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Lore of the Corps

Investigating War Crimes:

The Experiences of Colonel James M. Hanley During the Korean War

Fred L. Borch

Regimental Historian & Archivist

While most Army lawyers know that the United States prosecuted hundreds of war crimes in the aftermath of World War II, few know that the Judge Advocate General's Corps (JAGC) contemplated conducting similar trials after hostilities between Chinese, North Korean, and United Nations forces ended on the Korean peninsula. The investigation of these war crimes, and why no prosecutions occurred, is best told through the experiences of Colonel (COL) James M. Hanley, who served as an Army lawyer in Korea from 1951 to 1952.

"Jim" Hanley had an unusual career for an Army lawyer. Although an attorney (Bachelor's Degree in Law, University of Chicago, 1931) with considerable experience in private practice as well as in government practice as an assistant attorney general for North Dakota, Hanley served as an infantry officer in World War II. He was in the thick of combat in Europe as a battalion commander in the famous 442d "Go for Broke" Regimental Combat Team, which consisted almost entirely of Japanese-American Soldiers. Then-Lieutenant Colonel (LTC) Hanley led his battalion with great distinction in Italy, France, and then Italy again. When the war ended, he had spent thirty-nine months in Europe and had been decorated with the Legion of Merit, Bronze Star Medal, French Croix de Guerre, and Italian Cross of Valor. He also proudly wore the Combat Infantryman Badge.¹

Hanley was demobilized in July 1946, but his return to civilian life was brief. Hanley had applied for and was offered a Regular Army commission—in the Judge Advocate General's Department. As he was a lawyer, Hanley must have thought that being a judge advocate would be interesting, and perhaps a better use of his talents as he re-started his career as a Soldier. Consequently, when Hanley returned to active duty in June 1947, it was as an Army lawyer in the Office of The Judge Advocate General, Washington, D.C.²

When the Korean War began in June 1950, LTC Hanley was still in Washington, D.C., where he was serving as a member of the Armed Services Board of Contract Appeals. Some three months later, however, Hanley was in Japan with the Far East Command (FECOM), where he joined the Office of the Staff Judge Advocate (SJA) in Tokyo. Given Hanley's background, it must have been no surprise to him when the SJA, COL George W. Hickman, Jr., decided that Hanley would be a contract attorney in the office.

At the outbreak of the Korean War, General Douglas MacArthur announced that, although the United States had yet to ratify them, the United Nations Command (UNC) would follow the new 1949 Geneva Conventions. Not surprisingly, as MacArthur began to receive reports that North Korean soldiers had murdered wounded South Korean soldiers during fighting around Seoul, he publicly called on the North Korean People's Army (KPA) to adhere to the new Conventions as well. Nevertheless, the KPA continued to torture and kill captured U.S. and South Korean military personnel. MacArthur directed that evidence of these war crimes be collected, with the view toward prosecuting the offenders at the end of the war.

As a result of MacArthur's directive, COL Hickman established a "War Crimes Division" in FECOM and, perhaps given LTC Hanley's extensive combat experience, selected Hanley to take charge of this new organization. As Hanley remembered it, his mission "was to document war crimes revealed in the interrogation of prisoners of war . . . [and by] investigations in the field," with the intent to use this documentation "in postwar trials of perpetrators."³

Consisting of twenty-seven officers, two civilians, and fifteen enlisted personnel, the War Crimes Division quickly went to work. Hanley set out the organization's priorities in investigating war crimes in his "Field Memorandum No. 1."⁴ The first task was to gather information about those who had killed or mistreated prisoners of war (POWs). The second priority was "to identify those Koreans who had committed crimes against defenseless civilians."⁵ Third was to learn the identity of those who had used POWs for propaganda or, in the case of South Korean POWs, had forced them to join the KPA.

¹ War Department Form 53, Certificate of Service, James J. Hanley, Block 29 (Decorations and Citations) (7 July 1946); U.S. Dep't of Army, DA Form 66, Officer Qualification Record, James M. Hanley, Block 21 (Awards and Decorations) (14 Apr. 1955).

² U.S. Dep't of Army, DD Form 66, Officer Qualification Record, James M. Hanley, Block 18 (Records of Assignments) (14 Apr. 1955) [hereinafter DD Form 66].

³ JAMES M. HANLEY, *A MATTER OF HONOR: A MEMOIRE* 107 (1995).

⁴ ALLAN R. MILLETT, *THEIR WAR FOR KOREA* 228 (2002).

⁵ *Id.*

Hanley's war crimes investigations teams exhumed bodies of suspected victims and interviewed U.S. and South Korean soldiers. The best source of war crimes information, however, was the 120,000 North Korean prisoners of war held on Koje-do Island and the southwestern mainland. According to Korean War historian Allan R. Millett, "Hanley's operatives infiltrated the POW groups and recruited informers; Koreans eager to sever ties with the South Korean Labor (Communist) Party and the KPA proved willing converts and informers."⁶

As a result of their work, Hanley and his War Crimes Division determined that, between November 1950 and November 1951, the North Koreans had killed 147 American POWs and executed "at least 25,000 South Koreans and at least 10,000 northern Korean 'reactionaries.'"⁷ Hanley's evidence also showed that the Chinese (who had entered the war in October 1950) had killed 2,513 U.S. POWs, "and in addition, 10 British soldiers, 40 Turks, 5 Belgians and 75 UN soldiers of unknown nationality."⁸

On 14 November 1951, Hanley revealed what he knew about North Korean and Chinese atrocities at a press conference held in Pusan. In addition to revealing that the War Crimes Division had been investigating atrocities committed by North Koreans and Chinese, Hanley released information on specific war crimes. He disclosed, for example, that some 1,250 U.S. Soldiers had been murdered near the Yalu River by North Koreans between 16 and 18 September 1950. The men had been transported from a prison camp near Pyongyang and then "shot in groups after being fed rice and wine."⁹ Hanley also revealed that the Chinese had committed war crimes, including the killing of 200 U.S. Marine prisoners near Sinhung, ordered by a Chinese regimental commander.¹⁰

The intent of Hanley's remarks was to dispel any notion amongst the UNC forces that the Chinese forces adhered to the Geneva Conventions.¹¹ The Chinese People's Volunteer Force claimed that it treated UNC personnel captured on the battlefield in accordance with the Geneva Conventions. The claim was even implied in "an 8th Army training directive and reports in *Stars and Stripes*. . . ."¹² Hanley thought that the UNC forces had to be informed of the "true nature of

Chinese military" in its treatment of POWs¹³ and thought that revealing evidence of Chinese and North Korean war crimes "would squash a notion that the Chinese would treat POWs well and thus improve the Allied will to fight."¹⁴

Hanley's oral statements to the press were also released as a written memorandum. When this document reached America's major newspapers, it caused a huge public uproar—especially in families with Soldiers fighting on the Korean peninsula. The "Hanley Report" suggested that the hundreds of American Soldiers who had been reported as "missing in action" in fact had been captured and murdered by the Chinese and North Koreans.¹⁵ The United Nations was already in sensitive armistice negotiations with the Communists at Panmunjom and now the reverberations from the "Hanley Report" threatened to disrupt these talks.¹⁶ Although COL Hanley had obtained approval from the FECOM Public Information Officer prior to releasing his reports on the enemy war crimes, General Matthew Ridgway, who replaced General MacArthur as the Supreme Commander of UN forces in April 1951, defused the situation by downplaying Hanley's claims. As Ridgway explained, until the Chinese released a definitive list of American and Allied POWs, no one could possibly know for certain who was actually being held captive, much less whether they had survived.¹⁷

By 1952, the War Crimes Division had identified 936 POWs who could be tried for war crimes; two-thirds of them were North Koreans. The problem was that most of these criminal cases were built around confessions and corroboration was lacking for most. This explains why the division's staff reviewed 1,185 "confessions" but could find supporting evidence for only seventy-three.

As the war on the Korean peninsula continued, the Army decided that any war crimes trials, if they were to be held, should be conducted by the United Nations or some other international authority; "the U.S. Army did not want to return to the war crimes trials business."¹⁸ But just who should conduct these trials, and where they should be held, was never decided.

⁶ *Id.*

⁷ *Id.* at 229.

⁸ HANLEY, *supra* note 3, at 112.

⁹ *Id.* at 113.

¹⁰ *Id.*

¹¹ *Id.* at 110.

¹² MILLETT, *supra* note 4, at 229.

¹³ HANLEY, *supra* note 3, at 110.

¹⁴ MILLETT, *supra* note 4, at 229.

¹⁵ *Id.*

¹⁶ *Id.* at 230.

¹⁷ The three-page "Hanley Report" is reproduced in its entirety in Hanley's memoir. HANLEY, *supra* note 3, at 112a14.

¹⁸ MILLETT, *supra* note 4, at 230.

A Mindful Military: Linking Brain and Behavior Through Neuroscience at Court-Martial

Major Jason M. Elbert*

*Neuroscience is beginning to touch on questions that were once only in the domain of philosophers and psychologists, questions about how people make decisions and the degree to which those decisions are truly “free.” These are not idle questions. Ultimately, they will shape the future of legal theory and create a more biologically informed jurisprudence.*¹

I. Introduction

Sergeant Andrew Jones, a 21B Combat Engineer, served three tours in Iraq and Afghanistan between 2004 and 2010. He drove combat engineer vehicles (CEV), supervised crews, and cleared routes vital for military operations and economic growth. His weekly routine often included more than ten route-clearing missions. Luckily, he experienced few encounters with improvised explosive devices (IEDs) during his three tours.

His service, however, left it almost impossible to evade contact completely. Once, the ripple from IED contact on his convoy’s lead vehicle shook his head inside his trailing vehicle, forcing its collision with the vehicle’s interior. His worst experience: a direct hit incident causing his vehicle to tip. Despite careful reliance on his military equipment—combat helmet, improved outer tactical vest, and vigilant use of the vehicle’s safety restraints—Sergeant Jones slammed into the vehicle’s ceiling as it toppled. The impact left him unconscious. He rejoined his unit after several weeks of rehabilitation under doctor’s caution about the effects of post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI).

Redeployment with the head injury was unfriendly to Sergeant Jones. Increased frequency in the duration and intensity of headaches left him feeling changed. He became aggressive and volatile. His friends and family noticed drastic differences in his demeanor. The pain erupted five-months after his third deployment. Upset with a noisy neighbor, he grabbed a baseball bat from the front closet and stormed his neighbor’s apartment. Quickly he found the source of the noise—loud music from the middle-school kid next door—and started swinging. Sergeant Jones struck repeatedly until his neighbor could barely move.

While Sergeant Jones’s case is hypothetical, there are numerous civilian examples of criminals whose actions are triggered by brain abnormality or injury.² Neuroimaging

research has increasingly intersected with criminal law trial practice in an effort to explain how cognitive brain functions influence criminal behavior.³ As the popularity of neuroscience grows, military counsel must increase their understanding of neuroimaging and its potential at court-martial. Neuroscience should immediately impact sentencing considerations and the way military counsel view inquiries under Rule for Court-Martial (RCM) 706. Although the reliability of neuroimaging fails to meet current evidentiary standards,⁴ the military may provide a solution to several common concerns with the legal relevance of neuroscience research.

Neuroscience research suggests that the military is at a heightened risk for creating examples like Sergeant Jones.⁵ Neuroimaging-based studies have linked TBI to violent crime and deviant behavior.⁶ Between 2000 and 2010, the Defense and Veterans Brain Injury Center reported 178,876 cases of TBI.⁷ Despite current hurdles to the admissibility of neuroimaging evidence, it has potential to inform capacity

(mentioning the story of Phineas Gage). Gage is one of the first reported cases of modern neurology. *The Incredible Case of Phineas Gage*, NEUROPHILOSOPHY.COM, <http://neurophilosophy.wordpress.com/2006/12/04/the-incredible-case-of-phineas-gage/> (last visited Feb. 1, 2013). Gage received severe injury to his brain during a railroad accident that lodged a tamping iron through his skull. *Id.* The incident and brain damage resulted in severe personality changes. *Id.* See also Adam Teitcher, Note, *Weaving Functional Brain Imaging into the Tapestry of Evidence: A Case for Functional Neuroimaging in Federal Criminal Courts*, 80 FORDHAM L. REV. 355, 361–62 (2011) (telling the story of Ron’s case). Ron, an ordinary forty-year-old school teacher, suffered from uncontrollable urges and pedophilia due to a large tumor in his right frontal lobe. *Id.* Once Ron had the tumor removed, his urges dissipated. *Id.* Unfortunately, the tumor slowly returned. *Id.* As it grew so did Ron’s urges. *Id.*

³ Blumoff & Paavola, *supra* note 2, at 755. The article mentions Professor Adrian Raine as among the leading neuroscience researchers focused on understanding criminal behavior. *Id.* Professor Raine and similar researchers have shown that poor brain functions correspond with “impulsivity, loss of self control, and an inability to inhibit behavior—all conditions which conduce to criminal behavior.” *Id.*

⁴ See, e.g., *Zink v. Missouri*, 278 S.W.3d 170, 178 (Mo. 2009); *United States v. Mezvinsky*, 206 F. Supp. 2d 661, 674 (E.D. Pa. 2002).

⁵ See HANNAH FISCHER, CONG. RESEARCH SERV., RS22452, U.S. MILITARY CASUALTY STATISTICS: OPERATION NEW DAWN, OPERATION IRAQI FREEDOM, AND OPERATION ENDURING FREEDOM 2–3 (2010); Major Timothy P. Hayes, Jr., *Post-Traumatic Stress Disorder on Trial*, 190 MIL. L. REV. 67, 75–79 (2007); see also Kmarquize, *Study: Traumatic Brain Injury and Criminal Behavior*, HUBPAGES®, http://kmarquize.hubpages.com/hub/brain_injury_and_criminal_behavior (last visited Feb. 1, 2013).

⁶ Kmarquize, *supra* note 5.

⁷ See FISCHER, *supra* note 5, at 3.

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¹ David Eagleman, *The Brain on Trial*, THEATLANTIC.COM, http://www.theatlantic.com/magazine/archive/2011/07/the-brain-on-trial/308520/2/?single_page=true (last visited Feb. 1, 2013).

² See, e.g., Theodore Y. Blumoff & Emily Paavola, *Foreword: The Brain Sciences and Criminal Law Norms*, 62 MERCER L. REV. 705, 755 (2010)

determinations, assist with determining mental responsibility, and suggest whether an accused possessed an appropriate level of criminal mens rea.⁸ At a minimum, neuroimaging evidence may be introduced during sentencing to prove extenuation, mitigation, or aggravation.⁹

Looking to the future, the military holds a unique ability to support the development of neuroscience in the courtroom. The military's expansive population, medical entrance examination requirement, and focus on TBI provide the tools to combat several of the obstacles preventing the reliable legal application of neuroscience.

This article will first discuss some basic information about neuroimaging and its potential at court-martial. It will outline the technology supporting functional and structural neuroimaging and then detail neuroscience's likely impact on different areas of court-martial proceedings. It will walk through the foundational military statutes regulating capacity, mental responsibility, mens rea, and sentencing and explain their natural connection with neuroscience. Second, it will discuss current neuroimaging case law and address why counsel must be aware of the emerging field of neuroscience. Third, the article will highlight several of the influential drawbacks that prevent the admissibility of neuroscience evidence. Finally, it will speculate about the future of neuroimaging and recommend that the current military population base and focus on TBI could assist in the advancement of neuroscience.

II. Neuroimaging Basics and Court-Martial Potential

Neuroscience creates hope in a greater understanding of the connection between the physical makeup of the brain and the thoughts generated by one's mind.¹⁰ The vast potential surrounding neuroscience and its legal influence have stirred extensive academic debate and research.¹¹ Arguments range from calling for a complete overhaul of the way the law views intent-based crimes and their associated punishment to real world attempts to use functional imaging as a lie

⁸ See generally Teneille Brown & Emily Murphy, *Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant's Past Mental States*, 62 STAN. L. REV. 1119 (2010); Spencer Compton, *Not Guilty by Reason of Neuroimaging: The Need for Cautionary Jury Instructions for Neuroscience Evidence in Criminal Trials*, 12 VAND. J. ENT. & TECH. L. 333, 341-42 (2010); Nita A. Farahany, *Behavioral Genetics in Criminal Cases: Past, Present, and Future*, 2 GENOMICS, SOC'Y, AND POL'Y 72, 76 (2006).

⁹ See *Zink*, 278 S.W.3d at 181 (recognizing evidence of organic brain abnormality as a mitigating factor during the penalty phase of trial); *United States v. Kelley*, 22 C.M.R. 723, 729 (C.G.B.R. 1956) (holding the accused's mental ability to adhere to the right as important sentencing evidence); see also Farahany, *supra* note 8, at 76.

¹⁰ See generally Eagleman, *supra* note 1.

¹¹ See, e.g., *The MacArthur Foundation Research Network on Law and Neuroscience*, LAWNEURO.ORG, <http://www.lawneuro.org/> (last visited Feb. 1, 2013).

detection tool at trial.¹² More prominently, neuroscience has crept into trial practice as an aid to determine mens rea and mental capacity.¹³ Discussions include neuroscience's useful place during the sentencing phase of trial as well.¹⁴

Military counsel must understand the basics of neuroimaging, realize its growing influence on the law, and prepare for its application at court-martial. Part A of this section will briefly discuss the common methods of neuroimaging and highlight the distinction between functional and structural images. Part B will then analyze the areas of court-martial practice neuroscience will likely influence, pinpoint the legal concepts of capacity, mental responsibility, and mens rea as neuroscience focus areas during the merits phase of trial. Part B concludes with a discussion of the use of neuroimaging during sentencing.

A. Neuroscience Basics

Neuroimaging is a clinical specialty focused on producing non-invasive computer-generated images of the brain.¹⁵ Often seen as a "window to the human brain,"¹⁶ it attempts to develop a better understanding of the correlation between brain structure and human behavior.¹⁷ Neuroimaging testing technology includes a wide range of technical tools using different methods aimed at obtaining functional and structural information about the brain.¹⁸ The distinction between functional and structural neuroscience and the related imaging technology can impact trial strategy and admissibility.¹⁹ Therefore, counsel must understand the

¹² See Eagleman, *supra* note 1 (discussing the need to reform sentencing procedures and punishment tools in order to accept rehabilitation measures associated with neuroscience); Henry T. Greely, *Neuroscience and Criminal Justice: Not Responsibility but Treatment*, 56 U. KAN. L. REV. 1103, 1103-06 (2008); Report and Recommendation, *United States v. Semrau*, No. 07-10074 M1/P, at 38-39 (W.D. Tenn. E. Div. 2010) [hereinafter Report and Recommendation] (recommending the exclusion of expert testimony based on functional magnetic resonance imaging (fMRI) testing as a tool for lie detection).

¹³ Farahany, *supra* note 8, at 76.

¹⁴ *Id.*

¹⁵ Compton, *supra* note 8, at 339.

¹⁶ *Id.*

¹⁷ *Id.* at 334-35; see also Micahael S. Gazzaniga, *What Is Cognitive Neuroscience?*, in A JUDGE'S GUIDE TO NEUROSCIENCE: A CONCISE INTRODUCTION 2-4 (U. Cal. Santa Barbara 2010) (defining neuroscience as the field of scientific endeavor that is trying to understand how the brain enables the mind).

¹⁸ See Scott N. MacMillan & Michael Vaughn, *Weighing Evidence of Brain Trauma or Disorder in Courts*, 46 CRIM. LAW BULL. NO. 3, art. 5, at 1 (2010).

¹⁹ See Compton, *supra* note 8, at 339; Owen Jones et al., *Brain Imaging for Legal Thinkers: A Guide for the Perplexed*, 2009 STAN. TECH. L. REV. 5, ¶ 2, <http://stlr.stanford.edu/pdf/jones-brain-imaging.pdf> (last visited Feb. 1, 2013); see also Teitcher, *supra* note 2, at 363. "While structural imaging captures a snapshot of the brain at one point in time, functional imaging tracks patterns of metabolic activity in the brain over a period of time.

differences and the accompanying scientific complications.²⁰

1. Structural Imaging

Similar to an x-ray, structural neuroimaging is used to show structural abnormalities in the brain itself.²¹ Generally, computed tomography (CT) and magnetic resonance imaging (MRI) scanning are used to develop pictures of the brain's physical characteristics.²² Physical characteristic differences can be used to detect trauma results, depict brain lesions, and advance the discovery and treatment of neurological diseases.²³ Depending on the extent to which the brain abnormality influences behavior, structural neuroimaging evidence could find its way into court-martial proceedings.²⁴

Computed tomography scanning techniques push radiation through the body to develop a structural picture.²⁵ The pushed radiation encounters varying levels of density as it passes through different tissues in the body.²⁶ Researchers capture the variance on special film and create a picture of the body's internal structure.²⁷ The process is repeated from multiple angles around the body and compiled by computers to develop information about physical structure.²⁸ The images produced depict "damage, atrophy, intrusion, and developmental anomalies."²⁹

Magnetic resonance brain-imaging uses a different scientific procedure to capture physical characteristics.³⁰ The patient is surrounded by electromagnetic coils and the components of a transceiver that create a strong magnetic field around the patient.³¹ Additionally, the MRI creates

several smaller magnetic fields that send and receive radio waves.³² Within the atoms of the body, protons spin on an axis of the nuclei carrying a positive charge, and "[a]s they spin, these electric charges form what can be thought of as tiny magnets."³³ This normal occurrence is altered when a patient enters the MRI chamber.³⁴ The magnetic field forces the body's protons to align themselves.³⁵ Once aligned, the protons are hit with short, precise radio frequency pulses causing them to flip around temporarily altering their axes of spin.³⁶ The protons return to their original position after the pulses stop and give off a new energy picked up by the MRI coils.³⁷ The MRI is able to produce images from the energy information.³⁸

2. Functional Imaging

Functional imaging captures an entirely different aspect of the brain than structural imaging: the function or activity in the brain.³⁹ "[I]t is critically important to understand that functional brain imaging . . . is not like taking a picture with your iPhone;"⁴⁰ rather, it captures an indirect understanding of brain activity by tracking patterns of blood flow and oxygen consumption in different areas of the brain.⁴¹ Functional neuroimaging studies will generally attempt to pair a certain human behavior with increased activity in particular brain areas.⁴² The industry is not standardized, however, and numerous methods for capturing functional brain images exist.⁴³

Positron emission tomography (PET) and its associated single proton emission computed tomography (SPECT) measure brain functioning by injecting organic radioactive tracers into a patient's blood stream.⁴⁴ The tracers are

Functional brain imaging is thus categorically different than structural brain imaging." *Id.*

²⁰ See Compton, *supra* note 8, at 339.

²¹ Jones et al., *supra* note 19, ¶ 4.

²² *Id.*

²³ Teitcher, *supra* note 2, at 361.

²⁴ See *supra* Part II.B (discussing neuroimaging within the context of the court-martial process); see also Compton, *supra* note 8, at 341. Attempts to introduce structural neuroimaging evidence in a criminal context include use during competency determinations, guilt, and sentencing. *Id.*; see, e.g., Teitcher, *supra* note 2, at 357–62 (discussing two examples that suggest appropriate legal use for structural brain scans).

²⁵ Jones et al., *supra* note 19, ¶ 4.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See Marcus Raichle, *What Is an fMRI?*, in A JUDGE'S GUIDE TO NEUROSCIENCE: A CONCISE INTRODUCTION 5–7 (U. Cal. Santa Barbara 2010).

³² Jones et al., *supra* note 19, ¶¶ 4–5.

³³ *Id.*; see also Raichle, *supra* note 31, at 5–7.

³⁴ See Jones et al., *supra* note 19, ¶¶ 4–5; see also Mathew Kalapurayil, *What Is MRI? How Does MRI Work?*, MEDICAL NEWS TODAY (Apr. 16, 2009, 4:00 PDT), <http://www.medicalnewstoday.com/articles/146309.php>.

³⁵ See Jones et al., *supra* note 19, ¶¶ 4–5; see also Kalapurayil, *supra* note 34.

³⁶ See Jones et al., *supra* note 19, ¶¶ 4–5.

³⁷ *Id.*

³⁸ *Id.*

³⁹ See Blumoff & Paavola, *supra* note 2, at 748–52.

⁴⁰ Raichle, *supra* note 31, at 6.

⁴¹ See Jones et al., *supra* note 19, ¶¶ 4–5; Teitcher, *supra* note 2, at 363–64.

⁴² See Jones et al., *supra* note 19, ¶¶ 4–5.

⁴³ See *id.*; see also Teitcher, *supra* note 2, at 362–69.

⁴⁴ See Jones et al., *supra* note 19, ¶¶ 4–5. Although similar to positron emission tomography (PET), single proton emission tomography (SPECT) uses single photon emission computed technology. *Id.* In SPECT the radioactive isotopes can be traced for longer periods and require fewer injections, but do not map the brain activity as accurately. Teitcher, *supra* note 2, at 364–65.

measured repeatedly over a short period of time as they flow through the patient's bloodstream and accumulate in different areas of the brain based on the brain's metabolic needs.⁴⁵ The adjustments are paired with different segments of the brain indicating brain functioning.⁴⁶

Electroencephalography (EEG), magnetoencephalography (MEG), and quantitative electroencephalography (qEEG), apply another method to map brain functioning.⁴⁷ Non-invasive sensors are attached to a patient's scalp that measure electrical activity occurring near the patient's scalp.⁴⁸ The activity is monitored against different stimuli to gain inferences about brain processes.⁴⁹

Despite the alternatives, functional magnetic resonance imaging (fMRI) is the most discussed method of functional neuroimaging within the legal community.⁵⁰ Functional magnetic resonance imaging detects blood movement in the brain using the same technology as MRI structural imaging discussed above.⁵¹ Relying on the widely recognized principal that changes in oxygen demand are indicative of neural activity, fMRI traces neural activity by recording the movement of oxygen-carrying blood.⁵² Since neurons require oxygen-carrying blood immediately after firing to replace spent energy, blood levels suggest fluctuating brain activity.⁵³

Neuroimaging technology is able to trace the different magnetic properties in oxygenated blood and deoxygenated blood and monitor blood flow activity in small cubic volumes known as voxels.⁵⁴ The measurements indirectly capture adjustments in neuron activity.⁵⁵ Neuroscience studies attempt to measure and match increased neural activity in different areas of the brain as patients perform

controlled behaviors.⁵⁶

Patients undergoing fMRI examinations will enter the examination with the instruction to lie completely still.⁵⁷ The researcher will then enter a variable to elicit a change in neural activity.⁵⁸ The variable might be a specific physical behavior, answering questions, or visualizing some unknown.⁵⁹ Hundreds of recordings are made of each voxel during this process.⁶⁰ The activity within each voxel is measured over time and averaged.⁶¹ The results are then overlapped with an anatomical image of the brain.⁶² The final image "is a composite of an anatomical image, of the researcher's choosing, and a statistical representation of the brain activity in that image, also of the researcher's choosing."⁶³

Every method of structural and functional imaging provides new insight into the physical brain and its relation to cognition.⁶⁴ The fascination with the inner workings of the brain and the opportunity for answers to the unknown immediately raise questions about the application of neuroscience in the law.

B. Additional Evidence of Capacity, Responsibility, and Thought

Criminal law and court-martial proceedings are not immune to this fascination. Already, criminal courts have considered neuroimaging evidence at different stages of trial.⁶⁵ Trial attorneys have litigated to include neuroimaging for mitigation, as an indicator of mental responsibility demonstrating the lack of capacity.⁶⁶ Military counsel would be remiss not to consider the potential of neuroscience as it relates to sentencing procedures at court-martial, mental responsibility inquiries, and the elements of criminal offenses. Thus, the following sections will address neuroimaging in relation to an accused's capacity to stand trial, mental responsibility, mens rea, and its use as

⁴⁵ See Jones et al., *supra* note 19, ¶¶ 4–5; Teitcher, *supra* note 2, at 362–69.

⁴⁶ See Jones et al., *supra* note 19, ¶¶ 4–5; Teitcher, *supra* note 2, at 362–69.

⁴⁷ See Jones et al., *supra* note 19, ¶¶ 4–5; Teitcher, *supra* note 2, at 362–69.

⁴⁸ See Jones et al., *supra* note 19, ¶¶ 4–5; Teitcher, *supra* note 2, at 362–69.

⁴⁹ See Jones et al., *supra* note 19, ¶¶ 4–5.

⁵⁰ See Brown & Murphy, *supra* note 8, at 1138 (stating that fMRI will "dominate older methods as courtroom evidence"); see also Compton, *supra* note 8, at 339–40 (describing fMRI as the most notable form of neuroimaging technology); Raichel, *supra* note 31, at 5 (noting PET and magnetic resonance imaging (MRI) as the two techniques at the forefront of neuroimaging research in humans); Teitcher, *supra* note 2, at 366 (describing fMRI as the "most prevalent method of functional brain imaging").

⁵¹ See Jones et al., *supra* note 19, ¶¶ 4–5.

⁵² See *id.*; Blumoff & Paavola, *supra* note 2, at 748–49.

⁵³ Brown & Murphy, *supra* note 8, at 1138 (explaining the principle commonly referred to as hemodynamic response).

⁵⁴ *Id.* This process is known as Blood Oxygen Level Dependent (BOLD) response. *Id.*

⁵⁵ See Jones et al., *supra* note 19, ¶¶ 4–5.

⁵⁶ See *id.*; Brown & Murphy, *supra* note 8, at 1139.

⁵⁷ See Brown & Murphy, *supra* note 8, at 1139.

⁵⁸ *Id.*

⁵⁹ See *id.*; Jones et al., *supra* note 19, ¶¶ 4–5.

⁶⁰ See Jones et al., *supra* note 19, ¶¶ 4–5.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See, e.g., *McMurtey v. Ryan*, 539 F.3d 1112 (9th Cir. 2008); *People v. Weinstein*, 591 N.Y.S.2d 715 (N.Y. Sup. Ct. 1992); *Oregon v. Kinkel*, 56 P.3d 463 (Or. Ct. App. 2002); *United States v. Kasim*, No. 2:07CR56, 2008 U.S. Dist. Lexis 89137 (N.D. Ind. 2008).

⁶⁶ See, e.g., *People v. Jones*, 210 A.D.2d 904 (N.Y. App. Div. 1994); *Zink v. Missouri*, 278 S.W.3d 170 (Mo. 2009).

mitigation or aggravation evidence at sentencing.

1. Capacity to Stand Trial

Neuroscience likely will find that one of its quickest avenues into court-martial practice relates to an accused's capacity to stand trial. It will be most insightful in assessing the accused's current mental state at the time of trial. Furthermore, experts can easily integrate neuroimaging into mental capacity inquiries in conjunction with other relevant mental health indicators.⁶⁷ Under RCM 706, neuroscience can assist in determining whether an accused has the requisite mental ability to participate in a trial by providing the state of the accused's physical brain function and its link to his ability to stand trial.⁶⁸

The rule of law in the United States places great value on an accused's ability to participate in criminal proceedings against him.⁶⁹ The Due Process Clause of the Fourteenth Amendment prohibits prosecution of an accused who does not have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has 'a rational as well as factual understanding of the proceedings against him.'"⁷⁰ The Manual for Courts-Martial (MCM) echoes this critical right by requiring the accused's ability to cooperate intelligently in his defense before being brought to trial by court-martial.⁷¹

In furtherance of this important right, the MCM outlines a specific procedure for an inquiry into the mental capacity of the accused.⁷² Rule for Court-Martial 706 requires any investigating officer, trial counsel, defense counsel, or military judge with reason to believe that the accused lacks the mental competence to stand trial to request an inquiry into the accused's mental condition.⁷³ In part, the inquiry must answer whether the accused is "presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense."⁷⁴ An expert must make this determination.⁷⁵

⁶⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 909 (2012) [hereinafter MCM].

⁶⁸ *Id.* R.C.M. 706.

⁶⁹ See *Missouri v. Anderson*, 79 S.W.3d 420, 432 (Mo. 2002).

⁷⁰ *State v. Johns*, 34 S.W.3d 93, 104 (Mo. 2000) (citing and quoting *Godinez v. Moran*, 509 U.S. 389, 396 (1993)).

⁷¹ MCM, *supra* note 67, R.C.M. 909(a). "No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that her or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case." *Id.*

⁷² *Id.* R.C.M. 706.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

Typically, a board consists of at least one psychiatrist or clinical psychologist, but at a minimum the board must consist of physicians or clinical psychologists.⁷⁶ The accused's ability to raise the issue of capacity does not fade. Evidence at trial may trigger an inquiry under RCM 706 and, if successful, delay proceedings until the accused develops the capacity to stand trial.⁷⁷

Neuroscience fits cleanly into the process for determining the accused's current mental state. It can provide physical and functional brain variables that aid in the board's determination.⁷⁸ For instance, neuroimaging might uncover physical deficiencies such as tumors and areas of trauma.⁷⁹ Likewise, functional neuroimaging might discover abnormal blood flow patterns that suggest reduced functioning and capacity problems.⁸⁰ Logically, when capacity is an issue, the law requires a current assessment of brain function before the accused may face trial.⁸¹ This natural connection places capacity determinations at the forefront of discussions relating to the use of neuroscience in the law.

2. Mental Responsibility

Lack of mental responsibility is an affirmative defense under the MCM.⁸² The defense applies to any severe mental disease or defect that prevents an accused from appreciating the "nature and quality or the wrongfulness of his or her acts" at the time of the crime.⁸³ Naturally, this affirmative defense associates strongly with the potential application of neuroscience within criminal law.

Neuroscience attempts to relate the physical makeup or functioning of the brain to behaviors associated with decision-based activity. The law assumes that an accused is mentally responsible for his actions at the time of the crime, but will not hold someone accountable for involuntary acts.⁸⁴

⁷⁶ *Id.*

⁷⁷ *Id.*; *United States v. Estes*, 62 M.J. 544, 548-49 (A. Ct. Crim. App. 2005). If a capacity issue is raised at trial, the accused must demonstrate, by a preponderance of the evidence, that he suffers from a mental disease or defect that renders him unable to appreciate and participate in the proceedings. MCM, *supra* note 67, R.C.M. 706.

⁷⁸ See Helen Mayberg, *Does Neuroscience Give Us New Insights into Criminal Responsibility*, in *A JUDGE'S GUIDE TO NEUROSCIENCE: A CONCISE INTRODUCTION* 37-39 (U. of Cal. Santa Barbara 2010). For example, traumatic brain injury (TBI) has been linked to violent behavior. Kmarquize, *supra* note 5.

⁷⁹ See Mayberg, *supra* note 78, at 38-39.

⁸⁰ See *id.* at 38.

⁸¹ MCM, *supra* note 67, R.C.M. 909(a).

⁸² *Id.* R.C.M. 916(k)(1).

⁸³ *Id.*

⁸⁴ *Id.* R.C.M. 916(k)(3)(A).

If science could provide legally reliable evidence relating the involuntary nature of certain actions to physical evidence, it could reduce the potential for error associated with current methods of interpreting mental responsibility.⁸⁵

Currently, courts-martial must maintain a presumption of mental responsibility until the accused establishes that he was not mentally responsible at the time of the offense.⁸⁶ Once raised, the proper authority should refer the issue of mental responsibility to an inquiry conducted under RCM 706.⁸⁷ Like an inquiry into capacity, a board of physicians and clinical psychologists interview the accused and consider his background, actions, and mental history to determine whether he was mentally responsible at the time of the alleged offense.⁸⁸ The unbiased physical insight accompanying neuroscience could provide information beyond the inconclusive answers to questions posed by experts and the accused's mental history.

Most likely, structural neuroimaging could aid the diagnosis of trauma injuries like TBI.⁸⁹ The physical abnormalities might trigger additional testing or suggest reduced responsibility.⁹⁰ For example, PTSD has been associated with reduced size and function in the hippocampus, an area of the brain associated with memory recall.⁹¹ This association with reduced memory can also impact an individual's fear response under certain circumstances.⁹² It is not unreasonable to suggest that neuroimaging research could develop relationships between particular brain activity and violent behavior, deception, or the ability to process information that would assist mental responsibility determinations.⁹³

⁸⁵ See Frederick Schauer, *Can Bad Science Be Good Evidence? Neuroscience, Lie Detection, and Beyond*, 95 CORNELL L. REV. 1191, 1207, 1215, 1218–19 (2010). Reliability standards in science and law may be drastically different because each has different goals. *Id.* at 1214. Courts must maintain an error rate standard sufficient for the trier of fact, not for scientific validity. *Id.* at 1207, 1214–15.

⁸⁶ MCM, *supra* note 67, R.C.M. 916(k)(3)(A). The accused must establish the he was not mentally responsible at the time of the alleged offense by clear and convincing evidence. *Id.*; see also *United States v. Estes*, 62 M.J. 544, 548–49 (A. Ct. Crim. App. 2005).

⁸⁷ MCM, *supra* note 67, R.C.M. 916(k)(3)(B).

⁸⁸ *Id.* R.C.M. 706; see Major Jeff Bovarnik, *Trying to Remain Sane Trying an Insanity Case: United States v. Thomas S. Payne*, ARMY LAW., June 2002, at 13.

⁸⁹ Interview with Colonel Rick Malone, U.S. Army, Dir., Ctr. for Forensic Behavioral Sci. Forensic Psychiatry, in Washington, D.C. (Mar. 1, 2012) [hereinafter Malone Interview].

⁹⁰ *Id.*

⁹¹ *Id.*; see also Matthew Tull, *The Effect of PTSD on the Brain*, ABOUT.COM, <http://ptsd.about.com/od/symptomsanddiagnosis/a/hippocampus.htm> (last viewed Feb. 1, 2013).

⁹² Malone Interview, *supra* note 89; see also Tull, *supra* note 91.

⁹³ See Mayberg, *supra* note 78, at 37; see also Anthony Wagner, *Can Neuroscience Identify Lies?*, in A JUDGE'S GUIDE TO NEUROSCIENCE: A CONCISE INTRODUCTION 13 (U. of Cal. Santa Barbara 2010).

3. Mens Rea

Defendants are more commonly seeking to offer neuroscience evidence as a means to negate the mens rea element of an alleged crime.⁹⁴ A criminal conviction often requires elements of behavior (actus reus) and thought (mens rea).⁹⁵ While a person's physical actions are easily observable and articulated at trial, determining the level of intent associated with the actions provides a more ambiguous challenge. Neuroscience increases the hope of inserting a definitive explanation into the process of "coupling a particular state of mind (or level of deliberation) with the criminal act."⁹⁶

The use of neuroscience evidence as a potential means to negate a mens rea element is a fact-specific, crime-specific analysis.⁹⁷ Referred to as partial mental responsibility in the RCM, evidence showing that an accused had a mental condition affecting but not negating his ability to have a specific state of mind to commit a specific offense is not an affirmative defense.⁹⁸ It has potential, however, during the guilt or innocence phase of trial, to create reasonable doubt.⁹⁹ An accused unable to meet the requisite intent should not be convicted because he has not met an essential element of the crime.¹⁰⁰ For example, in *United States v. Mezvinsky*,¹⁰¹ the defendant attempted to introduce a PET scan to show his inability to knowingly make false statements as required by the elements within fraud charges against him.¹⁰² Although the court recognized the possibility of connecting diminished brain function to the elements of fraud, it excluded the evidence because Mezvinsky's experts could not connect his current mental ability to his level of knowledge at the time of the offenses.¹⁰³

The current model instruction in the Military Judges' Benchbook on circumstantial evidence links mens rea directly to the imprecision of indirect, circumstantial evidence: "Direct evidence of intent is often unavailable.

⁹⁴ See Jones et al., *supra* note 19, ¶ 2.

⁹⁵ See Brown & Murphy, *supra* note 8, at 1128–29.

⁹⁶ *Id.*

⁹⁷ See Jones et al., *supra* note 19, ¶¶ 5–6.

⁹⁸ MCM, *supra* note 67, R.C.M. 916(k)(2). The discussion states, "evidence of a mental condition not amounting to a lack of mental responsibility may be admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense." *Id.* R.C.M. 916(k)(2) discussion.

⁹⁹ See Farahany, *supra* note 8, at 72–73.

¹⁰⁰ See *id.*

¹⁰¹ 206 F. Supp. 2d 661, 67 (E.D. Pa. 2002). See also *People v. Weinstein*, 591 N.Y.S.2d 715 (N.Y. Sup. Ct. 1992) (finding brain defect evidence in support of an argument that the accused was not responsible for strangling his wife and throwing her from a twelfth floor window admissible).

¹⁰² See *Mezvinsky*, 206 F. Supp. 2d at 662–63.

¹⁰³ See *id.* at 665, 677.

The accused's intent, however, may be proved by circumstantial evidence. In deciding this issue, [the panel] must consider all relevant facts and circumstances."¹⁰⁴ Since one cannot x-ray a person's mind to determine what he was thinking at the time of the crime, fact-finders must infer intent through acts and words.¹⁰⁵ Advances in neuroscience may provide an opportunity to eliminate the guessing game fact-finders play while evaluating mens rea elements by linking behavior to identifiable brain functions at the time of the offense without inference.

4. Sentencing Phase

The military considers rehabilitation of the accused, general deterrence, specific deterrence of misconduct, and social retribution as the generally accepted sentencing philosophies.¹⁰⁶ Trial counsel may present matters in aggravation "directly relating to or resulting from offenses which the accused has been found guilty."¹⁰⁷ Defense may present matters in extenuation—explaining the circumstances surrounding the offense—and mitigation to support a recommendation of clemency in sentencing.¹⁰⁸ Furthermore, the military judge may relax the rules of evidence during sentencing upon defense request.¹⁰⁹

Neuroscience evidence is useful in many areas of military sentencing. Trial counsel may argue that brain images demonstrate a propensity for violence and suggest that there is minimal potential for rehabilitation given the accused's brain condition. Or, he may attempt to argue that the accused has a diminished ability to understand the wrongfulness of his actions and recommend prolonged confinement to promote the protection of society. Hypothetically, a shrinking hippocampus associated with diminished brain functioning and memory failure suggests reduced behavioral control. If true, everyday activity could trigger uncontrolled violence, limiting accused's rehabilitative potential and the legal system's ability to deter his specific behavior.

Several significant hurdles exist, however, preventing the admission of neuroimaging evidence by the government.¹¹⁰ Rule for Courts-Martial 1001(b)(4) places restrictions on evidence in aggravation: the government

aggravation evidence must demonstrate a direct adverse impact "immediately resulting from the accused's offense."¹¹¹ Without a connection to the offense, the government may not introduce neuroimaging evidence.¹¹² Additionally, government counsel may attempt to introduce evidence of rehabilitative potential.¹¹³ This evidence is substantially limited as well.¹¹⁴ Witnesses may give a brief "yes" or "no" answer as to whether the accused possesses rehabilitative potential and succinctly address the "magnitude or quality" of that potential.¹¹⁵ Rule for Courts-Martial 1001(b)(5) ensures the accused receives an individualized sentencing proceeding.¹¹⁶ If the government introduces rehabilitative potential evidence, it must relate to the accused's "character, performance, and potential."¹¹⁷ Testimony on rehabilitative potential must be accompanied by sufficient foundation to demonstrate knowledge of the accused's character and potential.¹¹⁸ This threshold presents several problems for the government. First, the accused has control over his brain. Just as an accused may limit the government's access to rehabilitative potential information by "simply not talking to anyone about his case," he could simply deny access to brain imaging. Second, neuroimaging may not qualify as information about the accused's "character, moral fiber, and determination to be rehabilitated."¹¹⁹ A neuroimaging expert would explain test results, which might fail to assess the deeper understanding of the accused's personality contemplated by R.C.M. 1001(b)(5).

Conversely, defense may attempt to show extenuation arguing that under the circumstances the accused could not understand or control his actions; perhaps the accused requires treatment and not punishment.¹²⁰ Neuroscience may support counsel's argument that enhanced punishment would not assist in any general or specific deterrence under the circumstances.

As early as 1956, military courts recognized neurological evidence as a mitigating factor during

¹⁰⁴ U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 7-3 (1 Jan. 2010).

¹⁰⁵ Brown & Murphy, *supra* note 8, at 1122 (quoting HOWARD LEVENTHAL, CHARGES TO THE JURY AND REQUESTS TO CHARGE IN A CRIMINAL CASE IN NEW YORK § 4:18 (2009)).

¹⁰⁶ MCM, *supra* note 67, R.C.M. 1001(g).

¹⁰⁷ *Id.* R.C.M. 1001(b)(4).

¹⁰⁸ *Id.* R.C.M. 1001(c)(1)(A) & (B).

¹⁰⁹ *Id.* R.C.M. 1001(c)(3).

¹¹⁰ See *infra* Part III.B.

¹¹¹ MCM, *supra* note 67, R.C.M. 1001(b)(4).

¹¹² *Id.*

¹¹³ *Id.* R.C.M. 1001(b)(5).

¹¹⁴ *Id.*

¹¹⁵ *Id.* See also Edward J. O'Brien, *Rehabilitative Potential Evidence: Theory and Practice*, ARMY LAW., Aug. 2011, at 5. Rule for Court-Martial 1001(b)(5) contemplates one question and a concise answer as to whether the accused has "good, no, some, little, great, zero, much . . . potential for rehabilitation." *Id.* at 7.

¹¹⁶ *Id.* at 8.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ MCM, *supra* note 67, R.C.M. 1001(c).

sentencing. In *United States v. Kelley*,¹²¹ the U.S. Coast Guard Board of Review found the accused sane after a detailed neuropsychiatric evaluation.¹²² But, the court acknowledged the accused's diminished ability to adhere to the right conduct and reduced his sentence.¹²³ The theory is present in civilian courts as well.¹²⁴ In *Crook v. State*,¹²⁵ the Florida Supreme Court vacated a death sentence because the lower court did not properly consider the effect of the accused's organic brain damage in sentencing.¹²⁶ Arguably less culpable, Crook's brain damage "predisposed him to fits of violence."¹²⁷

The relaxation of the rules of evidence during sentencing may encourage admission and allow counsel to avoid admissibility hurdles often associated with neuroimaging.¹²⁸ Although enticing to quickly apply neuroscience at trial as a "terrific, new, wiz-bang technology—which can reveal inner structures and workings of the brain,"¹²⁹ counsel must cautiously consider the particular relevance and reliability of brain-images as they relate to particular facts and circumstances.¹³⁰ Neuroscience may act as a double-edged sword ready to operate in favor of either side.

III. Neuroimaging—Current Criminal Law Admissibility

Historically, some courts have admitted brain imaging evidence introduced in support of successful mental responsibility defenses.¹³¹ Athletes, after years of compounding head impact injury, have relied on the possibility of brain trauma evidence to explain violent and criminal behavior.¹³² The future promises detailed insight

¹²¹ 22 C.M.R. 723 (C.G.B.R. 1956).

¹²² *See id.* at 729.

¹²³ *Id.* Additionally, defense counsel regularly present post-traumatic stress disorder (PTSD) diagnoses as extenuation evidence during sentencing. *See* Hayes, *supra* note 5, at 102–04. Being careful not to raise an affirmative defense, counsel may suggest leniency because of the impact PTSD has on an accused's judgment and behavior. *Id.*

¹²⁴ *See, e.g.,* Robinson v. Johnson, 151 F.3d 256 (5th Cir. 1998); People v. Sapp, 73 P.3d 433 (Cal. 2003).

¹²⁵ 908 So.2d 350 (Fla. 2005).

¹²⁶ *Id.* at 358–59.

¹²⁷ Farahany, *supra* note 8, at 73.

¹²⁸ *See infra* Part III.B; MCM, *supra* note 67, R.C.M. 1001(c)(3).

¹²⁹ Jones et al., *supra* note 19, ¶ 5.

¹³⁰ *See id.*

¹³¹ *See* Teitcher, *supra* note 2, at 401. In defense of John Hinckley's attempted assassination of Ronald Reagan, the judge allowed expert testimony and computer axial tomography (CAT) scan images of Hinckley's brain suggesting abnormal atrophy and organic brain disease. *Id.* The jury found Hinckley not guilty by reason of insanity. *Id.*

¹³² Mary Kate Malone, *Ex-Notre Dame Coach Brown Offers Mental Disease Defense*, SOUTH BEND TRIBUTE.COM (November 30, 2011), http://articles.southbendtribute.com/2011-11-30/news/30461383_1_insanity

into links between physical brain function and control over one's action.¹³³ Indeed, the law requires access to examinations that assist in the evaluation, preparation, and presentation of a defense "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial."¹³⁴ The future of neuroscience must balance this right against its own relevance and reliability at trial. Despite the hope associated with neuroimaging, steep hurdles exist that may prevent the admissibility and effective use of neuroscience in court.¹³⁵

Persuasive use of neuroimaging involves decisions regarding the appropriate forum in which to introduce evidence supporting brain injury and functioning. This section will outline current standards of admissibility required for expert testimony centered on neuroimaging. It will then map out the shortcomings of neuroscience as a predictor of intentional criminal behavior. Finally, it will suggest that the best fit for neuroscience during courts-martial is as an aid to RCM 706 inquiries and during the sentencing phase of trial.

A. Are Counsel Obligated to Look into the Brain?

The increased emphasis on neuroimaging begs the question whether counsel are obligated to affirmatively seek neuroimaging evidence. The genesis of this possibility stems from the U.S. Supreme Court decision in *Ake v. Oklahoma*.¹³⁶ Certainly, when mental impairment is an issue, courts impose additional requirements on counsel.¹³⁷ The expectation for counsel to consider neuroimaging evidence will rise as its popularity and use increase. Under the right circumstances, a failure to request brain scans will amount to ineffective assistance of counsel (IAC).

In *Ake*, the U.S. Supreme Court addressed whether the "Constitution requires that an indigent defendant have access

-defense-mental-state-corwin-brown (last visited Feb. 1, 2013). Corwin Brown, a former college and NFL defensive back, faces charges of confinement and domestic battery in Granger, Indiana. *Id.* Corwin plans to use an insanity defense and will receive psychological testing to help determine whether his actions were related to head trauma linked to college football and his eight-year National Football League career. *Id.*

¹³³ *See* Greely, *supra* note 12, at 1103–04 (representing the belief that neuroscience will dramatically change the criminal justice system); *but see* Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397 (2006).

¹³⁴ *Ake v. Oklahoma*, 470 U.S. 68 (1985); *see also* *United States v. Mustafa*, 22 M.J. 165, 169 (1986) (adopting the *Ake* standard for military courts).

¹³⁵ *See* Read Montague, *How Is Neuroscience Likely to Impact Law in the Near Future?*, in A JUDGE'S GUIDE TO NEUROSCIENCE: A CONCISE INTRODUCTION 60 (Univ. Cal. Santa Barbara 2010).

¹³⁶ 470 U.S. 68 (1985).

¹³⁷ *See, e.g.,* Porter v. McCollum, 130 S. Ct. 447 (2009) (requiring counsel to seek expert assistance because the accused had questionable mental health); *see also* *United States v. Kreutzer*, 61 M.J. 293 (C.A.A.F. 2005).

to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question.”¹³⁸ The Court’s conclusion that our system of justice entitled Ake to psychiatric assistance in forming his defense relied heavily on “the pivotal role that psychiatry has come to play in criminal proceedings.”¹³⁹ Specifically, the Court embraced the value of expert testimony in its finding that fundamental fairness entitles defendants to an “opportunity to present their claims fairly within the adversary system.”¹⁴⁰

In 1999, the Tenth Circuit applied *Ake* to neurological testing.¹⁴¹ That court believed that a history of severe physical and sexual abuse combined with lengthy periods of hospitalization and diagnosed schizophrenia were sufficient to trigger the application of *Ake*.¹⁴² Accordingly, the state should have provided CT scans to rule out brain abnormalities.¹⁴³ Furthermore, the court alluded to expansion of the right to introduce psychiatric testimony into competency determinations and sentencing.¹⁴⁴

Ake’s holding is expanding to include neurological expert assistance as well. In *People v. Jones*,¹⁴⁵ the New York Supreme Court, Appellate Division, found abuse of discretion in the denial of neurological testing for a defendant who sustained traumatic head injury as a child and produced evidence of a thirty-year history of alcoholism.¹⁴⁶ The court enforced Willie Jones’s right to introduce expert opinion relating his reduced cognitive ability to the element of intent.¹⁴⁷ More recently, the Ninth Circuit determined that “without medical expert opinion testimony” discussing the impact of the accused’s retardation and brain tumor on predisposition, the defense could not properly address its

entrapment defense.¹⁴⁸

Neuroimaging has also been tied to high profile cases like *United States v. Hinckley*.¹⁴⁹ The jury found John Hinckley not guilty by reason of insanity after considering CAT scan evidence that suggested organic brain disease.¹⁵⁰ Additional cases demonstrate the use of neuroscience in decisions finding accused incompetent to stand trial and as a tool to inspire leniency.¹⁵¹ An expectation for counsel to consider neuroimaging evidence should follow its increased popularity and use.

Court-martial practice should experience an expansion in the reliance on neuroimaging evidence much like that exhibited in civilian courts. In 1986, the U.S. Court of Military Appeals (CMA) adopted the holding in *Ake*.¹⁵² The CMA stated that there “can be no question that a military accused is entitled to have equal opportunity with the Government to obtain witnesses to assist him in his defense” and reiterated the *Ake* standard.¹⁵³

In cases with sanity at issue, military courts have carefully protected the accused’s right to due process under the Sixth Amendment.¹⁵⁴ In *United States v. Kreutzer*,¹⁵⁵ the Court of Appeals for the Armed Forces (CAAF) demonstrated this protection by finding that the trial judge erroneously denied Sergeant William Kreutzer a capital mitigation specialist.¹⁵⁶ In its decision, the CAAF suggested that the importance of the mental health mitigation specialist went beyond exploration of diminished capacity.¹⁵⁷ The court reasoned that “[p]roperly prepared and presented

¹³⁸ *Ake*, 470 U.S. at 70.

¹³⁹ *Id.* at 78–82 (quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974)).

¹⁴⁰ *Id.* The Court seemed heavily influenced by the factual background supporting Ake’s mental instability claims. *Id.* His bizarre behavior at arraignment prompted a competency determination, and a state psychiatrist found Ake incompetent to stand trial. *Id.* Once Ake was found competent, he was heavily sedated. *Id.* These facts, combined with the importance of the insanity defense to Ake’s case, led the Court to decide that Ake had been denied due process because he was not provided psychiatric assistance. *Id.*

¹⁴¹ *Walker v. Attorney Gen. for the State of Okla.*, 167 F.3d 1339, 1348 (10th Cir. 1999); *but see Bates v. Florida*, 750 So. 2d 6, 17 (Fla. 1999) (holding that the court did not violate *Ake* by not appointing organic brain experts to conduct a MRI and CAT scan).

¹⁴² *See Walker*, 167 F.3d at 1341–42, 1348.

¹⁴³ *Id.* at 1348.

¹⁴⁴ *Id.*; *see also Compton*, *supra* note 8, at 342.

¹⁴⁵ 210 A.D.2d 904 (N.Y. App. Div. 1994).

¹⁴⁶ *Id.* at 904.

¹⁴⁷ *Id.*

¹⁴⁸ *United States v. Sandoval-Mendoza*, 472 F.3d 645, 655–56 (9th Cir. 2006).

¹⁴⁹ 525 F. Supp. 1342, 1348 (D.D.C. 1981).

¹⁵⁰ *See id.* at 1348.

¹⁵¹ *See United States v. Kelley*, 22 C.M.R. 723, 724 (C.G.B.R. 1956) (considering neuropsychiatric evaluation as early as 1956 to reduce the accused’s sentence); *United States v. Kasim*, No. 2:07CR56, 2008 WL 4822291, at *10–11, 20 (N.D. Ind. 2008) (relying in part on SPECT scans showing reduced blood flow to the temporal lobes to find the defendant incompetent to stand trial).

¹⁵² *United States v. Mustafa*, 22 M.J. 165, 168–69 (C.M.A. 1986).

¹⁵³ *Id.* The court quoted the *Ake* standard that due process requires “that when a defendant demonstrates to the judge that his sanity at the time of the offense is to be a significant factor at trial,” the accused is entitled to “access to a competent psychiatrist that will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.” *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985).

¹⁵⁴ *United States v. Kreutzer*, 61 M.J. 293, 295 (C.A.A.F. 2005). “Compulsory process, equal access to evidence and witnesses, and the right to necessary expert assistance in presenting a defense are guaranteed to military accuseds.” *Id.*

¹⁵⁵ 61 M.J. 293 (C.A.A.F. 2005).

¹⁵⁶ *Id.* at 295. Sergeant Kreutzer requested a mental health specialist to address specific personality disorders. *Id.* at 301.

¹⁵⁷ *Id.*

testimony . . . could go beyond demonstrating diminished capacity and be a substantial part of a defense against the premeditation element” of premeditated murder.¹⁵⁸

As neuroscience expands and its use at trial becomes more popular, counsel must acknowledge its utility. As the courts have already experienced, neuroimaging case law regularly focuses on IAC issues questioning counsel’s failure to consider neuroimaging evidence as a trial tool.¹⁵⁹ Since counsel do not regularly consider neuroimaging evidence, issues arise on appeal questioning the absence of neuroscience at trial.¹⁶⁰ For instance, counsel could see consequences like those displayed in *Porter v. McCollum*.¹⁶¹ The U.S. Supreme Court found Porter’s counsel deficient for their failure to investigate and present evidence of Porter’s mental health, family background, and military service.¹⁶²

Although neuroscience is currently viewed as a discretionary trial tool that might assist in complex cases, it is a growing science. As neuroimaging refines itself, the legal gap between choosing neuroscience and mandating its use will likely shrink quickly. The transition of neuroimaging evidence should parallel legal changes requiring mental health evidence. At some point, neuroimaging and mental health will become so intertwined that the Court’s decision in *Ake* will extend neuroimaging as well.¹⁶³ Ultimately, the law and neuroimaging will collide by mirroring *Porter* and result in IAC for counsel’s failure to examine the brain.¹⁶⁴

B. Theory, Purpose, and Use

The accused’s right to seek psychiatric evaluation to assist in the defense does not ensure admissibility, however. Admission of expert testimony, like that associated with neuroimaging, must undergo careful judicial scrutiny before admission.¹⁶⁵ Since appellate courts review the military

judge’s decision to allow expert testimony for abuse of discretion,¹⁶⁶ she will act as the primary gatekeeper in determining whether to admit neuroimaging testimony.¹⁶⁷ This section will address the standards for admission of neuroscience-based expert testimony that are intended to safeguard fact-finders from unreliable or irrelevant expert testimony.

During court-martial, the military judge may admit expert testimony if: (1) the expert possesses appropriate qualifications; (2) the expert will testify regarding subject matter appropriate for expert testimony; (3) the court finds there is a basis for the expert testimony; (4) the testimony is relevant; (5) the evidence is reliable; and (6) the evidence’s probative value outweighs other considerations.¹⁶⁸ In *Daubert v. Merrell Dow Pharmaceuticals Inc.*,¹⁶⁹ the U.S. Supreme Court outlined five additional factors that should be considered before determining whether scientific testimony is reliable.¹⁷⁰ The technique should be (1) testable, (2) have a definable error rate, (3) be subject to peer review, and (4) have a standardized technique.¹⁷¹ Fifth, judges may also consider the technology and methodology’s general acceptance in the scientific community.¹⁷²

Commentator Edward Imwinkelried has paired these requirements into three gate-keeping questions for the trial judge.¹⁷³ First, the trial judge must determine “the specific theory or technique that the expert proposes to rely on as the basis for his or her opinion.”¹⁷⁴ Next, the judge must define the particular purpose for the specific technique proposed.¹⁷⁵

¹⁵⁸ *See id.*

¹⁵⁹ *See, e.g.,* Zink v. State, 278 S.W.3d 170 (Mo. 2009); United States v. Gray, 51 M.J. 1 (C.A.A.F. 1999); *see generally* MacMillan & Vaughn, *supra* note 18 (summarizing a number of neuroimaging-based cases appealed for ineffective assistance of counsel).

¹⁶⁰ *See generally* MacMillan & Vaughn, *supra* note 18 (summarizing a number of neuroimaging based cases appealed for ineffective assistance of counsel).

¹⁶¹ 130 S. Ct. 447 (2009).

¹⁶² *Id.* at 453. Porter suffered from brain abnormality and cognitive defects. *Id.* He also grew up in an abusive family and experienced harsh combat in the Korean War. *Id.* at 448–49.

¹⁶³ *See Ake v. Oklahoma*, 470 U.S. 68, 70 (1985) (requiring access to psychiatric examination and assistance).

¹⁶⁴ *See Porter*, 130 S. Ct. 477 (finding ineffective assistance of counsel for failure to examine the accused’s mental health).

¹⁶⁵ *See Brown & Murphy, supra* note 8, at 1174–76 (introducing the evidentiary cycle neuroimaging evidence must circle prior to admission).

The deciding judge must consider case law standards, Federal Rules of Evidence (FRE) 702, and 403. *Id.*

¹⁶⁶ United States v. Sandoval-Mendoza, 472 F.3d 645, 652 (9th Cir. 2006); United States v. Griffin, 50 M.J. 278, 283–84 (C.A.A.F. 1999).

¹⁶⁷ *Sandoval-Mendoza*, 472 F.3d at 652; *Griffin*, 50 M.J. at 283–84.

¹⁶⁸ *See MCM, supra* note 67, MIL. R. EVID. 401, 402, 403, 702, 703; *see also* United States v. Houser, 36 M.J. 392, 397 (C.M.A. 1993) (outlining the six factors a military judge should consider before admitting expert testimony); United States v. Gipson, 24 M.J. 246 (C.M.A. 1987) (addressing the reliability of expert testimony).

¹⁶⁹ 509 U.S. 579 (1993).

¹⁷⁰ *Id.* at 593; *see also* Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (extending the test established in *Daubert* to non-scientific experts).

¹⁷¹ *Daubert*, 509 U.S. at 593.

¹⁷² *Id.*

¹⁷³ Edward J. Imwinkelried, *Serendipitous Timing: The Coincidental Emergence of the New Brain Science and the Advent of an Epistemological Approach to Determining the Admissibility of Expert Testimony*, 62 MERCER L. REV. 959, 975–78 (2011). Imwinkelried compares the timing of the Supreme Court’s decision to move away from the general acceptance approach as a proxy for the reliability test established in *Frye* and toward the current approach. *See id.* He suggests that the test in *Frye* was unsuited to deal with brain imaging evidence; therefore, the Court moved to a test that would more carefully scrutinize expert reliability. *Id.*

¹⁷⁴ *Id.* at 975.

¹⁷⁵ *See id.* at 977.

Finally, the trial judge must consider “whether the expert presented enough methodologically sound empirical reasoning to validate that particular use of the specific theory.”¹⁷⁶

This approach is helpful because courts often intertwine reliability, relevance, and probative value when evaluating the admissibility of expert testimony and neuroimaging evidence. Relying on *Daubert* and the Federal Rules of Evidence (FRE) or the Military Rule of Evidence (MRE) 702, courts generally begin by testing reliability.¹⁷⁷ The reliability analysis includes consideration of portions of the *Daubert* factors as they apply to the case’s factual background.¹⁷⁸ “The test of reliability is ‘flexible,’ and *Daubert*’s list of specific factors neither necessarily nor exclusively applies to all experts or in every case,”¹⁷⁹ but must be tailored to the facts of the particular case.¹⁸⁰ Reliability must also focus on the scientific principles used in generating tests and methodology, not the conclusions drawn by the expert.¹⁸¹ Although this focus makes the scientific testing particularly important, it also requires a close nexus between reliability and relevance to the testimony sought in the specific case. The testimony must “fit” the issue before the court.¹⁸²

The “fit” test allows reliability to quickly bleed into a concurrently applied relevance test.¹⁸³ The reliability of scientific evidence like neuroimaging must be “valid for the purposes for which it is being offered.”¹⁸⁴ There must be a “logical nexus between the data and the ultimate conclusions.”¹⁸⁵ The reliability of the scientific method must “fit” the purpose for which it is being offered, and the data

must be valid for that purpose.¹⁸⁶ This link between testing, testimony, and purpose blends the analysis of relevance and reliability.¹⁸⁷ As a result, it allows courts to determine that there “is simply too great an analytical gap between the data and the opinion proffered.”¹⁸⁸

For example, researchers may develop neuroimaging tests to evaluate functioning under stressful conditions. The test may insert stressors like violent images or complicated tasks on a calm patient to analyze their impact on functioning. Although the results may be fascinating in the research setting, they are not reliable in predicting specific behavior or relevant to the accused’s criminal conduct. Instead, the test should recreate a behavioral trigger to meet the “fit” test.¹⁸⁹ If a patient suffers from PTSD associated with loud noises or a specific object, a better nexus might include testing in relation to those specific triggers.¹⁹⁰

Finally, courts balance relevance standards under FRE 401 and FRE 403. Although the *Daubert* factors are “not intended to be exhaustive or unduly restrictive,” courts are able to evaluate the potential of neuroimaging evidence to mislead fact-finders.¹⁹¹ Courts have come to different conclusions under FRE 403, depending on the particular phase of trial and attempted use of neuroimaging evidence.¹⁹²

In 2009, a Hawaii court allowed neuroimaging-based expert testimony.¹⁹³ After its FRE 403 balance, the court permitted the experts to discuss a defendant’s ability to reason, learn from experience, and interact independently in a social setting.¹⁹⁴ However, the court prohibited the experts from testifying to the ultimate conclusion: whether the defendant possessed the requisite mens rea.¹⁹⁵ Its opinion explained that expert testimony would be “significantly

¹⁷⁶ *Id.* at 978.

¹⁷⁷ See FED. R. EVID. 702; MCM, *supra* note 67, MIL. R. EVID. 702; see also *Saldana v. Kmart Corp.*, 260 F.3d 228, 232 (3d Cir. 2001); *United States v. Mezvinsky*, 206 F. Supp. 2d 661, 666 (E.D. Pa. 2002); *United States v. Griffin*, 50 M.J. 278, 284 (C.A.A.F. 1999); *United States v. Houser*, 36 M.J. 392, 398 (C.M.A. 1993).

¹⁷⁸ See *Houser*, 36 M.J. at 398.

¹⁷⁹ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141–42 (1999). “*Daubert* makes clear that the factors it mentions do not constitute a ‘definitive checklist or test.’” *Id.* at 150 (quoting *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 593 (1993)).

¹⁸⁰ See Report and Recommendation, *supra* note 12, at 23.

¹⁸¹ See *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1056 (9th Cir. 2003); *United States v. Williams*, No. CR 06-00079 DAE-KSC, 2009 WL 424583 (D. Haw. 2009).

¹⁸² See *Daubert*, 509 U.S. at 591; see also *United States v. Mezvinsky*, 206 F. Supp. 2d 661, 666 (E.D. Pa. 2002).

¹⁸³ See *Daubert*, 509 U.S. at 591 (describing the “fit” requirement as primarily a relevance determination); see also *United States v. Green*, 405 F. Supp. 2d 104, 119 (D. Mass. 2005) (relating the “fit” test to reliability).

¹⁸⁴ *Green*, 405 F. Supp. 2d at 119.

¹⁸⁵ *Brown & Murphy*, *supra* note 8, at 1178.

¹⁸⁶ See *Green*, 405 F. Supp. 2d at 119; *Brown & Murphy*, *supra* note 8, at 1178.

¹⁸⁷ *United States v. Williams*, No. CR 06-00079 DAE-KSC, 2009 WL 424583, at *4 (D. Haw. 2009) (stating, “testimony which does not relate to any issue in the case is not relevant, and ergo, non-helpful” in its discussion of the “fit” test).

¹⁸⁸ *Gen. Elec. Corp. v. Joiner*, 522 U.S. 136, 146 (1997).

¹⁸⁹ See *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 591 (1993).

¹⁹⁰ See *Imwinkelried*, *supra* note 173, at 983–86.

¹⁹¹ See *Clark v. Arizona*, 548 U.S. 735, 775 (2006) (contrasting mental disease evidence used for capacity determinations with its ability to inform jurors about mens rea without being unfairly prejudicial); see also *Sullivan v. U.S. Dep’t of the Navy*, 365 F.3d 827, 834 (9th Cir. 2004).

¹⁹² See, e.g., *Williams*, 2009 WL 424583 at *4; Report and Recommendation, *supra* note 12, at 33–38.

¹⁹³ *Williams*, 2009 WL 424583 at *19. *Williams*, charged with murdering his five-year-old daughter, sought to introduce evidence of his borderline intellectual functioning to demonstrate his inability to form the required intent. See generally *id.*

¹⁹⁴ See *id.* at *19.

¹⁹⁵ See *id.* at *17.

probative on the issue of whether Defendant could have formed the requisite mens rea,¹⁹⁶ but FRE 704(b) prevents testimony that “compels the ultimate conclusion of whether a defendant had the mens rea at the time of the offense.”¹⁹⁷ Likewise, in 2006, the Ninth Circuit reversed a case to ensure that the defendant was able to present MRI evidence of a brain tumor.¹⁹⁸ The evidence addressed his predisposition as it related to his entrapment defense.¹⁹⁹ The court believed the jury could not evaluate the merits of the defendant’s claim without the expert testimony.²⁰⁰

Others considered the appeal of neuroimaging evidence dangerous, like a shiny new toy captivating the attention of jurors and preventing them from focusing on the limitations of neuroscience studies.²⁰¹ This belief that the colorful brain images produced through neuroimaging will impress jurors to a degree that they will not adequately evaluate the testimonial explanation of the images is often referred to as the “Christmas tree phenomenon.”²⁰² The suggested phenomenon creates an even greater problem if jurors believe the images provide explanation beyond the science’s capabilities. If flashy photographs overpower questionable expert testimony, panels might rely solely on neuroimaging to draw conclusions on ultimate issues that such evidence should not ordinarily support.²⁰³ An overreliance on neuroscience could spark concerns under MRE 704, which prevents testimony answering the ultimate issue before the fact-finder.²⁰⁴

Judges must balance the reliability and relevance of the testing,²⁰⁵ counsel’s ability to critically cross-examine experts in the neuroscience arena,²⁰⁶ and the illusion of exactness brain testing provides when testing the “Christmas tree phenomenon.”²⁰⁷ As all the pieces of admissibility

intertwine, Imwinkelried’s three-step analysis for evaluating neuroimaging evidence provides a simple framework for this legally complex, factually intense area by focusing the *Daubert* analysis.²⁰⁸ In relation to neuroscience, it requires acknowledgment of the particular brain imaging technique, understanding of the techniques application, and scrutiny of the scientific reasoning linking expert opinion evidence to specific research.²⁰⁹

C. Hurdles to Neuroscience Admissibility

As discussed above, before developments in neuroimaging are considered in court, they must satisfy the expert testimony factors established in *Daubert*²¹⁰ and adhere to applicable rules of evidence.²¹¹ Once admitted, the evidence must then persuade the fact-finder.²¹² Presently, neuroscience is not ready to meet this heavy burden.²¹³ This section discusses several pitfalls that should currently prevent the admissibility of neuroscience evidence: (1) the inherent risk in the group-individual study dynamic, (2) the dilemmas neuroscience faces in its attempt to explain brain function at the time of the crime with information captured months or years after the fact, (3) the array of neuroimaging testing techniques and lack of standardization, and (4) the effects outside influences might have on individual brain testing.

1. Comparing the “Normal Brain” Against Individuals

Neuroscience researchers advance their theories through sample population testing designed to establish an example

¹⁹⁶ *Id.* at *19.

¹⁹⁷ *Id.* at *18. Likewise, Military Rule of Evidence (MRE) 704 prevents testimony that “embraces an ultimate issue to be decided by the trier of fact.” MCM, *supra* note 67, MIL. R. EVID. 704.

¹⁹⁸ See generally *United States v. Sandoval-Mendoza*, 472 F.3d 645 (9th Cir. 2006).

¹⁹⁹ *Id.*

²⁰⁰ See *id.* at 656.

²⁰¹ See *Compton*, *supra* note 8, at 344–46.

²⁰² See *Brown & Murphy*, *supra* note 8, at 1191. The Christmas tree phenomenon refers to the belief that jurors will be dazzled by the lights and imagery of neuroscience to such an extent they will be unable to evaluate the testimony explaining the pictures. *Id.* Like young children looking at a beautifully lit Christmas tree, jurors could be easily distracted. *Id.*

²⁰³ *Id.*

²⁰⁴ MCM, *supra* note 67, MIL. R. EVID. 704.

²⁰⁵ See *Imwinkelried*, *supra* note 173, at 981–86.

²⁰⁶ See *Compton*, *supra* note 8, at 338–39.

²⁰⁷ See *id.* at 345–46; see also *Schauer*, *supra* note 85, at 1210–12; see also *supra* note 206 and accompanying text (discussing the Christmas tree phenomenon).

²⁰⁸ See generally *Imwinkelried*, *supra* note 173.

²⁰⁹ See *id.* at 981–86. For example, a military judge might use this test in evaluating the use of fMRI testing linking brain functioning and the violent behavior displayed by Sergeant (SGT) Jones in this article’s introductory hypothetical. See *supra* Part I. The military judge must first understand the blood-oxygen measurements taken by fMRI. See *supra* Part II.A.2. The measurements might show increased brain functioning in a certain area of the brain during violent behavior with a degree of statistical certainty. The military judge must then determine the proposed purpose or “fit” for the research. See *Imwinkelried*, *supra* note 173, at 977–78, 983–85. Perhaps the expert will present information that SGT Jones’s brain displayed increased functioning in that area during a variety of behaviors. The military judge must evaluate its fit to an assertion that SGT Jones could not control his behavior during the assault or that SGT Jones’s brain acted more impulsively than normal. *Id.* Finally, the military judge must evaluate whether “there is enough or adequate support for the claim.” *Id.* at 979. This would likely require analysis of the frequency and reliability of the research. See *id.* at 979, 983–85.

²¹⁰ 509 U.S. 579 (1999).

²¹¹ See, e.g., MCM, *supra* note 67, MIL. R. EVID. 403, 702.

²¹² See N.J. Schweitzer et al., *Neuroimages as Evidence in Mens Rea Defense: No Impact*, 17 PSYCHOL. PUB. POL’Y & L. 357, 390 (2011) (concluding that the impact of neuroimages on juries “are not the irresistible force that some feared”).

²¹³ See generally *Morse*, *supra* note 133; see also *Schweitzer et al.*, *supra* note 212, at 388–89.

brain structure and function that represents the vast majority of society—to define the “normal” brain.²¹⁴ Unfortunately, the limited sample population and the complexity of the brain make it extremely difficult to establish a baseline “normal brain.”²¹⁵ Experts compound the issue as they attempt to relate population-based experiments to a particular individual.²¹⁶ An individual brain may look or function differently from the “normal” brain developed in the sample population, but function normally for that individual.²¹⁷ The clouded link between statistical probability and the individual can make neuroimaging unreliable and irrelevant evidence.

Another problem is that statistical error is inherent in current neuroscience. Neuroimaging has shown that not every brain functions in exactly the same manner.²¹⁸ Since each member of the sample population may have individual nuances in brain functioning, the “group brain” is not truly accurate.²¹⁹ It is an averaging of the population.²²⁰ Unique distinctions between individual brains in the control group create statistical error, and the error increases as the researcher compares the control group “normal” brain to an external test subject.²²¹ The extreme number of variables in brain functioning reduces the ability of expert analysis to make reliable predictions.²²² Neuroscience, then, can only compare an individual’s brain function or structure to that of a standardized “group brain” defined as the “normal” brain.²²³ Ultimately, differences merely indicate differences and, therefore, have no real legal diagnostic or evidentiary value, even with expert testimony.²²⁴ An individual brain could display a unique way of functioning and still be “normal” in its own way.

Neuroimaging’s scientific error could reduce in-court reliability and prevent admissibility under *Daubert*.²²⁵

²¹⁴ See Raichle, *supra* note 31, at 9–11.

²¹⁵ See Montague, *supra* note 131, at 61 (describing the limitations of neuroscience because it is in its infancy). See also Wagner, *supra* note 93, at 13–23 (discussing the limited sample populations used in functional imaging based attempts to ascertain information about how the brain functions during false testimony).

²¹⁶ See Teitcher, *supra* note 2, at 386–88.

²¹⁷ See Mayberg, *supra* note 78, at 38–40.

²¹⁸ See Morse, *supra* note 133, at 403–04.

²¹⁹ See Raichle, *supra* note 31, at 7–12.

²²⁰ *Id.*

²²¹ See Teitcher, *supra* note 2, at 387.

²²² *Id.*

²²³ See Mayberg, *supra* note 78, at 37–40; Morse, *supra* note 133, at 403–04.

²²⁴ See Mayberg, *supra* note 78, at 37–40.

²²⁵ See Raichle, *supra* note 31, at 9 (stating, “[i]t must, however, always be kept in mind that the validity of findings in any function image data is critically dependent upon the statistical analysis strategy employed”).

Compare neuroscience’s scientific error, which is driven by the researcher’s margin of accepted error in a particular experiment, to standardized levels in urinalysis testing.²²⁶ Even with specific widely accepted cutoff levels, drug testing has encountered problems under the *Daubert* standard.²²⁷ In *United States v. Campbell*,²²⁸ CAAF held that the military trial judge erred by admitting lysergic acid diethylamide (LSD) tests without hearing evidence on the “frequency of error and the margin of error in the testing process.”²²⁹ In particular, novel sciences must face “careful inquiry.”²³⁰ Accordingly, neuroscience, a new novel science, must prove statistical reliability before admission.

Neuroscience grows strength in its ability to predict behavior when a large sample group shares a similar brain function and when differences coincide with similar behavioral problems, however. For example, repeated studies have demonstrated that increased activity in a particular area of the brain may be shared commonly among subjects who display enhanced aggression.²³¹ Examples like this, when repeated over large sample populations with similar results, bring enhanced credibility to neuroscience.

Despite some findings of similarities across broader sample populations, a rapid increase in reliability is unlikely. The current science is expensive and control groups are sparse.²³² These practical factors limit neuroscience’s ability to develop a completely reliable “normal” brain model to compare individual tests against.²³³ More importantly, they limit neuroscience’s ability to generate accurate analyses of

²²⁶ See Major Walter Hudson & Major Patricia Ham, *United States v. Campbell: A Major Change for Urinalysis Prosecution?*, ARMY LAW., May 2000, at 38, 38–40. Military urinalysis cutoffs are set at 200 ng/ml for THC and 1000 ng/ml for BE, the metabolites for marijuana and cocaine, respectively. See *United States v. Barnes*, 53 M.J. 624, 629 (N-M. Ct. Crim. App. 2000).

²²⁷ See generally *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999); see also Hudson & Ham, *supra* note 227, at 38–40; but see *United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001).

²²⁸ 50 M.J. 154 (C.A.A.F. 1999).

²²⁹ *United States v. Campbell*, 52 M.J. 386, 388 (C.A.A.F. 2000). If this is a different citation to *Campbell*, please provide a full citation.

²³⁰ See *United States v. Green*, 55 M.J. 76, 79–80 (C.A.A.F. 2001).

²³¹ See Blumoff & Paavola, *supra* note 2, at 755. Blumoff discusses Professor Adrian Raine’s research indicating that deficits in the pre-frontal cortex signify a propensity to commit crime. *Id.* Symptoms such as impulsivity, loss of self-control and an inability to inhibit behavior are closely tied to criminal aggression. *Id.* See also ADRIAN RAINE, *THE PSYCHOPATHOLOGY OF CRIME: CRIMINAL BEHAVIOR AS A CLINICAL DISORDER* (1993); *Study: Traumatic Brain Injury and Criminal Behavior*, *supra* note 5 (correlating prefrontal cortex deficits associate with TBI to a predisposition for violent behavior).

²³² Morse, *supra* note 133, at 403–04. “Imaging is at present very expensive and requires carefully chosen and cooperative subjects. Consequently, the number of experimental subjects and control in any study tends to be small and precise replications are infrequent.” *Id.*

²³³ *Id.*

common defects among experimental groups.²³⁴ Thus, the ability to predict behavior is relatively limited.

The limits of neuroscience are particularly important in the courtroom. Generally, expert testimony incorporating neuroimaging seeks explanation of individual criminal responsibility.²³⁵ While the potential for science to make this determination is intriguing, it is not yet ready.²³⁶ The gap between the control group's "normal" brain and an individual's *mens rea* is too great for the current science to reliably predict.²³⁷ Although neuroimaging could describe physical and functioning differences as compared against some degree of normalcy, currently it cannot make the leap required to explain individual intent.²³⁸

2. Time Gap

Neuroscience's inability to determine mental responsibility relates closely to the time gap problems associated with the introduction of neuroimaging into evidence. Typically, counsel develop neuroimaging strategy well after a crime has been committed.²³⁹ Psychological examination and brain imaging usually occur around the time of trial. This practice equips the neuroscience expert with the ability to testify about an accused's brain structure and function at the time of trial.²⁴⁰ Most often, this testimony is not relevant, however, because the fact-finder's concern lies with the accused's mental state at the time of the crime.²⁴¹ At best, expert testimony could identify abnormalities in an accused's brain function and structure at the time of testing²⁴² but cannot provide "actual proof that the defendant is unable to appreciate the nature and quality or the wrongfulness of his acts" at the time of the crime.²⁴³

²³⁴ *Id.*

²³⁵ See Farahany, *supra* note 8, at 72–73.

²³⁶ *United States v. Mezvinsky*, 206 F. Supp. 2d 661, 667–69 (E.D. Pa. 2002) (excluding PET scans as unreliable and irrelevant to the legal question at issue); *United States v. Puerto*, No. 07-14097, 2010 WL 3191765 (11th Cir. 2010) (excluding neuroscience evidence because experts were unable to testify "with any medical certainty" that the defendant lacked intent at the time of the offense).

²³⁷ See Mayberg, *supra* note 78, at 41.

²³⁸ See John H. Blume, *Life, Death, and Neuroimaging: The Advantages and Disadvantages of the Defense's Use of Neuroimages in Capital Cases—Lessons from the Front*, 62 MERCER L. REV. 909, 911–14, 927–30 (2011); see also Teitcher, *supra* note 2, at 389–92.

²³⁹ See *United States v. Gray*, 51 M.J. 1, 14–15 (C.A.A.F. 1999) (raising the defense of mental responsibility during post-proceedings); Malone, *supra* note 128 (introducing a request for psychological brain testing after the government's initiation of charges).

²⁴⁰ See Jones et al., *supra* note 19, ¶ 10.

²⁴¹ See *id.*

²⁴² See Mayberg, *supra* note 78, at 37–38.

²⁴³ June Campbell Moriarty, *Flickering Admissibility: Neuroimaging Evidence in the US Courts*, 26 BEHAV. SCI. & L. 29, 42 (2008); see also MCM, *supra* note 67, R.C.M. 916(k).

Since the brain is a dynamic, complex organ, it is nearly impossible to draw a direct correlation between brain function and human behavior that meets the required legal standard, let alone sufficiently relate current images to past behaviors or thoughts that may be months or even years attenuated.²⁴⁴ The potential for inconsistency is too strong to allow admissibility.²⁴⁵ Replicating a brain's functioning as it occurred during the criminal event would be nearly impossible.²⁴⁶ Since the event already occurred, the mind may trigger new areas of the brain during attempts to reenact or reconstruct the scenario for analysis. The testing environment may create new brain functions different and perhaps indistinguishable from the criminal event.²⁴⁷ The mind may simply act differently over time.²⁴⁸ The variables are simply too extensive to allow testimony without reliable variance prediction.

Moreover, experts rarely have a baseline test from the accused to compare against an accused's current functional brain structure.²⁴⁹ This lack of baseline data generates questions regarding the extent of a brain abnormality at the commission of the crime.²⁵⁰ Tumor growth, brain deterioration, or subsequent head trauma could change images over time.²⁵¹ Neuroscience does not have an accurate way to hypothesize about past behavior using current images.²⁵² And without a baseline comparison of the accused's brain, allowing such evidence could confuse the fact-finder about the evidence's inherent unreliability.²⁵³

3. Human Error

The accuracy of neuroscience relies on clinical procedure selection, precise technical decisions, and human

²⁴⁴ See Teitcher, *supra* note 2, at 387–89.

²⁴⁵ See Compton, *supra* note 8, at 344. "The brain is incredibly complex—there is not one single area that controls a person's thoughts or actions; rather, there is an interconnectedness between different parts of the brain that cannot always be captured by scans or images." *Id.*

²⁴⁶ See Montague, *supra* note 135, at 60–62.

²⁴⁷ See Schauer, *supra* note 85, at 1201. A critical flaw in neuroimaging lie detection research is determining whether the study measures what it sets out to measure. See *id.* (pointing out the problem in instructing patients to lie rather than viewing brain activity as part of a uninfluenced behavior).

²⁴⁸ See Brown & Murphy, *supra* note 8, at 1188 (highlighting changes in mental state).

²⁴⁹ See *id.* at 1187.

²⁵⁰ *Id.*

²⁵¹ Jones et al., *supra* note 19, at 10. Jones lists concepts to consider that place brain imaging within its broader context. *Id.* His tenth point, "Today's brain is not yesterday's brain," encourages consideration of brain changes over time, which might include the development of "atypical anatomical or functional conditions." *Id.*

²⁵² See Mayberg, *supra* note 78, at 37.

²⁵³ See, e.g., *Trapp v. Spencer*, 479 F.3d 53 (1st Cir. 2007); *United States v. Dock*, 35 M.J. 627 (A.C.M.R. 1992).

interpretation.²⁵⁴ A minor variance in these factors could have substantial impact in the courtroom.²⁵⁵ Inside the decision to use a particular procedure lies the potential for human error.

The images produced by neuroimaging are the result of an expansive variety of tools both functional and structural.²⁵⁶ The lack of a standardized measurement tool creates extensive variability in neuroscience and its potential courtroom influence. Each clinical procedure brings particular nuances and technical requirements that could sway scientific results. For example, the American Academy of Neurology and American Clinical Neurophysiology Society determined that the validity of qEEG methods was insufficient for diagnosis of post-concussion syndrome, mild or moderate head injury, and attention disorders.²⁵⁷

Simple decisions could have major reliability impacts. The sophistication of neuroscience requires complex statistical maps describing brain function during testing.²⁵⁸ Small decisions regarding how to analyze the data or where to set the statistical significance threshold can have a large impact on the discovery of brain abnormalities.²⁵⁹ Even when the technical threshold is met, the resulting accuracy is still limited by the expert's ability to interpret the data.²⁶⁰ "As the studies get more complex, so does the data, which in turn increases the subjectivity and disparity in interpreting results."²⁶¹ Further, there may be limited correlation between the results from one scan to the next and from one researcher to the next.²⁶² This reality creates a reliability gap between the creation of neuroimages and its subjective supporting expert testimony.²⁶³

4. Outside Influence

Other outside factors can present unknown impacts on neuroimaging testing as well. "[U]se of psychoactive medications like sleep, anti-epileptic, antidepressant, and

anti-anxiety medications, as well as the patient's behavioral state, mood and motivation at the time of scanning (anxious, sad, sleepy, distracted, uncooperative), must also be considered as potential contributors to any observed deviant scan pattern."²⁶⁴ Furthermore, neuro-testing is generally performed under strict controls that allow the researcher to focus on a simple specific action or task.²⁶⁵ The complexity of the subject's everyday thought processing would likely change the scientific results.²⁶⁶ Likewise, the use of illegal drugs, anxiety associated with criminal actions, and the intensity of life outside the lab could change the brain's functional behavior.²⁶⁷ After all, "the brain is incredibly complex—there is not one single area that controls a person's thoughts or actions; rather, there is an interconnectedness between different parts of the brain that cannot always be captured by scans or images."²⁶⁸

The researcher must also consider whether the "behavioral state under investigation is static (developmental anomaly, old head injury), episodic (bipolar manic depressive versus euthymic state), or progressive (Alzheimer's disease, frontotemporal dementia)."²⁶⁹ If measurable over time, the condition could help explain past and future brain conditions.²⁷⁰ Unfortunately, this adds another layer to the already problematic analysis by increasing the number of required tests and ultimately the number of influential variables.

If admissible, the fact-finder should have a clear understanding of the limitations surrounding neuroscience evidence.²⁷¹ This includes background information regarding all factors that might alter testing reliability. One approach is crafting appropriate instructions. Spencer Compton suggests a sample jury instruction that includes the following:

- (1) instructing the jury not to assume the testifying witness is a scientific expert, but rather a witness qualified as an expert for the purposes of trial, (2) describing some limitations of neuroscience, (3) instructing jurors that they may accept or reject neuroscience evidence on the whole, and (4) reminding jurors of their role as fact-finders.²⁷²

²⁵⁴ See Jones et al., *supra* note 19, ¶¶ 6–10.

²⁵⁵ *Id.*

²⁵⁶ See generally, MacMillan & Vaughn, *supra* note 18. The article addresses court decisions surrounding Organic Brain Disorder, CAT scan evidence, PET scan evidence, MRI, and fMRI evidence. *Id.*

²⁵⁷ See Scott T. Grafton, *Has Neuroscience Already Appeared in the Courtroom?*, in A JUDGE'S GUIDE TO NEUROSCIENCE: A CONCISE INTRODUCTION 56 (Univ. of Cal. Santa Barbara 2010).

²⁵⁸ See Brown & Murphy, *supra* note 8, at 1144–52.

²⁵⁹ *Id.*

²⁶⁰ See Blume, *supra* note 239, at 925–27 (using a radiologist's failure to discover a brain tumor as an example of human error in neuroscience).

²⁶¹ Teitcher, *supra* note 2, at 386.

²⁶² *Id.*

²⁶³ See Compton, *supra* note 8, at 344.

²⁶⁴ Mayberg, *supra* note 78, at 39.

²⁶⁵ See Compton, *supra* note 8, at 344.

²⁶⁶ *Id.*

²⁶⁷ See Mayberg, *supra* note 78, at 39–40.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 40.

²⁷⁰ See *id.*

²⁷¹ See Compton, *supra* note 8, at 351–52.

²⁷² *Id.*

Despite the admissibility hurdles, the use of neuroscience in the law is expanding.²⁷³ Between 2007 and 2008, the number of cases in which counsel introduced neurological or behavioral genetics evidence jumped from 112 to 199.²⁷⁴ In 2009, the number hovered around 200.²⁷⁵

IV. Future Military Application

The application of neuroimaging is an unavoidable concern for counsel. Current practices in the U.S. military may provide solutions for a number of the hurdles associated with the introduction of neuroimaging evidence. For example, the military could provide a large sample population filled with cooperative subjects that can create a reliable comparative baseline. Furthermore, the military has begun extensive research into TBI that already includes the use of emerging neuroimaging techniques.²⁷⁶

This section will address the possible uses of neuroimaging within the military. It will discuss the steps the military has already taken in support of neuroscience and recommend the military as a sample population for future neuroscience research. Military-based research could provide a solution to many of the neuroimaging pitfalls associated with admissibility. Next, the section will address RCM 706 inquiries as an immediate possibility for the use of neuroimaging evidence and suggest how that information could influence other areas of the court-martial, such as sentencing proceedings. It will also discuss the current case law targeting the use of neuroimaging as a tool to negate mens rea.

A. A Military Sample Population

The brain, mind, and mental responsibility weigh heavy in the thoughts of servicemembers.²⁷⁷ The long wars in Iraq and Afghanistan have led to a steady increase in PTSD and TBI diagnoses among military ranks.²⁷⁸ Post Traumatic Stress Disorder rates have increased from 1,614 cases in 2000 to over 9000 in 2010.²⁷⁹ The ten-year total hits almost

90,000.²⁸⁰ Traumatic Brain Injury cases have seen similar annual increases from under 11,000 in 2000 to nearly 30,000 in 2009, totaling 178,876 between 2000 and the first quarter of 2010.²⁸¹

The stark changes in military brain-related trauma create further concern in an environment already focused on cognitive brain testing.²⁸² Additionally, the costs of neuroimaging decrease as the science grows. Within a military context, those costs might reduce further. The government has an incentive to increase neuroscience funding for the diagnosis and treatment of TBI and PTSD. Consequently, the military will continue to lead advances in neuroscience and the treatment of brain-related injury. Most likely, neuroimaging research tools and centers in the military will reduce the costs associated with requesting brain scans for legal purposes. This may accelerate the possible use of such science in military courtrooms beyond that exhibited currently in civilian courts.

In 2008, Congress responded to the military's TBI problem by directing pre- and post-deployment cognitive testing for servicemembers.²⁸³ Servicemembers are required to take a set of computerized tests that provide an individual cognitive assessment baseline.²⁸⁴ The testing allows a comparison base for servicemembers combating TBI.²⁸⁵ Although a step in the right direction, the required testing is limited.²⁸⁶ The tools used may not have the appropriate sensitivity to identify cognitive problems associated with mild TBI.²⁸⁷

Neuroscience could provide the necessary solution. Already, groups are working in connection with the military to use neuroimaging to diagnose PTSD and TBI.²⁸⁸ The U.S. Army has also partnered with Columbia University to develop pre- and post-deployment fMRI technology that

²⁷³ BRAIN WAVES MODULE 4: NEUROSCIENCE AND THE LAW 4 (The Royal Society 2011), available at <http://royalsociety.org/policy/publications/>.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ Peggy Eastman, *New National Treatment Center for Soldiers with TBI and PTSD Opens*, NEUROLOGYNOW (June 29, 2010), <http://journals.lww.com/neurologynow/blog/breakingnews/pages/post.aspx?PostID=8>.

²⁷⁷ See *Military & TBI*, BRAIN TRAUMA FOUNDATION, www.braintrauma.org/tbi-faqs/military-tbi/ (last visited Jan. 9, 2013).

²⁷⁸ See FISCHER, *supra* note 5, at 2–3. In 2000, the 1614 cases of PTSD are labeled “not deployed” meaning the PTSD was diagnosed before deployment. *Id.* at 2. In 2010, the PTSD cases are labeled 1423 “not deployed” and 7739 “deployed.” *Id.* Deployed cases are those that were diagnosed sometime after the individual deployed. *Id.* at 1.

²⁷⁹ *Id.* at 2.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 2–3.

²⁸² See Christian Elliott, *Military Uses for Cognitive Testing*, MYBRAINTEST (Aug. 17, 2010), <http://www.mybraintest.org/2010/08/military-uses-for-cognitive-testing/>; John Ohab, *Neuroimaging Study Investigates Blast-Induced Traumatic Brain Injury*, ARMED WITH SCIENCE (Feb. 2, 2010, 2:00PM), <http://science.dodlive.mil/2010/02/02/neuroimaging-study-investigates-blast-induced-traumatic-brain-injury/>.

²⁸³ Elliott, *supra* note 282.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ See Harvard Med. Sch. Psychiatry Neuroimaging Lab., *Traumatic Brain Injury*, PSYCHIATRY NEUROIMAGING LABORATORY, <http://pnl.bwh.harvard.edu/tbi.html> [hereinafter Harvard Med. Sch. Psychiatry Neuroimaging Lab.] (last updated on Feb. 1, 2013). A group started research in 2008 working with redeploying Soldiers to find markers within the brain that would indicate PTSD and TBI symptoms. *Id.*

focuses on identifying and treating TBI.²⁸⁹ Furthermore, the military opened a \$65 million technologically cutting-edge center focused on TBI treatment through neuroimaging in 2010.²⁹⁰ The National Intrepid Center of Excellence (NICoE) is located in Bethesda, Maryland, and includes an advanced area equipped with scanning with the most up-to-date PET, MRI, and CT technology.²⁹¹ The center can use multiple brain images to capture brain functioning and develop TBI treatment.²⁹² For trial practitioners, these centers introduce a viable option for brain scan requests. Instead of requesting expensive civilian expert assistance, counsel can request use of the facility to evaluate clients. Additionally, NICoE's research may lead to treatment possibilities that could enhance extenuation evidence by reducing TBI symptoms associated with violence and criminal behavior.²⁹³

The military has begun to implement several programs to combat TBI and the hurdles associated with neuroimaging.²⁹⁴ As technology increases and its associated cost decreases, the military should expand its testing beyond pre- and post-deployment.²⁹⁵ Currently, servicemembers are required to undergo a physical examination prior to entering service.²⁹⁶ The military could create a huge sample population by outfitting medical entrance processing stations with brain imaging technology. Doing so would create a universal baseline brain function recording. This process would expand the sample population used in neuroscience research from a generally small group to a diverse cross-section of the population. It would also take advantage of a compliant population with an incentive to cooperate because of their profession's increased risks of TBI and PTSD.

As an unintended consequence, the intersection of law and neuroscience could benefit from the implementation of military neuroimaging research. Studies have linked TBI to violent behavior often associated with crime.²⁹⁷ Such progressive research could provide a better understanding of TBI's influences over behavior as they relate to criminal elements and sentencing factors. Furthermore, the testing

would help reduce the common time gap problem associated with neuroscience. Experts would have a baseline record to compare against images taken after the commission of a criminal offense.

These advantages associated with military-based neuroimaging and the current focus on TBI identification and treatment should substantiate increased brain testing research among servicemembers. Future growth ought to encompass a means to capture a functional image of every servicemember's brain prior to service and at periodic steps throughout their career.

B. Rule for Court-Martial 706

Rule for Court-Martial 706 already includes an effective avenue to utilize neuroimaging evidence.²⁹⁸ As discussed earlier, RCM 706 requires a board of physicians or clinical psychologists to inquire into an accused's mental capacity and mental responsibility.²⁹⁹ This determination requires the board to answer four distinct questions: (1) "at the time of the alleged criminal conduct, did the accused have a severe mental disease or defect," (2) "what is the clinical psychiatric diagnosis," (3) "was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct," and (4) "is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceeding against the accused or to conduct or cooperate intelligently in the defense."³⁰⁰ In addition, other appropriate questions and answers may be included in the report.³⁰¹ Because of its close connection to psychiatry, neuroimaging bolsters the psychiatric diagnosis. The addition of neuroimaging to RCM 706 inquiries would provide a valuable tool to doctors on the board and counsel involved in the court-martial.

Criminal behavioral differences are a result "of the interplay between specific gene variants, environmental stressors, and violence."³⁰² Compelling testimony about an accused's mental responsibility should include a description of his brain function and structure, as well as his personal history, environmental influences, and behavior.³⁰³ A mental responsibility inquiry that could demonstrate these elements, including a neuroimaging element, would be more useful to the court and counsel. Combining traditional methods of psycho analysis with scientifically based examinations of

²⁸⁹ See Ohab, *supra* note 282.

²⁹⁰ See Eastman, *supra* note 276.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ See Kmraquize, *supra* note 5.

²⁹⁴ See Eastman, *supra* note 276; Harvard Med. Sch. Psychiatry Neuroimaging Lab., *supra* note 288.

²⁹⁵ See *The Brain Sciences in the Courtroom, A Symposium of the Mercer Law Review* October 22, 2010, 62 MERCER L. REV. 769, 833-34 (2011). Panel member, Emily Paavola, outlined the costs associated with MRI and PET scans. *Id.* Typical scans cost between \$7000 and \$8000 with an additional cost of \$15,000 for the quantitative analysis. *Id.*

²⁹⁶ U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS para. 2-1 (4 Aug. 2011).

²⁹⁷ See Kmraquize, *supra* note 5.

²⁹⁸ MCM, *supra* note 67, R.C.M. 706.

²⁹⁹ *Id.*; see *supra* Part II.B.

³⁰⁰ MCM, *supra* note 67, R.C.M. 706.

³⁰¹ *Id.*

³⁰² Farahany, *supra* note 8, at 74.

³⁰³ See *id.* at 75.

brain functioning and structure should provide a clearer picture of the influences guiding an accused's behavior.

This combination of factors has already influenced several civilian courts. In *Walker v. Oklahoma*,³⁰⁴ the Tenth Circuit acknowledged that the appellant's mental illness had an organic component, but did not find error because the expert at trial was able to form an opinion without additional neurological tests.³⁰⁵ In *United States v. Kasim*,³⁰⁶ the U.S. magistrate judge considered the defendant's demeanor, his inability to concentrate, his inability to understand the charges, and SPECT results supporting the symptoms before finding Kasim incompetent to stand trial.³⁰⁷ In *United States v. Williams*,³⁰⁸ the court and experts on both sides agreed that a variety of tests are useful for examining intelligence, cognitive functioning, and neuropsychological functioning.³⁰⁹ The court found that failure to conduct fMRI scans and qEEG analysis could impact the weight of expert testimony.³¹⁰

Military courts should face similar neuroimaging-based inquiry requirements in cases that require RCM 706 examination. Servicemembers have complex backgrounds that include the emotional impact of armed conflict, often receive treatment from various medical professionals, and undergo multiple treatment programs. Counsel might consider utilizing neuroimaging testing to increase the weight of expert testimony derive from RCM 706 results.

The CAAF has recognized that psychiatry is not an exact science.³¹¹ Often, psychiatrists come to varying conclusions.³¹² Neuroimaging information could provide psychiatrists with an evaluation factor that requires limited personal interpretation. For example, consider the impact of a timely neuroimaging testing request in a case like *United States v. Gray*.³¹³

In early 1988, a mixed officer and enlisted panel convicted Specialist Ronald Gray of numerous offenses including premeditated murder and three specifications of

rape.³¹⁴ The panel sentenced Gray to death, a dishonorable discharge, total forfeitures, and reduction to Private E-1.³¹⁵ Gray's appeal included three legal issues centered on neuroimaging.³¹⁶ The CAAF reviewed whether Gray should have received a "new trial based on newly discovered evidence of organic brain damage,"³¹⁷ whether the panel received an accurate understanding of Gray's mental health condition,³¹⁸ and whether he received adequate psychiatric assistance in the "evaluation, preparation, and presentation of his case."³¹⁹

During the post-trial process, Gray claimed that newly discovered evidence would "produce a substantially more favorable result."³²⁰ A physician specializing in neurology concluded that Gray "suffers from organic brain defects that probably impaired his capacity to distinguish right from wrong and conform his conduct to the law."³²¹ Gray also asserted a national standard of care for professional psychiatric evaluations that would require a MRI brain scan and a thorough analysis of Gray's head trauma history.³²² Although the court recognized *Ake's* requirement to competent psychiatric assistance and an appropriate mental health examination, its opinion demonstrated a clear concern for Gray's post-trial attack on the psychiatric assistance he received at trial.³²³

In its opinion on the neuroimaging issues, the CAAF highlighted the difference in the pre- and post-trial expert opinions and that the common occurrence of conflicting expert opinion does not alone require a rehearing.³²⁴ The court also relied on the "substantial mitigating evidence" already presented by Gray's "trial psychiatric experts and his family."³²⁵ Unwilling to enter a battle of experts on post-trial, the court found that counsel presented favorable evidence to demonstrate Gray's mental status and organic brain damage.³²⁶

Most counsel, however, will not find themselves in the middle of a post-trial mental responsibility battle. They will more likely find themselves at a point in the trial process

³⁰⁴ 167 F.3d 1339 (10th Cir.).

³⁰⁵ *Id.* at 1349.

³⁰⁶ No. 2:07CR56, 2008 WL 4822291 (N.D. Ind. 2008).

³⁰⁷ *Id.* at *17-18.

³⁰⁸ No. CR06-00079, 2009 WL 424583 (D. Haw. 2009).

³⁰⁹ *See id.* at *5.

³¹⁰ *Id.* at *6.

³¹¹ *United States v. Gray*, 51 M.J. 1, 17 (C.A.A.F. 1999). The court noted, "divergence of opinion among psychiatrists is not novel and does not provide a legal basis for concluding that one or the other is performing inappropriate tests or examinations." *Id.*

³¹² *See id.*

³¹³ 51 M.J. 1 (C.A.A.F. 1999).

³¹⁴ *Id.* at 9.

³¹⁵ *Id.*

³¹⁶ *Id.* at 5-8.

³¹⁷ *Id.* at 12.

³¹⁸ *Id.* at 14.

³¹⁹ *Id.* at 16.

³²⁰ *Id.* at 12.

³²¹ *Id.* at 13.

³²² *Id.*

³²³ *See id.* at 16-17.

³²⁴ *See id.* at 14-17.

³²⁵ *Id.* at 18.

³²⁶ *See id.* at 15-18.

ripe for a RCM 706 request. During trial preparation, without the benefit of hindsight, a complete assessment should include consideration of organic brain damage testing. Although the court in *Gray* did not reverse the case based on the experts' failure to conduct MRI scans, it recognized a variety of factors that indicated brain damage to the fact-finder.³²⁷ Prior head injury from parachuting, a history of development problems, and abnormal EEG results indicated similar diagnosis as the expected brain scan results.³²⁸

Unfortunately, these facts are not unique for military counsel. Many military accused suffer from deployment-related head injury and PTSD, immerse themselves in a drinking culture, and have lengthy stories that can reveal an abusive history. *Gray* demonstrates that military counsel have access to neuroimaging evidence. Additionally, it outlines factual circumstances that should trigger brain scan requests. If an accused's history includes head trauma, mental health issues, or alcohol abuse, neuroimaging evidence can provide significant insight into an accused's behavior. As neuroscience advances and interconnects with the law, counsel's discretion to request neuroimaging evidence will narrow.

Military counsel preparing for trial should avoid the post-trial problems associated with *Gray* and elicit neuroimaging tests as part of their traditional RCM 706 request. This approach allows neuroimaging to influence the board's mental responsibility determination without facing the evidentiary obstacles of in-court admissibility. Furthermore, counsel will gain insight into the accused's brain structure and function. Since RCM 706 allows for the inclusion of "other appropriate questions" and for defense to receive the full report, counsel can use the inquiry to pinpoint areas of mental emphasis or concern necessary for trial preparation.³²⁹ This information will be "critical not only to the question of his mental responsibility at the time of offense but as extenuation and mitigation evidence."³³⁰

C. Indication of Innocence

The RCM 706 inquiry results might also produce evidence indicating a lack of mens rea. Although courts should exclude neuroscience evidence because of the many hurdles discussed above,³³¹ they are already addressing mens rea issues relating to neuroimaging evidence. Despite the limited military case law centered on neuroimaging, military

counsel will likely encounter legal issues centered on neuroscience's ability to indicate whether an accused's brain function capability allowed him to form a specific intent during the commission of an offense. Increased cases of PTSD and TBI in the military only exacerbate this likelihood.³³² The growing number of servicemembers suffering from PTSD and TBI amplifies the possibility that military accused suffer from brain disease and mental health problems. Consequently, courts-martial should experience more litigation surrounding the accused's mental ability to form intent.

Without military precedent, civilian case law will drive the initial use of neuroimaging evidence to negate mens rea. For example, a New York court found an abuse of discretion in not authorizing neurological testing that could aid the fact-finder in assessing the defendant's ability to form intent and perceive risk.³³³ The defendant should have been allowed to explore his organic brain damage in support of his self-defense argument.³³⁴ The fact that the victim was larger than the defendant and held a three-foot piece of lumber while breaking into the defendant's home influenced the court's 1994 decision.³³⁵ More recently, the Ninth Circuit found an abuse of discretion in the exclusion of MRI-based testimony connecting a brain tumor to the element of predisposition in an entrapment defense.³³⁶ Although the lower court found the imaging evidence unreliable, the case was reversed under the assertion that uncertain medical knowledge should not be precluded when medical expert opinion testimony "permits the assertion of a reasonable opinion."³³⁷

Conversely, cases have acknowledged the "considerable debate" that "exists within the literature as to the reliability of functional MRI and QEEG scans."³³⁸ A Pennsylvania federal district court applied *Daubert* to PET scans relating to the "knowingly and willfully" element in a fraud case.³³⁹ The court strictly applied the "fit" test in its conclusion that the evidence's "hopelessly elusive nature simply would not be helpful to the trier of fact."³⁴⁰ In line with the hurdles to admissibility discussed earlier, the court pointed out that the science did not support a connection between specific areas

³²⁷ See *id.* at 17 (recognizing the expert opinion of Doctor Merikangas, a civilian psychiatrist).

³²⁸ *Id.*

³²⁹ MCM, *supra* note 67, R.C.M. 706(c).

³³⁰ *Gray*, 51 M.J. at 20.

³³¹ See *supra* Part III.B.

³³² See Hayes, *supra* note 5, at 78; see also FISCHER, *supra* note 5, at 2-3.

³³³ *People v. Jones*, 210 A.D.2d 904, 904 (N.Y. App. Div. 1994).

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *United States v. Sandoval-Mendoza*, 472 F.3d 645, 655-56 (9th Cir. 2006).

³³⁷ See *id.* at 655 (quoting *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002)).

³³⁸ *United States v. Williams*, No. CR06-00079, 2009 WL 424583, at *5 (D. Haw. 2009).

³³⁹ See *United States v. Mezvinsky*, 206 F. Supp. 2d 661, 667 (E.D. Pa. 2002).

³⁴⁰ *Id.* at 674.

of the brain and a specific disorder.³⁴¹ It also noted the inability of PET scans to explain twelve years of retrospective brain functioning.³⁴²

Missouri courts also focused on the link between neuroscience and testimony in a 2009 determination that PET scan evidence would have been inadmissible at trial.³⁴³ Although the defendant's mental state was an issue in whether he lacked the appropriate culpable mental state to commit first degree murder, the expert could not link the scientific method used to the defendant's mental problems.³⁴⁴ In 2010, a federal district court in Tennessee excluded fMRI tests focused on lie detection.³⁴⁵ The defense sought admission to disprove elements associated with fraud, but the court found the tests unreliable under *Daubert* and unfairly prejudicial under FRE 403.³⁴⁶

Courts-martial are not exempt from similar issues surrounding the introduction of neuroimaging evidence. Many crimes under the Uniform Code of Military Justice require proof of intent-based mens rea elements.³⁴⁷ Furthermore, military courts allow evidence that negates specific intent.³⁴⁸ In *Ellis v. Jacob*,³⁴⁹ the CMA ensured Ellis could present evidence of extreme sleep deprivation in order to negate the element of specific intent necessary to convict him of murdering his son.³⁵⁰ In *United States v. Berri*,³⁵¹ the trial judge erred by failing to instruct the panel to consider expert testimony that negated the element of specific intent.³⁵²

Military nuances may also impact the admissibility of neuroscience as a mens rea identifier. For example, military panels are generally made up of a cross-sample that includes a high level of education, deployment experience, and most likely some connection to mental defects through PTSD and

TBI.³⁵³ These attributes may make military panels less susceptible to the "Christmas tree" effect and more equipped to evaluate the appropriate weight expert testimony and neuroscience research deserve.³⁵⁴ At the same time, the military's relation to PTSD and TBI might reduce the effectiveness of neuroimaging evidence. Servicemembers familiar with successfully combating mental disease may be less influenced by evidence that suggests an accused could not possess a certain mens rea.

Additionally, neuroscience-based litigation has found its way into military practice. In *United States v. Dock*,³⁵⁵ a military panel considered contrasting expert opinion discussing whether the accused's crimes were caused by organic brain damage.³⁵⁶ Ultimately, the panel convicted Private First Class Todd Dock of premeditated murder.³⁵⁷ On appeal, the U.S. Army Court of Military Review found that the evidence supported the panel's finding that Dock understood the nature of his action and could have conformed to the law.³⁵⁸

Just as civilian courts have been forced to balance the questionable reliability of neuroscience against the accused's right to present a case on an increasing scale, courts-martial will likely confront the same issue. Although neuroimaging should initially find more success as a sentencing tool, military counsel must not discount attempts to introduce neuroscience on the merits. According to Colonel Rick Malone, Director for U.S. Army Center for Forensic Behavioral Sciences Forensic Psychiatry, neuroimaging performs best as a means to discover organic brain damage and as a tool in making diagnoses.³⁵⁹ Although skeptical of neuroimaging's admissibility on the merits, Colonel Malone agreed that under the right fact pattern neuroimaging could be used as a part of an expert's analysis as to whether an accused could meet a specific intent element.³⁶⁰ In his scenario, neuroimaging played a fraction of the expert's consideration.³⁶¹ Neuroimaging, most likely structural

³⁴¹ See *id.* at 675.

³⁴² *Id.*

³⁴³ See *Zink v. Missouri*, 278 S.W.3d 170, 178–79 (Mo. 2009).

³⁴⁴ *Id.*

³⁴⁵ See Report and Recommendation, *supra* note 12, at 39.

³⁴⁶ *Id.*

³⁴⁷ See generally MCM, *supra* note 67, pt. IV, ¶¶ 9, 43, 46. Article 85—Desertion, with an element that requires intent to remain away permanently, Article 121—Larceny, has varying levels of intent, and Article 118—Murder, which has layers of mens rea elements ranging from knowledge to premeditation. *Id.*

³⁴⁸ See *supra* Part II.B.3; see also MCM, *supra* note 67, R.C.M. 916.

³⁴⁹ 26 M.J. 90 (C.M.A. 1988).

³⁵⁰ *Id.* at 93–94.

³⁵¹ 33 M.J. 337 (C.M.A. 1991).

³⁵² *Id.* at 344.

³⁵³ See UCMJ art. 25 (2012). Court-martial panels members must be best qualified based on "age, education, training, experience, length of service, and judicial temperament." *Id.*

³⁵⁴ See *supra* Part III.B.

³⁵⁵ 35 M.J. 627 (A.C.M.R. 1992).

³⁵⁶ *Id.* at 636. The defense experts concluded that Dock's ventricular system was abnormally large due to illness or trauma. *Id.* at 633. They suggested that the pressure in Dock's brain combined with alcohol abuse and clinical depression could cause rage and aggression leading to irresistible impulses. *Id.* Government experts disagreed and expressed the unreliability of neurological testing in their conclusion that Dock's "neurological defect did not affect his ability to reason or control his behavior." *Id.* at 635.

³⁵⁷ *Id.* at 629.

³⁵⁸ *Id.* at 636.

³⁵⁹ Malone Interview, *supra* note 89.

³⁶⁰ *Id.*

³⁶¹ *Id.*

imaging, would aid in the diagnosis of a brain abnormality such as TBI.³⁶² Then, the expert would consider it among an array of neurological tests, patient history, and behavioral motivators before addressing the accused's ability to form a specific intent of an offense.³⁶³

Military courts have also recognized the inexact nature of forensic psychology.³⁶⁴ In *United States v. Gray*,³⁶⁵ CAAF refused to align itself with a particular side in a battle of expert testimony. It did "not welcome descent into the 'psycho-legal' quagmire of battling psychiatrists and psychiatric opinions."³⁶⁶ In *United States v. Griffin*,³⁶⁷ CAAF upheld a decision to prohibit coerced confession testimony.³⁶⁸ In *Griffin*, the trial judge found the expert testimony of little value to the trier of fact and unable to meet the MRE 702 and *Daubert* standards and CAAF held that he properly performed his "gate keeping" function.³⁶⁹ Perhaps neuroimaging will meet a similar fate. Or, the trial judge may let the panel weigh the issue under specific instructions.³⁷⁰ After all, the trier of fact is the appropriate evaluator of conflicting expert testimony.³⁷¹

Although neuroscience faces a steep challenge before admissibility as a means to indicate innocence in the military, a particular factual background and relevant purpose may push neuroimaging into evidence.

V. Conclusion

In a case like that of Sergeant Jones—a war-torn Soldier suffering from the effects of head trauma and PTSD—neuroimaging evidence provides a window of insight into the connection between his injury and behavior. The fast-paced development of neuroscience and its ever-increasing intersection with criminal law challenges counsel to study and understand its changing relevance. Court-martial practice enhances this reality because the nature of military service often presents military accused who suffer from mental health concerns and brain trauma.

Neuroscience's present novelty will quickly evaporate as researchers standardize neuroimaging testing and expand insight into the connection between the brain and behavior. As the reliability of and access to neuroscience increase, courts will solidify the expectation that counsel must consider, if not affirmatively pursue and introduce, neuroimaging evidence. To the extent they do so, courts should proceed incrementally, first requiring neuroimaging evidence on sentencing and as a required addition to inquiries under RCM 706; only later should they condone it as a means of assessing mens rea.

Neuroscience, however, is not a panacea with respect to mental health issues at trial, and counsel's understanding of its limitations is imperative. Counsel must understand the distinction between functional and structural neuroimaging and the value each may have in court. Furthermore, neuroscience research has specific evidentiary reliability problems it must overcome before courts accept its introduction. Time gaps between offense and brain testing, inexact error rates, outside influences on the brain, and its inherent group to individual brain comparison greatly reduce the legal reliability of neuroimaging evidence. Counsel must consider these variables along with the accused's history, additional neurological tests, and mental health analysis in determining the appropriate use of neuroimaging evidence.

Finally, the military's concern for advancing the treatment and diagnosis of PTSD and TBI, current research tools, and vast testing population provide tremendous opportunities and a ripe environment capable of reducing many neuroimaging research and admissibility concerns. As military neuroimaging research progresses, it will influence courts-martial practice and the expectation of counsel to consider neuroimaging evidence. Perhaps more than any other trial practitioner, the military advocate must understand the considerable future potential of neuroimaging.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *United States v. Ake*, 470 U.S. 68, 81 (1985); *see also United States v. Gray*, 51 M.J. 1, 17 (C.A.A.F. 1999) (addressing the potential disagreement in psychiatric diagnosis).

³⁶⁵ 51 M.J. 1 (C.A.A.F. 1999).

³⁶⁶ *Id.* at 17.

³⁶⁷ 50 M.J. 278 (C.A.A.F. 1999).

³⁶⁸ *Id.* at 285.

³⁶⁹ *Id.*

³⁷⁰ *See United States v. Dock*, 35 M.J. 627, 635 (A.C.M.R. 1992).

³⁷¹ *See id.* at 634–36. The trier of fact must evaluate conflicting expert testimony in "context of the totality of the evidence and after proper instructions by the military judge." *Id.*

Good Idea Fairies: How Family Readiness Groups and Related Private Organizations Can Work Together to Execute the Good Ideas

Major Laura A. Grace*

Good Idea Fairy: Military term; An evil mythical creature that whispers advice and ideas into the ears of military leadership, causing hundreds [of] unnecessary changes and countless wasted man-hours every year. The Good Idea Fairy should be shot on sight if she is seen in your area.¹

I. Introduction

As a brigade judge advocate (BJA), your commander's spouse, who is also the Headquarters and Headquarters Company (HHC) Family Readiness Group (FRG) leader, approaches you with an idea. After the monthly meeting, the FRG wants to host a luncheon. During the luncheon, there will be a raffle to raise money to fund the unit ball; to purchase a new scanner for the FRG office; and to purchase supplies for an orphanage in Afghanistan informally adopted by the brigade during their deployment. The FRG wants to solicit prizes for the raffle and to sell raffle tickets on its Facebook page. The FRG requests a room for the events; Soldiers to support the events; and child care. The FRG leader also asks the commander to encourage participation by announcing the raffle during staff call.

Judge advocates (JAs) often cringe the minute they hear the words, "The FRG wants to [insert good idea here]." Many JAs view the FRG leadership as well-meaning "good idea fairies" whose ideas run afoul of Army regulations and policies. Similarly, many FRG volunteers cringe at the prospect of asking a JA for legal advice because they perceive JAs as roadblocks when it comes to implementing their good ideas. While advising FRGs can be frustrating, it is helpful to understand that FRG volunteers suffer similar frustrations. Family Readiness Group volunteers donate countless hours and devote a significant amount of energy—many out of a sense of obligation²—to help make a challenging lifestyle a little better for the unit. They receive no financial compensation for their efforts, yet as a command-sponsored organization, they are restricted by the same rules and regulations as paid employees.³ Judge advocates can help diffuse this conflict by engaging early and helping shape ideas so that FRG volunteers and commanders achieve their goals legally.

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¹ URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=ood%20idea%20fairy> (last visited Jan. 12, 2013).

² Tim Hsia, *The Increasing Role and Influence of Military Spouses*, NY TIMES, Aug. 13, 2010, <http://atwar.blogs.nytimes.com/2010/08/13/the-increasing-role-and-influence-of-military-spouses> (discussing the social pressure for spouses of senior leaders to assume leadership positions in Family Readiness Groups (FRG)).

³ U.S. DEP'T OF ARMY, REG. 608-1, ARMY COMMUNITY SERVICE CENTER para. J-2c (19 Sept. 2007) (RAR 21 Dec. 2010) [hereinafter AR 608-1].

Using the scenario in the introduction to provide context, this primer is designed to be a quick reference guide for JAs advising commanders on issues relating to FRGs and private organizations⁴ (POs). Part II of this primer focuses on FRGs. Specifically, that section begins with a brief explanation of the changes FRGs have experienced since 2006, and then it discusses common FRG issues, including funding sources, fundraising, statutory volunteers, and the use of government resources. Part III defines POs and discusses some of the advantages and disadvantages of POs. Private Organizations—comprised of many of the same people as the FRG—might be able to accomplish what the FRG cannot, but there are limitations. That section highlights some ethics restrictions when dealing with POs.

II. Family Readiness Groups

A. Background

On July 21, 2006, the Department of the Army revised Army Regulation (AR) 608-1 to add the new Appendix J, Army Family Readiness Group Operations.⁵ This revision represented a seismic shift in the world of FRGs—they became official Department of the Army (DA) organizations.⁶ While gaining recognition as an official Army organization has advantages, it also means that FRG volunteers are subject to the same statutory and regulatory restraints as federal employees, including restrictions

⁴ Private organizations (POs) are self-sustaining, non-federal entities (NFE), that operate on a Department of Defense (DoD) installation with the written permission of the installation commander or higher authority. U.S. DEP'T OF DEF., INSTR. 1000.15, PROCEDURES AND SUPPORT FOR NON-FEDERAL ENTITIES AUTHORIZED TO OPERATE ON DoD INSTALLATIONS (24 Oct. 2008) [hereinafter DODI 1000.15].

⁵ AR 608-1, *supra* note 3 app. J. Appendix J of AR 608-1 provides regulatory guidance and policy for managing FRGs. *Id.* When advising on this topic, judge advocates (JAs) should ensure that their resources do not predate 2006, when FRGs became official Department of the Army organizations.

⁶ *Id.* See also U.S. DEP'T OF ARMY REG. 600-20, ARMY COMMAND POLICY para. 5-10a(2)(b) (18 Mar. 2008) (RAR 4 Aug. 2011) [hereinafter AR 600-20] (stating that "Family Readiness is the mutual reinforcement provided to Soldiers, civilian employees, retirees (regardless of marital status), and their Family members—both immediate and extended"). Commanders must encourage an effective Family program and maintain a unit FRG "to encourage self-sufficiency among its members by providing information, referral assistance and mutual support." *Id.* para. 5-10b(7).

contained in the Joint Ethics Regulation (JER)⁷ and the Department of Defense (DoD) Financial Management Regulation.⁸ Gone are the days when Family Support Organizations, as they were formally called, could raise unlimited funds. Fundraising restrictions are a source of frustration for commanders and FRG volunteers, especially for those who fail to appreciate that the FRG's mission is communication, not social events. Having the wrong focus can lead to dysfunction in both the FRG and the unit, which may detract from the mission.⁹

B. Mission: Communication!

Given the sacrifices military Families make,¹⁰ it is not surprising that DoD focuses a significant amount of time and resources on Family programs.¹¹ To truly take care of Families, an open line of communication between the command and Families is critical. Recognizing that the FRG leadership is in the best position to accomplish this, FRGs have the explicit mission to: "(1) Act as an extension of the unit in providing official, accurate command information. (2) Provide mutual support between the command and the FRG membership. (3) Advocate more efficient use of available community resources. (4) Help families solve problems at the lowest level."¹² The extent of the individual FRG's mission will depend on the expectations and support provided by the commander. At a minimum, an FRG will hold FRG member meetings, hold FRG staff and committee meetings, draft and distribute official newsletters, maintain and update unit rosters and family readiness information, establish telephone trees, and schedule educational

⁷ U.S. DEP'T OF DEF., REG 5500.07-R, JOINT ETHICS REG. (30 Aug. 1993) (C7, 17 Nov. 2011) [hereinafter JER].

⁸ U.S. DEP'T OF DEF., REG 7000.14-R, FINANCIAL MANAGEMENT REGULATION (last modified on 25 Jan. 2012) [hereinafter DOD FMR].

⁹ Associated Press, *Wife of O-6 Told to Stay Away from BCT Families*, ARMY TIMES, June 11, 2010, http://www.armytimes.com/news/2010/06/ap_drinkwine_wife_bragg_bct_061110 (discussing a dysfunctional FRG in which the commander's spouse threatened the careers of her husband's subordinates). The article reported that one of the subordinate commanders, Lieutenant Colonel Frank Jenio, who was in charge of 800 troops while deployed, "said the need to deal with challenges involving the unit's family support group nearly every other day took time away he could have been using to focus on the war." *Id.*

¹⁰ One study concluded that one-third of military children studied are at high risk for psychosocial morbidity. The most significant predictor of child psychosocial functioning was parenting stress. The study also found that family stress during deployments was mitigated by military, family, and community support. See Eric M. Flake et al., *The Psychological Effects of Deployment on Military Children*, 30 J. OF DEVELOPMENTAL & BEHAVIORAL PEDIATRICS No. 4, Aug. 2009, at 271-78.

¹¹ See OFFICE OF THE UNDER SEC'Y OF DEF. (COMPTROLLER)/CFO, OVERVIEW: UNITED STATES DEPARTMENT OF DEFENSE FISCAL YEAR 2013 fig.5-3, at 5-6 (2012). Despite the initiatives to reduce the defense budget, the DoD requested \$8.5 billion for family support programs for the fiscal year (FY) 2013 budget, an increase of \$0.5 billion from the FY 2011 budget. *Id.*

¹² AR 608-1, *supra* note 3, para. J-2a.

briefings.¹³

Fundraising and party planning are noticeably absent from the FRG mission. Recognizing that social events are beneficial to its members, Appendix J of AR 608-1 includes social activities under FRG roles and functions.¹⁴ Family Readiness Groups are permitted to host social activities paid for with informal funds,¹⁵ but it is not their mission. Many commanders and senior spouses have not embraced the 2006 changes and still want to channel a large portion of FRG time and money into social events.¹⁶ Consequently, the supporting JA's role with FRGs is primarily providing fiscal advice.

C. Money Matters

There are three potential funding sources for FRGs: appropriated funds (APFs), FRG supplemental mission funds, and informal funds.¹⁷ Each fund has a different purpose and different restrictions. Congress has imposed fiscal controls, such as a prohibition against augmenting funds, and failure to adhere to these rules could result in adverse personnel actions and criminal penalties.¹⁸ Therefore, it is essential that the JA know the purpose of an acquisition and the commander's view of the FRG mission before rendering fiscal advice. The following section discusses the three funds and the proper use of each fund.

1. Appropriated Funds

The first funding source for FRGs is the APFs, which may be used to pay for FRG mission-essential activities.¹⁹ Appropriated funds are tax-payer money, and as such, have

¹³ *Id.* para. J-2d.

¹⁴ *Id.* para. J-2.

¹⁵ Commanders may authorize FRGs to maintain one informal fund (IF). *Id.* para. J-7a(1).

¹⁶ See, e.g., E-mail from Amy Oskey, to author (Jan. 4, 2012 12:28 EST) (on file with author) (stating that "[t]here are many misconceptions as to what an FRG is. The FRG's main function is to disseminate information to family members. Some spouses think the FRG's main function is fund raising and party planning."). See also *Something Needs to Change*, SPOUSEBUZZ.COM (Sept. 14, 2007), <http://www.spousebuzz.com/blog/2007/09/something-needs.html> (discussing frustrations with FRG fundraising restrictions stating that "[t]hey can't raise funds in order to provide the services expected of them yet the services ARE expected of them. . .").

¹⁷ AR 608-1, *supra* note 3, paras. J-3, J-7 and J-9.

¹⁸ The Anti-Deficiency Act (ADA) prohibits making or authorizing an expenditure or obligation in excess of or in advance of an appropriation or formal subdivision. 31 U.S.C. §§ 1341 and 1627 (Westlaw 2012). A government official who violates the ADA could receive administrative discipline, up to \$5,000 fine or imprisonment for two years. *Id.* §§ 1349, 1350 and 1519; DOD FMR, *supra* note 8, vol. 14, ch. 9.

¹⁹ AR 608-1, *supra* note 3, para. J-3. Family Readiness Groups acquire appropriated funds (APFs) through the unit's budget process. *Id.* para. J-6.

many strings, or fiscal rules attached.²⁰ Expenditures must meet purpose, time, and amount tests.²¹ Time and amount will be dictated by the unit's resource manager; therefore, the JA's advice is typically limited to a purpose analysis. Where a particular expenditure is not specifically provided for in the appropriation act,²² the expenditure must be necessary and incident to the proper execution of the general purpose of the appropriation. The Government Accountability Office (GAO) established a three-part test to determine whether expenditure is a necessary expense of a particular appropriation: (1) the expense must be necessary and incident to the purpose of the appropriation; (2) the expenditure must not be prohibited by law; and (3) the expenditure must not be otherwise provided for.²³ Expenses are typically funded with Operation and Maintenance Funds (O&M);²⁴ therefore, an FRG's expenditure must be necessary and incident to the operation and maintenance of the unit; not be prohibited by law; and not be otherwise provided for.

The determination of whether the requested FRG expenditure is necessary and incident to the unit's mission has been made by DA: the DA has determined that FRG mission-essential activities are necessary expenses and specifically enumerates what expenditures are within the scope of FRG mission essential activities in Appendix J of AR 608-1.²⁵ Hence, a JA's analysis in the legal review will focus on whether the purpose of the expenditure is within the FRG mission-essential activity and the type of expenditure falls within the enumerated expense. In the FRG leader's proposal discussed in the introduction, the FRG requests APF to provide child care. Child care is expressly authorized for command-sponsored training.²⁶ Therefore, APFs may be used to fund child care during the FRG meeting. Child care is not authorized for the fundraiser since fundraising is not a FRG's essential mission. The unit may also purchase a scanner because FRG may use unit office equipment in support of FRG mission (disseminating command information and communicating with Families). If APF are not authorized for a purchase or activity, FRG

²⁰ See *United States v. MacCollom*, 426 U.S. 317 (1976) (explaining that "the established rule is that the expenditure of public funds is proper only when authorized by Congress, not what public funds may be expended unless prohibited by Congress").

²¹ 31 U.S.C. §§ 1301(a), 1552, and 1341-1344.

²² An appropriations act is a statute "that generally provides legal authority for federal agencies to incur obligations and to make payments out of the Treasury for specified purposes." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-734SP, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 13 (2005).

²³ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, VOL. I, at 4-21 (3d. ed. 2004).

²⁴ DoD FMR, *supra* note 8, vol. 2A, ch. 1, para. 010201.

²⁵ AR 608-1, *supra* note 3, para. J-3.

²⁶ 10 U.S.C. § 1788b (Westlaw 2012); U.S. DEP'T OF DEF. INSTR. 1342.22, FAMILY CENTERS (30 Dec. 1992); AR 608-1, *supra* note 3, para. J-3e.

supplemental mission funds might be an alternative funding source.

2. Family Readiness Group Supplemental Mission Funds

The second potential funding source for FRGs is the supplemental mission fund. The supplemental mission program is managed—and the money is controlled—by the Director of Morale, Welfare, and Recreation (DMWR).²⁷ These funds are generated entirely from unsolicited donations intended for family support. Unit commanders only have the authority to accept donations of \$1,000 or less on behalf of a particular FRG.²⁸ Donations exceeding \$1,000 must go to the supplemental mission program.²⁹

Supplemental mission funds may be used "for any purpose the commander determines clearly supplements an established mission of the FRG."³⁰ To receive funds, the battalion or rear detachment commander must approve the request.³¹ Before approving a purchase request, the commander must determine that: (1) the expenditure clearly supplements the established FRG mission;³² (2) APF are not authorized, except when reimbursing a statutory volunteer's incidental expenses;³³ (3) the purchase can withstand the test

²⁷ U.S. DEP'T OF ARMY, REG, 215-1, MILITARY MORALE, WELFARE, AND RECREATION PROGRAMS AND NONAPPROPRIATED FUND INSTRUMENTALITIES para. 5-10 (24 Sept. 2010) [hereinafter AR 215-1].

²⁸ U.S. DEP'T OF ARMY, REG, 1-100, GIFTS AND DONATIONS para. 5b(3) (15 Nov. 1983) [hereinafter AR 1-100]; AR 608-1, *supra* note 3, para. J-7f.

²⁹ AR 608-1, *supra* note 3, para. J-9. See also *id.* para. 3-2a (authorizing supplemental mission funds). Only the garrison commander can accept unsolicited gifts for the FRG supplemental mission fund. Memorandum from the U.S. Army Installation Management Command, For See Distribution, subject: Letter of Instruction—Family Readiness Group (FRG) Supplemental Mission Activity para. 7a(2) (14 Mar 2001) [hereinafter Letter of Instruction]. Donations exceeding \$1,000 cannot be designated for a particular FRG, but can be designated for a specific category of FRGs, such as FRG's preparing for a deployment. AR 608-1, *supra* note 3, paras. J-9f and J-2g. Garrison commanders have authority to accept gifts up to \$50,000. AR 215-1, *supra* note 26, para. 13-14e.

³⁰ AR 608-1, *supra* note 3, para. J-9c.

³¹ Letter of Instruction, *supra* note 29, para. 7d(1). If there is a brigade FRG or a separate detachment with no battalion commander, the next higher commander will likely be the approval authority but JAs should contact the MWR Supplemental Mission Funds point of contact for clarification.

³² The expenditure cannot directly support the official FRG mission because then APFs would be authorized. For example, supplemental mission funds could not be used to pay for child care during the FRG meeting because, as discussed in Part ILC.1.a, APFs are authorized. This is true even if APFs are not available. Similarly, supplemental mission funds could not be used to provide child care during the fundraiser, but for a different reason. Providing child care for a fundraiser does not supplement the FRG mission.

³³ See 10 U.S.C. § 1588(e) (Westlaw 2012) (authorizing the service secretaries to provide reimbursement of incidental expenses from APFs and nonappropriated funds). Child care is an incidental expense. AR 608-1, *supra* note 3, para. J-4b(1)(b)(2). Therefore, even if APFs are authorized, but are not available to fund child care for the FRG statutory volunteers during the FRG meeting, supplemental mission funds may be used.

of public scrutiny and waste, fraud, and abuse; and (4) the vendor's price is fair.³⁴ Finally, priority must be given to encourage maximum attendance and participation at FRG meetings, such as purchasing food and refreshments.³⁵

Applying the scenario from the introduction, supplemental mission funds could be used to purchase food for the FRG meeting. A commander could reasonably determine that food supplements the mission by attracting more attendees to the FRG meeting; that APFs are not authorized to purchase food; and that providing food at an official meeting withstands public scrutiny. Supplemental mission funds could not be used to purchase food for the fundraiser because it would not be supplementing a mission activity. However, if the luncheon was a morale event, such as a picnic, the commander could reasonably determine that the event supplements the FRG mission. If APF and FRG supplemental mission funds cannot be used for a purchase or activity, the FRG informal fund may be an alternative.

3. Family Readiness Group Informal Funds

a. What is the Family Readiness Group Informal Fund?

The third funding source for FRGs is the informal fund (IF), which is a self-generated fund, similar to a unit's cup and flower fund.³⁶ Appendix J of AR 608-1 cautions that "FRGs are not established to raise funds, solicit donations, or manage large sums of money."³⁷ Accordingly, FRG IFs may not exceed an annual gross receipts cap of \$10,000.³⁸ Funds are generated through unsolicited gifts, donations, and fundraising and are typically used for unofficial social activities.

As a command-sponsored program, the unit commander is responsible for how funds are generated and used. The commander must have visibility on the creation and use of the fund by approving an IF Standard Operating Procedure (SOP),³⁹ authorizing a bank account,⁴⁰ and requiring the

However, the volunteer must be a statutory volunteer as defined in Part II.D.

³⁴ Letter of Instruction, *supra* note 29, para. 7d(2). Expenditures should comply with Army Regulation (AR) 215-4. U.S. DEP'T OF ARMY, REG. 215-4, NONAPPROPRIATED FUND CONTRACTING (29 July 2008).

³⁵ AR 608-1, *supra* note 3, para. J-9c(1).

³⁶ See *supra* note 15 and accompanying text.

³⁷ AR 608-1, *supra* note 3, para. J-7e.

³⁸ Memorandum from the Sec'y of Army, For See Distribution, subject: Army Directive 2008-01, Increase in Family Readiness Group Informal Fund Cap (7 Mar. 2008) (increasing the cap from \$5,000 to \$10,000).

³⁹ AR 608-1, *supra* note 3, para. J-7c. The FRG IF Standard Operating Procedure (SOP) is a description of the funds purpose. The SOP must be signed by the FRG leader, the fund custodian and the alternate fund custodian, and be approved by a majority of the FRG membership and the unit commander. At a minimum the SOP must include the FRG's name; a

treasurer to provide monthly and annual reports on IF use.⁴¹ The IF SOP provides notice to the commander and membership on how the fund will be used. The servicing JA should review the IF SOP to ensure compliance with the JER and other relevant regulations. A well-written SOP should answer most of the questions asked by FRG volunteers, such as how the funds are generated and how the funds may be spent.

b. The "F" Word: Fundraising

Informal funds are generated through gifts, donations, and fundraising. Although volunteers are acting unofficially when fundraising, they are still subject to the same restrictions as paid employees.⁴² Specifically, FRGs may not conduct external fundraising,⁴³ they may not fundraise for the benefit of a single person or a cause,⁴⁴ and they are prohibited from soliciting gifts or donations.⁴⁵ As discussed in Part II.C.2, commanders may accept unsolicited gifts or donations with a value of \$1,000 or less for the FRG IF.⁴⁶ However, the majority of funds will likely come from internal fundraising.

A FRG "may officially fundraise from its own community members or dependents and from all persons benefitting from the Army organization."⁴⁷ This has been

description of the fund's purpose and functions; and a summary of its routine activities. *Id.*

⁴⁰ *Id.* para. J-7b. Funds will be deposited in a non-interest bearing bank account authorized by the unit commander. The commander designates a fund custodian (treasurer) and an alternate fund custodian, and signs a letter authorizing the designees to open a non-interest bearing bank account in the FRG's name. The fund custodian and the alternate fund custodian must not be the unit commander, a deployable Soldier, or the FRG leader. *Id.*

⁴¹ *Id.* The treasurer must provide monthly fund reports to the commander an annual report to the first O6 in the chain of command no later than January 30 each year. The reports consist of a summary of the fund's financial status, including current balance, total income, and an itemized list of expenditures along with an explanation showing how the expenditures are consistent with the fund's SOP. *Id.*

⁴² Fundraising will be governed by AR 600-29 and the JER. U.S. DEP'T OF ARMY REG. 600-29, FUND-RAISING WITHIN THE DEPARTMENT OF THE ARMY (7 June 2010) [hereinafter AR 600-29].

⁴³ AR 608-1, *supra* note 3, para. J-8; JER, *supra* note 7, secs. 2, 3-210a(6).

⁴⁴ AR 608-1, *supra* note 3, para. J-7d(1).

⁴⁵ *Id.* para. J-8. However, after consulting with an ethics advisor, FRGs may convey their needs in response to an inquiry. *Id.*

⁴⁶ AR 1-100, *supra* note 28, para. 5b(3); AR 608-1, *supra* note 3, para. J-7f. Gifts and donations are considered income and will count against the annual \$10,000 cap. AR 608-1, *supra* note 3, para. J-7f. The fair market value (FMV) of tangible items will be assessed against the funding cap. For example, a local church donates 200 toothbrushes to the FRG for care packages. If the FMV of a toothbrush is \$1.25, then \$250 would be assessed against the cap.

⁴⁷ AR 608-1, *supra* note 3, para. 1-7. See also E-mail from Mr. Brian Howell, U.S. Army Legal Servs. Agency, to Major Army Command Staff Judge Advocates (Jan. 11, 2006 13:30 EST) (on file with author) (explaining the Office of the General Counsel (Ethics and Fiscal Law

interpreted broadly to allow for garrison-wide fundraising.⁴⁸ Generally, fundraising in a personal capacity may not occur in the federal workplace⁴⁹ and should not conflict with the Combined Federal Campaign (CFC).⁵⁰

Commanders may endorse FRG fundraising activities,⁵¹ including using their “name, title, and position in memorandums, employee newsletters, or other routine communications to promote the fund-raising.”⁵² However, commanders cannot direct or coerce subordinates into participating or contributing.⁵³ The commander may not offer special favors, such as leave privileges or authorization to wear civilian clothes for servicemembers as an incentive to participate.⁵⁴ Keeping lists or asking whether certain personnel contributed is also prohibited.⁵⁵ Servicemembers and DoD civilians may participate in their personal capacity (off duty and out of uniform),⁵⁶ but it must be truly voluntary. Commanders are not prohibited from placing servicemembers in a pass status to fundraise in their personal capacity. When participating in their personal capacity, servicemembers and civilians may not solicit funds from a subordinate or a prohibited source, such as contractors.⁵⁷

Applying the scenario from the introduction, the commander could approve the fundraiser if the raffle does not meet the definition of gambling and raffles are permitted under state and local law. Gambling is prohibited on government-owned or leased property, including military installations.⁵⁸ To qualify as gambling, the event must have

Division) and the Army Standards of Conduct Offices’ interpretation of JER para. 3-210(a)(6)).

⁴⁸ *Id.* However, contractors may not be solicited. AR 600-29, *supra* note 42, para. 1-10*h*.

⁴⁹ AR 600-29, *supra* note 42, para. 1-7. Commanders may designate areas that are outside of the federal workplace, such as common areas or outside of the commissary where groups may fundraise. *Id.* para. 1-7*c*(1).

⁵⁰ *Id.* para. 1-8. The Combined Federal Campaign begins annually on 1 September. The local coordinating committee determines the dates of the campaign, but generally it will go through the fall. *Id.* para. 3-2*b*.

⁵¹ Department of Defense personnel may officially endorse membership drives or fundraising for “organizations composed primarily of DoD employees or their dependents when fundraising among their own members for the benefit of welfare funds for their own members or their dependents . . .” JER, *supra* note 7, para. 3-210.

⁵² AR 600-29, *supra* note 42, para 1-11.

⁵³ *Id.* para 1-10.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ JER, *supra* note 7, para. 3-300. Family readiness support assistants, paid employees who provide the FRG support, are prohibited from fundraising. AR 608-1, *supra* note 3, para. J-5*b*.

⁵⁷ AR 600-29, *supra* note 42, para. 1-10*h*.

⁵⁸ JER, *supra* note 7, para. 2-302 (deleting the exception for activities by organizations composed primarily of DoD personnel or their dependents, such as FRGs, when they were fundraising internally for the benefit of their welfare funds).

three elements: (1) the payment of money or something of value; (2) it must be a game of chance; and (3) it must offer a reward or prize.⁵⁹ For example, a raffle that requests donations for a raffle ticket is not considered gambling because it does not require the payment of money or something of value. In this case, the commander should only approve the raffle if it does not require the payment of money or something of value and it is also permitted under state and local law.

The fundraiser must take place in an area designated as a non-federal workplace and can be open to all Soldiers and Family members on the installation. If the raffle is authorized, the FRG could sell tickets on its Facebook page if the page is restricted to FRG members and state law permits selling raffle tickets over the internet.⁶⁰ At a minimum, the FRG could advertise the raffle on its Facebook page and disclose where to purchase the raffle tickets.

The FRG could not solicit prizes for the raffle. The FRG would have to purchase raffle items with the IF. The commander could also accept unsolicited gifts valued at \$1,000 or less, but the fair market value of the gift would be assessed against the annual \$10,000 cap. The commander could not direct Soldiers to assist with the fundraiser; however, Soldiers may voluntarily assist when off-duty or in a pass status and while wearing civilian clothes. The commander could announce the fundraiser in a staff call, but should be careful not to create an impression that staff members are required to contribute. In addition to all the restrictions placed on raising funds, FRGs are restricted in how they can spend their funds.

c. Family Readiness Group Informal Fund Expenditures

Family readiness groups may only raise funds for a particular purpose which must be consistent with the approved SOP and reflected in the fund ledger.⁶¹ Generally, the fund should be used for morale events that benefit the membership as a whole.⁶² For example, the FRG may not raise funds for a specific member whose house burned down because, although kind, it does not benefit the FRG as a whole. Likewise, IFs cannot be used for purchases for which

⁵⁹ *Brooklyn Daily Eagle v. Voorhies*, 181 F. 579 (C.C.N.Y. 1910); 41 C.F.R. §102-74.395 (Westlaw 2012).

⁶⁰ *See, e.g., CALIFORNIA PENAL CODE 320.4* (Westlaw 2012) (prohibiting the sale of raffle tickets on-line).

⁶¹ AR 608-1, *supra* note 3, para. J-7*e*.

⁶² *Id.* para J-7*a*(1). Examples include: “FRG newsletters that contain predominantly unofficial information and purely social activities, including, but not limited to, parties[,] social outings, volunteer recognition (not otherwise funded with APF), and picnics.” *Id.* para. J-7*a*(2). Purchasing traditional military gifts and funding the unit’s ball are expressly prohibited. *Id.* para. J-7*a*(3).

APFs are authorized, even if APFs are not available.⁶³ This is considered an illegal augmentation.⁶⁴

Informal funds may not be co-mingled with FRG supplemental mission funds, the unit's cup and flower funds, or any other fund.⁶⁵ However, FRGs may coordinate and pool their funds for large events as long as the money is not co-mingled. For example, for a battalion-wide event, the HHC FRG could purchase the food, the Alpha Company FRG could pay for a bouncy castle; and the Bravo Company FRG could pay for face painting.

Applying the scenario from the introduction, the FRG wants to spend IFs to host a unit ball, to purchase a scanner, and to purchase supplies for an orphanage in Afghanistan. First, funding a unit ball is expressly prohibited.⁶⁶ However, the FRG could use IFs to host a morale event, such as a picnic. Second, IFs could not be used to purchase a scanner because, as discussed in Part II.C.1, APFs are authorized. Finally, IFs could not be used to purchase supplies for orphans because the funds must be for the benefit of FRG members, not a cause.

D. FRG Statutory Volunteers and Use of Government Resources

As an official DA program, FRG volunteers are authorized the use of government resources. The level of support will depend on whether the FRG volunteer is acting in an official or unofficial capacity. But first, the volunteer must go through the process to become a statutory volunteer.

Family readiness groups are official DA programs and as such, FRG volunteers are volunteering their services to the government. The Anti-Deficiency Act (ADA) prohibits an officer or employee from accepting voluntary services unless authorized by law.⁶⁷ Commanders are specifically authorized to accept volunteers to support the FRG mission.⁶⁸ These volunteers are referred to as statutory volunteers. However, volunteers must in-process through the local Army Community Services (ACS) Center as part of the

Army Volunteer Corps Program to be statutory volunteers.⁶⁹ Although commanders are responsible for ensuring that certain criteria are met,⁷⁰ ACS or the Army Volunteer Corps Coordinator will assist the commander.⁷¹ However, JAs will also play a crucial role by providing fiscal and ethics guidance or advising on specific statutory protections afforded to statutory volunteers.⁷²

When volunteers are performing duties in accordance with their job descriptions, they are authorized to use government resources, including office space, equipment, office supplies, installation post offices, official mail,⁷³ and the use of government vehicles.⁷⁴ Family Readiness Group volunteers are not considered statutory volunteers when they are engaged in unofficial activities such as fundraising.⁷⁵ For example, a FRG statutory volunteer could use a government vehicle to pick up supplies for a FRG meeting, but not to pick up supplies for a fundraiser.

Statutory volunteers may be reimbursed for incidental expenses, such as training, travel, mileage, parking, telephone, and child-care expenses, with APF⁷⁶ or supplemental mission funds if APF are not available.⁷⁷ Although reimbursement of incidental expenses is authorized, it is not a right. The commander will determine whether resources are necessary and available. Commanders

⁶⁹ AR 608-1, *supra* note 3, para. J-1a(1).

⁷⁰ *Id.* para. 5-9b. The commander must ensure that volunteer documentation is complete, personnel records are maintained, awards and recognition are planned and executed, costs or reimbursable expenses and organization awards are budgeted, and a representative serves on the Volunteer Council. *Id.* Volunteers and supervisors must sign a DD Form 2793, Volunteer Agreement for Appropriated Fund and Nonappropriated Fund Instrumentalities. *Id.* para. 5-9k. Commanders must use the Volunteer Management Information System (VMIS) on Army OneSource to register volunteers and log volunteer hours. *Id.* para. 5-9b. The commander must supervise the volunteer in the same manner as a paid employee providing similar services. 10 U.S.C. § 1588 (Westlaw 2012); AR 608-1, *supra* note 3, paras. 5-9f and J-4a(1).

⁷¹ AR 608-1, *supra* note 3, para. J-4a(2).

⁷² When volunteers are performing duties in accordance with their job descriptions, they are considered federal employees only for the purpose of the following laws: workers compensation; tort claims; criminal conflict of interest laws; and malpractice. 10 U.S.C. § 1588(d) (Westlaw 2012).

⁷³ AR 608-1, *supra* note 3, para. 5-10b. The unofficial content in newsletters may not exceed twenty percent of the printed space used for official information; it may not increase the costs to the Government; and it may not include personal wanted/for sale advertisements. *Id.* para. J-3c(1). Many FRGs now distribute newsletters via e-mail. While including additional information may not result in increased costs to the government, the restrictions regarding content still apply.

⁷⁴ *Id.* para. 5-10c. The commander must determine that the use of the vehicle is for official purposes and that failure to provide such support would have an adverse effect on Soldier morale; the use will not hinder the accomplishment of the unit's needs; and the volunteer meets the requirements to operate the government vehicle. *Id.*

⁷⁵ *Id.* para. J-3f.

⁷⁶ *Id.* para. J-4b(1)(b)(2).

⁷⁷ *Id.* para. J-9c.

⁶³ *Id.* para. J-7a(3).

⁶⁴ There is no specific statute which prohibits the augmentation of appropriated funds, but the concept can be found in several statutes: 31 U.S.C. § 3302(b), the miscellaneous receipts statute, 31 U.S.C. § 3301(a), the purpose statute, and 18 U.S.C. § 209, which prohibits the payment or supplementation of a federal employee's salary. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, VOL. II, at 6-102(3d. 2006).

⁶⁵ AR 608-1, *supra* note 3, para. J-7a(3).

⁶⁶ *Id.*

⁶⁷ 31 U.S.C. § 1342 (2012). See *supra* note 18 (discussing the consequences of violating the Anti-Deficiency Act (ADA)).

⁶⁸ 10 U.S.C. § 1588 (2012); AR 608-1, *supra* note 3, para. J-3f.

may not authorize travel or reimbursement of volunteer expenses for members of their household or other persons that could present a potential conflict of interest.⁷⁸ Such decisions must be forwarded to the next senior level officer within the chain of command.⁷⁹

III. Friends of the FRG: Private Organizations

While being an official DA program has benefits, FRGs are severely restricted when it comes to social activities. Private organizations are not subject to the same restrictions and consequently can be an excellent alternative when it comes to social activities.

A. What is a Private Organization?

Non-federal entities (NFE) are exactly what the name implies—they are organizations that are not part of the federal government. On-post private organizations (POs) are NFEs that have received express permission to operate on a military installation.⁸⁰ There are many NFEs and POs that support the military. Some share the same family readiness goals and objectives of a specific FRG as well as much of the same membership. Judge advocates cannot directly advise POs, but a JA who understands the regulations pertaining to POs can offer alternate options to the leadership when the FRG cannot or should not fund an activity. Because of the potential for real and perceived ethics violations,⁸¹ JAs should ensure commanders and FRG leaders are aware of the pitfalls to avoid when interacting with these POs.

B. Private Organizations: Advantages and Disadvantages

Private organizations are subject to fewer restrictions regarding how they raise and spend funds than those imposed on FRGs.⁸² When fundraising internally, POs are

subject to some of the same limitations applicable to FRGs discussed in Part II, such as the prohibition against fundraising in the federal workplace and conflicting with the CFC. However, other limitations applicable to FRGs do not apply, which gives POs a significant fundraising advantage. For example, POs may fundraise outside the installation and solicit gifts and donations.⁸³ Another significant advantage is that POs do not have an income cap like FRGs do. A PO could send letters to businesses in the community soliciting donations and they can raise as much money as desired to meet their goals. Additionally, POs are not restricted in how they spend their funds.⁸⁴ A PO could use its funds for independent readiness purposes, such as care packages for deployed Soldiers; it could donate funds to the FRG IF; and it could even host a ball and invite members of the unit and their Families.⁸⁵

Private organizations also have disadvantages. As an organization that is not part of the government,⁸⁶ POs are subject to some restrictions that are more burdensome than those applicable to FRGs. There are several restrictions as a condition of becoming a PO approved to operate on post,⁸⁷ but the more troublesome ones are discussed here. First, a PO may not use the seal, logo, or insignia of the DoD, a military department, or a unit.⁸⁸ This restriction means that the unit's crest cannot be part of the PO's logo, on its letterhead, or on its resale items. However, with the commander's approval, a PO may use the unit's name or an abbreviation of the name as long as it is clear that there is no official sanction or support by DoD.⁸⁹

Second, POs must have adequate insurance as protection against liability, claims, property damage, or other legal actions arising from PO activities.⁹⁰ It must also

⁷⁸ 5 C.F.R. § 2635.502 (Westlaw 2012); *id.* § 2635.702; AR 608-1, *supra* note 3, para. J-4c.

⁷⁹ AR 608-1, *supra* note 3, para. J-4c.

⁸⁰ U.S. DEP'T OF ARMY REG. 210-22, PRIVATE ORGANIZATIONS ON DEPARTMENT OF THE ARMY INSTALLATIONS para. 1-1 (22 Oct. 2001) [hereinafter AR 210-22]. Non-federal entities seeking PO status must submit a written application to the garrison commander in accordance with paragraph 2-1a(2). Once approved, POs are required to submit a report to the garrison's commander's designee at least annually and to seek revalidation every two years. *Id.* para. 2-1c and *d.*

⁸¹ See 5 C.F.R. § 2635.10 (discussing the basic obligations of public service, including the obligation to avoid actions that would create an appearance of violating the law or ethical standards).

⁸² AR 608-1, *supra* note 3, para. J-11. While POs have more latitude with raising funds, it cannot be established solely for a monetary purpose (individual shall not accrue money from the PO's activities), unless it is an investment club. AR 210-22, *supra* note 80, para. 3-1c; DODI 1000.15, *supra* note 4, encl. 2, para. 11.

⁸³ The prohibitions contained in AR 608-1, *supra* note 3, para. J-8 and the JER, *supra* note 7, para. 3-210a(6) does not apply to POs.

⁸⁴ A PO's application to operate on post must include a description of how the PO intends to use the funds, but is not restricted on how they are spent. AR 210-22, *supra* note 80, para. 2-1a(2)(b).

⁸⁵ These would be considered gifts from a prohibited source and as such, acceptance must comply with 5 C.F.R. Part 2635 (Westlaw 2012), AR 1-100, *supra* note 28, and the JER, *supra* note 7. Generally, Service Members may accept unsolicited gifts valued at \$20 or less per source, per occasion as long as the total value of all gifts received do not exceed \$50 in a calendar year. 5 C.F.R. § 2635.204(a).

⁸⁶ AR 210-22, *supra* note 80, para. 1-5d.

⁸⁷ *Id.* ch. 3.

⁸⁸ *Id.* para. 3-1; DODI 1000.15, *supra* note 4, encl. 2, para. 1.

⁸⁹ DODI 1000.15, *supra* note 4, encl. 2, para. 1. If a PO uses all or part of the unit's name, it must include the following disclaimer whenever the name is used (in print or orally): "THIS IS A NON-FEDERAL ENTITY. IT IS NOT A PART OF THE DEPARTMENT OF DEFENSE OR ANY OF ITS COMPONENTS AND IT HAS NO GOVERNMENTAL STATUS." *Id.*

⁹⁰ Army Regulation 210-22 does not define adequate insurance. AR 210-22, *supra* note 80. A commander could reasonably determine that no insurance is adequate when the PO does not own any real property and has little personal property.

have fidelity bonding for members handling a monthly cash flow exceeding \$500.⁹¹ Liability insurance and bonding can be very expensive. For example, the cost of insurance for a PO with no real property and approximately \$10,450 in income costs \$1,341 annually.⁹²

Third, POs are subject to state, federal, and host nation laws, including tax laws. Private organizations do not receive tax-exempt status by virtue of operating on a military installation. A PO may apply for § 501(c)(3) tax exempt status from the Internal Revenue Service if it is established for religious, educational, or scientific purposes, but it is a lengthy process and may restrict the PO from engaging in social activities.⁹³ Seeking § 501(c)(3) status may be appropriate for an organization created to raise money for a memorial or scholarships for dependents of fallen Soldiers but would not be helpful to a PO that wants to engage in a lot of social events.

Finally, similar to FRGs engaged in fundraising activities, POs receive limited logistical support (meeting space and equipment) from the command. Private organizations cannot use Army services, such as “legal, audit, transportation, postal, printing, information management activities, clerical, financial, copying, management, and procurement services.”⁹⁴

Applying the scenario from the introduction, a PO could be established to benefit the Soldiers and Families of the Battalion HHC. Once approved, the “Friends of the HHC” PO could conduct a fundraiser on the installation, with permission from the garrison commander or his designee. A raffle would be subject to the same limitations discussed in Part II.C.3.b. The command could provide space (non-federal workplace) and limited logistical support for the fundraiser. The “Friends of the HHC” PO could also solicit businesses off-post for donations. Proceeds from the fundraiser or solicitations could be used in a variety of ways. The PO could purchase a scanner for the PO, fund a party, pay for child care during PO events, and purchase supplies for an orphanage in Afghanistan. The PO could also donate money to the FRG, which the commander could accept in accordance with AR 1-100. The PO could also host a ball and invite the members of the unit and their Family members. Members of the unit and their Family members could accept the gift of food and entertainment, after consulting an ethics attorney, if it complies with the

⁹¹ *Id.* para. 3-2.

⁹² Legal Center and School Club Revalidation Request to Operate as a Private Organization (24 Mar. 2010) (on file with command judge advocate) (submitted as required by AR 210-22, *supra* note 80, para. 2-1d).

⁹³ The organizing documents must limit the organization’s purposes to exempt purposes set forth in section 501(c)(3) and only an insubstantial part of its activities may be for other than the organization’s purpose. INTERNAL REVENUE SERVICE, PUB. 557, TAX EXEMPT STATUS FOR YOUR ORGANIZATION (2011).

⁹⁴ AR 210-22, *supra* note 80, para 5-3c.

standards of conduct gift rules.

On the down side, the “Friends of the HHC” PO could not use the unit’s logo and will likely pay federal and state taxes on the money raised. If managed effectively, the advantages of the PO outweigh the disadvantages and the unit can benefit greatly from the PO’s efforts. However, the close relationship to the unit can be confusing and is an area where inadvertent ethics violations can occur.

C. Ethics Considerations: Pitfalls to Avoid When Dealing with Private Organizations

Private organizations can be established to support the Soldiers and Families of a particular unit and FRG. As long as DoD employees, including FRG volunteers, avoid ethics violations in their interactions with the PO, the two organizations can be very compatible. First, unlike the FRG, the commander has no control over the management of the PO, and cannot direct the activities of the PO.⁹⁵ Army personnel cannot serve in the management of a PO in their official capacity,⁹⁶ but can serve as a liaison when the commander determines that there is a significant and continuing DoD interest in such representation.⁹⁷ For example, the Dragoon Foundation was originally established on Rose Barracks in Vilseck, Germany, to raise money for a memorial for the 2d Stryker Cavalry Regiment’s (2SCR) fallen Soldiers.⁹⁸ Since the memorial would later be gifted to the Army, the 2SCR leadership had an interest in ensuring that the memorial was tasteful and the names were correct. In this situation, it was proper for the commander to authorize a servicemember to serve as a liaison to the Dragoon Foundation in his official capacity. Since the servicemember was serving in his official capacity, he could attend meetings in uniform, on government time, and use government resources as well as his title and position to accomplish his mission of acting as a liaison.

Army personnel may voluntarily participate in PO activities in their personal capacity and can even serve as an officer as long as the position is not offered because of the servicemember’s official position.⁹⁹ The servicemember participating in his personal capacity should not give the

⁹⁵ See U.S. Army Inspector General Agency Report of Investigation, Case 09-006 (redacted copy on file with the author) (sustaining an allegation that either the commander or the commander’s spouse (it is unclear from the redacted report) improperly participated in the management of the Fort Polk Officers’ Spouses Club, a PO).

⁹⁶ JER, *supra* note 7, para. 3-202.

⁹⁷ *Id.* para. 3-201.

⁹⁸ This information is based on the author’s personal knowledge as the legal advisor to the Second Stryker Cavalry Regiment. See also DRAGOON FOUNDATION, <http://www.dragoonfoundation.com/DragoonFoundation/Home.html> (last visited Jan. 12, 2012).

⁹⁹ JER, *supra* note 7, para. 3-301.

appearance of endorsement or preferential treatment, such as using his official title.¹⁰⁰ If actively serving in a PO, the servicemember cannot take official action regarding the PO, such as approving fundraising requests or approving meeting space.¹⁰¹

The FRG leadership has stricter requirements than do servicemembers. Appendix J of AR 608-1 specifically prohibits managers or board members of the related PO from being placed in FRG leadership positions.¹⁰² Consequently, FRG leadership can participate in PO activities, but they cannot serve as board members in the related PO. While the commander is not expressly prohibited from serving on a PO board in his personal capacity, he must endeavor to avoid appearances of endorsement or preferential treatment.¹⁰³ It would be extremely difficult to overcome the appearance issue if the commander was also serving on a related PO's board.

Second, DoD employees must remain neutral when dealing with POs.¹⁰⁴ They may not endorse a PO that is established for the benefit of the unit and must treat all similarly situated POs the same.¹⁰⁵ However, DoD employees may officially endorse PO fundraising events.¹⁰⁶ For example, a commander can endorse an internal fundraising event for the "Friends of the HHC" PO, but he must also endorse fundraising events for similarly situated POs. Furthermore, DoD employees can use official channels, such as electronic mail, to notify DoD personnel of events sponsored by a PO if it is of common interest to the unit.¹⁰⁷ Electronic mail contents must be factual and should not express support for a particular PO, which may be construed as official DoD endorsement of that PO.¹⁰⁸

Third, commanders may provide limited logistical support to POs, such as the use of DoD facilities and equipment if the seven factors contained in JER, paragraph

3-211 are met.¹⁰⁹ Additionally, Army personnel serving in a PO in a personal capacity may be permitted to use government resources if it (1) does not adversely affect performance in official duties; (2) is of a reasonable duration and frequency and not on official time; (3) serves a legitimate public interest; (4) does not reflect adversely on DoD; and (5) creates no significant additional cost to DoD.¹¹⁰

Applying the scenario in the introduction, members of the HHC, including the FRG leadership, may voluntarily join the "Friends of the HHC" PO in their personal capacity. The FRG leadership may not serve as officers, but members of the unit can as long as the position is not offered because of the servicemember's official position. The HHC commander could provide the PO space for meetings and fundraisers, but would be required to offer the same support to similarly situated POs. The commander could announce PO events, but could not coerce members of the unit into joining or contributing to the PO. As long as federal employees, including FRG statutory volunteers, avoid the potential ethics conflicts discussed above, the PO could successfully raise funds and host social events that will benefit members of HHC and their Families.

IV. Conclusion

As the BJA, you are attending the HHC FRG meeting. The FRG leader suggests that after the next monthly meeting, the FRG host a luncheon and hold a raffle to raise money to fund the unit ball; to purchase a scanner; and to purchase supplies for an orphanage in Afghanistan. Excited about the idea, the membership suggests soliciting prizes for the raffle; selling raffle tickets on its Facebook page; requesting logistical support from the commander; and requesting APF to fund child care.

You quickly and wisely advise the FRG that while a fundraiser may be permissible, fundraising is limited to the installation, they cannot solicit funds, and the IFs cannot be used to fund a unit ball, pay for a scanner, or benefit orphans in Afghanistan. Sensing frustration in the room, you suggest that the FRG request APF for the scanner and child care for the FRG meeting. You also note that the "Friends of the

¹⁰⁰ *Id.* para. 3-300a(1). It is permissible to use the Service Member's rank. *Id.*

¹⁰¹ 5 C.F.R. § 2636.502 (Westlaw 2012); JER, *supra* note 7, para. 3-300.d.

¹⁰² AR 608-1, *supra* note 3, para. J-11.

¹⁰³ 5 C.F.R. § 2635.101(b)(14).

¹⁰⁴ *Id.* § 2635.101(b)(8). Additionally, DoD employees, including FRG volunteers, must be careful not to disclose non-public Government information, such as the FRG membership roster, with the PO. *Id.* § 635.703.

¹⁰⁵ AR 608-1, *supra* note 3, para. J-11.

¹⁰⁶ JER, *supra* note 7, para. 3-210a(6) (Department of Defense employees may not officially endorse membership drives or fundraising efforts of NFEs, but provides an exception for "organizations comprised of DoD employees or their dependents when fundraising among their own members for the benefit of welfare funds for their own members. . . .").

¹⁰⁷ *Id.* para. 3-209.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* para. 3-211 (setting forth the following factors: (1) The support may not interfere with the performance of official duties or detract from readiness; (2) The support serves DoD community relations, DoD public affairs or military training interests; (3) It is appropriate to associate DoD with the event; (4) The event is of interest and benefit to the local civilian community, the unit, or any other part of DoD; (5) The unit is able and willing to provide the same support to comparable events sponsored by other similar NFEs; (6) The use is not restricted by other statutes; and (7) No admission fee (beyond what will cover the reasonable costs of sponsoring the event) is charged for the event, or the portion of the event supported by DoD, or DoD support to the event is incidental to the entire event in accordance with public affairs guidance).

¹¹⁰ *Id.* para. 2-301b.

HHC” PO might be in a better position to host a party and would be able to invite members from the unit and their Families (as long as the cost of food and entertainment does not exceed \$20 per person). The PO could also send supplies to the orphans. You further suggest that instead of a fundraiser, the FRG host a morale event, which would allow them to request supplemental mission funds to pay for the food and entertainment. Before the meeting ends, the FRG members readjust their plan and their expectations.

While asking FRG volunteers to change their expectations so quickly may be highly optimistic, an involved JA who provides alternative solutions will

minimize frustration. Helping shape the ideas early can also keep the command mission-focused rather than having to deal with a dysfunctional FRG. When interacting with POs, there exists much potential for ethics violations. Judge advocates should proactively brief the leadership on ethics issues relating to participation in PO activities, endorsement, and providing logistical support to POs.

A View from the Bench: Charging in Courts-Martial

“Little Errors in the Beginning Lead to Serious Consequences in the End.”¹

Lieutenant Colonel Mark Kulish*

“Drafting or reviewing court-martial charges is one of the most important, and maddening, jobs in military justice.”² Counsel should appreciate why Chief Trial Judge Felicetti used the word “maddening.” Charging in courts-martial in the second decade of the 21st century is anything but a casual, routine, or ministerial process. Lesser-included offense (LIO) jurisprudence³ and jurisprudence regarding pleading of offenses charged under Article 134 (the “general article”),⁴ have recently changed in revolutionary ways. Even the substantive criminal law of important types of offenses continues to change. The substantive law regarding sexual assault changed dramatically in 2007, and changed yet again on 28 June 2012.

In this day and age, following model specifications in the Manual for Courts-Martial (MCM)⁵ and relying on the MCM’s enumeration of LIOs may fail to ensure that charged specifications are immune from attack, or that an accused is adequately placed on notice of uncharged offenses that may or may not be “genuine” LIOs. If a substantive offense has been amended or superseded by a new statute, reliance on seemingly well-settled case law interpreting the old, superseded offense is also likely to lead to errors in charging. For this very reason, the electronic, downloadable

version of the Military Judges’ Benchbook (MJBB),⁶ known as the Electronic Benchbook (EBB) is now a true living document, constantly updated and reposted on the Army’s JAGCNet.⁷

There are two basic steps in charging: first, what should go into each specification; and second, which, and how many, specifications should appear on a charge sheet. Conversely, for a defense counsel, there are two basic steps in evaluating a charge sheet served on your client: first, is any particular specification defective; and second, are there specifications on the charge sheet which can be challenged because of their relationship to other specifications.

This article discusses, through the use of several examples, the essential initial step in pleading particular specifications, or in scrutinizing any given specification on a charge sheet served on your client; go beyond model specifications, from whatever source, and put yourself in the shoes of the military judge who would instruct panel members on the elements of the offenses, and the definitions of relevant terms, in a contested case.

Second, this article discusses procedural law with regard to specifications which are vulnerable to attack as “failing to state an offense” or as otherwise defective, and notes that in many circumstances, this reputedly “non-waivable” error can be effectively waived unless it is raised and litigated at or before trial.

Finally, this article discusses (in brief, since it is more comprehensively discussed elsewhere⁸) the issue of which and how many specifications appear on a charge sheet: the charging of “quasi” LIOs in light of the Court of Appeals for the Armed Forces (CAAF) adoption of the “statutory elements” test; the continuing validity of the double jeopardy prohibition against charging “genuine” LIOs; and the pitfalls of overcharging.

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¹ “‘The least initial deviation from the truth is multiplied later a thousandfold.’ So wrote Aristotle in the fourth century B.C. Sixteen centuries later Thomas Aquinas echoed this observation. Paraphrasing it, he said in effect that little errors in the beginning lead to serious consequences in the end.” MORTIMER J. ADLER, *TEN PHILOSOPHICAL MISTAKES*, at xiii (1985).

² Captain Gary E. Felicetti, *Surviving the Multiplicity/LIO Family Vortex*, *ARMY LAW.*, Feb. 2011, at 46.

³ In *United States v. Jones*, the Court of Appeals for the Armed Forces (CAAF) adopted the statutory elements test for lesser included offenses (LIOs), and has since offered some further clarification regarding how that test will be applied. 68 M.J. 465 (C.A.A.F. 2010), *infra* notes 43–52 and accompanying text.

⁴ In *United States v. Foster*, the CAAF held that where a specification of adultery under Article 134 of the UCMJ was both challenged as defective and contested at trial, and where the “terminal element” (that is, “such conduct being prejudicial to good order and discipline” under Clause 1 of Article 134, and/or “such conduct being of a nature to bring discredit upon the armed forces” under Clause 2 of Article 134) was omitted from the specification, the specification failed to state an offense under Article 134, since the terminal element, in the court’s view, was not “necessarily implied” by inclusion of the word “wrongfully” in the specification. 70 M.J. 225 (C.A.A.F. 2011).

⁵ *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008) [hereinafter MCM].

⁶ U.S. DEP’T OF ARMY, PAM. 27-9, *MILITARY JUDGES’ BENCHBOOK* (1 Jan. 2010) [hereinafter MJBB].

⁷ The Electronic Benchbook (EBB), used by judges in all services, is no longer a static document updated every few years, with interim changes posted as separate documents. From early 2010, the EBB editor (a designated Army circuit or chief circuit judge) has republished and reposted for downloading the entire EBB every three to six months, incorporating with each revision interim changes approved by the Chief Judge, U.S. Army Trial Judiciary, since the last posting. The current and updated version of the EBB is always available for download at the U.S. Army Trial Judiciary home page, <https://www.jagcnet.army.mil/usatj>. Select “Electronic Benchbook” from the items that appear on the left side of the web page.

⁸ Felicetti, *supra* note 2.

When Pleading or Scrutinizing Specifications, Look at the Statute (or Punitive Regulation), the Elements, and the Definitions of Terms

In what is now a bygone era, reliance on model specifications in the MCM and the model specifications in the MJBB generally ensured that charged specifications were safe from challenge. The MJBB model specifications are intended to be more current than the MCM's model specifications, but given the pace of change may themselves be outdated at times. In any event, when drafting offenses today as a trial counsel, or when scrutinizing offenses already charged as a defense counsel, counsel must use the model specifications from either source only as a starting point. From the government's perspective, model specifications serve as a template for a rough draft, nothing more. From the defense's perspective, model specifications serve only as one among several indicators to apply to a specification in determining whether it is sufficient or, in some important way, defective.

The key to charging and finding flaws in charging is, quite simply, to put yourself in the shoes of the military judge should the case be contested before a panel. Put yourself in the position of the military judge as he or she would: (1) enumerate the elements of the offenses and (2) define related terms for the finder of fact.

Open the EBB,⁹ and bring up the elements of the offense and the related definitions of terms, as the judge would instruct on them. Tailor the elements to the specification you have drafted, or the specification which appears on your client's charge sheet. Then, ask yourself these questions: Are there terms in the draft specification, or in the specification on the charge sheet served on your client, that are not proper terms for that offense? Has the trial counsel verified the definitions of terms he or she has used? Has the trial counsel used terms which, as a judge would define them, do not comport with the facts the government has sought, or likely will seek, to prove in court? Has the trial counsel failed to specify facts which should have been specified? Has the trial counsel relied on the most current substantive law, and the case law interpreting that current law?

Example 1:

Failure to repair to a place of duty is, to all appearances, a straightforward, garden-variety military offense. Nevertheless, this example highlights that using available model specifications can sometimes result in a preferred specification challengeable as defective.

The MCM's model specification is as follows:

⁹ *Supra* note 7.

In that _____ (personal jurisdiction data), did (at/on board – location), on or about _____ 20____, without authority, (fail to go at the time prescribed to) (go from) his/her appointed place of duty, to wit: (here set forth the appointed place of duty).¹⁰

Accordingly, you, as trial counsel, draft—or you, as defense counsel, find on your client's charge sheet—a specification as follows:

In that Specialist G, U.S. Army, did, at or near Camp Casey, Republic of Korea, on or about 3 May 2010, without authority, fail to go at the time prescribed to his appointed place of duty, to wit: his Alcohol and Substance Abuse Program appointment at the Camp Casey Clinic.

You then review the offense of failure to go to appointed place of duty in the EBB.

First, you note that the model specification in the EBB is identical to that in the MCM.¹¹

You then review the elements:

(1) That (state the certain authority) appointed a certain time and place of duty for the accused, that is, (state the certain time and place of duty);

(2) That the accused knew that (he) (she) was required to be present at this appointed time and place of duty; and

(3) That (state the time and place alleged), the accused, without proper authority, (failed to go to the appointed place of duty at the time prescribed) (went from the appointed place of duty after having reported at such place).¹²

Here, you should note that there are two specified facts, called for by the elements to be used in instructing a panel according to the MJBB/EBB, which are *missing* from the model specifications in both the MCM and the MJBB/EBB, on which the drafted or preferred specification was based.

First, the model specification does not call for a factual specification of who prescribed the time and place of duty, whereas the first element in the MJBB/EBB instructions

¹⁰ MCM, *supra* note 5, pt. IV, ¶ 10f(1).

¹¹ EBB, *supra* note 7, ¶ 3-10-1b.

¹² *Id.* ¶ 3-10-1c.

calls for a factual specification of the “certain authority” who prescribed the time and place of duty.

Second, and probably more importantly, the model specification does not call for a factual specification of the “time prescribed;” instead, it only calls for a factual specification of “the appointed place of duty.” The first element in the MJBB/EBB instructions, in contrast, calls for a factual specification of both the time and the place of duty.

If you tailor the elements to the specification as drafted by a trial counsel, or as found on a preferred charge sheet by a defense counsel, they would read as follows:

(1) That [*somebody*] appointed a certain time and place of duty for the accused, that is, his Alcohol and Substance Abuse Program appointment at the Camp Casey Clinic [*at XXXX hours*];

(2) That the accused knew that he was required to be present at this appointed time and place of duty; and

(3) That at or near Camp Casey, Republic of Korea, on or about 3 May 2010, the accused, without proper authority, failed to go to the appointed place of duty at the time prescribed.

Italicized and in brackets, above, are the facts missing from the specification you, as trial counsel, drafted; or you, as defense counsel, find on the charge sheet. As trial counsel, this should prompt you to redraft your specification, along the following lines:

In that Specialist G, U.S. Army, did, at or near Camp Casey, Republic of Korea, on or about 3 May 2010, without authority, fail to go at the time prescribed to his appointed place of duty, to wit: his Alcohol and Substance Abuse Program appointment at the Camp Casey Clinic *at 1030 hours*.

Note that one of the missing facts otherwise called for by the elements instructions in the EBB is still omitted, that is, the factual specification of who appointed the time and place of duty. This fact likely can be omitted without risk of the specification being found defective, since the ultimate authority regarding what elements are required is not the EBB; rather, it is the statutory language of the substantive offense: “Any member of the armed forces who, without authority . . . fails to go to his appointed place of duty at the time prescribed . . . shall be punished as a court-martial may direct.”¹³ The statute only requires that the time and place of

duty be “appointed” and “prescribed.” For this reason, it would likely be sufficient for a military judge to instruct on the first element as follows:

(1) That there was appointed a certain time and place of duty for the accused, that is, his Alcohol and Substance Abuse Program appointment at the Camp Casey Clinic at 1030 hours.

If, on the other hand, the statute read, “Any member of the armed forces who, without authority . . . fails to go to his appointed place of duty at the time prescribed by a certain authority . . . shall be punished as a court-martial may direct,” then a factual specification of that “certain authority” would likely be required in order for the specification to be immune from challenge as defective.

If you are the defense counsel and find the specification, as originally drafted, on your client’s charge sheet, you have at least a colorable argument that the specification fails to state an offense and should be dismissed. The factual specification of a statutory element, “the time prescribed,” is missing.

While it may seem excessive to parse the drafting of a specification of such a simple offense in this way, the point here is that drafting or preparing a challenge to any specification, even those apparently most simple, always requires careful thought and attention to detail. Counsel should always bear in mind that the most authoritative sources of substantive criminal law are: first, the statute passed by Congress; second, appellate case law interpreting that statute; and, third, the elements as enumerated in MJBB/EBB instructions, which are based on decades of accumulated collective experience within the trial judiciaries of the armed services. Model specifications are only a starting point. Keeping these principles in mind becomes all the more important when more complex offenses are at issue, particularly when statutory law regarding those offenses has undergone, and continues to undergo, significant transformation.

Example 2:

Congress drastically transformed Article 120 of the UCMJ in 2007,¹⁴ and recently has recast yet again.¹⁵ The

¹⁴ National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3256 (2006).

¹⁵ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298 (2011). “The amendments made by this section shall take effect 180 days after the date of the enactment of this Act and shall apply with respect to offenses committed on or after such effective date.” The effective date of the new Articles 120, 120b, and 120c is 28 June 2012. The 2012 version of Article 120 is hereinafter referred to as UCMJ art. 120 (2012).

¹³ UCMJ art. 86 (2008).

primary purpose of using Article 120 examples in this article is to *highlight a process* counsel should go through in drafting or scrutinizing specifications, rather than to provide authoritative substantive guidance regarding any version of Article 120.

Here a specification of rape under the post-1 October 2007 version of Article 120, specifically, Article 120(a)(1), which you, as a trial counsel, have drafted, or you, as a defense counsel, see on a preferred or referred charge sheet served on your client:

Specification: In that [the accused], U.S. Army, did, at or near U.S. Army Garrison Yongsan, Republic of Korea, on or about 1 July 2010, cause Private First Class X to engage in a sexual act, to wit: vaginal intercourse, by holding her hips and not allowing her to move.

The MCM's model specification is as follows:

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required) , on or about _____ 20__, cause _____ to engage in a sexual act, to wit: _____, by using (physical violence) (strength) (power) (restraint applied to), sufficient that (he)(she) could not avoid or escape the sexual conduct.¹⁶

The EBB's model specification (in pertinent part) is as follows:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, cause _____ to engage in (a) sexual act(s), to wit: _____, by [if force alleged, state the force used].¹⁷

The specification, as drafted or as preferred, complies with the model specifications in the MCM and EBB, but depending on the evidence at trial, the government, having preferred such a specification, may have committed itself to proving more than it bargained for.

¹⁶ MCM, *supra* note 5, pt. IV, ¶ 45g(1)(a)(iii).

¹⁷ EBB, *supra* note 7, ¶ 3-45-3b. The omitted portions of the model specification in the MJBB/EBB refer to types of rape other than rape by force (i.e., rape by causing grievous bodily harm, rape by using threats or placing in fear, rape by rendering another unconscious, and rape by the administration of a drug, intoxicant, or similar substance). Counsel should bear in mind that when rape by force is at issue, the portions of the EBB model specification, omitted from the text above, have no application.

To see why, review the EBB elements and definitions of related terms as a military judge would instruct a panel, and tailor them to the facts as alleged in the specification. You should come up with something very close to the following:

ELEMENTS:

(1) That at or near U.S. Army Garrison Yongsan, Republic of Korea, on or about 1 July 2010, the accused caused Private First Class X to engage in a sexual act, to wit: vaginal intercourse; and

(2) That the accused did so by using force against Private First Class X, to wit: holding her hips and not allowing her to move.

DEFINITIONS:

“Sexual act” means the penetration, however slight, of the vulva by the penis.

The “vulva” is the external genital organs of the female, including the entrance of the vagina and the labia majora and labia minora. “Labia” is the Latin and medically correct term for “lips.”

“Force” means action to compel submission of another or to overcome or prevent another's resistance by physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual act.¹⁸

You should immediately note a problem in the specification as drafted or as charged; the “sexual act” with which the accused is charged (or would be charged if the draft were included in preferred charges) is “vaginal intercourse.” In the post-1 October 2007 version (and in the new 2012 version) of Article 120, the word “vagina” nowhere appears; rather, the statute uses the term “vulva.”¹⁹

¹⁸ *See id.* ¶ 3-45-3c & d.

¹⁹ From the post-1 October 2007 statute: “The term ‘sexual act’ means . . . contact between the penis and the vulva, and for the purposes of this subparagraph, contact involving the penis occurs upon penetration, however slight.” UCMJ art. 120(t)(1)(A) (2008). From the statute effective on 28 June 2012:

The term “sexual act” means . . . contact between the penis and the vulva or anus or mouth, and for the purposes of this subparagraph, contact involving the penis occurs upon penetration, however slight; or . . . the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by an object, with an intent to abused, humiliate, harass, or

A near synonym of “vagina” does appear in the post-1 October 2007 statute (but not in the 2012 statute), that is, “genital opening;” but “genital opening” is only relevant when the “sexual act” at issue is “the penetration, however slight, of the genital opening of another by a hand or finger or any object,”²⁰ rather than “contact between the penis and the vulva” where there is “penetration, however slight.”²¹ The EBB accordingly provides a definition for the terms “genital opening” and “vagina,” as follows: “[T]he entrance to the vagina, which is the canal that connects the genital opening to the uterus.”²²

Therefore, in order to prove the offense as the specification as drafted, the government will have to prove not just penetration, “however slight,” of the *vulva*, but penetration of the genital or *vaginal opening*. While this may not pose a problem if the alleged victim is clear about the extent of penetration and/or the accused has expressly admitted to penetration of the vaginal opening in a statement to law enforcement, usually the parties to the sexual act are not so precise in their statements, and all too often law enforcement is equally imprecise.

Accordingly, the government would do well to revise the specification as shown below:

Specification: In that [the accused], U.S. Army, did, at or near U.S. Army Garrison Yongsan, Republic of Korea, on or about 1 July 2010, cause Private First Class X to engage in a sexual act, to wit: penetration of the vulva by the penis, by using restraint sufficient that she could not avoid or escape the sexual conduct, to wit: by holding her hips and not allowing her to move.

The defense, for its part, may choose to wait until the military judge discusses instructions after all findings evidence has been presented, and demand that the military judge, in accordance with the wording of the specification

degrade any person or to arouse or gratify the sexual desire of any person.

UCMJ art. 120(g)(1)(A) & (B) (2012). There is no definition of the term “vulva” in either statute. The MJBB/EBB uses a standard medical definition, in accordance with the practice of federal courts applying similar statutes. “For women, the ‘external genitalia’ include the mons pubis, the labia majora, the labia minora, the clitoris, and the vaginal orifice. ‘The term . . . *vulva* includes all these parts.’” *United States v. Jagahirdar*, 466 F.3d 149, 152 (1st Cir. 2006) (internal citations omitted).

²⁰ “The term ‘sexual act’ means . . . the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.” UCMJ art. 120(t)(1)(B) (2008).

²¹ UCMJ art. 120(t)(1)(A) (2008), *quoted in supra* note 19.

²² EBB, *supra* note 7, ¶ 3-45-3d n.5.

(as originally drafted), depart from the standard MJBB/EBB instructions and instruct that a finding of penetration of the “genital opening” is required.

Note that under the 2012 revision of Article 120, it becomes all the more important to avoid completely the use of the term “vagina” in charging, since the term “genital opening” (and therefore the near-synonym “vagina”) is dropped altogether from either definition of “sexual act.” In the new statute, the term “vulva” is used in both definitions of “sexual act” (i.e., both penetration, however slight, of, *inter alia*, the vulva by the penis, and penetration, however slight, of, *inter alia*, the vulva “by any part of the body or by any object”).²³

Example 3:

As substantive criminal law changes, it is critical for counsel to bear in mind that terms and concepts from a prior, superseded statute should not influence the charging of an offense under a newer statute.

Here is a specification of rape under the post-1 October 2007 version of Article 120, specifically, Article 120(a)(1), which you, as a trial counsel, have drafted, or you, as a defense counsel, see on a preferred or referred charge sheet served on your client:

Specification: In that [the accused], U.S. Army, did, at or near Camp Casey, Republic of Korea, on or about 15 February 2011, cause Specialist X to engage in a sexual act, to wit: penetration of the vulva by the penis, by force sufficient to cause penetration of the vulva.

Here, the specification complies with the model specification in the EBB, which only calls upon the trial counsel to “state the force used,”²⁴ but not with the model specification in the MCM, which, if followed, requires the words “sufficient that she could not avoid or escape the sexual conduct” at the end of the specification.²⁵

Again, review the EBB, bring up the elements and definitions of related terms as a military judge would instruct a panel, and tailor them to the facts as alleged in the specification:

²³ *Supra* note 19.

²⁴ *See supra* note 17 and accompanying text.

²⁵ *See supra* note 16 and accompanying text.

ELEMENTS:

- (1) That at or near Camp Casey, Republic of Korea, on or about 15 February 2011, the accused caused Specialist X to engage in a sexual act, to wit: penetration of the vulva by the penis; and
- (2) That the accused did so by using force against Specialist X, to wit: *force sufficient to cause penetration of the vulva.*

DEFINITIONS:

“Sexual act” means the penetration, however slight, of the vulva by the penis.

The “vulva” is the external genital organs of the female, including the entrance of the vagina and the labia majora and labia minora. “Labia” is the Latin and medically correct term for “lips.”

“Force” means action to compel submission of another or to overcome or prevent another’s resistance by physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual act.²⁶

The specification purports to charge that accused accomplished the sexual intercourse (“penetration, however slight, of the vulva by the penis”) by force, but the Benchbook definition of “force” reveals that the specification as drafted (or as pled and preferred) simply has failed to plead “force” as defined by Article 120(t)(5)(C) of the post-1 October 2007 statute. “Force sufficient to cause penetration”—however slight—“of the vulva,” on its face, falls far short of “physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual act.”²⁷ Indeed, the specification amounts to a redundancy, in that it alleges that the accused engaged in sexual intercourse with Specialist X by engaging in sexual intercourse with Specialist X.

In other words, the drafted (or preferred) specification charges the accused with an *actus reus* (simple penetration) formerly defined, under the superseded pre-October 2007 version of Article 120, as constituting, by the fact of penetration itself, the “constructive” force required where the alleged victim, due to young age, mental infirmity, sleep, unconsciousness, or intoxication, is incapable of

understanding the nature of the sexual act, incapable of refusing to participate in the sexual act, or incapable of communicating lack of consent. In those instances, the military judge under the pre-1 October 2007 version of Article 120 would instruct that “no greater force is required than that necessary to achieve penetration.”²⁸

This is precisely the conduct criminalized, under the post-1 October 2007 version of Article 120, by Article 120(c)(2), that is, a form of aggravated sexual assault. Under the post-1 October 2007 version of Article 120, simple penetration of the vulva of an adult alleged victim by the penis, without any other act by the accused being alleged, is sufficient to constitute an offense (a crime no longer labeled as “rape” or punishable as rape) only if it is also alleged that the alleged victim was mentally infirm, or “substantially incapacitated” (a term which, under the post-1 October 2007 statute, denotes being incapable of understanding the nature of the sexual act, incapable of refusing to participate in the sexual act, or incapable of communicating lack of consent, due to mental infirmity or due to being asleep, unconscious, or intoxicated). Note that this distinction between rape by actual, physical force, and by committing a sexual act with a person incapable of consenting, is retained in the 2012 revision of Article 120.²⁹

The trial counsel, if he or she meant to charge the accused with a form of aggravated sexual assault, should redraft the specification as an aggravated sexual assault specification, along the following lines:

Specification: In that [the accused], U.S. Army, did, at or near Camp Casey, Republic of Korea, on or about 15 February 2011, engaged in a sexual act, to wit: penetration of the vulva by the penis,

²⁸ The Article 120 in effect prior to 1 October 2007 defined rape as “an act of sexual intercourse by force and without consent.” UCMJ art. 120 (2005). Further in various circumstances where literal force was not employed the definition of “force” was left to common law. In military practice, this common law was (and still is, due to the possibility of prosecutions for pre-1 October 2007 conduct) summarized in the MJB/EBB. EBB, *supra* note 7, ¶ 3-45-1, nn.3–11. The words “no greater force is required than that necessary to achieve penetration” appear four times in paragraph 3-45-1, note 8 (“Victims incapable of giving consent—children of tender years”); note 9 (“Constructive force (parental, or analogous compulsion) AND consent issues involving children of tender years”); note 10 (“Victims incapable of giving consent—due to mental infirmity”); and note 11 (“Victims incapable of giving consent—due to sleep, unconsciousness, or intoxication”).

²⁹ In the 2012 revision of Article 120, a closely similar offense, relabeled simply “sexual assault” rather than “aggravated sexual assault” appears, as Article 120(b)(3) (“commit[ting] a sexual act upon another person when the other person is incapable of consenting . . .”), and remains distinct from rape by using force, Article 120(a)(1) and (2) (whether “unlawful force” or “force causing or likely to cause death or grievous bodily harm”), with “force” defined, in Article 120(g)(5), as “use of a weapon,” “such physical strength or violence as is sufficient to overcome, restrain, or injure a person,” or “inflicting physical harm sufficient to coerce or compel submission by the victim.”

²⁶ See EBB, *supra* note 7, ¶ 3-45-3c & d (emphasis added).

²⁷ UCMJ art. 120(t)(5)(C) (2008).

with Specialist X, who was substantially incapacitated.

Alternatively, if the trial counsel indeed meant to charge the accused with rape by force, he or she should redraft the specification to allege “force” as defined in the current statute, along the following lines:

Specification: In that [the accused], U.S. Army, did, at or near Camp Casey, Republic of Korea, on or about 15 February 2011, cause Specialist X to engage in a sexual act, to wit: penetration of the vulva by the penis, by force sufficient that she could not avoid or escape the sexual conduct.

If the original draft specification is preferred and referred, the defense should consider whether to move to dismiss the specification as failing to state an offense prior to the presentation of evidence, or whether to contest the case without challenging the specification until after jeopardy has attached. The risks of the latter approach are discussed further below.

Example 4:

Counsel should bear in mind that not all critical definitions of terms will appear when they consult the elements and definitions in the MJBB/EBB. This is particularly the case when the accused is charged with a violation of a lawful general order or regulation under Article 92. Terms likely will appear in the relevant portion of the general order or regulation which are not defined in the MJBB/EBB. At some point, those terms will *have* to be defined with precision. Unless they are common dictionary terms, their meaning cannot be left to chance or a hunch.

Suppose, for example, you are charging an accused, or have a client who is charged with, violating the Secretary of the Army’s 1 February 2011 memorandum prohibiting, *inter alia*, the distribution of some variant of “Spice.”³⁰ Investigation has revealed that the accused distributed a substance to other Soldiers on 2 March 2011. That substance was never seized or tested by a forensic laboratory. However, on 3 March 2011, law enforcement found the accused in possession of a “stash” of a green leafy substance. That substance was tested and was found to be one of the five “synthetic cannabinoids” listed as Schedule I controlled substances on 1 March 2011.³¹

³⁰ Memorandum from Secretary of the Army, Command Policy Memorandum, Subject: Prohibited Substances (Spice in Variations) (10 Feb. 2011) [hereinafter SecArmy Memo].

³¹ Temporary Listing of Substances Subject to Emergency Scheduling, 21 C.F.R. § 1308.11(g) (2011). *See also* Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids Into Schedule I, 76 Fed. Reg. 11,075–11,078 (Mar. 1, 2011).

The Secretary of the Army’s policy letter provides that “[a]ll Army personnel are prohibited from, without proper authorization, . . . distributing . . . [a]ny controlled substance analogue or homologue such as ‘Spice’ or similar substances containing synthetic cannabis, any THC substitute, or any synthetic cannabinoid.”³²

The drafted (or preferred) specification reads as follows:

In that [the accused], U.S. Army, did, at or near U.S. Army Garrison Humphreys, Republic of Korea, on or about 2 March 2011, violate a lawful general order, to wit: paragraph 5, Secretary of the Army Policy on Prohibited Substances (Spice in Variations), dated 10 February 2011, by distributing to Sergeant Z a type of “spice,” a Tetrahydrocannabinol (THC) analogue.

If you bring up the Article 92 elements and definitions using the EBB, of course, you will not find any definition of “Tetrahydrocannabinol (THC) analogue.” Counsel should appreciate, of course, that “analogue” is here used, not in the common dictionary sense, but as a legal term of art applying to contraband substances under federal law. Counsel should then do what a military judge would do: go to the U.S. Code to find the controlling definition of “analogue.”³³ The federal statutory definition specifically provides that if a substance is a controlled substance, it is not a controlled substance analogue.³⁴

If whatever the accused sold to or shared with Sergeant Z on 2 March was from the same “stash” as law enforcement discovered in his possession on 3 March, and if the substance discovered in his possession on 3 March was (according to forensic testing of the substance seized) one of the substances added to Schedule I on 1 March 2011, then the accused distributed what was, as of 1 March 2011, a controlled substance, not an “analogue.”

The government, having discovered this definitional issue (by, again, standing in the shoes of a hypothetical military judge who is drafting findings instructions), should amend its draft specification to account for the possibility that the substance was, in fact, a controlled substance and not an analogue. An amended specification might read as follows:

In that [the accused], U.S. Army, did, at or near U.S. Army Garrison Humphreys, Republic of Korea, on or about 2 March

³² SecArmy Memo, *supra* note 30, ¶ 5.

³³ 21 U.S.C. § 802(32) (2006).

³⁴ *Id.* § 802(32)(C)(i).

2011, violate a lawful general order, to wit: paragraph 5, Secretary of the Army Policy on Prohibited Substances (Spice in Variations), dated 10 February 2011, by distributing to Sergeant Z a type of “spice,” a substance containing a synthetic cannabinoid.

Of course, applying the overall methodology advocated in this article, even this modified specification should not be preferred without first thinking through the definitions the military judge might give for the term “synthetic cannabinoid.” “Synthetic cannabinoid” may be susceptible of definition based upon, *inter alia*, the Drug Enforcement Administration’s Final Order placing five synthetic cannabinoids onto Schedule I of the Schedules of Controlled Substances.³⁵

The other possibilities (besides “synthetic cannabinoid”) provided for in the Secretary of the Army’s policy letter, “synthetic cannabis” and “any THC substitute,” could instead be used in the redrafted specification, but locating authoritative definitions for those terms is more problematic. Counsel should be wary of drafting and preferring a specification that reads, “a substance containing synthetic cannabis, any THC substitute, or any synthetic cannabinoid.” Even though that language tracks the language of the policy letter, the use of the word “or” could raise the issue of disjunctive pleading,³⁶ unless the terms “synthetic cannabis,” “THC substitute,” and “synthetic cannabinoid” have overlapping meanings or are near-synonyms.

³⁵ “A ‘cannabinoid’ is a class of chemical compounds in the marijuana plant that are structurally related. The cannabinoid D9-tetrahydrocannabinol (THC) is the primary psychoactive constituent of marijuana. ‘Synthetic cannabinoids’ are a large family of chemically unrelated structures functionally (biologically) similar to THC, the active principle of marijuana.” Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids Into Schedule I, 76 Fed. Reg. at 11,075.

³⁶

We take this opportunity to strongly discourage disjunctive pleadings. Such pleadings serve no discernable purpose and unnecessarily create avoidable appellate issues. While statutory construction may offer alternate theories of criminal liability, pleadings should specify those theories, using the conjunctive and if more than one may apply. . . . If concerned with exigencies of proof, trial counsel may plead in the conjunctive and fact-finders may find by exceptions. . . . This eliminates any potential for ambiguity in pleadings or findings. Further, we urge trial judges to eliminate disjunctives by ordering the Government to amend the specification when, as here, it otherwise gives sufficient notice of the crime alleged and would not constitute a major change. . . . Certainly, judges should ensure disjunctives are eliminated when entering findings or when members make findings on a specification.

United States v. Crane, 2009 WL 6832590, at * (A. Ct. Crim. App. 2009) (internal citations omitted).

If the specification, as *originally* drafted, is preferred then referred, the defense could not argue that the specification is facially deficient. However, the defense could argue that there is ample reasonable doubt that the alleged “THC analogue” substance distributed on 2 March was in fact the controlled substance seized on 3 March. That is, the defense could argue that no reasonable finder of fact could conclude that the substance distributed on 2 March was, beyond a reasonable doubt, distinct from the substance seized on 3 March. Therefore government’s proof cannot sustain the specification as charged: if the substance distributed on 2 March was a controlled substance, it could not have been a “THC analogue.”³⁷

Defective Specifications Challengeable at Any Time: Myth or Fact?

It may well be asked: can’t a defense counsel just sit on his or her hands and withhold a challenge to a defective specification until after jeopardy has attached? Indeed, can’t a defense counsel simply let the issue first be brought up before the service court on appeal? There are several problems with this approach. Depending on the sentence ultimately adjudged, not all convictions are susceptible of an appeal of right to a service court of criminal appeals.³⁸ More importantly, depending in part on *how* defective the specification is, waiver can be applied against an accused who fails to litigate the issue at or before trial on the merits.

“A specification that is susceptible to multiple meanings is different from a specification that is facially deficient. . . . [A] facially deficient specification cannot be saved by reference to proof at trial”³⁹ However, “a specification susceptible to multiple meanings” may be saved by reference to whether the proof at trial entailed sufficient evidence of the element arguably missing from that specification; whether the military judge’s instructions on findings enumerated (and, if necessary, defined terms relating to) that arguably missing element; and whether the defense counsel argued the insufficiency of the government’s proof regarding that arguably missing element.⁴⁰

Moreover, “[a] flawed specification first challenged after trial . . . is viewed with greater tolerance than one which was attacked before findings and sentence. . . .”⁴¹ Even a facially defective specification, e.g., an allegation of

³⁷ See United States v. Reichenbach, 29 MJ 128, 137 (C.M.A. 1989); see also United States v. Raymer, 941 F.2d 1031, 1045 (10th Cir. 1991).

³⁸ UCMJ art. 66(b)(1) (2008).

³⁹ United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006).

⁴⁰ *Id.* at 211–12.

⁴¹ United States v. Watkins, 21 M.J. 208, 209 (C.M.A. 1986).

distribution of controlled substances under Article 112a that omits the essential element of wrongfulness, may be shielded from dismissal on appeal if the accused failed to challenge the specification at trial or pled guilty.⁴²

A defense counsel faced with a defective specification must weigh the risks of withholding a challenge to the specification against the danger of being later held to have waived the challenge. It is possible that if the issue is raised very late in the findings portion of a trial, and if the military judge does not regard the specification as “facially deficient,” the military judge him- or herself may (as would an appellate court at a later stage) find the defense, by litigating the case as if the specification were in proper form, to have waived its challenge.

Charge “Quasi” LIOs (If the Evidence Warrants) But Not “Genuine” LIOs

The trial counsel, having wrestled with the question of what goes into any particular specification, must then face the further challenge of determining which specifications should be included on the charge sheet. The defense counsel, having scrutinized each specification for possible defects, must then consider whether one or more specifications can be challenged in light of their relationship to other specifications.

On the one hand, considering the exigencies of proof in light of the anticipated evidence, the trial counsel will not want to go to trial lacking charged specifications which are not real and “genuine” LIOs (that is, are only “quasi” LIOs) but which that evidence could sustain. On the other hand, the trial counsel should avoid overcomplicating matters by charging actual or “genuine” LIOs which, as the MCM urges (and as the prohibition against double jeopardy requires), should not be charged at all.⁴³ Nor should the trial counsel find himself or herself attempting to argue for instructions on what may or may not be “genuine” LIOs at trial which he or she simply did not think about or consider when the charges were preferred.⁴⁴

⁴² *United States v. Brecheen*, 27 M.J. 67, 68–69 (C.M.A. 1988). Recently, service courts have applied this principle of waiver to pleas of guilty to Article 134 offenses omitting the “terminal elements” (conduct prejudicial to good order and discipline or service discrediting conduct) found to be essential to a properly pled Article 134 offense in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) and *supra* text accompanying note 4. See, e.g., *United States v. Leubecker*, 2011 WL 4095937 (N-M. Ct. Crim. App. 2011), *petition for review granted*, 71 M.J. 302 (C.A.A.F. 2012).

⁴³ “In no case should both an offense and a lesser included offense thereof be separately charged.” MCM, *supra* note 5, R.C.M. 307(c)(4) discussion. To charge both a greater and a lesser offense, as measured by the statutory elements test, is violative of the prohibition against double jeopardy. See Felicetti, *supra* note 2, at 52 n.71.

⁴⁴ “A lesser included offense is reasonably raised when a charged greater offense requires the members to find a disputed factual element which is not required for conviction of the lesser included offense.” *United States v. Arviso*, 32 M.J. 616, 619 (A.C.M.R. 1991). In order for an LIO instruction

The altered landscape of LIO doctrine, in the wake of the adoption of the “statutory elements” test by the CAAF in *United States v. Jones*,⁴⁵ has been thoroughly and clearly delineated elsewhere.⁴⁶ Since *Jones*, the CAAF has applied the new “statutory elements” test in half a dozen cases. The CAAF has determined that negligent homicide under Article 134 is not a LIO of premeditated murder under Article 118⁴⁷ or of involuntary manslaughter under Article 119;⁴⁸ and that indecent acts with a child under Article 134 is not an LIO of forcible sodomy under Article 125.⁴⁹ These determinations by the CAAF were more or less a foregone conclusion, since the “terminal element” of any Article 134 offense will not be necessarily included in the elements of other punitive articles.

On the other hand, addressing the post-1 October 2007 version of Article 120, the CAAF has determined that aggravated sexual assault under Article 120(c)(1)(B), that is causing another person to engage in a sexual act by “causing bodily harm,” is an LIO of causing another person to engage in a sexual act by using force against that person, reasoning that when one “appl[ies] the common and ordinary understanding of the words in the statute,” any act of force, as the term “force” is defined by Article 120(t)(5)(C), “at a minimum, includes the offense touching that satisfies the bodily harm element” (“any offensive touching, however slight”) of aggravated sexual assault by inflicting bodily harm.⁵⁰

Two recent holdings by CAAF indicate that certain offenses can be deemed to be LIOs even though those lesser offenses, as abstractly defined by statute, may embrace not only the factual scenario envisioned in the charged offense, but also other factual scenarios the charged offense does not reach. The CAAF has determined that assault consummated by a battery is an LIO of wrongful sexual contact, reasoning that because assault consummated by a battery requires physical contact “however slight” with another person, without legal justification or excuse, and that the contact be “offensive”: all the elements of assault consummated by a battery are embraced within wrongfully causing the victim to have physical contact with the accused’s genitalia without the victim’s permission and with the intent of abusing,

to be warranted, that factual element must, in light of the facts in evidence, be “in dispute.” See MCM, *supra* note 5, R.C.M. 920(e)(5)(C) & discussion.

⁴⁵ 68 M.J. 465 (C.A.A.F. 2010).

⁴⁶ Felicetti, *supra* note 2.

⁴⁷ *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011).

⁴⁸ *United States v. McMurrin*, 70 M.J. 15 (C.A.A.F. 2011).

⁴⁹ *United States v. Yammine*, 69 M.J. 70 (C.A.A.F. 2010).

⁵⁰ *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010).

humiliating, or degrading the victim.⁵¹ The CAAF so concluded even though assault consummated by a battery, considered in the abstract, embraces a far wider scope of factual scenarios than does the offense of wrongful sexual contact.

In a similar vein, the CAAF has rejected the argument that, because “housebreaking can be proven by establishing the intent to commit an offense other than those listed in the third element of burglary,” housebreaking cannot be an LIO of burglary. In other words, simply because the universe of possible housebreaking offenses is larger than the universe of possible burglary offenses, housebreaking is not disqualified as an LIO of burglary. “The offense *as charged* included all of the elements of housebreaking and all of those elements are also elements of burglary. Housebreaking is therefore a lesser included offense of burglary.”⁵²

Implicit in these two recent holdings by CAAF is the common sense rule that when enumerating the elements of a LIO, the military judge must insert those elements precisely as the same specified facts that appear in the charged offense. Trial counsel should not expect to be able to argue successfully that an assault consummated by a battery, in the form of, say, a slap to the face or even a groping of the victim’s breasts, is a LIO of a charged wrongful sexual contact involving a groping of the victim’s buttocks. If the trial counsel had evidence of such a slap to the face or breast groping, he or she should have charged it. Conversely, defense counsel should be prepared to argue vigorously against any LIO instruction that does not hew precisely to the “overt acts” set forth in the charged offense.

The statutory elements test, in spite of the limited “as charged” exception thus far made by the CAAF, therefore appears to remain largely intact. The natural consequence is that the government will err on the side of charging more, rather than fewer, specifications. Charging more rather than less is a reasonable step for the trial counsel to take, *provided* his or her evidence warrants all specifications charged, *and provided* he or she is not charging what are clearly real or “genuine” LIOs. The trial counsel should not, for example, charge absence without leave (AWOL) in the alternative to desertion for the same date range. The AWOL is completely and inarguably included within desertion, save for the single *mens rea* element of having an intent to remain away permanently. Similarly, the trial counsel should not charge wrongful appropriation in the alternative to larceny. Applying “the common and ordinary understanding of the words in the statute,” an intent temporarily to deprive will, always and necessarily, be included within an intent permanently to deprive. That is, wrongful appropriation is a

⁵¹ United States v. Bonner, 70 M.J. 1, 3-4 (C.A.A.F. 2011).

⁵² United States v. Arriaga, 70 M.J. 51, 55 (C.A.A.F. 2011) (emphasis added).

“genuine,” not a “quasi,” lesser included offense of larceny, and should not be separately charged.

Overcharging

Charging more rather than less, however, necessarily risks running afoul of a defense challenge based on the doctrine of unreasonable multiplication of charges.⁵³ Charging more in order to account for anticipated exigencies of proof, and because “quasi” (i.e., not actual and “genuine”) LIOs must now be charged separately to ensure due process notice to the accused, are legitimate and laudable practices. Charging more specifications without such a rationale, indeed, charging more specifications in order to “suggest to the members that the accused has bad character,”⁵⁴ to otherwise lead the members to “draw a negative inference about the accused,”⁵⁵ or to cow the accused into submission of an offer to plead guilty on or approaching the government’s terms, is neither legitimate nor laudable, and in any event is ultimately not in the government’s best interests.

In the long run, it is far better to present an accused with a charge sheet that fairly reflects the misconduct the government believes it can prove, than it is to present the accused with a charge sheet consciously designed (at least in part) to tar the accused in the eyes of the finder of fact once it is transferred onto a flyer. A charge sheet and a flyer should contain enough specifications to account for exigencies of proof and for offenses which, while they may formerly have been regarded as LIOs, are no longer. To “pile on” for its own sake runs the risk that the accused and his counsel, in the face of what in their eyes may seem to be unreasonableness or vindictiveness, will merely dig in their heels, and subject the government to a grueling contest, not only on the merits of guilt or innocence and an appropriate sentence, but an extensive array of lesser issues as well. Lest any on the “government side” take offense, they should ponder this: were trial counsel to refrain from such tactics, there would be no need for the court-created doctrine of unreasonable multiplication of charges.⁵⁶

⁵³ See United States v. Quiroz, 55 M.J. 334 (C.A.A.F. 2001).

⁵⁴ Felicetti, *supra* note 2, at 51.

⁵⁵ *Id.* at 52 n.73.

⁵⁶

[T]he prohibition against unreasonable multiplication of charges address those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion . . . the prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal concept—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system.

Conclusion

Considerable time and effort on the record can be saved, and the accused can be properly put on notice of criminal misconduct susceptible of proof at trial, if charging errors, or charging misjudgments, are avoided at the outset. Conversely, defense counsel attuned to charging flaws can ensure that their clients go to trial based only on specifications that fairly and accurately describe the facts at issue in a given case; and in some circumstances, may be able to remove from consideration by the finder of fact criminal misconduct that was not properly charged.

In the end, properly charged offenses that reflect the important factual issues in a given case remove distractions for both sides and for the court, and contribute to the fair and

orderly administration of justice at trial. Prior to trial, proper and well-considered charging may enable the parties to assess more dispassionately the possibilities of a plea agreement or an alternate disposition. At trial, rather than spending hours on the record disputing whether one or more specifications are defective, contain superfluous language, constitute an unreasonable multiplication of charges, or amount to “genuine” LIOs which should not be on the charge sheet at all, the parties can concentrate on other, and ultimately more important and professionally rewarding, tasks: effectively presenting witness testimony, effective cross-examination, successfully admitting documents and tangible objects into evidence, raising pertinent objections to testimony or evidence, and persuasive argument.

Quiroz, 55 M.J. at 337–38.

The Law of Armed Conflict: An Operational Approach¹Reviewed by *Dan E. Stigall**

I. Introduction

Recent years have seen a distinct rise in the academic attention paid to all aspects of what is frequently termed, in the collective, national security law,² and various subcategories of international and domestic law which relate to national security.³ This increased academic interest, spurred by world events such as the U.S. conflicts in Iraq and Afghanistan and the increased focus on counterterrorism, has resulted in such heightened attention that many U.S. law schools now publish journals which focus exclusively on national security law⁴ and even offer LL.M. programs specializing in this distinct academic area.⁵ Courses on the law of armed conflict have also burgeoned.⁶ Concomitantly, since 2001, the number of textbooks designed to function as instructional tools to teach the law of armed conflict has burgeoned.⁷

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¹ GEOFFREY S. CORN, VICTOR HANSEN, M. CHRISTOPHER JENKS, RICHARD JACKSON, ERIC TALBOT JENSEN & JAMES A. SCHOETTLER, *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* (2012).

² Scott L. Silliman, *Teaching National Security Law*, 1 J. NAT'L SECURITY L. & POL'Y 161, 162 (2005) ("Although the study of national security law has always built upon a foundation of constitutional law, in recent years it has necessarily grown in scope to include coverage of fundamental principles of public international law, international criminal law, international humanitarian law, and numerous domestic statutes.").

³ *Id.*

⁴ See, e.g., J. NAT'L SECURITY L. & POL'Y, <http://jnslp.com> (last visited Dec. 21, 2012).

⁵ For instance, both The George Washington University School of Law and Georgetown Law School now offer LL.M. programs in National Security Law. See, e.g., Georgetown Law School, <http://www.kaw.georgetown.edu/academics/academic-programs/graduate-programs/degree-programs/national-security/index.cfm> (last visited Dec. 21, 2012) (describing its National Security Law LL.M.) ("The National Security Law LL.M. degree is a highly competitive one-year advanced degree program, created to give students the opportunity to engage in critical thinking about national security law.").

⁶ AM. BAR ASS'N, CAREERS IN NATIONAL SECURITY LAW, at xi (1st ed. 2008), available at http://www.americanbar.org/content/dam/aba/migrated/natsec/nsl_text.authcheckdam.pdf ("The number of accredited law schools offering courses on national security law has increased from one in 1974 to seven in 1984 to eighty-three in 1994. Today over 130 schools offer such courses.").

⁷ See Françoise J. Hampson, *Teaching the Law of Armed Conflict*, 5 ESSEX HUM. RTS. REV. No. 1, July 2008, at 6 ("Since 2001, particularly in the United States, a large number of academics have begun to address LOAC issues, some of whom appear to be uninhibited by ignorance. The role of an

Notable among those contributing to the literature in this recently fecund field are scholars who are current or former military lawyers, some of whom have entered academia after serving with distinction in the U.S. military for many years. The addition of these voices to the academic discussion has deepened the discourse, lent to the literature needed practical insight, and enriched the discussion with viewpoints informed by years of military experience, training, and indoctrination.⁸ While the contribution by military legal scholars to international law is certainly not a new phenomenon—after all, some of the earliest writers on international law and armed conflict were military lawyers⁹—commentators have noted the impact of recent writing by military lawyers and their marked inclination to approach issues through an “operational” lens.¹⁰

The Law of Armed Conflict: An Operational Approach, written by a phalanx of six authors with extensive military backgrounds, is a product of this academic approach. As its title implies, the book seeks to provide “operational context”¹¹ to an academic discussion of the law of armed conflict which is informed by the authors’ collective experiences serving as military advisors in the U.S. armed forces. All of the authors have independently made their respective marks in the field of international law, especially as it pertains to the law of armed conflict¹²—and five of the

academic drawing up a reading list has changed dramatically. It was once a matter of identifying the isolated examples of relevant material. It is now a matter of identifying what is worth reading amongst the mass of material produced.”). Notably, some textbooks have addressed facets of the law of armed conflict for decades. See, e.g., THOMAS EHRLICH & MARY ELLEN O’CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE* (1993).

⁸ See Kenneth Anderson, *Readings: The Rise of Operational Law of Armed Conflict as an Academic Specialization*, LAWFARE (Apr. 29, 2012, 5:37 PM), <http://www.awfareblog.com/2012/04/readings-the-rise-of-operational-law-of-armed-conflict-as-an-academic-specialization/> (“This new writing is genuinely academic in the sense that it is more than just operational manuals for JAG officers, limited in their audience to military practitioners. These practitioners-turned-academics are developing theoretical accounts of operational law issues. And although these writers do not always share the same views among themselves, there is a core orientation that at least partly defines “operational law” in an academic sense.”).

⁹ See, e.g., ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 73 (1947) (noting that one of the earliest commentators in this field, Balthasar Ayala, a Spaniard writing in the Sixteenth Century, “served in the high position of Auditor General (which may be likened to that of the American Judge Advocate General) in the army sent out by Phillip II against the Netherlands”).

¹⁰ Anderson, *supra* note 8 (noting, “although these writers do not always share the same views among themselves, there is a core orientation that at least partly defines “operational law” in an academic sense”).

¹¹ See CORN, HANSEN, JENKS, JACKSON, JENSEN & SCHOETTLER, *supra* note 1, at xxvii.

¹² See, e.g., Geoffrey S. Corn, Hamdan, *Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295 (2007); Eric Talbot Jensen & Chris Jenks, *All Human Rights Are Equal, But Some Are More Equal Than Others: The*

same six authors previously collaborated on a book which “focused on the operational resolution of issues related to the application of military power by the United States”¹³ This book, however, is distinct in that it is not an academic treatise but a textbook designed for classroom instruction and which seeks to provide the first real manual for broader classroom instruction on this subject from an “operational” perspective.¹⁴

II. The Operational Approach to International Law & the Law of Armed Conflict

The operational approach to international law is one with deep origins and which has cohered over the past two decades within the military legal community.¹⁵ With the advent of military-specific publications for legal scholarship and centralized military institutions for legal education,¹⁶ military attorneys in the United States have focused, with increasing frequency and acumen, on exploring and explicating the legal universe that surrounds and undergirds armed conflict. Military lawyers, thus, have propelled the ascendance of the concept of “operational law”—an area of law typically defined as the “body of foreign, domestic, and international law which impacts specifically” on the activities of military forces.¹⁷ As the U.S. Army Field Manual on Legal Support to Military Operations notes, “Operational law encompasses the law of war but goes beyond the traditional international law concerns to incorporate all relevant aspects of military law that affect the conduct of operations.”¹⁸

Extraordinary Rendition of a Terror Suspect in Italy, the NATO SOFA, and Human Rights, 1 HARV. NAT’L SECURITY J. 171 (2010).

¹³ MICHAEL LEWIS, ERIC JENSEN, GEOFFREY CORN, VICTOR HANSEN, RICHARD JACKSON, JAMES SCHOETTLE, *THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* (2009).

¹⁴ CORN ET AL., *supra* note 1, at xxvii.

¹⁵ See Lieutenant Colonel Marc L. Warren, *Operational Law—A Concept Matures* 152 MIL. L. REV. 33, 36 (1996) (citing Lieutenant Colonel David E. Graham, *Operational Law (OPLAW)—A Concept Comes of Age*, ARMY LAW., July 1987, at 9).

¹⁶ See THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, THE JUDGE ADVOCATE GENERAL’S SCHOOL, 1951–1961, at 1 (1961) (noting that “The Judge Advocate General’s School, U. S. Army, located on the Grounds of the University of Virginia opposite the Law School, is the United States Army’s military law center. It is an approved law school rated by American Bar Association inspectors as offering the highest quality specialized graduate program in law to be found in America, and provides a graduate law school atmosphere where the modern Army lawyer is professionally trained in the many aspects of military law. The School’s function is to orient the Army lawyer in the fundamentals of military law, to keep his training current, and to give him specialized legal training on an advanced level. As a military law center it attaches considerable importance to its research and publications, including texts and case books, as well as several legal periodicals.”).

¹⁷ See Warren, *supra* note 15, at 36 (citing THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 1-1 (1996)).

¹⁸ U.S. DEP’T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 5-20 (26 Jan. 2012).

In elaborating on the concept of operational law, Marc L. Warren, a retired judge advocate and a luminary in the field of military law, has noted that “[operational law] is not a specialty, nor is it a discrete area of substantive law. It is a discipline, a collection of all of the traditional areas of the military legal practice focused on military operations.”¹⁹ Moreover, Warren stresses that “[i]f the essence of the Army is its operations in the field, then operational law is the essence of the military legal practice.” This legal approach reflects the professional role of a military legal advisor. As the 2012 *Law of Armed Conflict Deskbook* notes:

Military operations involve complex questions related to international law. International law provides the framework for informed operational decisions, establishes certain limitations on the scope and nature of command options, and imposes affirmative obligations related to the conduct of U.S. forces. Commanders, rely on Judge Advocates to understand fundamental principles of international law, translate those principles into an operational product, and articulate the essence of the principles when required.²⁰

Given the fact that so many military attorneys are steeped in a legal culture that emphasizes an operational approach to law, it is unsurprising that an operational approach to legal scholarship—especially as it involves the law of armed conflict—would eventually emerge. Predictably, the scholarship on international law that emerges from this operational mindset bears the distinct markings of its military upbringing, such as its keen focus on the practicalities and routine problems confronted by military lawyers advising on issues related to armed conflict. But one must take care to avoid conflating an academic style with a military discipline and to distinguish the idea of “operational law” from any specific approach to legal scholarship. Likewise, it would be incorrect to imply that one particular approach to international law and its subcategories necessarily carries more “operational” legitimacy than others—especially in a field as laden with indeterminacy, competing theories, and competing practices as international law.²¹ A word such as “operational” can, therefore, be one of treacherous and evasive meaning. It suffices to say that, in the context of legal scholarship, “operational” has become a descriptive term used to indicate a practitioner-based approach—and, in the specific context

¹⁹ Warren, *supra* note 15, at 37.

²⁰ INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., *LAW OF ARMED CONFLICT DESKBOOK* 1 (2012) [hereinafter *DESKBOOK*].

²¹ See Martti Koskenniemi, *International Law in the World of Ideas*, *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 48–49 (James Crawford & Martti Koskenniemi eds., 2012).

of the law of armed conflict, one which has been championed by military scholars.²²

III. The Text: A Practical, Straightforward Discussion of the Law of Armed Conflict

Given his distinguished place in the pantheon of military attorneys and his influential writing on the maturation of the concept of “operational law,” it is appropriate that Marc L. Warren also writes the foreword for this book, emphasizing its aim of both elucidating its subject matter but also demonstrating how the law of armed conflict is applied in practice.²³ In that regard, one of the notable characteristics of this book is the breadth of the subject matter it seeks to address. The book is logically organized and, within its 599 pages, walks the reader through the major topics that comprise the corpus of the law of armed conflict—*jus ad bellum*, *jus in bello*, and *jus post bellum*. These include the legal bases for the use of force; the history of the law of armed conflict; the legal “triggers” for the law of armed conflict; and the principal subjects of concern to this area of the law (conflict classification, distinction, targeting, means and methods of warfare, etc.).

IV. The Pros: A Strong Emphasis on the Practical

The authors of *The Law of Armed Conflict: An Operational Approach* have placed much emphasis on practicality and constructed a discussion of the law of armed conflict from a decidedly U.S.-centric perspective. On that score, to facilitate the practical and operational approach of the book, the authors have designed the text around an operational scenario which is carefully interwoven into the discussion and which serves to provide an interlinking theme and operational focus—so that students are provided with theoretical discussion but also challenged by practical problems. The reader is, thus, asked to approach each chapter through the lens of a junior judge advocate advising commanders in the context of the 1989 U.S. invasion of Panama (Operation Just Cause).²⁴ The brief summary of the scenario at the beginning of each chapter serves as a sort of vignette to focus the reader and provide situational context—giving an idea of the sort of situation in which the material to be discussed might be needed. Each chapter then contains the relevant substantive material pertaining to the topic and concludes with questions designed to encourage the reader to use the material to resolve practical legal

problems that arise during the course of military operations.²⁵ This scenario-based aspect of the book immediately serves to separate it from other competing texts which lack such practical emphasis.

Additionally, *The Law of Armed Conflict: An Operational Approach* contains a great deal of important background information that serves to allow an uninitiated reader to grasp basic concepts that are critical to an understanding of the law of armed conflict and its application. The authors take great pains to walk the reader through the basic history, key players, fundamental government structures, and the relevant international framework. For instance, the introduction is notably helpful in that it contains an overview of the national security organization of the United States Government. The various roles of the Secretary of Defense, Chairman of the Joint Chiefs of Staff, Service Secretaries, and Combatant Commanders are clearly explained.²⁶ Such basic information is helpful as the complex chains of command which characterize the U.S. national security structure are not always clear or intuitive for the non-military or inexperienced reader. Many casual observers of world events would not fully appreciate, for instance, that the Chairman of the Joint Chiefs of Staff—who appears regularly alongside high-level national leaders at widely televised press conferences and serves as the principal military advisor to the President of the United States²⁷—is not actually in command of military operations when they are carried out.²⁸ Instead, it is the Combatant Commanders (four-star generals and admirals who, with rare exceptions, are generally less visible to the public) who are directly in command of forces conducting military operations.²⁹ Similarly, the roles of the various U.S. armed forces are expressly defined as are key concepts such as an “operational chain of command” and a “joint task force.”³⁰

This sort of introduction gives important background and also serves to provide some context at the outset so that the reader understands, albeit from an exclusively U.S. perspective, the institutional framework in which questions pertaining to the law of armed conflict are generally considered and the organizations to which this field of law most directly pertains. The subsequent discussions and study questions are, therefore, grounded in this basic understanding of the organizational context in which the U.S. military lawyer must operate. While such information is not legal in nature, it is imminently practical information and necessary for a complete understanding of the operational context in which most decisions relevant to the law of armed conflict are made. No comparable textbook exists which explains this institutional framework in such detail.

²² Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1435 (2008) (“Those who criticize the extent of judge advocate involvement during military operations thereby reveal their lack of operational experience. The law of war is complicated. Applying it in a progressively complex combat environment requires specialized training, practical experience, and in-depth knowledge of the operational art. Most civilians typically fall short in these regards.”).

²³ CORN ET AL., *supra* note 1, at xxii.

²⁴ *Id.* at xxviii.

²⁵ *Id.*

²⁶ *Id.* at xxix–xxx.

²⁷ *Id.* at xxix.

²⁸ *Id.*

²⁹ *Id.* at xxx.

³⁰ *Id.* at xxx–xxxii.

In a similar vein, the first chapter of the book begins with a concise, basic discussion of the legal framework governing the use of force by states. The chapter briefly discusses the history of *jus ad bellum* and recounts the most prominent theories on the law governing the resort to war, tracing the intellectual and legal development to the current framework which is governed by the United Nations (UN) Charter.³¹ Importantly, however, the chapter takes time to first explicate the UN system, its various organs, and the key aspects of the UN Charter which bear upon the legal authority of states vis-à-vis the use of force. The authors then go on to address the authorities granted under Chapter VI of the UN Charter for the pacific settlement of disputes as well as the more expansive authorities for the use of armed force granted under Chapter VII. Attention is given to the legal authority under the UN for peacekeeping,³² the establishment of ad hoc tribunals,³³ and the development of the International Criminal Court.³⁴ This discussion is comprehensive and explains not only the textual language of the UN Charter but also the various Security Council resolutions and General Assembly resolutions which have shaped the international approach to UN operations.

Among the other unique practitioner-oriented aspects of this book is its section on weapons and tactics, which discusses the process of conducting a legal review of weapons systems.³⁵ This section gives detailed guidance on numerous specific weapons systems such as shotguns; small arms and small arms ammunition; edged weapons (such as knives and bayonets); .50 caliber rounds; explosive munitions; depleted uranium; silencers; certain non-lethal weapons (such as rubber bullets and sponge batons); and “cyber weapons.”³⁶ The section even contains a sample memorandum from the actual office within the U.S. Army bureaucracy responsible for conducting such legal reviews.³⁷ Although such weapons reviews are a critical aspect of military legal practice and a central subject of many treaties relevant to the law of armed conflict, no other comparable textbook addresses this subject in such a concrete fashion and in such detail. This makes the text unique as it goes beyond a mere theoretical discussion of the law of armed conflict and gives the reader a practical understanding of

how the United States implements the treaty obligations being discussed.

The chapter on targeting, however, provides what is perhaps the best example of the difference between an “operational” approach to the law of armed conflict and more conventional academic approaches. Many textbooks on the law of armed conflict cover the way in which targeting is regulated by international law, the rules governing the targeting of combatants, protected persons and places, etc.³⁸ This text, however, is distinguishable in that it also discusses the targeting process and how U.S. forces go about the business of targeting enemy personnel or materiel within the framework of the law of armed conflict.³⁹ The chapter opens with a discussion of the targeting process, using graphics taken directly from the U.S. Army field manual on targeting and joint publications from which the U.S. military derives its targeting doctrine.⁴⁰ It is only after that process is thoroughly described that the chapter begins to elucidate the general principles of targeting, distinction, etc., so that the entire academic discussion is framed within an operational discussion that gives the reader an idea of who is responsible for targeting decisions and how they go about their work.⁴¹ Thus, the practitioner-based approach of this book provides readers rare insight into how the rules governing modern warfare are applied and the institutional framework in which its practitioners operate.

V. The Cons: An Occasional Emphasis on Policy and Practice over Legal Analysis

The book does, however, have its peculiarities. A notable characteristic of *The Law of Armed Conflict: An Operational Approach* is its expansive view of permissible military action. For instance, the second half of the first chapter details the basic legal framework for the use of force found in Articles 2(3), 2(4), and 51 of the UN Charter.⁴² Articles 2(3) and 2(4) form the legal bulwark designed to outlaw the use of force by states. The language of this chapter indicates a degree of indeterminacy in the meaning of Article 2(4):

Article 2(4) has become the accepted norm restricting the use of force among States. However, universal acceptance does not mean universal understanding. Although the international community as a whole accepts Article 2(4) to be binding, nations have very different views on what the language actually means. For example, the prohibition refers to the “threat or use of

³¹ *Id.* at 2–4.

³² *Id.* at 7–8. It should be noted, however, that this section somewhat inaccurately states that the Uniting For Peace Resolution, passed by the UN General Assembly at the urging of the United States, “hasn’t been applied to any particular international situation.” *Id.* at 6. In fact, the Uniting For Peace Resolution was used in 1956 to authorize and deploy an international emergency force (UNEF) which was tasked with maintaining peace between Israel and Egypt in the aftermath of the 1956 Suez Crisis. See THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ATTACKS* 35–36 (2005). Thereafter, in 1960, the Uniting For Peace Resolution was again used to authorize the initial deployment of a UN force to Congo (ONUC) that eventually conducted military operations against a secessionist group in Katanga Province. *Id.* at 37–38.

³³ CORN ET AL., *supra* note 1, at 10–11.

³⁴ *Id.* at 12.

³⁵ *Id.* at 199.

³⁶ *Id.* at 214–21.

³⁷ *Id.* at 228.

³⁸ *Id.* at 164–89.

³⁹ *Id.* at 161–64.

⁴⁰ U.S. DEP’T OF ARMY, *FIELD MANUAL 3-60, THE TARGETING PROCESS* 2-1 (26 Nov. 2010).

⁴¹ CORN ET AL., *supra* note 1, at 159.

⁴² *Id.* at 14.

force,” as opposed to words such as “war” or “aggression.” The Charter contains no definitions section, leaving each nation to determine what constitutes a use of force.⁴³

By noting the existence of contention but not exploring the validity of competing claims, such language might leave the reader with the impression that Article 2(4) is the subject of greater controversy or disagreement in the international community than is the case. As Dinstein notes, “When Governments charge each other with infringements of Article 2(4), as happens all too frequently, such accusations are always contested.”⁴⁴ But, in noting the existence of such disputes, it is equally important to evaluate the strength of competing claims and take into account the extensive treatment of Article 2(4) by noted commentators and authoritative international bodies. The weight of such authorities indicates that “[t]he correct interpretation of Article 2(4) . . . is that any use of inter-State force by Member States for whatever reason is banned, unless explicitly allowed by the Charter.”⁴⁵ The authors, however, never discuss these authorities and only note the fact of disagreement—never explaining or probing the quality of the dissenting or contradictory arguments. Accordingly, any extant disagreement in the international community vis-a-vis Article 2(4) of the UN Charter is overemphasized in a way that inures to the benefit of an argument for more expansive military action.

In contrast, when discussing the concepts of anticipatory and preventive self-defense, the authors tend to minimize the controversy surrounding the legitimacy of these bases for the use of force and, instead, present these concepts as being more accepted than a review of the literature would warrant.⁴⁶ For instance, while the authors do note that such attacks were considered “beyond the scope of appropriate self-defense” twenty years ago, the text states that preventive self-defense has “only recently begun to receive acceptance.”⁴⁷ Similarly, though noting that the international community is “dramatically split on this notion of self-defense,” the authors conclude by noting that “it is clear that some States have already justified the use of armed force against another State under this theory.”⁴⁸ But the authors do not note the relative rarity of attempts by states to justify

their actions based on arguments of preventive self-defense.⁴⁹ Moreover, the authors sidestep discussion of the wide condemnation of such state action⁵⁰ and the weight of existing authority which states that such preemptive action is illegal under international law.⁵¹ Dinstein, for example, notes that “[t]he idea that one can go beyond the text of Article 51 and find support for a broad concept of anticipatory or preemptive self defense in customary international law . . . is counterfactual”⁵² and that “the option of a preventive use of force is excluded by Article 51.”⁵³ This position is echoed by the UN High-level Panel on Threats, Challenges and Change which concluded that the use of force based on an anticipated threat could only be lawful if authorized by the UN Security Council.⁵⁴

[I]n a world full of perceived potential threats, the risk to the global order and the

⁴⁹ James Mulcahy & Charles O. Mahony, *Anticipatory Self-Defence: A Discussion of the International Law*, 2 HANSE L. REV. 231, 242 (2006).

Israel did not seek to rely on anticipatory self-defence when it launched what appeared to be a pre-emptive strike on Egypt, Syria and Jordan in 1967. Israel argued that the actions were taken in response to a prior armed attack. In the Security Council debates on the action Israel claimed that Egypt’s blocking of the Straits of Tiran to passage by Israeli ships was an act of war. This, according to Israel, was the armed attack justifying self-defence under the Article 51 regime. Additionally, when the USA forcibly intercepted nuclear weapons in transit from USSR to Cuba during the Cuban Missile Crisis of 1962, the aggressor did not rely on the doctrine of anticipatory self-defence, relying instead on regional peacekeeping under Chapter VIII of the UN Charter.

Id.

⁵⁰ *Id.* at 244, noting that, when Israel attacked an Iraqi nuclear reactor in 1981 and asserted a right to use pre-emptive force,

Some states rejected anticipatory self-defence generally, while others held the view that the facts of the incident did not justify the use of pre-emptive force, because Israel failed to prove that Iraq had plans to attack them. Even the USA condemned the actions of Israel, however this was on the grounds that Israel had not exhausted peaceful means for the conclusion of the dispute. What is important is the fact that none of the states sitting in the Security Council agreed with the anticipatory self-defence justification employed by Israel.

Id.

⁵¹ See generally TOM RUYTS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER (2010).

⁵² See DINSTEIN, *supra* note 44, at 197.

⁵³ *Id.* at 200; see also Mary Ellen O’Connell, *The Myth of Preemptive Self-Defence*, in AM. SOC’Y OF INT’L LAW TASK FORCE PAPERS 1, 2–3 (2002), available at <http://www.asil.org/taskforce/oconnell.pdf> (“Preemptive self-defence, however, is clearly unlawful under international law. Armed action in self-defence is permitted only against armed attack.”).

⁵⁴ U.N. High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change*, transmitted by Note of the Secretary-General, ¶ 190, U.N. Doc. A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld/report.pdf>.

⁴³ *Id.*

⁴⁴ See YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENSE* 97 (Cambridge Univ. Press 5th ed. 2011).

⁴⁵ *Id.* at 90–91; see also NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 77 (2010) (“The more persuasive opinion is that Article 2(4) prohibits any use of force on foreign territory, other than in accordance with the exceptions to the Charter.”). See also FRANCK, *supra* note 32, at 12 (noting the inclination of some to read Article 2(4) as permitting more limited uses of force and stating, “Such a reading of Article 2(4) is utterly incongruent, however, with the evident intent of sponsors of this amendment.”).

⁴⁶ CORN ET AL., *supra* note 1, at 22–24.

⁴⁷ *Id.* at 23.

⁴⁸ *Id.* at 24.

norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.⁵⁵

The omission of such discordant views serves to create an unnecessary imbalance in the discussion—an imbalance which is maintained throughout the discussion of this particular topic. For instance, the authors also include a brief discussion of Dinstein’s theory of “interceptive self-defense,”⁵⁶ which holds that states may be able to respond in self-defense when a hostile state has irrevocably committed to an attack in such a way that the state has “embarked upon an apparently irreversible course of action, thereby crossing the legal Rubicon.”⁵⁷ The authors do not, however, note the fact that this very theory posited by Dinstein emanates from his utter rejection of anticipatory or preventive self-defense and is articulated as a curative to the problem faced by the restrictions of Article 51.⁵⁸ It is a middle ground proposed by Dinstein which permits lawful self-defense before the impact of an attack (albeit an attack which must be underway) is felt—but, importantly, it is a theory offered in contradistinction to preemptive actions which Dinstein holds to be in violation of international law.⁵⁹ This aspect of the rationale undergirding Dinstein’s theory of interceptive self-defense, however, finds no mention in the discussion. Accordingly, the considerable authority rejecting notions of anticipatory and preventive self-defense are minimized in a way that inures to the benefit of an argument for more expansive military action.

This is not to imply that the positions taken by the authors are not defensible or legally supportable. There is certainly an abundance of literature and logic by which one could defend the positions articulated in the text and many legal scholars, in fact, subscribe to the interpretations the authors posit—but the authors seem to mute the debate on complex legal issues in favor of articulating an identifiable rule of thumb. To achieve this, the authors eschew a comprehensive legal discussion in favor of more forceful articulation of an expansive view of these areas of the law and, in the process, posit a maximalist position on the use of force.⁶⁰

This seemingly partisan approach may merely be a function of the operational approach to legal scholarship. In a text in which the authors seek to provide an intensely practice-based approach to the law, expatiation may be avoided in favor of a more concise discussion of the law as it is applied by U.S. military legal advisors. Such

breviloquence, however, is—to borrow a military metaphor—a double-edged sword. Such an intense focus on legal positions and practices adopted by practitioners in a given time and place (versus a broader discussion of the legal issues) can serve to unduly narrow the scope of analysis.

VI. Conclusion

In sum, *The Law of Armed Conflict: An Operational Approach* is a valuable contribution to the field of international law as it relates to the law of armed conflict. It is an experiential guide through the law of armed conflict from a U.S. military perspective. The book’s discussion of the law of armed conflict is enriched by the practical insight and knowledge of its authors, all of whom are distinguished practitioners with years of military experience. This combination of practical experience, knowledge of U.S. military practice, and scholarly acumen form what is clearly the book’s principal virtue. But every virtue has a concomitant defect and, in this case, the book’s keen focus on U.S. practice in a military context occasionally crowds out broader legal discussions and omits critique. As such, explanations of policy positions on certain issues can sometimes take the place of a fulsome, multidimensional explanation of the topic—leaving readers instructed on a particular policy position or insight into U.S. military practice, but left without a deeper examination of the myriad legal issues attendant to that position. Fortunately, this defect is occasional rather than recurring and does not, in the final analysis, unduly detract from the book’s value as a resource and a unique educational tool.

That said, the book’s approach does raise separate questions about a practitioner-based approach to the law of armed conflict. One may, at once, recognize the value of such scholarship yet question whether classroom instruction on the topic should not also include a fulsome discussion of competing theories and critical approaches to accepted practices. Warren notes in the foreword of this book, “The reader can become as knowledgeable as possible about the law of armed conflict without having served as a legal advisor in combat.”⁶¹ The author of this review would revise this statement somewhat and posit instead that, through this book, the reader can attain a solid understanding of the law of armed conflict, learn as much as possible about U.S. positions relating to the law of armed conflict, and learn how U.S. military lawyers approach this specific subset of international law. But there is, of course, a range of knowledge and a deeper understanding of international law that exists beyond any single nation’s various policy positions or what has become a standardized approach. And recent history has taught us that even the most virtuous nations—nations with luminous democratic traditions—can,

⁵⁵ *Id.* ¶ 191.

⁵⁶ CORN ET AL., *supra* note 1, at 23.

⁵⁷ See DINSTEIN, *supra* note 44, at 204.

⁵⁸ *Id.*

⁵⁹ *Id.* at 196, 203–05.

⁶⁰ See DESKBOOK, *supra* note 20, at 38.

⁶¹ CORN ET AL., *supra* note 1, at xxii.

even if only briefly, err and adopt policy positions of questionable legality.⁶²

Critical approaches and explanations of competing views, accordingly, have their value. As Yeats noted, “there is no longer a virtuous nation and the best of us live by candlelight.”⁶³ A curriculum that is too narrowly focused on

a single approach and eschews a broader legal discussion in favor of emphasizing the standardized practices and policies of one nation’s military may, therefore, be practical and effective on many levels—but it has its dangers.

⁶² See, e.g., Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct in Interrogation Under 18 U.S.C. §§ 2340–2340A, at 34 (Aug. 1, 2002), available at http://www.washingtonpost.com/wp-srv/nation/documents/dojinter-rogation_memo20020801.pdf.

⁶³ See STAN SMITH, W.B. YEATS: A CRITICAL INTRODUCTION 44 (1990).

CLE News

1. Resident Course Quotas

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

b. Active duty servicemembers and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices.

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

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

Go to Self Service, My Education. Scroll to ATRRS Self-Development Center and click on "Update" your ATRRS Profile (not the AARTS Transcript Services).

Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

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

2. TJAGLCS CLE Course Schedule (September 2012–September 2013) (<http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
GENERAL		
	61st Judge Advocate Officer Graduate Course	13 Aug 12 – 23 May 13
	62d Judge Advocate Officer Graduate Course	12 Aug 13 – 22 May 14
5-27-C20	189th JAOBC/BOLC-B (Ph 2)	1 Feb – 18 Mar 13
	190th JAOBC/BOLC-B (Ph 2)	22 Feb – 1 May 13
5F-F1	226th Senior Officer Legal Orientation Course	18 – 22 Mar 13
5F-F1	227th Senior Officer Legal Orientation Course	17 – 21 Jun 13
5F-F1	227th Senior Officer Legal Orientation Course	26 – 30 Aug 13
5F-F3	19th RC General Officer Legal Orientation Course	27 May – 1 Jun 13
5F-F40	Brigade Leader Course (Pilot)	22 – 25 Jan 13
5F-F1	CSM Legal Orientation Course	29 – 31 Jan 13
5F-F5	2013 Congressional Staff Legal Orientation (COLO)	21 – 22 Feb 13

5F-F52	43d Staff Judge Advocate Course	3 – 7 Jun 13
5F-F52-S	16th Team Leadership Course	3 – 7 Jun 13
5F-F70	44th Methods of Instruction	27 May – 1 Jun 13
5F-F70	45th Methods of Instruction	4 – 6 Sep 13
JARC-181	JA Recruiting Course	17 – 19 Jul 13

NCO ACADEMY COURSES

512-27D30	2d Advanced Leaders Course (Ph 2)	7 Jan – 12 Feb 13
512-27D30	3d Advanced Leaders Course (Ph 2)	7 Jan – 12 Feb 13
512-27D30	4th Advanced Leaders Course (Ph 2)	11 Mar – 16 Apr 13
512-27D30	5th Advanced Leaders Course (Ph 2)	10 – 16 Jun 13
512-27D30	6th Advanced Leaders Course (Ph 2)	12 Aug – 17 Sep 13
512-27D40	2d Senior Leaders Course (Ph 2)	11 Mar – 16 Apr 13
512-27D40	3d Senior Leaders Course (Ph 2)	10 – 16 Jun 13
512-27D40	4th Senior Leaders Course (Ph 2)	12 Aug – 17 Sep 13

WARRANT OFFICER COURSES

7A-270A0	20th JA Warrant Officer Basic Course	20 May – 28 Jun 13
7A-270A1	24th Legal Administrator Course	24 – 28 Jun 13
7A-270A2	14th JA Warrant Officer Advanced Course	25 – 29 Mar 13

ENLISTED COURSES

512-27D/20/30	24th Law for Paralegal NCO Course	18 – 22 May 13
512-27D/DCSP	22d Senior Paralegal Course	10 – 14 Jun 13
512-27DC5	40th Court Reporter Course	4 Feb – 22 Mar 13
512-27DC5	41st Court Reporter Course	29 Apr – 21 Jun 13
512-27DC5	42d Court Reporter Course	5 Aug – 20 Sep 13
512-27DC6	13th Senior Court Reporter Course	8 – 12 Jul 13
512-27DC7	18th Redictation Course	7 – 11 Jan 13
	19th Redictation Course	8 – 12 Apr 13

ADMINISTRATIVE AND CIVIL LAW		
5F-F22	66th Law of Federal Employment Course	29 Jul – 2 Aug 13
5F-F24	37th Administrative Law for Military Organizations	11 – 15 Feb 13
5F-F29	31st Federal Litigation Course	26 – 30 Aug 13
5F-F202	11th Ethics Counselors Course	8 – 12 Apr 13

CONTRACT AND FISCAL LAW		
5F-F10	166th Contract Attorneys Course	15 – 26 Jul 13
5F-F12	84th Fiscal Law Course	11 – 15 Mar 13
5F-F14	31st Comptrollers Accreditation Fiscal Law Course	18 – 22 Mar 13

CRIMINAL LAW		
5F-F33	56th Military Judge Course	15 Apr – 3 May 13
5F-F34	44th Intermediate Trial Advocacy Course	4 – 15 Feb 13
5-F-301	16th Advanced Trial Communications Course	29 – 31 May 13

INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	9th Intelligence Law Course	12 – 16 Aug 13
5F-F47	59th Operational Law of Armed Conflict Course	25 Feb – 1 Mar 13
5F-F47	60th Operational Law of Armed Conflict Course	29 Jul – 9 Aug 13
5F-F48	6th Rule of Law Course	8 – 12 Jul 13

3. Naval Justice School and FY 2012–2013 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	Course Title	Dates
03RF	Legalman Accession Course (10) Legalman Accession Course (20)	4 Mar – 17 May 13 10 Jun – 23 Aug 13
03TP	Basic Trial Advocacy (10)	4 – 8 Feb 13
049N	Reserve Legalman Course (10) (Phase I)	Cancelled
056L	Reserve Legalman Course (10) (Phase II)	Cancelled
07HN	Legalman Paralegal Core (10) Legalman Paralegal Core (20) Legalman Paralegal Core (30)	21 Jan – 17 May 13 20 May – 9 Aug 13 29 Aug – 18 Dec 13
08LM	Reserve Legalman Phases Combined (10)	TBD
08XO	Legal Ethics for Paralegals Course (30)	26 – 30 Aug 13
09XU	Professional Development (10)	Cancelled
09XY	Afghanistan Pre-Deployment (10) Afghanistan Pre-Deployment (20)	TBD TBD
09XZ	Information Operations Law Training (10)	TBD
09YA	Sexual Assault Disposition Authority Class for JA-Mobile Training Teams (10)	TBD
09YB	Sexual Assault Disposition Authority Class for Convening Authorities - Mobile Training (10)	TBD
09YF	Sexual Assault Disposition Authority Class for JA-Distance Learning (10)	TBD
09YO	Litigating Complex Cases (10)	20 – 24 May 13
09Y9	Working with Experts (10)	Cancelled
10E1	Ethics for Trial and Defense (20)	6 – 13 May 13

10E2	Post Trial Review (20)	15 – 30 Apr 13
10E3	Operational Law (20)	10 – 28 Jun 13
10E4	Law of Armed Conflict (20)	29 Apr – 13 May 13
846L	Senior Legalman Leadership Course (10)	22 – 26 Jul 13
932V	Coast Guard Legal Technician Course (10)	TBD
0257	Lawyer Course (20) Lawyer Course (30)	22 Jan – 29 Mar 13 29 Jul – 4 Oct 13
0258	Senior Officer (060) Senior Officer (070) Senior Officer (080) Senior Officer (090) Senior Officer (110) Senior Officer (120) Senior Officer (130) Senior Officer (140)	11 – 13 Mar 13 (Newport) 15 – 17 Apr 13 (Newport) 13 – 15 May 13 (Newport) 17 – 19 Jun 13 (Newport) 1 – 3 Jul 13 (Newport) 29 – 31 Jul 13 (Newport) 26 – 28 Aug 13 (Newport) 23 – 25 Sep 13 Newport)
627S	Senior Enlisted Leadership Course (Fleet) (60) Senior Enlisted Leadership Course (Fleet) (70) Senior Enlisted Leadership Course (Fleet) (80) Senior Enlisted Leadership Course (Fleet) (90) Senior Enlisted Leadership Course (Fleet) (100)	25 – 27 Mar 13 (San Diego) 29 – 31 May 13 (Norfolk) 29 – 31 May 13 (San Diego) 31 Jul – 2 Aug 13 (Norfolk) 16 – 18 Sep 13 (Pendleton)
748A	Law of Naval Operations (010) Law of Naval Operations (020)	15 – 19 Apr 13 (San Diego) 16 – 20 Sep 13 (Norfolk)
748B	Naval Legal Service Command Senior Officer Leadership (10)	29 Jul – 2 Aug 13
786R	Advanced SJA/Ethics (10)	22 – 26 Apr 13
846M	Reserve Legalman Course (10) (Phase III)	Cancelled
850T	Staff Judge Advocate Course (10) Staff Judge Advocate Course (20)	25 Feb – 8 Mar 13 8 – 19 Jul 13
850V	Law of Military Operations (10)	6 – 17 May 13
900B	Reserve Legal Assistance (10)	15 – 19 Apr 13

961J	Defending Sexual Assault Cases (10)	12 – 16 Aug 13
2622	Senior Officer (Fleet) (30) Senior Officer (Fleet) (40) Senior Officer (Fleet) (50) Senior Officer (Fleet) (60) Senior Officer (Fleet) (70) Senior Officer (Fleet) (80) Senior Officer (Fleet) (90) Senior Officer (Fleet) (110) Senior Officer (Fleet) (120)	25 – 28 Feb 13 (Cancelled) 8 – 11 Apr 13 (Cancelled) 20 – 23 May 13 (Cancelled) 24 – 27 Jun 13 (Cancelled) 8 -12 Jul 13 (Camp Lejeune, NC) 15 – 19 Jul 13 (Quantico, VA) 22 – 26 Jul 13 (Parris Island) 19 – 22 Aug 13 (Cancelled) 9 – 13 Sep 13 (Cancelled)
4040	Paralegal Research & Writing (30)	16 – 27 Sep 13
4048	Legal Assistance Course (10)	15 – 19 Apr 13
7878	Legal Assistance Paralegal Course (10)	15 – 19 Apr 13
S-5F-1217	Prosecuting Alcohol Facilitated Sexual Assaults (10)	12 – 16 Aug 13
S-5F-1218	TC/DC Orientation (10) TC/DC Orientation (20)	29 Apr – 3 May 13 9 – 13 Sep 13
NA	Legal Service Court Reporter (010) Legal Service Court Reporter (020)	10 Jan – 12 Apr 13 11 Jul – 10 Oct 13
NA	Legal Services Military Justice (10)	13 – 24 May 13
NA	Legal Services Post Trial Review (10)	22 Apr – 3 May 13
NA	Legal Services Admin Law (10)	3 – 14 Jun 13
NA	Legal Services Admin Board Recorder (10)	TBD
NA	Legal Specialist Course (20) Legal Specialist Course (30)	10 Jan – 12 Apr 13 7 May – 18 Jul 13
NA	Senior Trial Counsel/Senior Defense Counsel Leadership (10)	Cancelled

**Naval Justice School Detachment
Norfolk, VA**

0376	Legal Officer Course (40) Legal Officer Course (50) Legal Officer Course (60) Legal Officer Course (70) Legal Officer Course (80) Legal Officer Course (90)	11 – 29 Mar 13 8 – 26 Apr 13 6 – 24 May 13 10 – 28 Jun 13 8 – 26 Jul 13 12 – 30 Aug 13
0379	Legal Clerk Course (40) Legal Clerk Course (50) Legal Clerk Course (60) Legal Clerk Course (70) Legal Clerk Course (80)	11 – 22 Mar 13 8 – 19 Apr 13 10 – 21 Jun 13 8 – 26 Jul 13 12 – 23 Aug 13

0360	Senior Officer Course (40) Senior Officer Course (50) Senior Officer Course (60)	29 Apr – 1 May 13 3 – 5 Jun 13 9 – 11 Sep 13
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Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (40) Legal Officer Course (50) Legal Officer Course (60) Legal Officer Course (70) Legal Officer Course (80)	25 Feb – 15 Mar 13 6 – 24 May 13 10 – 28 Jun 13 22 Jul – 9 Aug 13 19 Aug – 6 Sep 13
947J	Legal Clerk Course (50) Legal Clerk Course (60) Legal Clerk Course (70) Legal Clerk Course (80) Legal Clerk Course (90)	4 – 15 Mar 13 13 – 24 May 13 17 – 28 Jun 13 29 Jul – 9 Aug 13 26 Aug – 6 Sep 13
3759	Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060)	8 – 10 Apr 13 (San Diego) 29 Apr – 1 May 13 (San Diego) 3 – 5 Jun 13 (San Diego) 16 – 18 Sep 13 (Miramar)

4. Air Force Judge Advocate General School Fiscal Year 2013 Course Schedule

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

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	Dates
Paralegal Apprentice Course, Class 13-02	15 Jan – 8 Mar 13

Judge Advocate Staff Officer Course, Class 13-B	11 Feb – 12 Apr 13
Paralegal Craftsman Course, Class 13-02	11 Feb – 29 Mar 13
Wills Preparation for Paralegals Course, Class 13-C	12 – 14 Mar 13
Paralegal Apprentice Course, Class 13-03	19 Mar – 8 May 13
Environmental Law Update Course-DL, Class 13-A	26 – 28 Mar 13
Defense Orientation Course, Class 13-B	1 – 5 Apr 13
Advanced Labor & Employment Law Course, Class 13-A (off-site)	2 – 4 Apr 13 (Washington, D.C.)
Air Force Reserve & Air National Guard Annual Survey of the Law, Class 13-A (off-site TBD)	12 -13 Apr 13
Military Justice Administration Course, Class 13-B	15 – 19 Apr 13
European Trial Advocacy Course, Class 13-A (off-site)	22 – 26 Apr 13 (Ramstein AB, Germany)
Cyber Law Course, Class 13-A	23 – 24 Apr 13
Negotiation & Appropriate Dispute Resolution, Class 13-a	29 Apr – 3 May 13
Advanced Trial Advocacy, Class 13-A	6 – 10 May 13
Operations Law Course, Class 13-A	6 – 17 May 13
CONUS Trial Advocacy Course, Class 13-B (off-site)	13 – 17 May 13 (Lackland AFB, TX)
Reserve Forces Paralegal Course, Class 13-A	20 – 29 May 13
Paralegal Apprentice Course, Class 13-04	20 May – 11 Jul 13
CONUS Trial Advocacy Course, Class 13-C (off-site)	3 – 7 Jun 13 (Nellis AFB, NV)
Staff Judge Advocate Course, Class 13-A	10 – 21 Jun 13
Law Office Management Course, Class 13-A	10 – 21 Jun 13
Paralegal Craftsman Course, Class 13-03	10 Jun – 26 Jul 13

Wills Preparation for Paralegals Course, Class 13-D	24 – 26 Jun 13
Judge Advocate Staff Officer Course, Class 13-C	8 Jul – 6 Sep 13
Paralegal Apprentice Course, Class 13-05	23 Jul – 12 Sep 13
Gateway, Class 13-B	29 Jul – 9 Aug 13
Environmental Law Course, Class 13-A	12 – 16 Aug 13
Paralegal Craftsman Course, Class 13-04	12 Aug – 27 Sep 13
Paralegal Contracts Law Course, Class 13-A	19 – 23 Aug 13
Accident Investigation Course, Class 13-A	27 – 30 Aug 13

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

- AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225
- ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600
- ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990
- CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973
- CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E

Fairfax, VA 22031
(703) 560-7747

- CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662
- ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900
- FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252
- FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600
- GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664
- GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250
- GWU: Government Contracts Program
The George Washington University Law School
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272
- IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080
- LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227
- LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837
- MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403

(800) 443-0100

MC Law: Mississippi College School of Law
151 East Griffith Street
Jackson, MS 39201
(601) 925-7107, fax (601) 925-7115

NAC National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(803) 705-5000

NDAA: National District Attorneys Association
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
(703) 549-9222

NDAED: National District Attorneys Education Division
1600 Hampton Street
Columbia, SC 29208
(803) 705-5095

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118

(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

6. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAIBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, students must have obtained at least the rank of CPT and must have completed two years of service since completion of JAIBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2014 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 hours, 1 November 2013 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Baucum Fulk, commercial telephone (434) 971-3357, or e-mail baucum.fulk@us.army.mil.

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students.

Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of Judge Advocates to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. Training Year (TY) 2013 RC On-Site Legal Training Conferences

The TY13 RC on-site program is pending policy and budget review at HQDA. To facilitate successful execution, if the program is approved, class registration is available. However, potential students should closely follow information outlets (official e-mail, ATRRS, websites, unit) about these courses as the start dates approach.

Date	Region, LSO & Focus	Location	POCs
8 – 10 Mar 13	Southeast Region 12th LOD Focus: Administrative and Civil Law	Atlanta, GA	LTC Phil Lenski plenski@saclc.net SSG Kayla Thomas shakaylor.thomas2@usar.army.mil
19 – 21 Apr 13	Southwestern Region 22d LOD Focus: Military Justice and Separations	Camp Robinson North Little Rock, AR	CPT DeShun Eubanks d.eubanks@usar.army.mil SFC Tina Richardson Tina.richardson@usar.army.mil
3 – 5 May 13	National Capital Region 151st LOD Focus: Fiscal and Contract Law	Camp Dawson, WV	LTC Tom Carter gcarter@nmic.navy.mil SGT Jessica Steinberger jessica.f.keller@usar.army.mil
31 May – 2 Jun 13	Northeast Region 4th LOD Focus: Client Services	Philadelphia, PA	LTC Leonard Jones ltcleonardjones@gmail.com SSG James Griffin james.griffin15@usar.army.mil CWO Chris Reyes chris.reyes@usar.army.mil
19 – 21 Jul 13	Heartland Region 91st LOD Focus: Client Services	Cincinnati, OH	1LT Ligy Pullappally Ligy.j.pullappally@us.army.mil SFC Jarrod Murison jorrod.t.murison@usar.army.mil
23 – 25 Aug 13	North Western Region 75th LOD Focus: International and Operational Law	Joint Base Lewis-McChord, WA	LTC John Nibbelin jnibblein@smcgov.org SFC Christian Sepulveda christian.sepulveda1@usar.army.mil

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

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

b. Access to the JAGCNet:

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

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

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

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

(d) FLEP students;

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

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil.

c. How to log on to JAGCNet:

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

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

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

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

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

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

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

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The Judge Advocate General's School, U.S. Army (TJAGSA), Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows Vista™ Enterprise and Microsoft Office 2007 Professional.

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

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

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

4. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet

satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

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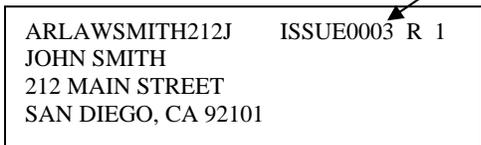
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