or emotionally charged cases."[12] A study by the National Judicial College on judges suffering from secondary and vicarious trauma from in-court experiences revealed that 63 percent of judges reported symptoms of work-related vicarious trauma.[13]

Understanding the impact of repeated exposure to trauma as a result of criminal litigation, judicial systems across the United States and in other countries, have begun to establish policies and legislation to combat vicarious trauma. For example, the United States Department of Justice Office of Victims of Crimes developed a Vicarious Trauma Toolkit containing over 500 resources to help litigators, supervisors, and employers to further understand vicarious trauma, its prevalence and risk factors, and its impact on those working in various helping professions.[14] Furthermore, following the trial of the Boston Marathon bomber where jurors imposed the death penalty after weeks of graphic testimony and photographic evidence of lives and bodies destroyed, the judge presiding over the case extended jury service by 90 days to permit jurors to receive free counseling through its Federal Employee Assistance Program.[15] In the United States, federal judges may extend a juror's service to enable them to take advantage of cost-free, voluntary, and confidential counseling services through the Federal Employee Assistance Program.[16] In Canada, since January 2017, jurors who complete jury duty on a criminal trial, civil trial, or a coroner's inquest may receive free, confidential, and professional counseling through the Juror Support Program.[17]

STRATEGIC PLAN OF ACTION

It is imperative that the Department of the Air Force prepares its military judges, litigators, paralegals, and those who lead them with the tools to manage, and when necessary, overcome the emotional, mental, and psychological impact of litigation. Becoming a trauma-informed organization requires a comprehensive strategic plan. Specifically, the JAG Corps should (1) employ a supervisory licensed mental health professional and embed at least one licensed mental health professional within each of the five litigation circuits, (2) enhance and standardize education and training in vicarious trauma for trial participants and those who lead them, and (3) implement psychological assessments at various stages for those in litigation-centered roles.

Becoming a trauma-informed organization requires a comprehensive strategic plan …. To date, the JAG Corps does not have embedded licensed mental health providers.

Employ and Embed Licensed Mental Health Professionals

The JAG Corps is currently comprised of five litigation circuits located around the world. Oversight of the military judges, litigators, and paralegals in each circuit is managed by the Chief Trial Judge, Chief Prosecutor, Chief Defense Counsel, and Chief Victims' Counsel. In addition, the JAG Corps has experienced personnel overseeing a Circuit Counsel Assistance Program, Defense Counsel Assistance Program, and the Victims' Counsel Assistance Program. To date, the JAG Corps does not have embedded licensed mental health providers who provide holistic individual and population-focused mental health care, support, treatment,

training, and resources for its judges, litigators, and paralegals. This responsibility continues to rest with each installation's mental health clinics and external support resources.

The concept of embedded behavioral and mental health is not new to the DoD. The United States Army assigns behavioral health providers to operational units, a practice that has led to an increase in visits to behavioral health.[18] The United States Navy reported in 2018 that 25 percent of its mental health workforce are embedded in operational units.[19] In 2018, the Air Force beta tested Task Force True North, a resiliency initiative that embedded mental health professionals within high-risk groups.[20] These initiatives and best practices exist so military members can receive expedited access to care and community-level treatment from a single provider in an effort to improve continuity of care, erode the stigma commonly associated with mental health care in the military, and allow providers to specifically tailor treatment options for unit members to a much greater degree.[21]

Given the nature of litigation in the Department of the Air Force, the types of cases which litigants are exposed to, and the travel associated with these positions, the JAG Corps must take steps to ensure timely and easily accessible care for these practitioners who may otherwise be unwilling to reach out to their installation's mental health clinic. One such action would be to embed a licensed mental health clinician in each of its five litigation circuits under the oversight of a supervisory licensed mental health professional.

Vicarious trauma should be taught at all foundational military justice courses.

"Sustained presence [of a mental health professional] over time allows Airmen, and their families, to work towards the conclusion that the unit caregiver is indeed a trusted resource."[22] Embedded mental health professionals who get to know the military judges, litigators, and paralegals in their circuit and who, over time, better understand the nature of the work they do in executing their judicial and litigation functions, will develop stronger relationships and personal connections. This familiarity will aid in ensuring timely access to care, foster trust, increase ease of access, and assist providers in developing tailored treatment specific to the members' needs and challenges. Circuit-level management of mental health care for military judges, litigators, and paralegals will aid JAG Corps senior leaders in assessing the impact of trauma on the overall organizational health, develop effective trainings, assess its effectiveness, and aid in the development of trauma-informed policies, procedures, and recommendations.

Standardize Vicarious Trauma Training

Training on vicarious trauma is not new to the JAG Corps or its Judge Advocate General's School. Currently, vicarious trauma is taught by mental health professionals during flagship courses like the Staff Judge Advocate Course (SJAC), Law Office Manager Course (LOMC), Paralegal Advanced Developmental Education (PADE), and the Victims' Counsel Course (VCC). As the content of such trainings are often variable and fragmentary, it is imperative that the JAG Corps conduct an inventory of vicarious trauma trainings currently taught at its various course offerings, and assess their outcomes and effectiveness. The JAG Corps must enhance and standardize training on this topic. Trainings should be taught by mental health experts who possess a strong knowledge of military justice practice in the Department of the Air Force, preferably a circuit-embedded mental health clinician who works with military judges, litigators, and paralegals, and who is familiar with their needs and challenges.

Vicarious trauma should be taught at all foundational military justice courses. As attendees in these courses are often in their first six years in the JAG Corps, training on vicarious trauma should emphasize how to recognize and address the early signs and symptoms that mimic post-traumatic stress and the steps for mitigating the impact of vicarious trauma, to include how to develop resilience and healthy coping skills, and create a personal and professional care plan.

Vicarious trauma training should continue as military members advance in rank. Training on vicarious trauma should be offered in leadership courses such as SJAC, Gateway, LOMC, and PADE. Specialized trainings appropriate for the demographics of these courses should cover matters such as balancing caseloads, staffing difficult cases, supporting subordinates, and creating a trauma-informed workspace. Trainings for these mid-career and senior leader courses should infuse a blend of scenario-based case studies, guided discussions, and forums to share personal experiences and best practices.

As collegial peer support is equally important in combating post-traumatic stress, elective vicarious trauma training should be offered at intermediate and advanced advocacy courses which are primarily attended by litigators. These opportunities will afford sitting practitioners the time and opportunity for personal and emotional reflection with peers.

Vicarious trauma can hit after one case or after years of handling or overseeing disturbing cases.

Psychological Assessments

In an effort to monitor and address the emergence of negative mental health outcomes and safeguard against vicarious trauma, many forensic workers who respond to massive disasters and law enforcement officials undergo screening for stress-related disorders during their career.[23] For instance, New York Police Department officers who were dispatched to assist family members from the September 11th terrorist attack were screened for vicarious trauma six months after the event and 20 percent of them exhibited symptoms of post-traumatic stress.[24] Military judges, litigators, and paralegals who are at an increased risk of being exposed to the trauma endured by others should undergo similar screening. Research shows "self-assessment and screening tools for vicarious trauma raises awareness of personal strengths and vulnerabilities and establishes a baseline of symptoms that could be monitored over time."[25] For this reason, it is imperative that the JAG Corps implement psychological assessments at various stages of a military judge, litigator, and paralegal's assignment in litigation-centered roles.

A psychological assessment by a circuit-embedded mental health professional at the onset of a member's litigation-centered assignment can assist in assessing any baseline symptoms that should be monitored over time. This initial consultation allows for mental health clinicians to work with military judges, litigators, and paralegals in developing a personal mental health care plan. Such assessment should be completed within 90 days of the JAG Corps member beginning their litigation-centered assignment. Another assessment should be completed mid-way through the assignment to assess the emergence, if any, of any negative mental health outcomes and to develop a treatment or care plan. At the conclusion of the litigation-centered assignment, an outgoing assessment should focus on providing resources and post-assignment counseling and making recommendations for further counseling, if necessary.

Post-trial, federal courts are doing what they can to help jurors exposed to horrific testimony. Trauma counseling provides jurors with an opportunity to walk through their experiences and unload the emotional and mental burden in an effort to prevent vicarious trauma.[26] The same effort should be afforded to military trial participants, namely military judges, litigators, and paralegals.

"Vicarious trauma can hit after one case or after years of handling or overseeing disturbing cases."[27] The ability to process the psychological and emotional effects with a licensed mental health professional familiar with the nature of a litigator's duties and responsibilities helps to ensure appropriate assessment and counseling is provided. Assessing the needs of military judges and litigators at the onset of their litigation-centered assignments, providing personal guidance, treatment and tailored resources at the appropriate time during the assignment, and conducting an outgoing assessment to make recommendations for future mental health needs, are all efforts that the JAG Corps can and should implement to combat vicarious trauma.

CONCLUSION

The Department of the Air Force must make an immediate concerted effort to combat vicarious trauma in its litigation practice. The practice of law, notably military justice, may result in repeated and/or extreme indirect exposure to aversive details of traumatic events experienced by others. Military judges, litigators, and paralegals are at an increased risk of experiencing the psychological effects of vicarious trauma from continuous exposure to traumatic materials and stories of a victim's traumatic event, which, if unaddressed, may lead to PTSD. Mitigating vicarious trauma requires a comprehensive strategic plan that calls for the JAG Corps to employ a supervisory mental health professional and embed at least one licensed mental health professional within each of the five litigation circuits, enhance and standardize education and training on vicarious trauma for trial participants and those who lead them, and implement psychological assessments at various stages of a military judge, litigator, and paralegal's litigation-centered assignment.

The impact of secondhand exposure to trauma on courtroom personnel and trial participants has been studied and taught for years. The time has come for the JAG Corps to develop and implement policies and initiatives to identify and mitigate vicarious trauma and its effect on Department of the Air Force military judges, litigators, and paralegals.

Edited by Capt Maureen Dowling
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EXPAND YOUR KNOWLEDGE

- **What is Vicarious Trauma?** https://ovc.ojp.gov/program/vtt/what-is-vicarious-trauma
- **Vicarious Trauma Toolkit** https://ovc.ojp.gov/program/vtt/introduction
- **Lunch & Learn Series: Vicarious Trauma**, https://www.dvidshub.net/video/812665/lunch-learn-series-vicarious-trauma
- **Drowning in Empathy: The Cost of Vicarious Trauma**, (TEDx Talks) https://youtu.be/Zsaorjlo1Yc

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Text Excerpt from JAG Reporter Post: 13 July 2022 https://www.jagreporter.af.mil

THE CENTAUR'S DILEMMA

National Security Law for the Coming AI Revolution

BOOK BY JAMES E. BAKER
REVIEWED BY LIEUTENANT COLONEL TIMOTHY LITKA, USA

The eye-opening moment of *The Centaur's Dilemma* comes when you realize you are not only gaining a profound perspective into National Security Law but you also learn how AI implications are in almost every legal practice area.

It's hard to have a complete understanding of … what decisions are actually being made algorithmically and which are being made by people …. When you don't have that, I would argue you have the risk of no longer having real understanding or control of your organizations.[1]

General (Ret) Stanley McChrystal

Asking a lot more questions than it answers, *The Centaur's Dilemma* is a must-read for any lawyer interested in gaining a better understanding of where artificial intelligence (AI) could impact their practice of law.[2] Mr. Baker provides volumes to think about, questions to begin asking, and takeaway points at the end of each chapter to improve retention. The eye-opening moment of *The Centaur's Dilemma* comes when you realize you are not only gaining a profound perspective into National Security Law but you also learn how AI implications are in almost every legal practice area.

Image Credit: © monticelllllo/stock.adobe.com

In what is described as a "defining technology of the twenty-first century … China's state council announced a $150 billion centralized program to develop AI and become the world's leader in AI by 2030 … [and] Vladimir Putin declared 'whoever controls [AI] will be the ruler of the world.'" Mr. Baker does not provide a similar bold statement from our policymakers. Of potential concern, he lets us know that our policymakers "understand the importance of operational timelines." However, "… they are less conscious of the risks of acting at machine speed…." Therefore he lays out that, currently government, private corporations, and academia are making their own policy rather than working toward a unified policy for national security. "If the government does not act, private actors and litigation will play a disproportionate role in defining national policy."

China's state council announced a $150 billion centralized program to develop AI and become the world's leader in AI by 2030.

Perhaps drawing on his time as a judge on the United States Court of Appeals for the Armed Forces, Mr. Baker categorically sets out a legal framework moving you through Constitutional issues. The Fourth and Fifth Amendment concerns for attorneys include understanding potential data bias and that "AI-generated results will serve as a predicate for probable cause" as well as Sixth Amendment concerns on whether the defendant will be able to "question the author of the algorithm."

That said he also touches on contract/fiscal law, weapons reviews, labor law, and ethics—asking questions such as: Does the Federal Government have sufficient numbers of qualified attorneys to be able to advise decision-makers during the potential collection, storage, use, and buying of data? Moreover, if a new weapon or weapons system incorporates AI, DoD Directives state that attorneys will need to do a legal review on acquisition and procurement as well as compliance with domestic law, treaties and international agreements. Do we have personnel capable of doing these reviews and doing so at the R&D stages?

In Chapter 10, Mr. Baker turns to ethics. *The Centaur's Dilemma* makes it clear "lawyers have a professional responsibility to understand and identify the ethical questions and dilemmas associated with AI-enabled systems and machines ….The lawyer who is not conversant with AI will not be invited into the decision making room and will not hold their place in that room." They also will not be "consulted at the research and development stage of AI system creation." If brought in at all, lawyers will be at the use stage with "fewer opportunities to ask the right questions and even fewer opportunities to guide AI applications to preferred outcomes …."

I highly recommend *The Centaur's Dilemma* to all practicing attorneys but especially government attorneys. As mentioned above, AI affects contract/fiscal law reviews. Administrative law attorneys will need to be conversant in AI when they review investigations and work with digital forensic experts to analyze audio and video evidence. Labor counsel need to understand AI when it is part of the hiring process. National Security Law advice will cover questions on sending out "the perfect wingman" or relying on AI outright to complete a mission. Finally, litigators will need to know who was involved at each stage of AI development, how to understand the data sets, and was the end-use reliable. Once we can answer these questions, we will be able to determine whom, if anybody, should be held accountable for what happened. The bottom line is that Mr. Baker is correct: AI will be the "defining technology of the twenty-first century." It will affect every aspect of our legal practice and as *The Centaur's Dilemma* makes abundantly clear, we need to be ready.

Edited by Major Charlton S. Hedden
Layout by Thomasa Huffstutler

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External Links to Additional Resources

- **Artificial Intelligence: Next Frontier is Cybersecurity** (National Security Agency/Central Security Service) https://www.nsa.gov/Press-Room/News-Highlights/Article/Article/2702241/artificial-intelligence-next-frontier-is-cybersecurity/
- **The Centaur's Dilemma**: A Discussion and Q&A with James E. Baker and Jamie Winders (Maxwell School of Syracuse University) https://youtu.be/zdGRYVm0-FY
- **National Security and Artificial Intelligence: Global Trends and Challenges** (Center for Strategic & International Studies) https://www.csis.org/events/national-security-and-artificial-intelligence-global-trends-and-challenges
- **National Security and the Impact of Technology** (McCain Institute) https://youtu.be/wslS6qpii0U
- **Technology Resources** (Cybersecurity & Infrastructure Security Agency) https://www.cisa.gov/safecom/technology

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Reprint: The Reporter, Volume 29-2 (June 2002) https://www.jagreporter.af.mil

ACKNOWLEDGMENT

The Reporter, Volume 29-2 (June 2002)

TIMELESS LEADERSHIP SERIES: ARTICLE REPRINT
BY MAJOR GENERAL ROBERT I. GRUBER

As part of a new series, "Timeless Leadership," *The JAG Reporter* is reprinting articles from past issues on leadership and JAG Corps values. Our first edition comes from *The Reporter*, Volume 29-2 (June 2002), and serves as a reminder to all of the importance acknowledgment plays in the development and maintenance of a ready Total Force. The article was reprinted in its entirety.

ACKNOWLEDGMENT OF OUR PEOPLE

This article will focus on a subject that can never be emphasized enough: acknowledgment of our people. While several sources have written about this over the years, recent evidence suggests a more comprehensive approach to the subject may be helpful.

Let's first define the scope of the "acknowledgment" we're talking about. Simply put, it runs from initial enlistment through and even beyond retirement. Acknowledgment is not just about federal decorations, although they are included. Acknowledgment need not only be for a job well done although that is certainly a worthy reason to acknowledge someone. Acknowledgment need not only come from commanders though they are certainly integral to acknowledgment of people. And most importantly, acknowledgment is not something to be pegged to specific timelines or exercised with any rigidity, but rather should be fluid, ongoing, internalized, and a way of life. Notice use of the term "acknowledgment" rather than "recognition,"

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the latter being more commonly used in the military. "Recognition" is a narrow term as it implies a formal process of bestowing tangible evidence of credit on someone for excellent performance. "Recognition" is incorporated into the broader term "acknowledgment" and it is the latter which is the subject of this paper.

These concepts apply to any grouping of people, and even to whole units. The type, source, and reason of this acknowledgment may come in many forms; and that too, should be emphasized.

> Acknowledging someone tells him or her that **they are important** and that they mean something to you or your office.

The types of acknowledgment can be oral, a nonverbal act such as the literal "pat on the back" or a "thumbs up" (way to go!), or written, or a combination of any of these. Sometimes a simple spoken "thank you" is appropriate. Oftentimes acknowledgment may take the form of a congratulatory oral announcement to the commander or other group, or taking the person aside, one-on-one and relating how much you appreciate what they do for you and your office. Other forms may include a "Welcome Package" or a letter an office gives to unit or office newcomers to acquaint them with your unit or office services and procedures, "thank you" letters, letters or certificates of appreciation or commendation for a job well done or extra duty served, "office- only" lunches, letters cards or notes for life cycle events of office personnel and their families, state awards or decorations, Air Force decorations, related organizational awards, congratulatory letters or notes upon promotion, receipt of awards or decorations or special or new assignments, and upon leaving the office/retirement ceremonies and celebrations. These are just a few types of acknowledgment, which can expand as far as your creative thinking allows.

Anyone can acknowledge anyone for anything. While acknowledgment to unit personnel most often comes from commanders, or supervisors to the people they supervise, it is not limited to these sources. Commanders and supervisors generate the more formal types of acknowledgment, but acknowledgment should know no rank or position, as the abiding rule is the "Golden Rule."

Acknowledging someone tells him or her that they are important and that they mean something to you or your office. **EVERYONE**, regardless of rank or position, needs to feel special and wants encouragement. A pat on the back, or a "well done" once in a while is an incentive to sustain excellence. This is acknowledgment. The more creative the type, the more frequently given, depending on the recipient and the circumstance, usually elevates that person's performance to new heights. Just remember how good you felt when someone you admire said a kind word to you.

A sense of professionalism and pride in one's own performance, while essential, will sustain a person only so long. Without acknowledgment, by peers or supervisors, that person may eventually lose interest and their performance will suffer a decline, which adversely affects the mission. This should tell you, that **ACKNOWLEDGMENT** is a **READINESS** issue, and should be treated as such.

Please constantly look for ways and occasions to acknowledge your colleagues in your offices. Tell their employers, tell their families, and tell **THEM** how much you appreciate them. When one of your unit members has performed an assignment that has kept the member away from home or civilian employment for a while or has been promoted or placed in a leadership position, a letter to that member's family or civilian employer to share their pride in this accomplishment or the added benefit to the civilian employer is not only a very nice thing to do, but also will boost the member's retention in the unit. It's not only an "if you do this, then look at all the good things that will follow" thing; it's just the way people who associate with each other should act toward one another. In short, the "Golden Rule."

Commanders and Supervisors: Do you know when the last federal decoration was received by each of the people you command or supervise? If you don't, you should.

Authority to award a decoration and "how to do it" are no longer barriers. The only two possible remaining reasons preventing this are: (1) "I just don't have the time" and (2) "the proposed recipient doesn't deserve it."

"No time." No one disputes that "people are our most important resource" and that "we have to take care of our people." We've all heard that often enough. But what does it really mean? It doesn't just mean we have to get them ready for deployment or other crises and prepare their families for their time away. It also means that as part of the everyday military environment we must acknowledge people every chance we can. This is not instituting a new program, but rather adopting a way of life. Federal decorations are just a part of it.

> As part of the everyday military environment we must acknowledge people every chance we can.

If you say you don't have the time, you're saying you have too many "other things" to do in connection with your military life such as briefings, meetings, conferences, training, etc. If people really are our most valuable resources and everyone needs ongoing acknowledgment to nourish the incentive to sustain and improve the quality of their performance, should those of you who have "no time" to acknowledge them, reassess your priorities? Let some of those "other things" that can wait, wait until you process that decoration package or acknowledge your people in some way. The point is you **MUST** make time to acknowledge your people as part of your everyday military life. "I have no time" is not an acceptable excuse. Acknowledgment has, for too long, in too many sectors, been thought of as an "extra" that you do if and when you have time. Your office is likely among the busiest in the unit. There's always something to do; and often you try to cram 10 hours of work into an eight-hour duty day that is already shortened by meetings, conferences, and classes. Nevertheless, you **MUST** make the time to express "thank you" or "good job."

"They're not deserving." If you as a supervisor or commander don't think one of your office or unit members deserves a federal decoration, consider whether that evaluation is more a reflection of your own leadership skills than of any deficiency of the considered recipient. If your people are not performing well enough to merit favorable consideration for a federal decoration every three years, you're either not motivating them enough to improve the quality of their performance to warrant that decoration or you've got the wrong person in that position. In either case, you should do something about it. If you are properly leading the right people in your unit or office, it is almost axiomatic that they should be favorably considered for a decoration every three years. If you recommend someone for promotion for their future potential, you have done them a disservice if during the time between promotions they have not received (a) federal decoration(s). So, awards and decorations, in addition to being a Readiness issue, is also a **LEADERSHIP** issue.

Remember supervisors, your commanders usually cannot know about the day-to-day performance of your people. You do. You have to take charge and let the commander know by preparing these packages.

It is a tenet of good leadership that the more deserved credit and expressions of gratitude that are given to those you command and supervise, the more favorably it reflects on your abilities as a leader.

Please don't wait three years to say "thank you" or "well done" or otherwise acknowledge your people. If you regularly do it, everybody wins, and you'll just feel better for saying or doing something nice for someone else.

Finally, from time to time when a person leaves a position or retires, that person wants to avoid any kind of fanfare on that occasion. With all good intentions, that person wants to avoid imposing a "burden" on others to say "goodbye" or show their appreciation and affection for all the good the person has done for them, the unit and the mission. As well motivated as that seems to be, it is a wrong, and even a somewhat selfish attitude for two reasons.

First, at the culmination of an assignment or career, those people with whom the person has associated have a basic human need to express their gratitude and appreciation. Far from being a "burden," people need the catharsis of saying "good-bye" and "thank you" in a manner, they, and not the person leaving, see fit. It is a "life-cycle" event as much for them as for the person leaving, and they need to celebrate it. Call it "emotional cleansing." Don't deprive them of it.

Second, expressions of appreciation on these occasions send a powerful morale message to the rest of the unit. Everyone inevitably leaves the unit or organization at some time in the future. When people see how the current person leaving is treated, it will hearten them to know that years of dedicated service may someday merit such a celebration for them and their families. So, if you come to the time when you leave your assignment or retire, let those who will honor you and your contributions do so, as they deem appropriate. You'll just have to sit there and "take" all those nice things they will say about you. Take comfort though, there are worse things you could endure.

CONCLUSION

In conclusion, take the time to do something nice for someone else every chance you can, and when your time comes, let people do something nice for you!

Layout by Thomasa Huffstutler

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CATEGORY Military Justice and Discipline

Text Excerpt from JAG Reporter Post: 27 Sept 2022 https://www.jagreporter.af.mil

MILITARY RULE OF EVIDENCE 513

A Review of 2022 Court of Appeals for the Armed Forces Updates to Military Rule of Evidence 513

BY CAPTAIN ROCCO J. CARBONE, III AND CAPTAIN CHRISTINA L. HEATH

C.A.A.F.'s opinions and actions this term helped to demarcate some of the boundaries to Mil. R. Evid. 513, yet the likelihood of litigation remains high.

Introduction

During the 2022 term, the Court of Appeals for the Armed Forces (C.A.A.F.) had the opportunity to certify four cases for review, all involving Military Rule of Evidence (Mil. R. Evid.) 513: *Tinsley*, *Beauge*, *Mellette*, and *McClure*.[1] Through both opinions and nonaction, C.A.A.F. provided practitioners clarity concerning the construction and applicability of Mil. R. Evid. 513, resolving longstanding disputes amongst military courts of appeal. This article outlines two C.A.A.F. opinions directly addressing Mil. R. Evid. 513, *Mellette*[2] and *Beauge*,[3] and the implications of C.A.A.F.'s decision to allow two Army Court of Criminal Appeal's opinions, *McClure*[4] and *Tinsley*,[5] to stand. After reviewing the substantive law at issue, the authors provide recommendations on how to interpret and apply the rule in light of these decisions, and the practical impact on military justice practitioners.

The Scope of Mil. R. Evid. 513 – According to its Plain Language

In 1996, the United States Supreme Court formally recognized the psychotherapist-patient privilege under federal common law in *Jaffee v. Redmond*.[6] In its decision, the Supreme Court acknowledged the societal benefits of encouraging mental health treatment and protecting those communications associated with treatment.[7] In 1999, the President also recognized this important public policy consideration[8] establishing the privilege as an evidentiary rule for the military.[9]

The privilege's plain text provides that "a patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and the psychotherapist … [when] such communication was made for the purpose of

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facilitating diagnosis or treatment of the patient's mental or emotional condition."[10] Since its codification, military courts of appeal had been split on how liberally to interpret the privilege.[11] Specifically, whether the privilege applies only to the "communications" between a patient and mental health provider, or whether it also includes the diagnosed disorders and prescribed medications that derive directly from those communications.[12] This year, C.A.A.F. resolved the issue in *Mellette*.[13]

In a three-to-two decision, the court held that the **privilege is limited** solely to the "communications" between the psychotherapist and patient.

In a three-to-two decision, the court held that the privilege is limited solely to the "communications" between the psychotherapist[14] and patient.[15] It does not protect the diagnoses, treatments, or other documents that derive from those communications, yet it does protect the portions of those documents which contain protected communications.[16]

Focusing on the plain language of Mil. R. Evid. 513(a), C.A.A.F. found that the "phrase 'communication made between the patient and a psychotherapist' does not naturally include other evidence, such as routine medical records, that do not memorialize actual communications between the patient and the psychotherapist."[17] C.A.A.F. highlighted a Florida statute to demonstrate the kind of additional verbiage added by the legislature that ensures the privilege is interpreted broadly enough to envelop "any diagnosis made, and advice given."[18] C.A.A.F. opined that similar expansive "nouns such as 'documents,' 'information,' or 'evidence[,]'" could have been used to expand the privilege's scope,[19] and reasoned that, if the President had so intended—like some state legislatures have done—the rule could have explicitly included this broader language, but no such effort was made.[20] As a result, C.A.A.F. rejected the government's numerous arguments to support a more expansive reading of the rule's scope,[21] and determined the omission to be intentional.[22] Thus, the plain language of the rule controls—only the "communications" between a patient and psychotherapist are protected.

Notably, C.A.A.F. emphasized that its holding was "not based on [its] views on the proper scope" of the privilege; rather, its analysis "rest[ed] solely on the specific text" of Mil. R. Evid. 513(a), and precedent.[23] C.A.A.F. put the limitation of the privilege's scope squarely on the President's shoulders, as the President possesses "both the authority and the responsibility to balance a defendant's right to access information that may be relevant to his defense with a witness's right to privacy."[24] C.A.A.F. reasoned it must respect the President's "choice" to limit the privilege's scope merely to communications, and regarding any future amendments to the rule, it would respect his decision making, "unless the President's decision with respect to that balance contravenes a constitutional or statutory limitation[.]"[25]

Apart from the scope of the privilege, C.A.A.F.'s opinions this term addressed the standard that governs the review of these records, and several of the rule's exceptions. The language of Mil. R. Evid. 513 governs both, and the standards that authorize an *in camera* review, and exceptions, are intertwined.

In Camera Review & Exceptions Standards

In practice, the first step of analysis regarding a request for mental health records begins with either a discovery[26] or production request[27], which may lead to a subpoena[28], or a motion to compel, culminating in a Mil. R. Evid. 513 hearing. C.A.A.F.'s decisions this term did not directly affect any of these rules or procedures, so practitioners can continue to rely on the applicable rules, and interpretative case law, when circumstances warrant a request for mental health records.[29] However, this term C.A.A.F. made clear the importance of the *in camera* review standard, and the limited nature of the scope of information that may be released based on an exception.

Generally, to determine the admissibility of mental health records, the movant seeking release of these communications or records must file and serve a written motion on the opposing party, military judge, and, if practical, the patient, at least five days prior to entry of pleas "specifically describing the evidence and stating the purpose" for the release.[30] The military judge must then hold a closed hearing[31] and provide the patient "a reasonable opportunity to attend … and be heard," which includes the right to be heard through their victims' counsel.[32] Thereafter, the military judge "may" elect to review the records via an *in camera* review to determine the applicability of the privilege.[33]

> Prior to authorizing an *in camera* review of potentially privileged records, a military judge must first find, by a preponderance of the evidence, that the moving party has established **four factors**.

Yet, prior to authorizing an *in camera* review of potentially privileged records, a military judge must first find, by a preponderance of the evidence, that the moving party has established four factors: (1) a specific, credible factual basis that demonstrates a reasonable likelihood that the records would contain information admissible under an exception to the privilege; (2) the requested information meets an enumerated exception; (3) the information is not cumulative of other, available information; and (4) the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources. Mil. R. Evid. 513(e)(3)(A)-(D).

In *Beauge*, C.A.A.F. specifically addressed the *in camera* review standard, and the significance of a party's failure to sufficiently establish it. C.A.A.F. emphasized the military judge's decision-making and obligations:[34] "the permissive nature of this passage … states that a military judge '*may* examine the evidence *in camera*,'" thus, clearly emphasizing that a military judge is neither presumed or obligated to conduct such a review.[35] To further support this position, C.A.A.F. "underscore[d] the fact that where an Appellant's motion to compel does not meet the standard laid out in [Mil. R. Evid.] 513(e)(3) [the four prong analysis], a military judge *does not have the authority* to conduct an *in camera* review."[36] This language clarifies both the importance of this standard for advocates, the repercussions for failing to meet this standard,[37] and appears to reaffirm a precedent set by the Army Court of Criminal Appeals that a military judge's decision to improperly engage in an *in camera* review is reversible error.[38]

The rule also makes clear that the movant seeking to pierce the privilege must rely on one of the "enumerated exceptions" listed in Mil. R. Evid. 513(d).[39] In the rule's current form, there are seven exceptions.[40] C.A.A.F's decision in *Beauge* addressed two of these exceptions,[41] which are discussed in detail below.[42] Previously, an eighth exception authorized the release of documents when "constitutionally-required" to do so, but the President removed this exception by amendment in 2015.[43] Despite its removal, some military courts of appeal were reading the exception back into the rule. Although C.A.A.F. did not explicitly resolve this issue this term—despite having ample opportunity to do so—its opinions and decisions provide clarity on the way-ahead for this exception.

Constitutionally-Required Exception

Mil. R. Evid. 513 is unambiguous and authorizes piercing the privilege for only "enumerated" exceptions; nonetheless, some military courts have been incorporating the now-excluded "constitutionally-required" exception back into the rule, creating a split between military courts of appeal.

In *J.M. v. Payton-O'Brien*, the Navy Marine Corps Court of Criminal Appeals held that practitioners and the courts may still read this exception into the rule,[44] and further held that even if none of the enumerated exceptions apply, if each of the factors for an *in camera* review are met, then the military judge must then determine whether an *in camera* review is constitutionally-required.[45] Specifically, the court reasoned that it could "not allow the privilege to prevail over the Constitution," because "the privilege may

be absolute outside the enumerated exceptions, but it must not infringe upon the basic constitutional requirements of due process and confrontation." However, in any instance in which the court finds the accused's constitutional rights demand disclosure of privileged material belonging to the victim, the victim always retains the right to deny waiver of the privilege.[46] Yet, such a denial is not without judicial remedy—it may result in the military judge abating the proceedings, with prejudice.[47]

This term, C.A.A.F. had the opportunity in at least four separate cases—*Mellette*, *Beauge*, *McClure*, and *Tinsley*—to address the constitutionally-required exception directly, but it chose not to. Although C.A.A.F. has not explicitly addressed this exception, by considering each of these cases in total, it appears C.A.A.F. has arguably overruled by implication the reasoning proffered in *J.M. v. Payton-O'Brien*.[48]

In *McClure*, the defense raised issues of waiver, and sought to pierce the **psychotherapist-patient privilege** based on the exception.

McClure and *Tinsley*, two Army Court of Criminal Appeals (A.C.C.A.), delivered opposite conclusions than *J.M. v. Payton-O'Brien* regarding the constitutionally-required exception. In *McClure*, the defense raised issues of waiver, and sought to pierce the psychotherapist-patient privilege based on the exception.[49] The defense requested access to the victim-patient's medical records because she admitted having multiple mental health diagnoses and related prescriptions.[50] As part of its basis to pierce the privilege, the defense argued, in a circular manner, that the mental health records were "constitutionally required because 'constitutionally required evidence very likely exists within the mental health records.'"[51] Specifically, the defense argued the appellant had due process rights, and the right to confrontation, to request and review these records, but no additional context for the request was provided.[52] The military judge denied the request because it found the victim-patient did not waive her privilege, and the defense failed to establish the four prongs of the *in camera* review standard.[53]

In affirming the military judge's decision, A.C.C.A. made clear that the military judge's decision "did not undermine appellant's confrontation rights,"[54] and relied on Supreme Court of the United States precedent, *Pennsylvania v. Ritchie's* holding that, "the constitutional right to confront witnesses does not include the right to discover information to use in confrontation … [and] [t]he right to question adverse witnesses 'does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.'"[55] Despite the defense's arguments, the court found the right did not overcome the privilege.

After A.C.C.A. issued its decision affirming the lower court's finding, the appellant sought review before C.A.A.F., which initially accepted and certified an issue, in part, regarding the applicability of the constitutionally-required exception.[56] C.A.A.F., however, did not issue an opinion in *McClure* in light of its decision in *Mellette*, thereby affirming A.C.C.A.'s decision, and leaving the issue expressly unresolved.[57]

After A.C.C.A. decided *McClure*, it more directly addressed both the issues of waiver and the constitutionally-required exception in the published opinion, *Tinsley*.[58] There, the court explicitly held there is no constitutionally-required exception under Mil. R. Evid. 513 and it cannot be a basis as an exception to pierce the privilege.[59] Specifically, the court held that neither the Confrontation Clause nor *Brady*[60] created an exception to pierce the psychotherapist-patient privilege for a victim's mental health records based on the plain language of Mil. R. Evid. 513 and the congressional intent to eliminate the constitutionally-required exception.[61] *Tinsley*, like *Mellette*, relied primarily on the President's authority to promulgate the military rules of evidence, and determined the lack of a constitutionally-required exception was not "clearly and unmistakably unconstitutional,"[62] especially in light of the fact several other recognized privileges, like the attorney-client privilege, have no such exception.[63]

C.A.A.F. ultimately denied a petition to hear *Tinsley*, foregoing the opportunity to address this issue, and allowing A.C.C.A.'s decision to stand.[64]

C.A.A.F.'s opinion in *Beauge* was the court's first explicit discussion of the constitutionally-required exception this term. One of the issues the court addressed was whether the defense counsel was ineffective for failing to raise the exception.[65] Ultimately, it found counsel was not ineffective,[66] because counsel did not raise a "cutting-edge claim" as a basis to pierce the privilege.[67] However, in doing so, the court stated that it was not explicitly addressing the viability of the constitutionally-required exception, because it was unnecessary to resolve the issues before it;[68] still, its later discussion of the applicable Supreme Court precedent appears to undermine this very assertion.

The right to confront witnesses does not include the right to ***discover*** **information** to use in confrontation.

C.A.A.F. recognized an accused's constitutional concerns to pierce the privilege would arise from the right to confrontation and right to present a complete defense.[69] Even though C.A.A.F. recognized these concerns, the court found that Supreme Court precedent limited these arguments, because "in certain instances, the psychotherapist-patient privilege seemingly trumps an accused's right to fully confront the accuracy and veracity of a witness who is accusing him or her of a criminal offense."[70] In coming to this conclusion, C.A.A.F. relied on *Ritchie*, and its discussion of the balance between discovery and an accused's Sixth Amendment right under the confrontation clause by citing to the proposition that "the right to confront witnesses does not include the right to *discover* information to use in confrontation[.]"[71] Further, it recognized that, based on *Holmes v. South Carolina*, any due process right to present a complete defense is only viable when rules "infring[e] upon a weighty interest of the accused *and* are arbitrary or disproportionate to the purposes they are designed to serve[.]"[72] In this case, it did not find that the privilege was either "arbitrary or disproportionate to the purpose served" in light of *Jaffee*, which held that the psychotherapist-patient privilege "promotes sufficiently important interests to outweigh the need for probative evidence."[73]

C.A.A.F.'s decision to address the constitutional issue in this way, arguably, undermined its stated purpose of not addressing the issue. The court framed both an accused's arguments for the constitutionally-required exception, and then responded in kind with how they are not constitutionally sound based on three Supreme Court cases. Although perhaps unintentional, one could argue that C.A.A.F. has, at the very least, signaled its position on the exception, and most importantly, laid out arguments regarding why the constitutionally-required exception is not viable.

This position is further supported by C.A.A.F.'s reliance on identical precedent and reasoning in A.C.C.A.'s *Tinsley* and *McClure*, which both held the constitutionally-required exception no longer exists.[74] In *Beauge*, C.A.A.F relied on *Ritchie*[75] in the same way that A.C.C.A. did in *McClure*.[76] Further, C.A.A.F.'s reliance on *Jaffee*[77] mirrors the position taken by A.C.C.A. in *Tinsley*.[78] These two cases predate *Beauge*.[79] C.A.A.F. could have reviewed these cases and affirmatively answered the question whether the constitutionally-required exception is still viable, but, instead, it elected otherwise and made the same arguments A.C.C.A. did regarding this exception.

C.A.A.F.'s decision in *Mellette* also supports the position that the constitutionally-required exception no longer exists, though less explicitly. By solely limiting its opinion to the scope of the privilege, C.A.A.F. did not need to address the exception. In its reasoning regarding limiting the privilege's scope, however, two important concepts implicate the constitutionally-required exception: courts must strictly construe the language of privileges, and the President has ultimate authority over the military rules of evidence.

First, by C.A.A.F. reaffirming the precedent that privileges must be strictly construed, it supports the position that the language in the rule matters. The underlying rationale for this precedent is that privileges cut against the truth-seeking concept of judicial fact-finding, and thus, information protected from release must be as limited as possible.[80] One could argue that the truth-seeking intent behind this admonition supports inserting the constitutionally-required exception back into the rule. Nevertheless, such an argument is fatally flawed. Inherent in the reasoning is that the rule's language, or lack of language in a rule, must control.[81] Thus, because an enumerated constitutionally-required exception does not exist in the rule, it cannot be a basis to pierce the privilege. This reasoning is in line with *Mellette*'s narrowing the scope of the privilege to include only "communications," and excluding all other types of derivative informative, because the rule did not explicitly include the more expansive nouns of "documents," or "information."[82] Simply put, words matter, and so does their exclusion.

"Psychotherapist-patient privilege trumps an accused right[s]."

Second, C.A.A.F. made clear the President solely controls the text of the rule.[83] C.A.A.F. relied almost exclusively on the plain text of the rule when interpreting its scope, and stated that, if the President wanted to change the rule, he had every right to do so.[84] When this same logic is applied to the constitutionally-required exception, it is clear that the President has already exercised is authority similarly by removing the exception in 2015. For C.A.A.F. to specifically reinforce the position that the President controls the language of the rule, and then undermine that position by reinserting the language into the rule that the President has already specifically excised, would be fundamentally illogical, and antithetical to *Mellette*.

Although C.A.A.F. did not explicitly state so, its decisions, and importantly, the reasoning behind those decisions, demonstrates a strong argument that the constitutionally-required exception is not a viable basis to pierce the privilege.[85] Importantly, C.A.A.F. signaled that it would respect the President's textual decisions, as long as no constitutional or statutory basis precluded agreement.[86] Here, with the court's reliance on *Ritchie*, and its statement in *Beauge* that the "psychotherapist-patient privilege trumps an accused right[s],"[87] the likeliest constitutional hurdle to upholding the President's decision to remove the exception seems unlikely. As a result, with no constitutional or statutory argument to the contrary, C.A.A.F. is likely to uphold the President's decision to have removed the exception.

C.A.A.F.'s silence on the constitutionally-required exception aside, the court explicitly weighed in on at least one of the enumerated exceptions this term. In *Beauge*, the court addressed the duty-to-report exception in the context of an alleged assault of a child, and based on the facts of the case, also discussed the evidence-of child abuse exception as well.[88]

Duty-to-Report and Evidence-of-Child-Abuse Exceptions

In *Beauge*, C.A.A.F. reviewed the scope and application of the duty-to-report exception under the rule,[89] and held that only the specific information required to be reported by state or federal law is not subject to the privilege.[90] In other words, only the information that must be reported under state law is a non-privileged communication. Moreover, the court opined that communications not required to be reported, but that were nonetheless disclosed, would remain privileged.[91]

Generally, Mil. R. Evid. 513(d)(3) allows for disclosures of privileged communications when federal law, state law, or a service regulation imposes a duty to report. Often times, mandatory reporter laws do not detail precisely what reporters must disclose to authorities. As a result, the information subject to disclosure can often be extremely limited. Sometimes, mandatory reporting laws require only a name.[92] Other times, the law may require a handful of identifiers, such as the name and address of the individual, the nature and extent of injuries, and any information that might be helpful identifying the perpetrator.[93] This means the mandated reporter—whether it be a teacher, therapist,

nurse, day care provider—who received the information can have a significant amount of discretion as to what to disclose.

Through *Beauge*, C.A.A.F. has interpreted the rule in a way that balances the purpose of the rule (to allow patients to seek advice, diagnosis or treatment of mental or emotional conditions) with the purpose of the exception (to initiate safety assessments for a vulnerable category of the population). As a result, the communications that fall within the exception, in application, are constricted.[94] Thus, counsel must examine the plain language of the specifically relied-upon mandatory reporting requirement to determine the scope of the disclosure.[95]

Based on the facts of the case, *Beauge* also tangentially addressed the evidence-of-child-abuse exception. Although communications involving evidence of child abuse or neglect are typically enveloped under state mandated reporter laws; however, Mil. R. Evid. 513(d)(2), expressly excepts such communications from a privileged status. Regardless of whether a duty to report such communications exists under state law, these types of psychotherapist-patient communications are likely not privileged in the military.[96]

Critical to every discussion of privilege are the issues of when and how a communication or document **loses its privileged status**.

Critical to every discussion of privilege are the issues of when and how a communication or document loses its privileged status. C.A.A.F.'s opinions this term did not specifically address wrongful disclosure or waiver in the context of Mil. R. Evid. 513; nevertheless, both *McClure* and *Tinsley* did.

Wrongful Disclosures

Privileged records are not always obtained by discovery or production requests. An overeager law enforcement agent may unilaterally request and receive an accused or victim's mental health records without providing notice. An estranged spouse may have gained access to victim's medical records and turned them over to defense counsel. When a patient does not have an opportunity to object to the disclosure, counsel should evaluate the information's release under a wrongful disclosure analysis. Practitioners should look to the text of Mil. R. Evid. 511, and *Tinsley* for support when such disclosures occur.[97]

Mil. R. Evid. 511 explains that privileged matters disclosed under erroneous compulsion or without an opportunity to claim privilege are not admissible against the holder of the privilege. When records have been wrongfully disclosed, counsel may file a motion to restore the records to their privileged status in order that a determination about their production or admissibility can be properly assessed under the appropriate rule.[98] The privilege holder then should be able to "prevent another from being a witness or disclosing any matter or producing any object or writing."[99]

Beyond the text of the military rules of evidence, *Tinsley* provides guidance that is more explicit on how to handle wrongful disclosures. It held that if a "health care provider, Criminal Investigation Division, or any other source inadvertently provides the government with potentially exculpatory privileged information, such action does not constitute a waiver or otherwise trigger an immediate duty to disclose."[100] In such situations, the government must inform the opposing party and patient of the inadvertent disclosure so the patient has an opportunity to assert privilege, which, if done timely, bars disclosure and requires return of the privileged records to the patient.[101] Notably, if there are any disputes about waiver after the disclosure, if the patient asserts the privilege, then the dispute should be resolved in the patient's favor.[102] Thus, in instances in which privileged records are inadvertently released with non-privileged records, privileged records maintain their status.

Waiver

Another commonly litigated issue generally implicated by privilege involves waiver. Practitioners should familiar with Mil. R. Evid. 510, and, in the context of mental health records, *McClure*.

Under Mil. R. Evid. 510, a person may waive a privilege if he or she "voluntarily discloses or consents to disclosure of any *significant* part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege."[103] Based on a plain reading of the rule, when a party asserts waiver, there are essentially three steps to the analysis: (1) whether the disclosure was voluntary or consensual, (2) how significant was the disclosure in relation to the protected information, and (3) whether it would be inappropriate to allow the privilege to continue based on the circumstances of the release.

The significance and voluntariness of the disclosure is fact-intensive. Generally, the issue turns on how much information has been released and to whom. Courts have determined waiver to underlying communications or documents has not occurred when counsel has failed to object to a discovery or production request[104] or when a victim voluntarily disclosed information about mental health diagnoses and treatments.[105] Conversely, C.A.A.F. has found that, where a privilege holder has voluntarily consented to the disclosure of privileged statements to trial counsel without express limitation, it would be "inappropriate to allow a claim of privilege to prevent [the accused] from using those statements at trial."[106]

Regarding the "inappropriateness to allow [the] privilege," courts have held that the privilege should not act as both a "sword" and a "shield." In other words, the privilege holder may not use it to disclose evidence "to establish advantageous facts and then invoke the privilege to deny the evaluation of their context, relevance, or truth—thus turning the privilege from a shield into a sword—a circumstance the waiver rule's broader language seeks to avoid."[107] Regarding appropriateness, practitioners should consider the perceived intent behind the communication when it was made and for what purpose.[108]

Practice Recommendations

After C.A.A.F.'s 2022 term, military justice practitioners litigating Mil. R. Evid. 513 issues should be mindful of the following points.

Mil. R. Evid. 513 is not an easy rule. Procedurally, and substantively, there are several subtleties, and the law is ever changing. Practitioners should take the time necessary to understand the issues before responding to requests for information, and practitioners should address disagreements on nuanced Mil. R. Evid. 513 issues.

Although *Mellette* has clarified the scope of the privilege, the rules or procedures regarding request for mental health records have not been affected. To the contrary, C.A.A.F. has reaffirmed their importance. The R.C.M.s regarding discovery and production, their applicable standards, and the *in camera* review standard, all still apply. Counsel should be mindful of the need to continue to articulate how the requested records meet the applicable standards, and how the *in camera* review standard has, or has not, been met.

Mil. R. Evid. 513 is not an easy rule. Procedurally, and substantively, there are several subtleties, and **the law is ever changing**.

C.A.A.F. has not explicitly held whether the constitutionally-required exception is still viable, but when reading the plain text of the rule, and its recent opinions and decisions, one can reasonably argue that the exception no longer exists. Although there are arguments on both sides, a plain reading of the current rule makes one thing abundantly clear—there is no such exception in the rule. Practitioners should argue as they (and their client's interest) see fit.

Based on C.A.A.F.'s interpretation of the duty-to-report exception, practitioners should narrowly construe enumerated exceptions to the privilege. Any release of information should be cross-referenced with the laws mandating such reports to ensure no spillage of privileged information occurred. Practitioners should take necessary steps to mitigate over-disclosures and work to return unnecessarily released information back to a privileged status.

Finally, although C.A.A.F. has not explicitly addressed the issue of wrongful disclosure or waiver in the context of Mil. R. Evid. 513, practitioners should feel confident relying on the holdings and reasoning in *Tinsley* and *McClure*, as well as the text of Mil. R. Evid. 510 and 511, when addressing these issues.

Conclusion

C.A.A.F.'s opinions and actions this term helped to demarcate some of the boundaries to Mil. R. Evid. 513, yet the likelihood of litigation remains high. Military justice practitioners should anticipate the potential for legal disagreements involving mental health records, and work to stay current on the ever-changing nature of the law regarding this privilege.

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Edited by: Maj Allison Johnson (Editor-in-Chief) and Maj Brittany Byrd (Senior Editor)
Layout by: Thomasa Huffstutler

Endnotes

[1] United States v. Mellette, No. 21-0312, 2022 CAAF LEXIS 544 (C.A.A.F. July 27, 2022); United States v. Beauge, 82 M.J. 157 (C.A.A.F. 2022); United States v. McClure, No. ARMY 20190623, 2021 CCA LEXIS 454 (A. Ct. Crim. App. Sep. 2, 2021); and United States v. Tinsley, 81 M.J. 836 (A. Ct. Crim. App. 2021).

[2] *Mellette*, No. 21-0312, 2022 CAAF LEXIS 544.

[3] *Beauge*, 82 M.J. 157.

[4] *McClure*, No. ARMY 20190623, 2021 CCA LEXIS 454.

[5] *Tinsley*, 81 M.J. 836.

[6] Jaffee v. Redmond, 518 U.S. 1 (1996); *see* Anne B. Pulin, *The Psychotherapist-Patient Privilege After Jaffee v. Redmond: Where Do We Go From Here?*, 76 Wash. U. L. Q. 1341 (1998) (discussing how Congress failed to codify privileges within the Federal Rules of Evidence, which were statutorily adopted in 1975).

[7] *Jaffe*, 518 U.S. at 11-12 (discussing that, without a psychotherapist-patient privilege, "confidential communications between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation.").

[8] United States vs. Jacinto, 79 M.J. 870, 879 (N-M Ct. Crim. App. 2020), *rev'd on other grounds*, 81 M.J. 350 (C.A.A.F. 2021) ("The public policy behind Mil. R. Evid. 513 is that '[e]ffective psychotherapy … depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.' Such treatment may cause 'embarrassment or disgrace' and the 'mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.' The important public interest in promoting mental health treatment is balanced with the right of an accused to present the most probative evidence during criminal trials.") (citations omitted).

[9] See Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 12, 1999); Major Stacy E. Flippin, *Military Rule of Evidence (Mil. R. Evid.) 513: A Shield to Protect Communications of Victims and Witnesses to Psychotherapists*, Army Law., Sept. 2003.

[10] Mil. R. Evid. 513(a).

[11] United States v. Rodriguez, No. ARMY 20180138, 2019 CCA LEXIS 387, *8 (A. Ct. Crim. App. Oct. 1, 2019) (holding that neither the diagnosed disorder nor the medications prescribed to treat the disorder are "confidential communications" under the privilege); H.V. v. Kitchen, 75 M.J. 717, 719-721 (U.S.C.G. Ct. Crim. App. 2016) (holding both the diagnosis, as well any prescribed medications, are covered by the privilege); *see* United States v. Mellette, 81 M.J. 681, 691-693 (N-M. Ct. Crim. App. 2021).

[12] *Id.*

[13] United States v. Mellette, 82 M.J. 13 (C.A.A.F. 2021) (certifying the question, "Did the lower court err by concluding diagnoses and treatment are also subject to the privilege, invoking the absurdity doctrine?"); *United States v. Mellette*, No. 21-0312/NA, 2022 CAAF LEXIS 32 (C.A.A.F. Jan. 13, 2022).

[14] Mil. R. Evid. 513(b)(1) ("'Patient' means a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.").

[15] Mil. R. Evid. 513(b)(2) ("'Psychotherapist' means a psychiatrist, clinical psychologist, clinical social worker, or other mental health professional who is licensed in any State, territory, possession, the District of Columbia, or Puerto Rico to perform professional services as such, or who holds credentials to provide such services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials."); Mil. R. Evid. 513(b)(3) ("'Assistant to a psychotherapist' means a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.").

[16] United States v. Mellette, No. 21-0312, 2022 CAAF LEXIS 544 (C.A.A.F. July 27, 2022).

[17] *Id.* at *11.

[18] *Id.* at *10.

[19] *Id.* at *11.

[20] *Id.* at *11-*13.

[21] *Id.* at *9-*19.

[22] *Id.* at *19.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] R.C.M. 701(a)(2)(i) and 701(B)(i) (discovery requests require the government to disclose information in its "possession, custody or control," when the information is "relevant to defense preparation").

[27] R.C.M. 703(e)(1) (production requests must be "relevant and necessary"); R.C.M. 703(b)(1) ("Relevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is stipulated as a fact."); *see also*, R.C.M. 703 (c)(2)(B)(i) (witnesses on findings or motions); R.C.M. 703(c)(2)(B)(ii) and 1001(f) (sentencing).

[28] R.C.M. 703(g)(3)(C)(ii) ("Before issuing a subpoena under this subparagraph and unless there are exceptional circumstances, the victim must be given notice so that the victim can move for relief under subparagraph (g)(3)(G) or otherwise object.").

[29] *See, e.g.*, United States v. Jones, No. ACM 39543, 2020 CCA LEXIS 207, *50 (A.F. Ct. Crim. App. June 11, 2020) (holding that the military judge reasonably found the defense's motion failed on a "fundamental level to establish relevance and necessity for records as required by R.C.M. 703(f)(3)."); LK v. Acosta, 76 M.J. 611, 616 (A. Ct. Crim. App. 2017) ("Mental health records located in military or civilian healthcare facilities that have not been made part of the investigation are not 'in the possession of prosecution' and therefore cannot be '*Brady* evidence.'").

[30] Mil. R. Evid. 513(e)(1)(A)-(B).

[31] Mil. R. Evid. 513(e)(2).

[32] *Id.*

[33] Mil. R. Evid. 513(e)(3).

[34] United States v. Beauge, 82 M.J. 157, 166 (C.A.A.F. 2022).

[35] *Id.*

[36] *Beauge*, 82 M.J. at 166 (emphasis added) (citing to Mil. R. Evid. 513(e)(3) "('[p]rior to conducting an *in camera* review, the military judge *must* find by a preponderance of the evidence that the moving party' met their burden (emphasis added))").

[37] *See, e.g.,* United States v. Arnold, No. ACM 39194, 2018 CCA LEXIS 322, *33-34 (A.F. Ct. Crim. App. June 27, 2018) (holding the military judge properly denied accused's request to order *in camera* review of victim's mental health records because accused failed to meet its burden); *see also*, United States v. Morales, No. ACM 39018, 2017 CCA LEXIS 612, *8 (A.F. Ct. Crim. App. Sep. 13, 2017) ("… trial defense counsel conceded he had 'no way of knowing' and could 'merely speculate' as to what information was in the requested records. The Government opposed the motion, which assistant trial counsel characterized as 'a fishing expedition in the extreme.'"); United States v. Marquez, No. 201800198, 2019 CCA LEXIS 409, *13-14 (N-M Ct. Crim. App. Oct. 28, 2019) ("The mere fact that an alleged victim has a discussion with her mental health provider about the subject matter of her prospective trial testimony does not, in and of itself, provide a *specific factual basis* demonstrating a reasonable likelihood that access to those privileged discussions would yield admissible evidence.").

[38] DB v. Lippert, No. ARMY MISC 20150769, 2016 CCA LEXIS 63, *33 (A. Ct. Crim. App. Feb. 1, 2016) (petition for writ of mandamus granted where the military judge failed to adhere to the *in camera* review standard analysis prior to reviewing mental health records).

[39] Mil. R. Evid. 513(e)(3)(B).

[40] Mil. R. Evid. 513(d)(1)-(7).

[41] Mil. R. Evid. 513(d)(2)-(3).

[42] *Infra* Duty-to-Report & Evidence-of-Child-Abuse Exceptions.

[43] *Compare* Exec. Order No. 13,643, *reprinted in* 78 Fed. Reg. 29,559, 29,592 (May 15, 2013) *with* Exec. Order 13,696 *reprinted in* 80 Fed. Reg. 35,783 (showing "constitutionally required" exception removed from Mil. R. Evid. 513).

[44] J.M. v. Payton-O'Brien, 76 M.J. 782, 787-788 (N-M. Ct. Crim. App. 2017).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] "To overrule a precedent by implication. An overruling sub silentio is a decision by a court that contradicts a precedent but fails to expressly state that the precedent is overruled. The later opinion may be written in such a manner to suggest it could be distinguished from the earlier opinion because of some variation in the facts, which would be considered a limitation of the earlier opinion rather than its overruling. When the later opinion appears, however, to be logically inconsistent with the reasoning of the earlier opinion, the earlier opinion is impliedly overruled, or overruled sub silentio." *Overrule Sub Silentio (Overruled by Implication or Effectively Overruled)*, The Wolters Kluwer Bouvier Law Dictionary (Desk ed. 2012).

[49] United States v. McClure, No. ARMY 20190623, 2021 CCA LEXIS 454, at *15 (A. Ct. Crim. App. Sep. 2, 2021).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at *20-*22.

[54] *Id.* at *22.

[55] *Id.* at *22-23 (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 52-53 (1987)).

[56] United States v. McClure, No. 22-0023/AR, 2022 CAAF LEXIS 48 (C.A.A.F. January 18, 2022) (certifying the questions: "Whether the military judge abused his discretion when he denied defense's motion for access to JS's mental health records under Mil. R. Evid. 510 and 513 and refused to review the mental health records *in camera* to assess whether a constitutional basis justified the release of the records to the defense."

[57] United States v. McClure, No. 22-0023/AR, 2022 CAAF LEXIS 574 (C.A.A.F. Aug. 8, 2022) ("No. 22-0023/AR. U.S. v. Michael L. McClure. CCA 20190623. On further consideration of the granted issue, 82 M.J. 194 (C.A.A.F. 2022), and in light of United States v. Mellette, __ M.J. __ (C.A.A.F. July 27, 2022), we conclude that even assuming some error by the military judge, Appellant was not prejudiced. Accordingly, it is ordered that the judgment of the United States Army Court of Criminal Appeals is affirmed.").

[58] United States v. Tinsley, 81 M.J. 836 (A. Ct. Crim. App. 2021).

[59] *Id.* at 850-853.

[60] Brady v. Maryland, 371 U.S. 812 (1962).

[61] *Id.* at 850 ("Accordingly, we find that any 'constitutional exception' to Mil. R. Evid. 513 grounded in the Confrontation Clause does not exist."); *id.* at 853 ("In conclusion, because there is no requirement to recognize an exception to the psychotherapist-patient based on *Brady* or any other constitutional balancing test, this court lacks the authority to create or otherwise recognize any such exception to Mil. R. Evid. 513. It follows that the *only* exceptions to the psychotherapist-patient privilege are those expressly set forth in Mil. R. Evid. 513(d)(1)–(7).").

[62] *Id.* at 849 ("[T]here is no dispute that it is the President, and not the military courts, who has the authority to promulgate the Military Rules of Evidence, including privileges and their exceptions. It is also clear that the military courts do not have the authority to either 'read back' the constitutional exception into M.R.E. 513, or otherwise conclude that the exception still survives notwithstanding its explicit deletion. Rather, the question that we must address in analyzing any continued reliance on the 'constitutional exception' is whether the lack of a Confrontation Clause exception to the psychotherapist-patient privilege is 'clearly and unmistakably' unconstitutional.") (citations omitted).

[63] *Id.* at 849-50 ("there is no 'constitutional exception' to the attorney-client, spousal, and clergy-penitent privileges as set forth in the Military Rules of Evidence. Nor is there any indication that either the Supreme Court or CAAF has ever considered the psychotherapist-patient privilege to be 'less worthy' than any other recognized privilege.").

[64] United States v. Tinsley, No. 22-0109/AR, 2022 CAAF LEXIS 392 (C.A.A.F., May 26, 2022).

[65] United States v. Beauge, 81 M.J. 301 (C.A.A.F. 2021) ("Did the lower court create an unreasonably broad scope of the psychotherapist-patient privilege by affirming the military judge's denial of discovery, denying remand for in camera review, and denying Appellant's claim of ineffective assistance of counsel?").

[66] United States v. Beauge, 82 M.J. 157, 167 (C.A.A.F. 2022) ("We next hold that Appellant's counsel was not ineffective for failing to raise a constitutional objection.").

[67] Beauge, 82 M.J. at 168 n. 12 (noting "that Appellant's counsel was not constitutionally ineffective for failing to raise what would have been a cutting-edge claim."); *see, e.g.*, Murray v. Carrier, 477 U.S. 478, 486 (1986) ("The constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.").

[68] Beauge, 82 M.J. at 167 n.10 ("We note that there is disagreement among the lower courts regarding the significance of the removal of the 'constitutional exception' from the list of enumerated exceptions in M.R.E. 513(d). Because the Government agrees with the reasoning of the United States Army Court of Criminal Appeals in LK v. Acosta, 76 M.J. 611 (A. Ct. Crim. App. 2017), 'that the removal of a constitutional exception from an executive order-based rule of evidence cannot alter the reach of the Constitution,' we need not decide the precise significance of the removal of this express exception in order to decide this case. Brief for Appellee at 34, United States v. Beauge, No. 21-0183 (C.A.A.F. Sept. 24, 2021) (internal quotation marks omitted) (quoting Acosta, 76 M.J. at 615)"); *id.* at 168 n. 12 ("Because this issue was presented as an ineffective assistance claim, we express no opinion as to when the Constitution may compel discovery of documentary records. Rather, we simply note that Appellant's counsel was not constitutionally ineffective for failing to raise what would have been a cutting-edge claim.").

[69] Beauge, 82 M.J. at 167.

[70] *Id.*

[71] Beauge, 82 M.J. at 167 (quoting Pennsylvania v. Ritchie, 480 U.S. 39 (1987) ("If we were to accept this broad interpretation … the effect would be to transform the Confrontation Clause into a constitutionally-compelled rule of pretrial discovery. Nothing in the case law supports such a view.")).

[72] *Id.* at 167 (quoting Holmes v. South Carolina, 547 U.S. 319, 324-25 (2006) (alteration in original) (emphasis added) (internal quotation marks omitted) (citation omitted)).

[73] *Id.* at 167-168 (quoting Jaffe, 518 U.S. at 9-10 (internal quotation marks omitted) (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).

[74] United States v. Tinsley, 81 M.J. 836, 850 n.5 (A. Ct. Crim. App. 2021); United States v. McClure, No. ARMY 20190623, 2021 CCA LEXIS 454, at *22-23 (A. Ct. Crim. App. Sep. 2, 2021).

[75] Beauge, 82 M.J. at 167 ("the confrontation issue is limited by the Supreme Court's decision in *Pennsylvania v. Ritchie*, in which a plurality of the Court opined that the Sixth Amendment right 'to question adverse witnesses … does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.'") (citing 480 U.S. 39, 53 (1987) (plurality opinion)).

[76] United States v. McClure, No. ARMY 20190623, 2021 CCA LEXIS 454, at *22-23 (A. Ct. Crim. App. Sep. 2, 2021) (relying on *Ritchie*, and stating that "Appellant's constitutional argument amounts to little more than a claimed right to discover information, regardless of any privilege, that may not prove useful in their cross examination of victim. Such an absolute right, however, does not exist.").

[77] Beauge, 82 M.J. at 167-168 ("And as the Supreme Court recognized in *Jaffee*, the psychotherapist-patient privilege 'promotes sufficiently important interests to outweigh the need for probative evidence'") (quoting Jaffee, 518 U.S. at 9-10) (internal quotation marks omitted) (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).

[78] United States v. Tinsley, 81 M.J. at 850 ("Accordingly, we find that any 'constitutional exception' to Mil. R. Evid. 513 grounded in the Confrontation Clause does not exists.") (citing to Jaffee, 518 U.S. at 9-10)); *but see, id.* at 850 n.5 (distinguishing the analysis and rationale in *Ritchie* as inapplicable, because Mil. R. Evid. 513 no longer enumerates a constitutionally-required exception, and is different than the absolute state privilege at issue in *Ritchie*).

[79] United States v. Tinsley, 81 M.J. 836, 850 n.5 (A. Ct. Crim. App. 2021); United States v. McClure, No. ARMY 20190623, 2021 CCA LEXIS 454, at *22-23 (A. Ct. Crim. App. Sep. 2, 2021).

[80] United States v. Mellette, No. 21-0312, 2022 CAAF LEXIS 544, at *9 (C.A.A.F. July 27, 2022) (citing Trammel v. United States, 445 U.S. 40, 50 (1980); United States v. Jasper, 72 M.J. 276, 280 (C.A.A.F. 2013)).

[81] *Id.* at *19 ("Instead, our analysis rests solely on the specific text of M.R.E. 315(a) and the Supreme Court's mandate—and our own precedent—that states that evidentiary privileges 'must be strictly construed.'") (quoting *Trammel*, 445 U.S. at 50; citing *Jasper*, 72 M.J. at 280).

[82] *Id.* at *11.

[83] *Id.* at *19.

[84] *Id.*

[85] Although "overruling by implication is disfavored," *United States v. Pack*, 65 M.J. 381, 383 (C.A.A.F. 2007), "it should be apparent that no special language is necessary to overrule a prior decision; the simple existence of some later, irreconcilably inconsistent holding by the same court is sufficient. Indeed, it does not seem particularly important whether the later court intended to overrule its prior holding or whether it was even aware that it was doing so." Bradley Scott Shannon, *Overruled by Implication*, 33 Seattle U. L. Rev. 151, 154 (2009).

[86] United States v. Mellette, No. 21-0312, 2022 CAAF LEXIS 544, at *19 (C.A.A.F. July 27, 2022).

[87] United States v. Beauge, 82 M.J. 157, 167 (C.A.A.F. 2022).

[88] Beauge, 82 M.J. at 167 ("From our perspective then, the duty-to-report exception and the evidence-of-child-abuse exception are effectively coterminous in this case.").

[89] Beauge, 82 M.J. at 157.

[90] *Id.* at 166.

[91] *Id.* at 162, n.3 (maintaining the privilege for information "that *was* reported but which was not *required* to be reported.") (emphasis maintained).

[92] *Id.*

[93] *See, e.g.*, Ga. Code Ann. § 19-7-5(e)(2).

[94] *See generally* Beauge, 2021 CCA LEXIS, at *12-14, *aff'd*, United States v. Beauge, 82 M.J. 157, 165-166 (C.A.A.F. 2022).

[95] *See* Beauge, 82 M.J. 157 (C.A.A.F. 2022).

[96] United States v. Beauge, 82 M.J. 157, 166 (C.A.A.F. 2022) ("In other words, the language of the duty-to-report exception should be read to mean that the privilege is vitiated *only* in regard to the specific *information* that *was contained in the communication to state authorities* and *was required by law or regulation to be reported*.") (emphasis maintained); *see also*, Air Force Instruction 40-301, ¶ 8.6.1 (2020) ("There is no privilege when the communication is evidence of child abuse or neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse.").

[97] United States v. Tinsley, 81 M.J. 836, 850-853 (A. Ct. Crim. App. 2021).

[98] DB v. Lippert, No. ARMY MISC 20150769, 2016 CCA LEXIS 63, *33 (A. Ct. Crim. App. Feb. 1, 2016).

[99] Mil R. Evid. 501(b)(4).

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] Mil. R. Evid. 510(a) (emphasis added).

[104] DB v. Lippert, No. ARMY MISC 20150769, 2016 CCA LEXIS 63, *12 (A. Ct. Crim. App. Feb. 1, 2016) ("[T]he failure to object cannot be construed as either an affirmative waiver of a privilege or waiver of the procedural requirements under Mil. R. Evid. 513. Even if the SVC had been included in the email chain, which he apparently was not, his silence cannot be deemed a waiver of procedural requirements." (internal citations omitted)).

[105] United States v. McClure, No. ARMY 20190623, 2021 CCA LEXIS 454, *18 (A. Ct. Crim. App. Sep. 2, 2021).

[106] United States v. Jasper, 72 M.J. 276, 281 (C.A.A.F. 2013).

[107] United States v. Mellette, 81 M.J. 681, 701 n.14 (N-M. Ct. Crim. App. 2021).

[108] *See, e.g.*, MAJ Colby P. Horowitz, *Confessions of a Convicted Sex Offender in Treatment: Should They be Admissible at a Rehearing?* 228 Mil. L. Rev. 44, 82-84 (2020) (arguing privilege is likely waived when a convicted offender has made statements while in treatment and then returned to courts-martial on rehearing).

The Reporter, Volume 31-3 (September 2004)—reprinted 20 October 2022 https://www.jagreporter.af.mil

Seven Pillars for Building Tomorrow's Air Force Leaders

The Reporter, Volume 31-3 (Sept 2004)

Timeless Leadership Series: Article Reprint

By Lieutenant Colonel Timothy Cothrel

Timeless Leadership Series: This edition analyzes the importance of building strong foundations in the practice of leadership.

Importance of Leadership

Alexander the Great once said, "I do not fear an army of lions, if they are led by a lamb. I do fear an army of sheep, if they are led by a lion." Like all of us, he recognized the tremendous importance of leadership in military success during both war and peace. And, as the technological and political arenas in which we operate become even more complex, leadership becomes even more important. That is why so many Air Force (and other) senior leaders frequently remind us that the ultimate function of any leader is not to attract more followers, but rather to create more leaders.

In spite of this, we rarely analyze leadership. We may have a gut instinct that helps us recognize good or bad leadership when we see it, and a sense of what is leading versus following, but we generally do not deconstruct the leadership role or process sufficiently to identify the specific value a leader adds to unit mission accomplishment. As a result, we may understand enough about leadership to practice it ourselves, but in order to teach it, to create and educate that next generation of leaders, we must dig to the very bedrock of its definition. While the seven principles below are in no way the complete or final word on leadership, they hopefully provide at least some insight.

1 Leadership is Something You Do

As Donald H. McGannon, former CEO of Westinghouse Broadcasting, observed "Leadership is action, not position." This is illustrated by Sacagawea, the Indian woman who guided the Lewis and Clark expedition through

Modified Illustration: © Deemerwha studio/stock.adobe.com

the Dakotas and beyond. While Lewis and Clark were technically in charge of the group, she was the one actually leading it—she was deciding where the group would go, when it would go, and how it would get there.

2 Leadership Creates Progress

Progress is more than mere activity—it is activity with direction. No matter how much effort you exert or how good your intentions may be, if in the end the group is no closer to your organizational goal, you failed to lead it effectively. In Sacagawea's case, the goal was a physical destination. For many Air Force leaders, the goal may be performing the mission better or faster or cheaper or with higher morale. No matter what the goal may be, as a leader your job is to find or create the right route to reach it, then guide your people along the way.

> To lead people, then, is to help them achieve their successes; that, in turn, requires that you understand their objectives ....

3 Leadership Responds to the Needs of the Followers

"Battles are sometimes won by generals; wars are nearly always won by sergeants and privates," wrote scholar F.E. Adcock. Also, General George S. Patton, Jr. said, "One of the most frequently noted characteristics of great men who have remained great is loyalty to their subordinates." Yet, there is sometimes a temptation among civilian and military leaders to regard their followers as resources at their disposal.

In truth, as Dee Hock, founder and former CEO of VISA International observed, "If you don't understand that you work for your mislabeled 'subordinates,' then you know nothing of leadership." To lead people, then, is to help them achieve their successes; that, in turn, requires that you understand their objectives, the obstacles they face in reaching those objectives, and the action necessary to remove those obstacles.

Obstacles to progress are not necessarily the mountains or rivers Lewis and Clark needed to cross—they are anything that may become an excuse for failure, including lack of training, lack of equipment or materiel, and lack of motivation.

4 Leadership Inspires Enthusiasm

Manipulating behavior is not necessarily leadership. After all, with a whip and a chair, a lion tamer can get a 400-lb. man-eater to sit up and beg, but nobody characterizes him as a leader.

In fact, five-star general and President Dwight D. Eisenhower defined leadership as "the art of getting someone else to do something you want done because he wants to do it." Similarly, Peter F. Drucker, a pioneer in the scientific study of management, defined leadership as "lifting a person's vision to higher sights, the raising of a person's performance to a higher standard, the building of a personality beyond its normal limitations."

In the long run, you cannot rely on fear or intimidation to achieve progress. Creating the hunger to succeed requires that you provide the group with instruction, encouragement, vision, communication, and, most importantly, an example.

5 Leadership Requires Standards

Discipline is an essential element of leadership. Bestselling author H. Jackson Brown said, "Talent without discipline is like an octopus on roller skates—there's plenty of movement, but you never know if it's going to be forward, backwards, or sideways."

There are individuals in the Air Force who are unwilling or unable to make the journey with the rest of the group. Allowing them to continually impede progress or jeopardize success would be unfair to the group. As a leader, you must live up to the unpleasant responsibility of dealing with those individuals in a swift, fair, and effective manner. However, no leader can expect her followers to uphold standards unless she is willing and able to do likewise, and then some. As the Chinese philosopher Lao Tzu observed, "Mastering others is strength. Mastering yourself is true power."

6 Leadership Opportunities are Everywhere

As the first principle states, being a leader is not a matter of having a certain rank or job title. Everyone can exercise leadership simply by taking responsibility for the welfare of other people, making decisions and taking actions that contribute to their progress, or passing on knowledge to them. You can seize the opportunities to be a leader at work, home, church, or school, in a club, a team, or a family. More importantly, you can help your subordinates find opportunities in their own lives where they can practice the leadership skills they will one day need to accomplish the Air Force mission.

> Good leaders may change course, but they never quit.

7 Leadership Perseveres

Like many things, leadership must to a large extent be learned through painful experience rather than taught through essays or articles. Along the way, disappointments and setbacks may slow leaders down, but they never keep them down. To function as a leader, you must remain focused on your destination, your plan, and your people, and soldier on in the face of any adversity.

Legendary football coach Vince Lombardi summed it up perfectly when he said, "Leaders aren't born; they are made. And they are made, just like anything else, through hard work. And that's the price we'll have to pay to achieve that goal, or any goal." The Greek philosopher Aristotle said, "We are what we repeatedly do; excellence then is not an act, but a habit."

When Vince Lombardi and Aristotle agree on something, it has to be worth noting—good leaders may change course, but they never quit.

Layout by Thomasa Huffstutler

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(2004 Biography)

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CATEGORY Leadership

Text Excerpt from JAG Reporter Post: 7 November 2022 https://www.jagreporter.af.mil

VETERANS DAY

Reflections on Deployment

By Major Allison K.W. Johnson

As we come upon this Veterans Day, we remember the sacrifices of those who have gone before us in battle, and continue to learn from those who share their experiences.

Colonel D. Blake Williams

U.S. Army Staff Sergeant Keith M. Maupin deployed to Iraq in 2004 and was one of the first soldiers to be captured when his convoy was ambushed by insurgents. One week after his capture, Al Jazeera aired a video in which he appeared wearing camouflage and a desert hat, surrounded by five masked men holding rifles.[1] True to the bedrock commitment of never leaving our brothers and sisters in arms behind on the battlefield, a joint military team pursued the kidnappers of Sergeant Maupin for four years. In March 2008, his body was recovered from a field northwest of Baghdad.

"I had a picture of Sergeant Maupin in my room, and I put it on the outside of my locker that I used as a closet and saw it every morning," Colonel D. Blake Williams, 11th Air Force Staff Judge Advocate, Joint Base Elmendorf-Richardson, Alaska, recounted. Colonel Williams—then

Then-Captain D. Blake Williams in Kuwait, waiting for a helicopter across the Iraqi border to Camp Bucca for performing the mission to sit on detainee review boards. Photo provided by Colonel D. Blake Williams.

(American Flag) Illustration: © ValeryBrozhinsky/istock.com

Captain Williams—deployed to Iraq in 2008, his first as an Air Force Judge Advocate. His duties on that deployment included detainee prosecutions. The photo hanging on then-Captain Williams' locker was a constant reminder of the tireless efforts of the U.S.-Iraqi prosecution team and the Joint Personnel Recovery Center, to bring Sergeant Maupin home and to bring the insurgents responsible for his kidnapping and murder to justice.

Hugely impactful describes many deployment experiences from judge advocates and paralegals.

Captain Williams spent countless hours with his team, first investigating and then prosecuting this particular group of insurgents in accordance with Iraqi law. He also briefed Sergeant Maupin's family on important updates in the case. Colonel Williams described the rule of law in Iraq as "a civilian judicial system that was more robust. Their judges were professionals and it was a functional judicial system" given the wartime conditions. "We were trying to bring them to justice in the Iraqi courts," Colonel Williams said of the team of attorneys involved. "I was fortunate enough to be in country when they found his remains and identified them, and I was a part of the briefing to his parents." Sergeant Maupin's father had sworn he would grow a beard until his son was found. True to his word, he had a full beard the day Colonel Williams' team briefed him that they had found his son.

Unfortunately, under the Iraqi court system, the insurgents were not found guilty of the murder charges, but they were found guilty of other terrorist acts. However, working within the rule of law in Iraq, Colonel Williams and his legal team secured a lengthy prison sentence, ensuring these insurgents would not harm again. "I'll never forget that experience partly because he was one of the first people to go missing and had not been found. It was hugely impactful." Hugely impactful describes many deployment experiences from judge advocates and paralegals.

Master Sergeant Devan Taylor

"I'm a huge advocate for doing things that people back home don't get to do," Master Sergeant Devan Taylor, a Technical Training Instructor at The Judge Advocate General's School, Maxwell Air Force Base, Alabama. Master Sergeant Taylor deployed in 2012 to Bagram Airfield, Afghanistan, working as a detainee operations paralegal. "I served as a recorder for the detainee review board, presenting evidence and arguments as to why the person should be detained or released," she recounted. It was the policy at the time to detain those present at the scene of an attack or those who appeared to be preparing for an attack. These detainees had the opportunity to have their cases reviewed by the board after six months so the board could determine whether there was sufficient evidence to warrant continued detention.

Typically, attorneys represent their clients at boards, but Sergeant Taylor broke the traditional role, raised her hand, and produced results—she set the record for serving on the most boards as a paralegal at the time in Afghanistan. In one instance, Master Sergeant Taylor was representing an elderly bread baker. His frail body sat with attention, keenly listening to every word that Sergeant Taylor was saying through the translator. His wife and daughter attended in solidarity, watching their loved one with bated breath. The board ruled that the grey-haired bread baker should be

Master Sergeant Devan Taylor is greeted by her family returning from her first deployment. Photo Credit: Operation Love Reunited.

released. In that moment, the whole family cried tears of joy. "Big picture, you never know who will be involved in those groups. We are there to protect people and do it through the process," Sergeant Taylor said.

Master Sergeant Taylor had the opportunity to deploy again in 2018 to the 380th Air Expeditionary Wing, Al Dhafra Air Base, United Arab Emirates, as the legal office's Non-Commissioned Officer In Charge. "We had a lot of people passing through," she recounted. Her main role was serving operators in a legal assistance function, making appointments and powers of attorney. "It hits a little different in a deployed environment because we know those people are going to war," she said.

Lieutenant Colonel Michael Raming

Lieutenant Colonel Michael Raming, Chief of Detention Law, Headquarters U.S. Southern Command, Florida, confirmed Sergeant Taylor's sentiments about Al Dhafra. He served as the Expeditionary Staff Judge Advocate, 380th Air Expeditionary Wing, from June 2020 to October 2020. Of Lieutenant Colonel Raming's three deployments, his favorite was Al Dhafra due to the mission. He said:

> It was the most Air Force out of all of them—we fight wars in the joint environment, but nobody has stayed in the Air Force and doesn't love airplanes. It was in direct support to what you think you're going to do: supporting an air expeditionary wing, supporting organizations that were flying the Air Tasking Order every day.

Lieutenant Colonel Raming saw the mission in action through his flights on two operational AWAC sorties and one EC-130 sortie at Al Dhafra. "It was all about supporting the people who had to go and fly a mission, and that was very rewarding," said Lieutenant Colonel Raming.

Major Joseph Cappola

Deployments to the joint environment are rewarding experiences. "My deployment was one of the highlights of my Air Force career, personally and professionally, and it was giving 100% to our Afghan partners," said Major Joseph

Then-Captain Joseph Cappola, during the Installation-wide 9/11 Memorial Ruck March he organized at HKIA, Afghanistan. Photo provided by Major Joseph Cappola.

Cappola, a Reserve Assistant Staff Judge Advocate for the 11th Wing Legal Office, Joint Base Anacostia-Bolling, D.C. Major Cappola, then-Captain Cappola, deployed to Hamid Karzai International Airport (HKIA), Afghanistan, as an Air Advisor from June 2020 to November 2020. He primarily advised the senior legal counsel for the Minister of the Interior for Afghanistan and the director of the Major Crimes Task Force, a special anti-corruption police unit.

He worked closely with five Afghan translators, sharing tea, meals, and a safehouse between key leader meetings. Major Cappola recalled his friendship with Ahmad, one of his translators whose name has been changed to keep him safe. In October 2020, Major Cappola and Ahmad were chatting outside the safehouse in northern Kabul, where Ahmad voiced his concerns about the Taliban. As a self-professed artist, Ahmad had progressive ideas for Afghanistan, such as religious freedom for all, and it showed through his work and on his own body. He thought the Taliban wouldn't approve of his tattoos or his photographs. Ahmad photographed when he wasn't translating for the NATO mission, posting beautiful images on social media under a pseudonym. Ahmad feared for his family, his young son only three days younger than Major Cappola's, if the Taliban were to advance in the country.

Unfortunately in August 2021, Ahmad's deep fear became a nightmarish reality. Although Major Cappola had since redeployed back to the United States, he closely followed the fall of Afghanistan. Major Cappola remembered coming home to Washington D.C. after a weekend trip to Philadelphia, PA, listening intently to the radio on the car ride as the Taliban marched their way into the streets of Kabul. He was heartbroken for his friends who were still in Kabul. One of his translators had left the country earlier in June 2021, and settled in Sacramento, California, but four of the translators, including Ahmad remained in Afghanistan. They were all eligible for the Special Immigrant Visa (SIV) program.

Major Cappola posted on social media a picture of himself and the five Afghan translators, asking for help. Help came in the form of an Excel spreadsheet. He found himself as an early member of what is now known as "Team America Relief,"[2] an organization that assembled real-time data to evacuate American citizens, U.S. lawful permanent residents (green card holders), and Afghans who were eligible for refugee status or the SIV program due to their work with the U.S. and NATO partners. "It was organizing a giant group of evacuees. By the end of the August, we had thousands of people in our database and my guys were numbers 16, 17, 18, and 19 on the list." They worked tirelessly around the clock, creating near recognition signs and countersigns for people to use at the HKIA checkpoints and receive passage into the U.S. controlled area and flights out of the country.

The whole two weeks, I've never been more happy and more sad, ever. The highs and lows were so wild.

"The only one I was personally able to get out was Hazrat," said Major Cappola. Hazrat, whose name we also changed, was a young, mid-twenties newlywed when he was working with Major Cappola. Hazrat called Major Cappola at 0200, Eastern time. Major Cappola locked himself in the storage room in his house, trying not to wake his family. Hazrat had gotten to the main terminal, and was being challenged about his family's evacuation, as they did not want to grant access to him or his wife. "My name is Captain Joseph Cappola, and this is my friend Hazrat. He is a legitimate SIV!" Major Cappola yelled into the phone. Desperate to help his friend, he shared a photo of himself with Hazrat to show to the U.S. guards. It worked, and Hazrat and his wife got through to safety.

It felt like an immense, terrible responsibility we had, and we were able to help some people, but not as many as we wanted to.

When recalling his August experience with Team America Relief, Major Cappola became emotional. "The whole two weeks, I've never been more happy and more sad, ever. The highs and lows were so wild." He knew his friends and countless other Afghans placed their lives in the hands of his rapidly growing team of civilian volunteers and other organizations like it. "Our ethos at the time was, we have to keep knocking on doors and we just need one of them to open. Just one more, just get out one more."

Major Cappola said:

> It felt so real that you had these people's lives in your hand—those who were getting out alive, and those who couldn't. It felt like an immense, terrible responsibility we had, and we were able to help some people, but not as many as we wanted to.

Major Cappola now knows four of the five have gotten out of Afghanistan safely. One remained due to a new marriage. And as for his friend, Ahmad, Maj Cappola kept in touch throughout the hard Afghanistan winter. He gave Ahmad realistic hope each time they chatted. Maj Cappola was overjoyed when recently, in October 2022, Ahmad texted, "Hello brother! I'm in Qatar."

Reflections

It is this bond of friendship that deployers come back to—the bond of being with the same people day in and day out. Colonel Williams said of his friends and coworkers from his two deployments:

> You spend so much time with the people you deploy with—three meals a day, seven days a week, 15-16 hour days. You PT with them, celebrate holidays with them, it's a family situation. You get in fights and annoy the hell out of each other, but you can't walk away, you have to fix it because you spend so much time with them in a tight space where you live and work. That bond sticks with you.

Master Sergeant Taylor reflected:

> You have lifelong friendships. No one else knew what was going on there. There're not many other people who can take incomings and know what that means or what it was like when Bagram would get hit. You reflect on your experiences, the good, bad, and ugly, and it's nice to have someone who was there with you.

A deployment is not a burden, a deployment is the reason we serve. It's an opportunity to fulfill the service and oath we took.

This rings true not just in the deployed environment. "One of my favorite things about the military is the bonds you form, and the instant commonality when they see the coin, picture, something that reminds them of a common experience, and you have an instant bond," said Colonel Williams.

Colonel Williams advises future deployers:

> A deployment is not a burden, a deployment is the reason we serve. It's an opportunity to fulfill the service and oath we took. Deploying to a combat zone, your life is in danger, there's nothing glamorous or exciting, but it is an opportunity to challenge you and make you grow as a person. The people you meet can become lifelong friends and have a huge impact on your growth as an officer, attorney, paralegal, NCO, or person.

He acknowledged, "Everyone serves in their own way … my own reflections on service would be very different if I didn't have my experiences from Afghanistan and Iraq."

I love sharing my opportunities with my daughter. When she was younger, I would tell her about a trip I went on, expressing a deployment was to help other people.

Sergeant Taylor smiled as she offered her advice:

> No one ever wants to leave their family, right? We all sign up and know it's going to happen. While it's difficult, think of all the things you're going to learn and take the opportunity to do good and learn the culture. It doesn't matter what operation you're working, you're going to leave there better or with a different perspective on things.
>
> I love sharing my opportunities with my daughter. When she was younger, I would tell her about a trip I went on, expressing a deployment was to help other people. I show her pictures of what we have done. It gives her a better appreciation as to why I left.

Veterans Day Remembrances

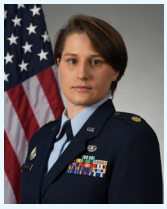
Veterans Day originated as Armistice Day, marking the end of World War I. As the holiday evolved in the United States, it now recognizes veterans of all wars. "For Veterans Day, it's a way to appreciate and celebrate those Americans who were ok to take that sacrifice, where we have military members leave and do the mission," Master Sergeant Taylor reflected.

For some, recognizing and honoring those veterans is a show of solidarity across nations. Colonel Williams recounted "When we were at NORAD, we were authorized to wear the red poppy on our uniforms in solidarity with our NATO partners." For others, there are family ties to honor. "Both my dad and grandfather were drafted. I'm here because I want to be. That's usually the big picture of what I'm thinking about," Lieutenant Colonel Raming says of Veterans Day. Others look to being involved in their communities. "This will be my first Veterans Day as officially separated" off Regular Air Force orders, Major Cappola said. He continued:

> I'm interested in learning what's available in my local community …. I will use it as an opportunity to build a network in my new town and as a time to reflect back on the veterans in my family, and what the future might hold for future veterans and active duty brothers and sisters.

As we come upon this Veterans Day, we remember the sacrifices of those who have gone before us in battle, and continue to learn from those who share their experiences. Start the conversation: talk with a battle buddy, a friend or relative who has served, or someone in your office about their experiences. Our Corps has a wealth of knowledge and experience that we should honor and learn from.

About the Author



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Edited by: Lieutenant Colonel Thomas Bittick, Major Laura Quaco, and Mr. Mark Stoup
Layout by: Thomasa Huffstutler

Endnotes

[1] Michelle Tan, *Honor the Fallen: Army Staff Sgt. Keith M. Maupin*, Military Times (2018), https://thefallen.militarytimes.com/army-staff-sgt-keith-m-maupin/3467430

[2] Michael Venutolo-Mantovani, *Inside the Shadow Evacuation of Kabul*, Wired (Aug. 30, 2022, 6:00 AM), https://www.wired.com/story/inside-shadow-evacuation-kabul-afghanistan/

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External Link to Additional Resource

- **DVIDS Video:** A short history of Veterans Day, https://www.dvidshub.net/video/821278/happy-veterans-day

CATEGORY Civil Law and Litigation

Text Excerpt from JAG Reporter Post: 29 November 2022 https://www.jagreporter.af.mil

Acquiring Machine-Readable Data

for an AI-Ready Department of the Air Force

By Major Andrew Bowne and Captain Ryan Holte

This article presents contracting and program management best practices on how to negotiate for the delivery of and rights to AI-Ready data, including sample clauses that can be used in all contracts and agreements.

Artificial Intelligence

Though often invisible to the human eye, artificially intelligent systems are ubiquitous in our daily lives. Artificial intelligence (AI) augments tasks as trivial as crunching numbers on a calculator all the way to previously insurmountable tasks like analyzing massive molecular data sets to create one of the most capable antibiotics in the world.[1] As a powerful technology enabler, AI is critical to national security. The Department of Defense (DoD) AI Strategy defines AI as "the ability to perform tasks that normally require human intelligence."[2] Yet, despite the lofty biological comparisons, these intelligent systems are beholden to logical principles. Those principles vary little from commercial to DoD use cases. However, the DoD acquisition system, created initially for hardware systems, inherently creates challenges acquiring, developing, and sustaining AI technologies.[3]

To effectively prepare for and leverage AI technologies, the DoD acquisition community and stakeholders must understand the technology and implement new data acquisition, intellectual property (IP), and contract management policies and best practices. An AI-Ready force is only possible through education that builds a foundation for technological fluency. This article provides a background on the state of the art in machine learning (ML) and introduces the elements of AI-Ready data. It then presents contracting and program management best practices on how to negotiate for the delivery of and rights to AI-Ready data, including sample clauses that can be used in all contracts and agreements. This knowledge is especially critical for program managers, contracting and agreements officers, and contract attorneys who will have to collaborate on bespoke clauses and understand the regulatory and statutory limits of negotiating for data delivery and the necessary data rights required.

(Data Processing Icons) Illustration: © stmool/stock.adobe.com

Artificial Intelligence and Data Foundations

Artificial intelligence theory is comprised of three types of AI: Artificial Narrow Intelligence (ANI), Artificial General Intelligence (AGI), and Artificial Super Intelligence (ASI).[4] ANI, often called weak AI, refers to non-sentient AI that outperforms human decision-making in a particular use case and environment.[5] In situations where the input from the use case or environment changes relative to the training input (i.e., training in a snowy environment and operating in a desert), the AI would fail miserably.[6] AGI, called strong AI, allows one algorithm to apply human-like intelligence to disparate use cases.[7] To achieve ASI, the machine must attain intelligence greater than a human.[8]

> AI cannot comprehend what it has never been taught.

Allusions from science fiction notwithstanding, all current artificially intelligent technology is ANI or composed of many different ANI algorithms to give the appearance of AGI.[9] Because ANI is built using data that is created and aggregated by humans from a specific environment, the algorithm can be brittle and susceptible to bias.[10] The brittleness and susceptibility to bias is a manifestation of its quality of training data.[11] In other words, AI cannot comprehend what it has never been taught.[12] If a model is trained with unrepresentative or inaccurate data, it will likely misunderstand what could appear unequivocally clear to its human counterpart; an error that could lead to incorrect and potentially unethical predictions.[13] This susceptibility to bias underscores the importance of good quality data sets.[14]

Training Quality and Machine-Readable Data

The DoD AI Strategy elucidates high-impact focus areas that, if pursued, will accelerate AI proliferation across the Department.[15] Specifically, the DoD implores delivery of AI-enabled capabilities that address key missions and leadership in military ethics and AI safety.[16] However, if the DoD is to invest in and develop AI technology, it must also heavily invest in robust, diverse and relevant data, commonly referred to as Training Quality Data (TQD).[17]

TQD is required for the successful application of an algorithm.[18] Machine learning, a subset of AI, builds statistical models based on data it observes and uses the model as both a hypothesis and as software that can solve problems.[19] This model continuously and iteratively trains itself using the available data to refine the algorithm that will ultimately produce a concise and environment-specific model.[20] If successful, ML can accurately predict an event at the same or greater accuracy than humans. However, without properly formatted and conditioned data, the model will fail to achieve the intended objectives.[21]

> If the data is not AI-Ready, data conditioning can be the most onerous portion of the developmental process, taking nearly 80 percent of the total development timeline.

Most AI algorithms, such as, deep neural networks,[22] use matrix mathematics to perform their computations.[23] As such, certain data formats are inherently preferred. In general, preparing systems to be "AI-Ready" involves collecting robust and diverse raw data and then parsing of the data for ensuing ingest, scan, query and analysis.[24] If the data is not AI-Ready, data conditioning can be the most onerous portion of the developmental process, taking nearly 80 percent of the total development timeline.[25] Fortunately, there are simple techniques that can be applied during the initial data collection and parsing that can radically lessen the time required. A best practice is to ensure that the data is in an industry standard machine-readable file format.[26] Machine-readable data is a computer's natural language, which minimizes the work required to produce the data needed for a model. Machine-readable formats, such as .csv (comma separated values) or .tsv (tab separated values), are examples of this data format and are easily ingested by the algorithm.[27]

Preparing and processing collected data in an AI-Ready format by using best practices such as the above can accelerate the creation of training quality data that can be used to train algorithms and ultimately meet DoD AI Strategy requirements.

Intellectual Property and Data Rights

The DoD created The DoD Data Strategy to unleash data and ultimately advance the overall National Defense Strategy (NDS).[28] The DoD Data Strategy conveys foundational principles that, if put into action, leverage data to enable ethical AI and ML development and proliferation to meet NDS and DoD AI Strategy requirements.[29] To truly capture and safely employ the DoD Data and AI strategies, the DoD must reassess how it views intellectual property (IP) and data rights. According to the DoD Instruction (DoDI) 5010.44 IP Acquisition and Licensing guidance, weapon and information systems that the DoD acquires in support of the warfighter will become increasingly dependent on technology, such as AI, and data for all stages of a system's lifecycle.[30]

> Acquiring the appropriate license rights is vital in ensuring that all systems remain functional, sustainable, upgradable, and affordable as the DoD becomes increasingly more reliant on IP-based and data-centric technology.

Acquiring the appropriate license rights is vital in ensuring that all systems remain functional, sustainable, upgradable, and affordable as the DoD becomes increasingly more reliant on IP-based and data-centric technology.[31] However, in addition to obtaining rights to the data, the government must seek fair treatment of all IP owners and create conditions that are conducive to contracting for technologically advanced solutions.[32] Balancing government and industry interests can be difficult, but early, consistent, and effective communication can facilitate clear expectations for all parties throughout negotiation and performance.[33]

Data rights are considered the license rights in technical data or computer software, provided to the government incident to a contract or agreement.[34] DFARS Part 227 outlines rights in technical data and computer software.[35] Basic rights under the DFARS contemplated license rights predicated by whether the technical data or computer software was developed with Government funds, produced by the contract as specified as an element of performance, or created with Government funds in the performance of a contract.[36]

> The contracting team must think through the entire data and AI/ML lifecycle **prior to contract award** to ensure that the project's lifecycle will have sufficient data rights.

Data rights as contemplated by DFARS apply to defined categories that may exclude important data described in this article. For example, the Court of Federal Claims granted summary judgment against the Government when it asserted it had rights over vendor lists, certainly data of a type that could be relevant to analysis and prediction via machine learning.[37] The Court held that technical data, as used in the DFARS, does not include everything a contractor provides the Government under a contract.[38] Rather, the term means "recorded information … of a scientific or technical nature."[39] Thus, while the DFARS carves out license rights for data related to the design of an item or process, how it was manufactured or its physical and functional requirements,[40] it does not provide rights to datasets, nor the format or quality of such data. Accordingly, to enable a sufficient AI/ML pipeline for data consolidation and data conditioning, the government must consider whether specially negotiated data rights terms and conditions are necessary. The contracting team must think through the entire data and AI/ML lifecycle prior to contract award to ensure that the project's lifecycle will have sufficient data rights. Additionally, as machine-readable data from one project may be useful as a training set for another model or

play a larger role within the DAF's data strategy, contracting should consider obtaining rights to data not strictly necessary for the project's lifecycle.

> It is important to note the difference between **collecting** data from a system and the **transmission** of that data between the owner and user.

When the DoD is acquiring AI/ML, there will be many scenarios when the government should have unlimited rights or Government Purpose Rights (GPR), or equivalent license rights. For example, if the DoD is acquiring an AI/ML tool that is trained on government owned data, then the model will inherently be produced using government assets. The government should have unlimited rights or GPR to the model via negotiated clauses adapted into the contract or agreement.

It is important to note the difference between collecting data from a system and the transmission of that data between the owner and user. For the scope of this article, the "user" is the individual program management offices and the "owner" of the data being the Contractor. During the procurement process, the contracting officer or agreement officer (CO/AO)[41] must ensure that the data rights clearly indicate the extent of the license to data as it traverses through each of its inherent states: use, rest, and motion throughout the lifecycle of the specific project. When a CO/AO awards a contract or agreement, understanding who owns the output data for a system is critical—data rights must be obtained in the output data, preferably unlimited rights, or the equivalent license in an Other Transaction Agreement (OTA).

The Department of the Air Force's Data Pipeline

According to the Fiscal Year 20 Industrial Capabilities Report to Congress, it is quite evident that DoD is the largest customer in the world.[42] The DoD, then, distributes the funding among its 2,586 programs which use these funds for national defense requirements and these programs are juncture where the DoD can enable an effective data supply chain.[43] These programs enable the DoD to own sensors of nearly every phenomenology that are gathering data from numerous environments.

The DoD does not have the manpower to independently support all the national defense requirements. Thus, the DoD executes contracts or agreements with industry to augment its capabilities to carry out its mission.[44] There are numerous types of contracts, but they are generally broken out into two categories: Federal Acquisition Regulation (FAR) based contracts and non-FAR based contracts.[45] Each contract and agreement has advantages and disadvantages, generally; however, regardless of the contract or agreement type, to implement the DoD AI and DoD Data strategies, the government must carefully assess and tailor what it requests as Contract Data Requirements Lists (CDRL) and Data Item Description (DID), as well as how it negotiates the license rights.

> When requesting CDRLs, it is critical that the government begin requesting machine-readable data. In addition, the government must begin requiring that the data is **accessible** and **readily usable**.

When requesting CDRLs, it is critical that the government begin requesting machine-readable data. In addition, the government must begin requiring that the data is *accessible* and *readily usable*. Although this added verbiage may seem tedious, it protects the government from receiving data that cannot be used for analysis or ML, at least not without significant cost, effort, and time.

Ensuring that data is accessible to government stakeholders is crucial for AI/ML development. While a contractor has full access to a product's data streams, handing data over to the DoD affords the contractor an opportunity for potential

profit as they could require a special access key for proper data access. Adding data accessibility requirements into the CDRL and DIDs assures efficient government access to government owned data.

Although it may seem redundant, the CO/AO should assure that the data is readily usable. Requiring readily usable data assures that, on top of requesting machine-readable data, the data is free of any technical or administrative inhibitions that may affect the government's ability to ingest the data directly into a chosen algorithm.

These simple steps can save millions of dollars and thousands of hours that would otherwise be spent simply finding and conditioning data into a useful state. More importantly, requiring data to be collected and delivered in a machine-readable and accessible file format will give the DoD a significantly better chance when competing with peer adversaries.

While these recommendations … align government contracting with data collection and ML best practices, not to mention commercial contracts, they are not in wide practice in the DoD.

While these recommendations are common sense steps that align government contracting with data collection and ML best practices, not to mention commercial contracts, they are not in wide practice in the DoD. For FAR-based contracts, requiring output data in an AI-Ready format as a deliverable may require new policy or class deviation pursuant to FAR 1.404 and DFARS 201.402. When utilizing other transaction authority, the proposed clauses in the appendix can be implemented immediately without policy change or class deviation.

Department of Defense access to machine-readable data on current contracts may be limited due to the DoD current variability with handling data. In some contracts, the DoD does not receive data as a deliverable or does not have adequate rights to use, modify, or disclose said data. There are two potential options for securing the same access to machine-readable, training quality output data on existing contracts. First, the government can pursue a bilateral contract modification to include AI-Ready data as a deliverable on a case-by-case basis. There is a potential cost risk associated with this approach as contractors may claim a cost increase with this request, though there is a significant cost risk associated with not acquiring the data in an accessible, machine-readable format as well. Second, the government can pursue third-party contract solutions to modernize its legacy output data, such as data labelling and reformatting. This approach assumes that the program currently has access to data and its rights to use, modify and disclose said data for government purposes.

Adapting to a Data-Focused Contracting Strategy

Successful AI requires relevant and robust TQD. To achieve its data strategy objectives, the DoD must ensure that the proper license rights language is included in all acquisitions. The DoD has access to unprecedented TQD through the equipment and contracts supported by its acquisition system, but the government must assert the appropriate rights (i.e., Government Purpose Rights or unlimited rights or equivalent license for other transactions) to effectively use that data to develop AI.

Asserting the appropriate license rights are only part of the challenge. To enable efficient supply chain development for TQD, the DoD must require machine-readable data from all possible programs and contracts in its acquisition system (see Appendix for sample contract terms and clauses).[46] This machine-readable data will proactively enable AI development for a host of AI applications.

These technologies will continue to evolve with or without the DoD. The DoD acquisition system and its stakeholders must implement these data rights best practices and novel acquisition strategies if it wishes to maintain pace with commercial AI development and its peer adversaries.

Sample Terms and Clauses

The following sample terms and clauses can be used in FAR contracts or non-FAR agreements. Use of these samples in a FAR contract will require higher-level approval or class deviation; nonetheless, this proposed adaptation is consistent with the policy described in FAR 1.402. The recommended contracting language can be adopted and used in other transaction agreements without any further policy or class deviation.

The clauses below should be tailored to meet the project requirements and should be a starting point for negotiations. These clauses should be included in both solicitation and contract when it is expected that data developed during performance can become useful for future analytics, training, testing, or modeling. These clauses define the data to be collected, formatted, and delivered; the rights of the Government to data; and delivery instructions for the data.

Note: The terms in bold below are defined in the definitions section.

Data Collection and Delivery

The Performer shall collect, format, and deliver **data** developed under this [(Contract) (Agreement)], whether **generated** manually, through traditional computer software or model prediction, in accordance with the [(Contracting Officer's) (Agreement Officer's)] direction provided in [insert reference to task description/data delivery instructions reference]. **Data** collected under this [(Contract) (Agreement)] shall be delivered in a **machine-readable** [JSON, .CSV, .TSV or other machine-readable file format], with data input and output formatted in tables. **Data** collected shall by organized in uniquely named columns. Output data shall be annotated with labels, features, and metadata included according to [insert reference to task description/data delivery instructions]. Performer shall provide **data** in a manner that is usable and readily accessible by the Government. No special data conditioning should be executed unless ordered by the [(Contracting Officer) (Agreement Officer)]. **Data** shall be protected using encryption in accordance with [insert security standard] at transit and at rest. The Government has the right to review, verify, challenge, and validate the **data** meets the requirements set out in [insert reference to task description/data delivery instructions].

Data shall be delivered according to [insert reference to task description/data delivery instructions] or within [insert number of days] days of an order by the [(Contracting Officer) (Agreement Officer)]. **Data** shall be securely delivered on an encrypted delivery file (JSON, .XML, .RDF, .XLS, .CSV, or .TSV) [(via API) (as directed by the Delivery Schedule)].

To facilitate any potential deliveries, the Performer agrees to retain and maintain in good condition and in accordance with [insert reference to DATA REPOSITORY clause] all **data generated** under this [(Contract) (Agreement)] until [three (3) or insert number of years] years after completion or termination of this [(Contract) (Agreement)], or when delivery of such **data** is requested by the Government, whichever is sooner.

Data Rights

With respect to **data** developed or generated under this [(Contract) (Agreement)] pursuant to [insert reference to task description/data delivery instructions], the Government shall receive [(**Unlimited Rights**) (**Government Purpose Rights**) (other negotiated license)], as defined in Article [insert reference to "DEFINITIONS" article]. [If multiple licenses to data exist in the contract or agreement, add the following.] With respect to **data** delivered pursuant to [insert reference to task description/data delivery instructions] under the [(Contract) (Agreement)], the Government shall receive **Unlimited Rights**. Notwithstanding the provision in [insert reference to provision providing less than Unlimited Rights in data], the performer agrees, with respect to **data generated** or developed under this [(Contract) (Agreement)], the Government may, within [three (3), or insert number of years] years after completion or termination of this [(Contract) (Agreement)], require delivery of **data** and receive **Unlimited Rights**.

Government will own the **Output**. Except for the licenses expressly granted in this [(Contract) (Agreement)], this [(Contract) (Agreement)] does not grant any rights and Government owns and reserves all right, title, and interest in and to **Government Materials** and **Output**. Government grants Performer a worldwide, non-exclusive license [(a)] to use, reproduce, modify, and create derivative works based on **Government Materials** in order to provide, and support the services and provide the **Output** to Government [and (b) use, reproduce, modify, and create derivative works based upon Government Materials and Output to analyze and improve Performer's products and services].

Definitions

- **Data:** Recorded information, regardless of form, the media on which it is recorded, or the method of recording.
- **Generated:** The data output resulting from a recording of processed input data as required by the [(Contract) (Agreement)], such as, but not limited to, manual recording of observable phenomena, output from traditional computer programming, or model predictions from a machine learning algorithm.
- **Government Materials:** The digital files, data, and machine learning models that Government submits to the Performer API or otherwise provides to Performer to facilitate Performer's provision of the work ordered.
- **Government Purpose Rights:** [Tailor DFARS 252.227-7013 or use the following definition:] The rights to use, duplicate, or disclose Data, in whole or in part and in any manner, for Government purposes only, and to have or permit others to do so for Government purposes only.
- **Machine Learning Output:** The fields returned by a Performer machine learning model as defined in the [Statement of Work/Statement of Objectives/Task Order/Delivery Order, etc.].
- **Machine-readable:** A form readily processable by a computer and where the individual elements of the data can be easily accessed and modified without additional costs or tools beyond those described in [(Contract) (Agreement)].
- **Output:** Annotations and labels based upon Government Materials that are returned to Government, including through the Performer API, or a CSV of TSV file, and Machine Learning Output.
- **Unlimited Rights:** [Tailor DFARS 252.227-7013 or use the following definition:] Rights to use, duplicate, release, or disclose, Data, in whole or in part, in any manner and for any purposes whatsoever, and to have or permit others to do so.

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External Link to Additional Resource

- **YouTube:** Artificial Intelligence–Foundational Concepts for an AI Workflow (MIT Lincoln Laboratory), https://www.youtube.com/watch?v=RaE33j9IkN4

Edited by: Mr. Robert Klauzinski

Layout by: Thomasa Huffstutler

Endnotes

[1] Henry Kissinger et al., The Age of AI, 10 (2021).

[2] Dep't of Defense, Summary of the 2018 Department of Defense Artificial Intelligence Strategy (2018) [hereinafter, "DoD AI Strategy"], https://media.defense.gov/2019/Feb/12/2002088963/-1/-1/1/Summary-of-DoD-AI-Strategy.pdf.

[3] *See* Defense Innovation Board, Software is Never Done, 1 (2019); Babak Siavoshy, *The DoD Should Pilot a New Category of Software Data Rights*, Anduril Blog (Mar. 2, 2022), https://blog.anduril.com/the-dod-should-pilot-a-new-category-of-software-data-rights-a949cc9aaae4.

[4] *See* Stuart Russell & Peter Norvig, Artificial Intelligence: A Modern Approach, 32–33 (4th ed., 2021).

[5] *Id.*

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Text Excerpt from JAG Reporter Post: 1 Dec 2022 https://www.jagreporter.af.mil

Special Education Legal Assistance

The Air Force Embraces Special Education Legal Assistance as the Nation Celebrates Special Education Day

By Ms. Sharon J. Ackah

The Department of the Air Force recognizes the need to ensure that military service is not a barrier to our children's educational progress. This December 2nd, Special Education Day is met with invigorated resolve to combat the notion that our families' geographic mobility is an excuse to deny services to our children.

National Special Education Day

Eighteen months have passed since the Department of the Air Force focused on a mission to deliver proactive and competent legal support in education law to eligible Airmen, Guardians and families with special needs. In April 2021, the Department of the Air Force created the Exceptional Family Member Legal Assistance and Policy program, dedicated to providing legal assistance to exceptional family member (EFM) families in education law. Since its inception, the program has improved operational readiness by training over 2,000 legal professionals, conducting outreach to more than 7,500 exceptional family member stakeholders, and offering special education legal assistance to EFM families at Air Force and Space Force installations worldwide.

National Special Education Day is December 2nd. It is a day set aside to commemorate the nation's first federal special education law, the Individuals with Disabilities Education Act, which was signed by President Gerald Ford on December 2, 1975. The day presents an opportunity to offer well deserved recognition to special educators, advocates, and community organizations that support students with disabilities. It is also an apt time for reflection on the evolution of special education law as the Air Force continues to innovate and accelerate changes in its special education legal assistance capabilities.

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Inequalities in Educational Opportunities

The concept of inequalities in educational opportunities can be traced back as far as 1849 when the Massachusetts Supreme Court ruled that segregation was permissible within schools (*Roberts v. City of Boston*). More than 100 years followed before tireless efforts to desegregate schools would prove fruitful in the landmark supreme court case of *Brown vs. Board of Education* (1954). Although the gravamen of the complaint in *Brown* was segregation based on racial identity, the opinion paved the way for much broader legal and policy discourse on inequalities and expanded into the field of special education. Parents of children with disabilities began to sue educational agencies for discriminatory practices not based on ethnicity, but on disabilities. Leading disability cases capitalized on the *Brown* court's recognition of the detrimental emotional and societal impacts of separating children in schools based on their inherent qualities. Plaintiffs also relied heavily on due process rights and equal protection under the law as afforded by the 14th Amendment.

Both cases established that children with disabilities should have the same access to education as their neurotypical peers.

During the early 1970s, two cases served as catalyst for the introduction of federal special education laws. In *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania* (1971), parents sued the state of Pennsylvania for its exclusion of children with disabilities from state supported public schools. The case was a game-changing legal victory for disability rights as the court found it was unconstitutional to deny children access to a free public education, irrespective of their disability. In 1972, *Mills v. Board of Education of the District of Columbia* followed the *PARC* case. Both cases established that children with disabilities should have the same access to education as their neurotypical peers. The *Mills* case went further in framing the legislative action to follow, by also addressing the practice of suspending or expelling children with disabilities, absent due process proceedings.

Brown, PARC, and *Mills* all amounted to judicial recognition of the rights of disabled children under the 14th amendment, disapprobation of local laws denying children with disabilities access to public schools, and loud sanction of the rights of all children to free public education. The following words of the Justices in *Brown* may have been foretelling of the legislative action that would naturally follow:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education in our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.[1]

In 1972 Congress launched an investigation into the status of children with disabilities across the United States. Relying upon statistics from the Bureau of Education, Congress noted that less than half of the 8 million children needing special education services and accommodations were receiving services appropriate to their disabilities. Almost 2 million received no services at all. In 1975 Congress enacted the Education for all Handicapped Children's Act. The Act codified what was already set forth in judicial precedent which is that all children have a right to a free public education. It also provided a process for accountability for educational agencies and procedural safeguards for parents of children with disabilities.

As case law and legislation are often intertwined, the 1982 Supreme Court case of *Board of Education of the Hendrick Hudson School District v. Rowley* provided interpretation on what level of support public schools are required to provide under the Act. The court described the requirements of a Free and Appropriate Public Education (FAPE) as that which confers an "appropriate" educational benefit within the context of a child's disability, not necessarily what is "best" for the child.

Special Education

The Education for All Handicapped Children's Act has been amended and is now the 2004 Individuals with Disabilities Education Act (IDEA). IDEA's overarching purpose is to protect the rights of students with disabilities and their parents. States receiving federal IDEA funds are obligated to provide FAPE for each child with a disability. This includes special education and related services, tailored to meet the unique needs of each child with a disability and sufficient support services to permit the child to benefit from the instruction. The primary vehicle for providing each child with FAPE is the Individualized Education Program (IEP) which is a personalized plan to meet the child's educational needs. Sometimes parents and schools disagree on the provision of FAPE. IDEA established formal procedures for resolving disputes that may arise.

> IDEA's overarching purpose is to protect the rights of students with disabilities and their parents.

Case law has continued to address various key aspects of special education, including related services, tuition reimbursement for private school placements, and most notably, the legal definition of a "meaningful educational benefit." When deciding if an IEP has been developed to confer a meaningful educational benefit, apply the standards of the 2017 *Endrew F. v. Douglas County School District* case. Are there challenging objectives? Is the progress expected of the child appropriate in light of the child's circumstances? Has the school offered compelling reasons for how the IEP services and support will help the child make progress? The courts have also offered a two-pronged test for determining whether a child's education is appropriate. First, whether the educational agency has followed the procedures set forth in IDEA and second, whether the IEP is reasonably calculated to enable the child to receive an educational benefit.

Conclusion

Military children will move an average of up to 9 times before they graduate high school. For approximately 35,000 children in the Department of Defense who have one or more disabilities, this transient lifestyle poses significant challenges to their education. The Department of the Air Force recognizes the need to ensure that military service is not a barrier to our children's educational progress. This December 2nd, Special Education Day is met with invigorated resolve to combat the notion that our families' geographic mobility is an excuse to deny services to our children. The Department of the Air Force's special education legal assistance capability helps military children receive FAPE while improving the overall readiness and resilience of the force. As stated by our Supreme Court Justices in *Brown*:

> [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[2]

About the Author

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Edited by: Maj Allison K.W. Johnson (Editor-in-Chief)
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Glossary

- **EFM:** exceptional family member
- **FAPE:** Free and Appropriate Public Education
- **IDEA:** Individuals with Disabilities Education Act
- **IEP:** Individualized Education Program

Websites

- Exceptional Family Member Program (EFMP)
- Military One Source Website: Exceptional Family Member
- The JAG Reporter
- DoD Instruction 1315.19, The Exceptional Family Member Program (EFMP)

Endnotes

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Text Excerpt from JAG Reporter Post: 28 Dec 2022 https://www.jagreporter.af.mil

End of Year Reflection

By Colonel Mark D. Hoover, Lieutenant Colonel Sarah W. Edmundson, and Chief Master Sergeant Lindsey A. Wolf

From the leadership team at The Judge Advocate General's School, we wish you a very happy and safe holiday season.

Thank You

As 2022 draws to a close, we at The Air Force Judge Advocate General's School reflect on the honor it is to work each day with our team in training our legal professionals and delivering cutting edge legal products to the field. We also thank our JAG Corps partners and adjunct faculty for their contributions to making this past year such a success.

The AFJAGS leadership team appreciates the talented, hardworking, award-winning faculty and staff here at the schoolhouse. Our team liaised with the JAG Corps Domain, Major Command, and Field Command senior leaders to create more robust and relevant curriculum, equipping our Judge Advocates, Paralegals, and Civilians with the top tools of our trade to operate and excel in today's ever-changing legal environment. Over the course of 2022, we taught 72 courses and instructed 9,670 students in the areas of Military Justice, Civil Law and Litigation, Operations and International Law, and Leadership.

We provide the training linchpin to the developing changes to Military Justice practice in our key advocacy courses: the Trial and Defense Advocacy Course, Advanced Sexual Assault Litigation Course, and Advanced Trial Advocacy Course. We advanced integration with the field, bringing in seasoned prosecutors to serve as guest judges for the mock trials at the Judge Advocate Staff Officer Course, giving the most up-to-date field experienced feedback for our newest Judge Advocates.

Over the course of 2022, we taught 72 courses and instructed 9,670 students.

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To keep our advisors relevant and lethal, AFJAGS has added a new course to its Operations and International Law curriculum, the Advanced Air Operations Course. In addition, we successfully hosted the JAG School Foundation's 2022 National Security Law writing competition, prompting legal discourse on crucial topics in our military operations.

We taught the latest Department of Defense policy developments to our students, maximizing their effectiveness in vital Civil Law topics from COVID-19 policy to First Amendment and extremism issues, to legal assistance areas such as special education law under the Exceptional Family Member Program and new rights for tenants in military housing.

We remain devoted to our mission to develop relevant legal professionals for the best client in the world—the United States Air and Space Forces.

During 2022, we also trained 234 Paralegals through eight Paralegal Apprentice and Craftsman Courses. Additionally, our Paralegal instructors and their attorney counterparts "Team Taught" at intermediate and advanced leadership courses, such as the Chief Master Sergeant Leadership Course, 5J Senior Master Summit, First Sergeant Academy, Gateway, Paralegal Advanced Development Education, and Staff Judge Advocate/Law Office Management Courses.

We partnered closely with JAG Corps Domain and Directorate experts to arm our current and future DAF senior leaders with valuable resources to excel as commanders and command chiefs at our senior officer and enlisted trainings, including the Senior Officer Legal Orientation Course and the Senior Enlisted Legal Orientation Course.

We continue to deliver updated and innovative legal products to the field, including *The Military Commander and the Law*, The AFJAGS Podcast, *The JAG Reporter*, *Air Force Law Review*, and our webcast series on Campus. We recognize these important publications would not be possible without the contributions to our scholarly work from the JAG Corps community.

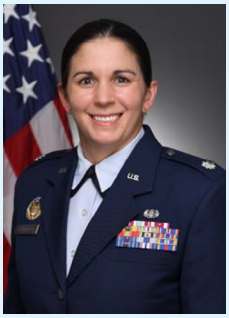
We hosted many distinguished visitors this year. Most notably, we showcased the JAG Corps enlisted and officer education and training in a visit from the Chief of Staff of the Air Force, General Charles Q. Brown, and the Chief Master Sergeant of the Air Force, Chief JoAnne S. Bass. We also hosted the Morehouse Lecture for the JAG School Foundation, whose keynote speaker was the 15th Judge Advocate General, Lieutenant General Jack L. Rives (Retired). AFJAGS is proud to serve as the hub of major JAG Corps meetings, enabling strategic discussions and workshops for our senior leadership. We continue to make the improvements on the intellectual home of the JAG Corps, including facility upgrades and installing state-of-the-art audiovisual systems in each classroom.

There are many other successes achieved by our team during 2022, and our combined strength is what makes our training excel—honing legal professionals, Airmen and Guardians, and joint and international partners. We remain devoted to our mission to develop relevant legal professionals for the best client in the world—the United States Air and Space Forces. We look forward to seeing all those in our JAG Corps Family who come through the schoolhouse next year as esteemed guests, expert instructors, and most importantly, valued students.

From the leadership team at The Judge Advocate General's School, we wish you a very happy and safe holiday season.

JAG School Leadership Team

Mark D. Hoover, Colonel, USAF
Commandant



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Text Excerpt from JAG Reporter Post: 29 Dec 2022 https://www.jagreporter.af.mil

JAG Corps Scholarly Articles and Writings

Members of the Air Force JAG Corps continue to make significant contributions to academic discourse and dialogue, a sample of which is listed below from Calendar Year 2022.

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Edited by: Maj Allison K.W. Johnson (Editor-in-Chief)
Layout by: Thomasa Huffstutler