1986

The Law and the Little Big Horn: What Beginning Law Students Can Learn from General Custer

Samuel W. Calhoun
Washington and Lee University School of Law, calhouns@wlu.edu

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlufac
Part of the Legal Education Commons

Recommended Citation
Most law students have heard of "Custer's Last Stand," in which General George A. Custer and a sizeable portion of the United States Seventh Cavalry were killed by the Sioux Indians and their allies. Probably fewer students know that since his death Custer has been the focal point of a continuing controversy. Custer's mission, set out in a written order, was to assist in forcing hostile Sioux, believed to be camped in the valley of the Little Big Horn River, to move to the Sioux reservation. Some have argued that Custer willfully disregarded the written instructions concerning his approach to the valley, while others have said that the order gave Custer sufficient discretion to justify his actions. Evan S. Connell, in his recent bestseller about Custer, writes that "it is a matter of interpretation ... it depends, like the blind man describing an elephant, on what part of the creature you touch." General Alfred Terry, Custer's commanding officer,
had no doubt: "[t]wo months after the battle [he] showed a Chicago Times correspondent a copy of the orders he had given Custer and stated that if Custer had lived he would have been court-martialed for disobedience." 8

One of the skills most important to success in law school is the ability to read critically. The premise of this paper is that immersion in the Custer controversy can help beginning law students develop this skill. Recently, as part of our first-year orientation program, I conducted an exercise to test this premise. In the hope that it may be of interest, I present in Part I the historical data that served as the raw material for the exercise. Part II then analyzes the order to Custer, describing the ways in which I tried to direct student discussion. I conclude in Part III with my thoughts as to the value of the exercise as a law-teaching device.

Part I: Raw Material

The starting point is the order to Custer, which follows in full. I have numbered the sentences to simplify discussion:

Camp at the Mouth of Rosebud River June 22, 1876
Lt. Col. Custer, 7th Cavalry:

Colonel:
(1) The Brigadier-General commanding directs that as soon as your regiment can be made ready for the march, you proceed up the Rosebud in pursuit of the Indians whose trail was discovered by Major Reno a few days ago. (2) It is, of course, impossible to give you any definite instructions in regard to this movement, and were it not impossible to do so, the Department commander places too much confidence in your zeal, energy and ability to wish to impose upon you precise orders which might hamper your action when nearly in contact with the enemy.

(3) He will, however, indicate to you his own views of what your action should be, and he desires that you should conform to them unless you shall see sufficient reason for departing from them. (4) He thinks that you should proceed up the Rosebud until you ascertain definitely the direction in which the trail above spoken of leads. (5) Should it be found, as it appears to be almost certain that it will be found, to turn toward the Little Big Horn he thinks that you should still proceed southward, perhaps as far as the headwaters of the Tongue, and then turn toward the Little Big Horn, feeling constantly however, to your left so as to preclude the possibility of the escape of the Indians to the south or southeast by passing around your left flank.

(6) The column of Col. Gibbon is now in motion for the mouth of the Big Horn. (7) As soon as it reaches that point it will cross the Yellowstone and move up at least as far as the forks of the Big and Little Big Horn. (8) Of course its future movements must be controlled by circumstances as they may arise; but it is hoped that the Indians, if upon the Little Big Horn, may be so nearly enclosed by the two columns that their escape will be impossible.

(9) The Department Commander desires that on your way up the Rosebud you should thoroughly examine the upper part of Tullocks Creek, and that you should endeavor to send a scout through to Col. Gibbon's column with information of the result of your examination. (10) The lower part of this creek will be examined by a detachment from Col. Gibbon's command.

3. Id. For a fascinating fictional account of this trial, see Douglas C. Jones, The Court-Martial of George Armstrong Custer (New York, 1977) (The verdict? Not guilty, but based not so much on the merits as on the refusal of the Court, several of whose members had commanded the Union Army in major defeats during the Civil War, to convict a losing commanding officer).
Learning from General Custer

(11) The supply steamer will be pushed up the Big Horn as far as the forks of the river are found to be navigable for that space, and the Department Commander, who will accompany the column of Col. Gibbon, desires you to report to him there not later than the expiration of the time for which your troops are rationed, unless in the meantime you receive further orders.

Respectfully,

E.W. Smith
Capt. 18th Infantry,
Acting Asst. Adjt. Genl. 4

Since it would be impossible for students to discuss whether Custer disobeyed without knowing contextual facts, I also provided a brief written chronology of events. To make sure that the students focused sufficiently on the facts, I began the exercise by reviewing the chronology paragraph by paragraph. I also supplemented the chronology at various points, after telling the students that they should listen carefully, since some of the additional information could be relevant to the issue of Custer's possible disobedience. The written chronology and supplemental data follow, with the chronology in twelve numbered paragraphs and the supplemental information inserted in lettered paragraphs at the appropriate spots.

(1) Late December, 1875: The Commissioner of Indian Affairs issued an ultimatum to the Sioux to report to their reservations by January 31, 1876, or be classified as hostile subject to military action. 5

(a) As background for the ultimatum, I began by mentioning the Fort Laramie Treaty of 1868, which ended the Red Cloud War. 6 Under the Treaty, roughly all of present South Dakota west of the Missouri River was set aside as the Great Sioux Reservation. 7 The treaty also reserved the Powder River country in parts of present Wyoming and Montana as "'unceded Indian territory' on which no white might trespass without Indian consent." 8

Events soon were to disrupt the precarious peace based on the Treaty. In the summer of 1873, surveyors for the Northern Pacific Railroad pushed their way up the Yellowstone River Valley. While it is debatable whether this

4. Colonel W. A. Graham, The Story of the Little Big Horn 114-17 (1941). See the Appendix for a map of the area referred to in the order. The map was reproduced from Edward S. & Evelyn S. Luce, Custer Battlefield 7, Historical Handbook Series No. 1 (National Park Service, 1952). The order both internally and when compared to another official document from General Terry (see text accompanying note 40, infra,) contains several discrepancies in capitalization and spelling. I have given the text exactly as it appears in the cited source.

5. Utley, supra note 1, at 14.

6. The Red Cloud War was fought by the Sioux chief of that name to cut off travel along the Bozeman Trail to the gold fields in Montana Territory. It was a smashing success—for the Sioux. Its most famous episode was the Fetterman Massacre of December 21, 1866, in which a force of 80 led by Brevet-Colonel William J. Fetterman was annihilated. For a thorough account of these events, see Dee Brown, Fort Phil Kearney (Lincoln, Neb., 1971).


8. Id.
projected route violated the 1868 Treaty, the Sioux reacted violently: there were two sharp engagements with Custer's Seventh Cavalry, part of the expedition assigned to guard the surveyors. Although Custer performed his guard functions well, his relations with Colonel David Stanley, the expedition commander, were not particularly good. At one point, Stanley had Custer placed under arrest for heading off with the Seventh Cavalry without permission.

The Sioux were further angered in 1874 when Custer led an exploratory expedition through the Black Hills, an area plainly within the Great Sioux Reservation. Accompanying the expedition were two miners, who confirmed the rumors of gold. News of this discovery predictably led to a gold rush. The government reacted "like a twin-headed dinosaur," attempting "to stop miners from entering the Black Hills while at the same time following up Custer's report" with the 1875 Jenny geological expedition.

If the Sioux had cause to be unhappy, so did the whites. Many Sioux, rather than moving onto the Great Sioux Reservation, had remained in the unceded Indian territory. Here they were the source of considerable trouble: "They raided all around the perimeter of the unceded territory. They terrorized friendly tribes. They contested the advance of the Northern Pacific Railroad. They disrupted the management of the reservation Indians while obtaining recruits, supplies, and munitions at the agencies for these hostile activities." As a last straw, they also interfered with Government efforts to purchase the Black Hills, which had become even more desirable after the Jenny expedition corroborated Custer's report of gold. "[M]ounting frustration" from these difficulties led to the ultimatum referred to in paragraph (1) of the written chronology. There was no "measurable response" to the ultimatum.

(2) February 1, 1876: The Secretary of Interior certified the Sioux as hostile and asked the Secretary of War to take such measures as he thought appropriate.

9. It is unclear whether the unceded Indian territory extended that far north. Id. at 242.
10. Id. at 242-43.
11. Monaghan, supra note 1, at 343. In fairness to Custer, it should be noted that Colonel Stanley apparently was not the most amiable of men. Connell describes him as a "squat, humorless, peevish alcoholic." Connell, supra note 2, at 234. In one example of that apotheosis of detail which characterizes Connell's book, we are told that Stanley was irrationally incensed by Custer's cast iron stove. Id. at 234-35.
13. Connell, supra note 2, at 249.
14. Utley, supra note 7, at 246.
15. Id. at 245-46.
16. Id. at 246-47.
17. Id. at 248.
18. Utley, supra note 1, at 14.
(3) April-May, 1876: A three-pronged expedition was begun against the hostile Sioux.\(^9\)

(b) The southern column of the converging movement, under General Crook, was met by the Indians on the Rosebud on June 17, about twenty miles from the site of Custer's battle on June 25.\(^20\) Although the hard-fought battle was a stalemate, the result was that Crook turned back and was effectively out of the campaign. Terry, Custer, and Gibbon were unaware of this development.\(^21\)

The eastern column also warrants a word of elaboration. As originally planned, Custer was to have been the field commander of this part of the expedition. Custer, though, had the misfortune to become involved in impeachment proceedings against Secretary of War Belknap. He offended President Grant, who not only removed Custer from command but refused to let him go with the expedition at all.\(^22\) Custer made "frantic efforts" to be reinstated, and "through the kindly intercession of General Terry, the President at the last moment lifted the ban."\(^23\) Custer could go, but only as leader of the Seventh Cavalry; General Terry would command the expedition.\(^24\)

(4) June 10-20, 1876: Major Reno, who accompanied the Terry-Custer column, conducted a scouting expedition which discovered a large Sioux trail heading south up the valley of the Rosebud.\(^25\)

(c) Reno's orders had been to search the valleys of the Powder and Tongue Rivers. Reno, however, abandoned his mission and moved westward to the Rosebud,\(^26\) where he followed the Sioux trail upstream.\(^27\) He reached his farthest southern point on June 17, the same day that Crook was battling the Sioux forty miles away.\(^28\)

(5) June 21, 1876: The overall commander, General Terry, held a conference with Custer and Gibbon. Although there is no contemporary record of what was said at this conference, General Terry later stated (with Gibbon's concurrence) that it was determined that Gibbon would enter the Little Big Horn Valley from the north, while Custer would enter the Valley from the south; the plan was that no action would be precipitated before June 26, the earliest day that Gibbon could reach the Little Big Horn.\(^29\)

19. Id. at 17. The map in the Appendix illustrates this expedition.
20. Luce & Luce, supra note 4, at 6.
21. Ambrose, supra note 1, at 390; Utley, supra note 7, at 255-56.
22. Graham, supra note 4, at 7-9.
23. Id. at 10.
24. Id.
25. Ambrose, supra note 1, at 386-87, 390-91; Utley, supra note 1, at 21.
26. Ambrose, supra note 1, at 386, 390. The explanation of why Reno did this is unclear. See infra note 82.
27. Graham, supra note 4, at 12.
28. Utley, supra note 7, at 256.
29. See infra notes 68-72 and accompanying text.
(6) June 22, 1876: The written order to Custer was issued; the Seventh Cavalry departed at noon with rations for fifteen days.  

(d) That evening, in camp twelve miles up the Rosebud, Custer told his assembled officers “to husband their rations and the strength of the horses and mules as he intended to follow the trail until the Indians were overtaken, even if the trail led the troops to the Indian agencies on the Missouri or in Nebraska.”

(7) June 23, 1876: Custer’s column found the Sioux trail previously discovered by Major Reno.

(8) June 24, 1876: After a march of about thirty miles, Custer’s column camped at dusk. Shortly after 9 p.m., Custer was informed by his scouts that the Sioux trail, which had grown larger and fresher all day, turned abruptly to the right and went westward toward the Little Big Horn Valley. Custer immediately roused his men and began a march along the trail. There was considerable “whistling [and] hallooing” as the men tried to stay together in the pitch darkness. By around 2 a.m., when a halt was called, the command had proceeded approximately ten miles toward the Little Big Horn Valley. Custer’s plan was to rest the men on the 25th and make a dawn attack on the 26th.

(e) The point at which Custer left the Rosebud to turn west was only about eight miles from the site of General Crook’s battle a week earlier.

(9) June 25, 1876, morning: Custer obtained information that his command had been discovered by the Sioux. He decided not to wait until the 26th for an attack, but to find the Sioux village and strike it as soon as possible.

(f) One piece of evidence that the column had been discovered was obtained when some soldiers went back along the trail to recover a box of bread that had fallen from one of the packs during the night march. The soldiers found the box all right, but a small party of Indians was there first. The Indians, upon seeing the soldiers, rode off toward the Little Big Horn Valley. Years later it was learned that these Indians in fact did not reach the Sioux village until after Custer had been killed.

30. Utley, supra note 7, at 257-58.
32. Utley, supra note 1, at 25.
33. Connell, supra note 2, at 268-69; Graham, supra note 4, at 15, 18-19; Utley, supra note 1, at 25.
34. Luce & Luce, supra note 4, at 10. Contra Ambrose, supra note 1, at 394 (sets the distance at eighteen miles).
35. Graham, supra note 4, at 20-22.
36. Id. at 21-22.
37. Connell, supra note 2, at 271. At the time, of course, Custer had no way of knowing this. Besides, there was other evidence that the column’s presence had been communicated to the village. Graham, supra note 4, at 22. The more interesting question is whether the fact that he had been discovered was the real reason for Custer’s attack on the 25th. See infra notes 73-80 and accompanying text.
June 25, 1876, afternoon: Custer and five companies of the Seventh Cavalry were killed.  

June 27, 1876: General Terry sent to General Sheridan a report of the disaster, which referred to the conference of June 21, but made no mention of a plan of cooperative action between Custer and Gibbon.  

July 2, 1876: General Terry sent to General Sheridan a second report of the disaster, marked “Confidential.” It read in part as follows:

I think I owe it to myself to put you more fully in possession of the facts of the late operations. While at the mouth of the Rosebud I submitted my plan to Genl. Gibbon and to General Custer. They approved it heartily. It was that Custer with his whole regiment should move up the Rosebud till he should meet a trail which Reno had discovered a few days before but that he should not follow it directly to the Little Big Horn; that he should send scouts over it and keep his main force further to the south so as to prevent the Indians from slipping in between himself and the mountains. He was also to examine the headwaters of Tullock’s creek as he passed it and send me word of what he found there. A scout was furnished him for the purpose of crossing the country to me. We calculated it would take Gibbon’s column until the twenty-sixth to reach the mouth of the Little Big Horn and that the wide sweep which I had proposed Custer should make would require so much time that Gibbon would be able to cooperate with him in attacking any Indians that might be found on the stream. ... The plan adopted was the only one that promised to bring the Infantry into action and I desired to make sure of things by getting up every available man. ... The movements proposed for Genl. Gibbon’s column were carried out to the letter and had the attack been deferred until it was up I cannot doubt that we should have been successful. ... The proposed route [Custer’s] was not taken but as soon as the trail was struck it was followed. I cannot learn that any examination of Tullock’s creek was made. I do not tell you this to cast any reflection upon Custer. For whatever errors he may have committed he has paid the penalty and you cannot regret his loss more than I do, but I feel that our plan must have been successful had it been carried out, and I desire you to know the facts. ... I send in another dispatch a copy of my written orders to Custer, but these were supplemented by the distinct understanding that Gibbon could not get to the Little Big Horn before the evening of the 26th.

It is noteworthy that Terry’s second message, although intended to be confidential, actually was publicized as the first official news of the disaster. Due to a communications foul-up, the second message was the first to reach Sheridan, who was in Philadelphia attending the Centennial Exposition. Sheridan showed it to Sherman, then in command of the Army, who was also in Philadelphia. Sherman, desiring to rely the message to the Secretary of War at once, entrusted it to a person whom he supposed to be a govern-

---

38. Seven of the Seventh Cavalry’s twelve companies did not go to their deaths with Custer. Shortly after noon on the 25th, Custer divided the Seventh into four parts: five companies (approximately 215 men) for himself, three for Major Marcus Reno, three for Captain Frederick Benteen and one to guard the pack train. Utley, supra note 1, at 28. Although Custer’s decision to divide his command is as controversial as his decision immediately to follow the Sioux trail westward, that particular controversy is beyond the scope of this paper.


40. Id. at 110–14. When this document is compared to Terry’s order to Custer, several discrepancies in capitalization and spelling appear. I have quoted the text exactly as it is given in the cited source.
Terry's confidential message appeared in full in that paper on July 7, 1876.\footnote{Graham, supra note 4, at 110. Connell speculates that Terry's first report may have been delayed because the telegraph operator in Bozeman, Montana Territory, celebrated the Fourth of July too enthusiastically. Connell, supra note 2, at 273.}

Part II: Analysis

If the question is whether Custer disobeyed his orders, the students’ task is to determine what he was ordered to do, whether he carried out those orders, and, if not, whether he was given sufficient discretion to justify his noncompliance. One way to begin this inquiry is to have the students attempt to characterize each of the eleven sentences in the document as either an “order” sentence or a “discretion” sentence. While a few sentences do not fit either category, the exercise is valuable in that it requires students to focus on each sentence. The process should also reveal the difference in wording between the various “order” sentences. Of the five sentences in this category, only sentence one uses the peremptory word “directs.” Sentences nine and eleven use the softer word “desires,”\footnote{Sentence three also contains the word “desires” and thus might be considered an “order” sentence. Since its thrust, however, is to give Custer discretion, I included it in that category.} while sentences four and five use the equally indeterminate word, “thinks.” A good question at this point is the significance of the precatory language—did it convey the same latitude in this military context that it would have in some other setting?\footnote{Connell speculates that Terry's first report may have been delayed because the telegraph operator in Bozeman, Montana Territory, celebrated the Fourth of July too enthusiastically. Connell, supra note 2, at 273.}
Learning from General Custer

Assuming that Terry's use of "desires" and "thinks" did not deprive the order of all compulsion, the next question is whether Custer did what he was told to do. The directive in sentence one was speedily carried out, as was the suggestion in sentence four. The contents of sentence five, however, were disregarded by Custer, in that he immediately turned west to follow the Sioux trail rather than proceeding southward up the Rosebud. Sentence nine likewise was disregarded, as was sentence eleven (although presumably we will accept Custer's excuse for failure to report).

Even if Custer failed to comply with certain aspects of his orders, he cannot rightly be accused of disobedience if he was given discretion broad enough to justify noncompliance. Sentences two and three contain considerable discretionary language, and the heart of the exercise is to determine just how much freedom of action they permitted.

On first impression, sentence two appears to have given Custer carte blanche. Closer examination, however, reveals that its discretion-bestowing power is quite limited. First, when one recalls how recently Custer had been humiliated by President Grant, it can be argued that the language praising entering students are usually anxious to hear "THE LAW"), could impair its effectiveness for the former by bogging the group down in legal issues that the students are not prepared to discuss.

44. Some students may have noticed that the order, although it states internally that it is being given by the Department Commander (Terry), is not signed by General Terry. The explanation lies in the standard military procedure of having written orders issued by a commanding officer's adjutant general, who serves in effect as chief administrative officer.

45. See paragraph 6 of the written chronology, supra. "By noon the column was ready to be reviewed, every man in his saddle, the pack train loaded. Promptness, action, no excuses. Let's go! This was Custer at his best." Monaghan, supra note 1, at 376. As the troopers passed before General Terry and Colonel Gibbon, Custer's "Ree scouts galloped back and forth singing their death songs." Connell, supra note 2, at 259.

46. See paragraphs 7-8 of the written chronology, supra.

47. See paragraph 8 of the written chronology, supra.

48. See paragraph 12 of the written chronology, supra.

49. At least one Custer partisan was not content to rely upon the order's discretionary language in attempting to prove that Terry had given Custer a free hand. The additional evidence was the affidavit, dated January 16, 1878, of Mary Adams, Custer's cook. According to the affidavit, Mrs. Adams overheard a conversation in Custer's tent at the Rosebud River camp in which Terry told Custer: "Use your own judgment and do what you think best if you strike the trail." It has now been established that the affidavit is worthless. When news of the disaster was conveyed to Mrs. Custer at Fort Lincoln on the morning of July 6, the person who first appeared at her door was none other than Mary Adams, who allegedly had been in Custer's tent two weeks earlier. For a full account of the Mary Adams affidavit, see Graham, supra note 43, at 279-82; see also Graham, supra note 4, at 176-77. By the way, also present when Mrs. Custer heard the news was Margaret Calhoun, Custer's sister, the wife of Lieutenant James Calhoun (no relation to the present writer), who died with Custer. It was a particularly bad day for Margaret: she had lost not only her husband, but also three brothers (Custer himself, plus his brothers Tom and Boston) and a nephew (Autie Reed). The Soldiers 216-17 (Boston, Mass., 1973).

50. See supra notes 22-24 and accompanying text.
Custer was chiefly a courtesy to soothe his ruffled feathers. Second, the reason for not imposing "precise orders" was that Custer not be hampered "when nearly in contact with the enemy." A good case can be made that this was not the condition on the night of June 24, when Custer roused his men to follow the Sioux trail. Most probably, the phrase was used in reference to battlefield tactics when a fight was imminent. Finally, sentence two is overridden by sentence three. Beginning sentence three with "He will, however . . .", in effect says "despite what I say in sentence two, you should do what I say in sentence three." Sentence three told Custer that he should conform to General Terry's views unless Custer saw "sufficient reason for departing from them." Whether there was "sufficient reason" thus becomes the dispositive issue.

Probably the best case that a Custer apologist could make would be to stress the order's obvious concern that the Sioux not escape. Although there is no indication that the Sioux were aware of Custer's presence at the time he made his June 24 decision to turn west toward the Little Big Horn, the Sioux trail had grown fresher all that day. Custer may have thought that he was so close behind the westward-moving Sioux that the chance of their escaping to the south or southeast, the order's only explicit reason for telling Custer to keep going southward even after the Sioux trail turned, was extremely remote. Continuing to head south would thus have been pointless; even worse, it might have given the Indians a chance to escape in some other

51. Utley, supra note 7, at 257. Custer in his last letter to his wife included the opening lines of Terry's order, with the comment that he knew how much she appreciated "words of commendation and confidence in [her] dear Bo." Monaghan, supra note 1, at 376.

52. It is true that the Sioux trail had grown "larger and fresher" all that day. Paragraph 8 of the written chronology, supra. The evidence, however, is conclusive that at the time Custer did not even know exactly where the Sioux were. Graham argues that as late as noon on the 25th "no village had been definitely located; no force of Indians had [been] seen; and there neither was nor could have been . . . any definite plan, either of approach or of attack, in Custer's mind." Graham, supra note 4, at 32.

53. See Hughes, supra note 45, at 28-30. But General Edward S. Godfrey, one of Custer's most ardent defenders, argues that the phrase referred "to the immediate time and place of writing the instructions, i.e.—the mouth of the Rosebud." Stewart, supra note 49, at 250 n. 48.

54. Since Custer apologists have been accused of skulduggery (see note 49, supra,) it is only fair to recount a possible incidence of the same by a Custer critic. In 1892, General James S. Brisbin printed Terry's order to Custer in an altered version that would have definitely established Custer's disobedience (Custer was told not to depart from Terry's instructions unless he saw "absolute necessity for doing so"). It has now been established that Brisbin's version of the order was inaccurate. Graham, supra note 43, at 155-56; see also Monaghan, supra note 1, at 408 and unnumbered note.

55. See sentences five and eight of Terry's order to Custer, supra. This concern reflected the belief, common at the time, "that the Sioux would, upon the appearance of the troops, hasten to strike their camp and escape. Nobody entertained the thought that they would stand and fight a pitched battle." Graham, supra note 4, at 16-17. The Sioux's battle with Crook had already shown this assumption to be erroneous, but Terry had no knowledge of this development. See supra note 21 and accompanying text.

56. See paragraph eight of the written chronology, supra.

57. This would be true only if Custer had the Sioux practically in sight. Otherwise, following behind the Indians would have made it easier for them to slip around his left flank.
The problem, of course, is that Terry had anticipated the Sioux turn westward and had told Custer to keep going south regardless. It also must have been anticipated that the fast-moving Seventh Cavalry would gain on the Indians, who Reno's scout had shown to be traveling in large numbers. Custer's immediate turn therefore arguably seems more the result of unwillingness to carry out Terry's desires than justified noncompliance based on conditions not contemplated when the order was issued. This conclusion is virtually compelled by the evidence that Custer's intention not to leave the trail was expressed prior to June 24.

Another barrier to establishing "sufficient reason" for Custer's early westward turn is the way such a move would frustrate the plan for coordination with Gibbon's column. Terry contended after the disaster that another reason that Custer was to have continued farther south before proceeding to

58. See Utley, supra note 1, at 26.
59. See sentence five of Terry's order to Custer, supra.
60. See paragraph 4 of the written chronology, supra. The grass along the Rosebud was "close-cropped for miles around, indicating a huge pony herd." Ambrose, supra note 1, at 394. At points the trail was "more than a mile wide, the earth so furrowed by thousands of travois poles that it resembled a plowed field." Connell, supra note 2, at 267.
61. "Exactly what was found to be true, Terry had anticipated would be found to be true and in that event Custer was left in no doubt what Terry intended he should do, and with no discretion to do otherwise than as ordered. . . ." Hughes, supra note 43, at 27. A possible response for a Custer defender would be to stress that the order called for Custer to conform to Terry's views "unless you [Custer] shall see sufficient reason for departing from them." See sentence 3 of Terry's order to Custer, supra. This individualized wording arguably committed the decision wholly to Custer's personal discretion: as long as he thought his reasons for noncompliance were sufficient, it is immaterial that others might disagree. The rejoinder is that all officers know that their decisions in the field are subject to review against a standard of how similarly-situated professionals would have responded. For those instructors inclined to expound upon the "subjective-objective" distinction present in several substantive law areas, see my advice in the last paragraph of note 43.
62. See note 31 and accompanying text, supra. In addition to Custer's statement to his officers on the evening of June 22, there are two other bits of evidence. First, on the evening of June 21, following the conference with Terry, Custer told his officers that the Seventh would "follow the trail for fifteen days unless we catch them before that time expires." Taunton, supra note 31, at 25. Second, sometime on June 22, presumably before the Seventh marched at noon, Custer filed his last dispatch to the New York Herald (yes, from the field Custer submitted a stream of articles to keep the public informed of his exploits), stating that the plan called for him to take up the trail "and follow the Indians as long and as far as horse flesh and human endurance could carry his command." Id. at 24. Taunton concludes that this evidence that Custer's decision to depart from Terry's instructions was premeditated, reached "before he could have ascertained the situation and invoked the ['sufficient reason'] clause giving him discretion," would have resulted in Custer's conviction had he survived to face courtmartial. Id. at 78. One perceptive student has questioned this conclusion with the argument that Custer's premeditation should not have convicted him if the evidence showed that had Custer delayed his decision to the appropriate time, he would have found sufficient reason for doing what he did. In other words, Custer's intent to depart from Terry's views regardless of the presence or absence of sufficient reason would be immaterial if sufficient reason in fact existed. I am not persuaded. The order permitted noncompliance only if Custer, having "turned his mind" to the question, found sufficient reason not to comply with Terry's views. A failure by Custer before acting to direct his thoughts to this issue would thus constitute disobedience, even if after the fact it could be shown that sufficient reason existed. My colleague Roger Groot has given me a wonderfully apt criminal law analogy for this mental state problem, but in view of the sentiments expressed at the end of note 48, I will not tempt you with it.
the Little Big Horn was that it would take Gibbon's slower-moving column, which was part infantry, until the 26th to reach the Little Big Horn Valley. Custer apologists have three responses to this charge. First, it is doubtful that there was a plan for coordinated effort between Gibbon and Custer. Second, even if such a plan existed, the June 22 order, by failing to mention the significance of June 26, shows that the plan had been superseded. Third, assuming that the plan did survive the order, Custer's June 24 turn westward was consistent with an intent to comply.

Was there a plan for coordination between Custer and Gibbon? It can be argued that Terry's delay in mentioning a plan until his second report of the disaster on July 2 suggests that the idea was an afterthought to exculpate himself. It should be remembered, though, that the first report, which failed to mention the plan, was intended to be made public, whereas the second report was meant to be confidential. This lends credence to the argument of Terry's defenders that the discrepancy in the reports actually resulted from an attempt by Terry to refrain from publicly assigning blame to the fallen Custer. It is also noteworthy that Gibbon, who would not seem to have had any particular reason for blaming Custer, corroborated Terry's account of the existence and content of the plan. Finally, there appears to be agreement among many historians that in fact there was a plan for cooperation between Custer and Gibbon calling for no attack by Custer prior to June 26.

Did the June 22 order supersede the plan calling for Custer to reach the Little Big Horn no earlier than June 26? A good case can be made that if June 26 remained a critical date as of June 22, it would have been explicitly mentioned in the order. Terry arguably should have known that absolute clarity was especially needed when dealing with Custer, who had shown a


64. See Comments by General J. B. Fry on Godfrey's Narrative (1892), reprinted in Graham, supra note 43, at 151, 152.

65. See supra note 41 and accompanying text.

66. Colonel Hughes contends that several of Terry's staff officers protested the exclusion from the first report of "the fact that disobedience had occurred and had caused the miscarriage of a well-considered plan that promised a great success." Hughes, supra note 43, at 18-19.

Terry, however, "would not give to the public the fact that Custer had flagrantly disobeyed, but would rather himself 'bear an imputation hurtful to his military reputation.' " Id. at 19. Hughes also attempts to refute the "afterthought" theory by citing a June 21 letter from Terry to his sisters, which explains his plan and closes with the remark, "'I have considerable hope that this combined movement may justify the expedition.' " Id. at 20.

67. Connell, supra note 2, at 255-56.

68. Id.; Graham, supra note 4, at 12-13; Utley, supra note 7, at 257. There also may be direct evidence from Custer himself that there was such a plan. See note 74 and accompanying text, infra. It should be noted that there is an important distinction between this plan restraining Custer from attacking before June 26, and a plan ordering Custer to attack on June 26. The latter interpretation is inconsistent with sentence eleven of the order, which authorizes Custer to delay his arrival on the Little Big Horn as late as the expiration of the time period for which his troops were rationed (fifteen days: see paragraph 6 of the written chronology, supra). See Stewart, supra note 45, at 250-51.
penchant for unauthorized, independent action.⁶⁹ Even though it perhaps was a mistake to omit June 26 from the June 22 order, its omission does not mean that the date was no longer important. Custer had, after all, been specifically told of its significance only the night before. Moreover, the order did refer to Terry's hope that the Indians, if upon the Little Big Horn, would "be so nearly enclosed by the two columns that their escape [would] be impossible."⁷⁰ No enclosure would have been possible until Gibbon was in a

₆₉. Recall the incident with Colonel Stanley in 1873. See supra note 11 and accompanying text. In addition, twice on the march from Fort Lincoln Terry had "threatened Custer with arrest for pacing ahead." Connell, supra note 2, at 260. See note 83, infra.

₇₀. Sentence eight of Terry's order to Custer, supra.
position to close the northern end of the valley. Finally, as Custer's column moved out at noon on the 22nd, Gibbon called to him, "Now, Custer, don't be greedy, but wait for us." Such a remark would have been nonsense had the plan for cooperative action been abandoned.

Was Custer's June 24 turn westward consistent with an intent to comply with the plan of cooperative action? The chief argument for Custer's intent to comply is his professed intention to rest his men on the 25th and attack at dawn on the 26th. It was only when Custer learned that his column had been discovered by the Sioux that he decided to attack on the 25th. There are several difficulties with this theory. First, dawn of the 26th was earlier than Gibbon's expected arrival in the Little Big Horn Valley, which the July 2 report refers to as the evening of that day. Second, Custer made no effort to communicate his early westward turn to Gibbon, who perhaps could have arrived earlier had he been notified. Third, Custer's announced reason for hurrying the attack seems somewhat suspect. If he was so afraid of discovery by the Sioux, why was so much noise permitted on the June 24 night march? In addition, why were the men allowed to build breakfast fires on June 25? Custer's own scouts saw the smoke from ten miles away.

---

71. See Connell, supra note 2, at 256. The statement thus corroborates the existence of the plan calling for no attack by Custer prior to June 26. See supra note 68 and accompanying text.
72. Ambrose, supra note 1, at 393. Custer's response? " 'No, I will not.' " Id. at 394.
73. A Custer critic would find laughable the suggestion that Custer had ever intended to abide by the plan. Not only did Custer's response to Gibbon's warning suggest as much (see supra note 72 and accompanying text), but there was also an even earlier indication that Custer's intent from the beginning had been to go it alone. On May 8, 1876, within minutes after Custer had been informed by General Terry that he could accompany the expedition, Custer told a fellow officer "that his purpose would be at the first chance in the campaign to 'cut loose from (and make his operations independent of) General Terry during the summer'; that he had 'got away with Stanley and would be able to swing clear of Terry.' " Hughes, supra note 43, at 14-15.
74. Paragraph 8 of the written chronology, supra. Ambrose, in describing the meeting in which Custer communicated this plan to his officers, states that Custer told them "he would rest the command through the day (June 25), then attack at dawn on June 26, the day Gibbon was expected to arrive on the Little Bighorn." Ambrose, supra note 1, at 396. See Utley, supra note 7, at 258. If this means that Custer actually mentioned Gibbon's expected arrival, it is conclusive proof that there was indeed a plan of cooperative action and that Custer knew of it.
75. Paragraph 9 of the written chronology, supra.
76. Paragraph 12 of the written chronology, supra; see Taunton, supra note 31, at 65-66. Gibbon's column in fact reached the Valley shortly after noon on the 26th. Connell, supra note 2, at 1-2.
77. Hughes, supra note 43, at 28. Custer further revealed his lack of interest in cooperating with Gibbon by his failure to examine Tullock's Creek and send him word of the results. Not only had he been explicitly ordered to do this (with no escape clause), but a scout had been furnished for this specific purpose. Sentence 9 of Terry's order to Custer, supra; paragraph 12 of the written chronology, supra. See Hughes, supra note 43, at 30-32.
78. Paragraph 8 of the written chronology, supra. See Connell, supra note 2, at 271.
79. Connell, supra note 2, at 269.
The lack of new information supporting Custer’s early turn westward and the way the turn frustrated the plan of cooperative action strongly suggest that there was no “sufficient reason” for this deviation from Terry’s orders. An argument might be made, however, that Custer had reason to believe, apart from the language of the order, that Terry would not find official fault with his decision immediately to follow the Sioux trail. Only a few days before, Terry had taken no steps to discipline Major Reno, who on his scouting expedition arguably had disobeyed Terry’s instructions in the same way that Custer intended to do. The major problem with this defense is that Custer’s situation on June 24 was entirely different than Reno’s some days earlier. On the 24th, not only was everyone certain that the Sioux were located on the Little Big Horn but a plan had been formulated for attacking them there no earlier than the 26th. Under these circumstances, Custer could...

80. This is my current view of the matter, despite the warning by Graham “that between wilful disobedience of orders and justifiable disregard of instructions there yawns a gulf both wide and deep” and that the “Commander on the scene is entitled to the benefit of every doubt, if there be room for doubt.” Graham, supra note 4, at 178. If my view is correct (and I must say that in the past I have felt differently), the question becomes, why did Custer disobey? This is a subject of endless fascination, and I can only list some of the theories:

(a) Custer and several of his officers wanted to finish with the Sioux quickly so that they could attend the opening of the Philadelphia Centennial Exposition on July 4. Connell, supra note 2, at 272.

(b) Custer was desperate for victory to protect his Army career. “Only a towering public reputation can protect an officer from the sort of Presidential displeasure Custer had provoked. Without some new military accomplishment he was probably finished....” The Soldiers, supra note 49, at 204. See supra notes 22-24 and accompanying text.

(c) Custer wanted to defeat the Sioux by himself because he was jockeying for the Presidential nomination of the Democrats, whose convention was about to open in St. Louis. Ambrose, supra note 1, at 373, 396; Connell, supra note 2, at 272; Mari Sandoz, The Battle of the Little Bighorn 230–31 (1966).

(d) Custer acted from his intense pride in the Seventh Cavalry and his conviction that it alone could whip the Sioux. Connell, supra note 2, at 260; Stewart, supra note 43, at 267–68; Uley, supra note 1, at 26. This characteristic helps explain Custer’s rejection, with the comment that the Seventh “could handle anything,” of the offer of four companies of the Second Cavalry just before his departure up the Rosebud. Connell, supra note 2, at 256–57. See Ambrose, supra note 1, at 391–92; General Edward S. Godfrey, Custer’s Last Battle (1892), reprinted in Graham, supra note 43, at 125, 134.

(e) Custer acted consistently with his nature. He had never been a “soldier to march away from the enemy’s known position.” Ambrose, supra note 1, at 396. “Every victory he had ever won had come from plunging to the attack.” The Soldiers, supra note 49, at 212. See supra note 1. Colonel Gibbon later wrote, “‘Poor fellow! Knowing what we do now, and what an effect a fresh Indian trail seemed to have had upon him, perhaps we were expecting too much to anticipate a forbearance on his part which would have rendered cooperation of the two columns practicable.’ ” Hughes, supra note 48, at 32–33. See Stewart, supra note 43, at 268; infra note 82.

81. Monaghan, supra note 1, at 372.

82. See supra notes 26-27 and accompanying text. Several writers state that Reno found a Sioux trail on the Tongue and followed it to the Rosebud. Ambrose, supra note 1, at 390; Godfrey, supra note 80, at 129–30; Monaghan, supra note 1, at 372–73. Others, however, state that Reno found a trail for the first time after he had reached the Rosebud in defiance of orders. Graham, supra note 4, at 11–12; Taunton, supra note 31, at 20; Uley, supra note 7, at 256. In any event, Reno had not been punished for pursuing the Indians contrary to orders. See Taunton, supra note 31, at 86. It is somewhat prophetic that Custer was angry at Reno—not for disobeying Terry, but for returning to camp: he could not “imagine how any Indian fighter could leave a hot trail, and he chewed Reno out in no uncertain terms.” Ambrose, supra note 1, at 391.
not have reasonably thought that Terry, in the absence of "sufficient reason" for his turn westward, would have held him blameless.  

Part III: Evaluation

There are only two definite claims I can make for the exercise. First, it is fun. Student interest is high and the discussion is spirited. Second, students who hereafter visit the Custer Battlefield in Montana will have a special appreciation of its history.

My more substantive claim is more tentative, but I am still willing to make it: I believe the exercise gives students a chance to do instinctively what most of us struggle to get them to do in our law classes—to grapple with the facts. In the arguments for and against Custer, an instructor will be pleased at how thoroughly the students grasp the facts presented and how astutely they marshall those that support their point of view. Later on in the year, when a student in contracts or torts seems adamant about a conclusion that has no basis in factual analysis, a helpful corrective might be, "I am not really asking you to do anything all that strange. Remember General Custer." This parallel is especially effective because the types of facts generally relevant in legal analysis—the words used, the context, prior and subsequent events—are the same types of facts that were dealt with in analyzing Terry's order to Custer.

I leave the reader with one word of caution. If you ever conduct this exercise, you run a substantial risk that you and your students will become forever ensnared, as many others have been, by the allure of what happened on the banks of the Little Big Horn so long ago. With that thought in mind (and borrowing from the dedication in W. A. Graham's fascinating book, The Custer Myth,) I dedicate this article to all of you "with malice aforethought, express and implied."

83. This difference in circumstances also distinguishes the events of the 24th from an incident on the march from Fort Lincoln, when Custer had taken four companies on a 45-mile scout without permission. Monaghan, supra note 1, at 372. Terry expressed his disapproval to his diary, but apparently said nothing to Custer. Id. On other similar occasions, Terry had been more vocal. See supra note 69.

84. There are other ways in which the exercise might prove useful. One is to have students make a written argument for or against Custer in his hypothetical court-martial. See supra note 54 and accompanying text. To get the best feeling for a student's analytical abilities, this should be done after the written chronology and supplemental data have been presented but before group discussion. After discussion, the written arguments can be reviewed to point out facts that have been omitted or poorly used. Another possibility is to have students explore how changes in the language of the order could affect the analysis of Custer's possible disobedience. Supra note 54, gives one example of such a change. Students might also be asked to redraft the order to make it more clearly mandatory without tying Custer's hands had circumstances proven radically different from the assumed facts.

APPENDIX