

THE Reporter

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Education and Outreach for The Judge Advocate General's Corps

2016 this edition:

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SHOULDN'T WE CARE ABOUT
WHAT HAPPENS TO SOMEONE
ACCUSED OF A CRIME?



The Reporter

2016 Volume 43, Number 1

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CITE AS: *THE REPORTER*, Vol. 43, No. 1



ABOUT Us

THE REPORTER is published by The Judge Advocate General's School for the Office of The Judge Advocate General, United States Air Force. **Contributions from all readers** are invited. Items are welcomed on any area of the law, legal practice, or procedure that would be of interest to members of The Judge Advocate General's Corps.

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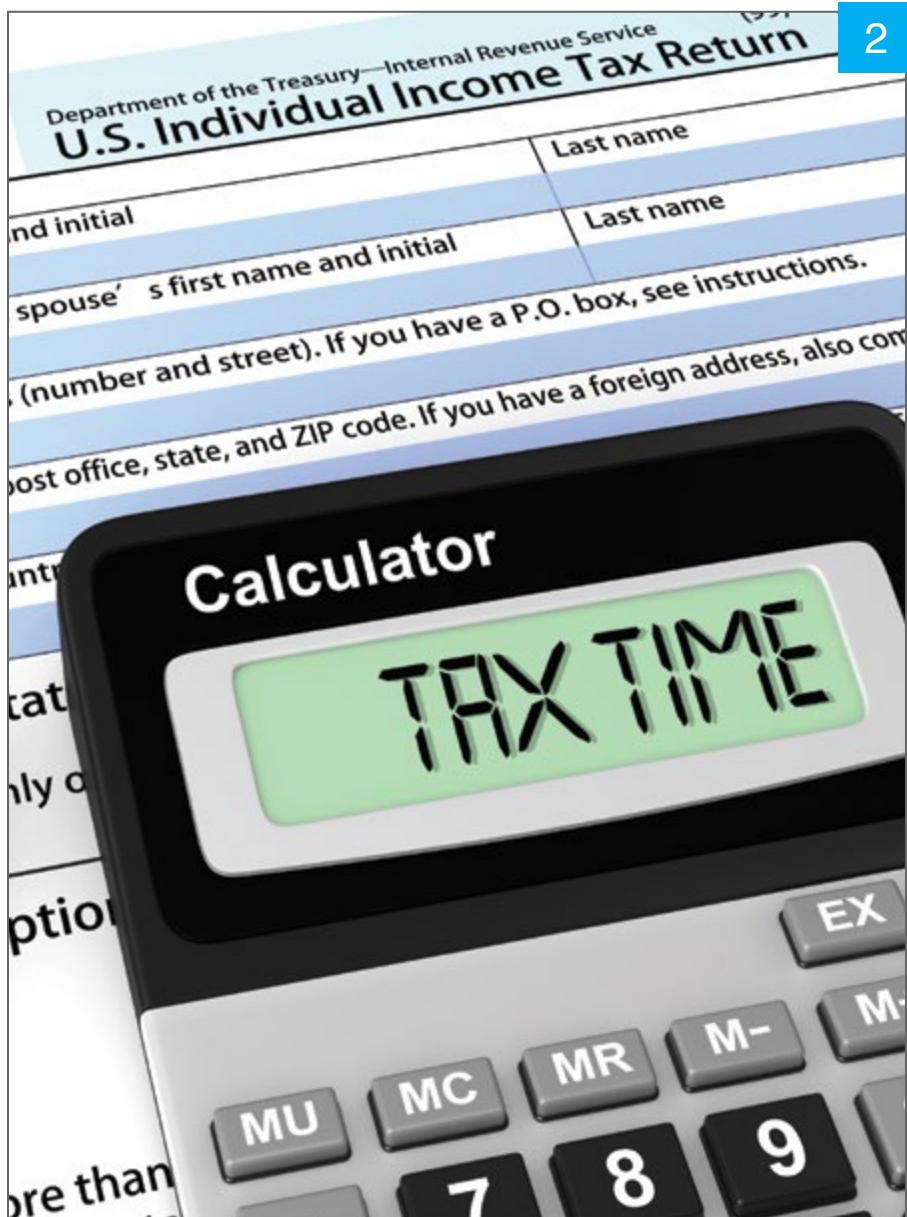
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Can you guess the location?



Message from The Commandant



Welcome to 2016! In honor of the New Year, this edition of *The Reporter* focuses on fresh perspectives and new opportunities. Our featured articles look at military justice through the lens of criminal defense. Major Chris Goewert explores the profound and significant effects that the accusation of criminal wrongdoing has upon [the accused](#), even when the accused is later acquitted. He asks if, in the current environment of victim focus, the Air Force is doing enough to care for the needs of the accused. Meanwhile, Captain Matt Tusing explores the murky world of [machine-generated evidence](#), focusing on the infamous breathalyzer. Captain Tusing provides a roadmap for the shifting legal landscape of breathalyzer result admissibility and source code discovery requests.

In addition to our featured articles, Lieutenant Colonel Ryan Oakley and Lieutenant Colonel Thomas Collick help you breathe new life into your [base tax program](#). They offer a thorough review of the latest developments in the base tax assistance program and tips for how to maintain a tax program with limited resources. Also, Technical Sergeant Amed Poveda provides an interesting account of his experience attending the inaugural class for the Inter-American Non-Commissioned Officer Academy held in Bogota, [Columbia](#).

Finally, this edition includes three book reviews to help replenish your reading list for 2016. To complete your 2016 lawyering reading requirement, Mr. Thomas Becker writes an informative review of [Mastering the Mechanics of Civil Jury Trials](#) by Tyler Draa, Doris Cheng, Maureen Harrington, and The Honorable Franklin Bondonno. Meanwhile, to keep your leadership skills sharpened, Captain M. Arthur Vaughn reviews [Team of Teams](#) by retired General Stanley McChrystal. Concluding our reading list, on the lighter side, Mr. Bryan Goldberg tells us about [Ghost Fleet](#) by P.W. Singer and August Cole.

Thank you to those who submitted articles for this issue of *The Reporter*. I encourage each of you to write and submit articles for publication. Through your efforts, *The Reporter* helps the JAG Corps to maintain its expertise within the ever changing world of law.

THE FUTURE IS UP TO YOU

Managing Base Tax Assistance Programs in the 21st Century

BY LIEUTENANT COLONEL RYAN D. OAKLEY AND LIEUTENANT COLONEL THOMAS F. COLICK

The hardest thing in the world to understand is income taxes. —ALBERT EINSTEIN

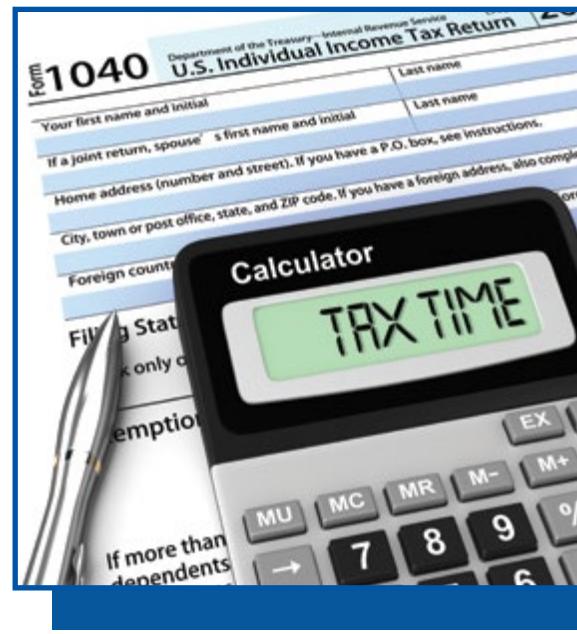
Commanders have long recognized that financial readiness has a direct impact on the combat readiness of our Total Force. While the U.S. economy gradually improves after a deep recession, the number one cause of stress for most Americans remains *money*—ranking higher than work, family responsibilities, and health concerns, according to a 2015 study conducted on behalf of the American Psychological Association (APA). Seventy-two percent of survey respondents reported anxiety about their finances, and nearly one in four adults experienced constant or “extreme” stress.¹ But on a

positive note, the APA emphasized that stress levels are greatly reduced among people who have someone to whom they can reach out for help. Here, Air Force Tax Assistance Programs provide tremendous support to our people by saving them time, preparation fees, and quickly putting hard-earned dollars back in their wallets. Currently, over 70 of our base legal offices worldwide are hosting full-service tax centers supported by 1,500-plus volunteers, helping prepare over 83,000 federal and state returns. This will result in \$16 million in savings for military families. Every year, you ensure Airmen have one less thing to worry about so they can focus on the mission.

¹ American Psychological Association Survey Shows Money Stress Weighing on Americans' Health Nationwide, Am. PSYCHOL. ASSOC. (Feb. 4, 2015), <http://apa.org/news/press/releases/2015/02/money-stress.aspx>.

MORE

Tax Preparation Tips



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Until recently, it was mandatory for every base legal office to run a tax center.

In 2014, The Judge Advocate General changed this policy to give installation commanders... discretion to set the appropriate model and scope for a base tax program, including the option "not to have a tax program."

PROFESSIONAL GUIDANCE AND SUPPORT

At the same time, across the Department of Defense (DoD), installations face hard choices due to budget cuts, competing mission requirements, manpower shortages, and decreased volunteer support. The total number of tax returns filed by base programs across all U.S. military services has declined by 50 percent over the past decade. Why? According to the Internal Revenue Service (IRS), more than 27 million Americans filed their tax returns from their home computers last year, out of a total of 62.2 million e-filed tax returns.² This number will undoubtedly grow, as the Internet provides tech-savvy taxpayers with free or low-cost alternatives to traditional tax preparation and filing services. Yet a computer program alone, no matter how sophisticated, cannot explain all the intricacies of the nation's complex, confusing, and often changing tax code, or the implications of major life changes such as renting or selling a home, getting married, or having children.³ And it cannot answer questions the taxpayer doesn't think to ask. As one leading tax professional put it: "There are numerous and conflicting [tax] credits available; which are the ones you should take advantage of?...I don't know that software can help you make those decisions."⁴ So, while the

apparent demand for traditional tax filing services has fallen, the actual need for professional guidance and support remains high. With this in mind, your legal office should understand the different ways you can provide access to free tax assistance to eligible beneficiaries, and advise commanders accordingly.

POLICY

Air Force Tax Assistance Programs are command programs designed to provide free tax assistance and filing service for eligible beneficiaries, separate and distinct from the Legal Assistance Program. Until recently, it was mandatory for every base legal office to run a tax center. In 2014, The Judge Advocate General changed this policy to give installation commanders (or equivalents), in consultation with their staff judge advocates (SJA), discretion to set the appropriate model and scope for a base tax program, including the option "not to have a tax program." While the pending revision of Air Force Instruction (AFI) 51-504, *Legal Assistance, Special Victims' Counsel, Notary, Preventive Law, and Tax Programs*, will further reflect this "command option" policy guidance, current authority for each of the following courses of action (COAs) can be found in AFI 51-504, paragraphs 1.4.14.2 and 3.2.1.11. Eligible beneficiaries for tax assistance include those entitled to legal assistance under 10 U.S.C. § 1044 and AFI 51-504. But SJAs can further limit the scope of the local tax program, if needed,

² More Taxpayers Filing from Home Computers in 2014, Many Taxpayers Eligible to Use Free File, IR-2014-28, INTERN. REV. SERV., (March 13, 2014), <https://www.irs.gov/uac/Newsroom/More-Taxpayers-Filing-from-Home-Computers-in-2014—Many-Taxpayers-Eligible-to-Use-Free-File>.

³ Jonnelle Marte, *Computers Can Win At Chess, But Not At Taxes*, MARKETWATCH (January 20, 2014, 8:38 AM), <http://www.marketwatch.com/story/should-apple-design-tax-preparation-software-2014-01-17>.

⁴ *Id.*

say by providing services for E-6 and below only, per commander's intent.⁵

COAS FOR COMMANDERS AND SJAs

How can you help your wing commander make the right call? When deciding whether their base will host a tax program, and if so, what type of program to have, commanders and SJAs should consider factors which may impact the availability of services and the scope of the program such as: (1) competing mission requirements; (2) available volunteer support;⁶ (3) the availability of IRS software and training support; (4) the negative impacts to program continuity (e.g., loss of future IRS support, loss of future volunteer support, & loss of institutional knowledge) should the installation want to continue the program at a later date; (5) budgetary constraints; (6) morale; (7) the demand for tax services; (8) the availability of free online filing services and other nearby Volunteer Income Tax Assistance (VITA) programs accessible for all beneficiaries; and, (9) the availability of other professional filing services near the installation. Additionally, SJAs for commands serving in a host or sup-

porting role on joint bases are advised to review support agreements for any provisions regarding the tax program. The bottom line is this: how can you best provide access to support, using available no-cost resources to meet the needs of your base community? And if you are considering standing down your tax program, realize it will not be easy to build back up.

If leadership decides to host a tax program, SJAs will provide program oversight. Consistent with commander's intent, SJAs will supervise and manage these programs, exercising discretion concerning the scope of assistance provided, eligible beneficiaries, and sources of support for training and electronic filing. In helping commanders make an informed decision, you can brief the following options to provide access to free tax assistance services. Please note, these are not exclusive or stand-alone choices. Instead, your base can create a "hybrid approach" customizing your program to flexibly handle surge demand and wisely use your tax volunteers' specific skillsets. For example, you can maintain a traditional tax center, while adding self-service computer kiosks for customers who require less hands-on assistance or want to minimize their wait time. Remember, there is not a one-size-fits-all solution.

OPTION 1: MAINTAIN TRADITIONAL TAX ASSISTANCE PROGRAM.

The traditional "full service" tax center remains the most popular method of providing support, where trained base legal office staff and tax volunteers prepare and file federal and

state income tax returns for eligible beneficiaries. Resourced and managed properly, a full-service program can enhance morale and help beneficiaries address some of the unique income tax aspects associated with military service. Your base should effectively use resources provided by the IRS' VITA program. This support includes electronic filing software, necessary training materials, as well as expert instructors who can help certify tax volunteers.⁷

The heart of a traditional tax program is its team of dedicated, IRS-certified volunteers. If your current level of support is waning, prior to limiting the scope or halting your program altogether consider contacting resources in your area such as the Retiree Affairs Office or a local university business school. One great example comes from the legal office at Columbus Air Force Base in Mississippi, which was cited as a best practice by the Inspections and Standardization Directorate (AF/JAI). Faced with limited support, the 14th Flying Training Wing Legal Office (14 FTW/JA) partnered with Mississippi University for Women to recruit approximately 15 volunteer undergraduate accounting students to assist in tax preparation. In return, the University allowed accounting students to attain course credit for their training and assistance with tax preparation services at the base. The

⁵ SJAs may also authorize the preparation and electronic filing of tax returns for federal civilian employees, to the extent permitted by the Internal Revenue Service. In making this determination, SJAs should consider whether available resources and volunteer support are sufficient to support the increased demands such an extension of support would entail. When federal civilian employees seek available tax assistance, they must adhere to applicable rules concerning use and accounting of their time. See U.S. DEPT OF AIR FORCE, INSTR. 51-104, LEGAL ASSISTANCE, NOTARY, AND PREVENTIVE LAW PROGRAMS para. 1.14.2.2 (27 Oct 2003, Incorporating Through Change 3, 24 May 2012) [hereinafter AFI 51-504].

⁶ Requesting a temporary civilian overhire or contract support may be a possibility, subject to Air Force hiring practices and local budgets.

⁷ Volunteers must either complete in-person VITA training hosted by the IRS, or online IRS "Link & Learn" e-learning, if they cannot attend live training. Tax program volunteers are not legal office volunteers, and must adhere to IRS Volunteer Standards of Conduct and other training requirements. Attorney-client privilege does not apply to the preparation of income tax returns.

legal office also recruited and trained local personnel and military spouses with previous tax and accounting experience to provide leadership as co-site coordinators. To ensure all volunteers had base and computer access, the legal office partnered in advance of tax season with the Security Forces and Communications squadrons.⁸ As a result, in addition to manning the tax center four days per week, the legal office was even able to provide on-site tax service at the enlisted dorms, as needed.⁹ A 2014 IRS inspection of the Columbus tax center found a 100% compliant program and 14 FTW/JA was recognized for three best practices!¹⁰

OPTION 2: SELF-SERVICE TAX CENTER WITH LIMITED VOLUNTEER SUPPORT.

If command decides to halt the traditional tax program, establishing a self-service tax center is an innovative way to provide ongoing support. This is the proverb of “teach a man to fish” in action, where customers can prepare their own tax returns online, with an IRS-trained volunteer available to assist if tax-related or

⁸ Guidance concerning volunteer computer access to a DoD network can be found in the Tax Center Resources Learning Center on CAPSIL. Tax Center Resources Learning Center, CAPSIL, <https://aflsa.jag.af.mil/apps/jade/navigation/portfolio.html> (CAPSIL access requires CAC log-in; select “Learning Centers” from CAPSIL homepage horizontal title menu, then “Legal Assistance” from Learning Center Categories, and finally click the “Air Force Tax Program Resources” hyperlink) [hereinafter CAPSIL Tax Center Resources]

⁹ See AF/JAI Inspections and Standardization Learning Center, CAPSIL, <https://aflsa.jag.af.mil/apps/jade/navigation/portfolio.html> (CAPSIL access requires CAC log-in; select “Learning Centers” from CAPSIL homepage horizontal title menu, then “HAF/AFLOA” from Learning Center Categories, and finally click the “AF/JAI – Inspections and Standardization” hyperlink; enrollment in learning center is required to gain access).

¹⁰ *Id.*

technical questions arise. Tax center personnel will direct a customer to a computer kiosk, get them going, and remain close by to help, if needed. The amount of one-on-one support will vary based on the comfort level of the customer. Even though the overall manpower you need to run the tax center can be minimized, quality customer service must be a priority so you can win over initial skeptics or those reluctant to embrace change.

Military OneSource (MOS) is the default program used by self-service tax centers. A DoD-funded program, MOS offers free tax consultation and e-filing to all active duty, Reserve and Guard members (regardless of activation status) and their dependents.¹¹ Eligible members may complete and e-file their federal return and up to three state tax returns. No copies of tax forms or tax returns are retained by the tax center. Instead, all information is stored in the online program accessible only to the client. Moreover, MOS is now linked with the IRS VITA program which provides base-level tracking information to the IRS through the use of a unique Site Identification Number. As a result, bases operating self-service tax centers will receive credit for the total returns processed

¹¹ Military OneSource is a confidential Department of Defense-funded program providing comprehensive information, call centers, and online support on various topics, at no cost to active duty, Guard and Reserve Component members, and their families. Additionally, MOS provides year-round on-call tax and financial counselors who can help service members and their families understand their unique tax requirements. For further information, see *Military OneSource Tax Filing Services*, MILITARY ONE SOURCE, http://www.militaryonesource.mil/pfm?content_id=268827 (last visited Dec. 8, 2015).

on site, so long as they have at least one trained tax volunteer on hand to assist customers. Be aware, however, that not all beneficiaries for Air Force Tax Assistance Programs will be eligible to use MOS (e.g. retired members after 6 months of leaving service and their dependents, or former spouses eligible under the 20/20/20 rule). So if you pursue this option, you should determine upfront how you will redirect such individuals to other alternatives. The Navy, for example, has set up extra computer kiosks allowing these customers who cannot use MOS to use a program available through the IRS Free-File Alliance (which has separate eligibility requirements, as described in Option 3). Therefore, a self-service tax center may be a good fit for bases which do not have a large pool of volunteers to draw upon, (e.g., overseas installations). It will also reduce overall costs and manpower as well as decrease wait times for customers.

But how do you get started? The Navy’s Legal Assistance Policy Division, which initiated a self-service pilot program in 2007, has published a Tax Assistance Center Manual (TACMAN), which is a step-by-step guidebook from startup to execution.¹² While designed for use in the Navy, the TACMAN is a valuable aid to Air Force offices moving toward the self-service tax center model, either to replace or augment a traditional full-service tax center.

¹² A copy of the current Navy TACMAN can be downloaded from the Tax Center Resources Learning Center on CAPSIL. See CAPSIL Tax Center Resources.

OPTION 3: HALT PROGRAM AND REFER CUSTOMERS DIRECTLY TO OTHER FREE TAX PREPARATION SERVICES.

If neither option 1 nor 2 appear feasible at your base, check to see if assistance is available through a co-located military service tax center or local IRS VITA Program, in addition to MOS on-call tax consultation services.¹³ Furthermore, as previously noted, there are alternate filing options available through the IRS Free File Alliance website. The Free File Alliance is a nonprofit coalition of tax software companies partnered with the IRS to provide free electronic tax services. This service allows eligible taxpayers access to a number of different tax software options from Free File Alliance members. After selecting the tax software that works best for their individual tax situation, users are transferred from IRS.gov to the software company's website to complete their returns.¹⁴ Note that Free File preparation and e-filing assistance software is only available to taxpayers who have a 2014 Adjusted Gross Income (AGI) of \$62,000 or less. Even though those with an AGI exceeding \$62,000 are not eligible for the free software, they can still use the IRS's Free File Fillable Forms, a basic e-filing service, with no preparation software assistance. As the IRS website notes, this option is best for those

experienced in preparing their own tax returns.¹⁵ As a reminder, when referring individuals to services provided by the IRS Free File Alliance, remember to avoid the appearance of endorsing any nonfederal sources of assistance.

COMMUNICATION

Regardless of the COA your commander approves, the base legal office should take the lead in publicizing how the eligible local community can access available tax-assistance services. For example, articles in the base newspaper, briefings, handouts, fliers, and social media all are all helpful ways to get out the message. Managing expectations, aggressively advertising your program, and anticipating customers' questions are all critical to the ultimate success of your base's tax program. The Navy's TACMAN provides a sample letter to customers that can be used to minimize confusion or disappointment from community members who are accustomed to the traditional tax-assistance program. Customers should also understand how to access MOS or the IRS Free File Alliance to prepare their returns, if your base is not hosting a program, or has otherwise limited the scope of services. Internally, tax center personnel may communicate directly with each other and with relevant organizations and persons about administration of your relevant programs and to share best practices. To facilitate this process, tax center leadership is encouraged to

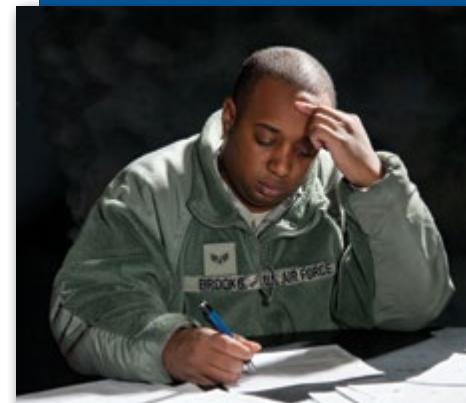
¹³ You can enter a ZIP code using the VITA Locator Tool on the IRS website to locate nearby free tax help programs for eligible taxpayers. See *Find a Location for Free Tax Help*, INTERN. REV. SERV., <https://www.irs.gov/Individuals/Find-a-Location-for-Free-Tax-Prep> (last visited Dec. 8, 2015).

¹⁴ Individuals can visit <http://freefilealliance.org/> to begin the process and locate information on how to use Free File. FREEFILE, <http://freefilealliance.org/> (last visited Dec. 8, 2015).

¹⁵ See *FAQs*, FREEFILE, <http://freefilealliance.org/faqs/#eligibility/> (last visited Dec. 8, 2015).

THE BASE LEGAL OFFICE SHOULD

**take the lead in publicizing
how the eligible local
community can access
available tax-assistance
services.**



Senior Airman Michael Brooks, 49th Logistics Readiness Squadron, attempts to file his taxes on his own. Brooks could have saved himself a lot of time and energy by filing his taxes with the Tax Center located on base. (U.S. Air Force Photo illustration by Airman First Class Anthony M. Ward)

join the Tax Center News forum in CAPSIL under the Legal Assistance Learning Center for routine updates.

TRAINING OPPORTUNITIES

Legal offices should always be on the lookout of available tax training, particularly in the local area. Every year, the Army Judge Advocate General's Legal Center and School hosts a flagship Tax Law Course targeted toward tax center OICs and NCOICs.¹⁶ Bases can also take part in live or remote IRS VITA training, which focuses on the tax preparers and the mechanics of entering tax information correctly on the forms.¹⁷ Another convenient option is the American Bar Association's (ABA) Adopt-A-Base Program. This initiative is collaboration between the IRS' Stakeholder Partnerships, Education and Communication (SPEC), the Section of Taxation of the ABA, and the Armed Forces Tax Council to instruct tax law to military personnel who will prepare or assist in preparing returns for other military personnel and their dependents. The Adopt-A-Base program augments SPEC's Military VITA Program and training resources. Adopt-A-Base volunteers will provide up to three days of free classroom training for tax program volunteers on substantive tax issues at your installation. They will not,

¹⁶ This is a substantive legal course, as compared to the IRS VITA course for tax volunteers on the "nuts and bolts" of preparing tax returns.

¹⁷ If live training is not available in your area, the IRS also provides a self-paced "Link and Learn Taxes" online e-learning course which instructs individuals in the VITA return preparation process and related tax law. *Link & Learn Taxes linking volunteers to quality e-learning*, INTERN. REV. SERV., <https://apps.irs.gov/app/vita/> (last visited Dec. 8, 2015).

however, directly assist your base in preparing tax returns.

REPORTING

Bases must file their annual tax program statistics in JAGUARS (do not use WebLIONS to input client information or tax program workload). Installation SJAs must ensure interim reports are submitted by 15 June for continental United States activities and 15 July for programs based outside the continental United States. SJAs also must ensure final reports are submitted by 1 February of the next calendar year. Offices with questions or needing assistance may contact AFLOA/CLSL directly and if necessary refer issues to the Armed Forces Tax Council for further discussion.¹⁸ Notify AFLOA/CLSL if your base decides to discontinue its tax program. Timely relaying this information ensures the IRS can provide support and issue current Electronic Filing Identification and Site Identification Numbers.

CONCLUSION

Leaders at the local level are now empowered to find the best path forward providing vital access to free tax filing services to Airmen and other beneficiaries. Sustaining a tax center in today's lean times is a leadership challenge, but there are new and innovative strategies you can use to recruit volunteers, maximize resources, and rejuvenate your

program. When you are gathering your lessons learned in a busy tax season, pause and take a moment for reflection. Ask yourself what works best for your base community? How can you improve? What would you advise your commander do differently next year? You are now in the driver's seat, and your base tax program is what you make it. **R**



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¹⁸ The Armed Forces Tax Council oversees the operation of the military tax programs worldwide, conducting outreach with the IRS to military personnel and their families. The AFTC consists of tax program coordinators for the Air Force, Army, Navy, Marine Corps, and Coast Guard.



The Accused

The Unacknowledged Victim of the Military's Robust Prosecution of Sexual Assault¹

BY MAJOR CHRISTOPHER J. GOEWERT

Author's note: This story is published with the express consent of the accused in the case. The victim, accused, and witnesses have been given pseudonyms to protect their privacy. The facts of the case are drawn from public sources: an Article 32 hearing and preliminary inquiry that occurred in October 2014 and January 2015, respectively, and from the trial itself, which occurred in April 2015. Statements about the effects of the court-martial on the life of the accused are taken from an interview with the accused ("SSgt Marks") conducted in November 2015.

¹ Department of Defense-wide statistics reveal that instances of referral of court-martial charges as a response to allegations of sexual assault have risen by over 550% between fiscal year 2007 and fiscal year 2014. In 2007, charges were preferred in 180 eligible sexual assault cases. In 2014, charges were preferred in 998 eligible cases. SEXUAL ASSAULT PREVENTION & RESPONSE OFFICE, U.S. DEPT OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2014, APPENDIX A: STATISTICAL DATA ON SEXUAL ASSAULT (2015), page 25, available at http://sapr.mil/public/docs/reports/FY14_Annual/FY14_Annual_Report_Appendix_A.pdf.

A FOURSOME IN FLORIDA

The warm Florida night air was an open invitation to youthful revelry. It was May 2012 and the three-day weekend spawned an impromptu gathering at the house of Staff Sergeant (SSgt) Marks which attracted numerous friends, both civilian and military, who in-turn brought their friends; among this group was Senior Airman (SrA) Bordeaux. She had been playing a drinking game with male coworkers in the dorms when they heard about the party. Within an hour's breadth of arriving, the guests had become attuned to a romantic spark between her and a tall, gangly party goer named Peter. Peter had been doing successive shots of Jägermeister with SSgt Marks and had subsequently become ill. SrA Bordeaux, with the aid of an inoffensive character named Kim and Kim's friend, Elton, assisted Peter to a second floor bedroom so he could recuperate. Here, accounts diverge and become murky—one

witness said it was prompted by a dare, another that it simply occurred organically, but either way things quickly became sexual between SrA Bordeaux and Peter in the presence of Kim and Elton. The witnesses all agreed that SrA Bordeaux was the driving force. SrA Bordeaux initially said that after helping the inebriated Peter to the bed, she sat down on the floor beside the bed where he began to kiss her neck. She recounted that she initially told him "no" but as the kissing felt so good she allowed him to continue and got into bed with him. The pre-coital behaviors embarrassed Kim who left and went off to gossip about the dalliance that was occurring upstairs. Unfortunately for SSgt Marks, he wandered into the room—his own room—intoxicated, and discovering Elton, Peter, and SrA Bordeaux in a precursory state of group love. Seeing this, SSgt Marks made the decision to join in. Peter soon slipped away.

Stock Graphic © iStock.com/wildpixel



This was not an individual who was reporting tonic immobility, blacked out, passed out, or in a stupor.

At this point, Kim, Peter and Elton described SrA Bordeaux to be in possession of her own faculties, actively engaged in sexual activities, and communicating with her lovers—guiding them and expressing her preferences. This was not an individual who was reporting tonic immobility,² blacked out, passed out, or in a stupor.

SrA Bordeaux would tell investigators that she told SSgt Marks “no” when he began to initiate sexual activity but as it felt so good she soon relented, letting him continue. According to Elton, SrA Bordeaux made out with SSgt Marks as a prelude to sex and then made out with Elton while engaging in intercourse with SSgt Marks. Elton and SSgt Marks swapped roles throughout the event and, at some point, Peter returned. According to Peter, when he returned SrA Boudreux pushed SSgt Marks off of her and told Peter that she had been “waiting from him all night,” beckoning him over to have sex. He eventually lost interest and left, replaced by SSgt Marks who continued with SrA Boudreux for some time. The house guests observed the escapade by turns through a crack in the door and even stuck cell phones in to digitally record the activity. The voyeurs uniformly reported a female moaning, sexually participating, and appearing to enjoy herself. As this escapade wrapped up, Elton

exited leaving SSgt Marks and SrA Bordeaux alone for a few remaining moments together.

Eventually, SrA Bordeaux and SSgt Marks wandered back downstairs and rejoined the group. SrA Bordeaux would tell investigators that she left immediately to return home. The others said that they lazily hung out until the party wound down, smoking, laughing, and making fun of her “sex-hair.” When she learned that Peter had a girlfriend, she apologized, yet then kissed him and exchanged numbers with him.

The video of the escapade made its way back to the maintenance unit where SrA Bordeaux worked and was passed around through the tittering ranks of some of the more juvenile Airmen. SrA Bordeaux became aware of this and reported concern over the video to her leadership who attempted to squelch the rumormongering. She never told them that the acts were non-consensual or even hinted that they might constitute an assault. She merely pontificated on society’s double-standards: men who manage sex with multiple females are given high-fives while women are dubbed “whores.”

In an odd turn of events during February 2013, a disgruntled Airman on his way to being discharged dropped numerous anonymous letters into a mailbox to various base officials recounting a number of real or imagined disciplinary infractions within the unit, one of which was an allegation of sexual

² “[A] state of profound motor inhibition typically elicited by a high fear situation that involves threat and/or restraint.” Grace Galliano et al., *Victim Reactions During Rape/Sexual Assault: A Preliminary Study of the Immobility Response and Its Correlates*, 8 J. INTERPERSONAL VIOLENCE 107, 108 (1993).

Determined agents located all of the party-goers and obtained statements which painted a picture of a consensual group romp—a spur of the moment orgy, which was embarrassing in retrospect, but to the guests was not criminal.

assault that he had heard about third-hand from someone who had seen a video. Investigators were able to ascertain that the video came from the party in May 2012, and found SrA Bordeaux, who told them that the events were “not quite as wanted as they should have been.” The video was never actually recovered. The investigation continued for over a year as determined agents located all of the party-goers and obtained statements which painted a picture of a consensual group romp—a spur of the moment orgy, which was embarrassing in retrospect, but to the guests was not criminal.³ SSgt Marks was duly charged with wrongful sexual contact and indecent acts.⁴ His case would progress to trial over the next seven months and would see both an Article 32 investigation and an Article 32 preliminary hearing; in neither of which would SrA Bordeaux actually testify.

³ Such views are common in the college age population. In an interview with Justin Garcia, Ph.D., Indiana University, The Kinsey Institute, he noted that “33% of males and 17% of females in the college-age population have engaged in multi-party sex and that approximately 15 million Americans have engaged in swinging behavior.” Telephone Interview with Justin Garcia, Director of Education & Research Training, The Kinsey Institute (Mar. 2015).

⁴ SSgt Marks was formally charged with violating Article 120(k), Indecent Acts, and Article 120(m), Wrongful Sexual Contact, Uniform Code of Military Justice. The legal theory of indecency was that the sexual acts occurred in the presence of others, both those who were sexual participants and those who may have watched through the door. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 120k-m (2012).

WHO CONSIDERS HOW IT MIGHT AFFECT AN ACCUSED?

A great deal of ink is spilled talking about the effects of a sexual assault investigation on victims,⁵ but who considers how it might affect an accused? SSgt Marks is diminutive and soft-spoken, and described by friends as gentle and kind-hearted. After the hangover of that night had passed, SSgt Marks moved on with his life by courting a woman he would come to marry shortly thereafter. He had generally been a good Airman, often performing duties normally assigned to the next pay grade. But once he learned that he was under investigation, his life turned upside down:

I was shocked when I first was called in for questioning by investigators. I knew I hadn’t done anything wrong, and would not have hooked up with a girl unless it was completely consensual. I had even attempted to apologize to her because I had called her by the wrong name at the end of the

⁵ See e.g., Patrick Buffet, *SHARP summit attendees explore harsh realities of sexual misconduct*, DVIDS (Aug. 26, 2015), <https://www.dvidshub.net/news/174334/sharp-summit-attendees-explore-harsh-realities-sexual-misconduct/>; Stephen Losey, *Report: Retaliation Against Sexual Assault Victims Rampant*, AIR FORCE TIMES, May 18, 2015, available at <http://www.airforce-times.com/story/military/2015/05/18/report-retaliation-against-sexual-assault-victims-rampant/27368747/>.

night and hurt her feelings, but the rest of the world didn’t seem to know this or care.

It quickly began to take an emotional toll on SSgt Marks: “I was overwhelmed and it caused me to be anxious all the time.” Soon the anxiety became a permanent fixture in his life. He would have to drop tasks he was working on and simply go for a walk to clear his mind. He could not sleep, often catching only a few hours and waking more exhausted than when he went to bed due to hours of tossing and turning. He had to be prescribed sleeping pills to get any rest. As he explained, “I was a ‘happy-go lucky’ person until then. I was on a tight string for months—just waiting to snap. I became anti-social. I used to go out often, but I became more solitary.” He was constantly afraid of running into SrA Bourdeau and couldn’t visit his sister-in-law when he discovered that she and SrA Bourdeau were neighbors. His anxiety became all pervasive, affecting his relationship with his wife:

I would often become moody and distant, preferring to be by myself so that I could be with my thoughts—but I could not tell her that, it would hurt her feelings. For like 6 to 8 months all I wanted was to be alone. She wanted to be intimate but I



wasn't in the mood. Things were tense, I would get short with her and it wasn't fair, but I had a hard time talking about it and didn't want to burden her with my feelings.

PRESUMPTION OF INNOCENCE WAS A HOLLOW MAXIM

Despite his efforts to keep up at work, he slowly became ostracized, "I felt like parts of my command believed I wasn't guilty but that their hands were tied." He had always kept himself in a high state of readiness so he could travel on short notice deployments. He had done so when the Libyan crisis hit and was ready to do so again if needed. However, after he fell under the shroud of investigation in the spring of 2013, his ability to serve was seriously encumbered. He could no longer be deployed and would not be chosen to attend TDYs that could help maintain his capabilities. He watched as he was stripped of his primary responsibilities, "when new members of my unit would rotate in they would assume that I was avoiding or neglecting my duties. My inability to deploy or train set my career so far back that for me, it was beyond recovery." The two years between the investigation and the trial constricted him as a productive Air Force asset. He did not think that he would be competitive for Technical Sergeant because of the missed opportunities for professional growth and being removed from his core tasks. The shadow of investigation was insidious. People who did not know him or the events simply prejudged him, "they assumed I was

a troublemaker, and that I would constantly need hand holding. People would walk past me talking and whispering and even if it wasn't rational, I thought it was about me."

The weeks before the trial were the worst.

The very label "under investigation" brought its own condemnations:

I tried to keep my head up and just do a good job. My flight chief put me in for a monthly unit award three or four months straight because of my work, but he was shot down. They told him that the unit would look bad if they gave out an award to someone who was accused of a crime.

The weeks before the trial were the worst:

My mind overflowed with the thoughts of what could happen: the odds were not in my favor. I was worried that everyone would believe her because she was saying she was a victim and wouldn't believe in me. I felt like the decision was already made and I was fighting a losing battle—it was like I saw a wrongful judgment would be forced on me and there was nothing anyone could do to change it. I broke down and cried a handful of times. I became fatalistic about it.

In the lost hours of the night, he would fruitlessly roam the internet for articles about sexual assault cases, “that only made things worse because there was nothing conclusive in them that could help me. I felt that if anyone believed her, it would be a loss for humanity.” He became fixated on a negative trial outcome, “I kept thinking, what if I go to jail for six years. My wife will not be able to afford the house. We will lose it. I will lose my wife, my house and dog. I will be a sex offender and have to move out to the boonies.”

BEING ACQUITTED AT TRIAL WAS COLD COMFORT

Over the course of events he developed a deep seated distrust of females:

I was unwilling to be one-on-one with a female that I didn't know well, such as a family member or my wife. Having someone lie about me and everything else and just not caring what it would do to another person...I lost trust in women in general. If we have someone over to the house, I will avoid ever being alone with her because I am too nervous about what she might say about me. I will only talk to females I don't know in large social settings.

SSgt Marks was acquitted at trial of all the charges, but the problems he had developed prior to the trial plagued him. Soon afterwards he went to Afghanistan to step in for a fellow airman who was unable to

deploy. He would be haunted by continued bouts of anxiety:

I would be up late at night in a kind of half dream, stuck thinking about the trial and what could have happened to me. This would occur several times a week, sometimes for almost six hours at a time. I also lost my appetite over this, and I still can't eat as much as I should.

He felt a pervasive sense of institutional injustice.

He felt a pervasive sense of institutional injustice:

I don't want to be a part of this culture. I know that if this happened to me, it has happened to hundreds of others. It left a giant distaste in my mouth. If someone asked me whether they should join the military, I would seriously tell them to think about it. There are plenty of other things they could do. If someone joins the military so that they can work on a jet or fly a jet there are lot of politics you have to deal with. I would not be enthusiastic to join up. I put myself in a situation, something that people are doing all over the country every day, and it got blown completely out of proportion and I almost went to jail for it.

SHOULDN'T WE CARE ABOUT WHAT HAPPENS TO SOMEONE ACCUSED OF A CRIME?

When military authorities act to dispose of cases, it is important to be mindful that their actions will have profound and significant effects on the life of an accused. When a command contemplates legal action, it ought to remember that our airmen are presumed innocent.⁶ Relying on courts-martial to simply placate victims or political causes may bring justice at times but has the real potential to victimize others. In making courts-martial the default arbiter in so many cases, we may be creating conditions where Airmen like SSgt Marks will be dehumanized and disregarded. In an era when victims' interests and the failures of the Department of Defense to adequately address sexual assault within its ranks are constant messages, perhaps SSgt Marks's experience will remind us of the traumas suffered by the innocents accused and serve as a caution to those wielding the awesome power to prosecute. **R**

⁶ Colonel Daniel Higgins & Major Shad Kidd, *Start by Believing the Accused*, 41 REPORTER, no. 2, 2014 at 16.



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Over the last few years, state courts have addressed new challenges to machine-generated evidence.

Machine-Generated Evidence

Preserving an Appealable Issue

BY CAPTAIN MATT TUSING

Convicted by Code

MORE

Computer code is used to help send defendants to jail

MORE

Release of DUI 'Breathalyzer' Source Code

MORE

My defense paralegal and I knew something was amiss as we walked into the local sheriff's office. The base legal office had received jurisdiction over an allegation of driving under the influence and the Special Court-Martial Convening Authority had referred the allegation to a court-martial. Our client had allegedly blown a .219 Breath Alcohol Content (BrAC). As we interviewed the officer in charge of its maintenance and inspected the DataMaster Breathalyzer machine, we discovered something eye-opening: they were using the machine incorrectly. This was not a mere procedural mistake, but rather, a mistake that called

into question how the machine was processing the data it collected.¹ The sheriff was admittedly and consistently calibrating the machine with his portable radio on. Most of the other sheriff's deputies were performing the test with their radios on as well. Moreover, the machine was resting against a wall that adjoined the police cruiser garage, where multiple police vehicle radio frequency devices were purring like a box full of kittens. Yet, the staff themselves posted a sign not three feet above the machine indicating all radios must be turned off during testing.

¹Equally as interesting, no civilian defense team in local law enforcement memory had ever visited the office to review the machine.

The National Patent Analytics Systems, the manufacturers of the machine, makes clear in their materials that radio frequencies may impact the results. Unfortunately, the manner in which that occurs is a mystery to all and makes it impossible to effectively challenge the weight of the evidence. The issue, however, is bigger than weight. The issue is admissibility; reliability is the crux of foundation and non-military courts are beginning to take notice.

Military courts regularly handle low-level drug and driving-while-intoxicated offenses passed on from state and local jurisdictions. Many of these crimes have at their evidentiary foundation machine-generated reports such as Breathalyzer readings or drug-testing reports. Over the last few years, state courts have addressed new challenges to machine-generated evidence. These challenges are not necessarily all based on non-testimonial versus testimonial hearsay. The fight has been much more basic: the relevancy and discovery of the source code on which the machines base their decision-making.

Defense counsel across the nation are demanding the source code from the machine manufacturers in order to better challenge the reliability of these results.² These efforts have been met with mixed results. Initially, many state courts punted the issue down

the trail by using the “Uniform Law to Secure the Attendance of Witnesses from Within or Without the State in Criminal Proceedings,”³ which places procedural limitations on state-to-state discovery. Other states have roundly denied defense requests for this relevant discovery, although a thaw in such positions appears forthcoming. A few state supreme courts have recently done an in-depth evidence and reliability study based on the particular machine used in that state. The creation of these evidentiary hearings at the state-level creates an opportunity to do the same in our federal jurisdiction.

STATES INITIALLY IGNORE ISSUE

States, for many years, punted on the issue of admissibility of machine source code. The state appellate courts in Florida⁴ and New Jersey⁵ were the first in a recent wave to address the concerns over machine-generated data, with other states like Minnesota,⁶ Georgia,⁷ and Nebraska⁸ following suit. These states did not directly consider the relevancy of the machine source code data head on, but rather rested on procedural limitations and the Uniform Law.

In Florida, for example, the state Supreme Court held⁹ that the criminal defendants did not follow procedures required by the Uniform Law when they filed their subpoena for source code with the registered agent. The Uniform Law requires that a Florida court certify a summons and order source code that is material and relevant. The defendants then serve the certification to a judge in the county and state in which the witness is found.¹⁰ That county court in a separate state determines whether the source code is material and necessary after the owner of the source code is heard.¹¹ Because the Uniform Law applies to witnesses and documents, the Florida court reasoned the defendants failed at their chance to get the source code, which was not a prejudicial error.¹² This analysis has been duplicated at numerous state appellate courts.

This Uniform Law had, for years, created a ‘Gordian Knot’¹³ for state-level defense counsel, because the jurisdiction where manufacturers resided seemingly protected the local manufacturers.¹⁴ But a shift has started to occur. The state-level defense community put enough evidence on the record at various levels

³ This Uniform Law to Secure the Attendance of Witnesses from Within or Without State Criminal Proceedings was drafted by the National Conference of Commissioners on Uniform State Laws in 1936. JOSEPH F. ZIMMERMAN, CONGRESS: FACILITATOR OF STATE ACTION 53-54 (2010). By 1959, 42 state legislatures had enacted the law. *Id.*

⁴ *Bastos*, 985 So. 2d 37.

⁵ *State v. Chun* 194 N.J. 54 (N.J. 2008).

⁶ *State v. Miller*, No. A08-1304, 2009 Minn. App. Unpub. LEXIS 679 (Minn. Ct App. 2009).

⁷ *Phillips*, 751 S.E.2d 526.

⁸ *Kuhl*, 755 N.W.2d 389 at 38.

⁹ *Ulloa*, 133 So. 3d at 921-22.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 925-26.

¹³ A Gordian Knot is commonly understood to be an intractable problem: a knot that cannot be untangled due to no available ends.

¹⁴ The Kentucky court in the Philips case “failed to hold a hearing” on the certified issue. *Phillips*, 751 S.E.2d at 530. Appellant appealed, but the Georgia appeals court affirmed the judgment of the trial court. *Id.* at 526.

to compel state courts to agree that source code is material and relevant.

Records are filling with facts related to the impact of machine source code. At an evidentiary hearing in a Florida trial court, the defense and the State presented expert testimony, on the issue of source code materiality.¹⁵ Experts testified that to utilize the Intoxilyzer 5000, a subject blows into a tube and the machine directs infrared light through the breath sample.¹⁶ However, the machine is designed to examine only a portion of the infrared spectrum.¹⁷ For that reason, it is unable to produce a “fingerprint” identification of ethanol to the exclusion of all other compounds.¹⁸

For the purpose of the evidentiary hearings, the court acknowledged the machine is known to produce false positives, including the existence of “compounds produced by the body as a result of the Adkins diet or diabetes.”¹⁹ Additionally, “[e]xposure...to certain paint thinners, lacquers, varnishes, and industrial cleaning solvents can also produce false positives.”²⁰ Where the false positives occur, “they can indicate that the subject has consumed alcohol when he or she has consumed none, or if the subject has consumed alcohol, the ‘false positive’ compound can produce an exaggerated

reading.”²¹ One of the defense experts opined “the machine is satisfactory as a screening test, but should not be used as a confirmatory test.”²²

Other experts, during evidentiary hearings, have determined specific equipment is inaccurate because the ‘partition ratio’ used to extrapolate the subject’s blood alcohol from the breath sample does not reflect the average of the population.”²³

In a case out of Georgia, the trial court certified that CMI Inc., the manufacturer of the “Intoxilyzer 5000,” was a material witness “in possession of...the computer source code for the Georgia version of the Intoxilyzer 5000[, which] source code is material because it is logically connected with the state.”²⁴

But, despite this certification, the Kentucky court where the machine manufacturer resides either disagreed about the materiality, or ignored the certification all together.²⁵ The Kentucky court determined that

the Georgia court certification was defective, that court certification was not material, and that the source code is a “trade secret.” But even if the certification was effective and material, the Kentucky Court held that Kentucky would not force their local manufacturer to supply the source code because it was an “undue hardship” on the manufacturer.²⁶ One can certainly assume in good faith that the local county courts are taking a protectionist approach to local proprietary information. With only limited numbers of manufacturers for such devices, only a select few state courts hold the keys to the source code kingdom. Thus, many other state courts desiring production have had no firm footing to compel production and therefore rely on incomplete evidentiary hearings.

SHIFTING TREND: STATES HOLDING EVIDENTIARY HEARINGS

While state courts initially punted on the issue of materiality and relevance of machine source code, a shifting trend has occurred as more states have held full evidentiary hearings on the specific source code of individual machines. Two of the seminal state-level reviews occurred in Minnesota (2012) and New Jersey (2006) and form the groundwork for challenging a specific machine and the reliability of results based on source code review.

Minnesota recently held an evidentiary hearing on specific software (labeled as the “240 software”) and its relationship to the performance

¹⁵ *Bastos*, 985 So. 2d 37.

¹⁶ *Id.* at 41.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 42.

²⁰ *Id.*

²¹ *Bastos*, 985 So. 2d 37.

²² *Id.*

²³ While this evidence called into question the reliability of the machine, the Nebraska State Supreme Court punted on the evidentiary issue because the Appellant did not object to the entry of the results at trial. Appellant did not have the ability to access the machine source code. Because he waived evidentiary entry of the machine results, the Court only reviewed for plain error “on its face.” Because the machine results had no plain error on its face, the Court held that in the lower judge did not error in disallowing defendant’s expert testimony on the importance of source code. *State v. Kuhl*, 755 N.W. 2d 389, 392 (Neb. 2008).

²⁴ *Phillips*, 751 S.E.2d at 528 (citing *Davenport v. State*, 711 S.E.2d 699, 702 (Ga. 2011)).

²⁵ *Id.* at 530.

²⁶ See *id.* at 529.

of the Minnesota version of the “Intoxilyzer” machine.²⁷ After extensive review by multiple defense and state experts, the Minnesota Court upheld the lower courts’ pretrial determination that Intoxilyzer 5000EN instruments running certain software and report a deficient breath sample are unreliable unless there is other evidence or observations that demonstrate the deficient sample was not the result of a source code error.²⁸ Thus, the court recognized that errors in the source code could impact the machine-produced results. As a result of the in-depth review conducted by the Supreme Court in Minnesota, the onus has shifted back to the State to demonstrate the source code was not the cause of certain deficient samples, or risk the evidence being thrown out altogether.

The extent of court review in this case is important and should be modeled by other jurisdictions handling machine-generated evidence. During the evidentiary hearing in Minnesota, state experts admitted *after source code review* that the “failsafe” in the machine software caused an adequate breath sample to be labeled as deficient when a person blows exorbitantly hard.²⁹ Simply put, these foundational problems with machine reliability would not have been discovered, but for the availability of the source code.

The source code was provided to defense as well.³⁰ An appellant expert testified that the source code was deficient in self-testing functions because the code was very limited and did not account for “power drift” (a change in voltage) [which] could create unstable readings.”³¹ A second expert witness testified that the range of acceptability set by the source code was “too narrow.”³² “In other words, if a test subject’s breath volume was outside the set range, the machine might report a ‘deficient sample’ even in instances in which a sample was not deficient.”³³ After source code review, that same expert testified the machine was accurate only within a 10% margin of error for a .08 concentration.³⁴ In addition, he testified about a statistical analysis study showed a 9-3/8% margin of error for a 0.08 alcohol concentration.³⁵

Other states are performing individualized reviews as well. The New Jersey Supreme Court, in 2006, adopted a massive 52-page missive about the particular machinations of the “Alcotest” Breathalyzer that uses a specific blood/breath ratio.³⁶ After thousands of review hours and source-code testing, the court

Foundational problems with machine reliability would not have been discovered, but for the availability of the source code.

²⁷ See *id.*

²⁸ *Id.*

²⁹ *Id.* at 532.

³⁰ *In re Source Code Evidentiary Hearings in Implied Consent Matters*, 816 N.W.2d 525 (Minn. 2012).

³¹ *Id.*

³² *Id.* (citing Rod G. Gullberg, *Breath Alcohol Measurement Variability Associated with Different Instrumentation and Protocols*, 131 Forensic Sci. Int'l 30 (2003)).

³³ *State v. Chun*, 194 N.J. 54 (N.J. 2006).

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determined there was sufficient evidence to support the continued use of that particular machine because the ratio used by the source code language “tends to underestimate the actual BAC in the vast majority of persons tested.”³⁷ In other words, the source code errors favored the defendant in the use of that particular machine. The Court recognized that certain source code variations existed and determined a small number of individuals may be “disadvantaged” by the device, but went on to lift the statewide stay on prosecutions of DUI’s because enough evidence supported continued utilization.³⁸ In this way, the court made very public the errors the machine could create under certain circumstances, but did not throw out the complete use of a particular machine.

Simply put, no state court has rejected, wholesale, the use of specific machines, but many courts are shining the light on particular instances where source code could impact a specific accused. Many jurisdictions are beginning to recognize the value of these evidentiary hearings to ensure the reliability of specific machines with specific source codes in their jurisdictions. The military has yet to follow suit.

MILITARY COURTS—PRESERVE THE ISSUE

An opportunity exists in federal court to challenge the reliability of source code data on various machine-

generated data, and by inference, to receive that source code data as part of discovery. Our military jurisdictions are not bound by the Uniform Law, and while state-to-state discovery limitations hamper local level attorneys in the defense of these state-level crimes, military attorneys face no similar limitation. Military jurisdictions have a unique opening to diligently protect foundational requirements of admissibility, specifically that testing devices are working properly at the time of the testing.

To preserve the issue, military defense counsel should protect the record from the outset and request source code. Defense counsel should make sure to request the following:³⁹



TRAINING DOCUMENTS

Any documents related to the training given to any government personnel involved in conducting [TYPE OF MACHINE] exam, or any other sort of forensic examination or test in this case.

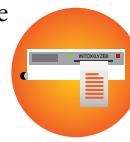
The defense is not seeking any person’s entire training record—only records concerning the performance of the relevant examination or test. These records may or may not be maintained locally—the defense requests that Trial Counsel retrieve them wherever they may be.



INSTRUCTIONS

Any Operating/Instruction Manuals or other documents relating to the [TYPE OF MACHINE] exams that were administered in this case.

This request includes, but is not limited to, any Air Force Instruction or regulation, [LOCAL JURISDICTION] or Security Forces guidance, locally-created Operating Instruction, Manufacturer’s manuals or other guidance documents, Certification standards, or other materials related to the maintenance and conduct of the relevant exams or tests created by the Air Force or [LOCAL JURISDICTION].



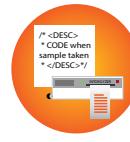
MACHINE GENERATED DOCUMENTS

An exact copy of any paper generated by any [TYPE OF MACHINE] relevant to this case.



LAST 365 DAYS

Copies of any documentation in the past 365 days related to maintaining, inspecting, repairing, or calibrating any [TYPE OF MACHINE] used in this case.



USED SOURCE CODE

A complete copy of the source code (programming language) of the [TYPE OF MACHINE] machine used in this case as that coding stood

³⁷ *Id.* at 96.

³⁸ *Id.*

³⁹ This is not an all-inclusive discovery list for a case. See the end of the article for more examples.

Defense counsel should make an expert request in the field of source code and programming review.

when the machine was used on [ACCUSED's] sample on [DATE].



ORIGINAL SOURCE CODE

A complete copy of the source code factory-installed on [TYPE OF MACHINE] by the manufacturer at the time that the [TYPE OF MACHINE] in this case was manufactured.



CURRENT SOURCE CODE

A complete copy of the source code factory-installed on [TYPE OF MACHINE] manufactured today.



PATCHES/UPGRADES SOURCE CODE

A complete copy of the source code for any patches or software upgrades that have been published by the manufacturer of the [TYPE OF MACHINE] since the [TYPE OF MACHINE] in this case was manufactured.



PATCHES/UPGRADES DOCUMENTATION

A complete copy of any explanatory documentation that accompanied any patch or software upgrade described above.

Second, defense counsel should make an expert request in the field of source code and programming review. That request should state the following:

(a) The [TYPE OF MACHINE] is manufactured by [MACHINE MANUFACTURER]. The [TYPE OF MACHINE] is regulated by software installed and periodically upgraded/patched by the manufacturer. The proper operation of the machine, and therefore the reliability of its reported [TYPE OF MACHINE] results, is directly dependent upon the proper coding of the machine's software. In order for the results to be admissible in court, the government must prove that the machine was in proper working order. The defense is entitled to receive the [TYPE OF MACHINE] source code and have it evaluated to ensure that it was governing the machine in such a way as to render reliable results on [DATE OF ALLEGED OFFENSE]. In order to make that determination, the defense will require an expert consultant who has a detailed understanding of the applicable programming language for the [TYPE OF MACHINE], and how the coding controls the machine's function. The expert will also need to be able

to understand the applicable patches/updates that have been issued by the machine's manufacturer and explain to counsel what deficiencies those measures were intended to address.

(b) I personally have no knowledge of software programming or any familiarity of the particular software installed on the [TYPE OF MACHINE]. Without expert consultant assistance, [ACCUSED] would be denied the opportunity to challenge the reliability of key evidence against him. Therefore, as a matter of military due process, [ACCUSED] is entitled to that expert consultant assistance. Specifically, this request meets the requirements of *U.S. v. Ford*, 51 MJ 445, 455 (C.A.A.F. 1999). The sufficiency of the source code directly bears on whether the primary evidence in this case can be relied upon, thus the expert assistance is needed. Further, I am completely incapable of gathering and presenting evidence regarding the programming code's reliability on my own. Only a person with specialized training and experience can look at computer programming code and understand what functions each entry performs for the machine as a whole. Trying to read the

code myself would be akin to trying to read a language I have never before seen. Therefore, it is clear that an expert could be of assistance in answering the question of the source code's sufficiency, and that defense counsel is unable to gather that evidence without expert assistance.

MILITARY COURTS—CHALLENGE THE EVIDENCE

While some convening authorities are more open to providing experts than others, the true heart of the strategy lies on the discovery request itself. The most important documents retrievable in discovery are the manuals and guidance governing the set-up, installation, maintenance, and use of the machine in question. Machine manufacturers, in an attempt to obfuscate financial responsibility for misuse, often describe in great detail the manner in which a user must properly set-up and perform functioning tests. Machine operators rarely use the machines correctly, but without a source code review, counsel is stuck in a world of "weight" when the code itself could lead to a challenge of admissibility.

Once defense counsel are able to demonstrate that a maintenance expert is necessary using manuals and guidance as a foundation, defense counsel may use that expert to form a basis for a source-code expert.

Often the maintenance expert can lead counsel to the nuisances and inefficiencies of that particular type of machine, but cannot describe the inner workings of how the machine

makes the decisions. If the convening authority approves the source-code expert prior to retrieving the source code, defense and government both are better suited to argue for an evidentiary proceeding or a subpoena to compel production.

Many jurisdictions are beginning to recognize the value of evidentiary hearings to ensure the reliability of specific machines with specific source codes in their jurisdictions.

If the convening authority does not provide the machine source code or a source-code expert, defense counsel has an opportunity based on state-level precedent, to request an evidentiary hearing on the reliability of the machine. Such requests can be made as a precursor to a motion to compel. An evidentiary hearing will give defense the ability to dig deep into the machine processes, as well as create a basis for a required source-code expert. State-level precedent, combined with other instances of machine misuse or malfunction at the local law enforcement level, will form a good basis to hold an evidentiary hearing on a particular machine.

At the end of the day, an evidentiary hearing may not result in the test being thrown out as a matter of law. However, any hearing will most likely

result in evidence to assist defense in questioning the reliability of the machine and creating reasonable doubt in the mind of the finder of fact. If all is denied, defense counsel has appropriately preserved the issue for appeal.

CONCLUSION

Whether military judges hold evidentiary hearings on source code data, at least to the level at which other state supreme courts have pursued the issue, is yet to be seen. But, many jurisdictions are beginning to recognize the value of evidentiary hearings to ensure the reliability of specific machines with specific source codes in their jurisdictions. To preserve such issue on appeal, the local military defense community should file the appropriate discovery requests, expert requests, motions to compel, and have prepared evidentiary hearings and objections to evidence preserved for the record. Performing these steps each and every time is the only way to challenge our federal jurisdiction to act where state-level jurisdictions are hamstrung by the Uniform Law, and to force evidentiary hearings that ensure machine-generated data is reliable enough to be admissible. R

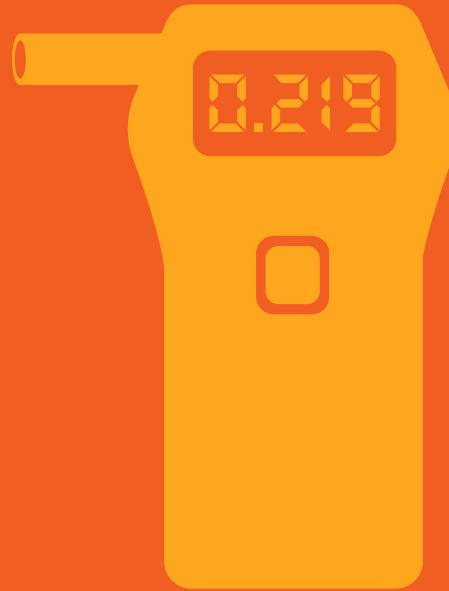


Captain Matt Tusing, USAF

(B.S., Indiana University-Indianapolis; J.D., Indiana University-Indianapolis) is the Area Defense Counsel of Offutt Air Force Base, Nebraska.

In Breathalyzer cases, defense should specifically ask for additional discovery, such as:

- **NAMES**
 - Breath analyzer operator's name
 - Breath analyzer maintainer's name
 - Breath analyzer inspector's name
 - Names of any police officers, officials, jail employees, medical personnel, lay person in the company of the Accused within one hour after his arrest who would have been in a position to observe his gait, hear his speech, see his mode of dress, or generally observe his action during that time
- **DATES**
 - Operator's original certification date
 - Maintainer's original certification date
 - Dates of all simulator tests or in-service training received by the operator since the last certification
 - Date of the machine's original certification
 - Date of the machine's latest certification
 - Dates of the last inspection, service, and check for accuracy
- **TESTING**
 - Repair records
 - Whether the machine has been tested for RFI and name of testor
 - Testing dates
 - Circumstances under which the testing was done
- **MACHINE DETAILS**
 - Serial number of the machine used
 - Proof of certification
 - Location of the machine
 - RFI sources to which the machine was subjected and the distance of each source to the machine
- **PROCEDURES**
 - Names of all persons who can testify that they observed the Accused for the statutory time prior to his or her breath test
 - Whether during this time the Accused ingested any alcoholic beverages or other fluids, or ate, smoked, or vomited
 - Number of times the Accused blew into the breath analyzer
 - Time device used to determine the time of the test
 - Procedure used to inform the Accused of his implied consent rights
 - Whether or not the Accused indicated he understood those rights
 - Name of the officer or person who informed the Accused of those rights
 - Copy of all written matters relevant to any "DUI" enforcement program or "officer awareness" of DUI enforcement priorities of the law enforcement agency responsible for the Accused's arrest, etc.





Six Weeks In Colombia

A Paralegal's Perspective

BY TECHNICAL SERGEANT AMED POVEDA

It is not often that a paralegal can go to another country, train with its armed forces, and serve as an ambassador to that nation....

Language Enabled Airmen Program (LEAP)

MORE

Embassy of Colombia

MORE

Colombian Culture

MORE

It is not often that a paralegal can go to another country, train with its armed forces, and serve as an ambassador to that nation, representing not only the United States Air Force but also the United States of America. I have always wanted a part in protecting U.S. interests and building partnerships via the U.S. military in Latin America. Since I was born in Costa Rica, lived for three years in Venezuela, and spent a good part of my formative years traveling the region, I figured that my cultural knowledge of the area would be useful one day. In May 2015, I learned that I was one of only three technical sergeants in the entire U.S. Air Force selected to attend the inaugural class for the Inter-American Non-Commissioned Officer Academy (INCOA) to be held in Bogotá, Colombia. As part of the Language

Enabled Airmen Program (LEAP), I was able to apply for this unique opportunity. The challenging INCOA course is given to Latin American Armed Forces by the Inter-American Air Forces Academy (IAAFA). [IAAFA](#) is located at Joint Base San Antonio, Texas. It was established in 1943 with the purpose of providing aviation training and professional military education (PME) to Latin American armed forces in order to build and enable partner nation capacity that supports global security and stability.¹ IAAFA instructors administer and teach the INCOA curriculum. The curriculum at INCOA is the same taught at the U.S. Air Force Non-Commissioned Officer Academy with one exception: INCOA's

¹INTER-AMERICAN AIR FORCES ACADEMY, <http://www.37trw.af.mil/units/inter-americanairforcesacademy/> (last visited December 1, 2015).

curriculum has a stronger focus on inter-Americanism. Our class was comprised of military members from the U.S. Air Force and Colombian Air Force, Army, Navy, and Marines. Our instructor core was formed not only by U.S. Air Force personnel but also by a captain and a sergeant major from the Salvadorian Air Force, and a major from the Brazilian Air Force.

Going to Colombia was the most rewarding trip I have been on since I enlisted in the Air Force, on both a personal and professional level. On a personal level, the friendships that my classmates and I forged will certainly last a lifetime. But beyond that on the professional stage, I learned what it was like to build a team across cultures. There are several stages that a group of individuals must go through to get to a point where they are fully functioning as a team. Our group dynamic was such that we began operating as a team in a very short time. But that success was not guaranteed. Besides the 100% Spanish curriculum, one of the major challenges of this course was presented by cultural dissidence. As Americans, the other U.S. Air Force non-commissioned officers (NCOs) and I were expected to take on a leadership role in bridging cultural differences in the class to form a highly functional team and successfully complete the course. Fortunately, from the beginning all students demonstrated patience and understanding in looking past cultural differences to achieve one common goal: graduation.

CULTURE SHOCK

I did not think the “culture shock” was going to be as big as it was. After all, I grew up traveling Latin America and my parents lived in Colombia for two years as missionaries. I thought I knew what to expect as I was probably more educated about that area of the world than most. I was wrong. It is incredible how many ideas we carry simply from what we have previously seen or heard. Without a doubt, our past experiences are important; however, they are not the final authority. One particular thing that we were informed about was that Colombians do not like the fact that their nation’s notoriety comes from **Pablo Escobar**, the guerilla group known as the Revolutionary Armed Forces of Colombia (FARC), and cocaine. To a Colombian a comment such as “Oh you are from Colombia? I bet you have to be careful down there with all the cocaine that’s trafficked and kidnappings that happen” can be offensive. They know that narcoterrorism and organized crime has greatly affected their country, but for the average Colombian, his country is more than the bad fame it has garnished itself within the past two decades. It would be like every time someone finds out that you are from the United States they ask you about meth labs and the crime in New York City. The fact that the Colombian government has been very effective in keeping guerilla groups from operating in major cities is not acknowledged nearly enough. Although unfortunately organized crime has once again picked back up in Colombia. I anticipate that this

will be Colombia’s next challenge as they pursue peace in their nation. Without counting the ongoing terrorist attacks, we are fortunate here in the United States that we have not fought a war on our soil in a very long time. For Colombia the war is on its own soil and it has been that way for a number of years. It was humbling to listen to the fact that the majority of our Colombian classmates had extensive combat experience fighting the guerillas in “la selva” (the jungle) and in “el monte” (the mountains). The sense of patriotism and willingness to do anything for their nation that our Colombian friends reflected was incredible. Listening to their experiences was certainly a highlight. Fortunately, even though Colombians live in a country where turmoil seems to be more constant than in other nations, they are very kind and generous by nature. They made us feel at home at all points during our stay. It also seemed that wherever I turned to speak to someone, everyone was extremely polite. I observed that for Colombians, manners are of maximum importance.

A LITTLE HISTORY

Historically, the partnership between Colombia and the United States has been very strong. Arguably, Colombia is our strongest ally in Latin America. In 1810, the United States was one of the first nations to recognize Colombia’s independence from Spain.² During the Korean War, Colombia sent soldiers to fight along-

²*A History of Partnership*, EMBASSY OF COLOMBIA, <http://www.colombiaemb.org/Partnership> (last visited December 1, 2015).

side our troops. Colombian soldiers proved themselves when they held off a brutal Chinese attack at the Battle of Old Baldy.³ However, the most well-known partnership between the United States and Colombia was during the drug-trafficking wars of the 1980s and the 1990s. And, beginning in the year 2000, these nations “launched Plan Colombia, an ambitious, bipartisan and bilateral cooperation program aimed at fighting drug trafficking and promoting alternatives to drug cultivation and production.”⁴ Most recently, the United States and Colombia have engaged in a “High-Level Strategic Security Dialogue” (HLSSD). The HLSSD allows both nations to “discuss new and innovative ways to counter threats like transnational organized crime, terrorism and, drug trafficking while continuing to strengthen our bilateral ties.”⁵ These partnership landmarks are only the high visibility points in our great partnership with Colombia. Every year the Department of Defense (DoD) carries out numerous training events and joint exercises with our South American ally with INCOA being just one of the many events held with our vital partner.

NEED FOR PROFESSIONALISM

The course began with a lesson and deep discussion on the need for professionalism within the armed forces. The class quickly recognized that the

need for professionalism was paramount. We tied a lack of professionalism to unit ineffectiveness and a drag on the ability to operate as competent NCOs. For the Americans, the lesson was a reminder to never let go of our Core Values and to maintain zero tolerance for unprofessional conduct. To our Colombian counterparts, the way we spoke of, and handled, issues such as sexual assault, professionalism in the work environment, corrective discipline, and legal procedures, to name a few, was a foreign concept. It was humbling to hear day-in and day-out that our hosts wanted to be just like us in these areas. We took care to remind our Colombian classmates that these traits took time and effort to hone; we did not achieve them overnight. We explained that it has taken the proverbial blood, sweat, and tears to become the Air Force we are today. I am extremely proud to say that we are our nation’s most lethal asset and the world’s leading air superiority contender with unparalleled air supremacy. But we did not become those things by simply standing by and putting up with the waste that rots and erodes good order and discipline. This concept brings to mind that the in the JAG Corps we are essentially the gatekeepers of justice. It is imperative to always maintain this fresh in our minds and put it into practice in our personal lives. Why? Because who we are outside of work has an impact on whom we are at work and how effective we are. Just ask yourself one question: “Who am I when no one is looking?”

³ Under one Banner: The United Nations Command in Korea, McARTHUR MEMORIAL, <http://www.macarthurmemorial.org/DocumentCenter/View/522>.

⁴ EMBASSY OF COLOMBIA, *supra* note 2.

⁵ *Id.*

SENSITIVE TOPICS

As we continued with our lessons we began to discuss sensitive topics such as sexual assault and sexual harassment. Immediately, the need for a better system within the Colombian units became the main point of the conversation. I chose to share my experiences in this area; however, it had to be stressed that the process in which these cases are handled is not the root problem. When you acknowledge there is a problem in your organization you are taking the first step of a possibly arduous journey. But you must immediately seek out the root of the problem. When sexual assault, sexual harassment, or any other types of serious issues are prevalent in an organization, it is often because certain behaviors have been condoned for long periods of time. For example, when inappropriate comments, photos, etc., are considered acceptable conduct then a unit’s morale and good order and discipline will begin to fade. This will happen whether or not people choose to acknowledge it. As JAGs and paralegals, we understand the dark side of a LAISSEZ-FAIRE attitude towards inappropriate conduct because we are consistently involved in the prosecution of these types of cases at the base level. Upon the conclusion of our discussion, it was fulfilling to see relief in our classmates’ faces when we told them that we also deal with these issues in our Air Force. Notwithstanding, we are blessed to be further in the fight than they are.

As we continued along in lessons and discussions regarding legal issues,

I had the honor to boast about the mission that the Air Force Legal Operations Agency is accomplishing via programs such as the Area Defense Counsels and the Special Victims' Counsels. Resources such as these are unheard of in Colombia. Hopefully, the U.S. Air Force can someday help establish such programs in the Colombian military. It is my strong conviction that the Colombian military cannot reach its full potential unless a firm and solid foundation of true professionalism is established at its core with solid prosecutorial and advocacy systems to strengthen and compliment that core. It is often difficult to overcome a cancer such as sexual misconduct when that cancer is a cultural problem. In 2012, Amnesty International issued a report on sexual violence in Columbia, where it concluded:

Survivors of human rights abuses face numerous obstacles when seeking justice. These include the authorities' historical lack of political will; lack of security for victims and for those involved in legal proceedings; and the role [or lack thereof] of the military justice system. Bureaucratic inefficiencies, underfunding and infiltration by illegal armed groups and organized crime also impede the ability of the civilian justice system to deliver justice. Such obstacles have a disproportionate impact on survivors of sexual violence.⁶

⁶ Amnesty International, *Colombia: Hidden From Justice, Impunity for Conflict-Related Sexual Violence,*

Interestingly, this paragraph above portrays the same frustration expressed by my fellow students when it came to the resolution of issues involving sexual misconduct.

MAINTAINING OUR CUSTOMS AND COURTESIES

As we pressed along in the course, we took the opportunity to learn from one another's experiences. One of the lessons reinforced for me at INCOA was that of never forsaking our military bearing or our customs and courtesies. This was not because the instructors taught it rather because we were able to remember the connection—and even witness the connection—between a lack of military customs and poor performance. We must always bear in mind that we are members of the military first; attorneys and paralegals second. As much as we would like to put our careers before our military profession, we simply cannot. Our Nation will always call on us to defend it in armed conflicts. No one has ever litigated their way out of a firefight. Further, part of what distinguishes us as a military organization is the constant practice of our customs and courtesies. When we salute, stand up when speaking to a higher-ranking member, wear our uniform properly, or appropriately address others, we are enforcing a discipline and a lifestyle not seen outside military circles. It is imperative not to treat this subject like a bag of trail mix; taking out what we like and leaving out what

We must always bear in mind that we are members of the military first; attorneys and paralegals second.

MORE **Amnesty International Report on Colombia**

MORE **Profiles: Colombia's Armed Groups**

MORE **FACT SHEET: Peace Colombia**

A lack of professionalism takes away all credibility from us as leaders.

we do not like, meaning we choose to follow some rules but not all. Such cracks in a unit's professionalism can and will blur the lines of professional and ethical behavior.

More importantly, a lack of professionalism takes away all credibility from us as leaders. For example, if I know that I have to wear my cover outside and take it off inside but consistently fail to do so, I have zero ground to stand on when I correct someone else for the same thing. When it comes to our customs and courtesies, a lackadaisical attitude will eventually reflect in the work that we do. That attitude will have a negative impact on our work. This lackadaisical attitude is the dangerous pitfall we must to avoid. In the legal realm this is evident in the form of poor legal reviews, botched court-martial documents, and other products that reflect our foul attitude and poor performance. In order to guard ourselves against apathetic attitudes and behaviors, we should think of what motivates us. As I like to say, "think of what makes you want to smash out some work." Professionalism is defined by Webster's dictionary as, "the conduct, aims, or qualities that characterize or mark a profession or a professional person."⁷ Let us never

waiver the positive traits and qualities that make us who we are as Airmen.

When it came to the subject of professional and ethical behavior, it was an honor to be part of the team that everyone admired. For the most part, the Colombian Air Force is a carbon copy of the U.S. Air Force. From the way they run air base defense to aircraft maintenance, the Colombian Air Force operates nearly the same as us in those areas. However, in Colombia cultural hurdles have made it a challenge for professional and ethical practices to become 100% the everyday norm. I was excited to provide additional examples of mission success due to appropriate behaviors to our South American allies. I believe that with a little help, willingness to change, and proper training, the sky will be the limit for Colombia's Air Force.

INTERESTING FACTS FROM THE TRIP

The following is a list of some interesting facts from the Colombian military that I noted. These facts range from legal issues to personnel matters. Some of these made me appreciate the way we do business. I also took some of their customs as learning points.

1. As previously stated, the Colombian Air Force is a carbon copy of the U.S. Air Force. When it comes to the operational realm, La Fuerza Aérea Colombiana (Colombian Air Force) runs business much like we do. In areas ranging from air base defense to medicine, our Colombian allies have been trained by U.S. Air Force personnel at nearly every facet of their operational and support functions.
2. Members have to pay to voluntarily enter into the Colombian Air Force. Whether they want to enter as an officer or an enlisted member they have to pay a hefty initial fee to become a service member.
3. Enlisted members are promoted solely based on time in service. This is something that even Colombian service members believe could be done better. Many of them would like to see a faster way to promote the individuals who deserve to be promoted.
4. The concept of an annual progress report that mirrors our EPR/OPR system is still in its infancy stages. The progress report is a notion that was introduced approximately a year or so ago.

⁷ Professionalism, MERRIAM-WEBSTER DICTIONARY, Professionalism, <http://www.merriam-webster.com/dictionary/professionalism> (last visited December 15, 2015).

5. The Colombian Military values military customs and courtesies. Every Friday morning all the units on base fall in formation outside on the streets in front of their respective work-centers to be briefed by officers and senior enlisted leaders. Regardless of workload, all work-centers are present during formation. This includes the base commander, tenant units, and sister services. This brought back memories of “the days of roll call.” Even though that was not that long ago, it is a custom that has faded away over time.
6. Enlisted and officer duties are extremely divided. This causes friction when it comes time to accomplishing the mission. One of the things that distinguished INCOA from regular NCOA is that we had the pleasure of working hand in hand with the Inter-American Squadron Officer School (ISOS). In the Colombian military, officers and enlisted would like to work together better than they are now. The joint exercises with ISOS definitely helped us demonstrate to our Colombian counterparts the benefits of a healthy professional relationship between officer and enlisted personnel.
7. There is zero confidentiality between mental health providers, chaplains, and military members. This came to us as a big shock. However, approximately three of the nineteen

Colombian students in our class raised the serious concern with instances when chaplains and psychologists failed to maintain confidentiality in cases which were of a sensitive nature.

A BITTERSWEET GOODBYE

As I boarded my airplane in Bogotá to come home, I remembered our graduation. We had formed an exceptional bond with our classmates. Military camaraderie and brotherhood had transcended cultural and language barriers. More importantly, I left satisfied because we had accomplished our mission. However, I felt that there was always room for more professional military education as well as more in-depth training and discussion regarding emerging legal issues. Traveling to Colombia was by far the most rewarding trip of my career. It was very satisfying to learn from our Colombian brothers and sisters. I am extremely grateful for the opportunity to sit in as a student. But I am even more grateful to have been entrusted to represent not only the U.S. Air Force but also the United States of America. Even though I went as a student, it was an honor to showcase our legal processes and link the results to the impact the JAG Corps is having on the world stage. I am certain that we achieved the goal for which the course was established: to help improve regional stability and security in Colombia and in Latin America. By giving our Colombian counterparts the tools to become even better professionals and more efficient NCOs, I am certain the lethality of the Colombian Air Force has been

enhanced. It is no surprise that Colombia is our biggest ally in Latin America. President John F. Kennedy stated the following in his inaugural address on January 20 1962; “To our sister republics south of our border, we offer a special pledge—to convert our good words into good deeds—in a new alliance for progress...”⁸ I am proud of being part of this alliance for progress. I look forward to being a part of what the JAG Corps, the U.S. Air Force, and Colombia will continue to do in Latin America. **R**

⁸ *Alliance for Progress (Alianza para el Progreso)*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM, <http://www.jfklibrary.org/JFK/JFK-in-History/Alliance-for-Progress.aspx> (last visited December 16, 2015)



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MASTERING THE MECHANICS OF CIVIL JURY TRIALS

A STRATEGIC GUIDE OUTLINING THE ANATOMY OF A TRIAL

BY TYLER G. DRAA, ESQUIRE, DORIS CHENG, ESQUIRE, MAUREEN HARRINGTON, ESQUIRE, AND THE HONORABLE FRANKLIN E. BONDONNO

REVIEWED BY MR. THOMAS G. BECKER

When my son was a defendant in personal injury litigation about 16 years ago, his lawyer—actually, the insurance company's lawyer—prepared him for the process as follows: "Look, we're going to do a Kabuki dance for a few months, and then we're going to settle for sixty-K." The lawyer's prediction was spot on. About ten years ago, my wife was the plaintiff in a personal injury case with similar predictions from her attorney (although for a much smaller amount); he was also on target. A few years before that, we were visiting my wife's family and I saw one of my law school classmates in a television ad promising that, if you would only hire him for your personal injury case, he would force the insurance company to cut a fat check and—I swear this is an exact

quote—"You won't have to go to court, *I guarantee it!*" Really? You can guarantee a good settlement without the possibility of going to court? Maybe my old buddy meant to say, "*I won't go to court, I guarantee it.*"

CIVIL LITIGATION IN AMERICA, OR THE LACK THEREOF

The reality of civil litigation in America is that the Seventh Amendment right to trial by jury in civil cases has suffered an erosion of landslide proportions. Attorneys calling themselves "trial lawyers" are in visual media everywhere you look. They are in television ads, on billboards,¹ and even on the sides of

¹At a recent lecture I gave to allied nations' officers attending an International Officers School course, one of them asked me, "Who is this [name of personal injury lawyer prominent in Alabama and the Florida panhandle]? My God, his picture is everywhere!"

This is a book about preparing for and conducting civil jury trials. It is not about “civil litigation.”

the Zamboni machine at pro hockey games.² However, few of them are trying cases to juries, largely by their own choice.³ The costs of litigation, time involved, uncertainty of either winning a contingent fee (for plaintiffs’ attorneys) or avoiding a big verdict (for defense attorneys), and the proliferation of ADR options—Alternative Dispute Resolution or, as some are calling it, Appropriate Dispute Resolution—combine to remove the incentive for lawyers to go to a jury trial in civil cases. Unless, of course, a jury trial is the only way your client, plaintiff or defendant, can get a shot at achieving that elusive and highly subjective notion of “justice.”⁴ For those cases, there are a dwindling number of lawyers still out there that specialize in civil jury trials. It’s our good fortune that three of them, with the help of a judicial veteran of the civil bench, have collaborated on *Mastering the Mechanics of Civil Jury Trials: A Strategic Guide Outlining the Anatomy of a Trial*, an entertaining guide for newer lawyers who have a yen to join this ever-more-exclusive club.

BRIDGING THE MENTORING GAP

This compact volume (only 177 pages without appendixes, organized into 25 short chapters) is the principal work of Tyler Draa, a retired U.S. Naval Reserve judge advocate and prominent civil defense lawyer in San Jose, California. With contributions from Doris Cheng (San Francisco plaintiff’s attorney and a regular visitor to the JAG School for advocacy teacher training programs), Maureen Harrington (one of Draa’s law partners), and The Honorable Franklin E. Bondanno of the Superior Court of California, County of Santa Clara, Draa has produced a user-friendly guide that should be required reading for any attorney contemplating dipping a toe into the civil jury trial waters. As a bonus, it’s also chock full of solid advice for any trial lawyer, even if his or her practice is limited to criminal cases whether by courts-martial or in federal or state courtrooms.

There are two things about *Mastering the Mechanics of Civil Jury Trials* that immediately jumped out at me as different from most of the litigation treatises out there. First, this is a book about preparing for and conducting civil jury trials. It is not about “civil litigation.” There isn’t a single word about discovery or pretrial motion practice, except in the context of the trial. As the authors make clear in the book’s introduction, Draa and his colleagues intend this book to

bridge the mentoring gap that has resulted from the drastic reduction in civil jury trials. Fewer trials mean fewer experienced trial lawyers to help new lawyers learn the ropes, a gap that continues to widen with each generation. The second thing about the book that stood out to me is made clear by the book’s subtitle: *A Strategic Guide Outlining the Anatomy of a Trial*. This is a metaphorical 30,000-foot view of the civil trial. There isn’t a lot of detailed “how to” tactics. Draa and company have chosen instead to send bigger, and more important, messages to the budding trial lawyer.

This strategic approach emphasizes a global understanding of the civil trial process. It is in stark contrast to other trial “manuals,” such as one on criminal trials I reviewed in an earlier edition of *The Reporter*.⁵ Such *opera magna*, while very thorough and detailed on everything that may come up in trials, can be unwieldy. For those ambitious manuals, I have recommended practitioners first skim the contents, familiarizing themselves with the topics and organization, and then return for more detailed reading as needed or when time permits. For *Mastering the Mechanics of Civil Jury Trials*, I recommend the opposite—sit down and read it straight through, which may be done in just a few

² I’m not making this up. I have a photo taken by my daughter at a Washington Capitals game.

³ See, e.g., Joe Forward, *The Disappearing Jury Trial: Implications for the Justice System and Lawyers*, INSIDE TRACK (Wisc. State Bar, Madison, Wisc.), Mar. 19, 2014, available at <http://www.wisbar.org/newspublications/insidetrack/pages/article.aspx?volume=6&issue=6&articleid=11435>.

⁴ As it says on a small plaque I have on my desk, “Too often we want justice—just for us.”

⁵ Tom Becker, *How to Try a Murder Case: Pretrial and Trial Guidelines for Prosecution and Defense*, 38 THE REPORTER 61 (2d ed. 2011) (book review).

sittings. This is such an easy read with so many valuable insights, you won't want to set it aside for very long until you've finished.

Foremost among those insights is the authors' emphasis on civility and ethical treatment of everyone involved in the trial. There are sharp condemnations of such venerable shyster tactics as the "speaking objection" (i.e., the objection is just an excuse to argue to the jury, or worse, give a witness clues about the preferred answer) and using rebuttal to sandbag opposing counsel with new evidence. One chapter is entitled "Opposing Counsel: Colleague First, Adversary Second." This should go without saying, but it needs to be said and I'm glad the authors say it. A cornerstone of any trial (civil, criminal, military, or civilian) is civility among opposing counsel. If you don't have it, the trial becomes a cacophony of tit-for-tat reprisals over trivial slights and the clients' interests get drowned out by the noise. This emphasis on civility often separates real trial lawyers, like Draa, Cheng, and Harrington (and, no doubt, Judge Bondanno in his life before the bench) from many of the swaggering TV "litigators" that equate effectiveness with red-meat rhetoric that demeans their opponents and, as a result, the entire process. In another chapter, "Establish Your Courtroom Footing," the authors emphasize the importance of getting to know, and treating with courtesy and respect, all court administration personnel. I learned this in 1975 as a first-year law student and part-time clerk at a firm in Topeka, Kansas. I'm amazed

at how many attorneys I've seen abuse the folks that run their courtroom tech support, control access to the judge or, for a lawyer running up the courthouse steps, may or may not delay a few seconds past five o'clock before locking the clerk's office door. Civility is the trial lawyer's safety net—if you're a jerk, you're working without one so you'd better be good. And no one is that good. In *Mastering the Mechanics of Civil Jury Trials*, Draa et al. stress the importance of ethics and civility at every opportunity.

CIVIL LITIGATION AND THE AIR FORCE ATTORNEY

While *Mastering the Mechanics of Civil Jury Trials* is, of course, directed at civil trial practitioners, Air Force attorneys should not dismiss it as inapplicable to our practice. Some Air Force attorneys, both military and civilian, do get to represent the United States in civil trials from time to time. Even if your practice is limited to courts-martial, this book has solid advice about presenting cases to juries, whether they're called that or answer instead to "Members of the Court." A few pet peeves of mine, in any trial, are overuse of PowerPoint and other complicated demonstrative aids, redirect and recross examinations as yo-yo contests that don't add anything to an attorney's case, and objecting or cross-examining just because you can without regard to your theory of the case. Draa and company address these, plus a lot more, giving the newly minted trial lawyer the lessons learned from decades of courtroom mistakes they've seen and made themselves.

The one weakness of *Mastering the Mechanics of Civil Jury Trials*, to which the authors freely admit, is its California emphasis. All the authors practice or preside in California so the rules and case law they cite are Golden State centric. The authors, however, are assembling appendixes (partially completed when I read this advance review copy) listing federal and state authorities on peremptory challenge of judges—I didn't know you could do that!—use of animations and other simulations as demonstrative evidence, and other common issues in civil trials. While it's likely the majority of purchasers of *Mastering the Mechanics of Civil Jury Trials* will be California lawyers, the completed appendices will broaden the book's appeal.

In this book, however, the specific legal issues that might come up during a trial sit second chair to common sense and sound trial fundamentals. These values aren't limited to any single jurisdiction. Last time I checked, anyway. **R**



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A TECH-HEAVY WARNING OF THE FUTURE

A Review of *Ghost Fleet*

BY P.W. SINGER AND AUGUST COLE
REVIEWED BY MR. BRYAN J. GOLDBERG



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It is perhaps human nature that the longer the world goes without high-intensity great power conflict, the greater the public fascination with a future, hypothetical World War III. Following the end of the Vietnam War, this genre of “near-future” science fiction blossomed in American film and literature—reaching its apex in the late 1980s, with various novels and films speculating on a future conflict between NATO and the Warsaw Pact. Who can forget that classic moment in *Red Dawn* where a young American guerilla goes to his death screaming “Wolverines!” while emptying an AK-47 magazine at a Soviet Mi-24 Hind helicopter

gunship?¹ However, the end of the Cold War and emergence of America’s role as the sole-remaining superpower saw a significant decline of this genre. In the post-Cold War era, few novels have managed to paint a realistic picture of World War III with the same force, technical detail, and encyclopedic knowledge as Tom Clancy’s *Red Storm Rising*, Harold Coyle’s *Team Yankee*, Ralph Peters’ *Red Army*, and Sir John Hackett’s *The Third World War*. Although not quite reaching the breadth, depth, or relatable characters of those ‘80s Word War III classics, renowned futurists Dr. P.W. Singer

¹RED DAWN. (United Artists 1984).



and August Cole's *Ghost Fleet* delivers a remarkable vision of the future, a message on the double-edged sword of technology, and a warning against hubris and complacency in the U.S. military establishment.

Before reading further, please be forewarned that this article contains some minor plot spoilers from *Ghost Fleet*.

PREMISE

The novel's premise is that an economically and militarily growing China (allied with Russia) will eventually seek its "place in the sun" by challenging America's naval, economic, and diplomatic hegemony in the Pacific Rim. Constant parallels are drawn with Japan's geo-strategic situation in the early 1940s—a rising industrial, resource-starved East Asian power seeks to defeat a perceived weak, decadent, and overconfident Western opponent through a lightning naval and air campaign. Also similar to the opening of World War II, China exploits emerging methods of warfare and technological

vulnerabilities to achieve stunning success. Just as Japan's past use of aircraft carrier-based torpedo and dive bombers at Pearl Harbor demonstrated the obsolescence of the U.S. Navy's (USN) battleship fleet, China's use of novel weapons and tactics gives them an overwhelming initial advantage. For example, Chinese space-superiority technology, ballistic anti-ship missiles, and crippling cyber-attacks sink many USN ships, catch many aircraft on their runways, and blind American reconnaissance assets. Following the initial Chinese victories, the rest of the novel focuses primarily on the American naval counterattack and

Stock Photos © iStock.com/Pinkypills and Andrey Prokhorov

Ghost Fleet provides a unique and unsettling look into the future of technology and warfare.

the American insurgency against the Chinese occupation of Hawaii, along with supporting space and cyberspace operations.

STRENGTHS

The book's greatest strengths lie in a creative format and extremely well-informed vision of the future. With all manner of equipment and weapons systems, the authors take currently experimental or developing technologies and add 20 years of advancement and maturation. Never do the authors create outlandish technologies whole cloth without a basis in the present. For example, the authors base their fictional DF-21E "Stonefish" anti-ship ballistic missile on the existing Chinese DF-21D "Carrier Killer" missile. Rather than include more pages going into exhaustive technical and capability details of the weapon (a la Tom Clancy), the authors simply provide a current Air Force Magazine article in the endnotes discussing the present threat of the DF-21D and its future development potential. The example showcases the novel's unique format. Over 130 endnotes are interspersed throughout the novel; the reader can choose between diving into greater technical and background detail in the endnote articles or simply continuing on with the story. As a side note, the e-book version of *Ghost Fleet* makes excellent use of iPad, Kindles, and other e-reader devices' embedded hyperlinks feature.

The book also succeeds in emphasizing the long-term importance of

technological development, without presenting it as a panacea to all military challenges. Fitting with the authors' expertise with cyberwar, future technology, and privatized military companies, the book delves into all manner of future military technologies, but ends with neither side being able to win the war on the strength of technology alone. The controversial F-35 fares poorly in initial engagements due to the element of surprise and the overall Chinese cyberspace dominance. In addition, even eventually successful technologies (like the resurrected American railgun) are plagued with problems. Other ultimately successful tactics and technology, such as an American hacker horde and the operation against the weaponized Chinese space station, originate outside the U.S. defense establishment: the group "Anonymous" and a Sir Richard Branson-like "privateer," respectively.

Beyond presenting a thoughtful discussion of future technology and weapons systems, the book also succeeds in highlighting the long-term consequences of current fiscal and diplomatic decisions. The novel presumes that global economic woes, significant budget crises, and fiscal restrictions will constrain the size and development of the U.S. military, while allowing the Chinese "Directorate" (a fictional future post-Communist, nationalist Chinese government) military to make great strides. Although not addressed directly, the authors also indicated the importance of the existing U.S.

diplomatic structure in Europe and the Pacific. For example, in the wake of initial Chinese victories, all Pacific nations except Australia, and all NATO countries except Britain and Poland abandon the United States. Such a disaster presumes that crucial multilateral and bilateral relationships were allowed to atrophy and decay to the point that they could not withstand a major test.

WEAKNESSES

The primary problems with the book revolve around its very limited page count. The book covers so much time so quickly that it almost reads as a summary of a more thorough depiction of World War III. Those looking for the depth and breadth of *Red Storm Rising* will be disappointed. The authors never attempt to capture a more complete picture of the war, opting instead to provide a very limited series of snapshots. Crucial events—Polish “Lend-Lease” aid to the U.S. for example—receive a few paltry sentences to explain the presence of a diesel submarine. Although the format keeps the plot moving and the story accessible, it leaves the reader thirsty for more detail. In addition, weeks and months pass between chapters, with sometimes only scant detail of what passed in-between. Furthermore, disproportionate amount of character interaction exists only to provide exposition of major events, which gradually detracts from the realism. In contrast to the significant gaps of information, an inordinate amount of pages are spent on the tension-filled

relationship between Captain Jamie Simmons and his estranged father, who becomes his Chief Petty Officer. These characters come across a bit too sappy and artificial, without the sincerity or realism of similar naval epic protagonists, such as Herman Wouk’s Captain Victor Henry in *The Winds of War* and *War and Remembrance*, or Clancy’s clever sub-hunter, Commander Edward Morris, in *Red Storm Rising*. Such issues likely stem from the limited page count; the authors are forced to discard subtle and careful character development in favor of jamming the maximum amount of plot-driving action into each page.

In addition to the storyline gaps and often tedious drama, the book leaves a great deal of unanswered questions. For example, the authors never address the fate of Taiwan—which, under most scenarios, would feature largely in Chinese strategic objectives. Neither is any mention made of the Spratly Islands except an oblique, brief note that the South China oil fields were “disappointments.” In addition, with the exception of some limited joint air and naval operations, the book does not discuss Russian strategic goals or operations during the conflict. Other areas such as Africa, the Middle East, and Indian subcontinent are almost completely omitted. Even under the book’s own logic—that rare-earth materials become more valuable than oil in the wake of widely-used alternative energy—maintaining access to African resources would be a crucial Chinese strategic goal.

Finally, the novel does not address the most obvious American military strategy to combat China in a global conflict—strategic interdiction. Even in a future where access to Middle Eastern oil did not loom large in economic and strategic considerations, it is hard to believe that at least some part of the war would not involve an American campaign against China’s maritime commerce—especially in the Indian Ocean.

In addition to the
storyline gaps and often
tedious drama, the book
leaves a great deal of
unanswered questions.

CONCLUSION

In conclusion, *Ghost Fleet* provides a unique and unsettling look into the future of technology and warfare. Furthermore, August Cole and P.W. Singer provide an educational examination of existing equipment, developments, and international politics via their extensive endnote references. The book’s strengths closely follow Dr. Singer and Mr. Cole’s incredible expertise in the realm of future military technology. Although the book has its flaws, it has vastly succeeded in its primary goal—to generate thoughtful public discussion about the future of American national security. The book’s greatest drawback is, in essence, a compliment—the book left this reader wanting more. R

TEAM — OF — TEAMS

BY GENERAL STANLEY MCCHRISTAL ET AL., REVIEWED BY MAJOR M. ARTHUR VAUGHN II

INTRODUCTION

*Most of us would consider it unwise to do something before we are fully prepared; before the equipment is optimally in place and our workers well trained. But as the reader will discover, that's the situation we found ourselves in. And in researching this book, we discovered that that is the situation leaders and organizations far from any battlefield face every day.*¹

Team of Teams, written by U.S. Army retired General Stanley McChrystal, makes the compelling case that for an organization to succeed in today's fast moving and technologically based environment, it's imperative to be able to adapt to complexity and continual change rather than focusing on efficiency.² McChrystal, probably more known to the general public from the infamous *Rolling Stone* article³ which led to his resignation as Commander of U.S. Forces in Afghanistan,⁴ takes the reader on

a fascinating ride documenting the struggle of the Joint Special Operations Task Force (TF) fighting a modern day enemy that was "tough, flexible, and resilient...."⁵ *Team of Teams* chronicles the transformation of the TF as they battled Al Qaeda in Iraq (AQI) and searched for its leader, Abu Musab al Zarqawi (Zarqawi).⁶ Although the book highlights many of the experiences the TF encountered in its fight, it is not meant to be a "war story."⁷ Rather, it conveys the writers' belief that when leading an organization, efficiency is not as

² Efficiency remains important, but the ability to adapt to complexity and continual change has become an imperative. *Id.* at 5

³ Michael Hastings, *The Runaway General*, ROLLING STONE (June 22, 2010), [HTTP://WWW.ROLLINGSTONE.COM/POLITICS/NEWS/THE-RUNAWAY-GENERAL-20100622](http://WWW.ROLLINGSTONE.COM/POLITICS/NEWS/THE-RUNAWAY-GENERAL-20100622).

⁴ Obama Relieves McChrystal over Critical Remarks,

Names Petraeus as Replacement, FOX NEWS (JUNE 23, 2010), <HTTP://WWW.FOXNEWS.COM/POLITICS/2010/06/23/MCCHRISTAL-AFGHANISTAN-FATE/>.

⁵ McCHRISTAL, *supra* NOTE 1, AT 4.

⁶ Zarqawi was a Jordanian born extremist who led the Sunni extremists in Iraq. *Id.* at 2.

⁷ *Id.* at 5.

¹ STANLEY MCCHRISTAL ET AL., TEAM OF TEAMS: NEW RULES OF ENGAGEMENT FOR A COMPLEX WORLD (2015).

important as the ability to adapt to complexity and continual change.⁸ To that end, McChrystal's stated goal is not to provide a checklist or "how-to" manual,⁹ but rather to document the journey from the problems he and his team faced in Iraq to their solutions.¹⁰ By using many different sources and examples from hospitals, businesses, nongovernmental organizations, and historical research, McChrystal provides the reader with concrete, real world examples to support his assertions.¹¹ This book is written for the strategic leader who leads a large organization with lots of moving parts. Regardless, *Team of Teams* has principles that even a leader of a small business, unit, or team can employ to maximize the potential of his or her organization.

SUMMARY

The book begins by explaining the problem the TF faced in Iraq. Although small, AQI was more agile and dispersed than the TF.¹² To most, this seems counter-intuitive. By all objective accounts, the TF was better trained and more qualified than AQI.¹³ In spite of this, the TF was

losing the battle.¹⁴ In essence, AQI functioned as a dispersed network as opposed to a top-down command structure.¹⁵ McChrystal knew the TF would have to transform itself if they had any hope of winning the fight.¹⁶ The TF moved from a traditional top-down command structure to a team of teams.¹⁷ To effect the transformation, the team employed two principles the author calls "shared consciousness"¹⁸ and "empowered execution."¹⁹ By forming the TF into a team of teams, they operated seventeen times faster.²⁰ Astonishingly, they accomplished this and eliminated Zarqawi²¹ with minimal increases in personnel and funding.²²

Efficiency is not as important as the ability to adapt to complexity and continual change.

COMPLICATED V. COMPLEX

To explain why the TF had difficulty countering AQI, McChrystal uses history to understand military and civilian organizational structures. These organizations are structured and managed to confront predictable things that may be complicated, but not complex.²³ AQI and the world

¹⁴ *Id.* at 27 ("Understanding that environment would be the key to understanding why we were failing and AQI was winning.").

¹⁵ *Id.* at 32 ("In place of a traditional hierarchy, it took the form of a dispersed network that proved devastatingly effective against our objectively more qualified force.").

¹⁶ *Id.* ("To win we had to change.").

¹⁷ *Id.* at 128.

¹⁸ *Id.* at 153.

¹⁹ *Id.* at 214.

²⁰ *Id.* at 218 ("We tried to do the same things tighter and faster under the constraints of the old system, we managed to increase the number of raids per month from ten to eighteen; by 2006, under the new system, this figure skyrocketed to three hundred.").

²¹ *Id.* at 241.

²² *Id.* at 218.

²³ MCCHRISTAL, *supra* NOTE 1, AT 59-69.

we live and operate in today is different than what we are accustomed to because they are complex,²⁴ but not in the sense we commonly use the term.²⁵ Complex things “have a diverse array of connected elements that interact frequently.”²⁶ They are unpredictable.²⁷ However, complicated things are different than complex things in that complicated things may have many moving parts, but are ultimately predictable.²⁸ These are the types of problems and issues we are accustomed to confronting, those we can predict.²⁹ Because of social media and technological advances, information travels farther and faster than ever before.³⁰ The interconnectedness of people and things can cause situations to grow and change at speeds making it nearly impossible to know the end result,³¹ as evidenced by the Arab Spring uprising.³² AQI was no different; they were unpredictable. To be successful, the TF needed to change to combat this new, complex enemy.³³

²⁴ *Id.* at 59.

²⁵ *Id.* at 56.

²⁶ *Id.*

²⁷ *Id.* at 57.

²⁸ *Id.*

²⁹ *Id.* at 69-70.

³⁰ *Id.* at 62-70.

³¹ *Id.* at 59 (“The reality is that small things in a complex system may have no effect or a massive one, and it is virtually *impossible* to know which will turn out to be the case.”).

³² *Id.* at 53-54.

³³ *Id.* at 20 (“Almost everything we did ran against the grain of military tradition and of general organizational practice. We abandoned many of the precepts that had helped establish our efficacy in the twentieth century, because the twenty-first century is a different game with different rules.”).

SHARED CONSCIOUSNESS

SEAL teams have a unique ability to “coalesce into a single organism.”³⁴ McChrystal needed to figure out how to create this same sense of teamwork and adaptability across the entire TF of thousands of people.³⁵ For this to happen, he believed that organizations needed to have a “state of emergent, adaptive organizational intelligence,” something he and his team call “shared consciousness.”³⁶

Shared consciousness, within an organization, is comprised of “extreme, participatory transparency” and a “strong internal connectivity across teams.”³⁷ Like members of a small SEAL team, participatory transparency allowed the TF to have a holistic awareness that typically existed only within small teams.³⁸ McChrystal accomplished this by creating a generalized awareness of what each member contributed to the team as a whole.³⁹ He found that by requiring each person to have a baseline understanding of what was entailed in the job of each team member, they were able to understand holistically where each member fit into the team and how they contributed to the fight.⁴⁰ Interestingly, Apple

³⁴ *Id.* at 94.

³⁵ *Id.* at 114 (“Our challenge, now that we understood it, was to find a way to reshape our structure to create teamlike oneness across an organization of thousands.”).

³⁶ *Id.* at 153.

³⁷ *Id.* at 197.

³⁸ This awareness also worked to create not only an understanding of what everyone contributed to the fight, but to a sense of common purpose as well. *Id.*

³⁹ MCCRISTAL, *supra* NOTE 1, AT 161.

⁴⁰ *Id.* at 169 (“The initial imagery analyst would get the

recently did something very similar by allowing their hardware and software teams to collaborate early on in the development process.⁴¹ On top of general awareness, McChrystal issued standing guidance within the TF to “[share] information until you’re afraid it’s illegal.”⁴² Instead of the old “need to know” belief about information, sharing everything they could allowed the TF to act smarter and learn, simultaneously.⁴³ Additionally, this helped counter the belief that competition within an organization is healthy and began to foster cooperation.⁴⁴

Secondly, he completely reorganized their Joint Operations Center (JOC).⁴⁵ He pulled everyone on the team, from intelligence analysts to operators, together in one large bunker.⁴⁶ This architectural setup

visceral satisfaction that her work had saved lives and that her continued effort was impacting operations directly, not just generating a paper storm in D.C.”).

⁴¹ Jessica E. Lessin, *Apple Design Team Get Cozier*, WALL ST. J. (MAR. 23, 2013, 4:39 PM), <HTTP://BLOGS.WSJ.COM/DIGITS/2013/03/21/APPLE-DESIGN-TEAMS-GET-COZIER/>.

⁴² MCCRISTAL, *supra* NOTE 1, AT 164.

⁴³ *Id.* at 169.

⁴⁴ The same competitiveness that can exist between companies is not healthy within companies. Shown the whole process, units within an organization between to cooperate with each other instead of compete with each other. *Id.* at 174.

⁴⁵ *Id.* at 160-61.

⁴⁶ *Id.* at 161 (“A wall of screens at the front of the space showed live updates of ongoing operations: video feeds of small skirmishes or ongoing raids, JOC log entries recording the outcomes of successful captures or “friendly” casualties, maps of our gains and losses in different regions of the country. Immediately in front of the screens, we arranged portable tables in a large U-shaped configuration where the Task Force commander and key leaders all sat, able to see and communicate with one another easily as they worked. Radiating outward were banks of long tables and chairs for the myriad functions of intelligence, air and artillery support, medical evacuation, liaison officers, and all the other capabilities germane to our operations.”).

allowed anyone, regardless of their position on the team, to know instantly what was going on and how their decisions supported the overall mission.⁴⁷ It gave members, no matter their role, the visceral satisfaction that their work directly contributed to the operations.⁴⁸

As great as they were, transparency and a holistic understanding of the operations was not enough.⁴⁹ Success required the smaller teams within the TF to have strong internal connectivity between not only each other within their smaller teams, but between members of the other teams in the larger organization.⁵⁰ Trust between team members was one of the most important things to the cohesiveness and effectiveness of a SEAL team.⁵¹ Even so, replicating this same trust between teams themselves would have to be accomplished much differently.⁵² McChrystal took individual members from one team and embedded them into another for approximately six months.⁵³ In its most basic form, this consisted of a

member from one smaller team being embedded into a different team.⁵⁴ For example, taking a SEAL team member and embedding him within an Army Ranger unit. In spite of warnings from others that this was a bad idea,⁵⁵ McChrystal knew that even if one person from a smaller team were embedded in a different team, once they returned to their original team, there would be a certain level of trust created between each of those teams.⁵⁶ Now, instead of a member working with an unknown from another unit, they would “envision a friendly face rather than a competitive rival.”⁵⁷ This, McChrystal surmised, was the key to creating a team of teams.⁵⁸

EMPOWERED EXECUTION

After achieving shared consciousness within the TF, keeping pace with their enemy required “decentralized control.”⁵⁹ Shared consciousness had changed their beliefs about sharing information and responsibilities, while decentralized control had changed their beliefs about power and leadership.⁶⁰ They called this next step “empowered execution.”

Typically, leaders believe that if they can see what is happening within their organization, they should control it.... Interestingly, McChrystal's response was exactly the opposite.

⁴⁷ *Id.* (“Anyone in the room—regardless of their position in the org charts' silos and tiers—could glance up at the screens and know instantly about major factors affecting our mission at that moment.”).

⁴⁸ *Id.* at 169.

⁴⁹ *Id.* at 171.

⁵⁰ *Id.* at 197.

⁵¹ MCCHRISTAL, *supra* NOTE 1, AT 97-98.

⁵² *Id.* at 128 (“But on a team of teams, every *individual* does not have to have a relationship with every other individual; instead, the relationships between constituent *teams* need to resemble those between individuals on a given team: we needed the SEALs to trust Army Special Forces, and for them to trust the CIA, and for them all to be bound by a sense of common purpose: winning the war, rather than outperforming the other unit. And that could be effectively accomplished through representation.”).

⁵³ *Id.* at 176.

⁵⁴ *Id.*

⁵⁵ *Id.* (“Predictably, initial resistance was intense. ‘Our teams train in entirely different ways,’ I was informed. I was told that I needed to understand that the tight bonds inside assault teams came from working with trusted comrades over years—to insert an outsider is an unwise and unfair risk to operators already performing the most difficult missions.”).

⁵⁶ *Id.* at 129.

⁵⁷ *Id.*

⁵⁸ *Id.* at 128-29.

⁵⁹ *Id.* at 198.

⁶⁰ *Id.*

Typically, leaders believe that if they can see what is happening within their organization, they should control it.⁶¹ After all, “knowledge is power.”⁶² Interestingly, McChrystal’s response was exactly the opposite.⁶³ By allowing his subordinates to make decisions, he empowered those around him because now they were charged with actually making a decision rather than asking permission.⁶⁴ By taking a more “hands-off” approach, not only did the speed of decision making increase, but the quality of decisions made increased as well.⁶⁵ Resisting the desire to micromanage, and instead creating an environment that fosters a shared awareness and an empowerment to make decisions is something McChrystal describes as “leading like a gardener.”⁶⁶ A gardener doesn’t actually grow the crops, but rather creates an environment where plants can grow on their own.⁶⁷ The same can be said about leading an organization. Instead of making every decision possible and micromanaging because you can, a leader should nurture the “structure, process, and culture”

⁶¹ *Id.* at 208.

⁶² *Id.* at 167.

⁶³ *Id.* at 214.

⁶⁴ *Id.* (“It is one thing to look at a situation and make a recommendation to a senior leader about whether or not to authorize a strike. Psychologically, it is an entirely different experience to be charged with *making* that decision.”).

⁶⁵ *Id.* (“Decisions came more quickly, critical in a fight where speed was essential to capturing enemies and preventing attacks. More important, and more surprising, we found that, even as speed increased and we pushed authority further down, the *quality* of decisions actually went up.”).

⁶⁶ *Id.* at 225.

⁶⁷ *Id.*

of the organization.⁶⁸ If you’ve read other books on leadership, this may sound familiar to you. Although not referenced by McChrystal, this theory bears a striking resemblance to the Servant Leadership theory wherein a leader attempts to “grow” their subordinates to become more effective and help them perform at their highest possible level.⁶⁹

**In *Team of Teams*,
McChrystal provides a
real world example of
when, done correctly
and with a sense of
purpose, change is a
good thing.**

CONCLUSION

Even though this book is meant to provide an insightful means to transform a large organization to succeed in the 21st century, it is a fascinating read for leaders and subordinates alike. Many principles can be used by even a leader of a small group of people. For instance, creating a general awareness of a small unit’s purpose can foster “buy-in” from all members of the team making them more efficient. Additionally, creating a culture of empowered execution can not only increase the speed at which the unit can make decisions, but

⁶⁸ *Id.*

⁶⁹ KENT M. KEITH, GREENLEAF CTR. FOR SERVANT LEADERSHIP, CHANGING THE WORLD THROUGH SERVANT LEADERSHIP 1-5 (2011), [HTTP://TOSERVEFIRST.COM/PDFS/CHANGING-THE-WORLD-THROUGH-SERVANT-LEADERSHIP-2011.PDF](http://TOSERVEFIRST.COM/PDFS/CHANGING-THE-WORLD-THROUGH-SERVANT-LEADERSHIP-2011.PDF).

can potentially increase the quality of the decisions made. However, as McChrystal points out in his book, it is unwise to simply delegate decisions to subordinate members without creating a holistic understanding of the overall goal.⁷⁰

Through McChrystal’s eyes, the reader witnesses a combat tested general morph and change his management and leadership style under fire. McChrystal did not change his leadership style to simply place his mark on an organization. In *Team of Teams*, McChrystal provides a real world example of when, done correctly and with a sense of purpose, change is a good thing. **R**

⁷⁰ MCCHRISTAL, *supra* NOTE 1, AT 245.



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WHERE? IN THE WORLD



Where is Major Israel King?

Photo courtesy of Lieutenant Colonel Frank Coppersmith

If you have a unique, funny, or poignant photograph of your travels in the JAG Corps for inclusion in “Where In The World?” please email the editors at AFLOA.AFJAGS@us.af.mil.

Answer: Burg Eltz (Eltz Castle), nestled in the hills above the Moselle River between Koblenz and Trier, Germany. It was built in the 12th Century by the Eltz Family, who still own the castle today. This is one of only two castles on the left bank of the Rhine which have never been destroyed.

An F-16 Fighting Falcon pilot from Shaw Air Force Base, S.C., walks down the flightline on Tyndall AFB, Fla., Dec. 10, 2015, during exercise Checkered Flag. (U.S. Air Force photo/Senior Airman Sergio A. Gamboa)

